XXIst Meeting of European Labour Court Judges
30 September – 1 October 2013
Vienna, Austria

NATIONAL REPORTS

Topic 1

Case law

General reporters: Dr. Mario Eylert, Federal Labour Court of Germany
Dr. H.C. Reinhard Schinz, Landesarbeitsgericht Berlin-Brandenburg

Australia

National reporter: Vice President Graeme Watson, Fair Work Commission

HIGH COURT OF AUSTRALIA
FRENCH CJ,
GUMMOW, HAYNE, HEYDON AND CRENNAN JJ

THE BOARD OF BENDIGO REGIONAL
INSTITUTE OF TECHNICAL AND FURTHER EDUCATION APPELLANT

AND

GREGORY PAUL BARCLAY & ANOR RESPONDENTS

Board of Bendigo Regional Institute of Technical and Further Education v Barclay
[2012] HCA 32
7 September 2012
M128/2011

ORDER

1. Appeal allowed.

2. *Orders 1, 2 and 3 of the orders of the Full Court of the Federal Court of Australia, made on 9 February 2011, be set aside, and in their place, order that the appeal to that Court be dismissed.*

3. *Any question of the costs of the appeal be dealt with by consent order or by this Court on the papers as indicated in the reasons for judgment.*

On appeal from the Federal Court of Australia

Representation

J L Bourke SC with P M O'Grady for the appellant (instructed by Lander & Rogers Lawyers)

R C Kenzie QC with M A Irving for the first and second respondents (instructed by Holding Redlich)

T M Howe QC with S P Donaghue SC and L E Young intervening on behalf of the Minister for Tertiary Education, Skills, Jobs and Workplace Relations (instructed by Australian Government Solicitor)

CATCHWORDS

Board of Bendigo Regional Institute of Technical and Further Education v Barclay

Industrial law (Cth) – General protections – Adverse action – Section 346 of *Fair Work Act* 2009 (Cth) prohibits employer from taking adverse action against employee because employee "is ... an officer or member of an industrial association" or "engages ... in industrial activity" – Section 361 creates presumption that adverse action taken for prohibited reason unless employer proves otherwise – First respondent was employee of appellant and officer of second respondent – Second respondent was industrial association – First respondent engaged in industrial activity – Chief Executive Officer of appellant took adverse action against first respondent – Chief Executive Officer gave evidence at trial that adverse action taken for innocent reasons and not for prohibited reasons – Trial judge accepted that evidence – Whether adverse action taken for prohibited reason.

Words and phrases – "because", "substantial and operative factor".

Fair Work Act 2009 (Cth), ss 342, 346, 360, 361.

1 FRENCH CJ AND CRENNAN J. Section 346 of the *Fair Work Act* 2009 (Cth) ("the Fair Work Act") prohibits an employer from taking adverse action against an employee because that employee is an officer or member of an industrial association, or because that employee engages or proposes to engage in particular kinds of industrial activity. Under s 361 of the Fair Work Act, adverse action taken against an employee will be presumed to be action taken for a prohibited reason unless the employer responsible for taking the adverse action proves otherwise. Similar protections have existed in federal industrial relations legislation in Australia since the enactment of the *Conciliation and Arbitration Act* 1904 (Cth)[1].

2 The issue in the present appeal arises from a decision by the Chief Executive Officer of the Bendigo Regional Institute of Technical and Further Education ("BRIT"), Dr Louise Harvey, to suspend the first respondent, Mr Greg Barclay, from duty on full pay and to request him to show cause why he should not be subject to disciplinary action. The appellant is the statutory authority responsible for the operation of BRIT. Mr Barclay is an employee of BRIT, and is also the President of the BRIT Sub-Branch

[1] Originally the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth), renamed the *Conciliation and Arbitration Act* 1904 (Cth) by the *Conciliation and Arbitration Act* 1950 (Cth), s 3.

of the second respondent, the Australian Education Union ("the AEU"). The AEU is registered as an industrial association under the *Fair Work (Registered Organisations) Act* 2009 (Cth).

3 Following Mr Barclay's suspension, the respondents applied to the Federal Court under s 539 of the Fair Work Act for a declaration that BRIT had contravened s 346 by impermissibly taking adverse action against Mr Barclay because, among other things, he was an officer of the AEU, and he had engaged in particular kinds of industrial activity. Orders were also sought for civil penalties[2], compensation[3] and interlocutory relief.

4 In the Federal Court, the primary judge (Tracey J) dismissed the respondents' application[4]. His Honour accepted evidence given by Dr Harvey as to her reasons for suspending Mr Barclay, and was satisfied that she had acted for the reasons which she gave and had not acted for any reason prohibited by the Fair Work Act[5]. A majority of the Full Court of the Federal Court (Gray and Bromberg JJ; Lander J dissenting) upheld the respondents' appeal from the primary judge's decision and remitted the matter to the primary judge for further consideration[6]. By special leave, the appellant now appeals to this Court to challenge the interpretation, and application, of the relevant provisions favoured by the majority in the Full Court. The Minister for Tertiary Education, Skills, Jobs and Workplace Relations intervened, by leave, in support of the respondents.

5 The task of a court in a proceeding alleging a contravention of s 346 is to determine, on the balance of probabilities, why the employer took adverse action against the employee, and to ask whether it was for a prohibited reason or reasons which included a prohibited reason. This appeal was concerned with identifying the correct approach to that task.

6 The respondents argued that the relevant provisions of the Fair Work Act require that such a proceeding should not be resolved in favour of a defendant employer unless the evidence in the proceeding objectively establishes that the employer's reason for taking adverse action was dissociated from any reason prohibited by s 346. For the reasons which follow, the respondents' interpretation of the relevant provisions must be rejected and the appeal upheld.

Factual background

7 The basic facts are not in contest. In January 2010, staff of BRIT were preparing for a re-accreditation audit to be conducted by the Victorian Registration and Qualifications Authority ("the VRQA"), the statutory authority responsible for the accreditation of providers of vocational education and training in Victoria. BRIT requires accreditation in relation to each of its courses in order to continue to offer those courses and confer relevant qualifications, and to receive funding for that purpose. Auditors from the VRQA were due to attend at BRIT on 16 and 17 February 2010, and staff of BRIT had been preparing documentation for the re-accreditation audit since mid-2009.

8 Mr Barclay's present role as an employee of BRIT is "Team Leader – Teaching Excellence". As part of this role, Mr Barclay is part of a team responsible for ensuring that the courses provided by BRIT are accredited and retain accreditation. Mr Barclay reports to the "Manager – Teaching, Learning and Quality", Mr Jamie Eckett. Mr Barclay is also the President of the BRIT Sub-Branch of the AEU. The BRIT Sub-Branch of the AEU consists of all AEU members employed by BRIT. The AEU does not reveal the names of its members to BRIT, although some BRIT employees do publicly identify themselves as AEU members. As part of his role as President of the BRIT Sub-Branch, Mr Barclay is responsible for advising, assisting and representing AEU members employed by BRIT to resolve concerns, issues and disputes through both formal and informal avenues.

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[2] Fair Work Act, s 546.

[3] Fair Work Act, s 545(2)(b).

[4] *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251.

[5] *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251 at 264-265 [54].

[6] *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212.

9 On four separate occasions between late 2009 and mid-January 2010, members of the AEU employed by BRIT approached Mr Barclay to raise concerns about inaccurate information being included in documentation prepared for the re-accreditation audit. On each occasion, Mr Barclay discussed these concerns with the member outside of his BRIT office. Each of the members indicated to Mr Barclay that they did not want him to take any formal action in relation to their concerns, and did not want him to disclose their name or detailed information about their concerns to BRIT.

10 In early January 2010, Mr Barclay was present during a telephone conversation between Mr Eckett and another BRIT employee which included a discussion of the issue of inaccurate information being included in documentation prepared for the re-accreditation audit. Following this telephone conversation, Mr Barclay and Mr Eckett continued to discuss this issue, and examples of such inaccurate information. At about the same time, in the course of his duties as Team Leader, Mr Barclay became aware of other inaccurate information contained in documentation prepared for the re-accreditation audit.

11 On 29 January 2010, in his capacity as President of the BRIT Sub-Branch of the AEU, Mr Barclay sent the following email to all AEU members employed by BRIT:

> "**Subject:** AEU – A note of caution
>
> Hi all,
>
> The flurry of activity across the Institute to prepare for the upcoming reaccreditation audit is getting to the pointy end with the material having been sent off for the auditors to look through prior to the visit in February.
>
> It has been reported by several members that they have witnessed or been asked to be part of producing false and fraudulent documents for the audit.
>
> It is stating the obvious but, **DO NOT AGREE TO BE PART OF ANY ATTEMPT TO CREATE FALSE/ FRADULENT** [sic] **DOCUMENTATION OR PARTICIPATE IN THESE TYPES OF ACTIVITIES**. If you have felt pressured to participate in this kind of activity please (as have several members to date) contact the AEU and seek their support and advice.
>
> Greg Barclay
> President
> BRIT AEU Sub-Branch"

12 Copies of this email were seen by senior managers at BRIT, including Mr Eckett. On 1 February 2010, Mr Eckett forwarded a copy of the email to Dr Harvey, accompanied by comments from other managers to the effect that the email had the potential to cause serious damage to BRIT's reputation. Mr Eckett told Dr Harvey that he had discussed the email with Mr Barclay earlier on 1 February 2010, and that Mr Barclay had declined to provide him with the names of the members referred to in the email as having witnessed or been asked to be part of producing false and fraudulent documents. Dr Harvey considered the email and the comments overnight and formed the view that Mr Barclay had contravened certain clauses of the Code of Conduct for Victorian Public Sector Employees.

13 On 2 February 2010, Dr Harvey invited Mr Barclay to meet with her. Mr Barclay was accompanied at this meeting by an AEU representative. At the meeting, Dr Harvey handed Mr Barclay a letter in the following terms which asked him to show cause why he should not be subject to disciplinary action:

> "**Re: Possible Serious Misconduct**
>
> I refer to an email sent by you to many Bendigo TAFE staff on Friday, 29th January 2010 in which you alleged that serious inappropriate behaviour has occurred in that several staff members have been 'asked to be part of producing false and fraudulent documents for the audit' for Bendigo TAFE's re-accreditation.
>
> Your allegation raises the possibility that improper conduct has occurred which will require a full and thorough independent investigation. I am in the process of arranging for this to occur.

You will be required to be interviewed by the investigator appointed. I will supply more information to you about that in the near future.

However, the purpose of this letter is to ask that you show cause why you should not be subject to disciplinary action for serious misconduct in your role as Team Leader – Teaching Excellence. It appears to me that such disciplinary action may be warranted because of:

- the manner in which you have raised the allegation, via a broadly distributed email;
- your actions in not reporting the instances of alleged improper conduct directly to your manager or me to enable us to take appropriate action; and
- your refusal or failure to provide particulars of the allegations when asked to do so by your manager.

In my preliminary view, this conduct is inconsistent with the behaviour expected of a public sector employee, a BRIT employee and a Team Leader in the Teaching, Learning & Quality Unit of this organisation. Additionally, I am of the view that because your accusation is vague and general, it doesn't demonstrate proper respect for your fellow employees and places the individuals concerned in the re-accreditation process under the shadow of suspicion with no right of reply or defence.

I believe you have breached Clause 3.6, 3.9 and 6.1 of the Code of Conduct for Victorian Public Sector Employees. Clause 3.6 refers to public sector employees reporting to an appropriate authority any unethical behaviour. You did not report to your supervisor your knowledge of possible unethical behaviour and as yet have not provided proof of your allegation to your manager when asked to do so. Clause 3.9 refers to public sector employees behaving in a manner that does not bring themselves or the public sector into disrepute. The manner in which you have disseminated your allegations (whether or not they are well-founded) clearly threatens the reputation and probity of Bendigo TAFE. Finally, Clause 6.1 refers to public sector employees being fair, objective and courteous in their dealings with other public sector employees. By making generalised allegations, that could apply to anyone in the Institute involved in the re-accreditation process, you have cast a slur on your colleagues against which they cannot defend themselves.

In line with Clause 3 of the BRIT Staff Discipline procedure, it is my decision to suspend you from duty on full pay until Friday, 19th February 2010. This period of time will provide you with the opportunity to formally respond to the charge of serious misconduct as outlined above. You should provide your response to the charges by no later than 12 noon on 17 February 2010. Until 19 February you are not to attend any of the Bendigo TAFE campuses and your electronic access account will be suspended."

14 Mr Barclay was suspended on full pay, denied internet access through the BRIT computer system and prohibited from entering the BRIT premises until it was agreed between the parties at an interlocutory hearing before the primary judge on 12 February 2010 that Mr Barclay should return to work on a normal basis. Mr Barclay remains subject to the disciplinary proceedings referred to in the letter, which have been suspended pending the outcome of Mr Barclay's legal proceedings.

Relevant provisions of the Fair Work Act

15 Part 3-1 of the Fair Work Act provides for general protections in the workplace for industrial associations and their representatives. Division 4 of Pt 3-1 contains various provisions which protect the rights of officers and members of industrial associations to associate freely in the workplace and to be involved in lawful industrial activities.

16 Section 336, in Div 1 of Pt 3-1, provides that the objects of Pt 3-1 include protecting "freedom of association".

17 Section 342, in Div 3 of Pt 3-1, defines "adverse action" in considerable detail. It is not presently disputed that BRIT took "adverse action" against Mr Barclay within the meaning of s 342[7].

18 Section 346, in Div 4 of Pt 3-1, relevantly protects the rights claimed in the respondents' application:

> "A person must not take adverse action against another person because the other person:
>
> (a) is ... an officer ... of an industrial association; or
>
> (b) engages, or has at any time engaged ... in industrial activity within the meaning of paragraph 347(a) or (b); or ..."

19 Section 347(b), also in Div 4, relevantly provides that a person "engages in industrial activity" if the person:

> "(iii) encourage[s], or participate[s] in, a lawful activity organised or promoted by an industrial association; or
>
> ...
>
> (v) represent[s] or advance[s] the views, claims or interests of an industrial association; or ..."

20 The terms "lawful activity" and "unlawful activity" are not defined in the Fair Work Act.

21 Sections 360 and 361, in Div 7 of Pt 3-1, make it easier than it otherwise would be for an employee to establish a contravention of the protective provisions in Pt 3-1, including s 346. Section 360 provides that, for the purposes of Pt 3-1, "a person takes action for a particular reason if the reasons for the action include that reason." Section 361(1), which casts a burden of proof on an employer to show that it did not take action for a prohibited reason, relevantly provides:

> "If:
>
> (a) in an application in relation to a contravention of this Part, it is alleged that a person took ... action for a particular reason ... ; and
>
> (b) taking that action for that reason ... would constitute a contravention of this Part;
>
> it is presumed, in proceedings arising from the application, that the action was ... taken for that reason or with that intent, unless the person proves otherwise."

22 Part 4-1 provides for civil remedies in respect of a contravention of s 346.

The proceedings

23 Before the primary judge, the case that s 346 had been contravened was founded on the close relationship between the reasons for Mr Barclay's dismissal and his role as an AEU officer: Mr Barclay had become aware of the AEU members' concerns in his capacity as an AEU officer; he had sent the email on 29 January 2010 in his capacity as an AEU officer; and he had only sent the email to AEU members.

24 BRIT denied that it had taken adverse action against Mr Barclay for any impermissible reason and the decision-maker, Dr Harvey, gave sworn evidence to that effect.

25 In her affidavit, Dr Harvey first explained the significance of the re-accreditation audit as follows: "A satisfactory Audit result is crucial for [BRIT] because failure to comply with VRQA's requirements could ultimately lead to [BRIT] losing its accreditation and hence its right to deliver education and training. Accordingly, the Audit is taken very seriously by [BRIT]."

26 Dr Harvey then described her concerns after considering the contents of Mr Barclay's email:

> "I had a number of very serious concerns about the Email and Mr Barclay's related conduct. My concerns were that:

[7] *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251 at 263 [46].

(a) the allegations of fraudulent conduct were made without any complaint or report of conduct of that kind being raised with me or any other member of senior management;

(b) the language used in the Email was bound to cause distress to members of staff, bring the reputation of [BRIT] into question and undermine staff confidence in the Audit process; and

(c) I was also concerned that Mr Barclay was employed in the Unit responsible for overseeing the preparation for the Audit process."

27 Dr Harvey also gave evidence in her affidavit of her reasons for taking adverse action against Mr Barclay:

> "I considered the investigation into Mr Barclay's actions necessary because it appeared to me that he had failed to notify either me or his direct manager of very serious allegations, being allegations of fraudulent conduct in the workplace, which were material to the Audit process. Instead, he proceeded to cast aspersions and innuendo upon his colleagues by way of a widely circulated email. I regarded this as *prima facie* evidence of a breach of the Code of Conduct and his obligations as a [BRIT] employee.
>
> I made the decision to investigate Mr Barclay's conduct in sending the Email on the basis that he is an employee of [BRIT] who is required to adhere to policy and procedures that govern his employment, not because of his membership of or role in the AEU ...
>
> I made the decision to suspend Mr Barclay because I was of the view that the allegations against him were serious and I was concerned that if Mr Barclay was not suspended he might cause further damage to the reputation of [BRIT] and of the staff [of BRIT]."

28 Dr Harvey stated that she would have taken the same action in similar circumstances against a person who was neither a member nor an officer of the AEU.

29 Dr Harvey was cross-examined on her affidavit. In her oral evidence, Dr Harvey made it plain that she did not object to Mr Barclay raising the issue of fraud with AEU members, and that she had taken the adverse action against Mr Barclay because he had not raised such a serious issue with senior management. Dr Harvey agreed in her oral evidence that it was a legitimate activity for Mr Barclay to advise members of the AEU and to encourage AEU members to obtain advice from the AEU.

30 It was not disputed before the primary judge that the AEU is an "industrial association" or that Mr Barclay is an "officer" of the AEU within the meaning of those terms in s 12 of the Fair Work Act. It was also common ground before the primary judge that Mr Barclay "had the right (and probably the duty) to discuss workplace issues of concern to members with those members and to advise them" and that Mr Barclay was "bound to respect confidences"[8].

31 The primary judge said[9]:

> "The task of the court, in a proceeding such as the present is, then, to determine why the employer took the adverse action against the employee. Was it for a prohibited reason or reasons which included that reason? In answering this question evidence from the decision-maker which explains why the adverse action was taken will be relevant. If it supports the view that the reason was innocent and that evidence is accepted the employer will have a good defence. If the evidence is not accepted the employer will have failed to displace the presumption that the adverse action was taken for a proscribed reason.
>
> If an employer, who is alleged to have contravened one of the provisions of Part 3-1 in which the word 'because' is to be found, adduces evidence which persuades the court that it acted solely for a reason other than one or more of the impermissible reasons identified in a

[8] *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251 at 262 [42].

[9] *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251 at 260-261 [34]-[35].

particular protective provision, it will have made good its defence. Because of the reverse onus provision the employer will normally need to call evidence from the decision-maker to explain what actuated him or her to act to the employee's detriment ... That evidence can be tested in the light of established facts. The credibility of the decision-maker will be assessed by the court."

32 The primary judge stated his reasons for accepting Dr Harvey's evidence[10]:

> "When ... [Dr Harvey] was called on to explain her reasons for taking adverse action against Mr Barclay she provided convincing and credible explanations of why it was that she took the steps that she did. Dr Harvey said that she had been extremely concerned by the statement that false and fraudulent documentation had been prepared for the purposes of the audit. She wished to establish whether or not this had occurred and immediately instituted an inquiry to establish whether there was any foundation for the allegation. She adhered to her explanation ... for calling on Mr Barclay to show cause why he should not be disciplined for circulating the e-mail. She said that she had determined to exclude him from BRIT campuses and suspend his e-mail access because she did not want Mr Barclay on the premises while the auditors were there and because she did not want any other 'loose allegations' made inappropriately during the audit to the detriment of BRIT. She maintained her denials of having acted against Mr Barclay for any reason associated with his union membership, office or activities ... I accept her evidence. I am satisfied that she did not act for any proscribed reason. Rather, she acted for the reasons which she gave."

33 The primary judge concluded that Dr Harvey had not taken adverse action against Mr Barclay for any reason associated with his position as an officer of the AEU or with his engagement in industrial activity, and that BRIT therefore had not contravened s 346 of the Fair Work Act[11].

34 In upholding an appeal from the decision of the primary judge, the majority in the Full Court said[12]:

> "The central question under s 346 is why was the aggrieved person treated as he or she was? If the aggrieved person was subjected to adverse action, was it 'because' the aggrieved person did or did not have the attributes, or had or had not engaged or proposed to engage in the industrial activities, specified by s 346 in conjunction with s 347?
>
> The determination of those questions involves characterisation of the reason or reasons of the person who took the adverse action. The state of mind or subjective intention of that person will be centrally relevant, but it is not decisive. What is required is a determination of what Mason J in *Bowling* [(1976) 51 ALJR 235 at 241; 12 ALR 605 at 617] ... called the 'real reason' for the conduct. The real reason for a person's conduct is not necessarily the reason that the person asserts, even where the person genuinely believes he or she was motivated by that reason. The search is for what actuated the conduct of the person, not for what the person thinks he or she was actuated by. In that regard, the real reason may be conscious or unconscious, and where unconscious or not appreciated or understood, adverse action will not be excused simply because its perpetrator held a benevolent intent. It is not open to the decision-maker to choose to ignore the objective connection between the decision he or she is making and the attribute or activity in question."

35 Their Honours later said[13]:

> "All of the relevant conduct in issue in this case involved Mr Barclay in his union capacity. None of it involved him in his capacity as an employee of BRIT."

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[10] *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251 at 264-265 [54].

[11] *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251 at 265 [54], [59].

[12] *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at 221 [27]-[28].

[13] *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at 233 [73].

36 Their Honours held that Mr Barclay had engaged in industrial activity within the meaning of ss 347(b)(iii) (encouraging or participating in a lawful activity organised or promoted by an industrial association) and (v) (representing or advancing the views, claims or interests of an industrial association) of the Fair Work Act by: sending the email on 29 January 2010; encouraging members of the AEU to contact the AEU and seek support and advice; and retaining the confidences of AEU members who had approached him in his capacity as an officer of the AEU[14].

37 Their Honours treated Dr Harvey's sworn evidence about her reasons for taking adverse action as leaving uncontroverted the possibility that Dr Harvey had taken action for an unconscious reason or a reason which was not appreciated or understood by her which was prohibited. In essence, their Honours reasoned that, because the sending of the email on 29 January 2010 amounted to engagement in industrial activity, and because Dr Harvey's reasons for taking adverse action against Mr Barclay were "founded upon" the sending of the email, the reasons why Dr Harvey had taken adverse action against Mr Barclay "included the fact that he was an officer of the AEU and the fact that he had engaged in industrial activity."[15] On this basis, their Honours held that BRIT had contravened both s 346(a) and s 346(b) of the Fair Work Act.

38 In dissent, Lander J agreed with the reasoning of the primary judge. His Honour said that the word "because" in s 346 directs an investigation into the reason actuating the person who took the adverse action and that contravention of s 346(b) is not made out "by simply establishing that adverse action was taken whilst the union official was engaged in industrial activity."[16]

Submissions

39 In challenging the decision of the majority below, the appellant contended that a contravention of s 346 requires a mental element – a contravention will be established if the subjective reason why the employer took the adverse action was because of the employee's position as an officer or member of an industrial association or because the employee was engaged in industrial activity. That construction was said to be supported by the text of s 346 construed by reference to ss 360 and 361, considerations of legislative history and various authorities concerning legislative predecessors to the current provisions.

40 The competing view advanced by the respondents was that a contravention of s 346 is to be determined objectively – if adverse action is taken when an employee is an officer or member of an industrial association engaged in industrial activity covered by s 347, a contravention of s 346 is established if a reasonable observer would conclude that the employer had not demonstrated that the real reason for the adverse action was dissociated from the reasons prohibited by s 346. The respondents recognised that this involved "a large and liberal" interpretation of ss 346 and 347 which, it was said, was appropriate because those provisions are concerned with human rights and give effect to Australia's obligations under particular international instruments[17]. It was contended that the circumstance of Mr Barclay being an officer of an industrial association engaged in lawful industrial activity at the time the adverse action was taken was sufficient to bring Mr Barclay within the protective provisions.

The correct approach

41 The question of why an employer took adverse action against an employee is a question of fact arising from the operation of interdependent provisions of the Fair Work Act. These provisions must be construed together in accordance with the principles of statutory construction established by this

[14] *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at 231 [63]-[64].

[15] *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at 234 [78].

[16] *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at 257 [218], 258 [227].

[17] Freedom of Association and Protection of the Right to Organise Convention (1948), Arts 2, 11; Right to Organise and Collective Bargaining Convention (1949), Art 1; Worker's Representatives Convention (1971), Art 1; International Covenant on Economic, Social and Cultural Rights (1966), Art 8; International Covenant on Civil and Political Rights (1966), Art 22.

Court, which must begin with a consideration of the text of the relevant provisions and may require consideration of the context including the general purpose and policy of the provisions[18].

Text

42 Determining why a defendant employer took adverse action against an employee involves consideration of the decision-maker's "particular reason" for taking adverse action (s 361(1)), and consideration of the employee's position as an officer or member of an industrial association and engagement in industrial activity ("union position and activity") at the time the adverse action was taken (ss 342, 346(a), 346(b), 347 and 361(1)).

43 Clearly a defendant employer interested in rebutting the statutory presumption in s 361 can be expected to rely in its defence on direct testimony of the decision-maker's reason for taking the adverse action. The majority in the Full Court correctly rejected an argument put by the respondents that the introduction of the statutory expression "because" into a legislative predecessor to s 346[19], in place of the previous statutory expression "by reason of"[20], rendered irrelevant the state of mind of the decision-maker[21].

44 There is no warrant to be derived from the text of the relevant provisions of the Fair Work Act for treating the statutory expression "because" in s 346, or the statutory presumption in s 361, as requiring only an objective enquiry into a defendant employer's reason, including any unconscious reason, for taking adverse action. The imposition of the statutory presumption in s 361, and the correlative onus on employers, naturally and ordinarily mean that direct evidence of a decision-maker as to state of mind, intent or purpose will bear upon the question of why adverse action was taken, although the central question remains "why was the adverse action taken?"[22].

45 This question is one of fact, which must be answered in the light of all the facts established in the proceeding. Generally, it will be extremely difficult to displace the statutory presumption in s 361 if no direct testimony is given by the decision-maker acting on behalf of the employer[23]. Direct evidence of the reason why a decision-maker took adverse action, which may include positive evidence that the action was not taken for a prohibited reason, may be unreliable because of other contradictory evidence given by the decision-maker[24] or because other objective facts are proven which contradict the decision-maker's evidence. However, direct testimony from the decision-maker which is accepted as reliable is capable of discharging the burden upon an employer even though an employee may be an officer or member of an industrial association and engage in industrial activity[25].

Policy and purpose

46 The provisions of the Fair Work Act containing the general protections for officers and members of industrial associations commenced operation on 1 July 2009. However, provisions analogous to s 346(a), prohibiting an employer from taking adverse action against an employee because he or she is an officer or member of an industrial association, have existed in federal industrial relations legislation in Australia since the enactment of the *Conciliation and Arbitration Act* 1904 (Cth).

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[18] As to which, see *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ; [2009] HCA 41. See also *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; [1997] HCA 2; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28.

[19] *Industrial Relations Act* 1988 (Cth) (as enacted), s 334.

[20] The expression "by reason of" last appeared in the *Conciliation and Arbitration Act* 1904 (Cth) (as amended by the *Conciliation and Arbitration Amendment Act* 1984 (Cth)), s 5(1).

[21] *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at 220 [25].

[22] *Purvis v New South Wales* (2003) 217 CLR 92 at 163 [236] per Gummow, Hayne and Heydon JJ; [2003] HCA 62.

[23] See, for example, *General Motors-Holden's Pty Ltd v Bowling* (1976) 51 ALJR 235 at 241 per Mason J; 12 ALR 605 at 617.

[24] See, for example, *Pearce v W D Peacock & Co Ltd* (1917) 23 CLR 199 at 208 per Isaacs J, 211 per Higgins J; [1917] HCA 28.

[25] See, for example, *Harrison v P & T Tube Mills Pty Ltd* (2009) 188 IR 270 at 276 [31]-[33].

47 That Act, which initiated a federal system of conciliation and arbitration, was preceded by social and legislative developments in Australia and New Zealand[26], Britain[27], and Europe and North America[28], which all reflected a growing appreciation that, in industrialised countries, stable industrial relations and the settlement of industrial disputes were best secured through a system of collective bargaining between employees and employers. In his second reading speech in the House of Representatives on the Conciliation and Arbitration Bill 1904 (Cth), Alfred Deakin referred to experiences in Great Britain and the United States as a prelude to his explanation that an effective system of compulsory conciliation and arbitration, which the Bill was designed to achieve, necessitated a balance in the powers of the parties involved[29].

48 As originally enacted, s 9(1) of the *Conciliation and Arbitration Act* 1904 (Cth) made it a criminal offence for an employer to dismiss an employee from his employment "by reason merely of the fact that the employee [was] an officer or member of an organization or [was] entitled to the benefit of an industrial agreement or award." Reflecting an increase in the categories of conduct protected by legislation, prohibited reasons for taking adverse action have been expanded over the years as substantive provisions have been amended or reproduced in substitute legislation[30]. In particular, provisions analogous to s 346(b) (read with ss 347(b)(iii) and (v)), prohibiting an employer from taking adverse action against an employee in respect of lawful industrial activity, have existed since 1973[31].

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[26] See Davison, Hirst and Macintyre, *The Oxford Companion to Australian History*, (1998) at 647-649; Mitchell, "State systems of conciliation and arbitration: the legal origins of the Australasian model", in Macintyre and Mitchell (eds), *Foundations of Arbitration*, (1989) 74 at 82-97; Australia, Committee of Review into Australian Industrial Relations, *Australian Industrial Relations Law and Systems*, (1985), vol 2 at 18-20; Australia, House of Representatives, *Parliamentary Debates* (Hansard), 22 March 1904 at 762-791; Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 July 1903 at 2858-2883.

In 1890, Charles Kingston (acknowledged by Alfred Deakin as a major architect of the federal legislation) unsuccessfully introduced a Bill for an "Act to Encourage the Formation of Industrial Unions and Associations, and to Facilitate the Settlement of Industrial Disputes" into the South Australian Parliament. This was the earliest proposal for a compulsory system of conciliation and arbitration in Australia, the conceptual framework of which included the idea of incorporating trade unions into the process through a system of registration and regulation. Its form and content can be detected in subsequent legislation: the *Industrial Conciliation and Arbitration Act* 1894 (NZ), the *Industrial Conciliation and Arbitration Act* 1900 (WA), the *Industrial Arbitration Act* 1901 (NSW) and, to a lesser extent, in modified form in the *Conciliation Act* 1894 (SA). The marginal notes to the Conciliation and Arbitration Bill 1904 (Cth) record the derivation of various clauses of the Bill from sections of those four Acts, including the derivation of cl 9 (the predecessor to ss 346(a) and 361 of the Fair Work Act) from s 35 of the *Industrial Arbitration Act* 1901 (NSW).

[27] See Great Britain, Royal Commission on Labour, *Fifth Report* (1892); *Conciliation Act* 1896 (UK). The *Conciliation Act* 1896 (UK) was enacted following a recommendation made in Royal Commission's report. See further Brodie, *A History of British Labour Law 1867-1945*, (2003) at 1-62; Mitchell, "State systems of conciliation and arbitration: the legal origins of the Australasian model", in Macintyre and Mitchell (eds), *Foundations of Arbitration*, (1989) 74 at 76-80.

[28] See Mitchell, "State systems of conciliation and arbitration: the legal origins of the Australasian model", in Macintyre and Mitchell (eds), *Foundations of Arbitration*, (1989) 74 at 80-82.

[29] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 22 March 1904 at 763-765. See also Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 July 1903 at 2864, 2870.

[30] See *Conciliation and Arbitration Act* 1904 (Cth) (as amended by the *Commonwealth Conciliation and Arbitration Act* 1909 (Cth)), s 9(1); *Conciliation and Arbitration Act* 1904 (Cth) (as amended by the *Commonwealth Conciliation and Arbitration Act (No 2)* 1914 (Cth)), ss 9(1)(a), (b) and (c); *Conciliation and Arbitration Act* 1904 (Cth) (as amended by the *Commonwealth Conciliation and Arbitration Act* 1920 (Cth)), s 9(1)(d); *Conciliation and Arbitration Act* 1904 (Cth) (as amended by the *Commonwealth Conciliation and Arbitration Act* 1947 (Cth)), s 9(1)(e) (at this stage, s 26 of the *Commonwealth Conciliation and Arbitration Act* 1947 (Cth) renumbered s 9 of the *Conciliation and Arbitration Act* 1904 (Cth) to s 5); *Conciliation and Arbitration Act* 1904 (Cth) (as amended by the *Conciliation and Arbitration Act* 1973 (Cth)), s 5(1)(f); *Conciliation and Arbitration Act* 1904 (Cth) (as amended by the *Conciliation and Arbitration Act* 1977 (Cth)), s 5(1)(aa); *Conciliation and Arbitration Act* 1904 (Cth) (as amended by the *Conciliation and Arbitration Amendment Act* 1981 (Cth)), ss 5(1)(ab) and (ac); *Industrial Relations Act* 1988 (Cth) (as enacted), s 334(1); *Workplace Relations Act* 1996 (Cth) (as enacted), ss 298K(1) and 298L(1); *Workplace Relations Act* 1996 (Cth) (as amended by the *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth)), ss 792(1) and 793(1).

[31] See *Conciliation and Arbitration Act* 1904 (Cth) (as amended by the *Conciliation and Arbitration Act* 1973 (Cth)), s 5(1)(f); *Industrial Relations Act* 1988 (Cth) (as enacted), s 334(1)(j); *Workplace Relations Act* 1996 (Cth) (as enacted), ss 298K(1) and 298L(1)(n); *Workplace Relations Act* 1996 (Cth) (as amended by the *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth)), ss 792(1) and 793(1)(o).

49 A statutory presumption and correlative onus of the kind now found in s 361 of the Fair Work Act can also be found in earlier provisions[32]. In his second reading speech on the Commonwealth Conciliation and Arbitration Bill (No 2) 1914 (Cth), the Attorney-General, Billy Hughes, identified the rationale for the statutory presumption in favour of the employee, and the placing of an onus on the employer, as being the need to remedy the ease with which an employer might avoid liability[33].

50 The following description of a legislative predecessor to s 361[34] given by Mason J in *General Motors-Holden's Pty Ltd v Bowling*[35] remains pertinent[36]:

> "the plain purpose of the provision [is to throw] on to the defendant the onus of proving that which lies peculiarly within his own knowledge."

51 Observations about the rationale for including s 361 in the Fair Work Act are consistent with the abovementioned descriptions of the evident purpose of its legislative predecessors[37].

52 Since the enactment of the *Workplace Relations Act* 1996 (Cth), the general protections have been enforced through a civil penalty regime, which replaced the criminal offence regime that had been in place since 1904.

Relevant authorities

53 The decisions of this Court in *Pearce v W D Peacock & Co Ltd*[38] and *Bowling* dealt with different legislative predecessors to ss 346 and 361 of the Fair Work Act[39].

54 In *Pearce*, an employee who was a member of an organisation registered under the *Conciliation and Arbitration Act* 1904 (Cth) was dismissed from his employment. A director of the defendant employer gave evidence that the employee was not dismissed "because of being in a union", but rather because he was dissatisfied with his wages and conditions[40]. A question arose as to whether the director's evidence was sufficient to satisfy the onus cast upon the employer. In deciding that the director's

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[32] See *Conciliation and Arbitration Act* 1904 (Cth) (as enacted), s 9(3); *Conciliation and Arbitration Act* 1904 (Cth) (as amended by the *Commonwealth Conciliation and Arbitration Act* 1909 (Cth)), s 9(3); *Conciliation and Arbitration Act* 1904 (Cth) (as amended by the *Commonwealth Conciliation and Arbitration Act (No 2)* 1914 (Cth)), s 9(4); *Conciliation and Arbitration Act* 1904 (Cth) (as amended by the *Commonwealth Conciliation and Arbitration Act* 1947 (Cth)), s 5(4); *Conciliation and Arbitration Act* 1904 (Cth) (as amended by the *Conciliation and Arbitration Act* 1977 (Cth)), s 5(4); *Industrial Relations Act* 1988 (Cth) (as enacted), s 334(6); *Workplace Relations Act* 1996 (Cth) (as enacted), s 298V; *Workplace Relations Act* 1996 (Cth) (as amended by the *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth)), s 809.

[33] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 13 November 1914 at 659:

> "Under the Act as it stands, in order to secure a conviction it is necessary to prove that an employé has been dismissed merely because he is a unionist. It is a fact, and one of the most cheering evidences of the innate goodness of mankind, that convictions have been secured for this offence under the existing law. But for every one offender caught, ninety-nine go free. It is obvious that if a man wishes to dismiss an employé because he is a unionist, he may easily do so. An employer may discharge a man because he is a unionist, and say that he has dismissed him because he does not like his appearance. We are amending the principal Act so that the onus will rest on the employer, and that is quite compatible with the policy of the Act."

As repealed and substituted by the *Conciliation and Arbitration Act (No 2)* 1914 (Cth), the onus in s 9(4) required a defendant employer "to prove that he was not actuated by the reason alleged in the charge."

[34] *Conciliation and Arbitration Act* 1904 (Cth) (as amended by the *Conciliation and Arbitration (Organizations) Act* 1974 (Cth)), s 5(4).

[35] (1976) 51 ALJR 235; 12 ALR 605 ("*Bowling*").

[36] (1976) 51 ALJR 235 at 241; 12 ALR 605 at 617 per Mason J.

[37] Australia, House of Representatives, Fair Work Bill 2008, Explanatory Memorandum at 234 [1461]:

> "in the absence of such a [section], it would often be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason."

[38] (1917) 23 CLR 199 ("*Pearce*").

[39] *Pearce* concerned ss 9(1) and (4) of the *Conciliation and Arbitration Act* 1904 (Cth) which, at that stage, had last been amended by the *Commonwealth Conciliation and Arbitration Act (No 2)* 1914 (Cth). *Bowling* concerned the renumbered ss 5(1) and (4) of the *Conciliation and Arbitration Act* 1904 (Cth) which, at that stage, had last been amended by the *Conciliation and Arbitration Act* 1973 (Cth).

[40] *Pearce* (1917) 23 CLR 199 at 202.

evidence was sufficient, the majority in *Pearce* recognised that mere declarations of an innocent reason or intent in taking adverse action may not satisfy the onus on an employer if contrary inferences are available on the facts[41]. In the minority, Isaacs and Higgins JJ decided that the director's evidence of his reasons for dismissing the employee did not satisfy the onus because other evidence given by the director had contradicted it. In considering this issue, Isaacs J recognised that it is not possible to "peer into [an employer's] mind"[42]. Equally, it is not possible in a curial process to plumb the depths of "[an employer's] unconscious"[43].

55 More generally, in *Pearce*, Isaacs J said of s 9(4) of the *Conciliation and Arbitration Act* 1904 (Cth) (the then applicable legislative predecessor to s 361)[44]:

> "The provision casting the onus on the defendant employer means that the fact that the dismissed employee was a member of an organization must not enter in any way into the reason of the defendant, if he desires exculpation."

56 That interpretation was rejected in *Bowling*. In *Bowling*, an employee who was a shop steward was dismissed from his employment. The decision-makers, two directors of the employer, did not give evidence. In a short judgment concurring with Mason J, Gibbs J said[45]:

> "The onus of proving that the fact that the employee held the position was not a substantial and operative factor in the dismissal is to be discharged according to the balance of probabilities and is not to be made heavier by any presumption that if an employee who is dismissed for disruptive activities happens to be a shop steward the latter circumstance must have had something to do with his dismissal. If in the present case evidence had been given by the directors responsible that the employee was dismissed because he was guilty of misconduct or because his work was unsatisfactory, and that in dismissing him they were not influenced by the fact that he was a shop steward or indeed that he was dismissed in spite of the fact, and that evidence had been accepted, the onus would have been discharged."

57 Mason J, with whom Stephen and Jacobs JJ also agreed, said of the interpretation adopted by Isaacs J in *Pearce*[46]:

> "The protection of trade unions and their representatives from discrimination and victimization by employers does not require an interpretation as extreme as that favoured by Isaacs J. It would unduly and unfairly inhibit the dismissal of a union representative in circumstances where other employees would be dismissed and thereby confer on the union representative an advantage not enjoyed by other workers, to penalize a dismissal merely because the prohibited factor entered into the employer's reasons for dismissal though it was not a substantial and operative factor in those reasons."

58 His Honour went on to say that the decision-makers in *Bowling* who failed to give direct evidence could hypothetically have said in evidence[47]:

> "'We dismissed him because he was a troublemaker, because he was deliberately disrupting production and setting a bad example and we did so without regard at all to his position as a shop steward'."

Because no such evidence was given, his Honour found that the evidence in the case[48]:

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[41] *Pearce* (1917) 23 CLR 199 at 203 per Barton ACJ (with whom Gavan Duffy and Rich JJ agreed). See, subsequently, *Heidt v Chrysler Australia Ltd* (1976) 13 ALR 365; *Lewis v Qantas Airways Ltd* (1981) 54 FLR 101.

[42] *Pearce* (1917) 23 CLR 199 at 206.

[43] *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at 221 [28] per Gray and Bromberg JJ.

[44] *Pearce* (1917) 23 CLR 199 at 205.

[45] *Bowling* (1976) 51 ALJR 235 at 239; 12 ALR 605 at 612.

[46] *Bowling* (1976) 51 ALJR 235 at 241; 12 ALR 605 at 616.

[47] *Bowling* (1976) 51 ALJR 235 at 241; 12 ALR 605 at 617.

"left uncontroverted the possibility that the respondent's position as a shop steward was an influential, perhaps even a decisive, consideration in [the decision-makers'] minds."

59 Despite the change to a civil penalty regime effected in 1996, s 361 does not differ in relevant respects from its legislative predecessors and *Bowling* remains authoritative in relation to a number of the arguments raised on the appeal.

60 First, it is erroneous to treat the onus imposed on an employer by s 361 as being made heavier (or rendered impossible to discharge) because an employee affected by adverse action happens to be an officer of an industrial association. Further, the history of the relevant legislative provisions reveals no reason why the onus must now be different if adverse action is taken while an employee engages in industrial activity – like a person who happens to be an officer of an industrial association, a person who happens to be engaged in industrial activity should not have an advantage not enjoyed by other workers.

61 Central to the respondents' argument on this appeal was the contrary and incorrect view that Mr Barclay's status as an officer of an industrial association engaged in lawful industrial activity at the time that Dr Harvey took adverse action against him meant that Mr Barclay's union position and activities were inextricably entwined with the adverse action, and that Mr Barclay was therefore immune, and protected, from the adverse action. If accepted, such a position would destroy the balance between employers and employees central to the operation of s 361, a balance which Parliament has chosen to maintain irrespective of the fact that the protection in s 346(b) has a shorter history than the protection in s 346(a). That balance, once the reflex of criminal sanctions in the legislation, now reflects the serious nature of the civil penalty regime. Speaking more generally, that balance is a specific example of the balance of which Alfred Deakin spoke as being necessary for an effective conciliation and arbitration system.

62 Secondly, it is a related error to treat an employee's union position and activity as necessarily being a factor which must have something to do with adverse action, or which can never be dissociated from adverse action. It is a misunderstanding of, and contrary to, *Bowling* to require that the establishment of the reason for adverse action must be entirely dissociated from an employee's union position or activities. Such reasoning effectively institutes an interpretation of the relevant provisions indistinguishable from that of Isaacs J in *Pearce*, which was rejected in *Bowling*. The onus of proving that an employee's union position and activity was not an operative factor in taking adverse action is to be discharged on the balance of probabilities in the light of all the established evidence.

