



FIRST ITEM ON THE AGENDA

**Deferred examination of Conventions**

**(c) Termination of Employment Convention,  
1982 (No. 158) (Short survey)**

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## Introduction

1. The Working Party undertook its first examination of the Termination of Employment Convention, 1982 (No. 158), in March 1997.<sup>1</sup> This examination resulted in a decision to request information from member States on the obstacles and difficulties encountered that might prevent or delay ratification of the Convention or that might point to the need for its revision. In March 1998 the Working Party re-examined this Convention in the light of the results of consultations held in 1997. The Working Party did not reach a consensus on the future action to recommend, and in order further to explore the possibilities to arrive at a consensus, the Working Party decided that a “short survey” be carried out on the obstacles and difficulties encountered that might prevent or delay ratification of this Convention or that might point to the need for its revision.
2. During the 277th Session (March 2000) of the Governing Body, the Working Party was informed that, at the request of the Office, an external expert had carried out a short survey concerning Convention No. 158. Due to consultations within the Office, the short survey could not be concluded in time to permit a re-examination of Convention No. 158 at the March 2000 session of the Governing Body. The Working Party therefore decided to defer examination of this Convention until its present meeting.<sup>2</sup>
3. In the context of the deferred examination of the Holidays with Pay Convention (Revised), 1970 (No. 132)<sup>3</sup> in March 2000, the Working Party discussed the method of conducting short surveys. In the light of this discussion, the Office presents the appended short survey concerning Convention No. 158. It takes into account the previous discussions and consultations held in 1997, as well as additional information on legislation on termination of employment in 59 countries. This additional information on legislation is based on information contained in a recent publication by the ILO on termination of employment legislation.<sup>4</sup> Finally, it includes an examination of the current debate on labour flexibility and Convention No. 158, based on a study carried out by an external expert at the request of the Office.<sup>5</sup>
4. It should be noted that Convention No. 158 is complemented by Recommendation No. 166. This Recommendation is submitted for examination by the Working Party at the present session in the context of the examination of Recommendations.<sup>6</sup> The texts of these instruments appear in Appendices III and IV.

<sup>1</sup> For excerpts from the relevant Governing Body documents see Appendix II.

<sup>2</sup> See GB.277/LILSWP/PRS/3/1, and GB.277/11/2 including GB.277/LILS/4(Rev).

<sup>3</sup> See GB.277/LILS/4(Rev), paras. 55-62.

<sup>4</sup> ILO: *Termination of Employment Digest: A legislative review*, Geneva, International Labour Office, 2000.

<sup>5</sup> Mr. Simon Deakin, ESRC Centre for Business Research, University of Cambridge, United Kingdom.

<sup>6</sup> See GB.279/LILSWP/PRS/3.

## Re-examination of the Termination of Employment Convention, 1982 (No. 158)

### Recent developments

5. Since the previous examination of Convention No. 158 in March 1998, one additional ratification of this Convention has been registered, by Papua New Guinea (2000), bringing the total number of current ratifications to 28.<sup>7</sup> Comments by the Committee of Experts on the Application of Conventions and Recommendations on its implementation are pending for nine member States.<sup>8</sup> Two representations under article 24 of the Constitution, alleging non-observance by Ethiopia (together with the Discrimination (Employment and Occupation) Convention 1958 (No 111)), and by Turkey of Convention No. 158, are under consideration.

### Summary of short survey

6. The short survey outlines the main provisions of Convention No. 158, provides a brief overview of its legal context and traces its origins. A detailed examination of the obstacles and difficulties encountered that might prevent or delay ratification of the Convention or that might point to the need for its revision is carried out on the basis of the 1997 consultations with member States and on the basis of additional information on legislation concerning termination of employment in 59 member States. The survey also includes a discussion regarding Convention No. 158 in the context of the current debate on labour flexibility.
7. The detailed examination of the obstacles and difficulties reported to the Office in the 1997 consultations confirmed that there seemed to be no obstacles to ratification in 20 countries. On the other hand, 30 member States had encountered obstacles or difficulties that seemed to prevent or delay ratification. These obstacles did not seem to reflect an opposition in principle to the protection offered by the Convention. With respect to revision, five member States considered a revision was due on specific issues, while three stated that they saw no need for a revision. According to the additional information analysed, the main provisions of Convention No. 158 seemed, to a large extent, to be reflected in the national legislation of the 59 member States considered in the survey.
8. Viewed together, the 1997 consultation and the examination of the additional information seemed to indicate that there were no or limited obstacles to ratification in 68 countries. However, as mentioned above, 30 member States reported in the consultation that they did encounter obstacles. Of these, 21 were included in the examination of the additional information on legislation, which overall gave a less negative impression of the obstacles in these countries. It should be recalled, however, that the additional information examined focused only on the main provisions of Convention No. 158. In conclusion, the additional information examined in the present survey does not seem to resolve the main

<sup>7</sup> *Australia, Bosnia and Herzegovina, Cameroon, Democratic Republic of the Congo, Cyprus, Ethiopia, Finland, France, Gabon, Latvia, The former Yugoslav Republic of Macedonia, Malawi, Republic of Moldova, Morocco, Namibia, Niger, Papua New Guinea, Portugal, Slovenia, Spain, Sweden, Turkey, Uganda, Ukraine, Venezuela, Yemen, Yugoslavia and Zambia.*

<sup>8</sup> *Bosnia and Herzegovina, Cameroon, Democratic Republic of the Congo, Ethiopia, Finland, Gabon, Latvia, Niger and Spain.*

contradiction that the 1997 consultations seemed to reveal. While the basic concept on which Convention No. 158 rests seems to retain large acceptance, several member States considered that there are obstacles or difficulties that prevent or delay ratification of Convention No. 158, as mentioned in the 1997 consultations.

9. In order to obtain some further indications, the survey also contains a discussion of Convention No. 158 in the context of the current debate on labour flexibility. Based on a summary of economic theory concerning the effects of legislation aimed at protecting employment security, the conclusion is drawn that there is a highly complex relationship between systems of regulation and labour market behaviour and that the view that regulation equals inflexibility and inefficiency is being replaced by a more subtle approach. Accordingly, regulation may mitigate the effects of market failures, which would otherwise impede the use of bargaining or self-regulation to arrive at efficient solutions to contracting problems.
10. According to the expert consulted by the ILO,<sup>9</sup> the flexibility debate has been particularly lively in Australia, New Zealand, the United Kingdom and the United States. These countries have, in different ways, taken the lead in promoting reforms aimed at liberalizing the labour market. The survey includes a brief analysis of the way rules on employment termination have been introduced in these four countries. In addition to showing that termination of employment regulations seem to be applied in three of these countries (the exception is the United States), it is also shown that such legislation has, in fact, not only fulfilled the function of protecting employment but has also served as a tool for economic restructuring and economic policy. One of the countries examined has ratified Convention No. 158. In the 1997 consultations, Australia and New Zealand called for revisions of specific Articles of the Convention, while the United Kingdom and the United States reported on general and specific obstacles to ratification of the Convention.
11. On the basis of the economic arguments made and the examination of the developments in these four countries, the conclusion is drawn that there seems to be no fundamental contradiction between the goal of labour flexibility and the type of labour standards that is contained in Convention No. 158. The general norm of fairness in employment relations, which it underpins, appears to be compatible with forms of employment protection which strike an appropriate balance between job security and the need of employers to adapt to changing economic circumstances.
12. The short survey concludes by noting that, overall, its results tend to point in different directions. While several factors, including the discussion of the role of Convention No. 158 in the context of the current debate on labour flexibility, seem to underscore the relevance and topical importance of Convention No. 158, there are also indications that the obstacles and difficulties that are preventing or delaying a ratification of this Convention are prevailing, as demonstrated through the 1997 consultations.

## Remarks

13. Against this background, the Office is proposing to the Working Party to consider recommending two alternative courses of action. On the one hand, the Working Party may wish to note the confirmations of the continued relevance of Convention No. 158 that certain parts of the results in the short survey undoubtedly contain. Against this background it could conclude that the ratification of this Convention should be promoted.

<sup>9</sup> See note 5 *supra*.

In such a case it would seem appropriate, timely and useful for the Office to make use of the extensive information available on obstacles to its ratification and to plan targeted promotional activities with a view to assisting those member States that have reported obstacles to ratification to overcome such obstacles. On the other hand, the Working Party might consider that several member States seem to have chosen to apply the main provisions of Convention No. 158 without ratifying, and that 30 member States report on what may be seen as technical obstacles and difficulties in certain cases, which nevertheless prevent or delay ratification in these countries. Against this background the Working Party may wish to recommend the status quo with respect to this Convention.

## Proposals

14. The Working Party may wish to recommend to the Governing Body *either*

- (a) that member States be invited to contemplate ratifying the Termination of Employment Convention, 1982 (No. 158), *and*
- (b) that the Office be invited to undertake activities aimed at promoting the ratification of Convention No. 158, in particular with a view to removing the obstacles and difficulties that might prevent or delay ratification of Convention No. 158, against the background of information in this short survey and other available information,

*or*

- (c) the maintenance of the status quo regarding the Termination of Employment Convention, 1982 (No. 158).

15. *The Working Party is invited to re-examine the Termination of Employment Convention, 1982 (No. 158), against the background of the appended short survey and on the basis of the proposals set out above, and to make recommendations to the Committee on Legal Issues and International Labour Standards of the Governing Body.*

Geneva, 17 October 2000

*Point for decision:* Paragraph 15.

# Appendix I

## Short survey concerning the Termination of Employment Convention 1982 (No. 158)

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## Introduction

1. The present short survey is submitted to the Working Party pursuant to a decision by the Governing Body in March 1998. It is intended to provide it with additional information on the obstacles and difficulties encountered that might prevent or delay ratification of the Termination of Employment Convention, 1982 (No. 158), or that might point to a need for its revision. The purpose of this short survey is to assist the Working Party in arriving at a consensus on the proposed future action to recommend with respect to this Convention.

## Content and origin of Convention No. 158

### Main provisions

2. Convention No. 158 regulates termination of (individual) employment as well as collective or economic dismissals. Accordingly, the substantive provisions of the Convention contain standards of general application and supplementary provisions concerning termination of employment for economic, technological, structural or similar reasons. The standards of general application consist in provisions on the justification of termination, procedures prior to or at the time of termination, the procedure of appeal against termination, period of notice, and income protection in the event of termination of employment. In addition to substantive provisions on these issues it offers different possibilities for its implementation and its applicability can be limited in manners prescribed.

### ***Implementation and possible exclusions (Articles 1-2)***

3. A ratifying State may choose between different methods to give effect to the Convention: by laws or regulations, “by means of collective agreements, arbitration awards or court decisions or in such other manner consistent with national practice” (Article 1). The exclusion of certain categories of employed persons, specified in Article 2, paragraph 2, is permitted. Other categories may also be excluded provided the competent authority first consult with the organization of employers and others concerned (Article 2, paragraphs 4-5).

### ***Valid reason for dismissal (Article 4)***

4. As a basic principle, the employment of a worker shall not be terminated unless there is a *valid reason* for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking.

### ***Non-discrimination (Articles 5-6)***

5. Certain categories of reasons for terminating an employment are not admitted. These reasons include: union membership and activities; seeking office as or acting as a workers’ representative; whistle blowing; race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and absence from work during maternity leave. Nor shall temporary absences from work because of illness or injury constitute valid reasons for termination, although the Government may determine what constitutes temporary absence.

### ***Procedures and compensation (Articles 7-10)***

6. The employer is required to observe certain basic procedures with regard to dismissals for reasons related to the worker’s conduct or performance. The worker should have the opportunity to defend himself prior to dismissal (Article 7), have the right to appeal (Article 8) and not to have to bear alone the burden of proving that the termination was not justified (Article 9). The Convention prescribes the establishment of an impartial body such as a court, labour tribunal, arbitration committee or arbitrator (Article 8) for this purpose, with the power to award remedies including reinstatement or compensation (Article 10).

**Due notice and income protection (Articles 11-12)**

7. A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof. A worker has such a right unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period (Article 11). Furthermore, a worker whose employment has been terminated shall be entitled to either severance allowance or other separation benefits or, benefits from unemployment insurance or other forms of social security benefits (Article 12).

**Collective dismissals (Articles 13-14)**

8. In the case of dismissals for economic, technological, structural or similar reasons, the Convention provides for the establishment of procedures for information and consultation with workers' representatives (Article 13) as well as for the notification to the competent authorities (Article 14).

**Related ILO instruments**

9. This Convention is related to other ILO instruments including the following:
  - instruments concerning protection against acts of anti-union discrimination such as the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Workers' Representatives Convention, 1971 (No. 135), and Recommendation (No. 143), 1971; the Rural Workers' Organisations Convention (No. 141) and Recommendation (No. 149) 1975;
  - instruments against discrimination in employment or occupation such as the Discrimination (Employment and Occupation) Convention (No. 111) and Recommendation (No. 111), 1958; the Workers with Family Responsibilities Convention (No. 156) and Recommendation (No. 165), 1981;
  - instruments concerning maternity protection such as the Maternity Protection Convention (Revised) (No. 103) and Recommendation (No. 95), 1952 and the newly adopted Maternity Protection Convention (No. 183) and Recommendation (No. 191), 2000;
  - instruments concerning the protection of workers' claims in the event of insolvency such as the Protection of Workers' Claims (Employer's Insolvency) Convention (No. 173) and Recommendation (No. 180), 1992;
  - instruments concerning part-time work such as the Part-Time Work Convention (No. 175) and Recommendation (No. 182) 1994.

**Origin of Convention No. 158**

10. The development of international labour standards on the termination of contracts of employment was triggered by a resolution adopted in 1950 by the International Labour Conference. The first instrument developed on this question was the Termination of Employment Recommendation (No. 119) that was adopted by the International Labour Conference in 1963. This instrument already contained important recommendations with regard to justification for termination, notice, the right to appeal, compensation and income protection and included provisions concerning reduction of the workforce. This instrument marked the recognition, at the international level, of the idea that workers should be protected against the arbitrary and unjustified termination of their employment relationship and against the economic and social hardship inherent in their loss of employment. The impulse to consider a new suitable instrument taking into consideration new developments since 1963 was given in 1974 by the Conference Committee on the Application of Standards when

considering a General Survey on the application of Recommendation No. 119.<sup>1</sup> As a result, the question of termination of employment at the initiative of the employer was placed on the agenda of the Conference in 1981 and Convention No. 158 and Recommendation No. 166 were subsequently adopted in 1982.

11. The preparatory documents to the instruments on termination of employment, particularly the numerous comments from member States in response to the questionnaire and the many formal amendments submitted during the second discussion, reflect that the texts adopted by the Conference were the fruit of a compromise regarding the form of the instrument, its scope, valid reasons for termination of employment and the question of the burden of proof imposed on the worker in cases of appeal against a termination of employment.<sup>2</sup>
12. In the final remarks of the 1995 General Survey,<sup>3</sup> the Committee of Experts noted that the economic and political changes which had occurred throughout the world had become broader and more rapid since the adoption of Convention No. 158 in 1982. It noted further that practically all countries were confronted with the problems of structural adjustment, unemployment (particularly long-term unemployment), underemployment and the need to raise levels of competitiveness in the context of the increased globalization of the economy, all of which raise new challenges in the field of labour relations as well as for ILO standards. It also emphasized that flexibility had become the dominant theme and for some a fundamental requirement for achieving the necessary adjustment. It summarized the main arguments in the debate related to the protection of employment security stating that:

The protection of employment security has been and remains a central issue in the debate. In one approach stressing the market economy, criticism is principally directed against measures to suppress or restrict the freedom of the employer to terminate employment, the procedural time limits that have to be observed and the compensation payable. It is alleged that the resulting increase in the cost of labour dissuades employers from recruiting workers and inhibits prompt reaction to changes. Moreover, the rigidity of some protective measures is criticized as prejudicing productivity and the mobility of workers. In other words, the constraints and costs of protecting employment are said to have a negative effect on the efficiency of production and employment. [...] Clearly the impact of these constraints depends on the rigour with which security of employment is regulated at the national level. [I]n most countries the protection provided through legislation and negotiation is confined to the imposition of standards of equity and to the provision of a level of minimum protection which does not generally go beyond the protection contained in ILO standards. [T]here are [...] good reasons for believing that the more usual, moderate approach to the protection of employment security tends to limit job losses through unjustified terminations of employment and to moderate reductions of the workforce for economic reasons, while at the same time making a positive contribution to productive efficiency and the innovative capacity of enterprises. [O]n the relationship between flexibility and stability [...] the appropriate protection against unjustified dismissal is in principle not inconsistent with new forms of employment relations that allow enterprises to adjust their human resources to changing economic environment. [The 1982 instruments] set a *minimum level of protection* to be provided throughout the world, which is necessary for all workers. [T]erminations of employment [...] have to be carried out in conditions, under which enterprises [...] can survive and develop and which at the same time guarantee workers a minimum level of protection.

<sup>1</sup> ILO: "Termination of Employment," *General Survey of the Reports on the Termination of Employment Recommendation* (No. 119), 1969, ILC, 59th Session, 1974, Report III (Part 4B).

<sup>2</sup> See ILO: Report VII(1) and (2), ILC 67th Session, 1981, and Report V(1) and (2), 68th Session, 1982. *Provisional Record* No. 35/1-4, ILC, 68th Session, 1982, Geneva.

<sup>3</sup> ILO: "Protection against unjustified dismissal", *General Survey on the Termination of Employment Convention (No. 158) and Recommendation (No. 166)*, 1982. Report III(4B), ILC, 82nd Session, 1995. See in particular paras. 2-16.

The Convention appears to be perfectly adapted to achieving these two seemingly irreconcilable objectives.<sup>4</sup>

13. In the course of the discussion on the General Survey at the Conference,<sup>5</sup> the Employers' members provided detailed explanations of their view on the General Survey and Convention No. 158. They considered that, the Committee of Experts tended to make extensive interpretations of the Convention that rigidified certain of its provisions, that the Committee of Experts seemed to mistrust any form of flexibility and that the General Survey presented certain economic notions that did not correspond to reality, above all when dismissals were necessary for economic reasons. In the Employer members view, the General Survey included details and interpretations which established a level of protection for workers beyond that which was provided for in the Convention. The low level of ratification, due to the high requirements of the Convention, should be considered as a "realistic criteria of evaluation".<sup>6</sup> That is why Convention No. 158 ought to be revised as soon as possible. On the other hand, the Worker members considered that the General Survey contributed to clarifying and explaining some terms of the Convention, which contained flexibility clauses and underscored the right of employers to dismiss workers for valid reasons and took into account the national differences. In their view, Convention No. 158 was as relevant now, in the context of globalization, as ever before. The Worker members approved the idea contained in the General Survey in which "employment stability was (as) beneficial (...) to capital investments as to worker's skills and provided an incentive for social peace".<sup>7</sup> With respect to the level of ratification, they agreed that ratifications were important but they were not the "be-all and end-all".<sup>8</sup> Convention No. 158 inspired jurisprudence. Finally, a large number of Committee members commented on the quality of the General Survey and underscored its importance, as a source of explanations and a potential source of inspiration for national legislations. In fact, the General Survey will help the development of jurisprudence regarding protection against unjustified dismissal.

## Obstacles and difficulties encountered

14. The following section consists of two parts. In the first section the outcome of the 1997 consultations with the member States on this Convention is examined in detail.<sup>9</sup> In the second part, an analysis of recently published information of legislation related to termination of employment in 59 member States is examined.

## The 1997 consultations

### Introduction

15. In the course of the consultations held with the member States in 1997 a total of 56 member States<sup>10</sup> responded to the request for information on obstacles and difficulties that might prevent or delay

<sup>4</sup> General Survey, op. cit., paras. 376-380.

<sup>5</sup> *Record of Proceedings*, International Labour Conference, 1995, Report 24, pp. 24/28 to 24/44.

<sup>6</sup> *Record of Proceedings*, op. cit., p. 24/31.

<sup>7</sup> *Record of Proceedings*, op. cit., p. 24/43.

<sup>8</sup> *Record of Proceedings*, op. cit., p. 24/43.

<sup>9</sup> See GB.271/LILS/WP/PRS/2. Relevant excerpts are included in Appendix II.

<sup>10</sup> *Angola, Antigua and Barbuda, Argentina, Australia, Austria, Azerbaijan, Belarus, Belgium, Canada, Chile, China, Colombia, Comoros, Costa Rica, Côte d'Ivoire, Cuba, Czech Republic, Denmark, Dominican Republic, Egypt, El Salvador, Estonia, Finland, Germany, Ghana, Guinea-Bissau, Hungary, India, Italy, Japan, Jordan, Republic of Korea, Latvia, Lebanon, Luxembourg,*

ratification. Five of the replies were received too late to be able to include an examination thereof in the report submitted to the Governing Body in March 1998.<sup>11</sup> The views of these five countries have been taken into account in the present analysis. In several cases responses submitted to the Office contained separate views of employers' or workers' organizations.<sup>12</sup> To the extent that the views differed from the views of the governments, their observations are noted separately in the following.

16. It should be noted that several of the responses received included several views, which are categorized separately below. A member State could, for example, list several obstacles to ratification. The total number of opinions recorded below therefore exceeds the number of countries responding. For a global overview of the opinions, see the summary in paragraphs 32-33.

### **Ratification prospects**

17. In 15 member States, the question of ratification was not excluded, was being examined or would be reconsidered after obstacles in national legislation had been removed.<sup>13</sup> Among them, one country did "not exclude ratification",<sup>14</sup> another country considered that its legislation was "in conformity with the Convention",<sup>15</sup> and one country reported that "the content of the Convention would be taken into account in the preparation of new labour legislation and that ratification would be considered thereafter".<sup>16</sup> In two other countries<sup>17</sup> national legislation relevant to the question of termination of employment was under discussion, and ratification would be considered when final decisions on those matters had been taken.<sup>18</sup> In another country,<sup>19</sup> the question of ratification would be reconsidered after national legislation complying with the provisions concerning unemployment insurance in Article 9 had been enacted.
18. Two member States considered that their national provisions were, in principle, in conformity with the Convention.<sup>20</sup> In total<sup>21</sup> therefore, there seemed to be no obstacles preventing or delaying a ratification of this Convention in 20 member States.<sup>22</sup>

*Mauritius, Mexico, Netherlands, New Zealand, Norway, Panama, Philippines, Poland, Qatar, Romania, Seychelles, Singapore, South Africa, Sri Lanka, Suriname, Switzerland, Syrian Arab Republic, Thailand, United Kingdom, United States and Uruguay.* (Parties to the Convention in bold.)

<sup>11</sup> *Angola, Antigua and Barbuda, Belarus, Guinea-Bissau and Seychelles.*

<sup>12</sup> Including employers' organizations from *Belgium, Canada, Chile, Germany, Republic of Korea and Mauritius* and workers' organizations from *Belgium, Czech Republic, Finland, Germany, India, Switzerland, New Zealand and United Kingdom.*

<sup>13</sup> *Azerbaijan, Chile, Comoros, Côte d'Ivoire, Czech Republic, Denmark, Ghana, Italy, Republic of Korea, Luxembourg, Norway, Philippines, Seychelles, South Africa and Suriname.* An employers' organization in Chile was opposed to ratification, however.

<sup>14</sup> *Luxembourg*, but also reported on obstacles in relation to Article 2 (scope of application).

<sup>15</sup> *Republic of Korea*, but also reported on obstacles regarding Article 7 (right to defence).

<sup>16</sup> *Czech Republic* but was facing obstacles regarding Article 11 (due notice).

<sup>17</sup> *Belarus and Netherlands.*

<sup>18</sup> According to information available to the Office, no such legislation has been adopted to date in the Netherlands. In Belarus the Office notes the adoption of the Labour Code of 26 July 1999 (Text No. 432). *Vedomosti Verkhovnogo Soveta*. 1999-09-15. Nos. 26-27, pp. 2-203.

<sup>19</sup> *Egypt.*

<sup>20</sup> *Cuba and New Zealand.*

## Obstacles and difficulties

19. In all, 30 member States<sup>23</sup> reported on obstacles and difficulties. These are detailed in paragraphs 19-30 below. Eight countries reported that their national legislation represented an obstacle to ratification but did not specify further the nature of these obstacles.<sup>24</sup> The details of the general and specific obstacles reported from the remaining 22 member States are as follows:

### General obstacles

20. Two of the member States<sup>25</sup> declared to be in conformity with the Convention but did not see any need for a ratification of Convention No. 158. Another member State declared that its national legislation offered a better protection than Convention No. 158.<sup>26</sup> In addition, in one country, relevant national legislation, collective agreements and practices, taken as a whole, were generally in conformity with the requirements of the Convention, but these requirements were not fully met, in particular for unorganized workers.<sup>27</sup>

21. In two countries,<sup>28</sup> the lack of tripartite consensus was referred to as the obstacle, while the prevailing economic conditions affected the prospects of a ratification of Convention No. 158 in two other countries.<sup>29</sup> Five countries<sup>30</sup> noted that their national legislation was based on the concept of freedom to terminate employment, which was not in conformity with the Convention.<sup>31</sup>

<sup>21</sup> Including the countries in para. 17 above.

<sup>22</sup> *Azerbaijan, Belarus, Chile, Comoros, Côte d'Ivoire, Cuba, Czech Republic, Denmark, Egypt, Ghana, Italy, Republic of Korea, Luxembourg, Netherlands, New Zealand, Norway, Philippines, Seychelles, South Africa and Suriname.* It should also be noted that Latvia, which has ratified Convention No. 158, did not express any further view in their response to the request for information. In addition to the member States reported under para. 16.

<sup>23</sup> *Antigua and Barbuda, Argentina, Australia, Austria, Belgium, Canada, China, Colombia, Dominican Republic, Estonia, Finland, Germany, Hungary, India, Japan, Jordan, Lebanon, Mexico, Mauritius, Panama, Poland, Qatar, Romania, Singapore, Switzerland, Syrian Arab Republic, Thailand, United Kingdom, United States and Uruguay.*

<sup>24</sup> *Argentina, China, Estonia, Jordan, Panama, Qatar, Singapore and Syrian Arab Republic.*

<sup>25</sup> *Antigua and Barbuda and Hungary.* It should also be added that *Ghana* seemed to indicate that it did not consider a ratification of Convention No. 158 useful.

<sup>26</sup> *Mexico.*

<sup>27</sup> *Canada.*

<sup>28</sup> *Dominican Republic and Uruguay.*

<sup>29</sup> *Romania and Thailand.*

<sup>30</sup> *Austria, Belgium, Switzerland, Thailand and United States.*

<sup>31</sup> In *Belgium*, however, the workers' representatives in the "Conseil National du Travail" asked for the modification of the national legislation and the ratification of Convention No. 158, while the employers' representatives recalled their opposition to the ratification of the instrument. Furthermore, in *Switzerland*, a workers' organization was in favour of ratification, while it recognized that, at present, there were obstacles to ratification, they considered the national legislation should adapt to the provisions of the Convention and European standards.

## Specific obstacles

22. A total of 12 member States<sup>32</sup> reported on difficulties with specific articles of the Convention as follows:

### *Scope of application/Possible exclusions (Article 2)*

23. Six countries referred to problems related to this Article.<sup>33</sup> In one country it was considered that Article 2 fell below the national and EU anti-discrimination legislation, as it seemed to leave the door open to termination of employment on the grounds of gender.<sup>34</sup> One country reported that the obstacle to ratification was that their national legislation did not cover all workers, economic sectors and establishments referred to in Article 2.<sup>35</sup> In one country, there were continuing and increased<sup>36</sup> legal obstacles with respect to the application of Article 2(3),<sup>37</sup> and it was not considered realistic to obtain a majority for revising the Convention so as to enable ratification.<sup>38</sup> With reference to Article 2.6,<sup>39</sup> another country<sup>40</sup> noted that it seemed to be interpreted inflexibly in that no further exemptions were allowed after the submission of the first report. It expressed the view that either Convention No. 158 should be revised or Article 2.6 should be interpreted more liberally.

### *Valid reason for dismissal (Article 4)*

24. Three countries<sup>41</sup> reported problems with this Article. One (federal) country<sup>42</sup> added that under its traditional common law system an employee without a contract for a fixed term could be discharged for “good cause, no cause or even a morally wrong cause”. This country further stated that in more and more of its states it was “no longer permissible for employers to discharge at will employees for bad cause, that is, for an unlawful reason or for a purpose that contravenes public policy”. It further noted that there were of course federal laws that protected the individual rights of employees not covered by a collective bargaining agreement and there were also laws that prohibited employers from discharging employees on the basis of their civil rights.

<sup>32</sup> *Australia, Colombia, Finland, Germany, India, Japan, Lebanon, Mauritius, Poland, Thailand, United Kingdom and United States.*

<sup>33</sup> *Australia, Germany, Finland, India, Lebanon and United Kingdom.*

<sup>34</sup> *Finland*, see also below concerning the detailed views of the Finnish Trade Unions.

<sup>35</sup> *India.*

<sup>36</sup> *Germany* reported that the legal obstacles had increased as compared to the situation in 1994 when Germany reported to the Committee of Experts in the context of the General Survey.

<sup>37</sup> Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time with the aim to avoid the protection resulting from Convention No. 158.

<sup>38</sup> An employers’ organization in *Germany* considered this Convention to be a “striking example of a Convention with lack of realism and flexibility”.