63 Thirdly, it is appropriate for a decision-maker to give positive evidence comparing the position of the employee affected by the adverse action with that of an employee who has no union involvement.

64 Finally, the international instruments referred to in passing by the respondents are consistent with the approach to the relevant provisions identified above.

Conclusions

65 In this case the primary judge adopted the correct approach to the relevant provisions. Dr Harvey gave evidence of her reason for taking adverse action against Mr Barclay and also gave positive evidence that this was not for a prohibited reason and that she would have taken the same action against a person circulating a similar email who was not an officer of the AEU. That evidence was accepted by the primary judge and his findings in that regard were not challenged before the Full Court[49]. The appellant discharged the burden cast upon it to show that the reason for the adverse action was not a prohibited reason, and that Mr Barclay's union position and activities were not operative factors in him being required to show cause. The appeal must be upheld and consequential orders made.

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[48] *Bowling* (1976) 51 ALJR 235 at 242; 12 ALR 605 at 619.

[49] *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at 258 [226] per Lander J.

Orders

66 The orders of the Court should be:

1. Appeal allowed.

2. Orders 1, 2 and 3 of the orders of the Full Court of the Federal Court of Australia made on 9 February 2011 be set aside and, in their place, order that the appeal to that Court be dismissed.

3. Any question of the costs of the appeal be dealt with by consent order or by this Court on the papers as indicated in the reasons for judgment of Gummow and Hayne JJ.

67 GUMMOW AND HAYNE JJ. The first respondent, Mr Barclay, is a senior teacher at the Bendigo Regional Institute of Technology and Further Education ("BRIT"), the Board of which is the appellant. Mr Barclay is also President of the BRIT Sub-Branch of the second respondent, the Australian Education Union ("the AEU"). The AEU is an organisation registered pursuant to legislative provisions now found in Ch 2 of the *Fair Work (Registered Organisations) Act* 2009 (Cth).

68 On 2 February 2010, BRIT suspended Mr Barclay on full pay from his employment, suspended his internet access, excluded him from the BRIT premises and commenced disciplinary proceedings against him. (It later was agreed that Mr Barclay return to work on a normal basis, but he remains subject to pending disciplinary proceedings.) The action on 2 February 2010 followed an e-mail sent by Mr Barclay four days previously. The e-mail was headed "A note of caution" and warned employees of BRIT who were members of the AEU that they should "not agree to be part of any attempt to create false[/fraudulent] documentation" in preparation for an audit of BRIT to be conducted by the Victorian Registration and Qualifications Authority.

69 In proceedings in the Federal Court, Mr Barclay and the AEU sought declaratory relief that the action by BRIT contravened s 346 of the *Fair Work Act* 2009 (Cth) ("the Act"). This provided that a person should not take adverse action against another "because" that other person: (a) was or was not an officer or member of an industrial association, or (b) engaged or proposed to engage in "industrial activity". They also sought orders for compensation under s 545(2)(b) of the Act and orders pursuant to s 546 for the imposition and recovery of penalties. Tracey J dismissed the application[50].

70 However, the Full Court (Gray and Bromberg JJ, Lander J dissenting)[51] allowed an appeal by Mr Barclay and the AEU. The matter was remitted to the primary judge to determine the appropriate penalties to be imposed on BRIT for its contraventions of the Act.

71 For the reasons which follow, in addition to those in the other joint reasons, with which we are in general agreement, the appeal by BRIT to this Court should be allowed and consequential orders made.

72 The provisions in s 346 of the Act, contraventions of which were alleged against BRIT, have a lengthy provenance in industrial law in Australia. An appreciation of the issues which arise in the present appeal is assisted by some reference to that legislative history, including several decisions upon the earlier legislation which informed the submissions on the appeal.

Legislative history

73 Section 346 of the Act derived from s 9 of the *Commonwealth Conciliation and Arbitration* Act 1904 (Cth) ("the 1904 Act"). As first enacted, s 9 of the 1904 Act provided:

> "(1) No employer shall dismiss any employee from his employment by reason merely of the fact that the employee is an officer or member of an organization or is entitled to the benefit of an industrial agreement or award.
>
> Penalty: Twenty pounds.

[50] *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251.

[51] *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212.

(2) No proceeding for any contravention of this section shall be instituted without the leave of the President or the Registrar.

(3) In any proceeding for any contravention of this section, it shall lie upon the employer to show that any employee, proved to have been dismissed whilst an officer or member of an organization or entitled as aforesaid, was dismissed for some reason other than those mentioned in this section."

Section 9 in this form was omitted by the *Commonwealth Conciliation and Arbitration Act* 1909 (Cth) and a substituted s 9 provided:

"(1) No employer shall dismiss any employee from his employment *or injure him in his employment* by reason merely of the fact that the employee is an officer or member of an organization, or of an association that has applied to be registered as an organization or is entitled to the benefit of an industrial agreement or award.

Penalty: Twenty pounds

(2) No proceeding for any contravention of this section shall be instituted without the leave of the President or the Registrar.

(3) In any proceeding for any contravention of this section, it shall lie upon the employer to show that any employee, proved to have been dismissed *or injured in his employment* whilst an officer or member of an organization or such an association or whilst entitled as aforesaid, was dismissed or injured in his employment for some reason other than that mentioned in this section." (emphasis added)

Whilst s 9 of the 1904 Act was the first federal provision of its kind, it was drawn from New South Wales legislation.

74 In his second reading speech in the House of Representatives on the Bill for what became the 1904 Act, Alfred Deakin described the *Industrial Arbitration Act* 1901 (NSW) ("the New South Wales Act") as[52]: "the most advanced and complete piece of legislation of this kind which has yet found its way upon a statute-book". He went on to indicate that the Bill had been drafted with the provisions of the New South Wales Act in mind.

75 This is apparent from the terms of s 35 of the New South Wales Act:

"If an employer dismisses from his employment any employee by reason merely of the fact that the employee is a member of an industrial union, or is entitled to the benefit of an award, order, or agreement, such employer shall be liable to a penalty not exceeding twenty pounds for each employee so dismissed.

In every case it shall lie on the employer to satisfy the court that such employee was so dismissed by reason of some facts other than those above mentioned in this section: Provided that no proceedings shall be begun under this section except by leave of the court."

76 In his second reading speech in the Legislative Council on the Bill, for what became the New South Wales Act, the Attorney-General[53], The Hon Bernhard Wise KC, made extended reference to industrial strife in the United States, adding:

"We know that there is a black list in the United States, and one of the most potent instruments of the capitalists in the United States is that black list. A man who makes himself conspicuous as an advocate of the rights of the workmen is debarred from employment; though he may disguise himself, and change his name as he will, he is debarred from employment from one end of the Union to the other."

Of the clause which became s 35 of the New South Wales Act, the Attorney-General said:

[52] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 July 1903 at 2866.

[53] New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 2 October 1901 at 1841.

"The clause would not operate harshly upon an employer who honestly dismisses a man for a genuine reason; but if the clause is to exist at all in the bill, it is absolutely useless, unless the burden of showing that the man was dismissed for some other reason than that of belonging to the union is cast upon the only man who knows the real reason, that is, the employer."

77 The protections provided for by the Act in contemporary times serve purposes not dissimilar to its antecedents. In argument on this appeal reference was made to *Pearce v W D Peacock & Co Ltd*[54]. *Pearce* involved an unsuccessful appeal direct to this Court from the dismissal of the prosecution, in a Tasmanian Court of Petty Sessions, of an employer for an offence under s 9 of the 1904 Act[55]. The information had been laid by Mr Pearce, the general secretary of the union of which Mr Batchelor was a member. It alleged that the respondent employer had dismissed Mr Batchelor by reason of the circumstance that he was a member of the union which was an organisation registered under the 1904 Act. Mr Batchelor had been the only employee who was a member of the union. The employer had been served with a log of claims in Arbitration Court proceedings. Mr Batchelor refused to sign a paper proffered by the employer in which he would indicate his satisfaction with his working conditions and remuneration. If he had signed as requested, the result would have been to deprive the Arbitration Court of jurisdiction to include the employer in the award[56]. Mr Batchelor was dismissed after he refused to sign the paper. The employer argued that the dismissal had occurred because Mr Batchelor had expressed dissatisfaction with his job, and not for any reason connected to his union involvement.

78 By majority (Barton ACJ, Gavan Duffy and Rich JJ, Isaacs and Higgins JJ dissenting), this Court held that there was evidence to support the view that the employer had not been actuated by the reason alleged in the information, and that it had been open to the Court of Petty Sessions to dismiss the union's information.

79 With respect to the operation of s 9, Barton ACJ said[57]:

"No doubt, it is an inquiry in a large measure as to motive; and no doubt also, the motive is to be inferred from facts, and mere declarations as to the mental state that prompted the employer's action are entitled to little or no regard."

80 Isaacs J was in dissent on the issue of whether, on appeal, the High Court had the power or duty to form its own reasons and conclusions on the evidence before the Magistrate. His Honour also went further regarding the interpretation of s 9 and concluded[58]:

"[A]s I read that section, it is designed, among other things, to preserve organizations, so that the method selected by Parliament for settling disputes shall not be thwarted. The provision casting the onus on the defendant employer means that the fact that the dismissed employee was a member of an organization *must not enter in any way* into the reason of the defendant, if he desires exculpation. Otherwise he might add any other reason whatever to the membership of a union, and break down the whole structure of the Act, so far as he is concerned, as the defendant has, in fact, done in this case." (emphasis added)

81 When read with s 10 of the 1904 Act, the protection applied both to employees and employers. Isaacs J continued[59]:

"It is very material to remember that the Statute must be construed as a whole. It applies equally both to employers and employees. An employee's dissatisfaction is no more and no less independent of the industrial dispute in which it is expressed, where it is relied on

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[54] (1917) 23 CLR 199; [1917] HCA 28.

[55] The legislation considered in *Pearce* was the *Commonwealth Conciliation and Arbitration Act* 1904-1915 (Cth); s 9 had remained unaffected by the subsequent legislative amendments.

[56] As Isaacs J emphasised: (1917) 23 CLR 199 at 208-209.

[57] (1917) 23 CLR 199 at 203.

[58] (1917) 23 CLR 199 at 205.

[59] (1917) 23 CLR 199 at 206.

to justify an employer in dismissing an employee, than where it is relied on to justify an employee for striking because of his dissatisfaction with existing conditions. Neither position is, in my opinion, justifiable in law, and both are to be condemned. When we consider the Act as speaking with equal force to both parties to a dispute, then a Court must, in arriving at its view of the meaning of the law, take into account the consideration that whatever is a legal justification in the one case is equally a legal justification in the other. To hold what is relied on here as a legal justification to be so in either case, and consequently in both cases, to my mind would mean reducing the law in all cases to a dead letter, and defeating the objects of the Act to the injury of the general community, which ought to be protected against both employers and employees taking the law into their own hands in disregard of the general welfare."

82 By 1976, the 1904 Act had undergone substantial amendment. Relevantly, through a process of renumbering, s 9 had become s 5 of the *Conciliation and Arbitration Act* 1904-1976 (Cth) ("the 1976 Act")[60]. Section 5(1) was in the following terms:

> "An employer shall not dismiss an employee, or injure him in his employment, or alter his position to his prejudice, by reason of the circumstance that the employee –
>
> (a) is or has been, or proposes, or has at any time proposed, to become an officer, delegate or member of an organization, or of an association that has applied to be registered as an organization; or
>
> ...
>
> (f) being an officer, delegate or member of an organization, has done, or proposes to do, an act or thing which is lawful for the purposes of furthering or protecting the industrial interests of the organization or its members, being an act or thing done within the limits of authority expressly conferred on him by the organization in accordance with the rules of the organization.
>
> Penalty: Four hundred dollars."

83 Under the 1976 Act, the onus remained with the defendant employer to prove it was "not actuated" by the reason alleged in the charge[61].

84 Section 5 of the 1976 Act was considered by this Court in *General Motors Holden Pty Ltd v Bowling*[62]. By majority (Gibbs, Stephen, Mason and Jacobs JJ, Barwick CJ dissenting), the Court dismissed an appeal from the Industrial Court of Australia. The Industrial Court had convicted the appellant company of contravening s 5(1) in dismissing Mr Bowling.

85 Mason J, with whom Stephen and Jacobs JJ agreed, began his analysis of s 5 by remarking that the section had "a legislative history which extends back to the turn of the century when the trade union was a more fragile institution than it is today and when it stood in need of a large measure of protection from employers"[63]. His Honour went on to say that[64]:

> "The protection of trade unions and their representatives from discrimination and victimization by employers does not require an interpretation as extreme as that favoured by Isaacs J [in *Pearce*]. It would unduly and unfairly inhibit the dismissal of a union representative in circumstances where other employees would be dismissed and thereby confer on the union representative an advantage not enjoyed by other workers, to penalize a dismissal merely because the prohibited factor entered into the employer's reasons for dismissal though it was not a substantial and operative factor in those reasons."

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[60] *Commonwealth Conciliation and Arbitration Act* 1947 (Cth), s 26, and made in accordance with Sch 2.

[61] *Conciliation and Arbitration Act* 1904-1976 (Cth), s 5(4).

[62] (1976) 51 ALJR 235; 12 ALR 605.

[63] (1976) 51 ALJR 235 at 240; 12 ALR 605 at 616.

[64] (1976) 51 ALJR 235 at 241; 12 ALR 605 at 616.

Mason J preferred the construction that[65]:

> "[Section] 5(1) does not proscribe the circumstances which it lists as the sole or predominant reasons for dismissal. It is sufficient if the circumstance is *a substantial and operative factor*. And it does not cease to be such a factor because it is coupled with other circumstances or because regard is had to it in association with other circumstances not mentioned in the section." (emphasis added)

86 With respect to the onus borne by the employer, Mason J stated[66]:

> "Section 5(4) imposed the onus on the [employer] of establishing affirmatively that it was not actuated by the reason alleged in the charge. The consequence was that the [employee], in order to succeed, was not bound to adduce evidence that the [employer] was actuated by that reason, a matter peculiarly within the knowledge of the [employer]. The [employee] was entitled to succeed if the evidence was consistent with the hypothesis that the [employer] was so actuated and that hypothesis was not displaced by the [employer]. To hold that, despite the subsection, there is some requirement that the prosecutor brings evidence of this fact is to make an implication which, in my view, is unwarranted and which is at variance with the plain purpose of the provision in throwing on to the [employer] the onus of proving that which lies peculiarly within his own knowledge."

87 Turning to the facts of the case, Mason J held[67]:

> "Once it is said that the appellant dismissed [the respondent] because he was deliberately disrupting production and was setting a bad example it is not easy to say without more that this had nothing to do with his being a shop steward. Although the activities in question did not fall within his responsibilities as a shop steward his office gave him a status in the work force and a capacity to lead or influence other employees, a circumstance of which the appellant could not have been unaware. It would be mere surmise or speculation, unsupported by evidence, to suppose that the appellant's management, if concerned as to the bad example he was setting, divorced that consideration from the circumstance that he was a shop steward."

88 Gibbs J accepted the "substantial and operative factor" criterion adopted by Mason J, and added[68]:

> "The onus of proving that the fact that the employee held the position was not a substantial and operative factor in the dismissal is to be discharged according to the balance of probabilities and is not to be made heavier by any presumption that if an employee who is dismissed for disruptive activities happens to be a shop steward the latter circumstance must have had something to do with his dismissal. *If in the present case evidence had been given by the directors responsible that the employee was dismissed because he was guilty of misconduct or because his work was unsatisfactory*, and that in dismissing him they were not influenced by the fact that he was a shop steward or indeed that he was dismissed in spite of that fact, and *that evidence had been accepted, the onus would have been discharged*." (emphasis added)

89 The construction of the legislation accepted in *Bowling* was subsequently applied by Morling J in *Lewis v Qantas Airways Ltd*[69]. This case concerned the dismissal of an employee, Mr Lewis, around the time of an industrial dispute which resulted in a twelve-day strike[70]. Mr Lewis was a delegate of the Transport Workers' Union of Australia. Another employee, Mr Macfarlane, was dismissed at the same

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[65] (1976) 51 ALJR 235 at 242; 12 ALR 605 at 619.

[66] (1976) 51 ALJR 235 at 241; 12 ALR 605 at 617.

[67] (1976) 51 ALJR 235 at 241; 12 ALR 605 at 617-618.

[68] (1976) 51 ALJR 235 at 239; 12 ALR 605 at 612.

[69] (1981) 54 FLR 101.

[70] (1981) 54 FLR 101 at 105.

time. The central question for determination was whether the fact that Mr Lewis was a union delegate constituted a "substantial and operative factor" which actuated his dismissal[71]. The case presented by Qantas was that the dismissal of Mr Lewis (and Mr Macfarlane) had been prompted by timekeeping mispractice with respect to the bundy card system utilised by Qantas to record time spent by employees at work.

90 In holding that Qantas had not contravened s 5 of the 1976 Act in dismissing Mr Lewis, Morling J assessed the reliability and weight of the evidence adduced by both parties. His Honour made findings that Mr McLean, the dismissing officer, "bore no ill-will to the prosecutor", and that[72]:

> "It is significant that McLean did not single out the prosecutor for treatment different from that meted out to Macfarlane, who was not a union delegate and who had not taken any special part in the quarantine dispute. ... I am satisfied that neither Macfarlane nor the prosecutor was unfairly treated. If facts favourable to the prosecutor did not emerge at the interview, that failure was due entirely to his own refusal to say anything in his own defence."

91 Morling J concluded that the evidence was sufficient to draw a reasonable inference that Mr Lewis had directly or indirectly requested Mr Macfarlane to "clock" his bundy card[73]. His Honour agreed with the statement by Northrop J in *Hyde v Chrysler (Australia) Ltd*[74], that being a member, delegate or officer of a union organisation[75]:

> "'does not confer on that employee an immunity from dismissal by reason of the circumstance that he is a delegate of an organization'. ... The timekeeping offence for which the prosecutor was dismissed had no relation to his position as a union delegate or to the part which he had played in the industrial disputation with the company. His position as delegate gave him no immunity from dismissal for the offence."

The *Fair Work Act* 2009

92 In 1988, s 5 of the 1976 Act was embodied in s 334 of the *Industrial Relations Act* 1988 (Cth) ("the IR Act"). This provision was then encapsulated first in ss 298K and 298L of the *Workplace Relations Act* 1996 (Cth) ("the WR Act") and then in ss 792 and 793 of the WR Act, as amended in 2006. The WR Act was repealed in 2009 and replaced by the Act.

93 The critical provision, s 346, is contained in Ch 3, Pt 3-1, Div 4 of the Act under the chapeau "Industrial activities". Part 3-1 (ss 334-378) is headed "General Protections".

94 The objectives of Pt 3-1 include protecting the freedom to elect to become a member of, be represented by and participate in the lawful industrial activities of industrial associations (s 336(b)). Division 3 of Pt 3-1 (ss 340-346) concerns the protection of "Workplace rights", Div 5 (ss 351-355) provides for "Other protections" and Div 7 (ss 360-364) provides "Ancillary rules". As will be seen, the interpretation of any of the provisions contained within Pt 3-1 requires an appreciation of the Part as a whole.

95 Section 346 is in the following terms:

> "A person must not take adverse action against another person *because* the other person:
>
> (a) is or is not, or was or was not, an officer or member of an industrial association; or
>
> (b) *engages*, or has at any time engaged or proposed to engage, *in industrial activity within the meaning of paragraph 347(a) or (b)*; or

[71] (1981) 54 FLR 101 at 107.

[72] (1981) 54 FLR 101 at 109.

[73] (1981) 54 FLR 101 at 108-109.

[74] (1977) 30 FLR 318 at 332.

[75] (1981) 54 FLR 101 at 113.

(c) does not engage, or has at any time not engaged or proposed to not engage, in industrial activity within the meaning of paragraphs 347(c) to (g).

Note: this section is a civil remedy provision (see Part 4-1)." (emphasis added)

The Note refers to Pt 4-1 of Ch 4, which includes orders for compensation (s 545(2)(b)), and pecuniary penalty orders (s 546).

96 A person "engages in industrial activity" under s 347 if the person:

"(b) does, or does not:

...

(ii) organise or promote a lawful activity for, or on behalf of, an industrial association; or

(iii) encourage, or participate in, a lawful activity organised or promoted by an industrial association; or

...

(v) represent or advance the views, claims or interests of an industrial association".

97 The term "industrial association" is used by the Act to replace the term "organizations" found in the earlier legislation. The term is defined in s 12 of the Act as:

"(a) an association of employees or independent contractors, or both, or an association of employers, that is registered or recognised as such an association (however described) under a workplace law; or

(b) an association of employees, or independent contractors, or both (whether formed formally or informally), a purpose of which is the protection and promotion of their interests in matters concerning their employment, or their interests as independent contractors (as the case may be); or

(c) an association of employers a principal purpose of which is the protection and promotion of their interests in matters concerning employment and/or independent contractors;

and includes:

(d) *a branch of such an association*; and

(e) an organisation; and

(f) a branch of an organisation."

(emphasis added)

98 The taking of "adverse action" is defined in s 342(1). Amongst other actions, adverse action is taken by an employer against an employee if the employer[76]:

"(c) alters the position of the employee to the employee's prejudice; or

(d) discriminates between the employee and other employees of the employer."

99 Finally, the term "officer" of an industrial association is defined in s 12 as:

"(a) an official of the association; or

(b) a delegate or other representative of the association."

Section 12 defines "official" as meaning:

[76] *Fair Work Act* 2009 (Cth), s 342, It 1.

" a person who holds an office in, or is an employee of, the [industrial] association."

The appellant concedes that the AEU is an "industrial association" and that Mr Barclay, as President of the BRIT AEU Sub-Branch, is an "officer" for the purposes of these proceedings.

100 The application of s 346 turns on the term "because". This term is not defined. The term is not unique to s 346. It appears in s 340 (regarding workplace rights), s 351 (regarding discrimination), s 352 (regarding temporary absence in relation to illness or injury) and s 354 (regarding coverage by particular instruments, including provisions of the National Employment Standards).

101 The use in s 346(b) of the term "because" in the expression "because the other person engages ... in industrial activity", invites attention to the reasons why the decision-maker so acted. Section 360 stipulates that, for the purposes of provisions including s 346, whilst there may be multiple reasons for a particular action "a person takes action for a particular reason if the reasons for the action include that reason". These provisions presented an issue of fact for decision by the primary judge.

102 Reference was made in argument to *Purvis v New South Wales*[77]. That litigation concerned the application of the *Disability Discrimination Act* 1992 (Cth) to the suspension and expulsion of a disabled student from a State school. Section 5(1) used the expression "because of the disability". Gummow, Hayne and Heydon JJ emphasised that s 10 of the statute stated that if an act is done for two or more reasons, one of which is the disability of a person, even if it not be the dominant or a substantial reason for doing the act, the act is taken to be done for that reason[78]. This provision may be compared with s 360 of the Act just described.

103 With respect to what became s 346 of the Act, paragraph 1458 of the Explanatory Memorandum to the Fair Work Bill 2008 stated:

> "Clause 360 provides that for the purposes of Part 3-1, a person takes action for a particular reason if the reasons for the action include that reason. The formulation of this clause embodies the language in existing section 792 which appears in Part 16 of the WR Act (Freedom of Association) and *includes the related jurisprudence*. This phrase has been interpreted to mean that the reason must be an *operative or immediate reason for the action* (see *Maritime Union of Australia v CSL Australia Pty Limited*[79]). The 'sole or dominant' reason test which applied to some protections in the WR Act does not apply in Part 3-1." (emphasis added)

The phrase "operative or immediate reason" used in *CSL* is relevantly indistinguishable from the phrase "a substantial and operative factor" used by Mason J in *Bowling*.

104 In light of the legislative history of s 346 and the intention of Parliament outlined above, the reasoning of Mason J in *Bowling* is to be applied to s 346. An employer contravenes s 346 if it can be said that engagement by the employee in an industrial activity comprised "a substantial and operative" reason, or reasons including the reason, for the employer's action and that this action constitutes an "adverse action" within the meaning of s 342.

105 With respect to the onus of proof, the Act adopts the same position as that under the 1904 Act. Section 361 establishes the onus of proof under the chapeau "Reasons for action to be presumed unless proved otherwise". The provision is in the following terms:

> "(1) If:
>
> (a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and

[77] (2003) 217 CLR 92; [2003] HCA 62.

[78] (2003) 217 CLR 92 at 144-145 [169].

[79] (2002) 113 IR 326 at 342 [54]-[55].

(b) taking that action for that reason or with that intent would constitute a contravention of this Part;

it is presumed, in proceedings arising from the application, that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

(2) Subsection (1) does not apply in relation to orders for an interim injunction."

106 Consistent with the statement of Gibbs J in *Bowling*[80], the Explanatory Memorandum to the Fair Work Bill 2008 states[81]:

> "subclause 361(1) provides that once a complainant has alleged that a person's actual or threatened action is motivated by a reason or intent that would contravene the relevant provision(s) of Part 3-1, that person [in this case, the employer] has to establish, on the balance of probabilities, that the conduct was not carried out unlawfully. This has been a long-standing feature of the freedom of association and unlawful termination protections and recognises that, in the absence of such a clause, it would often be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason."

There is no issue of onus raised in these proceedings.

At trial

107 The respondents, then the applicants, submitted that in determining whether or not prejudicial action has been taken "because" of the status or activities of the victim, the subjective reason of the actor for taking the prejudicial action is wholly irrelevant. Rather the test was said to be "purely objective". This disjunction between "subjective" and "objective" reasons was to be productive of error in the Full Court. Alternatively, the respondents submitted at trial that BRIT had not established that, on the balance of probabilities, it had not acted for a proscribed reason[82].

108 With respect to the operation of s 346, Tracey J held[83]:

> "It has never been the case that an employer was prevented, by federal industrial legislation, from taking prejudicial action against an employee who happened to be a union member or a union official: see for example *Cuevas v Freeman Motors Ltd*[84]. An employer could not, however, act to the detriment of an employee 'by reason of' or 'because' of the employee's union membership or associated activities. Over the past century the legislature has expanded progressively the number of prejudicial acts which are denied to an employer and the number of proscribed reasons which might actuate the taking of such prejudicial action. The central issue in this case is concerned with the provisions of the Act which determine whether a causal nexus exists between an employee's union membership and activities and any prejudicial action about which complaint is made."

109 His Honour continued[85], after considering what was decided in *Bowling*:

> "In all of the cases to which I was referred ... and others which I have examined, the court proceeded on the basis that evidence of the employer's subjective reasons for taking the impugned action was relevant in deciding whether the employer had taken the action because of the existence of one or more of the circumstances in which such action was impermissible."

110 Dr Harvey, the Chief Executive Officer of BRIT, was the person responsible for the action taken against Mr Barclay. She gave evidence and was cross-examined at length. His Honour made the following findings regarding her evidence[86]:

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[80] (1976) 51 ALJR 235 at 239; 12 ALR 605 at 612.

[81] Australia, House of Representatives, Fair Work Bill 2008, Explanatory Memorandum at 234 [1461].

[82] (2010) 193 IR 251 at 258 [23].

[83] (2010) 193 IR 251 at 257 [19].

[84] (1975) 25 FLR 67 at 78-79.

[85] (2010) 193 IR 251 at 259 [28].

> "When, however, [Dr Harvey] was called on to explain her reasons for taking adverse action against Mr Barclay she provided convincing and credible explanations of why it was that she took the steps that she did. ... She said that she had determined to exclude him from BRIT campuses and suspend his e-mail access because she did not want Mr Barclay on the premises while the auditors were there and because she did not want any other 'loose allegations' made inappropriately during the audit to the detriment of BRIT. She maintained her denials of having acted against Mr Barclay for any reason associated with his union membership, office or activities. ... I accept her evidence. I am satisfied that she did not act for any proscribed reason."

111 The application was dismissed.

The Full Court

112 In dealing with the operation of the word "because" in s 346 on appeal to the Full Court of the Federal Court, the majority (Gray and Bromberg JJ) said[87]:

> "The central question under s 346 is why was the aggrieved person treated as he or she was? If the aggrieved person was subjected to adverse action, was it 'because' the aggrieved person did or did not have the attributes, or had or had not engaged or proposed to engage in the industrial activities, specified by s 346 in conjunction with s 347?
>
> ...
>
> So much is evident from the use of the word 'because'. It is also consonant with the *objective* and *protective* purposes of s 346." (emphasis added)

Their Honours continued[88]:

> "Objective facts, dependent on the determination of questions of mixed fact and law, have now been included in s 346 to a much greater extent than they were in the section's predecessors. Section 347 is replete with examples. For instance 'lawful activity' in (b)(ii) and (iii) and 'lawful request' in (b)(iv). Whether a person is or is not a member or officer of an industrial association is also a fact to be ascertained objectively by reference to a legal standard, usually the rules of the association."

113 Whilst accepting the view of the primary judge that the words "because" and "by reason of" are used interchangeably by the Act, Gray and Bromberg JJ took issue with the assessment of the employer's subjective state of mind in ascertaining the reasons relevant to the adverse action[89]:

> "The determination of those questions involves characterisation of the reason or reasons of the person who took the adverse action. The state of mind or subjective intention of that person will be centrally relevant, but it is not decisive. What is required is a determination of what Mason J in *Bowling*[90] called the 'real reason' for the conduct. *The real reason for a person's conduct is not necessarily the reason that the person asserts, even where the person genuinely believes he or she was motivated by that reason*. The search is for what actuated the conduct of the person, not for what the person thinks he or she was actuated by. In that regard, *the real reason may be conscious or unconscious*, and where unconscious or not appreciated or understood, adverse action will not be excused simply because its perpetrator held a benevolent intent. It is not open to the decision-maker to choose to ignore the objective connection between the decision he or she is making and the attribute or activity in question." (emphasis added)

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[86] (2010) 193 IR 251 at 264-265 [54].

[87] (2011) 191 FCR 212 at 221 [27], [29].

[88] (2011) 191 FCR 212 at 222 [33].

[89] (2011) 191 FCR 212 at 221 [28].

[90] (1976) 51 ALJR 235 at 241; 12 ALR 605 at 617.

114 Gray and Bromberg JJ concluded the primary judge erred by failing to require BRIT to establish the "real reason" for the treatment of Mr Barclay, rather than that by which Dr Harvey had thought she had been actuated[91]. Their Honours linked this notion of the "real reason" to what had been said in the passage set out above by reiterating that "the search required by s 346 is a search for what actuated the conduct of the person who took adverse action, not for what that person thinks he or she was actuated by"[92]. Further, the e-mail was sent by Mr Barclay in his capacity as an officer of the AEU and, even if it were to be accepted that the content of the e-mail may have been overstated, his failure was that of a union officer and not of an employee[93]. The dismissal therefore occurred for a proscribed reason in contravention of s 346.

115 In his dissenting reasons, Lander J preferred the approach of the primary judge, namely, that when looking to identify the reasons "because" a decision was made, the question is to be answered "by reference to the subjective intention of the decision-maker"[94]. In this regard, whilst Mr Barclay may have been acting on behalf of the AEU when sending the e-mail, the adverse action taken by BRIT was not for this reason. The action was taken because "[Dr Harvey] was of the view that the allegation against [Mr Barclay] was serious, and [she] was concerned if Mr Barclay was not suspended he might cause further damage to the reputation of the (BRIT) and of the staff in the BRIT", as found by the primary judge[95]. These findings of fact had not been challenged before the Full Court[96].

The appeal to this Court

116 Before this Court the appellant accepts that it took "adverse action" against the first respondent under s 342 of the Act. On the footing that s 346 applies, the primary issue for determination is whether or not the adverse action was made "because" of a reason proscribed by s 346. No party to the appeal seeks to agitate the findings of fact made by the primary judge.

117 The Minister for Tertiary Education, Skills, Jobs and Workplace Relations ("the Minister") sought, and was granted, leave to intervene. The Minister largely supported the position taken by Mr Barclay and the AEU.

118 The appellant submits that there are four questions to be dealt with in this appeal; and it is convenient to proceed in this fashion. The questions may be formulated as follows:

1. Is the question of whether a person has taken adverse action because of a proscribed reason for the purpose of s 346 of the Act to be answered by an "objective" or "subjective" test?

2. If a primary judge accepts evidence of an employer that a decision has been made for an innocent and non-proscribed reason, and such findings and the reasons for such findings are not challenged, is this a good answer to an alleged breach of s 346?

3. If the answer to Question 1 is an "objective" test, did the majority of the Full Court nonetheless erroneously apply the test impermissibly narrowly?

4. Did the findings of the primary judge only go toward the "conscious" state of mind of the decision-maker, leaving open to the Full Court the making of findings with respect to the "unconscious" state of mind of the decision-maker?

Question 1

119 The appellant submits, in support of the approach taken by the primary judge, that in applying s 346 the court should favour the application of a "subjective" test, which is based on the history of the

[91] (2011) 191 FCR 212 at 233 [73]-[74].
[92] (2011) 191 FCR 212 at 233 [74].
[93] (2011) 191 FCR 212 at 234 [78].
[94] (2011) 191 FCR 212 at 256 [208].
[95] (2011) 191 FCR 212 at 258 [226].
[96] (2011) 191 FCR 212 at 257 [221].

legislation and the intention of Parliament. It contends that, while "objective" considerations are relevant, they are not decisive in testing the reliability and weight of the evidence.

120 The respondents submit, with support from the Minister, that (a) questions of subjectivity as opposed to objectivity serve only to misdirect the correct interpretation of s 346; rather, the relevant inquiry concerns that which the employer must establish to avoid a finding of contravention, and that (b) the ultimate issue becomes "whether the employer has discharged the onus of dissociating all the real reasons from each of the reasons proscribed by s 346". Submission (a) should be accepted. But while submission (b) correctly emphasises the importance of the onus placed upon the employer, it does not give proper effect to *Bowling*.

121 With respect to submission (a), to engage upon an inquiry contrasting "objective" and "subjective" reasons is to adopt an illusory frame of reference. Such an inquiry into the "objective" reasons risks the substitution by the court of its view of the matter for the finding it must make upon an issue of fact. Here, that finding was made by Tracey J and it was an error of law to displace it in the way seen in the reasons of the Full Court majority.

122 However, some attention should be paid here to a passage in the reasons of Lord Nicholls of Birkenhead in *Chief Constable of West Yorkshire Police v Khan*[97], which was repeated by Baroness Hale of Richmond in *Derbyshire v St Helens Metropolitan Borough Council*[98]. Section 2(1) of the *Race Relations Act* 1976 (UK) defined "discrimination by victimisation" in terms which posited treatment of the person victimised "by reason that" this person had acted in any of the ways then set out in pars (a)-(d).

123 Lord Nicholls denied that the expression "by reason that" attracted notions of causation as understood when attaching a legal conclusion to a particular state of affairs[99]. Rather, as his Lordship said, "[t]he reason why a person acted as he did is a question of fact"; he also remarked that "[u]nlike causation, this is a subjective test"[100].

124 The particular difficulty is that Lord Nicholls spoke as he did in response to a question he framed as follows: "What, *consciously or unconsciously*, was his reason?" (emphasis added). The reference to unconscious reasoning presents a paradox apparent in the passage in the majority reasons in the Full Court set out above[101]. This reference is apt to confuse and mislead the finder of fact.

125 It may be noted that in *Derbyshire*, Lord Bingham of Cornhill summarised Lord Nicholl's proposition in *Khan* as "[w]hat matters is the discriminator's subjective intention: what was he seeking to achieve by treating the alleged victim as he did?"[102] This formulation has no reference to the unconscious.

126 The relevant frame of reference in this case is a statutory provision in which neither the words "objective" nor "subjective" appear. There is an inherent risk of misguidance when seeking to imply tests or requirements in the application of a statutory provision absent some persuasive basis to do so. Nothing was put in argument, nor are there any decisions of this Court, to provide such a basis. Indeed, no direct challenge was made to what had been said by Mason J in *Bowling*.

127 In determining an application under s 346 the Federal Court was to assess whether the engagement of an employee in an industrial activity was a "substantial and operative factor" as to constitute a "reason", potentially amongst many reasons, for adverse action to be taken against that employee. In assessing the evidence led to discharge the onus upon the employer under s 361(1), the reliability and weight of such evidence was to be balanced against evidence adduced by the employee and the

[97] [2001] 1 WLR 1947 at 1954; [2001] 4 All ER 834 at 841.

[98] [2007] 3 All ER 81 at 96.

[99] So also was Lord Scott of Foscote: [2001] 1 WLR 1947 at 1964; [2001] 4 All ER 834 at 850-851.

[100] [2001] 1 WLR 1947 at 1954; [2001] 4 All ER 834 at 841.

[101] At [114].

[102] [2007] 3 All ER 81 at 86.

overall facts and circumstances of each case; but it was the reasons of the decision-maker at the time the adverse action was taken which was the focus of the inquiry.

128 Whilst it is true to say, as do the respondents, that there is a distinction between discharging the onus of proof and establishing that the reason for taking adverse action was not a proscribed reason, there is nothing to suggest that the conclusions drawn by the primary judge, and the findings and reasons upon which these were based, did not take this into consideration. As Lander J concluded, if the reasons for the conclusions and the facts for which they were formulated are not challenged, then the contravention of s 346 cannot be made out[103]. This proposition should be accepted. To hold otherwise would be to endorse the view that the imposition of an onus of proof on the employer under s 361(1) creates an irrebuttable presumption at law in favour of the employee.

129 Question 1 is to be answered: "Neither. The test is whether adverse action has been taken because of a proscribed reason."

Question 2

130 In the joint reasons in *Fox v Percy*[104], in a passage which has been applied since[105], Gleeson CJ, Gummow and Kirby JJ said:

> "[An appellate court] must, of necessity, observe the 'natural limitations' that exist in the case of any appellate court proceeding wholly or substantially on the record[106]. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the 'feeling' of a case which an appellate court reading the transcript, cannot always fully share[107]."

131 Further, absent any challenge to the findings of fact or reasons for the conclusions drawn by the primary judge, the decision that an employer has not acted for a proscribed reason in taking adverse action against an employee must stand. The findings by Tracey J in relation to the evidence of Dr Harvey established that the reasons for adverse action were not proscribed by s 346.

132 Question 2 is to be answered "yes".

Question 3

133 Applying what has been said with respect to Question 1, the Full Court erred in reassessing the reliability and weight of the evidence in this case. Such a course was not open to it.

Question 4

134 Given the answers to the above three questions, there was no scope for the Full Court to make findings with respect to the "unconscious" state of mind of BRIT.

Conclusion

135 The appeal should be allowed and consequential orders made as proposed by the Chief Justice and Crennan J.

136 These orders do not include a costs order with respect to the appeal to this Court. Section 26 of the *Judiciary Act* 1903 (Cth) states that this Court has jurisdiction to award costs in all matters brought

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[103] (2011) 191 FCR 212 at 258 [226].

[104] (2003) 214 CLR 118 at 125-126 [23]; [2003] HCA 22.

[105] *Australian Securities and Investments Commission v Hellicar* (2012) 86 ALJR 522 at 548 [130]; 286 ALR 501 at 534-535; [2012] HCA 17; *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357 at 381 [76]; [2010] HCA 31.

[106] *Dearman v Dearman* (1908) 7 CLR 549 at 561; [1908] HCA 84. See also *Scott v Pauly* (1917) 24 CLR 74 at 278-281; [1917] HCA 60.

[107] *Maynard v West Midlands Regional Health Authority* [1984] 1 WLR 634 at 637; [1985] 1 All ER 635 at 637, per Lord Scarman, with reference to *Joyce v Yeomans* [1981] 1 WLR 549 at 556; [1981] 2 All ER 21 at 26. See also *Chambers v Jobling* (1986) 7 NSWLR 1 at 25.

before it. This appeal is a matter brought before the Court under s 73(ii) of the Constitution. On that basis the appeal would attract a costs order.

137 However, s 570 of the Act provides that in "proceedings (including an appeal) in a court (including a court of a State or Territory) exercising jurisdiction under this Act", a party may be ordered by the court to pay costs incurred by another party to the proceedings only in certain circumstances, none of which is presently applicable. If it can be said that the right or duty in issue on the appeal to this Court from the Full Court of the Federal Court owes its existence not to s 73(ii) of the Constitution but to the Act, in which s 570 appears, then s 570 would appear to be engaged[108].

138 If the appellant seeks against the first and second respondents a costs order in respect of this appeal, and this is not resisted by those parties then a consent order may be filed.

139 If the first and second respondents resist that course then:

(a) the appellant is to file written submissions on or before 10 September 2012,

(b) the first and second respondents are to file written submissions on or before 12 September 2012, and

(c) any submissions by the appellant in reply are to be filed on or before 14 September 2012.

The costs issue then will be determined by the Court on the papers.

HEYDON J.

The trial

140 Dr Louise Harvey was the appellant's Chief Executive Officer. Mr Greg Barclay, the first respondent, was an employee of the appellant. He was also an officer of the second respondent, a trade union. She suspended him from duty and took other measures against him. The question was whether she did this "because" he had engaged in industrial activity within the meaning of s 346 of the *Fair Work Act* 2009 (Cth) ("the Act"). The word "because" requires an investigation of Dr Harvey's reasons for her conduct. Section 360 provided that "a person takes action for a particular reason if the reasons for the action include that reason." The Explanatory Memorandum makes it clear that to satisfy s 360 the particular reason must be an "operative or immediate reason for the action"[109]. Under s 361 of the Act, it is presumed that action was taken for a prohibited reason, unless the employer proves otherwise. Examining whether a particular reason was an operative or immediate reason for an action calls for an inquiry into the mental processes of the person responsible for that action.

141 Dr Harvey gave an account of her mental processes in an affidavit. The respondents' searching cross-examination of her is recorded over 70 pages of the trial transcript. The record of her re-examination extends over three pages of that transcript. The assessment of a witness's mental processes is an assessment of that witness's state of mind. It is pre-eminently a matter in which a trial judge has a considerable advantage over an appellate court. In the course of his great speech in *Nocton v Lord Ashburton*, Viscount Haldane LC said[110]:

> "it is only in exceptional circumstances that judges of appeal, who have not seen the witness in the box, ought to differ from the finding of fact of the judge who tried the case as to the state of mind of the witness."

The trial judge possesses great learning in the present field. He has considerable experience of oral hearings. He said that Dr Harvey "provided convincing and credible explanations of why it was that she

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[108] See *Construction, Forestry, Mining and Energy Union v The Australian Industrial Relations Commission* (2001) 203 CLR 645 at 660 [41]-[44]; [2001] HCA 16.

[109] Australia, House of Representatives, Fair Work Bill 2008, Explanatory Memorandum at 234 [1458].

[110] [1914] AC 932 at 957. See also at 945 and 949. And see *Clark Boyce v Mouat* [1994] 1 AC 428 at 436-437.

took the steps she did." He said that she "maintained her denials of having acted against Mr Barclay for any reason associated with his union membership, office or activities." He concluded: "I accept her evidence. I am satisfied that she did not act for any proscribed reason. Rather, she acted for the reasons which she gave."[111] Of course, "mere declarations" by a witness as to his or her "mental state" may not be sufficient to discharge the appellant's burden of proof under s 361[112]. External circumstances could put into question the reliability or credibility of those declarations. But Dr Harvey's evidence did not consist only of "mere declarations". There was nothing to suggest that her evidence was incorrect.