<sup>39</sup> Prescribing, inter alia, that limitations as to the applicability of the Convention in accordance with Article 2(4) and (5), shall be listed in the first report and that reports on the law and practice shall include the position of its law and practice regarding the categories excluded.

<sup>40</sup> *Australia.*

<sup>41</sup> *Lebanon, United Kingdom and United States.* Among these should also be listed *Austria, Belgium, Switzerland and Thailand* (see para. 21 and note 30 above).

<sup>42</sup> *United States.*

*Non-discrimination (Articles 5-6)*

25. Two countries<sup>43</sup> referred to problems regarding these provisions. According to one of these countries, termination of employment was permissible, under certain conditions, of pregnant women if she was given notice before the fifth month of pregnancy.<sup>44</sup> In the other country national legislation was not fully compatible with the provisions in Article 5(b) (protection of workers representatives).<sup>45</sup>

*Procedures and compensation (Articles 7-10)*

26. Article 7 (right to proper defence) represented a specific problem in three countries.<sup>46</sup> In addition, one country<sup>47</sup> (a federal State) specified that the right to appeal the termination to an impartial body, such as a court, labour tribunal arbitration committee or arbitrator, would not necessarily be available to employees who live in jurisdictions where the freedom to terminate at will rule applies. Also, reports were noted concerning difficulties with specific reference to Article 9 (jurisdiction of courts of appeal and burden of proof rules).<sup>48</sup>

*Due notice and income protection (Articles 11-12)*

27. Three countries reported specific difficulties with respect to the provisions in Article 11 regarding periods of notice.<sup>49</sup> The regulation of severance allowance was a problem in two cases.<sup>50</sup> A further two countries<sup>51</sup> noted that the absence of an unemployment insurance system in their legislation would render application of Article 12(b) (severance allowance – entitlements to unemployment insurance) problematic.

*Collective dismissals (Articles 13-14)*

28. Two countries have reported<sup>52</sup> on problems in relation to the provisions on collective dismissals. One country<sup>53</sup> specifically referred to the question of the notification to be given to the workers' representatives.

<sup>43</sup> *Lebanon and Thailand.*

<sup>44</sup> *Lebanon.*

<sup>45</sup> *Thailand.*

<sup>46</sup> *Japan, Lebanon and Poland.*

<sup>47</sup> *United States.*

<sup>48</sup> *Japan, Lebanon, Thailand and United States.*

<sup>49</sup> *Japan, Lebanon and United Kingdom.*

<sup>50</sup> *Japan and Lebanon.*

<sup>51</sup> *Colombia and Mauritius.*

<sup>52</sup> *Japan and Lebanon.*

<sup>53</sup> *Lebanon.*



## Need for revision

### No need for revision

29. In the opinion of one country,<sup>54</sup> Convention No. 158 ensured the appropriate protection for employees in cases of termination and the revision of the Convention therefore seemed unnecessary. In two other countries,<sup>55</sup> the national legislation was not in full conformity with the Convention, but in their view the Convention did not need a revision.

### Proposed revisions

30. Five countries<sup>56</sup> took the view that the Convention should be revised. One country<sup>57</sup> considered that it should be revised in order to reduce its detailed prescriptions and that flexibility be introduced in the Convention. Four member States proposed a revision with reference to specific Articles of the Convention. According to one country<sup>58</sup> party to the Convention, the provisions in Article 2.6 concerning possible exclusions from coverage of the Convention seemed to be interpreted inflexibly. This provision should either be interpreted differently or revised to allow for exclusions from coverage even after the submission of the first report. According to another country<sup>59</sup> the scope of application of the Convention as defined in Article 2.1 should be revised to be more limited. A contrary view was expressed by another country<sup>60</sup> party to the Convention. In its view, the right in Article 2.1 to exclude limited categories of employed persons from the application of the Convention seemed to leave open the door to termination of employment on grounds of gender or gender-related reasons (such as pregnancy or family responsibilities).<sup>61</sup> This provision should therefore be modified. One country<sup>62</sup> suggested an expansion of the coverage of Article 5(b) (protection of workers' representatives) also to include "any other circumstance not related to the

<sup>54</sup> *Hungary.*

<sup>55</sup> *Czech Republic and Egypt.*

<sup>56</sup> *Australia, Finland, Hungary, New Zealand, and India.*

<sup>57</sup> *New Zealand.*

<sup>58</sup> *Australia.*

<sup>59</sup> *India.*

<sup>60</sup> *Finland.*

<sup>61</sup> A workers' organization in *Finland* made an extensive revision proposal including a proposal "to upgrade" Article 2(5) so as to prevent the use of fixed-term employment contracts for the purposes of evading employment security rules; to reword the economic and operational justifications for termination listed under Article 4 for greater accuracy; to expand the list of examples under Article 5 to include, among other factors, age, sexual orientation and the active promotion of one's own or others' interests; to place the burden of proving the existence of a valid reason for termination (Article 9) on the employer; to reword Article 10 for greater accuracy; to ensure that the Convention adequately safeguard workers' and their representatives' right to information, their right to be heard, and their right to negotiate prior to decision-making; and, finally, to move Paragraph 13 (consultations of workers' representative in cases of dismissals) from the Recommendation and include it in the Convention.

<sup>62</sup> *Hungary.*

employment relationship”. One country<sup>63</sup> had no difficulty with the general principles of the Convention, but reported that it did not comply with some detailed provisions related to Articles 13 and 14 (economic dismissals) that it wished would be revised.

### **Other opinions**

31. In addition the following views were expressed in the responses received from the following five countries. One country expressed that it was too early to consider the ratification of the Convention.<sup>64</sup> Another country stated that obstacles in national legislation had to be removed before ratification could be considered.<sup>65</sup> One country considered a study was necessary before any ratification.<sup>66</sup> One country was “giving attention” to the Convention.<sup>67</sup> Finally, in the case of one country, “action was pursued to examine the instrument afresh in the light of recent developments”.<sup>68</sup>

### **Summary**

32. One of the member States reporting merely noted it had ratified the Convention.<sup>69</sup> There seemed to be no obstacles to ratification in 20 member States,<sup>70</sup> while there seemed to be obstacles and difficulties of a varying degree that prevented or delayed ratification in the case of 30 member States.<sup>71</sup>
33. Finally, in addition to other opinions expressed, three member States stated that the Convention was not in need of revision,<sup>72</sup> while five member States (two of which are parties to the Convention) called for a revision of specific articles of the Convention.<sup>73</sup>

<sup>63</sup> *New Zealand*. It should be noted that a workers’ organization in New Zealand was opposed to revision, while an employers’ organization proposed a revision to “improve the flexibility” of the Convention.

<sup>64</sup> *Angola*.

<sup>65</sup> *Costa Rica*.

<sup>66</sup> *El Salvador*.

<sup>67</sup> *Guinea-Bissau*.

<sup>68</sup> *Sri Lanka*.

<sup>69</sup> *Latvia*.

<sup>70</sup> *Azerbaijan, Belarus, Chile, Comoros, Côte d’Ivoire, Cuba, Czech Republic, Denmark, Egypt, Ghana, Italy, Republic of Korea, Luxembourg, Netherlands, New Zealand, Norway, Philippines, Seychelles, South Africa and Suriname*.

<sup>71</sup> *Antigua and Barbuda, Argentina, Australia, Austria, Belgium, Canada, China, Colombia, Dominican Republic, Estonia, Finland, Germany, Hungary, India, Japan, Jordan, Lebanon, Mexico, Mauritius, Panama, Poland, Qatar, Romania, Singapore, Switzerland, Syrian Arab Republic, Thailand, United Kingdom, United States and Uruguay*.

<sup>72</sup> *Czech Republic, Egypt and Hungary*.

<sup>73</sup> *Australia, Finland, India, Hungary and New Zealand*.

## Developments in national legislation

### Introduction

34. In order to complement the information available, national legislation in 59 countries which are not parties to Convention No. 158 has been examined. The purpose of this examination has been to get an indication of the trends regarding the regulation of termination of employment in national legislation in the light of the main provisions of Convention No. 158. This review is based on the recently published *Digest* of national legislation on termination of employment.<sup>74</sup> In light of the scope of the present study, it was not possible to make a detailed analysis of the information available. A selective use has therefore been made of the vast amount of information it contains.
35. The *Digest* is composed of analytical summaries of legislation on termination of employment. The findings are presented in two ways: in the form of country-by-country summaries, and in the form of tables summing up the relevant information in a convenient *yes* or *no* form.<sup>75</sup> As the latter type of presentation offered the possibility of quantifying the information, it was considered a useful way to depict some general trends of relevance in the present context.
36. The information in the tables included in the *Digest* that has been used for the purpose of the present examination relates to the issues which are regulated in eight basic provisions of Convention No. 158, namely Articles 4 (Valid reason for dismissal), 5(a) and (b) (Non-discrimination against trade union officials and workers' representatives), (e) (Non-discrimination against pregnant women), 10 (Statutory compensation for unfair or unjustified dismissal), 11 (Due notice), 13 (Collective dismissals – Consultations with employee representative) and 14 (Collective dismissals – Advance notice). It was considered that the degree to which the provisions of these Articles were reflected in national legislation could provide an indicator of whether or not there were obstacles to the implementation of Convention No. 158. The existence of such obstacles could not, however, be used as an indication of the need for revision of Convention No. 158 as such obstacles also could be removed by amendments to national legislation. The information in the *Digest* was thus only relevant for the evaluation of obstacles to ratification. The review does therefore not include an examination of the situation in the States that are examined in the *Digest* but that are already party to Convention No. 158.<sup>76</sup> The results are presented below and are summarized in the two tables annexed to this survey.

### Valid reason for dismissal (Article 4)

37. One of the basic provisions of Convention No. 158 is contained in Article 4 and provides that “the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service”. The information available seems to indicate that national legislation in 47 (out of 59) countries requires such a valid reason for the termination of employment.<sup>77</sup> From a regional point of view, the laws examined establish such a requirement in 13

<sup>74</sup> ILO: *Termination of Employment Digest: A legislative review*, Geneva, International Labour Office, 2000.

<sup>75</sup> Or in a form that could be converted to a yes or no form.

<sup>76</sup> *Australia, Cameroon, Cyprus, Ethiopia, Namibia, Spain, Sweden, Venezuela, Zambia.* Brazil denounced the Convention in 1996, but has been included in the examination.

<sup>77</sup> *Argentina, Bangladesh, Brazil, Bulgaria, Cambodia, Canada, Chile, Côte d'Ivoire, Czech Republic, Dominican Republic, Egypt, Gambia, Germany, Guinea, Hungary, India, Indonesia, Islamic Republic of Iran, Iraq, Israel, Italy, Jamaica, Kenya, Republic of Korea, Lesotho, Malaysia, Mauritius, Mexico, Nepal, Netherlands, New Zealand, Panama, Pakistan, Peru, Philippines, Poland, Russian Federation, Senegal, Singapore, South Africa, Swaziland, Syrian Arab Republic, United Republic of Tanzania, Tunisia, United Kingdom, Viet Nam and Zimbabwe.*

(out of 15) African countries,<sup>78</sup> nine (out of 12) countries in the Americas,<sup>79</sup> 15 (out of 19) countries in Asia<sup>80</sup> and 10 (out of 13) countries in Europe.<sup>81</sup> Seven other countries contained such a safeguard with exceptions,<sup>82</sup> while national legislation in five other countries does not contain such an obligation.<sup>83</sup>

### **Compensation/Reinstatement (Article 10)**

38. Article 10 of Convention No. 158 provides that in case of unjustified termination of employment the competent bodies shall be able to order either the reinstatement of the worker or the payment of adequate compensation. First, regarding the right to compensation, the overall trend was that, with the exception of legislation in one African<sup>84</sup> and one Asian<sup>85</sup> country, legislation in the remaining 57 countries provides for a right to compensation for unfair or unjustified dismissal. Second, as regards the right to reinstatement, 39 (out of 59) countries examined provide for such a right.<sup>86</sup> In Africa, eight (out of 15) countries provide accordingly in their national law.<sup>87</sup> Of the 12 countries in the Americas, five countries have included provisions to that effect in their labour codes,<sup>88</sup> another five have no such provisions<sup>89</sup> and the remaining two countries have the relevant provisions qualified with exceptions.<sup>90</sup> In Asia, almost all the countries examined (16 out of 19) reflect the provisions of

<sup>78</sup> *Côte d'Ivoire, Egypt, Gambia, Guinea, Kenya, Lesotho, Mauritius, Senegal, South Africa, Swaziland, United Republic of Tanzania, Tunisia and Zimbabwe.*

<sup>79</sup> *Argentina, Brazil, Canada, Chile, Dominican Republic, Jamaica, Mexico, Panama and Peru.*

<sup>80</sup> *Bangladesh, Cambodia, India, Indonesia, Islamic Republic of Iran, Iraq, Republic of Korea, Malaysia, Nepal, New Zealand, Pakistan, Philippines, Singapore, Syrian Arab Republic and Viet Nam.*

<sup>81</sup> *Bulgaria, Czech Republic, Germany, Hungary, Israel, Italy, Netherlands, Poland, Russian Federation and United Kingdom.*

<sup>82</sup> *Austria, Belgium, China, Colombia, Japan, Switzerland and Thailand*

<sup>83</sup> *Ghana, Nigeria, Bolivia, Sri Lanka and United States.*

<sup>84</sup> *Ghana.*

<sup>85</sup> *Nepal.*

<sup>86</sup> *Austria, Bangladesh, Bulgaria, Canada, Czech Republic, Gambia, Germany, Guinea, Hungary, India, Indonesia, Islamic Republic of Iran, Iraq, Italy, Jamaica, Japan, Kenya, Republic of Korea, Lesotho, Malaysia, Mexico, Nepal, Netherlands, New Zealand, Pakistan, Panama, Peru, Philippines, Poland, Russian Federation, South Africa, Singapore, Sri Lanka, Swaziland, United Republic of Tanzania, Thailand, United Kingdom, Viet Nam and Zimbabwe.*

<sup>87</sup> *Gambia, Guinea, Kenya, Lesotho, South Africa, Swaziland, United Republic of Tanzania, Zimbabwe.*

<sup>88</sup> *Canada, Jamaica, Mexico, Panama and Peru.*

<sup>89</sup> *Argentina, Bolivia, Brazil, Chile and Dominican Republic.*

<sup>90</sup> *Colombia and United States.*

the Convention on this matter.<sup>91</sup> Finally, similar provisions exist in Europe in ten (out of 13) countries examined.<sup>92</sup>

### **Due notice (Article 11)**

39. The Convention further provides that the worker whose employment is to be terminated is entitled to a reasonable period of notice, without setting a specific duration for this period (Article 11). Many countries apply periods that vary according to seniority or the type of contract. For the purposes of this study and in accordance with Convention No. 158 requirements to provide notice have been taken into account regardless of their duration. Of the 59 countries examined, 50 countries have provisions on due notice.<sup>93</sup> Legislation in all but one of the countries from the African region contains relevant provisions.<sup>94</sup> A large majority of countries from the American continent (nine out of 12) also provide for such notice.<sup>95</sup> The same is the case in the Asian region (15 out of 19).<sup>96</sup> Legislation in all but one of the European countries provides for a notice period.<sup>97</sup>
40. Article 11 also provides that monetary compensation can be paid in lieu of notice. In total, 40 (out of 59) countries have provisions to that effect.<sup>98</sup> Article 11 is also reflected in the laws in all but one<sup>99</sup> of the African countries examined. A large proportion of countries in the Americas (eight out of 12) also provide for this entitlement.<sup>100</sup> In Asia, 13 (out of 19) countries include such a provision

<sup>91</sup> *Bangladesh, India, Indonesia, Islamic Republic of Iran, Iraq, Japan, Republic of Korea, Malaysia, Nepal, New Zealand, Pakistan, Philippines, Singapore, Sri Lanka, Thailand and Viet Nam.*

<sup>92</sup> *Austria, Bulgaria, Czech Republic, Germany, Hungary, Italy, Netherlands, Poland, Russian Federation and United Kingdom.*

<sup>93</sup> *Argentina, Austria, Bangladesh, Belgium, Bolivia, Brazil, Bulgaria, Cambodia, Canada, Chile, China, Colombia, Côte d'Ivoire, Czech Republic, Dominican Republic, Gambia, Germany, Ghana, Guinea, Hungary, India, Israel, Italy, Jamaica, Japan, Kenya, Republic of Korea, Lesotho, Malaysia, Mauritius, Nepal, Netherlands, New Zealand, Nigeria, Pakistan, Peru, Poland, Senegal, Singapore, South Africa, Syrian Arab Republic, Sri Lanka, Swaziland, Switzerland, United Republic of Tanzania, Thailand, Tunisia, United Kingdom, Viet Nam and Zimbabwe.*

<sup>94</sup> *Egypt.*

<sup>95</sup> *Argentina, Bolivia, Brazil, Canada, Chile, Colombia, Dominican Republic, Jamaica and Peru.*

<sup>96</sup> *Bangladesh, Cambodia, China, India, Japan, Republic of Korea, Malaysia, Nepal, New Zealand, Pakistan, Singapore, Sri Lanka, Syrian Arab Republic, Thailand and Viet Nam.*

<sup>97</sup> *Russian Federation.* Note also, however, that in *Israel* notice periods are not provided in statute, but may be provided by collective agreement or custom. See *Digest*, p. 186.

<sup>98</sup> *Argentina, Austria, Bangladesh, Belgium, Bolivia, Brazil, Cambodia, Canada, Chile, Colombia, Côte d'Ivoire, Dominican Republic, Gambia, Ghana, Guinea, India, Israel, Jamaica, Japan, Kenya, Republic of Korea, Lesotho, Malaysia, Mauritius, Nepal, Netherlands, New Zealand, Nigeria, Pakistan, Senegal, Singapore, South Africa, Swaziland, Syrian Arab Republic, United Republic of Tanzania, Thailand, Tunisia, United Kingdom, Viet Nam and Zimbabwe.*

<sup>99</sup> *Egypt* (not applicable).

<sup>100</sup> *Argentina* (but not in small and medium-sized companies), *Bolivia, Brazil, Canada, Chile, Colombia, Dominican Republic and Jamaica.*

in their law.<sup>101</sup> The situation is different in Europe where legislation in less than half of the countries examined (five out of 13) contains a provision on monetary compensation.<sup>102</sup>

### **Non-discrimination (Article 5)**

41. Article 5 enumerates a series of non-acceptable reasons for termination of employment. In the present context and due to the data available, it has been possible to take into account three reasons. They include union membership (paragraph 5(a)), being a workers' representative (paragraph 5(b)), and maternity protection (paragraph 5(d) and (e)).
42. Regarding the protection of trade union officials and workers' representatives (Article 5(a) and (b)), a total of 50 (out of 59) countries have legislation to that effect.<sup>103</sup> Regionally, the legislation in 12 (out of 15) countries from the African region contains such a safeguard.<sup>104</sup> Legislation in all the American States examined seems to be in conformity with Article 5 on this matter.<sup>105</sup> In Asia, legislation in 14 out of the 19 countries examined contains such requirements.<sup>106</sup> Finally, trade union officials and workers' representatives are protected in all but one of the 13 European States.<sup>107</sup>
43. Regarding the protection of maternity (paragraph 5(d) and (e)) the legislation in 44 out of 59 countries seems to reflect the provisions of Convention No. 158.<sup>108</sup> Among the countries from the African region ten out of 15 countries examined provide such protection.<sup>109</sup> The legislation in all the

<sup>101</sup> *Bangladesh, Cambodia, India, Japan, Republic of Korea, Malaysia, Nepal, New Zealand, Pakistan, Singapore, Syrian Arab Republic, Thailand and Viet Nam.*

<sup>102</sup> *Austria, Belgium, Israel, Netherlands and United Kingdom.*

<sup>103</sup> *Argentina, Austria, Bangladesh, Belgium, Bolivia, Brazil, Bulgaria, Cambodia, Canada, Chile, China, Colombia, Czech Republic, Dominican Republic, Egypt, Gambia, Germany, Ghana, India, Indonesia, Israel, Italy, Jamaica, Japan, Kenya, Republic of Korea, Lesotho, Malaysia, Mauritius, Mexico, Netherlands, New Zealand, Nigeria, Pakistan, Panama, Peru, Philippines, Poland, Russian Federation, Senegal, Singapore, South Africa, Swaziland, Switzerland, United Republic of Tanzania, Thailand, United Kingdom, United States, Viet Nam and Zimbabwe.*

<sup>104</sup> *Egypt, Gambia, Ghana, Kenya, Lesotho, Mauritius, Nigeria, Senegal, South Africa, Swaziland, United Republic of Tanzania and Zimbabwe.*

<sup>105</sup> *Argentina, Bolivia, Brazil, Canada, Chile, Colombia, Dominican Republic, Jamaica, Mexico, Panama, Peru and United States.*

<sup>106</sup> *Bangladesh, Cambodia, China, India, Indonesia, Japan, Republic of Korea, Malaysia, New Zealand, Pakistan, Philippines, Singapore, Thailand and Viet Nam.*

<sup>107</sup> *Austria (for works council members and candidates), Belgium (for members of works council and of committees on occupational safety and health), Bulgaria, Czech Republic, Germany (for members of workers' representative bodies), Israel, Italy (for members of workers committees), Netherlands, Poland, Russian Federation, Switzerland and United Kingdom (for collective dismissals, transfer of undertaking and pension trustees).*

<sup>108</sup> *Argentina, Austria, Belgium, Bolivia, Brazil, Bulgaria, Cambodia, Canada, Chile, China, Colombia, Czech Republic, Dominican Republic, Gambia, Germany, Ghana, Hungary, India, Indonesia, Israel, Italy, Jamaica, Japan, Republic of Korea, Lesotho, Mauritius, Mexico, Netherlands, New Zealand, Nigeria, Panama, Peru, Poland, Russian Federation, Senegal, Singapore, South Africa, Swaziland, Switzerland, Tunisia, United States, Viet Nam, United Kingdom and Zimbabwe.*

<sup>109</sup> *Gambia, Ghana, Lesotho, Mauritius, Nigeria, Senegal, South Africa, Swaziland, Tunisia and Zimbabwe.*

examined states from the Americas contains provisions to this effect.<sup>110</sup> Less than a half of the Asian States examined contained relevant provisions<sup>111</sup> (nine out of 19) and all the European countries examined reflect the requirements of Article 5(d) and (e).<sup>112</sup>

### **Collective dismissals (Articles 13 and 14)**

44. The Convention provides that consultations with the representatives of the employees must take place before announcing collective dismissals (Article 13). Overall, legislation in 38 out of 59 countries examined provide for such consultations.<sup>113</sup> In 11 (out of 15) African countries legislation contained such a provision.<sup>114</sup> In one case, the national control commission must be consulted when such licensing is about to take place.<sup>115</sup> The tendency in the American region is variable on this matter. The laws in five (out of 12) countries contain relevant provisions.<sup>116</sup> A similar situation prevails in Asia. Legislation in 11 States out of 19 requires prior negotiation<sup>117</sup> while in the other eight no such requirements are established. Finally, in Europe, the tendency is to provide such protection as 11 (out of 13) countries have introduced such provisions in their laws.<sup>118</sup>
45. According to Article 14.1 the administrative authorities should be notified of the decision of collective dismissal as soon as possible. In 39 (out of 59) countries the national legislation provided accordingly.<sup>119</sup> The laws in ten African states contain such clauses.<sup>120</sup> In the Americas, legislation in

<sup>110</sup> *Argentina, Bolivia, Brazil, Canada, Chile, Colombia, Dominican Republic, Jamaica, Mexico, Panama, Peru and United States.*

<sup>111</sup> *Cambodia, China, India, Indonesia, Japan, Republic of Korea, New Zealand, Singapore and Viet Nam.*

<sup>112</sup> *Austria, Belgium, Bulgaria (with labour authority's authorization), Czech Republic, Germany, Hungary, Israel, Italy, Netherlands, Poland, Russian Federation, Switzerland and United Kingdom.*

<sup>113</sup> *Argentina, Austria, Belgium, Brazil, Cambodia, Canada, China, Côte d'Ivoire, Czech Republic, Gambia, Germany, Guinea, India, Indonesia, Israel, Italy, Japan, Kenya, Republic of Korea, Mauritius, Netherlands, New Zealand, Nigeria, Peru, Philippines, Poland, Russian Federation, Senegal, South Africa, Sri Lanka, Swaziland, Switzerland, Thailand, Tunisia, United Kingdom, United States, Viet Nam and Zimbabwe.*

<sup>114</sup> *Côte d'Ivoire, Gambia, Guinea, Kenya, Mauritius, Nigeria, Senegal, South Africa, Swaziland, Tunisia and Zimbabwe.*

<sup>115</sup> *Tunisia.*

<sup>116</sup> *Argentina, Brazil, Canada, Peru and United States.*

<sup>117</sup> *Cambodia, China, India, Indonesia, Japan, Republic of Korea, New Zealand, Philippines, Sri Lanka, Thailand and Viet Nam.*

<sup>118</sup> *Austria, Belgium, Czech Republic, Germany, Israel, Italy, Netherlands, Poland, Russian Federation, Switzerland and United Kingdom.*

<sup>119</sup> *Argentina, Austria, Bangladesh, Belgium, Bulgaria, Cambodia, Canada, Chile, China, Côte d'Ivoire, Czech Republic, Egypt, Germany, Ghana, Guinea, India, Indonesia, Israel, Italy, Kenya, Mauritius, Netherlands, Pakistan, Panama, Peru, Philippines, Poland, Russian Federation, Senegal, Sri Lanka, Swaziland, Switzerland, Syrian Arab Republic, Thailand, Tunisia, United Kingdom, United States, Viet Nam and Zimbabwe.*

<sup>120</sup> *Côte d'Ivoire, Egypt, Ghana, Guinea, Kenya, Mauritius, Senegal, Swaziland, Tunisia and Zimbabwe.*

six (out of 12) countries requires prior notification to the authorities.<sup>121</sup> In Asia legislation in 11 (out of 19) countries contains such a clause.<sup>122</sup> In Europe, all but one country requires that the administration be notified.<sup>123</sup>

## Conclusions regarding obstacles and difficulties encountered

46. The outcome of the more detailed examination of the 1997 consultations was inconclusive in that it indicated that there were few, if any obstacles, in 20 countries, but that a slight majority (30) of the countries responding reported on obstacles and difficulties that prevented or delayed ratification of Convention No. 158.
47. On the other hand, the examination of the legislation in 59 countries complements this analysis with a rather positive outlook on the actual application of termination of employment legislation. In comparison with Convention No. 158, most countries in the African and American regions seem to have legislation in force that reflects the majority of the fundamental provisions of Convention No. 158. Furthermore, in Asia and Europe, approximately three-quarters of the countries examined appear to reflect these provisions in national law. This would seem to indicate a general acceptance in these countries of the protection provided in Convention No. 158. Furthermore, the lack of significant regional differences would seem to indicate that inequalities in economic development do not have a major influence upon the adoption of laws reflecting the requirements of Convention No. 158.
48. When these results are viewed together, however, the picture that emerges is more complex. Eleven of the 20 countries that reported were also among the 59 countries whose legislation was examined separately. Viewed together, the 1997 consultation and the examination of the additional information would thus seem to indicate that there were no or limited obstacles to ratification in 68 countries. On the other hand, 30 member States reported on obstacles in the consultation. Of these, 21 were included in the examination of the additional information on legislation which overall gave a less negative impression of the obstacles in these countries. It should be recalled, however, that the additional information examined focused only on the main provisions of Convention No. 158.
49. If ratification of Convention No. 158 would depend only on compliance with the parameters examined in the context of the review of the legislation of 59 countries, the prospects for additional ratifications of Convention No. 158 could be considered very positive. The complementary information has not, however, resolved the main contradiction that the 1997 consultations seemed to reveal. Convention No. 158 has attracted a comparatively low level of ratifications and even if the basic concepts on which Convention No. 158 rests seem to retain a large acceptance, 30 countries considered in 1997 that there were obstacles or difficulties of a varying degree that prevented or delayed ratification of this Convention.
50. Against this background it was deemed relevant to examine Convention No. 158 in a larger context and in particular in the context of the current debate on labour flexibility. This examination was entrusted to an expert<sup>124</sup> who chose to focus particularly on the experience in four common law countries – Australia, New Zealand, the United Kingdom and the United States – on the ground that the flexibility debate has been particularly lively in these four countries and that each of these countries (in different ways) has taken the lead in promoting reforms aimed at liberalizing the

<sup>121</sup> *Argentina, Canada, Chile, Panama, Peru and United States.*

<sup>122</sup> *Bangladesh, Cambodia, China, India, Indonesia, Pakistan, Philippines, Sri Lanka, Syrian Arab Republic, Thailand and Viet Nam.*

<sup>123</sup> *Hungary.*

<sup>124</sup> Mr. Simon Deakin, ESRC Centre for Business Research, University of Cambridge, United Kingdom.



labour market. The examination is intended as a contribution to the debate on how far these market-orientated reforms might be seen as calling into question the regulatory framework of Convention No. 158.

## Convention No. 158 in the context of labour flexibility

### Introduction

51. There are many issues that are relevant to the current debate on flexibility in labour law, such as the role of labour market institutions and the environment within which labour relations are embedded in particular countries. These and other challenges to the acceptance and application of Convention No. 158 are outlined in the 1995 General Survey.<sup>125</sup> The following sections focus exclusively on the flexibility issue, since experience has shown that it is this subject that has given rise to some of the most intractable and difficult problems of analysis.