No challenge pressed to the trial judge's factual reasoning

142 In the Full Court, the respondents did not attempt to demonstrate any error vitiating the trial judge's fact-finding process[113]. In this Court, the respondents filed a notice of contention asserting that the trial judge "failed to appreciate the weight or bearing of established circumstances, namely that the first respondent was acting as an officer and engaging in industrial activities". However, at the end of their counsel's address, that notice of contention was almost silently abandoned. In that way, the respondents also jettisoned a number of unsupported and pejorative remarks in their written submissions about the trial judge, for example, that his conclusion "beggars belief". Had the respondents seriously attempted to demonstrate any error vitiating the trial judge's fact-finding process, they would inevitably have failed.

The Full Court majority's approach

143 Why, then, did the majority in the Full Federal Court depart from the trial judge's conclusions? The majority gave two main reasons.

144 *"Conscious" and "unconscious" reasons.* Their Honours drew a distinction between the "real reason for a person's conduct" and "the reason that the person asserts, even where the person genuinely believes he or she was motivated by that reason."[114] Their Honours said that the "real reason" could be "unconscious"[115]. They said that "what actuated the conduct of the person who took adverse action" could be different from "what that person thinks he or she was actuated by."[116]

145 In this Court, the respondents did not refer to this approach in their written submissions. This was despite the fact that the appellant had criticised it in its written submissions. The respondents referred to it in oral argument. But they did not long persist in any attempt to defend it. It is indefensible. Counsel for the respondents courteously, but scarcely enthusiastically, said of the Full Court majority's approach:

> "It might be said that that might be interesting, but it would be a little difficult to turn into a practical set of propositions in resolving a case. It might be so, but it might not be very helpful."

The respondents made no attempt to turn the Full Court majority's approach into a practical set of propositions enabling them to gain victory in this case.

146 To search for the "reason" for a voluntary action is to search for the reasoning actually employed by the person who acted. Nothing in the Act expressly suggests that the courts are to search for "unconscious" elements in the impugned reasoning of persons in Dr Harvey's position. No requirement for such search can be implied. This is so if only because it would create an impossible burden on employers accused of contravening s 346 of the Act to search the minds of the employees

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[111] (2010) 193 IR 251 at 257-258 [54].

[112] *Pearce v W D Peacock & Co Ltd* (1917) 23 CLR 199 at 203 per Barton ACJ; [1917] HCA 28.

[113] *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at 257 [221] and 258 [224] and [226].

[114] *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at 221 [28].

[115] *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at 221 [28].

[116] *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at 233 [74].

whose conduct is said to have caused the contravention. How could an employer ever prove that there was no unconscious reason of a prohibited kind? An employer's inquiries of the relevant employees would provoke, at best, nothing but hilarity. The employees might retort that while they could say what reasons they were conscious of, they could say nothing about those they were not conscious of.

147 Even if the Act did suggest that a search for "unconscious" elements was a proper one, the respondents did not demonstrate that there was any "unconscious" element in Dr Harvey's reasoning. Understandably, it did not occur to counsel for the respondents at trial to put any such proposition to Dr Harvey in cross-examination. It is true that the burden of proof was on the appellant at the trial. But at this appellate stage it is incumbent on critics of the trial judge's conclusion to point to an error underlying it. This the respondents did not convincingly do. There is no evidence whatever that supports the proposition that Dr Harvey "unconsciously" employed prohibited reasoning in taking action against Mr Barclay.

148 *A "logical" consequence of Mr Barclay's representative role.* The second theme in the Full Court majority's reasoning was that the appellant had not met its onus of proof because all the conduct of Mr Barclay which led Dr Harvey to act "was … done for and on behalf of" the second respondent[117]. The respondents submitted that from this fact it "logically" followed that the appellant must fail. Contrary to that submission, that circumstance did not prevent the appellant meeting its onus of proof. Dr Harvey's mental state did not turn on whom Mr Barclay was acting for, but on what he did.

The respondents' stance in this Court

149 In this Court, the respondents contended that s 346 of the Act "is not confined to the subjective intent of the decision-maker". They argued:

> "The 'real reason' for the adverse action may comprise a multiplicity of reasons, some of them 'subjective' in the sense that they refer to an intention, belief or other state of mind of the actor and others of which are objective in the sense that they refer to extrinsically ascertainable facts which comprise the context in which the action was taken. However, the enquiry to ascertain the real reason or reasons is objective. The decision maker may or may not be in a position to give dispositive evidence of the real reasons for the adverse action".

The respondent did not make it plain what precise meaning the words "objective enquiry" would have in this context. The language of the Act does not support the respondents' submission. The international instruments to which Australia is party and on which the respondents relied do not support it either. Nor do the authorities to which the respondents referred. One of those authorities, for example, was Mason J's judgment in *General Motors-Holden's Pty Ltd v Bowling*, with which Stephen and Jacobs JJ concurred. In that case, his Honour was considering the purpose of an earlier version of the Act. His Honour held that its purpose was to place on the defendant the onus of proving "that which lies peculiarly within his own *knowledge*" (emphasis added)[118].

Orders

150 The appeal should be allowed and the orders proposed by other members of the Court should be made.

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[117] *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at 233 [73].

[118] (1976) 51 ALJR 235 at 241; 12 ALR 605 at 617.

FAIR WORK AUSTRALIA

DECISION

Fair Work Act 2009
s.302—Equal remuneration order
s.160—Variation of modern award

Equal Remuneration Case

Australian Municipal, Administrative, Clerical and Services Union and others
(C2010/3131)

Australian Business Industrial
(AM2011/50)

JUSTICE GIUDICE, PRESIDENT
VICE PRESIDENT WATSON
SENIOR DEPUTY PRESIDENT ACTON
COMMISSIONER HARRISON
COMMISSIONER CARGILL

MELBOURNE, 1 FEBRUARY 2012

DECISION OF JUSTICE GIUDICE, SENIOR DEPUTY PRESIDENT ACTON, COMMISSIONER HARRISON AND COMMISSIONER CARGILL

INTRODUCTION

[1] This decision relates primarily to an application made by the Australian Municipal, Administrative, Clerical and Services Union (ASU) on its own behalf and on behalf of a number of other unions for an equal remuneration order under Part 2-7 of the *Fair Work Act 2009* (the Act) in the social, community and disability services industry throughout Australia (the SACS industry). The details of the application and the relevant circumstances are set out in the *Equal Remuneration Case—May 2011 Decision* published on 16 May 2011 (the May 2011 decision).[1] This decision also deals with an application by Australian Business Industrial (ABI) to vary the *Social, Community, Home Care and Disability Services Industry Award 2010*[2] (the modern award) under s.160 of the Act. ABI's application was lodged on 30 September 2011 and amended on 1 December 2011.

[2] In the May 2011 decision we summarised our findings as follows:

> "**[291]** In this decision we have concluded that for employees in the SACS industry there is not equal remuneration for men and women workers for work of equal or comparable value by comparison with workers in state and local government employment. We consider gender has been important in creating the gap between pay in the SACS industry

[1] [2011] FWAFB 2700.
[2] MA000100.

and pay in comparable state and local government employment. And, in order to give effect to the equal remuneration provisions, the proper approach is to attempt to identify the extent to which gender has inhibited wages growth in the SACS industry and to mould a remedy which addresses that situation. We have reached some preliminary views about how that might be done, recognising that simply adopting the pay rates resulting from the Queensland Equal Remuneration decision is not appropriate. It is desirable, however, that we give the parties the opportunity to make further submissions on the matters."[3]

[3] We then indicated that we would be interested to know the views of the parties on a number of matters. Those matters were:

"1. The nature of the alterations, if any, that should be made to the classifications and associated wage rates in the *Social, Community, Home Care and Disability Services Industry Award 2010* [MA000100] having regard to the Commonwealth's previous submission concerning graduate wage rates in that modern award.

2. The extent to which wage rates in the SACS industry are lower than they would otherwise be because of gender considerations, including how the amount of the gender related undervaluation of the work of the classifications in the industry should be calculated and concrete estimates of that gender related undervaluation.

3. The amount or amounts, either dollar or percentage, to be included in any equal remuneration order and estimates of the cost.

4. The phasing-in of any equal remuneration order and the effect of such phasing on the transitional provisions in the modern award.

5. The form of any equal remuneration order, including whether it should specify the particular wage rates that are to apply to the classifications in the modern award, or a monetary or percentage addition to the wage rates for the classifications in the modern award and whether it should provide for salary packaging and absorption of any overaward payments.

6. Whether the quantum in any equal remuneration order could or should be included in the modern award having regard, amongst other things, to the operation of the better off overall test."[4]

[4] We made provision for further submissions and encouraged the parties to hold discussions. Further hearings were scheduled for 8 to 10 August 2011. Many parties filed further submissions in June and July 2011. The hearings scheduled for 8 to 10 August 2011 were postponed until late October 2011 to permit discussions between the parties to continue. On 24 October 2011, the Commonwealth sought a further adjournment for the same purpose. The adjournment was granted. On 17 November 2011, the applicants and the Commonwealth lodged a Joint Submission setting out a number of agreed matters. In particular, the submission contained an agreed outcome, subject to some matters of detail.

THE JOINT SUBMISSION

[3] [2011] FWAFB 2700.

[4] [2011] FWAFB 2700 at para 292.

[5] The parties to the Joint Submission have agreed on an equal remuneration order, which is expressed in percentage terms as an addition to the modern award rate. The percentages and the resulting additions to modern award rates at each level are shown in the following table:

Modern award classification	Addition to modern award rate		Modern award rate plus equal remuneration order
	%	$	$
Level 2 Year 1	18	6 324.53	42 103
Year 2	18	6 773.31	43 678
Year 3	19	7 267.30	45 293
Year 4	20	7 849.57	46 892
Level 3 Year 1	20	7 849.57	46 892
Year 2	22	8 867.34	49 036
Year 3	22	9 055.25	50 079
Year 4	23	9 813.01	51 671
Level 4 Year 1	28	11 928.00	54 907
Year 2	27	11 844.77	55 950
Year 3	28	12 850.55	58 082
Year 4	29	13 443.82	59 692
Level 5 Year 1	33	15 449.60	62 824
Year 2	33	16 065.87	64 457
Year 3	33	16 525.64	66 043
Level 6 Year 1	36	18 468.63	69 107
Year 2	36	18 380.41	70 145
Year 3	35	18 304.18	71 195
Level 7 Year 1	38	20 392.17	74 404
Year 2	38	20 845.95	75 984
Year 3	38	21 303.73	77 568
Level 8 Year 1	41	23 417.72	80 803
Year 2	41	23 841.49	82 353
Year 3	41	24 346.27	83 984

[Source: Exhibit ASU 141.]

[6] The resulting minimum wage at each pay point, shown in the final column of the above table, is said to be the equivalent of the current rates in the *Queensland Community*

Services and Crisis Assistance Award – State 2008[5] (Queensland SACS award). The Joint Submission proposes that the increases should be phased in over the period from 1 December 2012 to 1 December 2018.

[7] Chapter 2 of the Joint Submission deals with the extent to which wage rates in the SACS industry are lower than they would otherwise be because of gender considerations. That chapter sets out a method of validation based on comparisons with wages payable in the public sector for comparable work. The approach is summarised in the following passage:

> "2.9 The method the Government and the applicants propose in this submission first identifies differences in the value of comparable work nationally, by the reference to appropriate public sector comparator rates, and then proposes a means of ensuring that, for SACS workers nationally, there will be equal remuneration for work of comparable value. In this way the Bench is able to ensure that there will be equal remuneration for the employees to whom the ERO proposed by this application will apply, as required by s. 302(1)."[6]

[8] The starting point for the validation is the Full Bench's conclusion, expressed in the May 2011 decision, that at a generalised level the value of the work in the SACS industry is comparable to the value of work of employees delivering similar programs and services in state and local government employment.[7] The Joint Submission identifies rates payable in each jurisdiction to employees said to be responsible for delivering similar programs and services to those in the SACS industry. The public sector rates so identified are then compared with the minimum wages in the modern award and the difference calculated at each level. This is referred to as the "public sector pay differential". The next step in the process involves an attempt to identify the proportion of the public sector pay differential attributable to gender considerations. Various studies concerning the extent of the unexplained portion of the gender wage gap were referred to. In particular, the study of Cassells and others and its finding that 60 per cent of the gender pay gap is unexplained by factors other than gender was relied on.[8] The Joint Submission utilises "caring work" as a proxy for gender considerations. To take two examples by way of illustration, jobs at Level 2 were said to be comprised of 96 per cent caring work and jobs at Level 8 were said to be comprised of 56 per cent caring work. The "caring work" percentages at each level were then applied to the public sector pay differential in order to put a monetary value on the extent of gender-based undervaluation. The proportion of caring work, involving both direct and indirect caring, for each level is based on a study that the applicants commissioned from Dr Anne Junor and Dr Celia Briar.[9]

[9] The results of these calculations are shown in Table 5 of the Joint Submission as amended during the hearing. That table is reproduced as Attachment A to this decision. The

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[5] The rates at Levels 6, 7 and 8 exclude the 7.5 per cent loading which is payable under the Queensland SACS award. The rates at Level 8 include the final instalment of Commissioner Fisher's Order which is payable from 9 January 2012.

[6] Applicants and Australian Government, Joint Submission, 17 November 2011 at para 2.9.

[7] [2011] FWAFB 2700 at para 242.

[8] R Cassells, Y Vidyattama, R Miranti and J McNamara, *The impact of a sustained gender wage gap on the Australian economy*, Report to the Office for Women, Department of Families, Community Services, Housing and Indigenous Affairs, November 2009, cited in the Joint Submission at para 2.28.

[9] C Briar and A Junor, *Community Sector Work: Proportion of Client Based Care by Modern Award Level October 2011*, Australian School of Business Research Report, University of New South Wales, cited in the Joint Submission at Attachment 1.

rates in the final column of Attachment A are said to be the Queensland SACS award rates. This method of calculating and compensating for gender-based undervaluation was said to justify the rates which would result from the agreed equal remuneration order. We note that in Attachment A the percentages proposed to be included in the order are rounded to the nearest whole number.

[10] The Joint Submission also sought to validate the rates which would result from the agreed equal remuneration order by using a comparison of award rates for comparable positions in the public sector. The comparisons were made between the Level 3 Year 1 rate in the modern award and rates for the equivalent classification levels in public sector awards applicable to comparator positions. On average, the public sector award rates were 18 per cent above the modern award Level 3 Year 1 rate. The relativities in the Queensland SACS award were then applied throughout the modern award classification structure to the increased Level 3 Year 1 rate. The resulting rates were said to validate those generated by using caring work to calculate gender-based undervaluation.[10]

[11] Chapter 3 of the Joint Submission deals with remedy. The parties to the Joint Submission acknowledged that the agreed equal remuneration order will result in rates which are lower than those which would result from the use of caring work as a proxy for gender-based undervaluation. They advanced two reasons. The first is to achieve national consistency. The second relates to the cost of implementing the care-based method and the potential employment effects.[11] The Joint Submission accepts that the order should operate as a percentage in addition to modern award rates and proposes that the precise percentage amounts can be worked out once the decision on remedy has been made.

[12] The proposals in relation to the phasing-in of the order are set out in the following passage:

> "3.10 The Government and the applicants submit that FWA should adopt the following approach to the implementation of the wage rates as proposed in this submission:
>
> a) Phasing in of the new rates of pay should commence from 1 December 2012.
>
> b) The full phasing in of the final pay rates should occur over a six year period (with the first instalment paid on 1 December 2012 and the final instalment implementing the full rates paid for all workers no later than 1 December 2018).
>
> c) Recognising that different employees may transition to the new pay rates at different times, the total cost of the transition arrangements should not exceed the total cost that would apply if all categories of employees were to transition to the new rates in equal annual instalments paid on 1 December of the years 2012 to 2018 inclusive.
>
> d) Transitional arrangements should allow those employees who are to receive a lesser quantum of increase to transition at a faster rate than employees who are to receive a higher quantum of increase.

[10] Joint Submission at para 2.62.

[11] ibid., at para 3.3.

e) That the arrangements are workable for employers to administer."[12]

[13] Under the heading of "Minimum wage adjustments and transitional arrangements", the Joint Submission deals with the transitional arrangements under the modern award and foreshadows an application to vary those arrangements. That application was dealt with in our decision of 22 December 2011.[13] It was also submitted that "barriers to bargaining that exist in the SACS sector will take time to ameliorate" and accordingly it would be "appropriate and desirable from a national consistency perspective given the Queensland order for an additional loading of one per cent per annum to be awarded in December of each of the years 2012, 2013, 2014 and 2015".[14] It was said that these amounts would be short-term compensation during the transition to a new funding and workplace relations environment.

[14] The Commonwealth drew our attention to the Prime Minister's announcement on 10 November 2011 that the Australian Government would provide over $2 billion during the six-year implementation period. It is committed to fund its share of the programs which it funds directly and also in proportion its share of the joint state/federal funding through specific purpose payments and national partnership payments. While the way in which those funding commitments will be applied will be the subject of discussions between relevant parties, it was made clear in submissions that the Australian Government is committed to meeting its share of the burden that will flow from any decision that is given in this case and there is no suggestion of a limit at the figure of $2 billion.

[15] A number of employers and other interested persons and bodies expressed support for the proposals in the Joint Submission. A list of those which had lodged letters of support was tendered by the Commonwealth.[15] The bodies on that list, other than employers, included the National Pay Equity Coalition and the Women's Electoral Lobby, the Council to Homeless Persons and the Australian Council of Social Service. The Australian Council of Trade Unions (ACTU) made oral submissions in support of the Joint Submission. In particular, it urged us to reject suggestions that implementing the proposals would lead to claims for flow-on increases in other industries. The Australian Human Rights Commission supported the methodologies established in the Joint Submission for evaluating the extent to which wage rates in the SACS industry are lower than they would otherwise be because of gender considerations. It submitted that economic consequences, such as capacity to pay, funding and employment, can only be taken into account when considering the implementation arrangements. Other submissions made in support or partial support of the Joint Submission are considered below in dealing with the submissions made by State and Territory Governments and by employers and employer bodies.

SUBMISSIONS OF STATE AND TERRITORY GOVERNMENTS

[16] We deal now with the submissions made by the State and Territory Governments. Following the May 2011 decision, submissions were received from the Australian Capital Territory, New South Wales, Queensland, South Australian, Tasmanian and Victorian Governments. The submissions responded to the matters identified in that decision.

[12] ibid., at p. 27.

[13] [2011] FWAFB 8800.

[14] Joint Submission at paras 3.16 and 3.17.

[15] Exhibit Commonwealth 8.

Following the Joint Submission, further submissions were received from the ACT, NSW, Queensland, South Australian and Victorian Governments. Some of these governments also made oral submissions.

Australian Capital Territory

[17] The ACT Government filed a written submission on 28 July 2011 and a letter dated 9 December 2011. The submission summarised a survey of wages and entitlements paid by SACS industry employers in the Australian Capital Territory which was conducted between December 2010 and February 2011.[16] The survey showed that at least 83.87 per cent of SACS industry employees in the ACT are paid overaward salaries and the actual proportion is likely to be higher.[17] It was submitted that this demonstrates that the salaries of such employees are set by the market. The high proportion of overaward payments was attributed to the lowest unemployment and highest workforce participation rates of any state or territory, relatively high levels of indexation growth in the ACT SACS industry funding models, multiple competing employers and the absence of non-urban regions in the ACT.[18] The ACT Government supports the proposals in the Joint Submission.

New South Wales

[18] The NSW Government filed supplementary contentions on 2 August 2011. In those contentions, it rejected any suggestion that there is a burden on non-applicant parties to disprove the link between gender and undervaluation, and said that it would be beyond statutory power to make an equal remuneration order providing greater remuneration for the employees to whom it applies than is payable to workers performing corresponding roles in the public sector. It also contended that any equal remuneration order should form part of, or be referred to in, the modern award.[19]

[19] In further supplementary contentions filed on 6 December 2011, the NSW Government referred to the Joint Submission and emphasised that to ensure the ongoing viability of the SACS industry, the amount of any wage increases flowing from this case needs to be sustainable and consistent with the requirement to ensure equal remuneration.[20]

[20] The overall budget impact on New South Wales of the remedy proposed in the Joint Submission and the NSW Government's policy of escalating the wages component of non-government organisations' funding was estimated to be between $977 million and $1.65 billion over the seven financial years affected by the proposed phase-in period.

[21] The NSW Government said the approach in the Joint Submission suffers from a number of limitations, including that it involves "reference to median rates of comparator award classifications, rather than actual comparators in relation to particular roles";[21] it is unconventional in relying on the extent of caring work carried out by a small group of SACS

[16] ACT Government, Further written submissions, 28 July 2011 at para 1.3.

[17] ibid., at para 2.34.

[18] ibid., at para 2.38.

[19] NSW Government, Supplementary contentions, 2 August 2011 at paras 39, 51.

[20] NSW Government, Supplementary contentions, 6 December 2011 at para 42.

[21] ibid., at para 27.

industry workers as a proxy for undervaluation; and the wage rates used to construct the national comparators have not been discounted to reflect non-gender components.

[22] With respect to the claim for a 1 per cent equal remuneration component to remedy impediments to bargaining and create national consistency on rates of pay, the NSW Government submitted that the conditions leading to the awarding of the equal remuneration component by the Queensland Industrial Relations Commission (QIRC) in *Queensland Services, Industrial Union of Employees AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others*[22] (the Queensland Equal Remuneration decision) are not present in this matter. It submitted there has been no finding here that barriers to bargaining have contributed to the gender undervaluation of the work in the SACS industry, the claim would reduce the incentive to bargain, and national consistency is not required by Part 2-7 of the Act.[23]

[23] The NSW Government concluded that the outcome of the case should not be regarded as setting a precedent.

Tasmania

[24] The Tasmanian Government filed a written submission on 29 July 2011. It submitted that an equal remuneration order and variation of the modern award should be made "to the extent that such an order can sustainably address the historical inequities in remuneration that have persisted for SACS workers".[24] It pointed out that its funding in the area is focused on outputs, although research has indicated that a significant proportion of the funding is allocated to wage-related expenditure.[25] It said that the potential impact on employment and services should be considered in determining how and over what period pay equity is achieved.

Queensland

[25] In a letter dated 6 December 2011, the Queensland Government indicated that it does not object to the outcomes proposed in the Joint Submission.

South Australia

[26] The South Australian Government filed a submission on 7 December 2011 supporting the remedy proposed in the Joint Submission.

Victoria

[27] The Victorian Government filed further submissions on 29 July 2011 and 6 and 12 December 2011. While it reiterated its support for pay equity and the making of an equal remuneration order to address undervaluation attributable to gender, it submitted that in fashioning an appropriate remedy we should also give consideration to matters such as the

[22] [2009] QIRComm 33; (2009) 191 QGIG 19.

[23] NSW Government, Supplementary contentions, 6 December 2011 at paras 22, 25.

[24] Tasmanian Government, Further submission at para 5.2.

[25] ibid., at paras 3.2–4.

impact on the SACS industry, SACS funding bodies and the broader economy.[26] It estimated that the cost of the proposals in the Joint Submission for Victoria, excluding the four 1 per cent increases, would be between $900 million and $1.1 billion over six years.[27] The four 1 per cent increases would cost an additional $200 million over six years.[28]

[28] The Victorian Government maintained that the principal causes of the disparity in wages between the SACS industry and state and local government employment are the role of government funding and the superior bargaining outcomes in the public sector. Other factors, including gender, have had less impact. It submitted that the applicants bear the onus of proving the extent to which rates are undervalued because of gender.[29]

[29] It also submitted, in response to the Joint Submission, that any remedy could not award "better than equal" wages compared to the relevant comparator workforce.[30] The methodologies used in the Joint Submission for calculating remedy were criticised because they do not discount the comparator wage rates for bargaining outcomes. The median national comparator rate, based on state public sector enterprise agreement rates, and the average national comparator rate, based on state public sector awards, result in higher rates of pay for many SACS industry workers in Victoria compared to their alleged public sector comparators. The "caring factor", used in the Joint Submission as a basis for determining remedy, was considered to be of little value as it is based on a sample size of only 17 care workers; has never been suggested as a means of measuring the extent of undervaluation; and the inclusion of "indirect care" leads to a skewed percentage of "caring" work being attributed to those in the upper echelons of management of the SACS industry.[31]

[30] The Victorian Government also submitted that the four 1 per cent increases sought in the Joint Submission should not be included in the equal remuneration order because it has not been demonstrated that the difference in bargaining outcomes between the SACS industry and the comparator workforce is due to gender.

[31] The Victorian Government said that any order should be separate from, but read in conjunction with, the modern award, provide as necessary for the disaggregation of the remedy as between various states and territories, and should be phased in over a six-year period commencing on 1 December 2012.[32]

EMPLOYER SUBMISSIONS

[32] Employers and employer associations made a variety of submissions on the questions posed in the May 2011 decision. The Joint Submission served to crystallise the position of many employers. Employers who subsequently made submissions amounting to unqualified support for the Joint Submission included:

- Jobs Australia

[26] Victorian Government, Further submissions, 29 July 2011 at para 7.

[27] Exhibit Vic 5, Attachment B, Statement of Georgina Grant at para 19.

[28] Victorian Government, Further submissions, 6 December 2011 at para 29.

[29] Victorian Government, Further submissions, 29 July 2011 at paras 43–45.

[30] Victorian Government, Further submissions, 6 December 2011 at para 3.

[31] ibid., at para 13.

[32] ibid., at paras 37–38.

- Anglicare (Canberra & Goulburn)
- St Vincent de Paul Society
- Hanover Welfare Services
- Inclusion Melbourne
- Domestic Violence Victoria
- Connections UnitingCare.

[33] Other employer groups raised concerns about the need for full funding of the claim in the course of expressing support for the proposed outcome. For example, National Delivery Services submitted that not-for-profit service providers have no capacity to pay for wage increases without increased government funding. The National People with Disabilities Carer's Council submitted that increases that were not fully funded will result in service reductions. Other employers who expressed similar concerns included Berry Street, Home Ground Services, the Federation of Community Legal Services, and the Association of Neighbourhood Houses and Learning Centres.

[34] Catholic Social Services Australia submitted that inadequate funding would impact adversely on jobs, the people seeking services and the community more generally. It submitted that at the time of the hearings, in December 2011, 75 per cent of its services remained unfunded to meet the proposed wage increase.

[35] A number of employer organisations and individual employers made submissions opposing the proposals in the Joint Submission. We deal now with some of those submissions.

Australian Industry Group

[36] The Australian Industry Group (Ai Group) submitted that it is essential that we adopt a very careful, methodical and rigorous approach. It did not identify an amount which would be needed to address the gender inequality which the tribunal has found to exist, but put forward an analysis intended to assist the tribunal to determine the appropriate amount.

[37] It relied on a study published in The Economic Record for the proposition that at all levels of the wage distribution, public sector employees receive a wages premium unrelated to gender.[33] The premium is significant in most cases—ranging from 15 per cent to 25 per cent, except in the 90th percentile, where the difference is much less.

[38] It submitted that it must be assumed that public sector rates are set on a gender neutral basis and rates which are higher than the lowest rate are not influenced by gender. Hence, the lowest public sector rate should be considered and discounted for factors that are not related to gender.

[39] Ai Group submitted that a number of factors should be considered, including the need to ensure that awards remain relevant and that their role as the safety net is not undermined, the need to avoid disturbing relativities in the safety nets that operate in different industries, the need to encourage collective bargaining and the need to avoid undermining the low paid bargaining provisions of the Act. In relation to the transitional

[33] JD Baron and DA Cobb-Clarke, *Occupational Segregation and the Gender Wage Gap in Private- and Public-Sector Employment: A Distributional Analysis*, The Economic Record, vol 86, No. 273, June 2010, pp. 227–46.

arrangements, Ai Group proposed that the term of any equal remuneration order should expire two years after the final step in the phasing-in process to permit enterprise bargaining to develop.

[40] In responding to the Joint Submission, Ai Group took issue with the extent of the unexplained portion of the gender wage gap in the Cassells study.[34] Ai Group relied on academic literature indicating that the unexplained gender wage gap is significantly smaller at lower ends of the wages distribution.[35] It also submitted that the methodology for establishing gender-based undervaluation based on the proportion of caring work has not been properly established.

Australian Federation of Employers and Industries

[41] The Australian Federation of Employers and Industries (AFEI) submitted that as no suggestion has been made that rates in the public sector have been influenced by gender, the starting point for any comparison must be the lowest discounted public sector rates for comparable work. It further submitted that the public sector comparator rates should be discounted for the well-established public sector premium and discounted further by the productivity component of public sector rates. It pointed to the movement in rates above the policy caps of 2.5 per cent and submitted that discounts should have regard to the extent of these movements. It estimated that for New South Wales, based on wage movements between 1997 and 2010, the discount should be 14.9 per cent.

[42] AFEI also submitted that the applicants had failed to demonstrate that the difference between public and private sector rates of pay is gender-based and that a partial discounting of the asserted public sector comparator rates demonstrates that there is no gender-based pay gap to justify an equal remuneration order. In the alternative, it submitted that any order should be minimal given the SACS industry's reliance on constrained government funding and the potential for leap-frogging.

[43] AFEI disputed the existence of an unexplained gender pay gap based on conceptual studies, relying instead on findings that there is no systematic gender wage gap for care workers in the SACS industry.[36] It also submitted that the methodology put forward in the Joint Submission for measuring gender undervaluation is unreliable. It contended that it has not been established that there is any connection between the proportion of care work and the causes of higher public sector wages. It submitted that the award comparator proxy rates are not a useful measure because of the numerous flaws in the comparisons, such as the lack of a precise job match and the additional components of public sector wages.

Australian Chamber of Commerce and Industry

[44] The Australian Chamber of Commerce and Industry (ACCI) submitted that the proposals in the Joint Submission constitute a claim for comparative wage justice with the public sector as the differences in pay have not been demonstrated to be gender-based.

[34] op. cit., R Cassells, et al. 2009.

[35] HJ Kee, *Glass Ceiling or Sticky Floor? Exploring the Australian Gender Pay Gap using Quantile Regression and Counterfactual Decomposition Methods*, Discussion Paper No. 487, March 2005, The Australian National University, Centre for Economic Policy Research Discussion Paper.

[36] G Meagher and N Cortis, *The Social and Community Services Sector in NSW: Structure, Workforce and Pay Equity Issues* April 2010, p. 29 and p. 30 at Table 7, cited in AFEI Further Submission on Remedy, 2 December 2011 at para 18.

Although it may not be possible to determine the degree of undervaluation with precision, the approach must involve an appropriate amount of rigour to determine why differences in pay exist. ACCI said:

> "Pay increases under the s.302 process should be awarded only on a rigorous basis. This is essential to (a) protect the integrity of wages policy and safety net scheme and (b) prevent expectations of flow-on with resultant industrial unease and unrest created by unrealistic expectations of flow-on. The fact that the Tribunal has not been able to indicate the quantum of gender related undervaluation which currently exists, is an indication that this application should not succeed and the Tribunal should not exercise its discretion."[37]

[45] ACCI submitted that the applicants have failed to isolate and quantify a gendered component of rates for comparable work. The application has a broad, industry-wide basis and the comparisons made with the public sector are simplistic. The methodology in the Joint Submission is inconsistent with the intention of Parliament, contrary to the objects of the Act and "key binding and relevant international conventions".[38] As a general principle, industry-wide claims should not be permitted under Part 2-7 of the Act.

[46] Finally, ACCI raised an issue concerning our jurisdiction under Part 2-7. The substance of the point is that in making comparisons with the rates for employees in the public sector we are limited to comparisons with the rates paid by national system employers to national system employees, namely: Victorian local government and public service employees, Tasmanian local government employees, and employees of the Australian Government and of the Territories.

Australian Business Industrial

[47] ABI submitted that the task of identifying the quantum of gender undervaluation may be assisted by identifying instruments that are demonstrably gender neutral. Comparisons with public sector awards and agreements, however, are not useful because of the presence of other factors, including a general public sector premium. ABI rejected reliance on private sector agreements for similar reasons.

[48] However, ABI submitted that the consent award rates in the non-government SACS industry in New South Wales are a useful guide because of their consensual development over many years, the application of the New South Wales Equal Pay Principle, historical consideration of difficulties in bargaining in the sector and the female characterisation of the work.

[49] ABI urged us to be cautious about adopting the rationale and approaches contained in the Joint Submission. It submitted that the comparator rates should be modified to remove misleading and extraneous factors. According to ABI, one way of confining the differential to genuine gender-based factors is to apply the assessment of Cassells that 60 per cent of differences in earnings between men and women workers are because of simply being female.[39] This would involve applying this percentage to the differences in salaries

[37] Australian Chamber of Commerce and Industry, Submission, 29 July 2011, at para 13.

[38] ibid., at para 50.

[39] op. cit., R Cassells, et al. 2009.

between public sector wages and the modern award. ABI submitted that this "washes out" other public sector considerations and adopts a sound and reasonable approach to the assessment of the extent of gender-based undervaluation.[40]

Chamber of Commerce and Industry Western Australia

[50] The Chamber of Commerce and Industry Western Australia submitted that the applicants have not addressed the questions posed in the May 2011 decision. They have failed to quantify the degree of gender-based undervaluation and, as they bear the onus of establishing the case, the claim must fail. It submitted that making an order which does not satisfy the necessary criteria would be likely to lead to other unions putting forward unsubstantiated demands that would be costly to defend and potentially unsustainable if implemented.

Queensland Community Services Employers' Association

[51] The Queensland Community Services Employers' Association submitted that it is affected by instruments derived from the QIRC Equal Remuneration decision in 2009. It is concerned that rates in the relevant Queensland instrument were increased by $20 and 3.4 per cent in September 2010 and September 2011 respectively, and believes that the amounts are incorrect. It has been involved in meetings with the Fair Work Ombudsman in Queensland to ascertain the correct legal obligations, but at the time of its submission was not aware of the outcome. It believes that the Joint Submission uses incorrect rates derived from the QIRC decision and that they should not be adopted in this case.

Mission Australia

[52] Mission Australia operates in the fields of employment services and community services under different enterprise agreements and funding arrangements. The employment services operations are not covered by the claim and are not considered to be female dominated.

[53] Mission Australia submitted that no case has been made out for the non-service delivery employees involved in administration, facilities management, cleaning and food service. If an order is made in relation to these groups of employees, it will result in inequity with similar employees working in other industries and between the two groups of employees employed by Mission Australia. At Level 2 of the community services structure the effect of the claim will be that administrative and non-care employees in community service operations will be paid between 4.8 and 21.7 per cent higher than the employees performing the same work in its employment services operations. It submitted that this inequity will result from the fact that the employment services work is not female dominated.

[54] Mission Australia submitted that the historical gap between public and private sector rates should be removed from the analysis because it is not gender-based. The resultant difference would be the only amount that could be justified as the amount of gender-based undervaluation.[41]

[40] Australian Business Industrial, Further submission, 2 December 2011 at paras 3.2–4.

[41] Mission Australia, Submission, 29 July 2011 at para 35.

CONCLUSIONS

[55] In the May 2011 decision, having indicated that we intended to make an equal remuneration order, we recommended that the parties enter into discussions with a view to reaching agreement on the terms of an order. The Joint Submission contains an agreement between the Commonwealth and the applicants on the main elements of an order. Although the Commonwealth is not a SACS industry employer, it plays a very important funding role, both directly and through the provision of funds to the states.

[56] An important, though provisional, view expressed in the May 2011 decision is that any equal remuneration order we make should take the form of an addition to rates in the modern award.[42] In light of the submissions we have now received, we confirm that conclusion.

[57] The issue has particular importance in this case because we are dealing with an industry of great size and diversity. Were we concerned with a single employer the issue may not arise in the same way. In that case it may only be a question of ordering equal remuneration as between the employees in the claimant group and the employees in the comparator group. As we indicated in the May 2011 decision, complications arise because of the industry-wide nature of the application and the diversity of the industry in question.[43]

[58] While the May 2011 decision dealt with the gap between rates in the SACS industry and rates in state and local government agreements, there is no justification for establishing a nexus between an equal remuneration order and market rates in state and local government. Attempting to establish such a link would be fraught with difficulty. Which rate or rates should be chosen? At what level or levels should the nexus be established? When should adjustments be made? Apart from these issues, there is also a difficulty in establishing a link to rates which are determined by market forces. Many factors influence market rates and it is clear that not all of the factors are gender-related. It is also important to be aware of the potential for wage levels resulting from an equal remuneration order to feed back into, and place pressure on, enterprise bargaining. If market rates were to be influenced by an equal remuneration order, it could be inconsistent with the equal remuneration provisions. We also agree with those who submitted that the equal remuneration provisions should not be used to facilitate what are in effect claims for parity with rates in the public sector.

[59] We said in the May 2011 decision:

> "We agree that it would be wrong to conclude that the gap between pay in the sector with which we are concerned and pay in state and local government employment is attributable entirely to gender, but we are in no doubt that gender has an important influence. In order to give effect to the equal remuneration provisions in these complex circumstances, we consider that the proper approach is to attempt to identify the extent to which gender has inhibited wages growth in the SACS industry and to mould a remedy which addresses that situation."[44]

[42] [2011] FWAFB 2700 at para 285.

[43] ibid., at para 277.

[44] ibid., at para 282.

[60] This approach, of attempting to identify the extent to which gender has inhibited wages growth in the SACS industry, was central to the May 2011 decision and remains central to our consideration of remedy. The adoption of percentages based on the modern award rates is consistent with that approach.

[61] For these reasons, we have decided that any equal remuneration order we make should be based on the wages in the modern award. The proposals in the Joint Submission are consistent with that requirement. Importantly, the percentage additions to the modern award wages, as varied from time to time in annual wage reviews, will provide an ongoing remedy for the part gender has played in inhibiting wages growth in the SACS industry.

[62] Following from our reasons for this conclusion, we have reservations about the two methods used in the Joint Submission to justify the percentages which are proposed at each modern award level. In particular, we do not think it would be appropriate to endorse any percentage or other relationship between the wages resulting from an equal remuneration order and wages in state and local government agreements or in an award. To the extent that comparisons with wages in state and local government agreements and awards provide a snapshot at a particular point in time they are useful in a general way. Given the almost universal support for phased implementation of any order under s.304 of the Act, it is inevitable that there will be a lengthy implementation period. There will be further growth in bargained and award wages in state and local government over the implementation period. In the circumstances, comparisons with current wage levels should be treated with some caution. We return to this matter later.

[63] We note the reliance placed on caring work as a proxy for gender-based undervaluation. Attempting to identify the proportion of work which is caring work at the various classification levels is consistent with one of the principal conclusions in the May 2011 decision.[45] In our view, however, the application of the care percentages suggested to the public sector pay differentials results in wage levels which are too close to current public sector pay levels. Pay levels which, as we have said, are determined by market forces. In some cases, the rates derived from the agreed percentages would exceed current public sector rates for comparable work, although this is highly unlikely to occur in fact as the rates will not be fully implemented until the conclusion of the phasing period, by which time public sector rates will have increased. We also have some doubts about the inclusion of indirect care in the definition of caring work. Despite these reservations we take the view that in general terms the percentages proposed in the Joint Submission are appropriate.

[64] There is widespread support for the proposals. While AFEI, Ai Group, ABI, the constituent members of ACCI and some individual employers oppose the proposals, many employers support them. A number of employers, if not most, are also concerned about funding issues. While not determinative, in an area where an exercise of broad judgment is called for, the level of agreement is important.

[65] The Commonwealth has given a commitment to fund its share of the increased costs arising from the proposals. While some state governments are opposed, no government has indicated it will be unable to fund its share. On the other hand there are significant risks which need to be considered. For example, there will be an impact on employers in relation

[45] ibid., at para 253.

to programmes and activities which are not government funded. As a number of opponents of the proposals pointed out, any order we make has the potential to affect employment levels and service provision where costs cannot be recovered. We are also concerned about the effect on the finances of a number of the states. We have decided that in the circumstances these risks can be satisfactorily addressed by an extension to the length of the implementation period.

[66] The percentages we have decided on at the various modern award levels in response to the proposals set out in paragraph 5 of this decision are as follows:

Level 2—19%
Level 3—22%
Level 4—28%
Level 5—33%
Level 6—36%
Level 7—38%
Level 8—41%

[67] These percentages are in line with the proposals in the Joint Submission. As we have already indicated, however, we have decided to extend the length of the agreed implementation period. The percentage loadings will be introduced over eight years, in nine equal instalments, commencing on 1 December 2012 and ending on 1 December 2020. This extends the implementation period proposed in the Joint Submission by two years. This extension is in recognition of the potential effects of the equal remuneration order on employment and service provision, and on state finances. Historically, growth in wages in agreements applying to state and local government employment has exceeded growth in wages in federal awards over similar periods. On that assumption, by December 2020, the gap between the wages derived from the operation of the equal remuneration order and wages in state and local government agreements will have increased. As time goes on the gap will continue to grow.

[68] We deal now with the proposal for cumulative annual loadings of 1 per cent over the first four years of the implementation period. The parties to the Joint Submission proposed, under the heading "Minimum wage adjustments and transitional arrangements", a loading of 1 per cent per annum in December of each of the years 2012, 2013, 2014 and 2015 to recognise impediments to bargaining in the industry and to provide national consistency with the position in Queensland. It was said that these amounts would "provide short term compensation for the SACS industry for its historical inability to bargain while it transitions to the new funding and workplace relations environments."[46]

[69] We have already indicated that the percentages proposed at each level are too close to current public sector wage levels. For this reason and because of the concerns we have already expressed about the potential impact of the order, we have decided that the proposed loadings, totalling a 4 per cent addition to wages, should be subject to the same implementation arrangements as the percentage additions to wages at each level. Therefore our order will provide for a loading of 4 per cent to be introduced in nine equal instalments over the period 1 December 2012 to 1 December 2020.

[46] Joint Submission at para 3.17.

[70] A number of parties proposed methods for estimating the extent to which the gap between wages in the SACS industry and wages in the public sector is attributable to gender. The Joint Submission refers to a number of studies which identify a proportion of the gender pay gap which is unexplained by factors other than gender. Particular emphasis was placed on a study which found that 60 per cent of the gender pay gap is attributable to gender considerations. Other studies estimated other percentages, mostly higher than 60 per cent. ABI submitted that 60 per cent was an appropriate proportion of the gap between wages in the SACS industry and wages for comparable work in the public sector to attribute to gender.

[71] Ai Group submitted that gender influences can be removed from public sector rates by discounting for factors not related to gender. It relied on a study which estimated that the appropriate discount ranges from 25 per cent at the 25th percentile to 15 per cent at the 75th percentile, although the difference at the 90th percentile is much less.

[72] As we have already explained, we do not think that it is appropriate to fix a relationship between the rates derived from the equal remuneration order and public sector rates. It is worth pointing out, however, that if historical differences in rates of growth in award rates and public sector agreement rates are maintained, it is likely that by 2020, at most levels, the wages resulting from the order will account for less than 60 per cent of the difference between the rates for the modern award classifications and the public sector comparator classifications used in the Joint Submission. Equally, on the same assumptions, the public sector discount proposed by Ai Group is likely to be achieved at most levels. While we are aware of various criticisms made of the public sector comparator rates selected, those criticisms do not affect the overall growth rates in public sector wages.

[73] We are prepared to make an equal remuneration order in the terms indicated. Such an order will ensure that for the employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value. The percentage additions at each wage level and the further 4 per cent loading will be introduced in nine equal instalments on 1 December in each of the years 2012 to 2020.

[74] We note that the transitional provisions in Schedule A to the modern award were amended in January 2012. The transitional provisions recognise that there are SACS industry employees covered by this decision whose current minimum wage, in a transitional minimum wage instrument or award-based transitional instrument, is lower or higher than the minimum wage for their classification in the modern award. Consideration should be given to the interaction between the transitional provisions and the implementation arrangements for the equal remuneration order. We encourage the parties to review the position to ensure there are no unintended consequences and that in any one year the overall cost impact is appropriate.

OTHER MATTERS

[75] In the May 2011 decision we sought the views of the parties in relation to a number of specified matters. We set those matters out at the commencement of this decision. There are some matters which remain to be addressed. We deal with them now.

[76] The first matter concerns the availability of salary packaging in relation to the amount of any equal remuneration order. In the May 2011 decision we said we did not think it appropriate to regard the possible benefits of salary packaging as equivalent to remuneration.[47] However, we left open the issue of whether any equal remuneration order should provide for salary packaging. Not all parties made submissions on this matter. Some who did misunderstood the Full Bench's remarks and addressed a different question. Few parties addressed the question which we raised. The Commonwealth submitted that salary packaging should be provided for in the equal remuneration order. Because of the terms of s.306 of the Act, unless the order deals with salary packaging explicitly, that section will preclude any enterprise agreement, whether made before or after the order, allowing for salary packaging. Ai Group submitted that the order should contain a note about salary packaging for the purposes of s.324 of the Act to clarify the situation. In our view, it would be appropriate to provide that any amounts payable under the equal remuneration order could be subject to salary packaging, complementing the provisions of the modern award in that respect.[48]

[77] The next matter is whether the order should provide for the absorption of overaward payments. There was general support for absorption. We think it is appropriate that the order should include a provision similar to clause 2.2 of the modern award.

[78] The final matter is whether the order should form part of the award or stand alone. Most parties took the view that the order should stand alone. Of the parties who addressed the operation of the better off overall test for enterprise agreements, most took the view that the benefit of the order would be protected by the terms of s.306 of the Act regardless of the operation of the better off overall test. We agree. The order should stand alone. Steps will be taken to include a notation in the modern award alerting readers to the existence of the order.

THE ABI APPLICATION

[79] We deal now with an application made by ABI to vary the modern award in relation to minimum wages for graduates. The starting point for consideration of the application is the following passage from the May 2011 decision:

> "**[262]** We next deal with a submission made by the Commonwealth concerning the modern award rates. The submission deals with the fixation of rates in the modern award, in particular the rates for graduates, and traces the relevant award history. [Australian Government, Outline of contentions, 18 November 2010.] The submission suggests that the graduate rates may not have been properly translated from predecessor awards when the classification structure in the modern award was finalised by the Full Bench of the AIRC in late 2009. In the Commonwealth's submission, the potential loss of relativity for graduates is between 2.3–2.7 per cent. In our view this matter requires further investigation. If an error occurred in the fixation of the rates and relativities in the modern award, or if the existing relativities were departed from for no good reason, the situation should be rectified."[49]

[47] [2011] FWAFB 2700 at para 244.

[48] See clause 14—Salary Packaging of the *Social, Community, Home Care and Disability Services Industry Award 2010* [MA000100].

[49] [2011] FWAFB 2700.

[80] ABI submitted that there are errors of the kind suggested in the Commonwealth's submission. It submitted that the entry point for the 3-year graduate and 4-year graduate should each go up one pay point to correct a misalignment of the wage rates when the modern award was made in 2009. While contending that the errors identified are not directly relevant to the operation of the equal remuneration provisions, ABI submitted that it would be desirable to correct the errors in order to ensure a known base for the operation of the equal remuneration order. We could amend the modern award using powers available under other provisions in the Act. There was general agreement to the application and no opposition to it. It is based on the reinstatement of the wage levels fixed for 3-year and 4-year graduates respectively by the Australian Industrial Relations Commission in the *Social and Community Services (Queensland) Award 2001* in 2002.[50] We grant the application including the consequential amendments to the classification definitions in the modern award.

[81] The Commonwealth submitted that in order to fully restore the relativities fixed in 2002, it would also be necessary to increase the rates for graduates by $164.10 per annum and to then apply that increase at every level in the classification structure. No other interested person or body supported this proposal. The Commonwealth does not have the capacity to make an application for a determination varying a modern award. Since no person or body with that capacity has sought a determination, we would be required to make a determination on our own motion. In the circumstances, we do not think it would be appropriate to act on our own motion.

FINALISATION OF THE ORDERS

[82] We require the applicants to file draft orders to give effect to this decision within 21 days.

PRESIDENT

DECISION OF VICE PRESIDENT WATSON

INTRODUCTION

[83] I am respectfully unable to agree with the conclusion of the other members of the Full Bench expressed in paragraphs 62–73 of the majority decision. In my view the applicants in this matter have failed to establish that the salary increases sought are consistent with the legislative provisions under which the application has been made.

[84] The case is unprecedented by reference to international equal pay cases. It does not seek equal pay for men and women in a single business, or in an industry. Rather, it seeks to establish a large minimum overaward payment for all men and women in the entire SACS industry to a level approaching public sector wage levels. It has more in common with a case

[50] AP808848, at clause 22 in particular, and AW796897 PR914950, 5 March 2002.

based on comparative wage justice than equal pay. In my view the applicants have failed to establish key ingredients of their claim. In particular, it has not been established that:

- the public sector is an appropriate equal remuneration comparator,
- the wage gap between the not-for-profit SACS industry and the public sector is primarily due to gender-based undervaluation, and
- it is appropriate to effectively extract the entire SACS industry from the enterprise bargaining framework of the Act for the foreseeable future.

For these reasons the claim should be rejected.

[85] The approximately 150 000 employees covered by this application are employed to assist the most vulnerable members of Australian society. The employers—approximately 4000 mostly small not-for-profit organisations—had their origins in voluntary charity work and still perform a significant amount of their work through volunteers. Employees covered by the modern award are primarily engaged in the delivery of services funded by governments. Governments previously conducted many of these services themselves but have moved the delivery of the services to the not-for-profit sector because it was considered that the not-for-profit sector could deliver the services in a more efficient and cost-effective manner. The employers are therefore heavily reliant on government funding for the programs in which employees are engaged.

[86] It is indisputable that employees in the SACS industry deserve more recognition and reward for the work they undertake. It is also indisputable that the organisations that deliver the services deserve to be funded in a manner that enables them to attract, retain and fairly reward qualified employees to perform the valuable services to those most in need. These factors clearly have strong emotional appeal and might have been relevant if broad arbitral discretion was available. However, the factors are not relevant to the primary statutory test Fair Work Australia is required to apply in relation to this application.

THE NEED FOR A CAREFUL AND RIGOROUS APPROACH

[87] The application is to make an equal remuneration order which is only available if it is established that there is not equal remuneration for men and women workers who perform work of equal or comparable value. The applicants have not sought to make comparisons between women's pay and men's pay. They have consistently sought to make comparisons between levels of pay in the SACS industry and the rates paid to government employees who perform similar work.[51] The highly unusual nature of this case highlights the need for very careful scrutiny of all elements of the case.

[88] In the May 2011 decision, the Full Bench found that gender is an important influence on the level of wage rates in the SACS industry and required the parties to make further submissions on the extent to which wage rates in the SACS industry are lower than they would otherwise be because of gender considerations. This task requires an adjudication as to the extent of gender-based undervaluation in the SACS industry. The application also requires a consideration of various discretionary factors which might bear upon the making

[51] [2011] FWAFB 2700 at para 277.

of an order. It is imperative that a careful and rigorous analysis is applied to these tasks. The test must be clear, the conclusion must be based on accurate findings and all relevant circumstances must be taken into account.

[89] Equal pay for men and women employees performing equal or comparable work is recognised as a fundamental right by major human rights instruments and the International Labour Organization. Legislative remedies exist in various jurisdictions including the European Union, the United Kingdom (UK), the United States of America (US) and Canada. In the United Kingdom, despite legislation existing for about 35 years, the number of new applications has increased markedly in recent years. In 2004–05, 8229 new applications were made. This increased to 44 013 new equal pay applications in 2006–07.[52] The increase in applications has led to the time taken for determining applications increasing to up to 8–10 years.[53] Of the 20 148 applications determined in 2008–09, 36 were successful.[54] Of the 20 100 determined in 2009–10, 20 were successful.[55]

[90] The UK experience highlights the potential for increased equal pay litigation in Australia. To the extent that the claims in the UK are valid, they disclose practices at the workplace inconsistent with legislation and contemporary community standards. To the extent that claims are not valid, they represent an attempt to misapply a legitimate legal remedy. To the extent that the number of applications arises from uncertainty as to the nature of obligations and remedies available it is a sad indictment on those responsible for the laws and their application. In the light of this experience, it is not inconceivable that an increased number of equal pay claims will be made in Australia if, arising from this case, there is ambiguity and uncertainty as to the nature of claims that can be made, the nature of the test to be applied and the findings necessary for a successful case.

[91] In Australia, the concept of equal pay has a long history and is universally supported. However, as outlined in the May 2011 decision, previous attempts to obtain equal remuneration orders under the federal legislation have been unsuccessful because of the failure of the applicants to demonstrate that the rates of remuneration arise from discrimination based on gender. There have since been changes to the legislative provisions. For example, as noted in the May 2011 decision, the explanatory memorandum to the Act states that the requirement to demonstrate discrimination as a threshold issue has been removed.[56] Nevertheless, the task of determining whether there is equal remuneration for men and women workers for work of equal or comparable value remains the fundamental requirement for any order.

[92] The context of the application and the nature of wage fixing in Australia also emphasises the need for a careful and rigorous approach. Since the 1990s the focus for fixing actual wage rates has been through a process of enterprise bargaining. Arbitration of wage rates has been limited to the rates contained in minimum rates awards, which each have a work value relationship with other rates in all other minimum rates awards, and very rarely, arbitration when industrial action over enterprise bargaining causes significant damage to the economy. Even when arbitration was more generally available, comparative wage justice

[52] Fredman, S, *Reforming Equal Pay Laws*, 2008, 37 Industrial Law Journal 193 at 195.

[53] Fredman, S, *The Public Sector Equality Duty*, 2011, 40 Industrial Law Journal 405 at 416.

[54] ibid.

[55] ibid.

[56] [2011] FWAFB 2700 at para 234.

was a discredited concept. It was considered that there was nothing anomalous in differences in pay and that comparisons with other groups of employees could not amount to a merit justification for a wage increase.

[93] The applicants are effectively seeking the arbitration of actual rates of pay for the entire SACS industry. The application is based on the concept of equal remuneration aimed at delivering significant wage increases utilising comparisons with wages paid to public sector employees. Media reports have quoted the ACTU as suggesting that the May 2011 decision will help establish a standard for other industries and is a milestone in seeking wage justice for women in all lines of work across Australia.[57] Despite the submissions of the ACTU to the contrary, it is also obvious that the ultimate result will be an important element of the precedent established by the case, especially if, as proposed by the majority, the original claim is granted in full.

[94] These circumstances demonstrate the need for a careful and rigorous approach. Once such an approach is adopted, it is clear, in my view, that the applicants have failed to establish that the rates they seek are justified or appropriate having regard to both the legislative test and the application of discretionary factors. I turn to the reasons for this conclusion.

THE ABSENCE OF A LEGITIMATE COMPARATOR

[95] On any view various aspects of the claim are highly unusual. An equal remuneration order is sought for both men and women workers. Unlike the remedies available in the UK which require comparisons of relative payments to men and women within a single business, the order is sought across multiple employers for their entire male and female award-covered employees.

[96] Not only is no comparison sought to be made with male employees employed by the same employer—no comparison is sought to be made with male employees of any other employer. The comparison that is sought to be made is with public sector employees who perform similar work. As with SACS industry employees, those employees are also primarily female. It is asserted that the pay of government employees is not subject to gender undervaluation. However, despite raising concerns as to the appropriateness of public sector comparisons in the May 2011 decision,[58] no reliable analysis has been provided of the inherent differences which exist between industries and different employers or the factors which might otherwise explain the reason for the differences in rates of pay.

[97] The UK case law is replete with analysis of the reasons for differences in pay because no breach of equal pay obligations arises where the pay practice is explained by objectively justified factors not related to gender.[59] The concept is that differences in pay, even within a single business, can and do exist for all types of legitimate reasons. A remedy is only available if the difference is because of gender. As I have noted above, differences in pay between employers, let alone between industries, are beyond the scope of UK equal pay

[57] Australian Council of Trade Unions, *Campaign—Equal Pay and Better Jobs for Women*, viewed 18 January 2012, <http://www.actu.org.au/Campaigns/EqualPay/default.aspx>.

[58] [2011] FWAFB 2700 at paras 277–80.

[59] See, for example, *Glasgow City Council v Marshall*, [2000] IRLR 272 (House of Lords); *Gibson and Others v Sheffield City Council*, [2010] EWCA 63 (Court of Appeal).

laws, apparently because differences in pay between employers are regarded as entirely legitimate in a market economy. Similar limitations exist under US statutes such as the *Equal Pay Act of 1963*.

[98] In both the UK and US jurisdictions, it is a defence to show that differences in pay are for reasons other than gender. In the case law in both jurisdictions, courts and tribunals examine the reasons for differences in pay in great detail. A remedy can only be granted to the extent that differences in pay are found to be for reasons tainted by gender. The House of Lords has warned that without a reliable comparator and without confining the equal pay remedy to differences because of gender, the equal pay legislation could be called into operation whenever mixed groups of workers are paid differently.[60] Questions of appropriate comparators and causation are important aspects of the case law in other jurisdictions. An inappropriate comparator or an alternative justification for a difference in pay is fatal to an equal pay claim. In Australia, the High Court has emphasised the need for a careful approach to issues of causation in anti-discrimination laws and applied relevant English authorities.[61] A similar approach is required in this matter.

[99] This international perspective and considerations of logic require the claim in this matter to be based on the establishment of a reliable benchmark or comparator and the elimination of any factors not related to gender from any comparisons that can legitimately be made. If a benchmark is sought to be utilised, it must be reliable. It must constitute equal or comparable work in every respect. Generalised comparisons of work between industries are insufficient. Comparable roles must be fully assessed against work value criteria. Remuneration for comparable roles must not contain additional elements such as the inevitable differences in pay between employers and between different industries or superior bargaining outcomes that generally arise in different sectors of employment.

[100] If government employment is sought to be the benchmark for pay in the SACS industry, it must be demonstrated that payment at the level of government employment is the minimum gender neutral level of wages for the SACs industry. As noted in the May 2011 decision, no such presumption can be made.[62] Further, the Full Bench has already stated that it would be wrong to conclude that the gap between pay in the SACS industry and pay in state and local government employment is attributed entirely to gender.[63] The applicants have not established that this conclusion is erroneous or should be departed from.

[101] Further, there is material before this Full Bench that establishes that there is a public sector premium not related to gender in public sector earnings in Australia.[64] It is also evident that there have been superior bargaining outcomes in the public sector which cannot be attributed to gender. The Australian Industrial Relations Commission repeatedly acknowledged this difference and in various arbitrated cases refrained from imposing public sector wages and conditions on private sector employers.[65]

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[60] *Glasgow City Council v Marshall*, [2000] IRLR 272.

[61] *Purvis v State of New South Wales (Department of Education and Training)*, 217 CLR 92 at 234–6, per Gummow, Hayne and Hayden JJ.

[62] [2011] FWAFB 2700 at para 277.

[63] ibid., at para 282.

[64] Ai Group Submission, 29 July 2011 at 25–45.

[65] See, for example, *CPSU, the Community and Public Sector Union v Employment National Limited*, Print R2508, 26 February 1999; *State of South Australia v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia*, PR957094, 8 April 2005.

[102] It has not been established that public sector wage levels are a reliable benchmark for gender neutral wages in the not-for-profit sector. In my view the failure to establish a valid benchmark represents a significant flaw in the applicants' case and is a barrier to granting the relief sought in this matter.

EVALUATING GENDER-BASED UNDERVALUATION

[103] There is an additional fundamental flaw in the applicants' case. The claim in this matter can only succeed to the extent that it is demonstrated that differences in pay are because of gender or to address gender-based undervaluation. In the first submissions made by the applicants since the May 2011 decision, it was asserted that the extent of undervaluation attributed to gender is the difference between what is paid to SACS industry employees under transitional arrangements and the remuneration paid to state and local government employees who perform similar work.[66] This approach was widely criticised by most parties including the Commonwealth as inconsistent with the Act. For example, the Commonwealth contended that an equal remuneration order can only address differences in remuneration that are gender based and the critical issue is the isolation of the gender-based component of the wage gap.[67]

[104] In subsequent submissions two techniques contained in the Joint Submission were relied on in an effort to demonstrate the extent of gender-based undervaluation in the SACS industry. The majority decision highlights the difficulties with both of these approaches. There is no reason in logic why the extent of gender-based undervaluation corresponds to the proportion of caring work undertaken by some employees in the classifications in the modern award. Further, the analysis of direct and indirect caring work relied on in the Joint Submission is highly questionable for reasons explained by employer groups in their submissions. The additional comparison of private and public sector wage rates is simply a comparison of those rates. It does not establish the extent of gender-based undervaluation.

[105] Nevertheless, the claim is maintained for increases which raise the entitlements of employees to the same level as decided by Commissioner Fisher in the Queensland Equal Remuneration decision. As noted in the May 2011 decision, the Queensland Equal Remuneration decision adopted, with some qualifications, the rates applying to what was found to be comparable work in state and local government employment.[68] In the May 2011 decision the Full Bench explained in detail the reasons why it would be inappropriate to adopt the rates resulting from the Queensland Equal Remuneration decision.[69] There is no reason to alter that conclusion. In relation to the requirement to assess the extent of gender-based undervaluation, the conclusion is equally valid whether the increase is applied immediately or phased in over time.

[106] As noted in the May 2011 decision, it is not alleged that the employers in the SACS industry are responsible for any gender-based undervaluation.[70] Employers are constrained by funding arrangements and do not differentiate between male and female employees. Nor

[66] ASU Submission, 22 June 2011 at 8.

[67] Australian Government Submission, 8 July 2011 at 3.3–7.

[68] [2011] FWAFB 2700 at para 240.

[69] ibid., at paras 263–8.

[70] ibid., at para 278.

is it asserted or admitted that those responsible for funding arrangements are responsible for gender-based undervaluation. Yet as noted in the May 2011 decision, it appears clear that the rates paid to employees in the SACS industry are the direct result of funding arrangements.[71] Governments fund programs based on factors such as limiting the cost of programs to the public purse and the competition that exists for grants. Funding is linked to outputs not inputs. Current levels are linked to historical funding levels. Voluntary labour, budgetary restraints and competition for funding have historically contributed to funding arrangements and continue to do so.

[107] The submissions in support of the claim in this matter infer that gender is inextricably entwined within these funding arrangements so that virtually the entire difference between the public sector rates and not-for-profit sector rates is gender related. Submissions in opposition to the claim contend that the funding arrangements are substantially unrelated to gender and do not provide justification for an equal remuneration order to the extent sought of 18–41 per cent. The majority of this Full Bench places significant reliance on the agreement of the Commonwealth and several major employers in the SACS industry to the increases sought. In my view the case should be decided on the tests required by the applicable legislation.

[108] The level of remuneration paid to employees depends on statutory and contractual obligations together with further amounts that may be agreed by an employer. Employers are almost always constrained in the payments they can afford to pay their employees by business circumstances, market conditions, commercial contractual terms or funding arrangements. If required to pay more than they can afford, the additional cost must be offset by a reduction in the number of hours worked by their employees or the number of employees.

[109] In the SACS industry the evidence establishes that employers are predominantly constrained from paying their employees more by funding arrangements. In many service contract areas of industry, employers are constrained from paying their employees more by competitive contractual rates.

[110] One employer who made submissions in this matter, Mission Australia, conducts some community service operations covered by the modern award and other employment services that are not. It employs various categories of employees, including many not directly engaged in service delivery such as administrative employees, cleaners and food service employees. A high proportion of community service employees are female but in the employment services division, most employees are male. The rates of pay in each division are similar—because of funding arrangements. Mission Australia is concerned that the order sought in this matter will require it to pay different amounts to administrative employees in each division who essentially perform the same work and that the increased rates for employees in its community services division will be because of the predominantly female workforce. This example shows that funding arrangements—and not gender considerations—are a major reason for current pay levels.

[111] One can test the proposition advanced by the applicants by reference to other similar circumstances. If a large employer decided to “contract out” catering or cleaning functions to a commercial contractor who provides services at lower costs by paying its predominantly

[71] ibid., at para 270.

female employees less than the direct employees, would the differential between the pay of direct employees and contractor employees be the result of gender undervaluation? In my view the commercial aspects of such examples are a major factor unrelated to gender.

[112] These circumstances lead to the conclusion that the current rates of pay for SACS industry employees are not entirely the result of the circumstance that a significant proportion of employees in the SACS industry are female. The rates are the result of market and funding arrangements which cannot be equated with gender undervaluation. Governments are responsible for the funding arrangements, and hence the wage gap between the SACS industry and the public sector. Any change to that situation must be based on a review of those funding arrangements.

[113] Further, no amount of agreement to the claim, or phasing in of the increases, can overcome the legislative hurdle that must be satisfied. The amount of agreement and the emotional appeal of the plight of SACS industry employees and their employers have been heavily relied on in this case. If this case was run under the anomalies principle in the 1980s, these factors would have a significant bearing on the broad arbitral discretion that once existed. But no such discretion now exists.

[114] Agreement could however be highly relevant in a different context. If the employees and employers in the SACS industry were successful in jointly lobbying the government funders to increase funding such as to allow enterprise agreements to be made on more than award minimum rates of pay, the existence of the agreement of the employers would satisfy the major statutory test and all those involved would be lauded for their efforts. Indeed, there appears to be every reason why this should occur and no reason why it should not, in the light of agreement by some governments to increase funding to the SACS industry. However, this case must be judged against the statutory test for equal remuneration orders and the applicants have simply failed, in my view, to demonstrate that increases in pay of the order sought correspond to the extent of gender-based undervaluation.

[115] It is not appropriate to speculate as to what increases are likely to occur in public sector employment and minimum wage adjustments in the future. For one thing, the recent high increases, closer scrutiny of government expenditure and a change to percentage minimum rates adjustments could indicate that the past is no indication of the future. Such an analysis also involves an inconsistent approach to the extent to which superior public sector bargaining outcomes are indicative of gender undervaluation. Estimating the future gap in public sector and SACS industry wages is certainly no substitute for a reliable finding on the extent of gender-based undervaluation. Such a finding is required if this claim is to succeed. No such reliable finding that justifies the extent of the claim can be made on the evidence adduced in this matter.

DISCRETIONARY FACTORS

[116] Even if a case of gender-based undervaluation is made out, the applicants would also need to satisfy Fair Work Australia that it is appropriate to make an order for increases at a particular level. This arises from the discretion vested in Fair Work Australia in relation to equal remuneration orders. The discretionary considerations involved in this matter are

many and varied as explained in the May 2011 decision.[72] When a claim for an order providing for significant increases in wages is involved, the impact on enterprise bargaining looms as a significant factor.

[117] The objects of the Act include achieving productivity and fairness through an emphasis on enterprise-level collective bargaining.[73] The provisions of the Act further this objective by providing very limited availability for any other method of achieving increases in actual rates of pay. Arbitration is of course not generally available. Enterprise bargaining is a process which enables employees and employers at the workplace level to develop actual terms and conditions which suit the circumstances of the enterprise. The mere participation in the process of enterprise level discussions and agreement making has an important impact on workplace culture and employee and employer alignment. Every group of employees in Australia is required by these provisions to seek agreement to wage increases or improvements in conditions with their employer. In many cases, the economic circumstances of the employer or the bargaining power of employees results in wages and conditions remaining at or near the level of the award safety net.

[118] The effect of granting the claim is that over the phasing-in period all employees in the SACS industry will have access to additional annual wage increases on top of the award safety net in addition to increases to award wages arising from annual wage reviews. When the order is fully phased in, there will be an ongoing entitlement to be paid well above the award. Funding arrangements at this stage are uncertain and many employers expressed concern at the situation if increased funding does not match new obligations. It is correct to observe that no government indicated that it would not meet increased funding obligations to enable payments to be made in accordance with the order without cuts in services or reductions in hours worked by employees. However, if this claim is granted, it is unlikely that future funding will exceed the obligations under the award and the accompanying equal remuneration order.

[119] The consequences of this are clear. If the claim in this matter is granted, it is inevitable that there will be very little or no enterprise bargaining in the entire SACS industry for very many years, probably decades. To selectively extract an entire industry from the enterprise bargaining legislative framework is a change of mammoth proportions. It is significant enough for the SACS industry alone. The precedent it creates for many other industries who cannot afford to pay significantly above the award and are female dominated highlights the need for great caution. It is not an overstatement to suggest that the future status of enterprise bargaining in this and other industries with similar attributes is at stake.

[120] Further, as indicated above, there is every reason why funding arrangements should be altered to allow employers in the sector to reach enterprise agreements with their employees for wages above the award safety net. Given the commitments or preparedness to fund increases arising from an equal remuneration order, there does not appear to be any reason why this increase in funding should not occur for enterprise bargaining purposes. Such an approach would not disturb the application of the central enterprise bargaining concepts of the Act to this industry and potentially other similar industries.

[72] ibid., at paras 273–5.

[73] *Fair Work Act 2009*, s.3(f).

[121] In my view, these additional factors lead to the conclusion that the claim for increases of the magnitude sought should not be granted in the circumstances of this case.

CONCLUSION

[122] This is a highly unusual case, unprecedented by international standards, in which the applicants are seeking to use the concept of equal remuneration for men and women workers to achieve significant above-award wage increases for both men and women workers in an entire industry. The case is seen as a test case of the equal remuneration provisions of the Act. These features require a very careful and rigorous approach to be adopted by Fair Work Australia.

[123] When subjected to such scrutiny, it is clear that the claim in this matter must fail.

[124] There has not been a satisfactory basis for establishing that public sector work is an appropriate comparator for employees in the not-for-profit SACS industry. In addition there is no basis for a finding that the extent of gender-based undervaluation is 18–41 per cent above award wage levels. It follows that an equal remuneration order providing for increases of that magnitude cannot validly be made.

[125] Further, the significant impact of the claim on enterprise bargaining in the SACS industry and other comparable industries militates against the claim being granted. The alternative of increased funding for enterprise bargaining in the SACS industry is a far more appropriate course of action.

[126] For these reasons, which are explained in more detail above, I do not consider that the applicants have made out a case for granting an equal remuneration order providing for increases above the award of between 18 and 41 per cent. In the circumstances of this matter, any such order would be inconsistent with the relevant statutory requirements and an inappropriate exercise of the discretion of Fair Work Australia. In my view the claim cannot succeed.

VICE PRESIDENT

Appearances:

P Lowson of counsel, *T Slevin* of counsel and *M Irving* of counsel with *K Harvey* and *J Wright* for the Australian Municipal, Clerical and Services Union and others.

H Borenstein SC with *M Harding* of counsel for the Australian Government.

R Doyle SC with *S Moore* of counsel and *K Bugeja* for the Minister for Employment and Industrial Relations for the State of Victoria.

K Eastman of counsel and *L Doust* of counsel with *G Boyd* for the Minister for Finance and Services for New South Wales (formerly appearing for the New South Wales Minister for Industrial Relations).

P Garrison of counsel for the Minister for Community Services and the Minister for Industrial Relations for the Australian Capital Territory.

W Ussher with *B O'Brien* and *L Booth* for the Queensland Attorney-General and Minister for Industrial Relations.

R Warren of counsel with *G Brack*, *D Makins*, *T Doyle* and *G Allen* for the Australian Federation of Employers and Industries.

S Smith with *M Mead* for the Australian Industry Group.

J Fetter with *E Thornton* for the Australian Council of Trade Unions.

B Briggs and *S Haynes* for Australian Business Industrial.

D Grozier for Australian Business Industrial and National Disability Services.

M Pegg for Jobs Australia.

D Gregory with *D Mammone* for the Australian Chamber of Commerce and Industry.

C Howell of counsel with *M Lindley* and *B Ackers* for the Australian Human Rights Commission.

B Lawrence of counsel with *A Matreve* and *M Cusack* for the Catholic Commission for Employment Relations and Catholic Social Services Australia.

C Smith for the Australian Council of Social Service.

R Davidson for Mission Australia.

S Hammond for the National Pay Equity Coalition and the Women's Electoral Lobby.

G Muir for the Queensland Community Services Employers Association Incorporated.

L Maloney for the Australian Childcare Centres Association and the Australian Community Services Employers Association.

S Bibby with *J Lawton* for the Community Employers of Western Australia.

D Jones with *C Harris* for the Chamber of Commerce and Industry Western Australia.

D Proietto for Open Families Australia Incorporated.

Hearing details since May 2011 decision:

2011.
Melbourne–Sydney (by video link):
October 24.
November 28.
December 7–8.

Attachment A—Exhibit ASU 141

Modern Award Classification	Current SACS Modern Award Rate	Public Sector Comparator Rate	Difference between SACS Modern Award and Public Sector Comparator (Total Undervaluation)	% undervaluation attributable to gender (based on Junor and Briar)	Undervaluation attributable to gender	Gender Neutral Wage Outcome (SACS Modern Award rate plus Undervaluation attributable to gender)	% increase from Modern Award to achieve Gender Neutral Wage Outcome	% increase from Modern Award to achieve Queensland SACS Rates	Queensland SACS rates
Level 2 Year 1	$35,778.47	$43,482.00	$7,703.53	96.00%	$7,395.39	$43,173.86	21%	18%	$42,103
Level 2 Year 2	$36,904.69	$44,789.00	$7,884.31	96.00%	$7,568.94	$44,473.63	21%	18%	$43,678
Level 2 Year 3	$38,025.70	$45,846.00	$7,820.30	96.00%	$7,507.49	$45,533.19	20%	19%	$45,293
Level 2 Year 4	$39,042.43	$47,310.00	$8,267.57	96.00%	$7,936.87	$46,979.30	20%	20%	$46,892
Level 3 Year 1	$39,042.43	$49,239.50	$10,197.07	89.00%	$9,075.39	$48,117.82	23%	20%	$46,892
Level 3 Year 2	$40,168.66	$50,964.50	$10,795.84	89.00%	$9,608.30	$49,776.96	24%	22%	$49,036
Level 3 Year 3	$41,023.75	$52,074.00	$11,050.25	89.00%	$9,834.72	$50,858.47	24%	22%	$50,079
Level 3 Year 4	$41,857.99	$54,387.50	$12,529.51	89.00%	$11,151.26	$53,009.25	27%	23%	$51,671
Level 4 Year 1	$42,979.00	$60,892.00	$17,913.00	85.50%	$15,315.62	$58,294.62	36%	28%	$54,907
Level 4 Year 2	$44,105.23	$63,760.00	$19,654.77	85.50%	$16,804.83	$60,910.06	38%	27%	$55,950
Level 4 Year 3	$45,231.45	$65,410.00	$20,178.55	85.50%	$17,252.66	$62,484.11	38%	28%	$58,082
Level 4 Year 4	$46,248.18	$66,468.00	$20,219.82	85.50%	$17,287.95	$63,536.13	37%	29%	$59,692
Level 5 Year 1	$47,374.40	$72,543.00	$25,168.60	81.00%	$20,386.57	$67,760.97	43%	33%	$62,824
Level 5 Year 2	$48,391.13	$74,324.00	$25,932.87	81.00%	$21,005.62	$69,396.75	43%	33%	$64,457
Level 5 Year 3	$49,517.36	$76,543.00	$27,025.64	81.00%	$21,890.77	$71,408.13	44%	33%	$66,043
Level 6 Year 1	$50,638.37	$84,187.00	$33,548.63	56.50%	$18,954.98	$69,593.35	37%	36%	$69,107
Level 6 Year 2	$51,764.59	$89,985.00	$38,220.41	56.50%	$21,594.53	$73,359.12	42%	36%	$70,145
Level 6 Year 3	$52,890.82	$90,372.00	$37,481.18	56.50%	$21,176.87	$74,067.69	40%	35%	$71,195
Level 7 Year 1	$54,011.83	$98,954.00	$44,942.17	57.30%	$25,751.86	$79,763.69	48%	38%	$74,404
Level 7 Year 2	$55,138.05	$103,212.50	$48,074.45	57.30%	$27,546.66	$82,684.71	50%	38%	$75,984
Level 7 Year 3	$56,264.27	$105,572.00	$49,307.73	57.30%	$28,253.33	$84,517.60	50%	38%	$77,568
Level 8 Year 1	$57,385.28	$111,882.50	$54,497.22	56.00%	$30,518.44	$87,903.72	53%	41%	$80,803
Level 8 Year 2	$58,511.51	$115,016.00	$56,504.49	56.00%	$31,642.51	$90,154.02	54%	41%	$82,353
Level 8 Year 3	$59,637.73	$115,016.00	$55,378.27	56.00%	$31,011.83	$90,649.56	52%	41%	$83,984

Decision summary

CONDITIONS OF EMPLOYMENT – wages – equal remuneration – work of 'equal' or 'comparable' value – gender disparity – discrimination – women – social and community services – non government employees – 'not for profit' sector – ss.302, 306 Fair Work Act 2009 – Full Bench – application by ASU and other unions for an equal remuneration order for social and community services (SACS) employees in the 'not for profit' sector – May 2011 decision concluded there is not equal remuneration for men and women in the SACS industry when compared with those in comparable local or State government employment – requested parties attempt to identify degree to which gender has inhibited wages growth and mould appropriate remedy – majority – Commonwealth government and applicant unions reached agreed position on remedy – generalised value of work in SACS industry is comparable with that in relevant government employment – SACS industry is one of great size and diversity – no justification for establishing nexus between SACS modern award rates and the market rates applying in public sector – equal remuneration case should not be vehicle to facilitate parity with public sector rates – equal remuneration order should be based on wages in modern award – increasing modern award rates will provide ongoing remedy for the part gender has played in wages disparity – caring work identified as proxy for gender based pay differential – attempting to identify the proportion of caring work undertaken in various SACS modern award classifications is consistent with May 2011 decision – Commonwealth committed to funding its part of any increased costs – risks about potential effects on employment levels and service provision can be addressed by suitable phasing in arrangements – percentage increases between 19% – 41% across modern award classifications – increases to be phased in via 9 equal instalments over next 8 years – increases fully absorbable against over award payments – minority – applicants have failed to establish that salary increases sought are consistent with Act – case is unprecedented by reference to international pay cases – applicants do not make comparisons between men's and women's pay – applicant's effectively seeking arbitration of actual rates of pay for entire SACS industry – inevitably there will be little if any enterprise bargaining in the industry for many years – would have dismissed application.

Equal Remuneration Case

C2010/3131 [2012] FWAFB 1000
Giudice J Melbourne 1 February 2012
Watson VP
Acton SDP
Harrison C
Cargill C
Citation: *Equal Remuneration Case* [2012] FWAFB 1000 (1 February 2012)

Austria

National reporter: Dr. Gerhard Kuras, Supreme Court of Austria
Report prepared by Christina Hießl

Judgment in Case 8ObA31/13m

Date of decision: 28.05.2013

Head

The Supreme Court as a court of appeal in matters of labour and social law,

composed of Chairman Dr. Spenling, Senate President of the Supreme Court, Hon. Prof. Dr. Kuras and Dr. Brenn, Judges of the Supreme Court, and Expert Lay Judges Mag. Dr. Wolfgang Höfle and Mag. Johann Schneller,

in the matter of labour law brought by plaintiff H***** K*****, represented by Dr. Norbert Moser, attorney in Klagenfurt, against the defendant B***** GmbH & Co KG, *****, represented by Dr. Heinrich Berger and Mag. Ulrich Berger, attorneys in Bruck an der Mur (value in dispute: EUR 21,800),

on the plaintiff's appeal against the judgment of the Oberlandesgericht Graz as Court of Appeal in labour and social law matters of 14 February 2013, GZ 6 Ra 93/12m-19, overruling the judgment of the Landesgericht Leoben as Labour and Social Court of 5 April 2012, GZ 21 Cga 19/12i-15 modified, gives the following judgment in closed session:

Verdict

The appeal is not allowed.

Grounds

The plaintiff was employed by the defendant as a blue-collar employee in the extruder department as from 17 July 2000. The employment relationship was subject to the Collective Agreement for Workers in the Iron and Metal Industry. By letter dated 30 January 2012, the plaintiff was dismissed in April 2012. The works council of the defendant objected to the termination, but did not follow the applicant's demand to challenge the dismissal in court.

The extruder department is organised by the defendant in three shifts. Until April 2012, four workers were working in each shift period; since May 2012, there are only three workers per shift. The duties of workers per shift are distributed by "division of labour", that is, each of the workers is qualified and also deployed for each of the three activities (mixer, examiner and presser). Only the plaintiff always worked as a mixer.

The plaintiff's dismissal is based on economic reasons on the part of the defendant. The management of the defendant wanted to keep staff with a high level of professional qualification. Thereby, temporary and permanent staff should be treated equally. The applicant was selected because he was

the only one trained and deployable exclusively for the position of a mixer. Until April 2012, nine permanent and three temporary employees were employed in the extruder department; since May 2012, there have been eight permanent and two temporary employees. After the dismissal of the plaintiff, no new temporary agency workers were hired in the department.

The plaintiff sought a declaration of uninterrupted continuance of his employment contract (main claim) and, alternatively, to declare the dismissal void (alternative claim). The alleged nullity of the dismissal is based on § 2(3) of the Law on Employee Assignment (AÜG). This rule prohibits the displacement of the regular workforce. According to the plaintiff, his workplace was not redundant because the temporary employees still working there exercised the same activity as the applicant. The dismissal was also socially inacceptable. Personal reasons for termination were not present.

The defendant replied that the Law on Employee Assignment does not provide for the sanction of nullity of a dismissal. Furthermore, no "replacement dismissal" was at issue. The applicant could therefore challenge the dismissal only based on [the general rules on dismissal protection of] § 105 of the Labour Constitution Act (ArbVG).

The first instance allowed the claim and declared that the plaintiff's employment contract continued beyond 30th April 2012. It held that the use of temporary employees must not endanger the jobs of employees in the user undertaking. A violation of § 2(3) AÜG can invalidate the dismissal. There was no "replacement dismissal" in the narrow sense. Nevertheless, in case of temporary employment, staff savings cannot be considered as an operational reason for termination if similar activities continue to be exercised by temporary employees. This could be affirmed in the case at issue, so that the endangering of the plaintiff's job by the use of temporary workers was obvious.

The Court of Appeal granted the defendant's appeal and dismissed the plaintiff's main claim by part judgment. It stated that a general prohibition to dismiss permanent employees while hiring temporary agency employees cannot be derived from § 2(3) AÜG. Only when a situation occurs in which the permanent workforce is replaced by temporary employees who are easily made redundant, this may require the sanction of nullity of termination of ordinary employment contracts. Such a replacement dismissal was not at issue. The reason for the dismissal of the claimant was based on rationalisation measures. The proscribed motive of displacement of the plaintiff as a regular employee could not be established. Ordinary appeal to the Supreme Court was permitted, because last-instance jurisdiction on the question of whether and under what conditions a termination is void if at the same time temporary employees are assigned to the same company was missing.

This decision is the subject of the plaintiff's appeal, which aims at the allowance of the main claim.

In its reply, the defendant requested to declare the appeal inadmissible or, in the alternative, to dismiss it.

Legal assessment

The appeal is admissible for the reasons given by the Court of Appeal. But it is not well-founded.

1.1 It needs to be held at the outset that subject of this appeal is only the claim for a declaratory judgment. The question at issue is only whether the dismissal of the plaintiff was void because of a connection with the hiring-in of temporary employees within the meaning of § 2(3) AÜG in conjunction with § 879 Civil Code. The challenge of the termination based on social unacceptability is not subject of this appeal.

1.2 The applicant takes the view that the protective provisions of § 2(3) AÜG must be constructed so that, also in case of rationalisation measures, the working conditions of regular employees are to be protected primarily, and therefore the hiring-in of temporary agency employees must in any event be reversed if the activity entrusted to a temporary employee could also be exercised by the regular employee to be made redundant. Thereby, he points out that after proper training he could be used as an examiner (but not as a presser).

This raises the question whether – in case of cancellation of a job due to rationalisation – a regular employee can displace an agency employee, if that regular employee exercises activities comparable to those of the temporary employee or could exercise them after retraining.

2.1 According to § 2(3) AÜG, the use of temporary agency work must not impair wages and working conditions, nor jeopardise jobs in the user undertaking.

Sacherer (in Sacherer/Schwarz, Arbeitskräfteüberlassungsgesetz² 107) argues that a dismissal is "as a rule" void for breach of an express statutory prohibition (§ 879 Civil Code) if employees are dismissed (also when given the option of employment under less favourable conditions) although similar activities are (continued to be) exercised by temporary employees. Moreover, when confronted with an action challenging the dismissal as socially inacceptable according to § 105(3)2 ArbVG, the employer will often hardly be in a position to establish operational reasons for termination pursuant to subsection b of this provision, if comparable activities are provided at least temporarily by employees assigned to the undertaking.

Tomandl (Arbeitskräfteüberlassung 42) refers to the view of Sacherer. He also points out that the objectives of § 2 AÜG consist in the protection of agency employees and the prevention of adverse labour market developments. The protection of regular workers according to § 2(3) AÜG specifies the objective of avoiding adverse labour market developments through the use of assigned employees (Tomandl, Arbeitskräfteüberlassung 39 and 41).

Schindler (in ZellKomm² § 2 AÜG para 16) argues that the dismissal of regular employees could "usually" not be justified on operational grounds (§ 105(3)2 ArbVG) where the undertaking hires in employees whose activities the dismissed employee could take over – possibly after appropriate retraining. If regular employees are dismissed and replaced by the use of a temporary employee, such a dismissal is void for violation of § 2(3) AÜG, regardless of the expected duration of the assignment, because any replacement dismissal is contrary to the express statutory prohibition. He also points out that § 2(2) and (3) AÜG contain two fundamental instructions for achieving the objectives set out in § 2(1).

According to *Geppert* (Arbeitskräfteüberlassungsgesetz 40), operational requirements justifying a dismissal under § 105(3)2(b) are lacking where temporary employees are hired in and regular ones are dismissed for that reason.

2.2 The Supreme Court agrees with the view that a *replacement termination,* in which a regular employee is laid off and replaced by a temporary employee, is void for breach of a statutory prohibition according to § 879(1) Civil Code in conjunction with § 2(3) AÜG.

An replacement dismissal in this sense is not at issue here. Thus, the plaintiff was not replaced by a temporary employee. Rather, the Court of First Instance found that after the dismissal of the plaintiff no new temporary workers were hired in to work in the extruder department.

2.3 Even otherwise, a nullity of the dismissal of the plaintiff cannot be assumed based on the continued employment of temporary employees.

According to the findings, the tasks are performed by division of labour in each shift; that is, each of the (formerly four and now three) employees per shift, whether regular or temporary, practice all three activities as a mixer, examiner and presser. In this sense, the plaintiff himself has argued that there were no fixed workplaces in the extruder department. But the plaintiff was the only one who practiced only one activity, namely that of a mixer. If work in the extruder department is considered as a comprehensive activity, the applicant cannot rely on the exercise of a comparable activity due to his limited range of capacity.

In addition, it is crucial that the dismissal of the plaintiff was based on rationalisation measures of the defendant. Since May 2012, there have no longer been four, but only three employees working in three shifts in the extruder department. The staff of this department has been reduced by one regular employee and one temporary employee. On closer examination, inter alia, one workplace became

redundant in the plaintiff's shift, namely that of the plaintiff. This workplace was therefore cancelled. In this shift, one temporary employee continues to work.

The defendant can also rely on an objective reason for choosing the plaintiff for termination. The plaintiff was the only one to be used only as a mixer. A job as a presser was not an option. He could have been trained only for the work as an examiner. The importance of work by division of labour in the extruder department for the defendant, i.e. the fact that each employee per shift is capable of all kinds of work, is not invalidated by the applicant. Rather, he has himself pointed out in his submission that in the department in question there were no fixed workplaces. According to the findings, the defendant tried to treat regular and temporary employees equally in the course of the rationalisation.