### Regulation of termination of employment

52. The main provisions of Convention No. 158 are elements that constitute together a series of procedural and substantive controls on the ability to dismiss, which otherwise, under the rules of private law (in this case mainly those of the law of contract) would be rights vested in the employer. The predominant rule in both the common law and the civil law prior to the advent of modern employment protection legislation was that the employer could dismiss the employee without the need for a valid reason or for any reason at all, simply by giving the requisite notice. Under the common law, the only remedy for failure to give notice is a claim for damages based on “wrongful dismissal”, which could result in damages representing net wages or salary for the notice period.
53. Employment termination standards may therefore be thought of as a form of regulatory control over the exercise of private contractual power by employers. This is the essence of the idea of employment security. It is different from employment stability. The latter can exist even in a situation where the employer’s authority over dismissals is not subject to external regulatory controls; however, the notion of employment security entails more than the bare expectation that a particular employment relationship will continue through time.<sup>126</sup> It also needs to be distinguished from the idea of employees’ ownership of jobs, which implies some kind of veto over dismissal or at least an automatic right to compensation for loss of employment;<sup>127</sup> in practice, employment termination legislation falls short of providing such protection.
54. For example, Convention No. 158, in common with similar instruments, does not deny the employer’s authority to carry out economic dismissals. What it does, instead, is to subject this authority to a number of substantive and procedural controls. These may increase the costs of such dismissals to employers, and may therefore have significant economic consequences. However, the idea that employment termination standards seek to guarantee a life employment to employees is without foundation.
55. A working definition of employment security might therefore be “the existence of some form of regulatory intervention designed to protect workers against arbitrary managerial decision-

<sup>125</sup> See p. 6 note 3, *supra*.

<sup>126</sup> Büchtemann, C. (1993): “Introduction: employment security and labor markets”, in C. Büchtemann (ed.): *Employment security and labor market behavior. Interdisciplinary approaches and international evidence* (Ithaca, NY: Cornell UP).

<sup>127</sup> See Meyers, F. (1964): *Ownership of jobs: A comparative study* (Los Angeles: UCLA Press).

making”.<sup>128</sup> As such, it underpins the entire structure of regulations affecting the individual employment relationship: that is, rules governing basic terms and conditions of employment, protection of wages, the disciplinary process, and protection against discrimination, and not simply the process of termination. Without protection in relation to the decision to dismiss, the individual employee would be unable to assert and enforce these other rights and protections in a meaningful way. In this sense legal standards governing termination of employment form the essential foundation for the legal regulation of the individual employment relationship in modern labour law systems.<sup>129</sup>

56. At the same time, it is maintained that the standards laid down in Convention No. 158 are, in many respects, flexible. The legal concepts adopted – in particular the core notion of a “valid reason for termination ... connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service” (Article 4) – are open-ended and can be interpreted, in concrete settings, in a variety of different ways. The Convention does not stipulate the precise length of notice but prescribes that the requirement is for a “reasonable period of notice” (Article 11). Nor does the Convention prescribe the exact amount of severance payments that are required for compliance. The relevant Article 12 refers to “a severance allowance ... the amount of which shall be based, inter alia, on length of service and the level of wages ...”. There are also exceptions in Article 2(2) to the categories of employed persons who come within its scope.

## The debate over labour flexibility

57. A number of meanings have been attributed to the term “labour flexibility”, but for present purposes it is useful to focus on the idea that flexibility is a non-judicial concept that reflects the extent to which a labour market is regulated. The less regulated a labour market the more flexible it will be. According to one view, absolute flexibility is a condition of “unregulated” markets which allows the price mechanism to act unimpeded. This view influences the argument that economic efficiency can be restored through “deregulation” and that once rules are removed, market forces are free to allocate resources to their most efficient use.
58. Employment protection legislation is only one of the “rigidities” which modern labour law systems are said to induce in the labour market; others include centralized collective bargaining, high unionization rates, employment taxes and social security contributions, and earnings-related unemployment benefits. The general effect of such regulation, according to some analyses, is that “flexibility is prevented by institutional conditions”.<sup>130</sup>
59. A number of specific effects have been attributed to legislation aimed at protecting employment security. These include: raising the costs of hiring labour; making it more difficult for employers to dismiss under-performing workers; and delaying the point at which lay-offs and redundancies are implemented by firms. These are all said to contribute to a lessening of the level of competition on markets and a reduction in the internal, productive efficiency of organizations, which together result in higher unemployment and a lower employment rate.
60. In practice, however, the nature of the link between labour regulation and flexibility is unclear. Empirical studies<sup>131</sup> have led some commentators to conclude that regulation can be seen as a

<sup>128</sup> Deakin, S. and Morris, G. (1998): *Labour Law*, 2nd. ed. (London: Butterworths), p. 388.

<sup>129</sup> See the preceding examination of national legislation.

<sup>130</sup> Siebert, H. (1997): “Labor market rigidities: At the heart of unemployment in Europe”, in *Journal of Economic Perspectives*, 11, p. 37, 53.

<sup>131</sup> Much of the debate turns on whether the “inflexible” European systems have a worse employment record than the “flexible” US system, and, if so, whether this can be attributed to differences in employment law. An account of this debate lies outside the scope of the present paper, but it may be said that the present state of the debate is inconclusive on both issues. See the

response to structural imperfections in the labour market. These alternative economic models predict the presence of market “imperfections” of various kinds even under conditions of pure competition.<sup>132</sup> Given that this is the case, the goal of a fully competitive market is unattainable, no matter how much “deregulation” might be carried out. However, there is a lack of consensus among those engaged in this debate on what an “efficient” system of labour market regulation would look like.

61. A number of studies suggest that many employers would adopt of their own volition a rule of no dismissal without just cause, since it would be in their interests to do so.<sup>133</sup> These norms are part of employer strategies aimed at retaining and motivating “core” employees, that is, those who have firm-specific skills. The legitimacy of regulation therefore no longer depends on whether employment security is a worthwhile objective; for many employers, it is accepted that it is. The crucial issue is whether it is feasible to expect workers and employers to bargain for an efficient level of employment protection without legal encouragement to do so. Some analyses argue that legal regulation would be needed to help to bring about outcomes that, because of market failure, would not be arrived at by means of private bargaining, even though economic efficiency would be enhanced if they were.<sup>134</sup> This is what is meant by the idea that labour law rules may have a “public good” aspect to them.
62. Critics argue, nevertheless, that labour regulation is much too blunt an instrument to be used as a means of “perfecting” the market.<sup>135</sup> Regulation may have undesirable side effects, such as the exclusion of “outsiders” who cannot gain access to “core” employment.<sup>136</sup> In response, followers of a more explicitly ‘institutional’ approach would argue that it is incorrect to see norms and regulations as necessarily being sources of rigidities. Such approaches suggest that labour standards may open up possibilities for cooperative strategies which would otherwise be regarded as too high-risk.<sup>137</sup> Employment protection standards, which may formally limit the power of the employer to

recent contributions of Krueger, A. and Pischke, J.-S. (1997), “Observations and conjectures on the US jobs miracle”, National Bureau of Economic Research Working Paper 6146 (Washington: NBER); Siebert, *supra* n. 15; Nickell, S. (1997): “Unemployment and labour market rigidities: Europe versus North America”, in *Journal of Economic Perspectives*, 11: 55-74; Addison, J. (1998): “The US employment miracle in comparative perspective”, in *Comparative Labor Law and Policy Journal*, 19: 283-294.

<sup>132</sup> The reason for the persistence of these imperfections is that the market can only attain equilibrium under extremely unusual conditions – such as complete information and costless contracting. Economists increasingly recognize that these conditions are rarely if ever satisfied in the case of the labour market.

<sup>133</sup> Büchtemann, note 1 *supra*; Verkerke, J. H. (1995): “An empirical perspective on indefinite term employment contracts: Resolving the just cause debate”, in *Wisconsin Law Review*: 838-917; Rock, E. and Wachter, M. (1996): “The enforceability of norms and the employment relationship”, in *University of Pennsylvania Law Review*, 144: 1913-1952. For a different view, see Epstein, R. (1984): “In defense of the contract at will”, in *University of Chicago Law Review*, 51: 947-982.

<sup>134</sup> Levine, D. (1991): “Just-cause employment policies in the presence of worker adverse selection”, in *Journal of Labor Economics*, 9: 294-305. For similar arguments in the context of training, see Dertouzos, J. and Karoly, L. (1993): “Employment effects of worker protection: evidence from the USA”, in C. Büchtemann (ed.): *Employment security and labor market behavior. Interdisciplinary approaches and international evidence* (Ithaca, NY: Cornell UP).

<sup>135</sup> Alogoskoufis, G.; Bean, C.; Bertola, G.; Cohen, D.; Dolado, J.; and Saint-Paul, G. (1995): *Unemployment: Choices for Europe* (London: Centre for Economic Policy Research) p. 84.

<sup>136</sup> See Saint-Paul, G. (1996): “Understanding labour market institutions: a political economy perspective”, CEPR Discussion Paper 1428 (London: Centre for Economic Policy Research).

<sup>137</sup> Boyer, R. (1994): “Labour institutions and economic growth: a survey and a “regulationist” approach”, in *Labour*, 7: 25, 26.

respond to changes in the external market by dismissing employees may help and also stimulate firms to achieve competitive success through other means, such as training and joint investment with employees in firm-specific skills.

63. Therefore, the law and economics of employment contracting is gradually coming around to the view that there is a highly complex relationship between systems of regulation and labour market behaviour. The view that regulation equals inflexibility and inefficiency is being replaced by a more subtle approach. Instead, regulation may mitigate the effects of market failures, which would otherwise impede the use of bargaining or self-regulation to arrive at efficient solutions to contracting problems. The long-run dynamic effects of regulation on innovation and growth also need to be considered.

## Labour standards governing employment termination: The experience in selected countries

64. Economic debates have had a considerable impact on the way in which the law governing termination of employment has developed in common law systems. The contribution of neo-liberal philosophies to recent policy debates in these systems is well known. It is less well known that economic arguments have also been deployed in favour of legal intervention at various points. This can be seen from the following overviews of developments in certain four common law<sup>138</sup> jurisdictions, one of which is a party to Convention No. 158.<sup>139</sup> In addition, recent developments in two civil law countries (France and Germany) is also briefly touched upon.

### Australia

65. Australia and New Zealand have followed a similar course on according an increasing role to individual enforcement of protective rights before labour courts as collective procedures of conciliation and arbitration became less prominent. Thus, at the start of the 1980s, there was no federal law on unfair dismissal in existence. At state level, some jurisdictions applied an 'industrial dispute' model under which dismissals were dealt with in the framework of collective conciliation and arbitration procedures; others had moved to an "individual rights" approach. Movement at federal level was prompted by the decision of the Conciliation and Arbitration Commission in the Termination, Change and Redundancy case brought by the Australian Council of Trade Unions.<sup>140</sup> This established that, in the context of the federal award system that was then in force, an employer contemplating collective dismissals was under an obligation to inform and consult with union representatives, and also to observe minimum standards relating to severance payments.<sup>141</sup>

<sup>138</sup> *Australia, New Zealand, United Kingdom and United States*. Most legal systems of the world, both common law and civil law systems, have at present adopted employment protection legislation, and the flexibility debate has led to significant changes in the labour systems derived from both common law and the civil law tradition. Nevertheless policies aimed at promoting flexibility through "deregulation" are furthest advanced in systems with a common law background. In certain common law systems, institutional or collective control over the determination of pay and conditions of employment has diminished considerably over the past decade and a half, while this is not the case in most civil law systems. See Hepple, B. (1998): "Flexibility and security of employment", in R. Blanpain and C. Engels (eds.): "Comparative labour law and industrial relations in industrialised market economies", 6th ed. (The Hague: Kluwer); Deakin, S. (1991): "Legal change and labour market restructuring in Western Europe and the US", in *New Zealand Journal of Industrial Relations*, 16: 109-125.

<sup>139</sup> *Australia*.

<sup>140</sup> (1984) 8 IR 34; 9 IR 115.

<sup>141</sup> Creighton, B. and Stewart, A. (1990): *Labour law: An introduction* (Annandale, NSW: Federation Press) pp. 172-173.

66. In 1993 the Commonwealth Parliament passed the Industrial Relations Reform Act, amending the Industrial Relations Act, 1988, in such a way as to establish a general floor of minimum standards in relation to termination of employment (as well as in a range of other matters). By using the external affairs power of the Constitution to implement Convention No. 158, the Parliament decided to restrict federal legislative standards to the protection of workers covered by federal awards.<sup>142</sup> The principal substantive standard contained in the new legislation was the rule that a reason for termination would not be valid if “having regard to the employee’s capacity and conduct and [the employer’s] operational requirements, the termination is harsh, unjust or unreasonable”. The federal Industrial Relations Commission was given powers in respect of the remedies of reinstatement and compensation.
67. At the same time as unfair dismissal law was developing, the Australian labour law system was being strongly affected by the flexibility debate. This initially took the form of a series of reforms and adjustments, which included the liberalization of previous rules concerning the employment of part-time, casual and fixed-term employees and the linking of pay bargaining to improvements in productivity.<sup>143</sup> The Workplace Relations Act, 1996 marked a turning point in the debate by narrowing the scope of federal awards, further encouraging enterprise level bargaining, and allowing for individualised employment agreements, but at the same time it extended the powers of the Industrial Relations Commission in respect of dismissals. Some researchers have therefore pointed out that there is no clear-cut indication that pressure for greater flexibility has prompted Australia to severely deregulate legislation on dismissal.<sup>144</sup>
68. This analysis should be seen in the light of the results of the consultations carried out by the Office which indicated that Australia, a party to Convention No. 158, responded to the consultations and proposed a review or different interpretation of Article 2.6 (scope of application and possible exclusions). In Australia’s opinion, this Article should be interpreted to allow for limitations of the scope of application of Convention No. 158 not only at the time of submission of the First Report but also at a later stage. Alternatively, this provision should be revised accordingly. The proposed revision would seem to be more than a technical change as it would imply that parties to Convention No. 158 would be entitled to limit the coverage of the Convention over time, i.e. to dismantle existing protection.

## **New Zealand**

69. In New Zealand, unfair dismissal laws have grown in importance during a period when efforts were being made to decentralize and, in some cases, to individualize the determination of pay and conditions of employment. Procedures regulating dismissal and other causes of “personal grievances” were introduced in New Zealand law in the early 1970s. As in the United Kingdom,<sup>145</sup> an important motivation was the establishment of a procedure that limited recourse to strike action

<sup>142</sup> Pittard, M. (1994): “International labour standards in Australia: Wages, equal pay, leave and termination of employment” in *Australian Journal of Labour Law*, 7: 170-197. The High Court later ruled that the external affairs power could not be legitimately used to implement the “harsh, unjust or unreasonable” standard since the latter was not contained in Convention No. 158. However, a different set of powers was found as the basis for the Workplace Relations Act, 1996, which largely re-enacted the unfair dismissal provisions of the earlier Act.