2.4 In the specific situation of the case at issue, in accordance with the principles described, a nullity sanction cannot be applied to the dismissal of the plaintiff as a regular employee. Neither does the dismissal of the plaintiff constitute a displacement of ordinary workers, considering its underlying objective justification.

3.1 To sum up:

A *replacement termination*, in which a regular employee is laid off and replaced in his/her function by a temporary employee, is void. Where, however, the dismissal of a regular employee while continuing to hire in a temporary employee is based on objective reasons of importance for the employing undertaking, such as rationalisation, the dismissal of the regular employee does, generally speaking, not entail the nullity of the dismissal.

3.2 The Court of Appeal's decision is in line with these principles. The appeal by the plaintiff therefore had to be rejected.

Belgium

National reporter: Justice Koen Mestdagh, Court of Cassation

In Belgian Labour Law the historical distinction between manual workers (blue collar) and intellectual workers (white collar) is still made. Many differences in all sorts of matters still exist. This distinction is also reflected in the structure of some trade unions, in collective bargaining (in a lot of branches of activity separate joint industrial committees exist for the manual and intellectual workers), and even in the composition of the panel of a Labour Court.

Some of the differences are not important or merely organisational. For instance a manual worker must be paid twice a month, while an intellectual worker is paid monthly. The wages of manual workers are expressed in an hourly rate, the wages of intellectual workers in a monthly rate. For manual workers the holiday payment is collected by the National Social Security Office and paid to the worker by one of the Holiday Funds organised by employer associations, or by the National Holiday Service, while an intellectual worker receives his holiday payment straight from his employer.

But there are also some important differences and two of these have been examined by the Constitutional Court:

- In case of work incapacity not caused by an occupational disease or a labour accident, both manual and intellectual workers preserve the right on their normal wage during 1 month, but for a manual worker the first day is not taken into account (carenz day) if the duration of the work incapacity is less than 14 days (article 52, § 1, al. 2, Labour Contract Act). For intellectual workers the first day of work incapacity is always taken into account.
- According to article 82, § 2, Labour Contract Act, the employer who wants to dismiss an intellectual worker with a labour contract for indefinite duration, has to observe a period of

notice of 3 months if the employee has less than 5 years seniority in the undertaking; the period of notice is prolonged with 3 months for every begun period of 5 years. If the annual wage of the intellectual worker exceeds 16.100 euro (31.467 euro in 2012), the period of notice has to be negotiated (if it doesn't come to an agreement, it is decided by the judge) but cannot be less than as stated in the aforementioned § 2 (article 82, § 3).

For manual workers the period of notice the employer has to observe is 28 days up to 20 years of seniority and 56 days if the worker has at least 20 years of seniority in the undertaking (article 59, al. 2 and 3, Labour Contract Act).

- The period of notice is raised by the CLA n° 75 of 20 December 1999 to 35 days (between 6 months and 5 years of seniority), 42 days (between 5 and 10 years of seniority), 56 days (between 10 and 15 years of seniority), 84 days (between 15 and 20 years of seniority) and 112 days (over 20 years of seniority). In some branches of activity a more favourable period of notice is provided for by Royal Decree or CLA, but never comparable to what is provided for intellectual workers.
- By Act of 12 April 2011 the general notice period for manual workers is brought, only for employment that has begun after 1 January 2012, to 28 days (- 6 months of seniority), 40 days (between 6 months and 5 years of seniority), 48 days (between 5 and 10 years of seniority), 64 days (between 10 and 15 years of seniority, 97 days (between 15 and 20 years of seniority) and 120 days (over 20 years of seniority).

Since 1989 the Constitutional Court (then called the Court of Arbitration) has the competence to examine whether provisions of Parliamentary Acts are in accordance with the principles of equality and non-discrimination laid down in the articles 10 and 11 of the Constitution.

The first time the Constitutional Court was invited to examine a preliminary question on the provisions of the Labour Contract Act establishing differential treatment for manual and intellectual workers concerning the length of the period of notice, it found that in 1993 the historical distinction had become difficult to justify objectively and reasonably. It considered however that the legislator was gradually eliminating this inequality and that this process would continue and decided that, at the time being, the differential treatment was not unconstitutional. In 2004 the Constitutional Court upheld this judgment.

In 2011 the Constitutional Court had to examine for the third time a preliminary question on this matter. By now it had lost its patience. By judgment n° 125/2011 of 7 July 2011, the Constitutional Court considered that the relevant criterion for distinction could no longer be deemed relevant. Although the Special Law of 6 January 1989 doesn't empower the Constitutional Court to do so (a judgment given in preliminary proceedings has a declaratory nature), it decided to maintain the effect of the provisions at issue until 8 July 2013 at the latest, thus giving the legislator two year to harmonise the treatment of manual and intellectual workers.

The government left it to the social partners to find a solution and for a long time the social partners didn't do anything. For the observer it was quite clear that it would be nearly impossible for the social partners to bridge the huge gap between the positions of manual workers and intellectual workers, already for the two provisions that were at issue in the Constitutional Court's judgment n° 125/2011 of 7 July 2011. The question how to solve the problems that will arise if the legislator doesn't come with a solution has been on the mind of Labour Tribunal and Labour Court judges for a long time.

Finally, after 56 hours of negotiations, mediated by the Minister of Work, her chief of cabinet and the prime minister's chief of cabinet, an agreement was reached in the night of 5 on 6 July 2013. At the

time of writing I can't explain exactly what has been agreed upon concerning the matter of the length of notice, the only information I have coming from the press. From what I've heard, the new rules will be complicated and there is a fair chance that they will provoke new preliminary questions to the Constitutional Court. What I'm certain of however is that the new rules only will come into force on 1 January 2014. The time in between is needed to draft the new provisions and get them voted in Parliament. The social partners have also committed themselves to lift other differences than the two that were at issue in judgment n° 125/2011.

Thus, in the coming months and years the Labour Tribunals and Labour Courts, and eventually the Court of Cassation, will be confronted with the problem how to deal with the claims of employees, in particular manual workers, who are dismissed between 7 July 2013 and 1 January 2014. Can for instance a manual worker with 6 years of seniority in the undertaking, dismissed in September 2013 with a 42 days notice, claim a compensation equal to 20 weeks of wages from his former employer? Or does he need to involve the Belgian government in the procedure and claim that compensation from the State?

I think this could lead to an interesting discussion in which the differences in our legal systems undoubtedly will play a prominent roll.

See Annex 1.

Denmark

National reporter: Judge Niels Waage, Justice, Municipal Court

Introduction to the Danish Labour Court judgment "Vejlegården"

It is characteristic of Danish labour market regulations that wages and other working conditions are secured through collective agreements and not through legislation. The workers' organisations right to conflict in order to achieve a collective agreement is thus decisive for wage setting and achieving other core working conditions in Denmark and rather extended.

The Danish Parliament has until now left it to the practise of the Labour Court to define the limits of the workers' organisations right to conflict, although motions several times have been proposed in the Danish Parliament to compel the government to present proposals for limiting the possibilities of workers' organisations to initiate conflict and industrial action, e.g. in cases where a trade union starts a dispute to achieve a collective agreement in an area already covered by a collective agreement with another trade union. These motions have not been adopted, however, with reference to the fact that codification of the right to conflict would be very difficult and would fundamentally change the current division of roles on the Danish labour market.

Therefore, when the Labour Court deals with such cases, the result is often a great political interest from the public and the media. This also happened in 2012 when a relatively small case concerning a small restaurant "Vejlegården" in Jutland escalated into a sort of test case on the politically delicate matter of the limits of the right of conflict in Danish collective labour law. As such it resulted in a more intense interest from the public, politicians and media than any other labour court case for many years. E.g. more political parties who supported the owner of the restaurant held meetings in the restaurant to demonstrate their support.

We have chosen the judgment "Vejlegården" as the Danish example of a "leading case" not only because of the great public interest of the case, but also because we believe that the judgment well illustrates an essential part of Danish Labour law and the central role the Labour Court plays on the labour market.

Judgment of the Danish Labour Court of 29 November 2012
in case no. AR2012.0341:

The Christian Employers' Association
on behalf of
Restaurant Vejlegården ApS
(Attorney-at-Law Anders Schmidt)
vs.
The Danish Confederation of Trade Unions
on behalf of
The United Federation of Danish Workers
(Attorney-at-Law Pernille Leidersdorff-Ernst)
Judges: Lene Pagter Kristensen, Thomas Rørdam (Presiding Judge), Poul Dahl Jensen; see the Danish Industrial Court Act, section 8, subsections 1 and 2.

The dispute

The case, which was brought before the Danish Labour Court by way of the complaint of 23 May 2012, relates to whether the main dispute against Restaurant Vejlegården ApS notified and initiated by the United Federation of Danish Workers, and secondary action initiated in support of the main dispute, are lawful.

Claims

The plaintiff, the Christian Employers' Association on behalf of Restaurant Vejlegården ApS, primarily claimed that the defendant admit that the total scope of the main dispute initiated and the secondary action initiated is not proportionate considering the fact that the plaintiff is already covered by a collective agreement between a nationwide employee and employers' organisation, for which reason the secondary action is illegal.

In the second alternative, the plaintiff claimed that the defendant admit that the main dispute initiated is illegal, as the secondary action to a material extent is based on illegal industrial action, and that the defendant for this reason is precluded from supporting a collective bargaining demand using main and secondary action during a 'peace period' determined by the Labour Court.

In the third alternative, the plaintiff claimed that the defendant be ordered to admit that the secondary action initiated, comprising

1) customer inquiries and calls for customer boycott and/or
2) mail delivery and/or
3) waste removal

is illegal.

The defendant, the Danish Confederation of Trade Unions on behalf of the United Federation of Danish Workers, denied the claims.

Statement of claim

The main dispute and the use of banners and handbills and customer inquiries etc.

On 1 November 2011, Restaurant Vejlegården ApS took over the lease of Restaurant Vejlegården. Amin Skov, who is also in charge of the restaurant, owns the company. Soon after the takeover, Amin Skov was contacted by the United Federation of Danish Workers (3F), Vejle, which wished to enter into a collective agreement with the company covering the restaurant. However, Amin Skov did not wish to enter into a collective agreement with 3F, as the company as a member of the Christian Employers' Association was already bound by the collective agreement between the Christian Employers' Association and the Christian Trade Union.

As no agreement could be reached, 3F initiated a main dispute on 19 March 2012 by way of a strike and blockade against the restaurant with a view to reaching a collective agreement.

In its particulars of the claim of 21 March 2012 to the Labour Court, the plaintiff claimed inter alia that the defendant admit that 3F, Vejle, used illegal resources by using banners and handbills, and that 3F was to refrain from calling upon customers to boycott the restaurant.

The banners used by 3F's pickets in front of the restaurant stated the following:

> "DON'T STOP HERE! Restaurant Vejlegården does not wish to enter into a collective agreement"

The following appears, among other things, from the handbills, which were distributed near the restaurant:

> "We encourage you to go to restaurants that are covered by collective agreements instead. See the list on the back."

On the back of the handbill was a long list of restaurants in Vejle with which 3F has collective agreements.

On 22 March 2012, the Labour Court held a meeting concerning the industrial action. It appears from the records of the Labour Court that the defendant declared that the branch was willing to remove the banners and stop handing out the handbills. The plaintiff declared that it was willing to discontinue the action if the declaration was put into effect.

In its complaint of 27 March 2012, the plaintiff once again brought the case before the Danish Labour Court due to the fact that 3F had started using new banners, which, according to the plaintiff, also constituted illegal industrial action.

These new banners read:

> "A GOOD TASTE IN YOUR MOUTH"

and:

> "If you see the OK label, you can rest assured that the conditions of the employees are in order".

On 29 March 2012, a new court hearing was held in the Labour Court. 3F informed that they were no longer using the banner but were instead using a banner with the text:

> "3F wishes to enter into a collective agreement with Vejlegården".

The plaintiff had no objections to this banner, provided that it was not used on the restaurant premises.

On 11 May 2012, regional daily newspaper Vejle Amts Folkeblad published a food review in which the restaurant was given two out of six stars with the following headline:

> "When it is all about the food...
>
> Vejlegården is the most talked-about restaurant in the Vejle area – but the food is nothing to write home about …"

3F used the review on the front of a handbill, which subsequently, e.g. on 22 May 2012, was posted on the car windows of restaurant guests, with the following text on the back:

> "Restaurant Vejlegården does not want proper wages and working conditions for its employees.
>
> Restaurants covered by collective agreements are available at www.3f.dk/spisesteder".

3F used a banner with a similar wording on its building, which is next to the restaurant.

On 15 May 2012, 3F sent a mail to a restaurant patron with the following wording:

> "Hi,

Today, a car from your company was parked in front of Restaurant Vejlegården, Toldbodvej 13, Vejle, and two men were eating at the restaurant.

The restaurant is part of the dispute with 3F, which has received widespread media exposure, because the tenant Amin S Bardbegi has terminated the HORESTA/3F collective agreement and replaced it by what is known as a Christian collective agreement, which places the employees in a disadvantaged position on all counts.

We would like to know whether the visit is an expression of your company having taken a stand in the pending dispute and of therefore supporting Restaurant Vejlegården.

Yours sincerely,

Henning L Troelsen"

Later the same day, the patron replied. The reply states, among other things:

"Hi Henning, I think you are such wimps standing there, being the laughing stock at the expense of the members, and I think it is lousy that we cannot get something to eat without you bothering us. I think you should do something sensible instead of giving a bunch of unemployed people extra money to stand there. I do not support you."

On 16 May 2012, 3F replied:

"Hi,

Thank you for your answer.

Now we know who your business supports!"

On 7 June 2012, yet another restaurant patron received a mail from 3F with a text similar to the text in the mail of 15 May 2012.

Mail delivery

On 3 April 2012, the Danish Confederation of Trade Unions (LO) informed Restaurant Vejlegården and the Confederation of Danish Employers that LO and 3F had decided to initiate secondary action starting from 13 April 2012 to the effect that no 3F member employed by DIO-I members would be allowed to perform work, among other things, that arose from or was aimed at the company. The secondary action took effect as notified and the result was, among other things, that no mail was delivered to the restaurant.

The following appeared in an article in the Danish daily Jyllandsposten on 16 August 2012:

"*Mail boycott is illegal*

It is illegal for Post Danmark to fail to deliver mail to Vejlegården, expert says.

The management of Post Danmark are violating the Danish Post Office Act in the industrial dispute regarding Restaurant Vejlegården. This has been established by Claus Haagen Jensen, Professor and Master of Laws at Copenhagen Business School, CBS.

The restaurant has not received any mail since the middle of April due to the fact that postal employees organised in 3F have formed part of the secondary action against Vejlegården after the owner terminated the collective agreement with 3F covering restaurant employees.

'The Post Office Act clearly states the right to have your mail delivered,' says Claus Haagen.

Criticism is dismissed

Post Danmark does not wish to give an interview but through the press department, the management says:

'As members of DI we comply with the rules on the labour market, and we have nothing further to add.'

The Danish Transport Authority is obliged to ensure that Post Danmark complies with the Post Office Act. Nevertheless, the Authority has no intention of intervening.

'When the case is that of a dispute of which notice has been legally served, this is a question of force majeure,' says Thorbjørn Ancker, Communications Manager at the Danish Transport Authority.

But the fundamental rules of labour law known as the Danish model cannot trump Danish law, says Claus Haagen Jensen."

On 22 August 2012, an article appeared in the regional daily Vejle Amt Folkeblad with the headline:

"Minister: Mail boycott of Vejlegården is in order"

In the article, Minister for Transport Henrik Dam Kristensen is quoted as saying, among other things:

"… that Post Danmark informed Restaurant Vejlegården that the company could pick up its mail at the local post office."

On 28 March 2011, under section 14 of the Danish Post Office Act, the Minister for Transport granted Post Danmark A/S an individual permit for the transport of mail. The following, inter alia, appears from the permit:

"*2. Duty to provide transport at home and abroad*

Post Danmark is under an obligation to guarantee the transport on Danish territory of the following national mail items and items from abroad, the Faroe Islands and Greenland to addressees in Denmark, as well as mail to foreign countries, the Faroe Islands and Greenland:

…

The duty to transport covers collection from letterboxes, post offices and shops, as well as the sorting, transport and delivery of mail.

…

2.2. Quality requirements and quality measurement

…

In connection with the monthly reports, Post Danmark can request the Danish Transport Authority to approve cases as force majeure by documenting an extreme situation. Examples of force majeure appear from Appendix 2.

...

Appendix 2

...

In cases of force majeure, relevant test letters are not part of the quality measurement. Force majeure includes the following:

- Power breakdown
- Complete or partial closure of (parts of) the country due to extreme weather conditions, such as blizzards
- Shutdown of the bridges over the Great Belt, Little Belt or the Farø bridges due to a storm or accident."

Waste collection

On 29 May 2012, the secondary action was extended to also include the collection of waste. Henning Troelsen first sent an email to the waste collection companies that collect waste from the restaurant, stating the following:

"Hi,

We wish to inform you that one of your customers; Restaurant Vejlegården, Toldbodvej 13 B, 7100 Vejle, as of Monday 29 May 2012, is covered by secondary action.

From 19 March 2012, 3F Vejle has been engaged in a dispute with the company due to the fact that the company terminated its collective agreement with 3F and instead joined the Christian Employers' Association.

Originally, the Confederation of Danish Employers objected to our secondary action including the collection of waste, but last Friday it elected to accept the inclusion of waste collection in the secondary action due to an announcement from its member associations.

We therefore expect that you will take this into account and will stop providing services to the company."

On the morning of 29 May 2012, Henning Troelsen sent an email to some colleagues in 3F, which states:

"Hi,

We are very keen to ensure efficient secondary action against Restaurant Vejlegården regarding the collection of waste and would prefer it not to take two weeks to get this up and running.

The action can only be efficient if we are vigilant from the beginning and if you let us know the second you see a car from the following waste collection companies:

Meldgaard Miljø

SL Renovation, Brdr. Larsen

Lotra A/S

Kind regards,

Henning"

The restaurant is subject to Vejle Municipality industrial waste regulations applicable from 1 January 2012. Section 10 of the regulations relates to a system covering garbage-like waste, and section 10, subsection 1, states that garbage-like waste means, among other things:

"Perishable waste, such as waste containing animal or odorous waste; waste that gives rise to sanitation problems by way of odours, flies, vermin or similar waste, the composition of which is similar to garbage from private households.

Garbage-like waste includes the following: waste from consumption and welfare facilities; food waste from dining rooms/eating establishments, canteens, catering centres, company kitchens, or delicatessens; easily perishable waste from food companies, wholesalers, etc."

Under section 10, subsection 2 of the regulations, the garbage system applies to all companies in Vejle Municipality producing garbage-like waste, and is described as follows in section 10, subsection 3:

"The garbage system is organised as a collection system. All companies producing garbage-like waste shall sort such waste and handle it through the municipal collection system for garbage-like waste.

Companies are not allowed to handle garbage-like waste via other waste collection systems, e.g. waste suitable for incineration."

It appears from section 10, subsection 9 of the regulations that containers for garbage-like waste are emptied once a week on a certain weekday. Furthermore, the section sets out, inter alia:

"In the event of periods where the garbage-like waste is not collected, for instance due to a strike or the weather, the municipal council can instead instruct that the waste be collected in

bags, which will subsequently be picked up or are to be delivered at the recycling centres in the municipality, without any deductions from the refuse fee."

Scope and importance of the conflict

The following is from a feature published on 24 April 2012 on YouTube:

"*3F increases Vejlegården's turnover*

For a long period now, 3F has mounted blockades against Vejlegården due to the fact that the restaurant does not wish to enter into a collective agreement with them. Instead, the restaurant has entered a collective agreement with KRIFA. It turns out, however, that the 'damage' they have been hoping to inflict on the company has had the opposite effect: customers are flocking to the restaurant!"

On 22 July 2012, the daily newspaper BT published an article that stated:

"*Saxo boss mocks 3F – hands out free food in Vejle*"

… As indicated in the classified advertisement, I [Lars Seier Christensen, CEO of Saxo Bank] would like to invite some friends over for dinner at Vejlegården, which deserves the support of all good people right now. For this reason, I have decided to give away 250 dinners, 100 of them for my Facebook friends on a first-come-first-served basis (on top of this, I am inviting 100 members of LA (Liberal Alliance) and 50 members of LAU (Liberal Alliance Youth), but the two organisations are handling this themselves)."

The following appeared in an article in the regional daily Horsens Folkeblad on 24 July 2012:

"*Local gallery owner filled Vejlegården in 80 seconds*

…

It only took gallery owner Erik Guldager 80 seconds to fill up 110 seats at a party supporting the highly publicised Restaurant Vejlegården in Vejle."

Also, this appeared in an article in the daily newspaper Politiken on 25 July 2012:

"*Restaurant Vejlegården has had a higher turnover since the dispute with 3F broke out.*

…

'We have seen an increase in the daily turnover of 15 per cent on days when the restaurant has been the news of the day,' Amin Skov tells politiken.dk.

But he also adds that, during this period, he has had a special offer on the traditional Danish dish of fried bacon with parsley sauce, which normally attracts a lot of people to the restaurant."

In an article referred to on the website ekstrabladet.dk on 27 July 2012, Claus Gilbert Clausen from the media agency MEC Danmark is quoted as saying, among other things:

"His conservative estimate is that the publicity, translated into advertising money, amounts to well over one million Danish kroner in column inches. Add to this the measurable impact of the many visitors who have travelled to Vejlegården to eat at the famous restaurant. A lot of other advertising campaigns have practically no effect. But here, the effect can be seen."

On 1 August 2012, Danish TV2 News referred to the dispute on their website, nyhederne.tv2.dk, which states, among other things:

"For a long time now, Restaurant Vejlegården and the trade union 3F have been engaged in a dispute because the restaurant entered a collective agreement with Krifa and not 3F.

…

And the support for Restaurant Vejlegården does not surprise the on-site restaurant manager:

'We have had a lot of guests these past weeks, and they are all positive and happy and supportive. We appreciate the support and sympathy we have received. The best thing guests can do is to come and eat at our restaurant. This makes us happy and positive and gives us the courage to keep up the fight a little longer,' the restaurant manager tells TV2 News."

On the same day, Politiken wrote that, in protest against 3F, the Liberal Alliance party had decided to move its summer group meeting to Vejlegården.

An article on the website vejleamtsfolkeblad.dk from 2 August 2012 states that:

"*The beer is flowing through the blockade of Vejlegården*

3F's attempt to curb the delivery of beer and water to Restaurant Vejlegården is being scuppered by unorganised workers.

Restaurant Vejlegården is ready to pour pints for the politicians of the Liberal Alliance when the party finishes its summer conference on Friday.

Despite the fact that since 13 April the trade union 3F has forbidden LO members to deliver beer and water to the restaurant as part of secondary action against Vejlegården, the restaurant has no problems with its beverage supply."

The following appeared in an article on the website denkorteavis.dk on 5 August 2012:

"At Restaurant Vejlegården, restaurateur Amin Skov Badrbeigi does not for a moment doubt that money can't buy the advertising that 3F has given him!"

Vejlegården's accountant, Lone Vinge, Bachelor of Commerce, MSc in Business Administration and Auditing, has submitted the following financial information to the Danish Labour Court for their processing of the case:

"The company was incorporated on 1 November 2011 and by 31 August 2012 – a period of 10 months' operation – had achieved the following:

Turnover	DKK 3,188,510
Gross profit	DKK 1,824,531
Wages and other staff costs	DKK 1,509,975
Other costs	DKK 1,046,656
Interest, etc.	DKK 7,683
Operating loss in the period, in total	DKK -739,783

The figures given are based on the present accounting balance as at 31 August 2012, which I have examined and found to be correct.

This is not an audit and no measures have been taken as may be expected in relation to the company's annual report."

During the proceedings, on 1 March 2012, a comparison was issued by 3F of the collective agreement between the Christian Employers' Association and the Christian Trade Union Movement and 3F's collective agreement with HORESTA. The comparison lists 46 items. This comparison has been reviewed with the Christian Employers' Association, who agree on the technical basis.

Statements

The following individuals have given statements: Amin Skov, Karsten Høgild, Henning Troelsen and Bent Moos.

Amin Skov explained, among other things, that he joined the Christian Employers' Association just after he took over the restaurant on 1 November 2011. This meant that the restaurant was covered by the union's collective agreement with the Christian Trade Union Movement. On 23 November 2011,

he was contacted by Henning Troelsen, 3F in Vejle, and they agreed to meet. At the meeting, it turned out that 3F wanted to enter a collective agreement with the restaurant. He refused to do so on the grounds that the restaurant was already covered by a collective agreement. Henning Troelsen informed that 3F did not recognise the collective agreement and that refusal to enter a collective agreement with 3F would entail consequences.

The conflict means that Carlsberg no longer delivers beer and water to the restaurant. Instead, the restaurant gets its beverages from a number of smaller suppliers and from supermarkets, which are normally more expensive. Furthermore, the restaurant misses out on campaign offers and bonuses from Carlsberg. His estimate is that the bonus loss amounts to DKK 30,000 annually. The restaurant also has to collect meat, wine and gas itself, which involves extra costs and significant effort. Furthermore, the restaurant is unable to advertise in Vejle Amts Folkeblad in the newspaper columns and is instead required to use special inserts in the newspaper that are much more expensive than normal newspaper advertisements. This is due to print workers not being permitted to carry out printing work if the newspaper contains advertisements from the restaurant.

3F is located next door to the restaurant and there has been picketing with banners on the restaurant premises. The pickets have also handed out handbills, including the one with the food review, which has caused great difficulty in terms of running the restaurant. There is no doubt that the poor review of the food is the result of the journalist's visit taking place when the action against the restaurant was most effective. The handbills were handed out to passers-by, including patrons and potential patrons, and they were also placed on cars parked in the restaurant car park. He has been told by several guests that they have received emails similar to the one received on 15 May 2012, referred to in the statement of the case, with a photo of their car attached, which they were uncomfortable with. He has the feeling that 3F has systematically taken photos of cars with commercial licence plates parked in the restaurant car park. Now, guests park elsewhere or stay away from the restaurant completely. This is a problem for the restaurant, which normally is often used as a place for meetings and lunch for workers and businessmen.

He was not aware that the restaurant was not receiving mail until he was contacted by a journalist who asked for him to comment on this. The restaurant did not receive notice of the sympathy action prior to its execution. The lack of mail delivery has meant, among other things, that he has not been able to obtain reimbursement of sickness benefits and that the restaurant has not received invoices from creditors, which has twice resulted in claims against Vejlegården being referred for debt collection. He works around 95 hours weekly and does not have time to pick up the restaurant's mail at the post office himself. In his opinion, Post Danmark is under an obligation to deliver mail or at least to return it to the sender.

He was also informed about the waste collection action by a journalist. The restaurant produces a great deal of organic waste. This waste poses a risk to health if not collected on a regular basis due to it attracting seagulls and rats, for example. He therefore had to dispose of parts of it himself. The collection of organic waste was resumed after some time. The waste collection action still applies to cardboard waste. He has paid the full price for waste collection during the entire period.

The conflict does not put the restaurant at an advantage. His statements to journalists to the contrary have been part of the psychological game. He has certainly not made any money on the conflict, which is also evident from the calculation made by his accountant. To begin with, the newsworthiness resulted in good sales, but in total the conflict has resulted in a loss of probably around DKK 400,000. He has no financial interest in continuing the conflict.

Karsten Høgild explained inter alia that he is the manager of the Christian Employers' Association. The association has an agreement with the Christian Trade Union Movement, and through its membership of the Christian Employers' Association, Restaurant Vejlegården is covered by this collective agreement. Høgild has been involved in the case with 3F since the beginning of December 2011. He participated in a meeting with Bent Moos at which the collective agreement was compared with 3F's collective agreement. Technically, there are a number of differences. In certain respects, the collective

agreement between the Christian Employers' Association and the Christian Trade Union Movement is better for employees than 3F's collective agreement with HORESTA, and it may therefore be difficult to conclude which of the collective agreements is the best. In his view, a wide variety of collective agreements on the market will contribute, in overall terms, to better collective agreement coverage in Denmark.

Henning Troelsen explained inter alia that he is the group chairman of 3F in Vejle. The background to the conflict is the need to increase collective agreement coverage in the catering field, which currently stands at 40%. He was surprised that the restaurant did not wish to enter a collective agreement with 3F. 3F does not acknowledge the collective agreement between the Christian Employers' Association and the Christian Trade Union Movement, as in his opinion it is in many ways inferior to that of 3F. According to him, this is why 3F has to use the tools provided by the Danish model to make restaurants enter into collective agreements with 3F, which give employees the same level of protection as the collective agreement concluded with HORESTA. The background to 3F being specifically interested in Restaurant Vejlegården is that before Amin Skov took over on 1 November 2012, the restaurant had a collective agreement with 3F. Some of the employees are still the same, and their rights have now been compromised.

He has been involved in the action against the restaurant. At no point in time – nor at meetings in the Danish Labour Court – has 3F declared that they agree that the union's action could be seen as illegal industrial action. As soon as 3F have found out that their action could be construed as illegal, the action has been stopped.

At times when 3F had no pickets, they took photos of the cars of restaurant guests in order to call the visitors' attention to the conflict in the same way that they did through pickets. Some of the answers were nice and some of the respondents did not like the letter from 3F, but most of the answers were pleasant.

It was he who made the flyer with the food review and distributed it. Over the space of about an hour, he distributed it to 18–22 people before he stopped due to a colleague telling him that a journalist from Vejle Amts Folkeblad was upset that 3F had used the food review.

Bent Moos explained that he and Karsten Høgild compared the two collective agreements. In his opinion, 3F's agreement is superior in most respects and on an overall level.

The parties' arguments

In support of the principal claim, the plaintiff, the Christian Employers' Association for Restaurant Vejlegården ApS, stated, inter alia, that there is a need for adjustment of the legal practice to the effect that the boundaries of what a trade union is entitled to do with regard to the launch of a main dispute and secondary action against a company that does not wish to enter into a collective agreement with the association, will depend on whether the company is already covered by a collective agreement. If the company is already covered, less is needed to establish that industrial action is disproportionate. This applies in particular to this situation, where two thirds of the companies in the catering business have not entered into collective agreements with a trade union. Furthermore, the secondary action initiated has led to significant disturbance to the operations of the plaintiff. The plaintiff has lost customers and revenue, and today his livelihood is threatened. Thus, the dispute and industrial action initiated are disproportionate in relation to the purpose of the dispute and are therefore already illegal on the basis of the legal position that follows from previous legal practice.

In support of the second and third alternative claims, the plaintiff stated that 3F to a considerable extent used and to a certain extent still uses illegal industrial action that has threatened and continues to threaten the existence of the restaurant. Thus, by contacting the restaurant patrons and potential patrons in an unlawful manner, 3F has encouraged them to boycott the restaurant. In this context, 3F has violated the Danish Marketing Act and invaded the sanctity of private life. Furthermore, 3F prevented the restaurant in an unlawful manner from having its mail delivered. It follows from the

postal legislation and the Minister for Transport's individual permit to Post Danmark A/S that the restaurant has a claim regarding delivery of its mail and that 3F is therefore not entitled to establish a situation in which mail cannot be delivered to the restaurant by initiating a dispute. 3F cannot invoke force majeure considering that it caused the situation. Another outcome, i.e. that the restaurant can collect its mail at the local post office, is not possible. Extending the secondary action to include cessation of the collection of waste is also illegal industrial action, as the restaurant has a lawful claim regarding collection of its waste, and it pays for this service. It is particularly evident that it was unlawful when 3F for a period ensured that the restaurant could not have its biological waste collected; this poses a health risk.

It is contested that the plaintiff as a result of passivity is precluded from raising objections against the secondary action relating to postal delivery and waste collection.

As regards the second alternative claim in particular, the plaintiff further stated that the nature and scope of the illegal industrial action imply that the main conflict is illegal; see in this respect the judgment of the Danish Labour Court of 13 March 2007 in cases A2007.639-641 (AT 2008.98). Furthermore, the illegal industrial action implies that the interests and legal position of the restaurant can only be secured if the Danish Labour Court determines that 3F is precluded from persisting with the main and secondary action during a 'closed period' set by the court; see the judgment referred to above where the Danish Labour Court made a decision on a specific re-establishment period during which no industrial action terminating the collective agreement could be lawfully implemented.

The defendant, the Danish Confederation of Trade Unions (LO) for the United Federation of Danish Workers stated that 3F has a particular interest in initiating a dispute with Restaurant Vejlegården, especially considering that 3F had a collective agreement with the restaurant before Amin Skov took it over on 1 November 2011. As the collective agreement between the Christian Employers' Association and the Christian Trade Union Movement is inferior for employees compared to 3F's collective agreement, the legal position of the employees thus worsened on takeover. Danish labour law allows unions under LO to initiate main disputes and secondary action against a company that does not wish to enter a collective agreement with a union under LO, and this applies even if the company is covered by a collective agreement concluded with a third party union; see inter alia the judgment of 12 December 2007 of the Danish Labour Court in case A2007.831 (AT 2007.178) relating to Nørrebro Bryghus.

Any industrial action supporting a dispute shall be lawful and proportionate; however, when assessing the matter, it shall be taken into account that a dispute must 'hurt', as its purpose is to exert efficient pressure on the company. In the present case, 3F has not gone too far, and this has at no point been acknowledged, not even during court hearings in the Danish Labour Court. There is also no documentation proving that the restaurant is in danger of closing due to the industrial action. On the contrary, media coverage shows that the restaurant is benefiting from the dispute.

The nature of the banners and handbills was not a call for a customer boycott; they were only meant to encourage restaurant customers to think, and the action was, incidentally, of short duration. The lack of mail deliveries and non-collection of waste is the result of secondary action initiated by 3F, who also launched the main dispute. In this situation, more is needed to establish disproportionality than if the conflicts had been launched by different trade organisations. It is not disproportionate that the restaurant does not get its mail delivered, as mail can be picked up at the post office. Furthermore, it follows from the authorisation to Post Danmark A/S that the postal service is to be discontinued in the case of force majeure, and work stoppage is a classic force majeure situation. If the plaintiff disagrees, the plaintiff shall advance claims against Post Danmark A/S. Biological waste was not collected for a short period only and in total, there are only minor irregularities to speak of as regards the collection of waste. Thus, this does not give rise to disproportionality either.

Incidentally, in relation to postal delivery and collection of waste, the restaurant displayed passivity, which constitutes grounds for forfeiture, in that they did not claim that these disputes were illegal until 8 August 2012.

If it was assumed that illegal industrial action was used in certain cases, these are not of a nature or scope that leads to declaring the main dispute and secondary action unlawful. There is no legal basis for the Danish Labour Court to determine that a conflict cannot be maintained during a 'closed period'.

Reasoning and result of the Danish Labour Court

The plaintiff requests that judgment be passed to the effect that the access in order to take action against Restaurant Vejlegården ApS be restricted in terms of what is required under Danish Labour Court practice, taking into account that the restaurant is already covered by a collective agreement with another trade union.

As stated in the Danish Labour Court's judgment of 12 December 2007 in case A2007.831 (AT 2007.178) relating to Nørrebro Bryghus, it is characteristic of Danish labour market regulations that wages and other working conditions are secured through collective agreements and not through legislation. The workers' organisations right to conflict in order to achieve a collective agreement is thus decisive for wage setting and achieving other core working conditions in Denmark. Several times, motions have been proposed in the Danish Parliament that would compel the government to present proposals for limiting the possibilities of workers' organisations to initiate disputes, e.g. in cases where a trade union starts a dispute to achieve a collective agreement in an area already covered by a collective agreement with another trade union. These motions have not been adopted, with reference to the fact that codification of the right to conflict would be very difficult and would fundamentally change the current division of roles on the Danish labour market.

In line with this, the Danish Labour Court finds that the issue behind the main dispute, the secondary action and the legality of the disputed industrial action, including with regard to proportionality, shall be settled in line with the usual practice of the Danish Labour Court.

During these proceedings, it should be considered whether the disputes and industrial action initiated against Restaurant Vejlegården are beyond what is permissible. Danish Labour Court practice is described in "The main union's report on the right to industrial action in support of demands for a collective agreement", published by the Danish Employers' Association and the Danish Confederation of Trade Unions in June 2003. The conclusive "summary of the state of the law" says:

> "Issues relating to the legality of announced collective industrial action or of the conflict notices issued in this respect, and the issue of the legality of using collective industrial action in support of claims for collective agreements in areas where collective agreements have not been entered, fall under the jurisdiction of the Danish Labour Court; see the Danish Industrial Court Act, section 9, subsection 1(3) and (5).
>
> Danish Labour Court practice shows that the court sets a number of criteria that are always included in the court's assessment of specific cases. The criteria are as follows:
>
> *The general nature of the dispute.* A conflict of interests between the trade union and the employer shall exist, i.e. a disagreement on whether a collective agreement shall be made or renewed and, if so, on what conditions.
>
> *The objective of the dispute.* The dispute shall pursue a reasonable, professional objective. The objective of the trade union's launch of a dispute shall be to attain a collective agreement with the employer for whom work is performed that naturally falls within the trade union's professional field. A dispute aimed at achieving coverage of professional functions that do not fall within the professional field of the trade union is illegal. In the event that the work sought to be covered by the collective agreement is not already covered by a collective agreement, the point of departure shall be that a reasonable, professional objective is aimed for. In defining the natural, professional field of a trade union, it is irrelevant whether the union presently has any members in the company affected by the dispute. Contrary to this, the union shall have an appropriate and current interest in covering the field in question by a collective agreement. The objectives that the trade union can legally pursue and support with the use of collective action

may be limited by the law or main agreements such as general agreements. The objective of the dispute cannot be to enter a collective agreement the content of which is wholly or partially in conflict with the law.

Dispute means. The collective industrial action used by the trade union for the purpose of inducing the employer to enter a collective agreement shall be legal. The limits of what types of industrial action can be used are laid down by the Danish Labour Court, taking into account any general legal basis in the form of legislation or agreements. The industrial action resources of the trade unions are primarily strikes and blockades; those of employers are primarily lockout and boycott. In practice, the trade union supporting the main dispute with secondary action is often decisive. Physical blockade is not legal industrial action. Industrial action that deprives the employer affected by the conflict of all his possibilities for livelihood is also illegal.

Scope and effect of the dispute. The objective (the collective agreement) that the trade union seeks to achieve through the use of a dispute shall be in reasonable proportion to the industrial action (collective industrial action) that the trade union uses to reach its objective. This 'proportionality balancing' is performed by the Danish Labour Court. In the relatively rare cases presented to the court regarding the balance between the objective and the industrial action used, the court seems to be hesitant to deem a conflict illegal based on considerations of proportionality. This specifically applies to situations where only the trade union's own members are affected by the dispute. Assessing whether the industrial action used in a legal conflict is disproportionate to the objective sought seems to be mostly relevant in cases where other trade unions have initiated secondary action in support of the trade union that is a party to the main dispute."

Based on the evidence, the Danish Labour Court takes into account that, when claiming the need for a collective agreement in the present case, 3F's primary goal is to maintain and defend well-established contractual positions, including minimum rights for skilled and unskilled staff acquired through the union's national agreement with HORESTA. Furthermore, the Danish Labour Court finds that the interest of 3F in entering a collective agreement with Restaurant Vejlegården, taking into account its position and number of members, has the required strength and topicality for the conflict to be in pursuit of a reasonable professional purpose. In view of this, no importance can be attached to Restaurant Vejlegården already being covered by the collective agreement between the Christian Employers' Association and the Christian Trade Union Movement. As regards members and agreement coverage, the Christian Trade Union Movement is in open competition with 3F without the limitations that would apply if the competing unions were affiliated with the same main union. In essence, therefore, the main dispute is lawful; see inter alia the Danish Labour Court judgment of 6 May 1999 in cases A98.632 and A98.702 (AT 1998.53).

The assessment of the secondary action, including its importance to the legality of the main dispute, shall take into consideration that Danish employment law offers broad scope for setting up secondary action in support of legal collective agreement claims. The main criterion for the legality of secondary action is that the main dispute itself is legal. There must also be community of interests between the employees involved in the main dispute and in secondary action. Furthermore, secondary action shall be suitable in terms of affecting the main dispute. Finally, the secondary action shall be in reasonable proportion to the objective pursued in the main dispute.

The Danish Labour Court finds that 3F's interest in maintaining and defending the well-established positions mentioned above, which are provided for by the collective agreement acquired by the union through the national collective agreement with HORESTA, is fundamental and so strong and legitimate that it justifies other divisions of 3F initiating efficient secondary action, which necessarily must be perceptible by the restaurant. Thus, the required community of interests exists between the employees involved in the main dispute in and the secondary action, and similarly, the initiated secondary action is found to be suitable in terms of affecting the main dispute.

The question now is whether the scope of the secondary action is unfair in relation to the goal of the main dispute, and whether illegal industrial action was used in connection with the main dispute and secondary action, and if so, how this affects the legality of the disputes.

Initially, it should be noted that the plaintiff has not been found to have lost the right to raise objections against the secondary action due to passivity.

It follows from Danish Labour Court practice that a dispute cannot be so comprehensive that it completely prevents an employer from carrying on its business. This implies that it is illegal if, as part of a dispute, a labour organisation calls upon present and potential customers and business partners of the company affected by industrial conflict to boycott the company, for instance by handing out handbills. The Danish Labour Court finds that some of the handbills etc. used by 3F urged the restaurant patrons and potential patrons not to eat at the restaurant. These are the banners used by 3F's pickets saying "DON'T STOP HERE! Restaurant Vejlegården does not wish to enter into a collective agreement", the handbills saying "We encourage you to go to restaurants that are covered by collective agreements instead. See the list on the back", and the handbills with the food review from Vejle Amts Folkeblad on the back that say "Restaurant Vejlegården does not want proper wage and working conditions for their employees. Restaurants covered by collective agreements are available at www.3f.dk/spisesteder". The use of the above-mentioned banner and handbills therefore constitutes illegal industrial action. The same applies to the emails that 3F has sent to the patrons of the restaurant, including those of 15 May and 7 June 2012.

Furthermore, the Danish Labour Court finds that the health risk of the organic waste not being picked up was disproportionate and thereby illegal, and that 3F through the secondary action launched on 29 May 2012 established a situation following which organic waste was not collected for a period of time. To this extent, the secondary action initiated to prevent the collection of waste was illegal.

Contrary to this, the Danish Labour Court finds no basis for considering the other industrial action disproportionate or in other ways illegal. This also applies to the secondary action launched to prevent the delivery of mail, as the restaurant has the possibility of collecting its post at the post office. Here, it should be noted that the Danish Labour Court has no competence to decide on the legal relationship between Restaurant Vejlegården and Post Danmark A/S, including whether Post Danmark was entitled to refrain from mail delivery.

As regards the illegal industrial action in the form of unlawful customer inquiries, etc. and ceasing the collection of organic garbage, objections to this action resulted in 3F bringing it to a close, and as the matter stands, it has not been rendered probable that this illegal industrial action has had any significant impact on the progress of the dispute, let alone had any decisive importance for the business of Restaurant Vejlegården. The use of this illegal industrial action cannot therefore lead to the general view that the main dispute and/or the secondary action is/are illegal.

Nor has it been substantiated based on the evidence that the industrial action and secondary action initiated, which only affected 3F's own members, would inevitably lead to Restaurant Vejlegården being forced to close. Against this background, and taking into account the statement above on 3F's interest in entering a collective agreement, the Danish Labour Court finds that there is no basis for concluding that the legally initiated industrial action and secondary action exceed the limits of the permissible.