<sup>143</sup> Mitchell, R. and Rimmer, M. (1990): “Labour law, deregulation and flexibility in Australian industrial relations”, in *Comparative Labor Law Journal*, 12: 1-34.

<sup>144</sup> Mitchell, R. (1998): “Juridification and labour law: A legal response to the flexibility debate in Australia”, in *The International Journal of Comparative Labour Law and Industrial Relations*, 14(2): 134.

<sup>145</sup> Examined below, paras. 72-78.

as a way of settling disputes.<sup>146</sup> In line with the prevailing “award” system of conciliation and arbitration, the new legislation (introduced by the Industrial Relations Act, 1973) only applied to workers who were both union members and covered by an industry award or registered agreement. As a result, many white-collar and managerial workers were excluded. Moreover, an individual had no standing of his or her own to bring a claim, but depended on the procedure being invoked by his/her union.

70. The gradual extension of unfair dismissal protection to all workers since that point has occurred in step with the dismantling of the traditional award system. The Labour Relations Act, 1987, which retained the award system but expanded the role of voluntary collective bargaining at the expense of compulsory conciliation and arbitration, extended protection to all union members. In 1991 the Employment Contracts Act repealed the award system and removed all obligations upon employers to bargain with trade unions.<sup>147</sup> Following its passage there was, on the one hand, a substantial decline in union membership and in the coverage of collective agreements, which became largely confined to company or plant level.<sup>148</sup> On the other hand, the 1991 Act brought all employees within the personal grievance system, vested the right to invoke the procedure in individuals themselves, and retained the specialist labour courts and institutions that administered the law. The recent Employment Relations Act, 2000 (enacted with a view to promoting collective bargaining and observance of the ILO Convention on this subject) reinforces this provision. It facilitates access to information and mediation services and stipulates that personal grievance procedures shall be the only way to challenge dismissal (with some limited exceptions). The role of the newly created Employment Relations Authority and the Employment Court in resolving employment relationship problems is ensured. The Act provides a broader range of remedies, including full reinstatement, reimbursement and compensation for “humiliation, loss of dignity, injury to the feelings of the employee, the loss of any benefit (monetary or not) which the employee might reasonably have been expected to obtain if the personal grievance had not arisen”.<sup>149</sup> Moreover, reinstatement is to be the primary remedy.
71. The results of the consultations held by the Office should also be evoked in this context. New Zealand has not ratified Convention No. 158. Nevertheless, the New Zealand courts have held that it is appropriate to take international instruments into account and have made frequent reference to Convention No. 158 in developing its case law in relation to dismissal. New Zealand reported in the consultations held in 1997 that it had no difficulty with the general principles of the Convention, but that it did not comply with some detailed provisions related to Articles 13 and 14 (economic dismissals) and that it wished the Convention to be revised in order to reduce its detailed prescriptions and that flexibility be introduced in the Convention.<sup>150</sup>

<sup>146</sup> Anderson et al., note 12 *supra*, pp. 217-218. See generally Anderson, G. (1990): “The origins and development of the personal grievance jurisdiction in New Zealand”, in *New Zealand Journal of Industrial Relations*, 13: 257-275.

<sup>147</sup> Anderson et al., note 12 *supra*, p. 11.

<sup>148</sup> For analyses of the legal and economic effects of the Act, see California Western International Law Journal (1997) Symposium on the New Zealand Employment Contracts Act, 1991, *California Western International Law Journal*, 28.

<sup>149</sup> *Employment Relations Act, 2000*, No. 24 of 19 Aug. 2000, para. 123.

<sup>150</sup> See paras. 18, 30 *supra*. For an overview of current legislation in New Zealand, see *Digest*, pp. 247-251.

## United Kingdom

72. The current regulation<sup>151</sup> of dismissals and unfair dismissal legislation in the United Kingdom has its roots in legislation adopted in the 1960s and 1970s. Redundancy compensation appears to have been introduced in the United Kingdom for mainly economic reasons. The rationale of the Redundancy Payments Act of 1965 was the encouragement of industrial restructuring: the payment of redundancy compensation, subsidized by the State, was intended to give employees incentives to abandon employments in declining industries and move to new sectors in which employment was growing. It was thought that as a result of the introduction of the new law, employers would be encouraged to put in place disciplinary procedures for dealing with individual disputes, one effect of which would be to reduce unofficial strikes over dismissals. Formalization of managerial decision-making at establishment level was seen as a central part of a policy concern “to restore order, peace and efficiency to industrial relations and yet preserve and even extend the voluntarist tradition of collective bargaining”.<sup>152</sup> Since its introduction, this Act has continued to be used widely, particularly in the 1990s.<sup>153</sup> By comparison, however, the role of collective procedures for information and consultation in controlling redundancies has been minimal.<sup>154</sup>
73. The Industrial Relations Act of 1971, which introduced unfair dismissal legislation in the United Kingdom, had “a dual purpose of ... managerial efficiency and employment protection”.<sup>155</sup> It was influenced by the standards laid down in the Termination of Employment Recommendation, 1963 (No. 119), i.e. the forerunner to Convention No. 158, but also by a perceived need to streamline industrial relations procedures at plant level.
74. Flexible or non-standard forms of work were excluded from the coverage of protection against unfair dismissal from the very inception of this legislation. This exclusion was the consequence of legal provisions permitting waiver clauses, which were included in the 1971 Act and which were later confirmed. The form of the “continuity of employment” requirement, which excludes a large proportion of part-time workers and casual workers from employment protection, dates back to the Contracts of Employment Act, 1963.
75. The subsequent evolution of unfair dismissal law was influenced by the growing debate over flexibility. Deregulatory legislation was adopted in the 1980s which restricted access to labour tribunals, changed the burden-of-proof rules so as to remove from the employer the obligation of showing that he acted reasonably in dismissing the employee, and extended the qualifying period for general protection against unfair dismissal to two years. Nevertheless, this legislation made only a marginal impact on the main body of unfair dismissal protection.<sup>156</sup>
76. It has been argued that this was due to certain inherent weaknesses in the law which resulted in low rates of reinstatement, low levels of compensation, and the tendency for the courts and tribunals to stress procedural fairness at the expense of substantive rights. Furthermore, surveys of employers

<sup>151</sup> The main statute is the Employment Rights Act, 1996. For an overview of this legislation see *Digest*, pp. 347-353.

<sup>152</sup> Lewis, R. (1986): “The role of the law in employment relations”, in R. Lewis (ed.): *Labour law in Britain* (Oxford: Blackwell) p. 32.

<sup>153</sup> Deakin, S. and Wilkinson, F. (1994): “Rights vs. efficiency? The economic case for transnational labour standards”, in *Industrial Law Journal*, 23: 289-310.

<sup>154</sup> *ibid.*; Daniel, W. (1985): “United Kingdom”, in M. Cross (ed.): *Managing workforce reduction* (London: Croom Helm).

<sup>155</sup> Anderman, S. (1986): “Unfair dismissal and redundancy”, in R. Lewis (ed.): *Labour law in Britain* (Oxford: Blackwell) p. 416.

<sup>156</sup> Hepple, B. (1992): “The fall and rise of unfair dismissal”, in W. McCarthy (ed.): *Legal intervention in industrial relations: Gains and losses* (Oxford: Blackwell), p. 81.

have not detected any significant negative employment effects as a result of the operation of the legislation; at the same time, the possibility of legal action in respect of dismissals has encouraged greater care in hiring and selection procedures and has reduced turnover costs.<sup>157</sup>

77. The survival of this legislation is also possibly due to the fact that it performs a number of important functions within a de-collectivized industrial relations system. It underpins and legitimates the exercise of managerial authority at the same time as providing a comparatively low-cost mechanism for the resolution of disputes.<sup>158</sup>
78. The analysis of United Kingdom legislation should also take into consideration the results of the consultations held by the ILO. In the context of Convention No. 158, the review of national legislation seemed to indicate that the legislation in the United Kingdom was generally in conformity with the provisions examined of Convention No. 158. In the consultations, however, the United Kingdom reported on obstacles to ratification with reference to Article 2 (scope of application and exclusions), Article 4 (valid reasons for dismissal) and Articles 11-12 (due notice and income protection).

### **The United States**

79. The United States appears at first glance to be an exception in comparison with the systems so far considered.<sup>159</sup> As elsewhere, there has been a decline in the role played by collective bargaining as a source of regulation, but no corresponding rise in legal regulation of the employment relationship. On the contrary, the common law rule of employment at will remains well-entrenched in the vast majority of States.<sup>160</sup> The regulation of the employment relationship is a matter for state law, and state courts differ in the degree to which they recognize the exceptions to the at-will rule. At the federal level, there is significant US legislation governing discrimination on the grounds of sex, race, age and disability in relation to dismissals. The levels of compensation payable by employers to victims of discrimination often contain punitive elements, and they far outstrip the sums that could be paid in most European jurisdictions.
80. Federal legislation<sup>161</sup> provides for minimum notice of large-scale dismissals to be given to employees, and for a measure of information and consultation. However, there is only a remote prospect that a federal employment termination statute covering the whole range of dismissals might be adopted in the foreseeable future. Furthermore, there has been a process of “de facto”

<sup>157</sup> Dickens, L.; Jones, M.; Weekes, B. and Hart, M. (1986): *Dismissed. A study of unfair dismissal and the industrial tribunal system* (Oxford: Blackwell); Evans, S.; Goodman, J. and Hargreaves, L.: (1985) “Unfair dismissal law and employment practice in the 1980s”, Department of Employment Research Paper No. 53 (London: Department of Employment).

<sup>158</sup> *ibid.*

<sup>159</sup> Canada shares many features of the US system, such as the absence (for the most part) of unfair dismissal legislation, and a reliance on arbitration. However, the Canadian courts do not operate a presumption of employment at will, so that damages may be awarded at common law. In addition, legislation applies minimum notice periods in some instances. Moreover, the coverage of collective bargaining (and hence of arbitration mechanisms) is considerably greater in Canada than it is in the US, therefore the system cannot be said to be comparably devoid of regulation.

<sup>160</sup> See Fleming, J. (1995): “At will termination of employment has not been terminated”, in *Nova Law Review*, 20: 437-451, and *Digest* pp. 355-375.

<sup>161</sup> The Worker Adjustment and Retraining Notification (WARN) Act, 1988. See Ehrenberg, R. and Jakubson, G. (1993): “Why WARN? The impact of recent plant-closing and layoff prenotification in the United States”, in C. Büchtemann (ed.): *Employment security and labor market behavior. Interdisciplinary approaches and international evidence* (Ithaca, NY: Cornell UP); Ake, S. (1994): “Evolving concepts in management prerogatives: Plant closures, relocations, and mass layoffs”, in *Stetson Law Review*, 24: 241-266.



deregulation, as the unionized sector of the economy has diminished in size. As a result, a dual system now operates: a unionized sector, representing less than 15 per cent of the non-agricultural labour force, in which termination of employment is dealt with through internal arbitration mechanisms; and a non-union sector in which neither legal regulation nor arbitration plays a significant role in controlling dismissals. There are some signs, however, that the role of arbitration is increasing.<sup>162</sup>

81. The reasons for the persistence of the common law rule of at-will employment are the subject of debate. One view, for example, is that individual States which operate under a federal system may be deterred from enacting legislation that imposes regulatory costs on employers for fear of capital flight. This could conceivably induce a ‘race to the bottom’ or, at least, preclude any “race to the top”.<sup>163</sup> Empirical research would be required to examine the reasons for this development.
82. This examination should also take into account the outcome of the 1997 ILO consultations. The review of national legislation seemed to indicate that the United States legislation only in some respects reflected the provisions examined of Convention No. 158. The concept of at-will termination of employment prevailing in the United States was cited as a general obstacle to ratification and a specific obstacle to Article 4. This principle also had as a consequence that the right to appeal a termination of employment as provided in Article 7 was not generally available in the United States. The same was true with respect to the rules in Article 9 of the Convention.

### ***Developments in France and Germany***

83. By way of comparison some broad points may be noted of the developments in two civil law countries. As we have just seen, three of the four common law systems examined above (with the exception of the United States) have seen a consolidation of employment protection legislation, notwithstanding the growing stress on labour market flexibility. Most civil law systems have undergone a somewhat different process of transformation under which a series of exceptions has been carved out from the general law on dismissal, aimed at enhancing particular types of flexibility, but leaving the basic features of the legal systems intact.
84. In Germany, for example, the principal legislative change came in the form of the Employment Promotion Act of 1985. This loosened the otherwise strict rules surrounding the hiring of workers on fixed-term employment contract. The aim was to reduce dismissal costs and thereby encourage hiring. Later legislation exempted small firms (from 1996, those with fewer than ten employees) from dismissal regulation. Economic studies suggest that these changes have had a very small impact in terms of encouraging employment growth. They appear not to have changed the speed of labour market adjustments, that is to say, the responsiveness of wage and hiring decisions to shifts in market conditions.<sup>164</sup>
85. In France, there were a number of legislative initiatives throughout the 1980s and 1990s. They had the effect of encouraging the growth of part-time and fixed-term employment by exempting employers from dismissal protection in such cases and by subsidizing hiring under such contracts through other means such as the tax-benefit system. Again, the balance of opinion is that these reforms may have had a positive but minor overall impact on employment levels. They are likely to have led to an increase in the numbers employed in flexible or “atypical” forms of work, and hence

<sup>162</sup> Moller, S. (1998): “Birth of contract: Arbitration in the non-union workplace”, in *South Carolina Law Review*, 50: 184-233.

<sup>163</sup> This is a complex issue. See Deakin, S. (2000): “Two models of regulatory competition: Competitive federalism versus reflexive harmonisation”, in *Cambridge Yearbook of European Legal Studies*, 2: 231-260.

<sup>164</sup> See Fuchs, S. and Schettkat, R. (2000): “Germany: a regulated flexibility”, in G. Esping-Andersen and M. Regini (eds.): *Why deregulate the labour market?* (Oxford: OUP), pp. 231-233.

to growing segmentation between a secure “core” and a less secure “periphery” of workers. At a legislative level, their effects upon the core of French labour law have been minimal.<sup>165</sup>

86. The French and German experiences appear to be characteristic of the broader patterns of change in the mainland European systems.<sup>166</sup> At the outset of the flexibility debate in the early 1980s, most of the civil law systems began from a position of having strong dismissal laws, in contrast to those in the common law world, which were less highly developed. As efforts to increase flexibility in the labour market have intensified, the civil law systems have, in varying degrees, loosened controls over managerial decision-making, but have done so not through changes of a far-reaching nature to the core of dismissal law, but through limited exemptions in favour of “atypical” forms of work. The common law systems, meanwhile, have used dismissal law as a means of intervention in the labour market to speed up restructuring and promote industrial cooperation. In both sets of cases, notwithstanding some tension between the traditional aims of employment security and the calls for flexibility, employment protection legislation has been shown to be resilient to calls for fundamental reform, not least because of the uses to which it has been put as an instrument of economic policy.