Accordingly, the Danish Labour Court upholds the defendant's denial of the charges in respect of the plaintiff's primary and secondary claims, while the plaintiff's third alternative is upheld to the extent stated below.

IT IS HELD THAT:

The defendant, the Danish Confederation of Trade Unions for the United Federation of Danish Workers, recognises that the federation's use of the

- banners with the text “DON’T STOP HERE! Restaurant Vejlegården does not wish to enter into a collective agreement”
- handbills with the text “We encourage you to go to restaurants that are covered by collective agreements instead. See the list on the back”, and
- handbills with the text on the back of the food review in Vejle Amts Folkeblad “Restaurant Vejlegården does not want proper wages and working conditions for their employees. Restaurants covered by collective agreements are available on www.3f.dk/spisesteder”

is illegal.

The defendant shall recognise that the emails sent by 3F to the restaurant patrons, including the emails of 15 May and 7 June 2012, are illegal.

The defendant shall recognise that the secondary action initiated on 29 May 2012 was illegal with regard to the lack of collection of organic waste.

In other respects, the court found for the defendant.

The Christian Employers’ Association shall pay DKK 1,000 and the Danish Confederation of Trade Unions shall pay DKK 1,000 to the Danish Labour Court in legal costs.

Finland

National reporter: Tuula Ruikka, Labour Court

Jurisprudence > Supreme Court > Preliminary rulings > 2013

KKO:2013:10

Employment agreement – Discrimination – Equal treatment – Collective agreement

Register no.: S2012/271
Date referred: 7 November 2012
Date of ruling: 15 February 2013
Record: 321

The Town had paid an employee who was covered by the general collective agreement for civil servants in local government lower pay than an employee performing the same job duties who was covered by a separate agreement between KT Local government employers and the Union of Health and Social Care Professionals (Tehy), known as the Tehy Protocol.

It is the considered opinion of the Supreme Court, on the grounds cited in the ruling, that the Town, through its actions and decisions, did not treat the two employees unequally for reasons prohibited in chapter 2 section 2(1) of the Employment Contracts Act, nor did said actions and decisions constitute discrimination for instance on the basis of trade union activities. Nevertheless, the Town was under obligation, pursuant to the requirement of equal treatment in chapter 2 section 2(3) of the Employment Contracts Act, to equalise as far as possible any pay differences that may have emerged. (Ään.)

Constitution, section 6
Constitution, section 13(2)
Employment Contracts Act, chapter 2 section 2
Non-Discrimination Act, section 6(2)
Collective Agreements Act, section 4(3)

Processing of the case in lower courts
Ruling of the Supreme Court

[…]

Ruling of the Supreme Court

Grounds

Background to the matter and presentation of the issue

1. The Town of Länsi-Turunmaa, currently the Town of Parainen, was created by the merger of the municipalities of Parainen, Nauvo, Korppoo, Houtskari and Iniö at the beginning of 2009. With regard to the pay and other terms and conditions of employment of municipal social services and health care employees, the local authority observed the general collective agreement for civil servants in local government of 2007–2009 (KVTES 2007–2009 or KVTES) on the one hand and what is known as the Tehy Protocol, signed on 19 November 2007 and only applied to members of Tehy, on the other. Employees within the scope of the KVTES and the Tehy Protocol and performing the same or equally demanding job duties were earlier paid the same job-specific pay; but as of February 2008, the employer applied the aforementioned agreements in such a way that the pay of a member of SuPer ry covered by the KVTES was thereafter lower than the pay of a member of Tehy ry covered by the Tehy Protocol. This pay differential was not completely eliminated until January 2010.

2. 'J', a member of SuPer ry, was employed from 1996 as a practical nurse at an old people's home in the municipality of Houtskari and, after the municipal merger, the Town of Länsi-Turunmaa. In the complaint filed by 'J' against the Town, now the Town of Parainen, concerning matters including but not limited to unpaid wages, it was contended that the Town had paid 'J' a lower job-specific pay than to another employee performing the same job duties because of 'J's trade union membership, personal beliefs and opinions. 'J' demanded that the Town be required to compensate for the pay differential in question. 'J' contended having been paid a lower salary than the other employee in question because the Tehy Protocol, applying only to members of Tehy ry, had been applied to the other employee. Only the KVTES had been applied to 'J'. In doing so, it was claimed, the Town had discriminated against 'J' in breach of chapter 2 section 2 of the Employment Contracts Act and neglected to treat 'J' equally as far as pay was concerned.

3. The Town disputed the claims and considered that it was bound by law to abide by the KVTES 2007–2009 agreement and the Tehy Protocol in terms of employee pay as provided for in said agreements. In any case, the pay differentials were harmonised within a reasonable period of time.

4. It is undisputed in the matter that the KVTES 2007–2009 and the Tehy Protocol, being collective-level agreements (hereinafter the collective agreements) were binding on the Town and that both agreements were complied with in terms of pay determination by applying the provisions of the agreements as specified therein. It is also undisputed that the employee who was a member of Tehy ry and who was used as a comparison in evaluating pay differentials was performing the same or equivalent job duties as 'J', who was a member of SuPer ry. The amount of the pay differential that arose is likewise undisputed, as is the fact that the pay differential had been eliminated by January 2010.

5. The essence of matter at hand is to consider whether the Town was in breach of the anti-discrimination provision of chapter 2 section 2 of the Employment Contracts Act and its requirement of equal treatment, in this case because of a person's trade union membership, personal beliefs or opinions. The Town did pay 'J' a lower pay than another employee performing the same job duties on the basis that the two employees were members of two different trade unions and that their pay was determined on the basis of applying the collective agreement negotiated by their respective trade unions.

Applicable points of law

6. Section 6(1) of the Constitution states that everyone is equal before the law. Section 6(2) states that no one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person. In order to ensure non-discrimination as required in the Constitution in employment relationships, chapter 2 section 2(1) of the Employment Contracts Act provides that the

employer shall not exercise any unjustified discrimination against employees on the basis of age, health, disability, national or ethnic origin, nationality, sexual orientation, language, religion, opinion, belief, family ties, trade union activity, political activity or any other comparable circumstance. It is further stated in this section that the definition of discrimination is laid down in the Non-Discrimination Act. The same provision applying to civil service employment relationships is found in section 12 of the Act on Civil Servants in Local Government.

7. Under section 6(2) of the Non-Discrimination Act, discrimination means 1) the treatment of a person less favourably than the way another person is treated, has been treated or would be treated in a comparable situation (direct discrimination) or 2) that an apparently neutral provision, criterion or practice puts a person at a particular disadvantage compared with other persons, unless said provision, criterion or practice has an acceptable aim and the means used are appropriate and necessary for achieving this aim (indirect discrimination).

8. The Government Bill concerning the aforementioned provisions indicates that a particular practice would not be considered tantamount to discrimination if that practice were based on a regulation or policy that has a justifiable purpose and the means employed to achieve that purpose were appropriate and necessary. The justification of the actions or practices of a person should be evaluated on the basis of the grounds for those actions or practices. Similarly, a particular practice would not be considered tantamount to indirect discrimination if an action leading to a person being placed in a disadvantageous position were based on compliance with a mandatory point of law, provided that such a point of law could not have been complied with in such a way as to ensure equal treatment (HE 44/2003 vp, p. 42).

9. Under chapter 2 section 2(3) of the Employment Contracts Act, the employer must otherwise, too, treat employees equally unless there is an acceptable cause for derogation deriving from the duties and position of the employees. Collective agreements for employees and civil servants

10. Section 13(2) of the Constitution guarantees everyone the freedom of association. Freedom of association includes the right not to be a member of an association, and the provision specifically safeguards the freedom to form trade unions. This extends to trade unions having the right to look after the interests of their members through collective agreement negotiations.

11. The terms and conditions to be observed in employment agreements or otherwise in employment relationships may be agreed upon in collective agreements as referred to in section 1 of the Collective Agreements Act (436/1946); similarly, the terms and conditions to be observed in the employment relationships of civil servants in central and local government may be agreed upon in collective agreements for civil servants as referred to in the Act on Collective Agreements for State Civil Servants (664/1970) and the Act on Collective Agreements for Local Government Officials (669/1970), respectively. Under section 4 of the Collective Agreements Act, a collective agreement shall be binding on the employers and associations who or which concluded the collective agreement and also on the employers and employees who are, or during the period of the agreement were, members of an association bound by the agreement. A similar provision is included in the two other Acts on collective agreements referred to above.

International treaties and practices concerning collective agreements and freedom of association

12. The right of employees to organise and negotiate collectively is not only guaranteed in the Finnish Constitution and the Employment Contracts Act but also in international treaties binding on Finland such as the International Labour Organisation (ILO) Convention no. 98 (1949), Article 1, and the UN Covenant on Economic, Social and Cultural Rights adopted on 16 December 1966, Article 8. Under Article 11 paragraph 1 of the European Convention on Human Rights, everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. Paragraph 2 states that no restrictions shall be placed on the exercise of these rights other than such as are prescribed by law on the grounds specified in the Article. In its decision on the matter of Demir and Bayakara vs. Turkey of 12 November 2008, the Grand Chamber of the European Court of Human Rights considered, referring to the

aforementioned ILO Convention no. 98, that the right to bargain collectively had come to be regarded as an essential part of the right to join trade unions under the freedom of association safeguarded under Article 11 of the European Convention on Human Rights. Moreover, Article 28 of the European Union's Charter of Fundamental Rights states that workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels.

The Finnish collective agreement system

13. It is characteristic of the Finnish labour market system that employees' and employers' organisations play a key role in negotiating on and concluding collective agreements for employees and civil servants. This well-established practice, enshrined and acknowledged in employment legislation, is reflected in the Collective Agreements Act, whose predecessor was enacted in 1924, superseded by the current Act in 1946. In practice, a collective agreement is the instrument for agreeing not only on pay but on numerous other terms and conditions of employment too. A collective agreement is a collection of documents established through negotiation, and once concluded it is binding on the employers' and employees' associations that have signed it and on all trade unions acceding to the agreement and hence on their members. The overall principles concerning collective agreements also apply to collective agreements for civil servants as provided for separately in Acts concerning those agreements.

14. It follows from the established practice concerning collective agreements that there may be several collective agreements in force at any given workplace. However, even then both employer and employees are bound by whichever collective agreement they are both party to. What this means from the perspective of employees who are members of a trade union is that the terms and conditions of employment for any given employee are determined principally by the collective agreement concluded by the trade union of which the employee is a member. This basic principle is not affected by the fact that the terms and conditions of another collective agreement might in some cases be more advantageous for an employee than those of the collective agreement binding on the trade union of which that employee is a member. Concerning equal treatment of employees, it must also be considered that in comparing individual provisions of various collective agreements, a particular provision may prove to be more advantageous than the comparable provision in another collective agreement, but this shall not in itself justify the conclusion that one collective agreement would be more advantageous for a particular employee than another one when considered as a whole. Opinion of the Supreme Court regarding discrimination

15. The prohibition on discrimination as described above in section 6 guarantees the right to personal beliefs and opinions. Personal beliefs are a person's fundamental and deeply held beliefs and convictions. Freedom of opinion is closely related to freedom of speech, and discrimination on the basis of a personal opinion cannot be demonstrated if that opinion has not been expressed.

16. It is undisputed in the matter at hand that 'J' received less pay than the comparable employee because 'J' belonged to a different trade union than the comparable employee. The choice of which trade union to join cannot, in general, be considered such a fundamental conviction that it should be held as an expression of personal beliefs. The freedom of association guaranteed under the Constitution, including the freedom to choose which trade union to join, is not the same thing as freedom of opinion in this context. It is the considered opinion of the Supreme Court that 'J' was not discriminated against in the determination of pay in the matter at hand because of personal beliefs or opinions.

17. 'J' and the Town agree that 'J' was not discriminated against because of trade union activities. It is the considered opinion of the Supreme Court that the pay of 'J' falling below that of the comparable employee who was a member of Tehy ry was in no way related to the issue of whether 'J' was an active trade union member. It is also not alleged in the matter at hand that the local authority as employer interfered with an employee's right to choose which, if any, trade union to join as guaranteed by the freedom of association, or with the freedom of employers and employees to enter

into an agreement of any kind they wish and with any opposite parties they wish. It is further not alleged in any way in the matter at hand that the issue concerned equality between women and men, even indirectly, and therefore legislation and practices concerning gender equality have no bearing (Act on Equality between Men and Women (609/1986), Decisions of the European Court of Justice: Enderby, Case C127/92, ruling 27 October 1993, ECR I-5535; Royal Copenhagen, Case C-400/93, ruling 31 May 1995, ECR I-1275).

18. By contrast, what is relevant in the matter at hand is that the difference between the criteria for the job-specific pay of the employees concerned was directly and exclusively due to the collective agreements binding on the respective employer and employee parties. The Tehy Protocol concluded by KT Local government employers and Tehy ry states that the Protocol shall only be applied to the pay systems concerning members of Tehy ry. Therefore, the Tehy Protocol in and of itself restricts the range of employees on which it is binding. For any other employees of the local authority performing the same or equivalent job duties, the terms and conditions of the KVTES 2007–2009 binding on those employees shall apply.

19. A restriction clause such as that described above is, as such, permissible under section 4(3) of the Collective Agreements Act and section 5(6) of the Act on Collective Agreements for Local Government Officials. Both the Tehy Protocol and the KVTES 2007–2009 are by default applicable in their entirety and are binding on both employer and employee parties. They are therefore binding also on individual employers and employees. Hence, the Town was required by law to comply with the two different collective agreements in the determination of pay for the employees bound respectively by each collective agreement.

20. It is the considered opinion of the Supreme Court that the pay differential between 'J' and the comparable employee principally arose as the result of the across-theboard raise given as of February 2008 to employees who were members of Tehy ry. This pay differential was not eliminated through the sectoral allowances applied under both agreements in 2008 and in May 2009, because these sectoral allowances were agreement-specific and calculated in different ways. The determination of pay increases was based on the Tehy Protocol in the case of the comparable employee and, because of the restriction clause in that protocol, on the KVTES in the case of 'J'. The above resulted in the development of pay for employees covered by the Tehy Protocol being more advantageous than for other employees, and the pay of other employees remained lower than that of employees covered by the Tehy Protocol.

21. It is the considered opinion of the Supreme Court that the pay differential arising as described above does not in itself justify the conclusion that the difference in the terms and conditions of determining pay was discriminatory or that the application of parallel pay systems in different collective agreements is tantamount to pay discrimination.

22. It is possible in individual cases for the application of the terms and conditions of a binding collective agreement to lead to a conflict with mandatory legislation. Under chapter 13 section 6 of the Employment Contracts Act, any agreement reducing the rights of and benefits due to employees under this Act shall be null and void unless otherwise provided in that Act. However, chapter 13 section 7 of the same Act states that in derogation from what is laid down in section 6, national employer and employee associations are entitled to agree to deviate from the provisions of the Employment Contracts Act in certain matters as laid out in that section. The prohibition on discrimination and requirement of equal treatment provided for in chapter 2 section 2 of the Employment Contracts Act are not among these.

23. Therefore, the prohibition on discrimination and the requirement of equal treatment are mandatory provisions that restrict how the terms and conditions of an employment relationship may be agreed on in a collective agreement. Above all, this means that employees covered by the same collective agreement and performing the same or equivalent job duties shall not be discriminated against by the provisions of the collective agreement treating them unequally with regard for instance to pay entitlements.

24. The above is not the case when employees performing the same or equivalent job duties are in two different groups by virtue of belonging to different trade unions. In such a case, each group is covered by its own collective agreement, concluded between the relevant employers' and employees' organisations pursuant to the freedom of negotiation, independently and binding on both parties. Which collective agreement is binding on which employees depends, by law, on which employees' association those employees are members of. Therefore the terms and conditions of employment applicable to those employees and how similar or different they may be are consequences of the choices that the employees themselves have made by virtue of the freedom of association guaranteed them as a fundamental and human right. In such a situation, the only reason for why employees are treated differently in terms of the terms and conditions of pay is that the relevant provisions of the collective agreement covering one employee differ from the similar provisions of the collective agreement covering another employee.

25. The Town has complied with the provisions of two binding collective agreements, as required by law. The Town has not, by its own actions or decisions, aimed to treat its employees unequally or caused inequality. On the contrary, the pay differential between employees covered by the Tehy Protocol on the one hand and the KVTES on the other as of the beginning of February 2008 was the result of collective agreement negotiations where the Town in itself had no influence over the details of the outcome or the content of the terms and conditions agreed upon. It is therefore not justified to consider the actions of the Town as being in breach of the mandatory provisions of the Employment Contracts Act.

26. Based on the grounds detailed above, it is the considered opinion of the Supreme Court that in the circumstances in the matter at hand, the parallel application of two collective agreements on the part of the Town was not tantamount to treating employees performing the same or equivalent job duties unequally in a manner prohibited in chapter 2 section 2(1) of the Employment Contracts Act. The prohibition of discrimination cannot be considered to mean that an employee should be accorded pay entitlements according to whichever collective agreement should guarantee him/her the most advantageous outcome irrespective of which collective agreement is binding on him/her by virtue of how he/she has exercised his/her freedom of association. Therefore the matter at hand did not involve discrimination as referred to in the aforementioned provision.

Opinion of the Supreme Court regarding the requirement of equal treatment

27. It is the considered opinion of the Supreme Court that the matter at hand involves employees performing the same or equivalent job duties whose duties and positions were not so different as to warrant paying them job-specific pay of different amounts by default. Although the application of differing pay systems is not considered to be in breach of the prohibition on discrimination in the matter at hand, as detailed above, the principle of equal treatment of employees does require that the employer must as far as possible aim to correct such pay differentials. This judicial principle is apparent for instance in the Supreme Court's preliminary rulings KKO 1992:18 and 2004:133. The same principle in European Community law may be seen for instance in the ruling of the European Court of Justice in the case of Hennings and Mai (combined Cases C-297/10 and C-298/10, ruling 8 September 2011), where the matter at hand likewise concerned the replacement of a pay system leading to age-based discrimination with a pay system based on objective criteria. The Court accepted the retention of certain discriminatory features of the pay system of the first-mentioned kind on a temporary basis and for a limited time to ensure that the employees concerned could be transferred to the new pay system without income loss.

28. Based on the above, the essential pay criteria in an employer's pay system may not permanently be established in such a way that they create pay differentials between employees performing the same or equivalent job duties. However, in such a case the employer must be allowed a reasonable length of time for harmonising the disparate amounts of pay.

29. As shown above, a pay differential between local government employees covered by different collective agreements emerged as of 1 February 2008 and was harmonised by the Town as of 31

January 2010. The transition phase thus lasted two years. It is the considered opinion of the Supreme Court that the Town has harmonised the terms and conditions of pay within a reasonable period of time and has therefore complied with the requirement of equal treatment of employees provided for in chapter 2 section 2(3) of the Employment Contracts Act. Conclusion on the grounds for the complaint

30. Based on the points set forth above, it is the considered opinion of the Supreme Court that 'J' has not demonstrated the Town being in breach of the prohibition on discrimination and requirement of equal treatment provided for in chapter 2 section 2 of the Employment Contracts Act as specified in the complaint, cited as the grounds for claiming compensation of the pay differential on the part of the Town. Therefore the essential grounds of the complaint have not been proven, and the complaint is without merit.

Ruling

The decision of the Court of Appeal shall stand.

The matter was resolved by President Pauliine Koskelo and Justices of the Supreme Court Gustav Bygglin, Juha Häyhä (dissenting opinion), Soile Poutiainen and Jorma Rudanko. The referendary was Katariina Sorvari.

Dissenting opinion

Justice Häyhä:

For sections 1 to 9, I concur with the majority. Thereafter I record the following:

Opinion regarding discrimination

Both the KVTES and the Tehy Protocol are binding on both the employer and the employee parties pursuant to section 4(2) of the Collective Agreements Act. Under section 4(3) of the same Act, a collective agreement may contain provisions restricting its coverage. This was the case in the matter at hand, as the Tehy Protocol only applied to members of Tehy ry, and the KVTES was applied to the terms and conditions of pay and employment of all other social services and health care employees. 'J' being a member of SuPer ry, the pay of 'J' was determined on the basis of the KVTES.

The pay differential compared to members of Tehy ry performing the same job duties was based on the aforementioned agreements tantamount to collective agreements for employees or civil servants and the points of law referred to above, which require the Town to apply the agreements in question according to the provisions of those agreements concerning restriction of scope of application. The complaint brought by 'J' claims that 'J's pay should be based on the Tehy Protocol insofar as the outcome would be more advantageous to 'J' rather than the KVTES, which otherwise covers the terms and conditions of 'J's employment. Under chapter 13 section 6 of the Employment Contracts Act, any agreement reducing the rights of and benefits due to employees under this Act shall be null and void unless otherwise provided in this Act. Under chapter 13 section 7 of the Employment Contracts Act, national employer and employee associations are entitled to deviate from the Employment Contracts Act in agreeing on certain matters specifically listed in that provision. The prohibition of discrimination and requirement of equal treatment provided for in chapter 2 section 2 of the Employment Contracts Act are not among these. Discriminatory treatment of employees cannot therefore be justified solely by the fact that the practice is based on the provisions of a collective agreement which is binding on the employer and which the employer is required by law to apply.

Whether the matter at hand constitutes direct or indirect discrimination must primarily be evaluated on the basis of section 6(2) of the Non-Discrimination Act. In this evaluation, based on the Government Bill concerning the provision in question, attention should be focused on the stated purpose of the procedure in question and the means employed to achieve that purpose. A procedure may constitute discrimination even if its stated purpose is compliance with the law, insofar as the requirements of the law could have been satisfied by other means that would have ensured equal treatment (see HE 44/2003 vp p. 42).

Insofar as ‘J’s complaint is based on the contention that ‘J’ was discriminated against because of trade union activities, it should be noted that ‘J’ has reported being a member of the trade union in order to gain membership of its unemployment fund and in order to receive advice and help. ‘J’ has not been a trade union activist. Therefore it is not justified to consider that ‘J’ has been discriminated against through a pay differential because of personal beliefs or opinions or trade union activities.

‘J’ further contended having been discriminated against in a manner in violation of the freedom of association by virtue of the Town paying different employees different amounts solely on the basis of which trade union they belong to. With regard to this point, I would like to note that pay differentials within a workplace may be due to the structures of the labour market system itself and discriminatory practices incorporated therein. Different labour market organisations have different levels of negotiating power, which tends to lead to different outcomes in negotiations. If an employer should seek to influence the negotiating power of trade unions or to exploit differences between trade unions in this respect by treating employees unequally according to which trade union they belong to, this might be considered to constitute discrimination affecting an employee’s freedom of association. Therefore the situation should also be evaluated with a view to whether discrimination of a prohibited kind may be identified underlying the application of the collective agreements that resulted in the pay differential.

However, it has not even been contended in the matter at hand that the Tehy Protocol in its entirety is more advantageous and therefore discriminatory in comparison to the KVTES, which covers ‘J’. It has also not been contended that there is inequality underlying these agreements that would lead to their application constituting discrimination, even indirect discrimination. Therefore there is no merit to the claim that the Town has discriminated against ‘J’ and violated the freedom of association by deliberately favouring members of Tehy ry over members of SuPer ry.

Both agreements were binding on the Town. The Town was not party to these agreements and could not in any way influence their content. The Town was also not able to influence whose pay entitlements are determined according to the KVTES and the Tehy Protocol, respectively, as this depended entirely on how the Town employees chose to exercise their freedom of association. Therefore there was a justified purpose and means for the Town’s practice of paying ‘J’ according to the KVTES even though members of Tehy ry performing the same job duties were paid higher pay as itemised in the complaint.

The pay differential described in the complaint was not permanent in nature; it lasted for a period of about two years during which the aforementioned two agreements were in force. While those agreements were in force, the Town could not have been expected to carry out measures concerning personnel pay that would have affected the freedom of negotiation of or power relations between labour market organisations. It is also evident that the agreement practices between labour market organisations typically promote equalisation of pay within occupational groups compared with a situation where employee pay is determined in individual employment agreements. This reduces the need to resort to other measures to attain equality of pay. Because the Town had only very limited means to harmonise the terms and conditions of the employment relationships in question in the matter at hand, for the reasons detailed above, equal treatment could not have been reasonably achieved through other measures within the same time period.

On these grounds, I consider that the practice of the Town described in the complaint does not constitute discrimination as referred to in section 6(2) of the Non-Discrimination Act.

For sections 27 to 30, I concur with the majority.

Note:

The Ministry of Labour set up 1.2.2013 working group (two men). Group's topic is solidity of Tehy protocol's (or any collective agreement) regulation / rule, applied only to members of Tehy (or another collective agreement).

Working group's deadline is in the end of the summer.

Germany

National reporter: Reinhard Schinz, Landesarbeitsgericht Berlin-Brandenburg

Bundesarbeitsgericht (Federal Labour Court)

Dismissal on account of apostasy (leaving the church)

Judgement of 25.04.2013 (2 AZR 579/12)[1]

I. Abstract

1. Labour courts have to base their evaluation of demands made by a church on the loyalty and behaviour of their employees on those rules set up by the church itself as far as the constitution acknowledges the right of the church to rule their own affairs autonomously. The courts are bound by the assessment of the church unless they then contradicted basic principles of the legal system such as are laid down in Art. 3 of the constitution (prohibition of arbitrariness), § 138 BGB (morality) or Art. 30 EGBGB (ordre public). The courts have to ascertain that the church does not make unacceptable demands on the loyalty of their employees.

2. Practical concordance between the churches right of self-determination and the employees' fundamental rights has to be achieved by a process of balancing the legal positions within the framework of the law on employment protection. The labour law which is legally binding for the church as an employer does not provide an absolute ground for dismissal. This applies in the case of an employee's apostasy even if according to the self-concept of the Catholic Church this act generally rules out further employment by the church. Even in such a situation the conflicting interests have to be considered and balanced according to the national labour law. However, the churches right of self-determination is to be given prominence in this process.

3. Art 4 Subs 2 Dir 78/2000 EC does not preclude the justification of difference of treatment on account of religion if the churches rules pass a plausibility test and if at the same time the employer's demands on loyalty constitute a genuine and determining occupational requirement.

4. An extraordinary dismissal without notice can be justified if an employee of an institution run by the Catholic Church who is employed close to the churches domain of spreading the gospel leaves the church.

II. Facts

The plaintiff (P) had been employed since 1992 as a social education worker at the Caritas (C), a welfare organisation of the Catholic Church. Since 2008 he worked in a social centre in the town of Mannheim which is financed by the municipality and run by the Caritas. It provides educational help for socially handicapped children regardless of their religion. Teaching the Catholic faith or religion in general is neither part of the centre's activity nor P's duty.

P's contract of employment stipulates that

- employment in the Catholic church requires the observation of the churches laws and moral values even in his private life
- any transgression of Catholic doctrine of faith and ethics may cause the termination of the contract of employment
- after 15 years of employment the contract cannot be terminated by ordinary dismissal.

[1] http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&Datum=2013-4&nr=16885&pos=1&anz=41

P – like all his colleagues – had been a member of the Catholic Church.

In February 2011 P left the Catholic Church. He notified his employer giving as reasons the sexual abuse of children by members of the Catholic clergy, the events concerning the Society of St Pius X and the Good Friday liturgy with its anti-Semitic tradition. C pointed out that this would lead to a dismissal; P replied that he was aware of it.

C gave notice of extraordinary dismissal granting P 6 months' notice.

III. Legal context

1. § 626 BGB (Civil Law Code): Termination without notice for a compelling reason

(1) The service relationship may be terminated by either party to the contract for a compelling reason without complying with a notice period if facts are present on the basis of which the party giving notice cannot reasonably be expected to continue the service relationship to the end of the notice period or to the agreed end of the service relationship, taking all circumstances of the individual case into account and weighing the interests of both parties to the contract…

2. Grundgesetz (German Constitution, GG)

Article 140 [Law of religious denominations]

The provisions of Articles 136, 137, 138, 139 and 141 of the German Constitution of 11 August 1919 shall be an integral part of this Basic Law.

3. German Constitution of 1919 (Weimarer Reichsverfassung, WRV)

Article 137

… (3) Religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all. They shall confer their offices without the participation of the state or the civil community.

4. Basic Rules for employment relationships of the Catholic Church (passed by the German bishops)

Art. 5

(2) The contract of employment is to be terminated if the employee violates his obligations of loyalty gravely by (…) leaving the church, publicly denouncing fundamental doctrine of the church (e.g. supporting abortion), entering into an illegal marriage, apostasy or heresy, blasphemy, ridiculing the church…

(5) An employee who has left the church shall not be employed.

5. General Act on Equal Treatment

§ 9 Permissible Difference of Treatment On Grounds of Religion or Belief

(1) Notwithstanding Section 8, a difference of treatment on the grounds of religion or belief of employees of a religious community, facilities affiliated to it (regardless of their legal form) or organisations which have undertaken conjointly to practice a religion or belief, shall not constitute discrimination where such grounds constitute a justified occupational requirement for a particular religion or belief, having regard to the ethos of the religious community or organisation in question and by reason of their right to self-determination or by the nature of the particular activity.

(2) The prohibition of different treatment on the grounds of religion or belief shall be without prejudice to the right of the religious community referred to under Section 1, the facilities assigned to it (regardless of their legal form) or organisations which have undertaken conjointly to practice a religion or belief, to require individuals working for them to act in good faith and with loyalty to the ethos of the organisation.

IV: Judgement (Précis)

The Federal Labour Court upheld the Higher Labour Court's decision deeming the dismissal to be justified giving the following considerations:

1. A grave violation of an employee's obligation of loyalty can justify an extraordinary dismissal even if his motives are founded in his religious beliefs or his conscience. A social education worker employed by the church lacks the personal ability to fulfil his contractual obligations if he leaves the church. Even if normally the loss of an employee's ability to perform according to his obligations can only justify an ordinary dismissal, in this case it has to be observed that an ordinary dismissal is ruled out by the terms of the contract.
2. C is entitled to invoke the churches' right of self determination according to Art. 137 WRV. This includes the right to put up rules on behaviour and loyalty and to demand obedience of their employees.
3. C is entitled to define which kind of violation constitutes a particularly grave breach of their rules. Apostasy prevents a social worker from performing his duties because otherwise the church might lose their credibility; besides, P's action renders impossible any co-operation between the parties of the contract in a spirit of mutual trust and respect.
4. By virtue of this autonomy the labour courts have to accept the churches assessment of the gravity of the violation of duty as long as this assessment does not contravene superior principles of the national law such as laid down in Art. 3 GG (prohibition of arbitrariness), morality (§ 138 BGB) or ordre public. The courts have to ascertain that the church does not make unacceptable demands on the loyalty of their employees.
5. This autonomy is granted not only to the established church itself but also to its charitable institutions. The churches decide how they perform their self-imposed duties. This applies even if the charitable institutions provide the same services as secular organisations, if they compete with them and if they are funded by the state.
6. Which obligations of loyalty have to be observed is determined by the institution authorised by the church to pass such legislation (here: the bishop). There is no need for any democratic legitimation.
7. The churches autonomy is limited by the employee's constitutional position, e.g. Art. 12 GG (freedom of occupation) which constitutes an obligation of the state to provide an effective system of employment protection.
8. By a process of practical concordance, with regard particularly to the principle of proportionality, these diverging positions have to be balanced. This is reflected by the jurisdiction of the European Court of Human Rights (ECHR 3. 2. 2011 - 18136/02 - [Siebenhaar]; 23. 9. 2010 - 425/03 - [Obst]; 23. 9. 2010 - 1620/03 - [Schüth]). Observing this jurisdiction is obligatory by virtue of the German constitution as long as the rulings comply with the principles of the said constitution.
9. The employee's constitutional position does not necessarily constitute a part of the ordre public. If this were so the constitutional position of the church would be devalued. The church could only invoke their autonomy as long as it did not infringe the constitutional rights of others.
10. Thus the law does not in principle accept any autonomous regulation which provides that a specific reason – be it a misdemeanour or the disability to fulfil contractual obligations – shall justify an extraordinary dismissal without exception and without taking into account all the facts of the individual case and weighing the interests of both parties. However, the self-conception of the church is to be considered as particularly weighty.

11. According to these principles the appeal against the Higher Labour Court's decision is dismissed.

12. P's breach of his loyalty obligations is particularly severe according to the self-concept of the Catholic Church. P did not just fail to observe one specific demand of the churches' code of conduct but turned his back on the community of the faithful as a whole.

13. P was employed close to the churches domain of spreading the gospel. According to the self-concept of the church, pedagogic work is part of the churches vocation notwithstanding the secular concept of the social centre in which he worked. According to the churches rules not only pastoral but also educational work is an integral part of the Great Commission. These rules are not arbitrary nor do they contravene other principles of the national law.

14. P cannot claim that the church continues to employ priests who have committed serious crimes (e.g. sexual abuse of children). Firstly, priests are not employees in the technical sense; secondly, P has not claimed that the church tolerates apostasy by a priest. Whether or not the churches credibility suffers from the lenient treatment of such priests is irrelevant.

15. Both P's right of freedom of religion and his occupational freedom have to be considered in his favour.

16. In the process of balancing the positions of both parties it has to be taken into account that P knew the churches rules and loyalty demands when he applied for the post as an educational worker. The conflict between the parties results from P's sphere albeit that the freedom of religion entails the right to change one's beliefs.

17. P's motives for his disaffiliation do not justify any other assessment. They might not have been foreseeable for him and explain his decision not to stay within the Catholic Church. It might even be presumed that the church itself bears some responsibility for these issues. However, according to the churches self-concept even justified criticism can never justify apostasy. The church cannot trust such an employee to take part in the Great Commission and to adhere to the churches doctrinal theology and ethics. Furthermore by his criticism of the Good Friday liturgy P does not just distance himself from some ecclesiastical institutions but from the Catholic doctrinal theology as a whole.

18. The dismissal constitutes a direct difference of treatment on account of religion according to §§ 1, 7 AGG. However, this discrimination is justified according to § 9 AGG. Membership in the Catholic Church constitutes a justified occupational requirement, having regard to the ethos of the church and by reason of their right to self-determination. C may therefore require individuals working for them to act in good faith and with loyalty to their ethos. Since P has failed to do so he lacks the personal requirement to perform his profession within the institutions of the church.

19. This interpretation of § 9 AGG is in accordance with Art. 4 Subs. 2 Dir 2000/78/EC. There is no need for a preliminary ruling by the ECJ because C's requirements of loyalty of their employees are justified even by the strictest possible interpretation of the Directive. Art. 4 Subs. 2 Dir 2000/78/EC does not withstand the justification of a direct difference of treatment on account of religion if the churches requirements pass a plausibility test and if those requirements are deemed to be a justified occupational requirement. Art. 4 Subs. 2 Dir 2000/78/EC has to be interpreted in the light of Union primary law. According to Art. 17 TFEU the Church Statement of Amsterdam has become an integral part of European primary law. (*n.b.: This statement provides that "the member states have pledged to respect the status of the churches according to national legislation and not interfere with it through Community law.").* This provision limits the scope of Art. 4 Subs. 2 Dir 2000/78/EC in so far as the churches requirements pass a plausibility test and are deemed to be a justified occupational requirement.

Hungary

National reporter: Dr. Mercédesz Kádár, Labour Court of Budapest

Metropolitan Labour Court
29.M.5804/2004/18.
Subject of proceeding: compensation

Based on: Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities

Judgement:

The court obliges the defendant to pay the plaintiff 350.000, - HUF as non-pecuniary damages in 15 days.

State of affairs:

The defendant is a security company. The defendant subcontactor (New York Security Ltd.) had the task to guard the VIII. District Mayor's Office with three security Guards. New York Security Ltd. had agency contract with Prétor Ltd. hiring security guards.

The plaintiff came to Prétor Ltd's ad, and they arranged a meeting where Prétor Ltd, New York Security Ltd, and V.J. the director of the defendant and the plantiff were present.

V.J. the director of the defendant was the person who decided to hire the plantiff or not. After a few minutes - without preparation of aptitude assessment test – V.J. went out the office and called out T.I. from the Prétor Ltd, and he said her he did not want to hire the plaintiff, he did not say why.

The plaintiff wanted to know why he was not hired, later V.J. said because they wanted a young and handsome man to hire.

The plaintiff requested in his lawsuit 800.000, - HUF as non-pecuniary damages, the reason was that the defendant did not hired him because of his roma origin. Alternativelly he marked that he was not hired because of his appearance.

The defendant claimed to reject the lawsuit. The defendant first referred that he has not any connection with the plaintiff. In merit that the plaintiff was not a chamber member, so he chose that candidate who was a chamber member. And he referred that he has not got plaintiff size uniform

The claim is based.

According to the Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities the article 19, the plaintiff had to prove that he came into contact with the defendant for hiring and sufferred disadvantage, and he had attribution which is defined in the Act.

The plaintiff proved that he was in connection with the defendant. The defendant was looking for security guard, and the employment would have been established with the plaintiff. During the recruitment process the defendant rejected the plaintiff. The plaintiff proved that he had roma origin, and his appearance set around deductible article 8, point t).

The defendant's obligation was to prove that he acted in accordance with the equal treatment or he was not obliged to act in accordance with the equal treatment.

But he did not prove.

The defendant's next plea was that the plaintiff was not a chamber member. The plaintiff had valid membership at the time of the recruitment process. The next plea was that the question of uniform, the vitnesses said that the uniform was white shirt and suit at the Mayor's Office. The Plaintiff had this kind of clothes, and the subcontractors as well, who were at the meeting, but V.J. did asked them.

Vitness said that V.J. said them the reason of rejection was that he wanted to hire a more handsome candidate. V.J. did not denied this satement.

The court found that the defendant rejected the plaintiff because of his appearance without examining his capability and qualification. The defendant violated Article 5 of the Labour Code, and the Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities the article 19 a.) b.) points.

During the proving procedure there was not data about that the defendant had the problem with roma origin of the plaintiff.

Summary

In Hungary the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, and the Racial Equality Directive 2000/43/EC were implemented by the Act CXXV of 2003 on equal treatment and the promotion of equal opportunities.

The case I chose started in 2004, the defendant rejected the plaintiff because of his appearance without examining his capability and qualification. The defendant violated Article 5 of the Labour Code, and the Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities the article 19 a.) b.) points.

At the beginning of the procedure the plaintiff though that the defendant did not hired him because of his roma origin, later on it was proved he was not hired because of his appearance.

Discrimination is defined as treating a person "less favourably" compared to another, because he or she belongs to one or more of the mentioned groups: disability, age, religion or belief, sexual orientation. Throughout the entire text of the directive, "less favorable treatment" refers to a subjective perception of offense or the violation of one's dignity. There are no objective criteria given in order to define which behavior is deemed to be discriminatory and which is not. Anybody can claim to having been treated in a "less favorable" or "offensive" way, in large part subjective states, which could be automatically conceded as being true.

Direct discrimination shall be taken to occur where a person is treated "less favorably than another". Indirect discrimination shall be taken to occur where a rule or a practice which seems neutral, has a disadvantageous impact upon a person or group of persons having a specific characteristic. The intention to discriminate is explicitly not relevant. With such a definition, a major part of associations could be found guilty of indirect discrimination, for example a sports club who excludes wheelchair users, a Christian association choosing to hire the Christian rather than the atheist, a catholic adoption agency conveying children only to heterosexual couples.

Some exceptions are made in the Directive, such as the right of Member States to define the content of teaching in schools, or differences in treatment on the ground of age. However, each of the exceptions leads to a clash of rights with the principle of non-discrimination, the very core concept of the Directive. The reliability of these exceptions is therefore more than uncertain.

Freedom of Expression and freedom of conscience are key civil rights. The European Union should protect these basic rights from an alleged right not to be "offended" or a "freedom from hearing criticism" or a freedom from "hurt feelings".

So in our case the court found that the defendant rejected the plaintiff because of his appearance without examining his capability and qualification. The defendant violated Article 5 of the Labour

Code, and the Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities the article 19 a.) b.) points.

Ireland

National reporter: Kevin Duffy, Chairman, The Labour Court

Henry Denny and Sons (Ireland) Limited and Sinead Rohan

Background

This case came before the Labour Court by way of an appeal by Sinead Rohan (referred to in the Determination as the Complainant) against the dismissal by the Equality Tribunal of claims that she brought under the Employment Equality Acts 1998 to 2011 (referred to in the Determination as the Act) against her former employer, Henry Denny and Sons (Ireland) Limited (referred to in the Determination as the Respondent)

The Complainant alleged that she was discriminated against on grounds of her family status and on grounds of disability by association in respect to pay and in being denied equal treatment compared to others who did not have these protected characteristics. Under Irish law it is unlawful to discriminate directly or indirectly against a person by reason of their family status. Family status relates to responsibilities as a parent of a child under age 18 or of a person over that age with a disability of such a nature as to require continuing care.

In advancing her claim of discrimination by association the Complainant relied upon the decision of the CJEU in case C-303/06, *Coleman v Attridge Law* [2008] IRLR 722. Under Irish law associative discrimination is recognised as a form of discrimination for the purpose of the Act. Moreover, the family status ground, upon which the Complainant also relied, was considered to be sufficiently wide as to encompass the discrimination alleged in so far as it was grounded on the Complainant's responsibilities in caring for her disabled child. The Court dealt with the case on the basis that the discrimination contended for was on the family status ground and that it was unnecessary to separately consider if it was also covered by the disability ground.

The procedural and evidential requirements in advancing a claim of discrimination on the family status ground are the same as apply in a claim grounded on Directive 2006/54/EC, Directive 2000/43/EC and Directive 2000/78/EC. Hence, while family status may not be a protected ground in employment equality law in other jurisdictions, the legal principles applied in this case are the same as those applicable in cases grounded on any of the Equality Directives. On that basis the approach of the Court in the case may be of general interest.

The facts

The Claimant was employed by the Respondent as a senior manager. She was the mother of young children one of whom suffers from an intellectual disability. The Complainant was dismissed from her employment on grounds of redundancy in or about September 2008, when the plant at which she worked closed. During the currency of her employment with the Respondent the Complainant was required to reduce her working hours in order to attend to her family responsibilities, and in particular, to care for her disabled child. There was no dispute concerning the existence of a situation of redundancy and the fact that the Complainant's dismissal was solely on grounds of redundancy.

The Complainant made the following claims: -

- She claimed to have suffered discrimination in terms of pay in not being paid a bonus after 2004.

- She claimed discrimination in terms of pay in having her ex-gratia redundancy payments calculated by reference to her earnings in respect of her reduced work liability rather than by reference to her contractual hours
- She claimed discrimination in terms of pay in not having the 'festival days' element of her redundancy payment calculated at the same rate as that of others who received consideration for these days in the computation of their redundancy pay
- She claimed discrimination in terms of conditions of employment and /or access to employment in being made redundant prematurely.

The Respondent denied the claims. It contended that the Complainant was not paid the bonus because she was not engaged in work of equal value to those who received this payment in that she reported to a lower level of management. It claimed that the redundancy payment paid to the Complainant was calculated on the same basis at that applied in the case of all others who were made redundant. In the claim that the Complainant was made redundant prematurely, the Respondent contended that she had failed to nominate a comparator who was treated more favourably in a comparable situation.

Issues arising in the case

The Court first considered if the reporting relationship was a factor that could be taken into account in deciding if two workers were engaged in work of equal value. It held that it could not because reporting relationships are determined solely by the employer and do not relate to the work actually performed. On the claim relating to premature redundancy the Court found that this related to equal treatment and the Complainant was entitled to rely on a hypothetical comparator. The Court went on to consider how a hypothetical comparator could be constructed.