## Concluding remarks

87. This section has focused on the reception of standards governing employment termination in four legal systems that have been affected in varying ways by the debate concerning labour market flexibility. We have seen that at least three of the legal systems have, on the whole, tended to incorporate employment termination standards into their legal systems. There is little evidence to suggest that there are deeply-rooted institutional obstacles to the adoption of employment termination standards in the three of the four common law systems examined, if government policy is otherwise favourable to them.
88. Moreover, once this form of regulation has been adopted, it has proved to be resilient and enduring. In Australia, New Zealand and United Kingdom, measures aimed at deregulating the labour market by reducing the influence of collective procedures over pay and conditions have left the body of employment protection law largely untouched. Indeed, the removal of other forms of regulation has led in many ways to a strengthening of legislation governing employment termination in these systems.
89. The reason for the persistence of dismissal legislation lies, it is suggested, in its use as an instrument for achieving aims of economic policy. Governments committed to labour market reforms have used employment protection law for a variety of ends, which include streamlining procedures for the resolution of disputes and promoting cooperation in the management of workforce reductions. In this regard, the experience of the common law systems is, in some ways, one of convergence with the civil law jurisdictions, where the core of dismissal law has largely been retained, but with limited exceptions carved out for particular forms of work.

<sup>165</sup> Malo, M.; Toharia, L. and Gautié, J. (2000) “France: the deregulation that never happened”, in G. Esping-Andersen and M. Regini (eds.): *Why deregulate the labour market?* (Oxford: OUP), pp. 249-252.

<sup>166</sup> See the recent studies of Toharia, L. and Malo, M. (2000): “The Spanish experiment: Pros and cons of the flexibility at the margin”, in G. Esping-Andersen and M. Regini (eds.): *Why deregulate the labour market?* (Oxford: OUP); Samek Lodovici, M. (2000): “Italy: the long times of consensual re-regulation”, in G. Esping-Andersen and M. Regini (eds.) *Why deregulate the labour market?* (Oxford: OUP); Gorter, C. (2000): “The Dutch miracle?”, in G. Esping-Andersen and M. Regini (eds.): *Why deregulate the labour market?* (Oxford: OUP); and Bjorkland, A. (2000): “Going different ways: Labour market policy in Denmark and Sweden”, in G. Esping-Andersen and M. Regini (eds.): *Why deregulate the labour market?* (Oxford: OUP). These all report a pattern of varying degrees of minor adjustments to the system through qualified exceptions, but, at a deeper level, of considerable continuity in the civil law countries.

90. The main exception to this process of growth and development in dismissal law is the United States. One possible explanation for this fact is that employment termination laws did not include the “collective action” problem facing States operating within a federal jurisdiction (the “race to the bottom” issue).
91. The analysis presented here implies that there is no fundamental contradiction between the goal of labour flexibility and the types of labour standards that are contained in Convention No. 158. This is not to say that certain rigid forms of employment protection might not have an overall negative impact on employment and on efficiency.<sup>167</sup> However, Convention No. 158 does not in itself mandate a high level of rigidity of the kind that would have a clearly negative effect. The general norm of fairness in employment relations which it underpins is compatible with forms of employment protection which strike an appropriate balance between employment security and the need of employers to adapt to changing economic circumstances.
92. In striking such a balance, account must also be taken of the beneficial economic effects of employment termination standards. Recent developments in the economic analysis of labour law see a role for employment termination standards in offsetting market failures, or structural imperfections in labour markets, in such a way as to promote efficiency and overall well-being.
93. A lively debate is likely to continue for some time on the normative implications of this kind of economic analysis. However, some brief suggestions may be made for the way in which it may influence labour standards. Firstly, there will be a wider appreciation of the role which regulation plays in underpinning market processes. A reassessment of analyses, which posit a straightforward association between regulation and inefficiency, may therefore be anticipated. Secondly, stress will be laid on procedural solutions to problems of cooperation between labour and management. Thirdly, while new forms of labour standards may well emerge as part of this “procedural” orientation to regulation, it is likely that they will build on what has already been achieved in (for example) Convention No. 158, rather than displacing them entirely.

## Conclusion

94. The examination of the obstacles and difficulties that might prevent or delay ratification of Convention No. 158 seems to indicate that a relatively larger proportion of member States (30) had encountered obstacles or difficulties to the ratification of Convention No. 158 than member States that saw no obstacles to ratification (20). The calls for revision (five) seem rather few, while three member States stated clearly that they did not consider that a revision of the Convention was called for. On the other hand, the national legislation in 59 countries seemed to demonstrate a general and widespread acceptance of the main provisions of Convention No. 158 (as they were, to a large extent, reflected in national legislation).
95. The obstacles and difficulties reported from 30 member States related to various provisions in Convention No. 158. Only a few (five) member States reported on obstacles to the basic provision of Article 4 prescribing a valid reason for dismissal. These obstacles thus tended more to address specific situations than to reflect opposition in principle to the minimal protection offered by the Convention.<sup>168</sup> Neither one of the five proposals of revision concerned the main provisions of the Convention.

<sup>167</sup> See Grubb, D. and Wells, W. (1993): “Employment regulation and patterns of work in EC countries”, in *OECD Economic Studies*, 21: 7-58.

<sup>168</sup> As an example could be mentioned the fact that two member States (*Colombia* and *Mauritius*) cited the absence of an unemployment insurance system in their countries as an obstacle to ratification with reference to Article 12(b) of the Convention. This provision is, however, an alternative to the provision of several allowance regulated in Article 12(a). The absence of an unemployment system thus need not necessarily be seen as an obstacle to ratification (see above, para.27).

96. In the discussion of Convention No. 158 in the context of the current debate on labour flexibility, it is noted that current economic theory does not seem to confirm the view that employment protection regulations such as the labour standards contained in Convention No. 158 necessarily would have a negative impact on employment or lead to inefficiency. On the contrary, regulation may mitigate the effects of market failures. The general norm of fairness in employment relations, which Convention No. 158 underpins, appears to be compatible with forms of employment protection, which strike an appropriate balance between job security and the need of employers to adapt to changing economic circumstances. The examination of the experience in the four selected countries seems to indicate that employment protection legislation has, in fact, not only fulfilled the function of protecting employment but has also served as a tool for economic restructuring and economic policy.
97. Against this background of indications, which point, at least partially, in different directions, it seems as though the Working Party is faced with a choice. The Working Party may wish to take into consideration that several factors underscore the relevance and topical importance of Convention No. 158 and point towards a recommendation to promote its ratification. In such a context, it would seem to be required to give special consideration to the organization of special promotional activities with a view to assist member States in overcoming the obstacles and difficulties reported.
98. As an alternative, the Working Party may consider it important that several member States seem to have chosen to apply the main provisions of Convention No. 158 without being bound by the Convention, and that 30 member States report on obstacles and difficulties in these countries. Against this background the Working Party may wish to recommend the status quo with respect to this Convention.

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## Annex

### Termination of employment legislation in 59 member States – comparative table

The following table contains information on legislation termination of employment in 59 member States.

The source used is *Termination of employment digest: A legislative review*, Geneva. International Labour Office, 2000, in particular the summaries contained its tables 1-4. For details regarding the method for compiling the data in the *Digest*, see. page 383 of the *Digest*.

The 59 member States selected are not parties to Convention No. 158. The States examined were regrouped by region. The nine subject-matters covered correspond to subject-matters covered by provisions in Convention No. 158 as indicated in the table.

For the purposes of the present short survey it was deemed appropriate and relevant to presenting general trends in the information contained in the tables of the *Digest*. The facts in the tables that was retained was thus the data that could be quantified. In the case of “due notice”, the table in the *Digest* provides details regarding the periods of time regulated in national legislation. In the present context, and as Convention No. 158 only prescribes that “a reasonable period” be provided, any stipulated notice period in national legislation has been indicated with a “yes”.

In the same way as in the tables of the *Digest*, the exceptions and qualifications to the “yes” and “no” have been maintained and reproduced. “N.A” (as in Not Applicable) is used in the *Digest*, as well as in the present table, to indicate that explicit provisions were not available.

## Termination of employment legislation in 59 member States – Comparative table

Country	Valid reason		Compensation/reinstatement		Notice		Non-discrimination		Collective redundancies	
	Must an employer justify a dismissal?	Statutory compensation for unfair/unjustified dismissal granted?	Claim to reinstatement available?	Notice period granted?	Pay in lieu of notice?	Protection of trade union officials and other workers' representatives.	Maternity protection	Consultation with employee representatives required?	Advance notice to administration required?	
	Yes	Yes	Can be proposed or ordered by the impartial body	Reasonable period	Yes	Yes	Yes	Yes	Notification as early as possible	
Art. 4	Art. 4	Art. 10	Art. 10	Art. 11	Art. 11	Art. 5(a) and (b)	Art. 5(d) and (e)	Art. 13	Art. 14.1	
<b>Africa: 15 countries</b>										
Côte d'Ivoire	Yes	Yes	No	Yes	Yes	No	No	Yes	Yes	
Egypt	Yes	Yes	No, except for dismissal for trade union activities	No, except for apprentices	n.a.	Yes	No	No	Yes	
Gambia	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	
Ghana	No	No	No	Yes	Yes	Yes	Yes	No	Yes	
Guinea	Yes	Yes	Yes, in cases of termination for economic reasons	Yes	Yes	No	No	Yes	Yes	
Kenya	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	
Lesotho	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	
Mauritius	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	
Nigeria	No	Yes	No, except for specific categories of dismissals	Yes	Yes	Yes	Yes	Yes	No	
Senegal	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	
South Africa	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	
Swaziland	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	
Tanzania (United Rep. of)	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	

Country	Valid reason	Compensation/reinstatement		Notice		Non-discrimination			Collective redundancies					
		Must an employer justify a dismissal?	Statutory compensation for unfair/unjustified dismissal granted?	Claim to reinstatement available?	Notice period granted?	Pay in lieu of notice?	Protection of trade union officials and other workers' representatives.	Maternity protection	Consultation with employee representatives. required?	Advance notice to administration required?				
	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes			
Tunisia	Yes	Yes	Yes	Yes	Yes	Yes	No, except for works committee members	Yes	Yes	Yes	Yes			
Zimbabwe	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes			
<b>TOTAL</b>	Yes	Yes	Yes	No	Yes	No	Yes	Yes	No	Yes	No			
<b>African region</b>	13	2	14	1	8	7	14	1	14	0	3	10	5	5
<b>Americas: 12 countries</b>														
Argentina	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes, but not in small and medium-sized companies	Yes	Yes	Yes	Yes
Bolivia	No	Yes	Yes	No	Yes	No	Yes	Yes	Yes	Yes	No	Yes	No	No
Brazil	Yes	Yes	Yes	No	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	No	No
Canada	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Chile	Yes	Yes	Yes	No	Yes	No	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes
Colombia	Not if compensation for damages is paid	Yes	Yes	No, except for specific categories of dismissal	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No
Dominican Republic	Yes	Yes	Yes	No	Yes	No	Yes	Yes	Yes	Yes	No	No	No	No
Jamaica	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No
Mexico	Yes	Yes	Yes	Yes	No	Yes	n.a.	Yes	Yes	Yes	No	No	No	No
Panama	Yes	Yes	Yes	Yes	No <sup>1</sup>	Yes	n.a.	Yes	Yes	Yes	No	No	No	Yes





Country	Valid reason		Compensation/reinstatement		Notice		Non-discrimination		Collective redundancies	
	Must an employer justify a dismissal?		Statutory compensation for unfair/unjustified dismissal granted?	Claim to reinstatement available?	Notice period granted?	Pay in lieu of notice?	Protection of trade union officials and other workers' representatives.	Maternity protection	Consultation with employee representatives. required?	Advance notice to administration required?
	Yes	Yes	Yes	Can be proposed or ordered by the impartial body	Reason-able period	Yes	Yes	Yes	Yes	Notification as early as possible
	Art. 4	Art. 10	Art. 10	Art. 10	Art. 11	Art. 11	Art. 5(a) and (b)	Art. 5(d) and (e)	Art. 13	Art. 14.1
Malaysia	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No
Nepal	Yes	No	Yes	Yes	Yes	Yes	No	No	No	No
New Zealand	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
Pakistan	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes, authorization needed to close down or retrench more than 50% of employees
Philippines	Yes	Yes	Yes	Yes	No, due to system of prior clearance from Government	n.a.	Yes	No	Yes	Yes
Singapore	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No
Sri Lanka	No	Only for valid reasons	Yes	Yes	Yes	No	No	No	Yes	Yes
Syrian Arab Republic	Yes	Yes	No	No	Yes	Yes	No	No	No	Yes
Thailand	Generally, no	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
Viet Nam	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>TOTAL</b>	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
<b>Asian region</b>	15	4	18	1	15	4	14	5	11	8
<b>Europe: 13 countries</b>										
Austria	No, except for specific categories	Yes	Yes	Yes	Yes	Yes	Yes, for works council members and	Yes	Yes	Yes

Country	Valid reason	Compensation/reinstatement		Notice		Non-discrimination		Collective redundancies	
		Statutory compensation for unfair/unjustified dismissal granted?	Claim to reinstatement available?	Notice period granted?	Pay in lieu of notice?	Protection of trade union officials and other workers' representatives.	Maternity protection	Consultation with employee representatives required?	Advance notice to administration required?
	Yes	Yes	Can be proposed or ordered by the impartial body	Reasonable period	Yes	Yes	Yes	Yes	Notification as early as possible
	Art. 4	Art. 10	Art. 10	Art. 11	Art. 11	Art. 5(a) and (b)	Art. 5(d) and (e)	Art. 13	Art. 14.1
	of dismissal					candidates			
Belgium	No, except for specific categories of dismissals	Yes	No, except for specific categories of dismissals	Yes	Yes	Yes, for members of works councils and of committees on occupational safety and health	Yes	Yes	Yes
Bulgaria	Yes	Yes	Yes	Yes	No	Yes	Yes, with labour authority's authorization	No	Yes
Czech Republic	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes
Germany	Yes	Yes	Yes	Yes	No	Yes, for members of workers' representative bodies	Yes	Yes	Yes
Hungary	Yes	Yes	Yes	Yes	No	n.a.	Yes	No	No
Israel	Yes <sup>3</sup>	Yes, damages for wrongful dismissal	No, only for dismissals in breach of anti-discrimination legislation	Not in statute, but may be by collective agreement or custom. <sup>4</sup>	Yes	Yes	Yes	Yes <sup>5</sup>	Yes
Italy	Yes	Yes	Yes	Yes	No	Yes, for members of workers' committees	Yes	Yes	Yes
Netherlands	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Poland	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes
Russian Federation	Yes	Yes	Yes	No	n.a.	Yes	Yes	Yes	Yes
Switzerland	No, except for specific categories of dismissals	Yes	No	Yes	No	Yes	Yes	Yes	Yes

Country	Valid reason		Compensation/reinstatement		Notice		Non-discrimination		Collective redundancies	
	Must an employer justify a dismissal?		Statutory compensation for unfair/unjustified dismissal granted?	Claim to reinstatement available?	Notice period granted?	Pay in lieu of notice?	Protection of trade union officials and other workers' representatives.	Maternity protection	Consultation with employee representatives. required?	Advance notice to administration required?
	Yes	Yes	Yes	Can be proposed or ordered by the impartial body	Reasonable period	Yes	Yes	Yes	Yes	Notification as early as possible
	Art. 4	Art. 10	Art. 10	Art. 10	Art. 11	Art. 11	Art. 5(a) and (b)	Art. 5(d) and (e)	Art. 13	Art. 14.1
United Kingdom	Yes	Yes	Yes	Yes	Yes	Yes	Yes, for collective dismissals, transfers of undertakings and pension trustees	Yes	Yes	Yes
<b>TOTAL</b>	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
<b>European Region</b>	10	3	13	0	12	1	12	0	11	2
				3	5	7		13	0	12
				10	1	5		0	2	1

n.a. = Not applicable.