The essence of the Complainant's case was that the adverse treatment of which she complained was on grounds of her family status and her child's disability. In these circumstances the application of the principal of the shifting burden of proof which applies in cases under each of the Equality Directives was of central importance. The Court set out the tests that it consistently applies in considering if the onus of proof shifts to the Respondent. The Court also considered the extent to which a Respondent who carries the burden of proof must establish that the protected ground relied upon was not an influential consideration leading to the adverse treatment complained of. The Court went on to considered the extent to which it can rely on the knowledge and experience of its members in reaching conclusions of fact. That arose in the context of a finding that the reason why the Complainant was not paid the bonus was because she worked part-time. There was no statistical evidence to show that persons having the same family status as the Claimant would find it more difficult to work full-time than those whose family status was different. The Court held that it was entitled to decide that question on the experience and knowledge of its members without formal proof. Accordingly the Court held that the failure to pay the Complainant the bonus was an act of indirect discrimination.

By application of these principles and on the evidence the Court held as follows: -

- She was entitled to arrears of bonus payments for a period of three years,
- She was not discriminated against in the method of calculating her redundancy pay in that the calculation in her case was the same as that used in the case of all others,
- She was paid less in respect of local holidays on grounds of her family status and she was entitled to recover arrears

- She was not discriminated against in being made redundant at the time of her dismissal because a hypothetical person without her family status would probably have been similarly treated in similar circumstances

This case may be of interest in demonstrating the approach adopted in Ireland in applying the legal principles that arise regularly in cases involving discrimination.

ADE/12/45 DETERMINATION NO. EDA1310

SECTION 83, EMPLOYMENT EQUALITY ACTS, 1998 TO 2011

PARTIES :

HENRY DENNY AND SONS (IRELAND) LTD
(REPRESENTED BY IRISH BUSINESS AND EMPLOYERS' CONFEDERATION)

– AND –

SINEAD ROHAN
(REPRESENTED BY CLIONA KIMBER B.L. INSTRUCTED BY HARRISON O'DOWD SOLICITORS)

DIVISION :

Chairman : Mr Duffy
Employer Member : Mr Murphy
Worker Member : Mr Shanahan

SUBJECT:

1. Appeal under Section 83 of the Employment Equality Acts, 1998 to 2011.

BACKGROUND:

2. The Worker appealed the Decision of the Equality Officer to the Labour Court on the 27th July 2012. A Labour Court hearing took place on the 6th March 2013. The following is the Court's Determination:

DETERMINATION:

This is an appeal by Sinead Rohan against the Decision of the Equality Tribunal in her claim of discrimination made against her former employer, Henry Denny & Sons (Ireland) Limited. The claim was made on the gender, family status and disability grounds.

In this Determination the parties are referred to as they were at first instance. Hence, Ms Rohan is referred to as the Complainant and Henry Denny & Sons Limited are referred to as the Respondent.

The facts

The material facts giving rise to the dispute can be summarised as follows: -

The Complainant is a woman with children. Her daughter is a person with Downs Syndrome. In advancing her claim in so far as it relates to the disability ground the Complainant relies on the judgment of the Court of Justice of the European Union (CJEU) in case C-303/06, *Coleman v Attridge Law* [2008] IRLR 722. Arising from that decision the Complainant contends that by reason of her caring responsibilities for her disabled child she is encompassed by what has come to be known as associative disability. The Respondent does not take issue with her contention in that regard.

The Complainant was employed by the Respondent at its Kerry plant between 1988 and September 2008 when she was dismissed by reason of redundancy. She was employed as a senior Manager from 1991 until the termination of her employment. There is some difference between the parties as to the

precise description of the Complainant's job role. The Complainant described it as *'quality manager'* whereas the Respondent describes her role as that of *'systems and process development manager'*. This difference in description is not material for present purposes.

In or about July 2003 the Complainant applied for parental leave pursuant to s.6 of the Parental Leave Act 1998. Her parental leave commenced on 1st August 2003 and continued until 8th September 2003. Thereafter it was to continue for one day per week. In accordance with s.7 of the Act the aggregate duration of the parental leave was to be the equivalent of 14 weeks. However, the Complainant continued to work a four-day week until September 2007 when she resumed working a five-day week at the request of the Respondent. In December 2007 she reverted to four day working but intermittently worked a five-day week when the exigencies of the Respondent's business so required.

In 2003 the Respondent introduced a bonus scheme for senior managers. In the case of the Complainant this scheme could generate additional earnings of up to 7.5% of basic pay. In or about February 2004 the Complainant received a bonus under the scheme. She did not receive any subsequent payments by way of bonus although other managers did receive such payments. There is a conflict between the parties as to the reason for the discontinuance of the bonus payments to the Complainant. The Respondent contends that in 2004 the management structure was reorganised and the Complainant ceased to hold a position in the management structure at a level to which the bonus scheme was applicable. The Complainant contends that there was no material difference in the role which she performed in 2003 and thereafter. She contends that the reason why the Respondent ceased to include her in the bonus scheme was because of her shortened working week. This in turn, she contends, related to her family responsibilities and in particular her role as the primary carer of her disabled child.

In or about April 2008 the Complainant again requested parental / carer's leave. She proposed to work 15 hours per week with the difference between those hours and her contractual hours being taken as parental / carer's leave. At that time the Complainant was asked by the Factory Manager if she would accept redundancy as an alternative. The Complainant declined this offer. The Complainant's application for parental /carer's leave was refused by the Respondent on or about 2nd July 2008. Instead the Factory Manager informed the Complainant that she was to be made redundant. The Complainant's redundancy lump sum, which comprised statutory redundancy and an ex-gratia element, was calculated by reference to her earnings based on a four-day week. The Complainant received an additional amount equal to 0.5 day's pay per year of service in respect of what was referred to as *'festival days'*. She contends that in the case of others this element of the redundancy payment was calculated as 1.5 days' pay per year of service.

The Complainant's dismissal took effect from 26th September 2008. There was some residual work, appropriate to her position, to be performed before the plant finally closed in or about February 2009. The Complainant contends that her dismissal was premature in that she could have been retained to perform this work and the decision to terminate her employment earlier was in response to her application for parental / carers leave.

The claims

Arising from the foregoing the following claims have been advanced by the Complainant: -

- She claims to have suffered discrimination in terms of pay in not being paid a bonus after 2004.
- She claims discrimination in terms of pay in having her ex-gratia redundancy payments calculated by reference to her earnings in respect of her reduced working hours' liability rather than by reference to her contractual hours
- She claims discrimination in terms of pay in not having the 'festival days' element of her redundancy payment calculated at the same rate as that of others who received consideration for these days in the computation of their redundancy pay
- She claims discrimination in terms of conditions of employment and /or access to employment in being made redundant prematurely.

Position of the parties

The Complainant

The Complainant told the Court in evidence that she was a member of the Respondent's senior management team. She attended meetings of senior management and her position within the Respondent's management structure in that regard was always acknowledged. She said that because of her caring responsibilities she took parental leave in 2003 and on her return from the initial 'block' of leave she commenced working four days per week. She said that a bonus scheme was introduced for senior managers in 2003. In 2004 she received a payment under the scheme in respect of 2003. She did not receive any payment under the scheme thereafter. All other managers at the equivalent level continued to receive the bonus.

The Complainant told the Court that she sought an explanation for this omission but none was provided. She said that at the hearing before the Equality Tribunal the Respondent claimed that it was because she was not regarded as a 'senior manager'. That was the first time she heard that explanation. According to the Complainant her role had not changed in any material way since 2003 when she received the bonus. She accepted that following the reorganisation of management structures in 2004 she reported to Ms Ann Kennelly rather than directly to the General Manager. However it was the Complainant's evidence that she performed the same work as Ms Kennelly and that both were interchangeable.

In relation to the 'festival days' the Complainant told the Court that she was told by others that this element had been included in the calculation of redundancy payment at the rate of 1.5 days' per year of service. In her case it was included at 0.5 day's per year of service. She had not been provided with an explanation for this difference. The Complainant accepted in cross-examination that time off in respect of 'festival days' was afforded only to those employees whose employment commenced before 1981. She said that nonetheless at least one other manager whose employment commenced after that date was paid this element.

Turning to the circumstances of her dismissal, the Complainant told the Court that she applied to the Factory Manager for parental/carer's leave in April 2008 in order to care for her daughter. She proposed to work 15 hours per week with the remainder being taken as unpaid leave. She was asked by the Factory Manger to accept redundancy as an alternative. She declined this offer. Her request for parental / carer's leave was refused and she was told that she was being made redundant. She was asked to train a then current employee to perform some of the tasks for which she was responsible and to train a manager from another of the Respondent's plants to perform other tasks. Those replacement staff continued to work in the factory until its final closure in or about the end of February 2009. The Complainant believes that the decision to terminate her employment at that time was in response to her request for parental/carer's leave, which in turn was related to her family responsibilities including her responsibilities to her disabled child.

The Respondent

The Respondent denies that the Complainant was discriminated against in the manner and on the grounds alleged or at all.

Evidence was given by Mr James O'Connor who was General Manager at the Kerry plant between 2001 and 2004. He told the Court that he introduced a bonus scheme for management staff in 2003. It was intended to provide an incentive for heads of departments to meet predetermined levels of performance. Targets were set for each individual participant in the scheme and their performance was then measured against those targets. This witness confirmed that the Complainant was included amongst those managers to whom the scheme applied. The witness was succeeded as General Manager in 2004 by Mr Tom O'Driscoll. He said that his successor wanted one person in each department to report directly to him and with that in view he reorganised the management structure. The witness was unable to assist the Court on the exact reasons why the Complainant had ceased to

receive bonus but he thought that it was because she ceased to report directly to his successor as General Manager.

The witness was referred to the description of the Complainant's role in 2007 and he was asked to identify any changes that had occurred since 2003. The witness confirmed that the description set out in 2002-2003 was similar to that recorded in the performance review document for the Complainant in 2007.

Mr Oliver Heffernan gave evidence. Mr Heffernan was Operations Manager at the Kerry plant in 2004. At that time five managers reported to this witness. According to Mr Heffernan, Mr O'Connor's successor, Mr O'Driscoll, took over as General Manager in or about the end of January 2004. Mr O'Driscoll reorganised the management structure so as to have one person in each department reporting to him. In the case of quality assurance, the Complainant and Ms Anne Kennelly both reported to the General Manager. It was decided that only one of them would exercise that function. Mr O'Driscoll wanted the person so designated to be available five days per week and the Complainant was not in a position to undertake this role. Ms Kennelly applied for and was appointed to undertake that function.

The witness told the Court that the only occasion on which the Complainant raised an issue concerning the bonus was in the course of her performance review in 2006. She asked why she was not being considered for a bonus. The witness said that he undertook to find out why that was so and he spoke to Mr O'Driscoll. He was told that it was because the Complainant reported to Ms Kennelly. The witness said that he thought that he conveyed this to the Complainant but he was unsure on that point.

The witness agreed that the Complainant attended meetings of senior management but he said that others also did so who were not regarded as part of the senior management team. Mr Heffernan accepted that he reviewed the Complainant's performance in 2006. He was referred to the documents used for that review and he agreed that the description of her role and functions recorded in that document did not differ materially from the description of her role in 2002.

Mr Michael Munnelly gave evidence. He became General Manager in 2007. He said that when he was appointed to that position he was given a list of those eligible to participate in the bonus scheme by Mr O'Driscoll. He continued to operate the bonus scheme in respect of those included in the list and he did not question why the Complainant was not included. The witness agreed that the Complainant attended senior management meeting but this did not mean that she was regarded as part of the senior management team. He said that others who were not so regarded also attended. The witness also told the Court that others who attended these meetings, besides the Complainant, were not included in the bonus scheme.

Mr Munnelly told the Court that the Complainant returned to full-time work in 2007 at his request. However the plant lost business in or about December of that year and the Complainant was returned to a four-day week.

The Court was told that a decision was taken in 2008 to close the plant and staff were made redundant as the plant was wound down. The Complainant's job became redundant when it was decided that the need for a quality assurance manager no longer existed. The witness said that some residual work was required but it was of little significance and would not have been sufficient to occupy the Complainant for four days per week. However, matters surrounding the Complainant's redundancy were dealt with by the then Factory Manager and the witness had no direct dealings with this matter.

Conclusion

Grounds Relied Upon

In this case the Complainant has relied, *inter alia*, on the disability ground in advancing her claim. In essence she claims that she was treated less favourably because she was prevented from working full-

time due to her need to care for her disabled child. Thus, she claims that the less favourable treatment of which she complains was by reason of her association with her disabled daughter.

The Complainant also relied upon the family status ground. Family status is defined by s. 2 of the Act as:-

> *"family status" means responsibility— as a parent or as a person in loco parentis in relation to a person who has not attained the age of 18 years, or as a parent or the resident primary carer in relation to a person of or over that age with a disability which is of such a nature as to give rise to the need for care or support on a continuing, regular or frequent basis, and, for the purposes of paragraph (b), a primary carer is a resident primary carer in relation to a person with a disability if the primary carer resides with the person with the disability"*

It is clear that the meaning ascribed to family status for the purpose of the Act is sufficiently wide so as to encompass the Complainant's role as a carer of her disabled child. Consequently, in so far as her complaints are grounded on her caring responsibilities for her daughter, they come within the ambit of the family status ground and it is unnecessary to consider them by reference to the disability ground.

Comparators

It is settled law that an equal pay claim must be grounded on the difference in remuneration of the Complainant relative to that of a real as opposed to a hypothetical comparator with whom he or she is engaged on like work. This was made clear by Budd J. in *Brides v Minister for Agriculture* [1998] 4 IR 250. In this case the Respondent contends that the Complainant has not identified such a comparator. It is clear, however, that in her claim before the Equality Tribunal the Complainant did nominate a number of comparators. Moreover, in the Court's view, the nature of the claims is such that the requirement for a comparator can be easily satisfied.

In relation to the payment of bonus, it is clear that the Complainant is relying on the fact that the payments in issue were made to all other managers who, on that account, are potential comparators. The Complainant was paid the bonus in respect of 2003 and it can safely be assumed that she was then engaged in like work with all other managers who also received a bonus. On the uncontested evidence of the Complainant the Court is satisfied that the range of duties and responsibilities of the Complainant, and the circumstances under which they were performed, remained the same from 2002 up to the time that her employment came to an end.

The Complainant accepts that from 2004 onwards she reported to Ms Kennelly rather than to the General Manager as previously. However, a reporting relationship is not a factor to be taken into account in determining if jobs are of equal value. This Court so decided in Determination EDA0720, *Health Service Executive and Twenty Seven Named Complainants*. Here the Court was required to consider if female Directors of Public Health Nursing were engaged in like work with male Directors of Nursing (Mental Health). In contending that the complainants and their comparators were not engaged in like work the Respondent placed considerable emphasis on the different reporting relationships of the respective groups. The Complainants reported to the General Manager in their area whereas the Comparators reported to the Local Health Manager (LHO), which was a higher level of management. The Respondent contended that this was a significant factor indicative of the greater degree of responsibility attaching to the post of Director of Nursing (Mental Health). In rejecting that submission this Court held:

> *The Court does not accept that a reporting relationship is a matter which should properly be taken into account in measuring the value of two different jobs for the purpose of applying the provision of s7(1)(c) of the Act. Reporting relationships are determined by the employer and are often reflective of the importance which the employer accords to a job. If a reporting relationship were to be regarded as a determinative factor in measuring like work it could easily be used to conceal what is in reality a discriminatory pay arrangement, thus circumventing the protection of the Act. As was pointed out by Barron J. in* C & D Food Ltd. v

> Cunnion *[1997] 1 IR 147, the decision as to what constituted "like work" is for the Court and not the employer. If the employer's evaluation of the work is incorrect it cannot be relied upon to avoid liability under the Act.*

In relation to the claim concerning the calculation of her redundancy payments, it is clear that the same mode of calculation was used in the case of all full-time employees, namely, by reference to their earnings over a five-day week. Since all employees at the plant were made redundant it follows that this mode of calculation was applied to those who were engaged in the same work as the Complainant, those engaged in work of equal value and those whose work was of lesser value. Consequently, any or all of those employees are valid comparators for the purpose of the Complainant's claim.

The claim arising from what was termed 'the premature redundancy' of the Complainant raises an issue of equal treatment. Consequently a hypothetical comparator can be relied upon. In Determination EDA1129 *A Worker v Two Respondents*, this Court pointed out that in order to construct a hypothetical comparator the Court should establish the factual criterion for the impugned decision and consider if that criterion would have similarly been applied in the case of a person without the protected characteristic (see the observations of Lord Nicholls in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285, paragraphs 8-12). Consequently the appropriate comparator for the purposes of this aspect of the Complainant's claim is a hypothetical person who did not have the same family responsibilities as the Complainant and who did not apply to work reduced hours by reason of his or her family status.

For these reasons the Court is satisfied that the within claims are properly grounded by reference to an appropriate comparator.

Burden of proof

The Court must consider if the probative burden has shifted to the Respondent in accordance with s.85A (1) of the Act, which provides: -

> *Where in any proceedings facts are established by or on behalf of a complainant from which it may be presumed that there has been discrimination in relation to him or her, it is for the respondent to prove the contrary*.

The test for applying that provision is well settled in a line of decisions of this Court starting with the Determination in *Mitchell v Southern Health Board* [2001] ELR 201. That test requires the Complainant to prove the primary facts upon which he or she relies in seeking to raise an inference of discrimination. It is only if this initial burden is discharged that the burden of proving that there was no infringement of the principle of equal treatment passes to the Respondent. If the Complainant does not discharge the initial probative burden which he or she bears, his or her case cannot succeed.

The type or range of facts which may be relied upon by a complainant can vary significantly from case to case. The law provides that the probative burden shifts where a complainant proves facts from which it may be presumed that there has been direct or indirect discrimination. The language used indicates that, where the primary facts alleged are proved, it remains for the Court to decide if the inference or presumption contended for can properly be drawn from those facts. This entails a consideration of the range of conclusions which may appropriately be drawn to explain a particular fact or a set of facts which are proved in evidence. At the initial stage the complainant is merely seeking to establish a *prima facie* case. Hence, it is not necessary to establish that the conclusion of discrimination is the only, or indeed the most likely, explanation which can be drawn from the proved facts. It is sufficient that the presumption is within the range of inferences which can reasonably be drawn from those facts (See also Determination EDA0821, *Kieran McCarthy v Cork City Council*).

Where the probative burden passes to the Respondent it must be shown that there was no discrimination whatsoever in the sense that the protected ground relied upon was nothing more than a trivial influence in the impugned decision (*Wong v Igen Ltd* [2005] EWCA Civ 142).

The Court must then turn to a consideration of whether, by application of those principles, the onus of proof has shifted to the Respondent in this case and, if so, has the inference of discrimination thus created been rebutted. Each of the Complainant's claims is considered in turn.

Bonus

As already found elsewhere in this Determination the Court accepts that the Complainant was engaged in like work with other senior managers who received a bonus. The Court has also found that there was no material change in the nature of the work performed by the Complainant after 2003, when she was removed from participation in the bonus scheme. The only difference between the circumstances of the Complainant and those of the other managers who were regarded as qualified to receive a bonus, apart from any difference in reporting relationships, was that the Complainant worked a four-day week whereas the others worked a five-day week. The Court also accepts the Complainant's evidence that she sought an explanation from Mr Heffernan for her exclusion from the bonus scheme and that none was provided.

In this case the facts relied upon by the Complainant are not consistent with a claim of direct discrimination. It is not alleged that the bonus payments ceased because of her family responsibilities *per se*. Rather, the gravamen of the Complainant's case is that she was removed from the bonus scheme because she worked a four-day week. It is clear that this Court, as an expert tribunal, is entitled to draw on the knowledge and experience of its members in reaching conclusions of fact. That principle was enunciated by the Court of Appeal for England and Wales in *London Underground v Edwards (No.2)* [1998] IRLR 364 and by the Northern Ireland Court of Appeal in *Briggs v North Eastern Education and Library Board* [1990] IRLR 181. This Court adopted a similar approach in *Inoue v MBK Designs* [2003] 14 E.L.R. 98, as did the High Court in the more recent case of *Benedict McGowan and ors v The Labour Court, Ireland and the Attorney General and Ors* [2010] 21 E.L.R. 277.

Based on its own knowledge it is perfectly clear to this Court that women having the family status of the Complainant, and in particular women who are the carer of a disabled child, would find it more difficult to work full-time than either a man or a women whose family responsibilities are different. Consequently, a requirement to work full-time is a provision, criterion or practice which determines entitlement to a payment in employment. Consequently it can constitute indirect discrimination on the ground of family status if it operates so as to place persons having the same family responsibilities as the Complainant at a particular disadvantage.

In *Flynn v Primark* [1997] E.L.R 218, Barron J said the following (at 223): -

> *The principles of law established by the case law to which I have referred are not in my view in dispute between the parties. Once as between workers doing like work there is a difference in pay which prejudices significantly more women than it does men then, whatever the reason, there is a* prima facie *discrimination and an onus rests on the employer to establish that this difference is not gender based but that the reasons for such difference are objectively justifiable on economic grounds*.

While that case concerned an equal pay claim on gender grounds the principle enunciated in the passage quoted is of general application in cases involving any of the protected grounds under the Act.

The Court is satisfied that the primary facts surrounding this aspect of the Complainant's case are of sufficient significance to raise an inference that the Complainant was discriminated against on grounds of her family status. Consequently, since this is a case of indirect discrimination, it is for the Respondent to objectively justify the non-payment of the bonus to the Complainant on grounds unrelated to her family status.

None of the witnesses who testified on behalf of the Respondent could give direct evidence of the reason for the Complainant's exclusion from the bonus scheme. Mr Heffernan told the Court that he believed the reason to be the Complainant's indirect reporting relationship to the General Manager. Mr Munnelly's evidence was to similar effect. However, their evidence was based on discussions which they had with Mr O'Driscoll. Consequently their evidence must be regarded as hearsay. It was

Mr O'Driscoll who decided to remove the Complainant from the bonus scheme. Only he could give reliable evidence as to the reason for that decision and the basis upon which it could be objectively justified. Mr O'Driscoll did not give evidence.

The decision of the UK Employment Appeals Tribunal in *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] IRLR 332 (per Ansell J) indicates that since the facts necessary to prove an explanation for a seemingly discriminatory act would normally be in the possession of the respondent, a tribunal should expect cogent evidence to discharge the burden of proof. In this case there is no cogent or reliable evidence before the Court concerning the actual reason for the Complainant's exclusion from the bonus scheme. Nor is there any evidence upon which it could be held that her exclusion was objectively justified on grounds unrelated to her family status as that term is statutorily defined.

Accordingly the Complainant is entitled to succeed in this aspect of her claim.

Calculation of ex-gratia redundancy lump sum

There is no dispute concerning the material facts surrounding this aspect of the Complainant's claim. All employees who were made redundant, including the Complainant, had their ex gratia redundancy payments calculated by application of the formula provided in the Redundancy Payments Acts 1967-2003, that is to say, by reference to their actual earnings.

In contending that the Complainant was entitled to have her ex gratia redundancy lump sum calculated by reference to her earnings based on a five-day week, her Counsel, Ms Cliona Kimber, B.L, relied upon the decision of the CJEU in C- 116/08 *Meerts v Proost NV* [2009] All ER (D) 259.

That case involved a preliminary ruling by the Court of Justice in proceedings concerning the dismissal of the applicant by her former employer, Proost NV, whilst she had been on part-time parental leave. The applicant had been employed on a full-time basis since September 1992 under an employment contract of indefinite duration. From November 1996, the applicant had various forms of career break and, from 18 November 2002, worked half-time as a result of parental leave, which was due to end on 17 May 2003. On 8 May 2003 the applicant was dismissed with immediate effect subject to payment of compensation for dismissal equal to 10 months' salary calculated on the basis of the salary she had been receiving at the time, which was reduced by half because of the equivalent reduction in her working hours. She challenged the amount of that compensation for dismissal before the Labour Court of Turnhout, claiming that her employer should be ordered to pay compensation for dismissal calculated on the basis of the full-time salary which she would have been receiving if she had not reduced her working hours in connection with parental leave. Her application was dismissed by judgment of 22 November 2004. On appeal, the Antwerp Higher Labour Court upheld that judgment. In her further appeal, the applicant submitted that, both at first instance and on appeal, the courts interpreted national law without regard to the provisions of Council Directive 96/34/EC (on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, as amended by Council Directive (EC) 97/75). In due course, the national court stayed the proceedings and referred a question to the CJEU concerning the interpretation of Clauses 2.4 to 2.7 of the framework agreement on parental leave which was annexed to the Directive.

An issue arose as to whether clauses 2.4 to 2.7 of the framework agreement on parental leave were to be interpreted as meaning that, where an employer unilaterally terminated an employment contract without urgent cause or without compliance with the statutory period of notice, at a time when the worker was availing himself or herself of arrangements for reduced working hours, the payment in lieu of notice that was due to the worker had to be determined by reference to the basic salary calculated on the basis that the worker had not reduced his or her working hours as a form of parental leave in accordance with Clause 2.3(a) of that agreement.

The Court ruled that Clauses 2.6 and 2.7 of the framework agreement on parental leave had to be interpreted as precluding an employer from calculating the redundancy compensation payable to a

worker on part-time parental leave on the basis of her reduced earnings at the time the dismissal takes effect.

The Court does not accept that the decision in this case can avail the Complainant. The decision relates to the interpretation of Directive 96/34/EC (The Parental Leave Directive) which is transposed in this jurisdiction by the Parental Leave Act 1998, as amended. That Act provides an exclusive legislative route by which the entitlements derived from the Directive can be pursued. It involves a reference at first instance to a Rights Commissioner and a full appeal to the Employment Appeals Tribunal. This Court has no statutory jurisdiction under that Act and it cannot arrogate such a jurisdiction to itself. Moreover, the Court notes that the Complainant commenced her statutory parental leave on or about 11th August 2003. She availed of a four-week block of leave and the remainder of her entitlement was to be taken in the form of one day per week. Section 7 of the Parental Leave Act 1998, as amended, provides an employee with an entitlement to 14 weeks leave, or where it is taken otherwise than in a single block, the equivalent of 14 working weeks. Although the Court makes no finding on the point it appears that the Complainant's entitlement under the Act of 1998 was exhausted long before her employment came to an end and that her reduced working hours could not be classified as being in consequence of statutory parental leave although it was clearly related to her caring responsibilities.

In the Court's view this aspect of the Complainant's case must be determined by reference to the Employment Equality Acts and the jurisprudence applicable thereto. In *Kowalask v Freie und Hansestadt Hamburg* [1990] ECR 1-2591 the CJEU ruled that the obligation to treat a group of part-time workers made up predominately of women equally, in relation to a redundancy scheme, to that of a group made up mainly of men, meant that both groups should be treated equally in terms of the rules and conditions of the scheme applied pro rata to the hours worked (see also Determination EDA036, *Mary Brown v Eason & Sons Limited*).

In this case the Complainant was treated in the same way as all others who were made redundant in that her entitlements were assessed by reference to her weekly earnings at the time the redundancy took effect. Consequently there was no less favourable treatment and no discrimination. It follows that this aspect of the Complainant's claim is not well-founded.

Festival days

The Respondent took issue with the Complainant's entitlement to pursue this aspect of her claim. It submitted that this matter was not referred to in the initiating form submitted to the Equality Tribunal and was first raised at the hearing before the Equality Officer. It was submitted that the date of the hearing was more than three years since the date on which the redundancy payments were made and at the date of the hearing her claim under this heading was statute-barred.

The Court cannot accept that submission. As was pointed out by the High Court in *County Louth VEC v The Equality Tribunal*, (Unreported, High Court, McGovern J, 12th July 2009), the form used to initiate a complaint to the Equality Tribunal has no statutory basis and is intended to provide a broad outline of what is being claimed. It can be amended at any stage in the procedure provided the nature of the claim remains the same. It is clear that at all times the Complainant was contending that her ex-grata redundancy payments were calculated in a discriminatory manner. In that context the inclusion of the 'festival days' element was in the nature of a particularity of her original claim rather than a new claim.

In these circumstances this element of the claim is properly before the Court.

The facts surrounding this aspect of the claim are that some employees had an element included in their redundancy pay which related to additional leave granted to attend a local festival. It was accepted that this leave only applied to employees whose employment commenced before 1981. The Complainant was employed after that date and she did not have the benefit of this additional leave. According to the Complainant, others who were made redundant had an additional 1.5 days' pay per year of service added to their ex gratia redundancy pay. The Complainant was given an additional 0.5

day's pay per year of service attributable to this additional leave. The Respondent accepted that at least one full-time employee who, like the Complainant, did not have the benefit of this additional leave while employed, had the full allowance in respect of this leave (1.5 days' per year of service) added to his redundancy pay. The Respondent said that this was because he remained until the eventual closure of the plant although none of the witnesses tendered could give direct evidence as to the actual reason. If full-time workers received 1.5 days' pay in respect of this element in calculating their redundancy pay the Complainant had a *prima facie* entitlement to four-fifths of that allowance (1.2 days') rather than the 0.5 day's which she received.

The inconsistencies in the Complainant's treatment in relation to this matter are, in the Court's opinion, facts of sufficient significance to raise an inference of indirect discrimination against the Complainant as a person who worked part-time by reason of her family responsibilities. It is, therefore, for the Respondent to objectively justify the difference in treatment. No adequate explanation was proffered in evidence. Accordingly, the Complainant is entitled to succeed in this aspect of her claim.

Timing of Redundancy

The Respondent ceased production in Tralee and all of those employed there were made redundant. The Complainant is not disputing her redundancy *per se*. Rather she contends that her dismissal was premature in that at the time of her dismissal work appropriate to her role remained to be done. She contends that others were assigned to this work and that she was required to provide them with training to undertake that work.

In April 2008 the Complainant applied to reduce her working hours to 15 per week with the remainder being taken as parental / carer's leave. The reason for this request was to allow the Complainant to care for her disabled child. The application was made to the Factory Manager, Ms Sonia McDiarmid. She was asked to take redundancy as an alternative. The Complainant declined this offer. In or about July 2008 the Factory Manager refused the Complainant's request for parental / carer's leave and instead told her that she was being made redundant. The Court accepts that the Complainant was asked to train others to undertake parts of her job for which there was a continuing need up to the eventual closure of the plant in or about the end of February 2009.

The Complainant accepted that the requirement for the substantial parts of her job had ceased at the time the redundancy took effect. She had no direct knowledge of the extent to which aspects of her former role remained to be done. According to witnesses who gave evidence for the Respondent the amount of work remaining to be done was insignificant and the substantial parts of the Complainant's job had become redundant as part of the gradual wind-down of the plant.

This aspect of the case must be considered by reference to how a hypothetical employee of the Respondent, similarly placed to the Complainant, the substantial part of whose job had become redundant, but who did not have the same family responsibilities, would have been treated. There is no evidence before the Court from which it could be inferred that such a hypothetical person would not have been made redundant at the same time as the Complainant. In these circumstances the Court must hold that the Complainant has failed to establish facts from which discrimination could be inferred in the timing of her dismissal. Accordingly this aspect of her claim cannot succeed.

Outcome

For all of the reasons set out herein the Court finds as follows: -

- The Complainant was denied equal pay, on the ground of family status, in relation to bonus payments. The Act prescribes a three-year limitation period in equal pay claims. Consequently the Complainant is entitled to recover arrears of bonus payment in respect of the three years before the date on which her claim was presented to the Equality Tribunal.

- The Complainant was not discriminated against on the ground of family status in terms of pay in the mode of calculation used by the Respondent in computing her ex-gratia redundancy lump sum.
- The Complainant was denied equal pay on the ground of family status in being paid an allowance of 0.5 day's pay per year of service in respect of festival days rather than 1.2 days' pay per year of service. She is entitled to recover the difference of 0.7 day's pay per year of service by way of arrears of pay.
- The Complainant was not discriminated against in terms of access to employment in being made redundant in September 2008.

Redress

The Court directs the Respondent to pay to the Complainant:-

1. Arrears of bonus measured at 7.5% of her salary for each of the three years preceding the date on which her claim was presented to the Equality Tribunal.
2. Arrears in respect of her ex-gratia redundancy lump sum being the difference between an allowance of 0.5 day's pay per year of service and 1.2 day's pay per year of service, namely, 0.7 day's pay per year of service.

Section 82(5) of the Act allows for the awarding of interest on compensatory amounts where the discrimination found arises on the ground of gender. As the Court has not found that the Complainant was discriminated against on the ground of gender the question of awarding interest does not arise.

The amounts referred to at 1 and 2 above related to remuneration and are liable to income tax.

Determination

The appeal is allowed in part. The decision of the Equality Tribunal is set aside and substituted with the terms of this Determination.

Signed on behalf of the Labour Court
Kevin Duffy

CR
3rd April, 2013

_____
Chairman

Lucey Transport Limited and Marius Serenas

Background

This case came before the Labour Court by way of an appeal by the employer (referred to in the Determination as the Respondent) against a decision of a Rights Commissioner in which Marius Serenas (referred to in the Determination as the Claimant) was awarded compensation in the amount of €9,000 for having been required to work in excess of 48 hours per week. The Rights Commissioner also found that the Claimant had been required to work overtime without having been given at least 24 hours' notice of that requirement.

The claim was brought under the Organisation of Working Time Act 1997 (referred to as the Act of 1997, or the Act). That Act gave effect in Irish law to Directive 93/104/EC. It also made further provisions in relation to the organisation of working time that went beyond the requirements of the Directive. One such additional provision is that contained in s.17 of the Act which obligates an employer to give an employee a minimum of 24 hours' notice of a change in his or her starting or finishing time except where the change in necessary in order to deal with an unforeseen event.

Facts

The Respondent was engaged in road haulage both nationally and internationally. The Claimant was a migrant worker who was employed by the Respondent as a truck driver. His contract of employment required him to work up to 48 hours per week. He claimed that he was frequently required to work in excess of that number of hours. He also claimed that on those occasions on which he was required to work additional hours he received little or no notice.

The Respondent did not deny the facts alleged by the Claimant. Rather, it contended that the activity in which the Claimant was engaged (road transport) was not covered by the Act of 1997 and that the Labour Court had no jurisdiction to entertain his claim.

Legal Context

Activities involving the carriage of goods by road were excluded from the scope of Directive 93/104/EC. The Act of 1997 did not replicate that exclusion. Rather, it provided that such activity could be excluded from the scope of the Act by Ministerial Order. Such an exclusion was made by the relevant Minister in 1998 (S.I. 20 1998).

The Act of 1997 provided for a system whereby an employee whose rights under the Act were infringed could claim a civil remedy in damages by bringing a claim before a Rights Commissioner. The decision of the Rights Commissioner could be appealed to the Labour Court

Directive 93/104/EC was subsequently amended by Directive 2000/34/ EC. Directive 2002/15/EC made specific provision in relation to the organisation of working time in the road transport sector. That Directive was expressed to take precedence over Directive 93/104/EC. Directive 93/104/EC and Directive 2000/34/EC were replaced by Directive 2003/88/EC. Directive 2003/88/EC does not apply in sectors that are governed by more specific Community measures. In effect, that Directive does not apply to the type of road transport activity covered by Directive 2002/15/EC.

The difficulty that arose in this case stemmed from the manner in which the various Directives were implemented in Irish Law and the apparent conflict that emerged between the European legislative provisions and the corresponding provisions of domestic law.

Unlike Directive 93/104/EC the Act of 1997 did not exclude the road transport sector. Rather, the sector was excluded by statutory order. In 2004 Statutory Regulations were made so as to give effect to the consolidated Working Time Directive (2003/88/EC). These Regulations revoked the order of 1998 by which the road transport sector was excluded from the ambit of the Act of 1997. The 2004 Regulations made new exemptions in respect of certain types of road transport activities (light vehicles under 3.5 tonnes). The Regulations provided that they did not apply to activity involving heavy goods vehicles that were covered by Directive 2002/15/EC. The legal effect of the revocation of the 1998 order was to remove the exclusion from the scope of the Act of 1997 of those parts of the road transport sector not covered by the 2004 Regulations (those activities covered by Directive 2002/15/EC). Hence, those activities became covered by the Act of 1997 for all purposes.

In 2005 Regulations were made by Ministerial Order which were intended to give effect to Directive 2002/15/EC in domestic law. These regulations did not purport to amend the Act of 1997. They provided that a contravention of the Regulations amounted to a criminal offence punishable by a fine. But they made no provision by which an aggrieved employee could obtain a civil remedy of the type available to all other employees under the Act of 1997.

The Regulations of 2005 were subsequently revoked and replaced by new regulations governing the road haulage sector in 2012. These regulations again made no express amendment to the Act of 1997 but they did provide for the same remedies that are available under the Act for any contravention of the terms of the Regulations.

Issues arising in the case

It was clear that in European law Directive 2002/15/EC took precedence over Directive 2003/88/EC. But it was equally clear that in transposing both Directives the Irish legislature did not expressly make

a corresponding provision. The Respondent contended that the effect of European law was that the Statutory Regulations of 2005 and those of 2012, in effect, determined the rights and obligations of the parties and not the Act of 1997. Most of the transgressions complained of by the Claimant occurred before the Regulations of 2012 were promulgated. Hence, the Claimant could not have any right to a civil remedy.

The Court was called upon to consider the extent to which the domestic law was in conflict with European law and if there was conflict, how it should be resolved. The Court engaged in a detailed analysis of the European law provisions and the corresponding domestic law provisions. It also considered the nature and extent of the duty on national courts to interpret and apply provisions of national law so as to achieve the result envisaged by a Directive.

Based on its analysis, and for the reasons set out in the Determination, the Court found that the inclusion of the road haulage sector in the Act of 1997 was not inconsistent with the Directive. In reaching that conclusion the Court was heavily influenced by the fact that the 2005 Regulations, unlike the Act of 1997, did not provide employees whose rights were infringed with a civil remedy.

However, the Court found that the Regulations of 2012, which provided the same procedures and the same remedies as the Act of 1997, impliedly amended the Act of 1997 so as to provide that the rights and obligations of parties under Directive 2002/15/EC were to be enforced under those Regulations rather than under the Act of 1997.

The Case may be of interest in that it demonstrates the approach of the Court to the obligation to interpret and apply domestic law, as far as possible, in light of the wording and purpose of a Directive so as to achieve the result envisaged by the Directive in circumstances in which the doctrine of direct effect does not apply.

It also demonstrates the approach which should be adopted in cases where an apparent conflict between different statutory provisions dealing with the same subject by application of the old Doctrine of Implied Repeal or Amendment.

DETERMINATION NO. DWT1398

(r-122546-wt-12)

SECTION 28(1), ORGANISATION OF WORKING TIME ACT, 1997

PARTIES :

LUCEY TRANSPORT LIMITED
(REPRESENTED BY PURDY FITZGERALD SOLICITORS)

- AND –

MARIUS SERENAS
(REPRESENTED BY JOHN GLYNN & CO.)

DIVISION :

Chairman :	Mr Duffy
Employer Member :	Ms Doyle
Worker Member :	Ms Tanham

SUBJECT:

1. Appeal of Rights Commissioner's Decision No: r-122546-Wt-12/MH

BACKGROUND:

2. This is an appeal of Rights Commissioner's Decision No: r-122546-wt-12/MH. The issue concerns a claim by the worker that his employer breached Sections 15 and 17 of the Organisation of

Working Time Act, 1997. The dispute was referred to a Rights Commissioner for investigation. His decision issued on the 17th July 2012 and awarded the worker €9000 in compensation. On the 9th August 2012 the employer appealed the Rights Commissioner's Decision in accordance with Section 28(1) of the Organisation of Working Time Act, 1997. A Labour Court hearing took place on 8th January 2013. The following is the Court's Determination:

DETERMINATION :

This is an appeal by Lucey Transport Limited against the decision of a Rights Commissioner in a claim by Marius Serenas under the Organisation of Working Time Act 1997 (the Act). In this Determination the parties are referred to as they were at first instance. Hence, Lucey Transport Limited (which is the appellant herein) is referred to as the Respondent and Marius Serenas is referred to as the Claimant.

Facts giving rise to the claims

The Respondent is a limited liability company providing road transport and warehousing services to a range of industries. The Claimant is a driver and was first employed by the Respondent in that capacity on or about 6th September 2007. On or about 4th May 2012 the Claimant lodged a complaint with a Rights Commissioner under the Act in which he alleged that the Respondent contravened ss 15 and 17 of the Act in relation to him. Specifically, he alleged that the Respondent required him to work in excess of 48 hours per week, over the statutory reference period, contrary to s.15 of the Act. He further alleged that the Respondent failed to notify him of his starting and finishing times at least 24 hours in advance, contrary to s.17 of the Act.

The hearing before the Rights Commissioner

The claims were heard by a Rights Commissioner on 21st July 2012. The Respondent was not represented at that hearing. The Claimant attended the hearing and was represented by a solicitor. Having heard the uncontested evidence of the Claimant the Rights Commissioner found that the claims before him were well founded. He awarded the Claimant compensation in the amount of €9,000.

The Respondent appealed to this Court.

Position of the parties

The Respondent

The Respondent did not take issue with the facts alleged by the Claimant in grounding his claim. Rather, it contends that the Rights Commissioner had no jurisdiction to entertain the complaint in so far as it relates to s.15 of the Act. In advancing that submission the Respondent contends that at all material times the activity in which the Claimant was engaged was excluded from the scope of s.15 of the Act. It contends that instead mobile activities of the type in which the Claimant was engaged are regulated by Statutory Instrument No 2/2005, entitled European Communities (Organisation of Working Time of Persons Performing Mobile Road Transport Activities) Regulations 2005, which were made for the purpose of implementing Directive 2002/15/EC. It was further submitted that the aforementioned Regulations have been replaced, with effect from 30th January 2012, by Statutory Instrument 36/2012, entitled European Communities (Road Transport) (Organisation of Working Time of Persons Performing Mobile Road Transport Activities) Regulations 2012. These Regulations, it was pointed out, provide for the making of a complaint to a Rights Commissioner alleging a contravention of their terms and a right of appeal to this Court. It was submitted that if the Claimant had a cause of complaint concerning the organisation of his working time it should have been processed pursuant to the 2012 Regulations and not under the Act. It was further pointed out that the complaint to the Rights Commissioner giving rise to this appeal was presented after the 2012 Regulations came into effect.

On that basis it was submitted that neither the Rights Commissioner, nor this Court on appeal, had jurisdiction to entertain the within complaints.

The Respondent further contended that the definition of working time and the reference period over which it is to be measured, for the purposes of the Regulations of 2012 are different to that provided in the Act. In that regard it was pointed out that periods of availability during which a mobile worker is not actually working are excluded for the purposes of the Regulations but are included for the purposes of the Act. This, it was submitted, materially affected the validity of the Claimant's complaint in relation to his working time if considered by reference to the Regulations as opposed to the Act.

With regard to the complaint under s.17 of the Act, the Respondent concedes that a requirement for notification of starting and finishing times is not specified in the Regulations and that this aspects of the case can be dealt with under the Act. The Respondent submits, however, that it fully complied with its obligations under s.17 of the Act.

A similar question to that raised by the Respondent, in relation to the applicability of the Act vis-à-vis S.I. No.2/2005, was considered by this Court in Determination DWT0934- *Goode Concrete and 58 Workers*. In that Determination the Court held that road transport activity of the type in issue in the instant case came within the ambit of the Act. The Respondent submissions in the instant case are predicated on the proposition that the *Goode Concrete* case was wrongly decided. In advancing that argument the Respondent submitted that Directive 2002/15/EC (upon which S.I 2/2005 and S.I. 36/2012 are based) applying as it does to a specific sector, takes precedence over Directive 2003/88/EC which is of general application (and upon which the Act is based). According to the Respondent, it must follow that the domestic law provisions implementing Directive 2002/15/EC (S.I 2/2005 and S.I. 36/2012) must likewise take precedence over the Act. The Respondent accordingly claims that the Claimant's claim is misconceived and should have been brought under S.I. 36/2012

The Claimant

On behalf of the Claimant it was submitted that the decision in the *Goode Concrete* case governs the points of objection taken by the Respondent. Counsel for the Claimant adopted the Court's reasoning in that case in submitting that his entitlement to pursue a complaint under the Act is unaffected by either S.I. 2/2005 or S.I 36/2012. It was submitted that the Claimant was required to work in excess of the permitted 48 hours per week specified in s.15 of the Act. It was further contended that the Respondent did not provide the Claimant with 24 hours' notice of his starting and finishing times, contrary to s.17 of the Act. In these circumstances the Claimant contends that the decision of the Rights Commissioner was correct in fact and in law and should be affirmed.