<sup>1</sup>Concerning Panama, there is no such notice period, because of the necessity to seek clearance from authorities. <sup>2</sup>See, *Digest*, p. 53. <sup>3</sup>See, *Digest*, p. 186. <sup>4</sup>Counted as yes. See, *Digest*, p. 186. <sup>5</sup>See, *Digest*, p. 187.



## Appendix II

### I. Extract from document GB.268/LILS/WP/PRS/1

#### III.4 C.158 – Termination of Employment Convention, 1982

(1) *Ratifications:*

- (a) Number of current ratifications: 26.
- (b) Latest ratification: Namibia, 1996.
- (c) Ratification prospects: The Convention has slowly attracted an increasing number of ratifications, but remains rather poorly ratified. In a General Survey of 1995, a number of countries reported facing obstacles to ratification.<sup>29</sup> In addition, a ratification subsequent to the General Survey has been followed by a denunciation. It would seem that the ratification prospects of this Convention are somewhat uncertain.

(2) *Denunciations:*

- (a) Pure denunciation: 1

	Ratification 1995	Denunciation 1997 <sup>30</sup>
Brazil		

*Reasons for denunciation:* “[...] complex circumstances, of legal and economic nature, which could not have been foreseen at the time of ratification, have made it difficult for the Brazilian Government to implement Convention No. 158 within its legal system. In fact, the Convention could, on the one hand, be invoked to justify excessive and indiscriminate dismissals, based on the rather general and vague “operational requirements of the undertaking, establishment or service”, as stated in its Article 4, or on the other hand, give way to broad prohibition of dismissals which would not be compatible with the current program of economic and social reform and modernization. It is also felt that the Convention would be a step back in the course towards less state intervention and more collective bargaining. [...] Such uncertainty regarding the scope of the provisions of the Convention would, in the context of the Brazilian legal system, based on positive law generate insecurity and litigation, with no practical advantages for the improvement and modernization of labour relations.”

- (3) *Supervisory procedures:* Comments pending for 13 countries including on observations submitted by workers’ organizations in Brazil, Gabon and Spain. Three representations under article 24 of the Constitution have been submitted of which two, alleging non-observance by Brazil and Venezuela, have yet to be declared receivable and of which one, alleging non-observance by Turkey, is under consideration.
- (4) *Need for revision:* This Convention has not been revised. Although the Committee of Experts concluded as recently as 1995 in a General Survey that the obstacles to ratification reported by several countries might be overcome, there are indications that the Convention is encountering persistent difficulties in gaining approbation. The Convention remains relatively poorly ratified. It has been denounced by one country

<sup>29</sup> ILO: *Protection against unjustified dismissal*, International Labour Conference, 82nd Session, Geneva, 1995.

<sup>30</sup> The Act of denunciation was registered on 20.11.1996 and will take effect 21.11.1997.

and the Employers' members expressly proposed a revision of this Convention at the Conference in 1995.

- (5) *Remarks:* In the course of the Ventejol Working Party of 1987, this Convention was classified in the category of Conventions to be promoted on a priority basis. In the 1995 General Survey, the Committee of Experts noted that a certain number of governments had indicated legal or practical difficulties in the application of the Convention and that these difficulties were preventing its ratification. The Committee of Experts analysed these difficulties in detail, highlighted the flexibility offered by the Convention and concluded that in "[...] most of the cases examined the ratification of the Convention would not appear to be a social objective which is impossible to achieve. Indeed, the absence of prospects for its ratification would appear to be more the result of specific situations than opposition in principle to the minimal protection afforded by the Convention".<sup>31</sup> The General Survey was subjected to an in-depth discussion in 1995 at the Conference Committee on the Application of Standards. There, the Employers' members concluded that Convention No. 158 ought to be revised as soon as possible. The Workers' members, on the other hand, considered that the Convention was "as relevant now as ever before" and noted that the Committee of Experts had identified no points in need of revision. Since 1995, two new ratifications have been registered, but one of these was the ratification by Brazil, which subsequently denounced the Convention. It would thus seem that the ratification of this Convention is facing several obstacles and difficulties. It should also be noted that, according to the Committee of Experts, only a certain number of governments had supplied full information on difficulties of application and their intentions as regards ratification. In view of the foregoing, the Working Party might recommend to the Governing Body that it invite member States to ratify the Convention and, in order to enable a more informed decision as to the possible need for a revision of the Convention, to request information on the obstacles and difficulties encountered, if any, that might impede or delay ratification or that would point to the need for a full or partial revision of the Convention.

(6) *Proposals:*

- (a) The Working Party might recommend to the Governing Body that it invite member States to ratify Convention No. 158 and to inform the Office of the obstacles and difficulties encountered, if any, that might impede or delay the ratification of Convention No. 158 or that might point to the need for a full or partial revision of the Convention.
- (b) The Working Party (or the LILS Committee) could re-examine the status of Convention No. 158 in due course.

<sup>31</sup> op. cit., para. 370.

## II. Extract from document GB.271/LILS/WP/PRS/2

### II.2 C.158 – Termination of Employment Convention, 1982

#### Background

49. In the course of the examination of the Convention in March 1997,<sup>29</sup> it was noted, inter alia, that Convention No. 158 seemed to be encountering difficulties in gaining a significant number of ratifications.<sup>30</sup> In some of the reports submitted for the 1995 General Survey, governments noted that legal or practical difficulties in the application of the Convention were preventing its ratification. In its final remarks, the Committee of Experts pointed out that these instruments had lost none of their relevance and that the standards on termination of employment had a twofold objective: to protect workers in their professional life against any *unjustified* termination of employment while preserving the right of employers to terminate the employment of workers for reasons which are recognized as being valid. Although setting out a number of substantive principles, the Convention remains flexible as regards the methods of its implementation.<sup>31</sup> The General Survey did not identify any specific provisions in need of revision. During the discussions at the Conference in 1995 opinions were, however, divided as to the pertinence of the Convention.

50. A total of 51 member States<sup>32</sup> responded to the request for information. Several employers' or workers' organizations added their own observations on the issue.<sup>33</sup>

#### Ratification prospects

51. Eleven member States<sup>34</sup> stated that they were examining, or would be examining in the near future, the possibility of ratifying this Convention. In addition, two member States (the *Netherlands* and the *Philippines*) indicated that some legal obstacles needed to be overcome or that

<sup>29</sup> GB.268/LILS/WP/PRS/1, section III.4, and GB.268/8/2, Appendix II, paras. 56-58.

<sup>30</sup> One ratification was registered in 1997: *Republic of Moldova*. As at 28 February 1998, Convention No. 158 had received 28 ratifications.

<sup>31</sup> ILO: *Protection against unjustified dismissal*, General Survey on the Termination of Employment Convention (No. 158) and Recommendation (No. 166) 1982, Geneva, 1995, paras. 371-373.

<sup>32</sup> *Argentina, Australia, Austria, Azerbaijan, Belgium, Canada, Chile, China, Colombia, Comoros, Costa Rica, Côte d'Ivoire, Cuba, Czech Republic, Denmark, Dominican Republic, Egypt, El Salvador, Estonia, Finland, Germany, Ghana, Hungary, India, Italy, Japan, Jordan, Republic of Korea, Latvia, Lebanon, Luxembourg, Mauritius, Mexico, Netherlands, New Zealand, Norway, Panama, Philippines, Poland, Qatar, Romania, Singapore, South Africa, Sri Lanka, Suriname, Switzerland, Syrian Arab Republic, Thailand, United Kingdom, United States, and Uruguay.*

<sup>33</sup> Including employers' organizations from *Belgium, Canada, Chile, Germany, Republic of Korea* and *Mauritius* and workers' organizations from *Belgium, Czech Republic, Finland, Germany, India, Switzerland, New Zealand* and *United Kingdom*.

<sup>34</sup> *Azerbaijan, Chile, Costa Rica, Comoros, Denmark, El Salvador, Ghana, Italy, Republic of Korea, Latvia, Norway, South Africa, Sri Lanka, and Suriname.* An employers' organization in *Chile* was opposed to ratification, however.

tripartite consultations had to take place before a final determination of the ratification prospects could be made.

### Obstacles or difficulties encountered

52. A total of 34 member States reported obstacles or difficulties to ratification. Among these, seven governments indicated that they had difficulties with specific Articles of the Convention.<sup>35</sup> The *United States* added that under American common law an employee without a contract for a definitive term can be discharged for good cause, no cause or even a morally wrong cause.

53. Twelve member States reported that their national legislation represented an obstacle to ratification. Six (*Argentina, China, Egypt, Estonia, Panama and Qatar*) did not specify the nature of the obstacles. Four (*Austria, Belgium*<sup>36</sup> *Switzerland*<sup>37</sup> and *Thailand*) noted that their national legislation was based on the concept of freedom to terminate employment and, in their perception, was not in conformity with the Convention. *Germany* reported continuing and increased<sup>38</sup> legal obstacles with respect to the application of Article 2(3), and did not consider realistic the possibility of obtaining a majority for revising the Convention so as to enable Germany to ratify it.<sup>39</sup> *Canada* indicated that while relevant national legislation, collective agreements and practices, taken as a whole, were generally in conformity with the requirements of the Convention, these requirements were not fully met, in particular for unorganized workers.

54. Other types of obstacles were reported from four other member States: *Mexico* held that its national legislation offered better protection than the Convention; *Ghana* considered that as virtually all provisions were applied both in law and practice, ratification of Convention No. 158 was superfluous; *Uruguay* reported a lack of consensus for ratification; and *Colombia* mentioned the absence of an unemployment insurance system.

### Need for revision

55. Four member States proposed a revision of this Convention: *Australia*, which had ratified Convention No. 158 in 1993, considered that Article 2(6) seemed to be interpreted inflexibly and that it therefore could be revised; *Finland*, which ratified Convention No. 158 in 1992, considered the Convention to be in some respects outmoded and that Article 2 should be revised so as to prevent termination of employment on grounds of gender or gender-related reasons (such as pregnancy or family responsibilities);<sup>40</sup> *India* proposed a revision so as to limit

<sup>35</sup> Articles 2 and 4; *United Kingdom*; Article 5(b): *United Kingdom*; Article 7; *Republic of Korea, Japan, Poland, and United States*; Article 9: *United States*; Article 9(2): *Japan*; Article 11: *United Kingdom*; Article 12.1(a): *Czech Republic*; Article 12.1(b): *Mauritius*; Article 14: *Japan*; and Articles 13.1(a) and 14(2): *Czech Republic*.

<sup>36</sup> The workers' representatives in the "Conseil National du Travail" asked for the modification of the national legislation and the ratification of Convention No. 158, while the employers' representatives recalled their opposition to the ratification of the instrument.

<sup>37</sup> A Swiss workers' organization would favour a ratification, while recognizing that there are obstacles to ratification. This organization submits that the Swiss legislation should adapt to the provisions of the Convention and European standards.

<sup>38</sup> The legal obstacles had increased as compared to the situation in 1994 when Germany reported to the Committee of Experts in accordance with article 19, para. 5(e) of the Constitution.

<sup>39</sup> An employers' organization in *Germany* considered this Convention to be a "striking example of a Convention with lack of realism and flexibility".

<sup>40</sup> A workers' organization in *Finland* made an extensive revision proposal including a proposal "to upgrade" Article 2(5) so as to prevent the use of fixed-term employment contracts for the



the scope of application of the Convention as defined in Article 2, paragraph 1; and *New Zealand* had no difficulty with the general principles of the Convention, but reported that it did not comply with some detailed provisions related to Articles 13 and 14 which it wished to be revised.<sup>41</sup>

## Remarks

56. The replies received revealed a rather wide range of opinions regarding the future ratification prospects for this Convention. On the one hand, 11 member States reported that they were examining, or would be examining in the near future, the possibility of ratifying this Convention. On the other hand, reports of obstacles to ratification were received from 34 member States. At the same time four member States considered the Convention to be in need of revision. The continued relevance of the Convention was not questioned by any member State.

57. Convention No. 158 is an important Convention, which regulates sensitive issues, and which has generated differing views among constituents. The present situation does not appear to be satisfactory. On the one hand, while the ratification prospects are not unfavourable, such a wide range of obstacles to ratification have been reported that a further examination seems to be called for in order to mitigate or temper these difficulties. On the other hand, the consultations held have not revealed specific needs for revision and the calls for revision noted have not been frequent.

58. It is proposed that the Working Party continue the examination of the present Convention and entrust the Office with the task of pursuing its research and consultations, with a view to arriving at proposals which could secure a consensus. The results of such research and consultations could be presented to the Working Party in the form of a short survey for consideration at its session in March 1999.

## Proposal

59. *The Working Party is invited to recommend that the Governing Body request the Office to undertake a short survey concerning the Termination of Employment Convention, 1982 (No. 158), to be submitted to the Working Party for consideration at its meeting in March 1999.*

purposes of evading employment security rules; to reword the economic and operational justifications for termination listed under Article 4 for greater accuracy; to expand the list of examples under Article 5 to include, among other factors, age, sexual orientation and the active promotion of one's own or others' interests; to place the burden of proving the existence of a valid reason for termination (Article 9) on the employer; to reword Article 10 for greater accuracy; to ensure that the Convention adequately safeguard workers' and their representatives' right to information, their right to be heard, and their right to negotiate prior to decision-making; and, finally, to move Paragraph 13 from the Recommendation and include it in the Convention.

<sup>41</sup> In *New Zealand*, a workers' organization was opposed to revision, while an employers' organization proposed a revision to "improve the flexibility" of the Convention.