Conclusion of the Court

As previously observed the central issue arising in this case was fully considered by a different sitting Division of this Court, in so far as it relates to the effect of S.I. 2/2005, vis-à-vis the Act, in *Goode Concrete and 58 Workers*. The Determination in that case was subsequently appealed to the High Court on a point of law but that appeal was not pursued.

Although this Court will, in the interests of legal certainty, normally follow its own previous decisions it is not obliged to do so. Accordingly the Court will consider all the submissions made in this case notwithstanding its decision in *Goode Concrete*. Moreover, for reasons that will be more fully explained later in this Determination, different considerations apply in relation to the effect of S.I. 36/2012, vis-à-vis the Act than those that arose in that case.

The Court's reasoning in the *Goode Concrete* case are fully set out in Determination DTW0934. The rationale of the decision can be summarised as follows: -

- The original working time Directive, 93/104/EC, excluded the road transport sector from its scope. The Organisation of Working Time Act 1997, which implemented Directive 93/104/EC in Irish law, did not replicate that exclusion. Rather, statutory regulations, S.I. 20 1998 made pursuant to s.3(3) of the Act, effectuated such an exclusion from sections 11,12,13, 15 and 18 of the Act.

- Directive 2002/15/EC was enacted to make specific provision in European law in relation to the organisation of working time in the road transport sector and more specifically that sector involved in the transport of goods by vehicles weighing more than 3.5 tonnes . It is clear from the recitals to Directive 2002/15/EC that it was intended to take precedence over Directive 93/104/EC. Directive 93/104/EC was subsequently amended by Directive 2000/34/EC. Both Directives were subsequently replaced by a consolidated Directive, 2003/88/EC. Article 14 of Directive 2003/ 88/EC expressly provided that its terms shall not apply where other Community instruments contain more specific requirements relating to the organisation of working time for certain occupations or occupational activities.
- By order dated 13th December 2004, the Minister for Enterprise Trade and Employment made Regulations, pursuant to s. 4(3) of the Act, entitled Organisation of Working Time (Inclusion of Transport Activities) Regulations 2004 (S.I. 817 2004). These regulations revoked S.I. 20 1998. They introduced, in effect, new exemptions from the application of sections 11, 12, 13, 15 and 16 of the Act in respect of certain categories of mobile workers. However, those Regulations specifically excluded from their scope workers engaged in activity of the type in issue in this case (those covered by Directive 2002/15/EC). The effect of the revocation of S.I. 20 1998 was to bring activities covered by Directive 2002/15/EC within the scope of the Act for all purposes from the date of the revocation, namely 13th December 2004. Moreover, since the Regulations did not apply to workers covered by Directive 2002/15/EC the exclusions provided therein could not apply to those workers. Therefore from the 13th of December 2004 the activities of HGV drivers were covered by the provisions of the Act and there were no exemptions or exclusions in respect of those workers .
- By order dated 13th December 2005 the Minister for Transport made Regulations, pursuant to s.3 of the European Communities Act 1972 entitled European Communities (Organisation of Working Time of Persons Performing Mobile Road Transport Activities) Regulation 2005 (S.I. No. 2 2005). These Regulations made provision for the regulation of working time of mobile workers and more specifically employed heavy goods vehicle operators engaged in road transport activities. In line with the requirement of Directive 2002/15/EC they created a criminal offence of failing to comply with the restrictions on the working time of those to whom they applied. S.I 2/2005 did not provide any form of civil redress for a contravention of its terms. It did not restrict the application of the Act of 1997 and left undisturbed the right of such workers to pursue a claim under the Act through a Rights Commissioner, and on appeal to this Court.
- For the detailed reasons set out in Determination DWT0934 the Court concluded: -

  Mobile workers (including those who drive, or travel in, vehicles in the course of their employment) are covered by the general provisions of the Organisation of Working Time Act 1997.

  The generality of mobile workers are exempt from the requirements of sections 11,12,13 and 16 of the Act but they must be provided with adequate compensatory rest, as that term is defined in Directive 2003/88/EC

  Mobile workers who work in activities covered by Directive 2002/15/EC (in the main employed HGV drivers)are fully covered by the Act of 1997 and are <u>not</u> exempt from the requirements of sections 11,12,13 and 16 of that Act.

  The Rights Commissioners and this Court on appeal have jurisdiction to deal with complaints from all mobile workers alleging a contravention of the Act of 1997.

  The European Communities (Organisation of Working Time of persons Performing Mobile Road Transport Activities) Regulations 2005 (S.I. No. 2 of 2005) provides for criminal sanctions for a breach of its provisions but for no civil remedy.

> Neither the Rights Commissioners nor this Court have jurisdiction to entertain a complaint concerning a contravention of these Regulations.

The Respondent contends that the Court erred in the conclusions recited above. That contention is grounded in the proposition that since Directive 2002/15/EC takes precedence over Directive 2003/88/EC the domestic provisions giving effect to the former (S.I. 2/2005) must likewise take precedence over the domestic provisions giving effect to the latter (the Act). In considering those submissions the following legal principles are relevant.

The Doctrine of Supremacy

It is settled beyond argument that European law is superior to national law within the legal order of the European Union. Where there is conflict between Union law and domestic law it is the law of the Union that prevails. While that principle is easily stated its application in practice can give rise to difficulty, particularly where the legislative instrument is a Directive.

Directives are addressed to the Member States. Article 288 of the Treaty on the Functioning of the European Union (TFEU) provides: -

> *"A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods"*

In Case C-148/78, *Publico Ministero v Ratti* [1979] ECR 1629, the Court of Justice of the European Union (CJEU) pointed out that Directives cannot in themselves create rights and obligation for individuals. However, where a Directive is intended to create legal rights for individuals those rights may be relied upon in national courts where the doctrine of direct effect applies (C-41/ 74 *Van Duyn v The Home Office* [1974] ECR 1337). Since the decision of the CJEU in C-152/84, *Marshall v Southampton & South West Hampshire Health Authority* [1986] ECR 723 it is clear that the doctrine of direct effect can have no application in justiciable disputes between private individuals, such as in the instant case. Such disputes must be decided by reference to national law although national courts and tribunals are required to interpret their domestic law, as far as possible, in light of the wording and purpose of a Directive so as to produce the result envisaged by the Directive (C-106/89, *Marleasing SA v La Comercial Internacional De Alimentacion SA* [1990] ECR 4135). This interpretative obligation, now referred to as the doctrine of conforming interpretation, is not unlimited and it is clear that it does not require a national court to interpret its domestic law *contra legem*. Where the doctrine of direct effect does not apply, and a result consistent with a Directive cannot be achieved by conforming interpretation, an individual may have a cause of action in damages against a Member State that is in default of its obligation to properly transpose the Directive. That arises on the principle formulated by the CJEU in Case C 6/90 *Francovish & Others v Italy* [1991] ECR 5357.

The approach which national courts and tribunals should adopt in dealing with an apparent conflict between national and Union law contained in a Directive was most recently set down in Case 282/10 *Dominquez v. Centre Informatique du Centre Ouest Atlantique* [2012] IRLR 321. Here the CJEU held that the Court should: -

- By applying the interpretative methods recognised by domestic law seek to find an interpretation of that law that allows the Directive to have effect.
- If such an interpretation is not possible, it is for the national court to determine whether, in the light of the legal nature of the respondents in the proceedings, the doctrine of direct effect of the Directive applies against the Respondent.
- If the national court is unable to achieve the objective laid down in the Directive the party injured as a result of domestic law not being in conformity with European Union law can nonetheless rely on the judgment of 19 November 1991 in joined cases C 6/90 and C 9/90 *Francovich and others* in order to obtain, if appropriate, compensation for the loss sustained.

It is also a general principle of Union law that the implementation of a Directive should not result in a worsening of the pre-existing position of those for whose benefit the Directive was adopted (the principle of non-regression)

Questions arising

The question arising from the submissions advanced by the Respondent is, in essence, whether S.I. 2/2005 and/or S.I. 36/2012 must be interpreted as impliedly taking the type of road transport activity in issue outside the purview of Act of 1997. As previously noted in this Determination the within claim was presented to a Rights Commissioner on 4th May 2012. Accordingly, having regard to the six-month time limit prescribed by s.27 of the Act, the cognisable period in respect of which the Rights Commissioner and this Court has jurisdiction is that beginning on 5th November 2011. While s.27 of the Act allows for an enlargement of time by up to a further 12 months, no application for such an extension was made either to the Rights Commissioner or this Court.

If the Regulations have the effect contended for by the Respondent the dispute between the parties falls to be determined solely by reference to the Regulations. In the case of S.I. 2/2005, which was in force during part of the period covered by the within claims, there was no provision for a civil remedy. Consequently neither a Rights Commissioner nor this Court had jurisdiction in relation to those Regulations. S.I.36/2012, which came into effect on 30th January 2012, does provide for a civil remedy but the procedure for obtaining redress under those Regulations has not been invoked by the Claimant.

There are two principles of law that come into play in considering the Respondent's submissions. Firstly, the applicability of the doctrine of conforming interpretation must be considered in light of the contention that since Directive 2002/15/EC takes precedence over Directive 2003/88/EC the domestic provisions must be construed as having a similar effect. There is, however, a second principle of law that potentially arises, namely, that where there is a conflict in statutory provisions the later provision takes precedence over an earlier inconsistent provision. This principle, referred to as the doctrine of implied repeal or amendment, assumes that in enacting the second provision it was intended to repeal or amend the earlier inconsistent provision. Both parties were asked to engage with this principle in supplemental submissions but neither thought it necessary to do so although for different reasons. Nevertheless, the application of that principle of law is a relevant consideration in this case.

Doctrine of implied repeal or amendment

This doctrine is described by Bennion on Statutory Interpretation thus: -

> *"Where a later enactment does not expressly amend (whether textually or indirectly) an earlier enactment which it has power to override, but the provisions of the later enactment are inconsistent with those of the earlier, the later by implication amends the earlier so far as is necessary to remove the inconsistency between them"*

This doctrine encapsulates an old provision of the common law. In modern circumstances there is a strong presumption against its application. Nevertheless it remains part of our law as was made clear by the Supreme Court in *Director of Public Prosecutions v Scott Grey* [1986] IR 317. In his judgment in that case Henchy J adopted the following test formulated by AL Smith J in *West Ham Church Wardens and Overseers) v Fourth City Mutual Building Society* [1892] 1 QB 654, at p 658, to decide if a repeal (or amendment) has been effectuated by implication : -

> *"The test of whether there has been a repeal by implication by subsequent legislation is this: Are the provisions of a later Act so inconsistent with, or repugnant to, the provisions of an earlier Act that the two cannot stand together"*

Application of these principles

Conforming Interpretation

The analysis of the legal position of mobile workers formulated in *Goode Concrete,* and set out earlier in this Determination, is based on the literal interpretation of the various statutory instruments

relating to the organisation of working time in the road transport sector. The Respondent contends that the Court's analysis is erroneous because it does not conform to the result envisaged by Directive 2002/15/EC. Those submissions need to be considered in the context of what that Directive actually provides and the extent to which they are reflected in the relevant domestic statutory instruments

Article 1 of the Directive sets out it purpose as follows: -

> *The purpose of this Directive shall be to establish minimum requirements in relation to the organisation of working time in order to improve the health and safety protection of persons performing mobile road transport activities and to improve road safety and align conditions of competition.*

The fact that the Directive sets down minimum requirements is confirmed by Article 10, which also applies the principle of non-regression. This Article provides: -

> *This Directive shall not affect Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the health and safety of persons performing mobile road transport activities, or their right to facilitate or permit the application of collective agreements or other agreements concluded between the two sides of industry which are more favourable to the protection of the health and safety of mobile workers. Implementation of this Directive shall not constitute valid grounds for reducing the general level of protection afforded to workers referred to in Article 2(1)*.

As noted earlier in this Determination the Act of 1997 did not replicate Directive 93/104/EC in that it did not exclude the type of activity in issue in this case from its scope. Rather, it provided, at s.3(3), that certain types of activity could be excluded by statutory instrument. Such an exclusion, from sections 11,12,13, 15 and 18 of the Act, was effectuated by S.I. 20 1998. The inclusion of road transport activities within the ambit of the Act (but subject to an exclusion from certain provisions) was not inconsistent with Directive 93/104/EC since Article 15 of that Directive expressly provided that Member States may introduce more favourable provisions in their national law. That provision of Directive 93/104/EC was unaffected by the amending provisions of Directive 2000/34/EC.

On the revocation of S.I. 20 1998 by Regulation 5 of S.I. No. 817 2004 the exclusion ceased to have effect and the activities previously excluded by S.I. 20 of 1998 were brought fully within the ambit of the Act with effect from 13th December 2004.

Statutory Instrument 2/2005 was expressed on its face as being for the purpose of giving effect to Directive 2002/15/EC. It was made by the Minister for Transport pursuant to s.3 of the European Communities Act 1972. It made specific provision for the regulation of working time for those engaged in activity to which it related. Its principle provisions were in line with the requirements of the Act of 1997 although it did make more particular provision in relation to the definition of working time and in respect to the reference periods over which average working time was to be measured, including the fixing of a maximum working hours at 60 in any week during the averaging period.

Significantly, these Regulations provided that a contravention of their terms amounted to a criminal offence triable summarily. They did not confer rights on individuals to obtain redress through civil proceedings. It is of further significance that regulation 16 of these Regulations provided: -

> *"These Regulations shall apply without prejudice to any legislation that offers a greater level of protection to workers"*

At the time that these Regulations were promulgated on 13th December 2005, workers to whom they related had been brought within the purview of the Act of 1997 by virtue of the revocation of S.I 20 1998 exactly one year earlier on 13th December 2004. S.I. 2/2005 did not purport to reverse the effect of that revocation. Indeed, by having recourse to the complaints procedure provided by s.27 of the Act, those workers were afforded a greater level of protection than that provided by the Regulations themselves. Regulations 16 operated to save that additional protection.

The result

With effect from 13th December 2004 (on the revocation of S.I. 20 1998) workers performing road transport activities of the type in issue in this case were covered by all the provision of the Act of 1997 and could bring proceeding before a Rights Commissioner alleging a contravention of their rights under that Act. Separately, with effect from 13th December 2005, Statutory Instrument 2/2005 made more particular provision for the organisation of the working time of such workers, the contravention of which amounted to a criminal offence but did not provide for any form of civil redress. For the reasons referred to above, that result was not inconsistent with Directive 2002/15/EC nor with Directive 2003/88/EC, both of which allow Member States to make more favourable provisions than those provided therein. Consequently, the question of whether the doctrine of conforming interpretation came into play does not arise. Neither could it be held that the Act and S.I. 2/2005 were so inconsistent with each other that the latter impliedly amended the former.

Having regard to the forgoing the Court is satisfied that its Determination in Goode Concrete was not erroneous in relation to the effect of S.I.2/2005 vis-à-vis the Act.

Statutory Instrument 36/2012

The Regulations contained in this Statutory Instrument were made by the Minister for Transport, Tourism and Sport on 30th January 2012. Like S.I.2/2005, they were made pursuant to s.3 of the European Communities Act 1972 and were for the express purpose of giving effect to Directive 2002/15/EC, as was S.I. 2/2005. These Regulations replace (rather than amend) S.1.2/2005, which is revoked by regulation 24 thereof. These Regulations, unlike S.I. 2/2005, and bring self-employed drivers within their scope.

These Regulations go further than the earlier Regulations which they replaced. A person who fails to comply with these Regulations continues to be guilty of a criminal offence, which is now triable on indictment, and liable to a fine of up to €250,000. Of particular significance in the context of the instant case, a contravention of the Regulations renders an employer liable to an aggrieved employee in civil law through a complaints procedure which is identical in all material respects to that provided by s.27 of the Act. The Regulations provide for the same mode of redress as that provided by the Act and for the same avenue of appeal to this Court from the decision of a Rights Commissioner. They also provide for the same enforcement procedure, through the Circuit Court, of decisions of a Rights Commissioner and determinations of this Court and for the same right of appeal on a point of law to the High Court, as those provided in the Act.

In short, these Regulations replicate in all material respect the complaints and enforcement provisions of the Act. They also provide more detailed provisions for the regulation of working time in the road transport sector than those provided for the generality of workers by the Act. Significantly, the provision previously contained at regulation 16 of S.I. 2/2005, to the effect that those Regulations were without prejudice to *"any legislation that offers a greater level of protection to workers"* is not replicated or carried over. The Regulations do not expressly purport to override or supplant the corresponding provisions of the Act. But the question must arise as to whether they do so impliedly.

It seems to the Court that there are clear difficulties with the provisions of the Act and those of the Regulations in their current form standing side by side and a Rights Commissioner, and this Court on appeal, having concurrent jurisdiction to entertain a complaint arising from the same set of facts under both the Act and the Regulations. Such a result could not have been intended. Moreover, a consideration of considerable relevance in the *Goode Concrete* case was that the Regulations then in force operated in the field of criminal law only whereas the Act provided for civil redress in disputes between individual workers and their employer. That is no longer the case. In these circumstances, there is force in the argument that since Directive 2002/15/EC takes precedence over Directive 2003/88/EC, (as is clear from Recital 2 in the preamble to Directive 2002/15/EC) any conflict or inconsistence between the Act, which gives effect to the latter, and the Regulations, which give effect to the former, should be resolved in favour of the Regulations.

Outcome

It seems that any ambiguity concerning the applicability of the Act to workers engaged in activity now covered by S.I. 36/2012 could easily be resolved by the making of regulations pursuant to s.3(3) of the Act exempting such workers from the relevant provision of the Act. Regrettably, no such regulations have been made. Nevertheless, the Court has come to the conclusion that following the promulgation of S.I. 36/2012, the provisions of those Regulations set down the applicable law concerning the regulation of working time of those to whom they relate. Moreover, when read as whole, it could not be said that the Regulations now provide a lesser level of protection to workers to whom they relate than that provided by the Act. It follows that the Regulations, rather than the Act, should now be relied upon in pursuing complaints concerning any infringement of the rights of such workers concerning their working time.

The Regulations do not have retrospective effect. Consequently, this position only pertains in relation to complaints in respect of a period after they took effect. In relation to the instant case, while the within complaint was initiated under the Act after S.I 36/2012 took effect, the events to which the complaint relates occurred in part during a period before the commencement of the Regulations. It seems to the Court that the complaints are maintainable under the Act in so far only as they relate to that period. Accordingly, the Respondent's appeal must succeed in relation to so much of the Rights Commissioner's decision as related to events that occurred after S.I. 36/2012 took effect, namely, 30th January 2012. It is clear, however, that the complaint in relation to s.17 of the Act is fully maintainable under the Act.

Determination

There is no indication in the decision of the Rights Commissioner as to how he computed the monetary award made in favour of the Claimant or of the periods of time in which the contravention found to have occurred took place. Nor was any evidence adduced, or information furnished to the Court, on that point. Accordingly the Court will reconvene the hearing so as to hear the parties on the form of final determination that it should make in this case.

Signed on behalf of the Labour Court

Kevin Duffy

5th July 2013
AH Chairman

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Israel

National reporter: Judge Nili Arad, President, National Labour Court

This is a summary of a wide-ranging landmark Judgment constituting a precedent in which our court was required to consider the head-on collision between the right of employees to be organized in a Trade Union, and the right of the employer to freedom of expression, and the extent thereof, in circumstances where the initial organization had taken place before the establishment of a representative employees' organization at the workplace.

This judgment evoked heated arguments mostly among employers, and was followed by an appeal to the Supreme Court sitting as Court of Justice.

On the other hand' this judgment caused waves of workers' organizations all over the place.

The New General Confederation of Labor (the Histadrut) –
the Trade Union Organization Department – Pelephone Communications Ltd;
Collective Agreement Dispute Appeal Case File No. 25476-09-12

Judgment pronounced on January 1, 2013

The National Labor Court, in a panel consisting of the President Judge Nili Arad; the Vice President, Yigal Flitman; Judge Amiram Rabinovich; Public Representative (Employees) Mr. Yitzhak Shilon; Public Representatives (Employers) and Mr. Yoram Blizovsky, allowed the Appeal of the Histradut against the decision of the Regional Labor Court in Tel Aviv concerning the initial unionization steps in the Pelephone Company.

In a wide-ranging landmark Judgment constituting a precedent, the National Labor Court was required to consider the head-on collision between the right of employees to be organized in a Trade Union and the right of the employer to freedom of expression, and the extent thereof, in circumstances where the initial organization had taken place before the establishment of a representative employees' organization at the work-place.

All those involved in this dispute – the parties directly involved in it, those attending the hearing and stating their positions, agreed that the freedom to organize is a fundamental institution under our legal system and that the right of employees to organize must not be prejudiced, it being accepted by all concerned that the steps taken to unionize employees in a trade union are subject to the provisions of the law and must be taken solely within its framework. However, as regards the dispute that is the subject of the Appeal herein, there are two main lines of argument pleaded before us: According to the first proposition, it is maintained that in light of the built in hiatus in strengths between the employer and his employees, an expression of opinion on the part of the employer as regards the direct or indirect initial organizational steps, whether openly or secretly, gives rise to a presumption of pressure and coercion on the part of the employer on the individual employee, in an unequal power relationship between the parties, and that accordingly for as long as a representative organization has not been established at the work-place, all the expressions of the employer as regards the unionization of the work-force is an embodiment of his opposition to the initial unionization steps in his enterprise.

Accordingly, at the pre-collective stage, in the circumstances of initial organization, until the establishment of a representative organization at the work-place, the employers' right of expression recedes in the face of the right to organize, and cannot be allowed.

This proposition adds and maintains that the situation is different following the establishment of an employees' organization as the representative organization at the work-place. At that juncture, the representative employees' organization becomes the spokesman for the employees in processes and contacts with the employer, and both parties have their rights of organization and expression available to them, subject to the limitations set out in the law.

According to the other proposition, the employer's right to freedom of expression and statements made during his contacts with his employees is available to him at any of the organizational stages commencing from the initial stages and subsequently thereto, subject to the limitations set out in the law.

According to this argument, the employer's right of expression is permissible and desirable, and is vital in exercising the right of organization on its merits, because it is only in this way that the full amount of information that is necessary will be available to the individual employee in order to make a balanced judgment as to whether or not to be organized in a trade union, as long as the employer's statements do not carry with them a message of pressure, threat and compulsion at the work-place.

In view of the primary nature of the issues under discussion, and in light of their implications on the relationship of the parties directly involved in the dispute, and on labor relations in Israel, we have heard the arguments submitted by the Appellant, the New General Confederation of Labor (the Histadrut) – the Trade Union Organization Department, and the Respondent, Pelephone Communications Limited.

As to the normal aspects of the dispute and its ramifications, we have also requested submissions from parties attending the hearing: The Coordinating Bureau of the Economic Organizations, and the

Attorney General, and the submissions of those submitting an opinion in the appeal: The Association of Chambers of Commerce; The National Labor Confederation; and Power to the Workers – Democratic Employees Organization.

The balance between the right of the employees to organize themselves in a trade union against the right of the employer to freedom of expression and the principles governing the exercise thereof, in circumstances of initial organization at the workplace.

76. During the period of initial organization until the establishment of a Representative Employees Organization, prior to the coming to fruition of collective discourse between the parties, the presumption arises that the expression of a view by the employer or his representative as regards such organization or its ramifications, including "benefits" because of such organization or the denial thereof, constitutes the exercise of pressure and coercion and undue influence on the employees in exercising their right as to whether or not or organize. It is by virtue of this presumption that the bounds of the employer's freedom of expression in relation to the organization of the employees and its ramifications will be very restrictively examined and having regard to the circumstances of the case in question.

    The basis of this presumption is the hiatus in the inherent strengths as between the employer and his employees who are free as unorganized individuals as against the extra power of the employer by virtue of his ownership of the workplace and his managerial prerogative. As against this the employees' organization has no means of affording them protection collectively as it is in the throes of being established and recognized at the work-place.

    Therefore, in the circumstances of the initial organization until its establishment as a representative organization, the right of the employer to express himself is not of equal weight to that of the right of the employees' freedom of organization in a trade union, and the right of the employees to organize themselves in a trade union takes precedence over the employer's right to freedom of expression. However, as part of the employer's managerial prerogative and in the course of his day to day operation of the work-place, the employer must conduct himself as he conducted himself prior to the initial organizational steps, provided that there is nothing in the employer's conduct that is linked to the question of such organization and there is no influence on the organization and its ramifications, either directly or indirectly.

80. The position is different at the advanced pre-collective bargaining stage following the establishment of a representative organization at the work-place, or when, a material change has occurred in the relationship of forces between the employer who owns the enterprise, and the employees who are represented by the trade union. From that time and henceforth, the organizational campaign and talks in the course of it and as a result of it take place between the employer and the representative employees organization. In a comparison of these forces the collective labor relationships strengthen the status of the employee and his rights and they can simultaneously contribute to the promotion of the employer's interest in order to contribute to the stability of the work-place and the way in which it is run. The employer's freedom of expression is accordingly of a wider nature in the framework of which he may also express his views regarding the implications of the workplace being organized.

    Nevertheless, the widening of the employer's right of expression is subject to the fundamental principle that applies at all stages of the organizational steps which prohibits denial of the right to organize, to the same extent to which a prohibition remains on influencing the organizational steps either by statements expressed or an act, including prohibition of the taking of sanctions against those involved in the organizing of union activities, the promotion thereof and establishment at the work-place.

    In light of the foregoing, guiding rules can be set in relation to the actions of the employer and the statements he expresses either directly or indirectly in connection with the unionization of the employees in his enterprise. These guiding rules are founded on the fundamental constitutional rights inherent in our legal system and will be applied in respect of labor law, to the application of

the duties of good faith, fairness and disclosure and of human dignity in labor relations, on provisions of the law that are applicable including the decided cases, and having regard to the principles of comparative law.

What is certain is that the guiding rules hold true at this time and cannot be viewed in terms of a closed list. It stands to reason that as time goes by changes will be made in the rules according to the realities of the labor relations dynamic in Israel, including in the system of collective relations between the employees' and the employers' organizations, in so far as this may be appropriate.

Fundamental principles and guiding rules as regards the conduct of the parties in the organizational processes and especially in the initial organizational processes:

83. The following basic principles form the basis of the exercise of the right of employees to organize themselves in a trade union at the work-place, in general terms, and in relation to the initial organizational steps in particular and in balancing such rights against the right of the employer to express himself:

(a) In the course of labor relations, including at the time of initial organization, the employer, the employees, and the employees organizations are subject to the increased duties of good faith and fairness, including prohibition of deception and coercion[1] and the provisions of the Law of Defamation apply to them.

(b) The right to organize, as a constitutional right, as a sub-constitutional right in labor law and as a cogent legal right is not negotiable and is available to employees subject to them acting fairly and in good faith. The right to organize and the manner of its implementation in the course of collective negotiations may not be waived, either from the personal standpoint or the collective standpoint.

(c) The right of the employees to organize is vested in and is available to them at any of the organizational stages, commencing from the embryonic stages of the initial organization, the open stage of the initial organization, following the establishment of the representative organization, and at the time of the conclusion of collective agreements and the establishment of collective labor relations at the work-place.

(d) The protection of the employees' right to organize applies at all stages of the organization, including the manner of conduct of members of the action committee, whether engaged in secretly and by concealment or out in the open.

(e) The decision as to whether or not to unionize and in what employees' organization they will be organized is a matter as between the employees themselves and is exclusively their preserve.

(e) During the initial organizational period until the establishment of a representative organization, the presumption arises that the expression of an opinion by the employer or his representatives as regards the organization or its ramifications, whether directly or indirectly, constitutes the exertion of pressure and coercion and undue influence on the employees in exercising their right to organize or not to organize. By virtue of such presumption, the extent of the protection against the statements expressed by the employer with regard to the unionization of employees and its ramifications will be of a reduced nature having regard to the circumstances of the case in question.

(f) Subject to the said presumption, and as part of the horizontal balance between the rights vested in the parties to a labor relationship, the employer may continue exercising his managerial prerogative at the work-place in the same way as he conducted himself until the eruption of the initial organizational steps. In the meantime, the employer may continue

[1] As to the duties of good faith of an employer, employees, employees organizations, competing employees organizations in the course of organization, see High Court of Justice No. 6076/12 Power to the Workers - Democratic Employees Organizations and others v. the New Confederation of Labor (not published), December 13, 2012.

conducting meetings or talks with the employees, may bring to their attention reports and information in matters pertaining to the ongoing work at the work-place, and so forth. Provided that the employer's conduct in this regard shall not be such so as to prejudice, by act or omission directly or indirectly, the initial organizational steps or the process thereof.

84. On the basis of these principles, set out below in detail are the guiding rules serving as a criterion for a test of the exercise of the right of organization or the breach thereof. The implementation of the rules will be in according to the organizational stages and the balances required by law and having regard to the circumstances of the case in question.

(a) By virtue of the duty of the employees and the employees' organization to act towards the employer in good faith, fairly and reasonably, and pursuance to the provisions set out in Section 33I of the Collective Agreements Law, action by the employees and the organization in promoting the initial organizational steps will be taken according to the law "taking into account the needs of employment and the privacy of the individual" without interfering with day to day work and to the degree that it is possible, in coordination with the employer.

(b) The employer shall not intervene in the organizational processes at the work-place, either by act or omission, in expressing himself in statements that either directly or indirectly deny such organization.[2]

(c) The employer shall not claim that exercise of the right of employees to organize themselves in a trade union is prohibited and against the law. The employer shall not prescribe in a personal contract of employment of the employee or in any other contractual arrangement with him, that the employee may not be represented by an employees organization[3].

(d) The employer shall not prescribe in a contract of employment or otherwise, and shall not provide benefits or make promises of exceptional benefit to the employees because of them being organized or unorganized[4].

(e) The employer shall not establish "his own representative organization" nor take a position in the rivalry between organizations as to representation at the work-place nor intervene or express support for either of them or in general[5].

(f) In all that pertains to the organization and its ramifications and to the exercise of the right to organize, the employer shall not contact the employees in personal correspondence electronically or otherwise, shall not initiate or hold meetings with employees in groups or engage in one- on – one discussions[6].

(g) In the course of organizational procedures the employer shall not sign up employees on a letter in uniform format to the effect that they do not wish to be represented by a trade union[7] and neither shall he persuade employees to cancel their forms of membership in an employees organization[8].

(h) The employer shall not make enquiries about the employees with a view to frustrating the organizational procedures nor shall he keep lists monitoring which of them has joined the union or is active in it in promoting unionization.

(i) The employer shall not exploit his power in exerting pressure on the employees, by coercion, intimidation or threats of dismissal, or dismissals because of their organization in

[2] The Notav Case, the Horan and Leibovitch Case, the Delek Case

[3] The C.A.L. Case, paragraph 26

[4] Steve Adler's article

[5] The Open University Case; The Railway Case.

[6] Doorey article

[7] The Horan and Leibovitch Case

[8] CFA; CFA-Digest; Doorey Article.

the union, shall not take dismissal proceedings against members of a committee and against those active in the initial organizational procedures[9], nor shall he take action to remove a person from his position by devious schemes, disciplinary proceedings or closure of a factory[10] nor shall he discriminate between the employees on the basis of their organization in a trade union or their activity therein.

(j) The engagement of the employer in means of intimidation, coercion or undue influence in collective labor relations, either directly or indirectly, means in practical terms, the exertion of pressure on the part of the employer with a view to influencing the opinion of the employee as to whether or not to organize and in which trade union.

(k) The actions of the employer by act or omission, including statements expressed about employees active in organizing, pertaining to termination of employment or affecting the terms of their employment, give rise to a presumption of extraneous considerations, and impose an increased onus on the employer of persuasion otherwise.

(l) In examining the existence of a presumption of pressure and undue influence by the employer or a party acting on his behalf, by act by omission or by expressed statements, in the circumstances of the case in question, the following symptomatic considerations will be taken account of: the content of the employer's expressions; timing of the expressions and the forum in which they were aired; the degree of the effect of the means used by the employer in order to express his position including: distribution of written material to employees in a letter or note, sms messages to a mobile telephone, electronic mail, personal telephone or face-to-face conversations, or obligating the employees to participate in meetings as a "captive audience".

(m) In so much as the employer claims that the actions and expressions of senior or junior managers or other employees in connection with the unionization of employees at the workplace occurred other than with his knowledge and information – the onus is on the employer to prove such a claim and what measures he took against whoever was acting without his authority, for and on his behalf.

(n) Where the employer has become aware of actions or expressions pertaining to unionization, not with his authority and not on his behalf, he shall give authoritative notice thereof to the employees' organization involved in the unionization processes at the workplace.

Resolution of Disputes

15. In so far as any of the parties alleges flawed conduct in the course of the organizational processes and prejudice to vested rights, by either act or omission, including statements expressed and in publications, dissemination of false or incorrect information etc, such a party can apply to the Regional Labor Court by way of an application of a party to a collective proceeding for the grant of urgent relief in the protection of their rights and a cessation of such unlawful prejudicial conduct.

16. Where an application has been submitted to the Regional Labor Court by a party in a collective proceeding, for relief in respect of the initial organizational processes at the workplace, the application will be heard and decided in the Regional Labor Court with the maximum urgency, and without any delay.

In its final summing up of the matters in issue the National Labor Court made the following order:

1. The Histadrut's Appeal was allowed as detailed below.

2. In the circumstances of the case in question, as expressed in the two decisions of the Regional Labor Court that are the subject of the Appeal, there was no cause for the granting of a "temporary order" by the Regional Labor Court and it ordered that the order granting a stay of

[9] The Horan and Leibovitch Case

[10] Adler's Article, CFA; Doorey Article.

open organization if only for 72 hours be set aside. This order is disproportionate and is not reasonable, as it amounts to undue influence and a hostile elimination of the organizational process.

3. The decision of the Regional Labor Court in respect of the temporary order based on the presumption of equality of the relationship between the right of organization and the employer's "freedom of expression", is set aside.

4. General interim relief is hereby granted to the effect that Pelephone will desist from actions designed to frustrate the organizational process and from influencing its employees and shall not take any action, either by way of expressions in statements, whether by act or omission, that are liable to prejudice the exercise of the right of the employees to organize, including disciplinary measures, suspension, dismissals and so forth, against the background of the exercise of the employees' right to organize. In the meantime:

   (a) The Company shall not monitor those employees who have been organized, or employees who have elected not to be organized, by way of keeping lists or otherwise.

   (b) The Company shall desist from presenting its position as to unionization, at public information assemblies of employees who are engaged in Histadrut organizing at the Company's sites; in personal or in group meetings with the employees, in electronic mail communications or in any other way.

   (c) The Company shall desist from presenting the employees with the disadvantages that exist, in its opinion, in joining a trade union and the ramifications that unionization will have on the economic or other activity of the Company, including referral of position papers to the employees and disseminating its views with regard to unionization.

   (d) The Company shall not engage in the monitoring of the employees in the exercise of their right to organize, including the keeping of lists in respect of the names of those employees who have signed forms for joining the employees' organization.

   (e) The Company's statements pertaining to the dimensions of the damage that might be caused as a result of the unionization and damage to its competitive ability *vis a vis* competing entities, including the contents of the CEO's letter, even if its contents are true, constitute an improper expression of opinion and is prohibited.

5. The interim relief granted by the Regional Court, in which Pelephone was ordered "to desist from actions to thwart unionization by way of personal appeals to the employees" including a general or personal approach to the employees "in correspondence or in advertisements", is hereby extended. This to the effect that in addition to what is prescribed in it, we hereby order that Pelephone desist from initiating a personal meeting with employees, with groups of employees, in relation to the exercise of the right to organize; and further, the Company shall not make use of the means of communication at its disposal and its accessibility to the employees, in the dissemination of sms messages against the unionization, to mobile telephone devices or the distribution of messages to employees by electronic mail.

6. In the circumstances of the case there is no other reason for referring the Plaintiffs back to the Regional Labor Court with a view to examining the way in which the parties have conducted themselves in the past, according to their pattern of conduct as we have currently determined.

7. In as much as any of the parties is alleging flawed conduct in the course of the organizational processes, including in statements expressed and in publications, that party is at liberty to apply to the Regional Labor Court in terms of an application by a collective party for the grant or urgent relief. The Court will hear and decide such an application as soon as possible having regard to the guiding rules specified in this Judgment and their implementation in the circumstances of the case in question.

National reporter: Judge Elisheva Barak-Ussoskin

Long Term Employment in Unconventional Forms for

Avoiding Application of Workers' Rights

Labour Appeal 1189/00

Ilana Levinger

v.

1. The State of Israel (Respondent)

2. The New General Workers' Organization

[*Histadrut haOvdim haKlalit haChadasha*]

(Entitled to Argue its Position before the Court)

The National Labour Court

[October 2, 2000]

Before Judge Elisheva Barak-Ussoskin, Judge Amiram Rabinovitz, Judge Nili Arad, Labour Representative (Levin), Management Representative (Lubovsky)

For Appellant: Reuven Bork, Ronen Lifshitz;

For Respondent: Dana Mancha;

For Amicus Curie: Ilan Itach, Hannah Shnitzer.

JUDGMENT

Judge Elisheva Barak-Ussoskin

A motion for temporary relief, against the termination of appellant's employment after twenty years of work for respondent, was denied. Judge Sarah Meiri and Public Representatives Mssrs. Katzman and Mintz, of the Tel Aviv Regional Labour Court, rejected appellant's motion to grant her a temporary injunction forbidding respondent to terminate her employment. I shall state at the start that appellant was fired, and therefore her request was to reinstate her; but that is not important. An order to continue employment, until decision of the main suit, of a person whose employment has been terminated effective on a later date, and an order to reinstate a worker until decision of the main suit, when employment has been terminated effective immediately, are one and the same. The plea in both cases is to keep the employee at work until decision of the main suit. The type of order requested depends upon the circumstances: if the employer terminates the employee immediately, the order requested is for reinstatement; if the employer notifies the worker of his termination, but waits to carry it out, the order is an injunction to prevent termination. Both types of motion are intended to keep the worker at work until the decision of the main suit. Thus, I shall brush aside respondent's argument and the Regional Labour Court's determination, that the order at hand is a mandamus, and not an injunction.

The Prima Facie Facts, as they Appear in the Statement of Claim and the Judgment of the Regional Labour Court

At this *prima facie* stage, the question is whether the statement of claim indicates that, *prima facie*, there are grounds to grant the motion to prevent the termination of appellant's employment until decision of the suit; in other words, whether there are grounds to prevent alteration of the situation

which has existed for about twenty years. It should be noted that the facts have not been denied before us by respondent.

Long Term Employment in Unconventional Forms for Avoiding Application of Workers' Rights

Appellant, according to the statement of claim and the documents attached to it, was employed in the Institute for Pedagogical Aids in the Ministry of Labour and Welfare for approximately twenty years, as a secretary and stenographer. I shall discuss the way she was employed throughout the years. Appellant was employed at the institute starting at the end of 1979. At the beginning of her employment, she was employed for three months through the "Tigboor" manpower company. After three months, the director of the institute notified her that respondent does not wish to pay the broker's commission to the manpower company, and would therefore employ appellant directly. She was told to sign a service provision contract. That contract, signed on April 12 1980, was the first contract appellant signed. That contract stated that appellant is the "service provider"; that the service provider is to provide stenography and data processing services via a terminal; and that the service provider is to provide the services set out in the contract according to the deadlines and conditions set out in the contract. The parties agreed in the contract that –

> "The services for the institute shall not be performed in the framework of employment relations, rather the service provider will act as an independent professional providing her services as a contractor, and receive consideration for her services in accordance with the special fees for provision of services by contractors".

The contract period was three months – from April 15th 1980 until July 15th 1980. Further on in the contract the services which the "service provider" is to provide are specified. Payments to the National Insurance Agency, parallel tax, and all additional social benefits for the service provider or her workers, to the extent that she has any, were to be paid by the service provider. From the day she signed that agreement, *April 12 1980*, until the the end of *April 1991* – more than eleven years – appellant continued to be employed, and signed contracts similar to the first contract from time to time. Respondent paid appellant transportation costs, however did not make payments for her *1991* – more than eleven years – appellant continued to be employed, and signed contracts similar to the first contract from time to time. Respondent paid appellant transportation costs, however did not make payments for her to the National Insurance Agency for years, until the treasurer of the institute warned the institute that it must do so; after that, the payments were deducted from the appellant's pay. In letters written to her, for example the letter of *September 24 1989*, the institute director wrote that she must sign a service provision contract and pay the stamp tax for it.

The letter also instructed her to enclose verification from the National Insurance Agency that she pays the required national insurance payments, otherwise they will be deducted from her pay. At that time, appellant requested that the national insurance payments be deducted from her pay. Appellant worked at the institute six days a week, six hours a day. She answered to the institute director, administratively and professionally, and it was from him that she received vacation days or sick leave. Her tasks expanded during the period of her employment. At the beginning of 1991, appellant was told by the institute director at the time that the treasurer of the Ministry of Labour had told her that appellant cannot continue to be employed as a service provider, as there is serious concern that employee-employer relations exist between appellant and respondent. Appellant was told that for that reason, her employment would continue through a manpower company. In May 1991, a representative of the "Tigboor" manpower company came to the institute and explained to appellant and others that "Tigboor" would employ them. From that time, until termination of her work approximately nine years later, appellant's pay was paid by a series of manpower companies, which alternated from time to time. Her pay, she contended, did not vary between the period in which she was employed as a "service provider" and her employment via the various manpower companies. The manpower companies alternated. Each time a different manpower company won the tender to work

in the institute. I shall detail appellant's work periods via manpower companies as she details them in her statement of claim:
From May 1 1991 until June 15 1992, appellant worked for the "Tigboor" company. A representative of the "Tigboor" company

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From May 1 1991 until June 15 1992, appellant worked for the "Tigboor" company. A representative of the "Tigboor" company arrived at the workplace and announced that a now a different company would employ workers, including appellant, as "Tigboor" had won the tender.
From July 1 1992 until 31 August 1994, appellant worked via the Robert Rolf Company. During that entire period, appellant continued to work in the same fashion that she had before that new manpower company entered the workplace.
On October 1 1994 a representative of the "Tigboor" company arrived again and announced that the same workers would once again be employed by the "Tigboor" company. During *1997* appellant took a computer course at the institute, along with the institute employees, which was funded by the institute.
In August 1999 appellant requested that in light of the extended period she had worked, and considering that her work was satisfactory in the eyes of her superiors – a fact which the State did not deny – her salary be raised. The institute chairman investigated the issue. And indeed, on *August 18 1999* her salary was raised.
At the end of 1999 appellant was notified that respondent was terminating its ties with the "Tigboor" company. She and additional workers were notified that there was no certainty that they would continue being employed in the institute. Appellant, who has the most seniority of all those workers,

began to contact various bodies inside, and outside, respondent. She was given various letters of recommendation, recommending that her employment continue.
On December 29 1999 the "Tigboor" company notified appellant of her termination, effective January 2 2000 – two days away – in light of an additional replacement of the "Tigboor" company by another manpower company which had won the tender. Appellant continued to report to work at the institute.

On January 25 2000 respondent announced to the worker who worked beside appellant, that appellant's employment would apparently be terminated since "the institute doesn't want to get itself into a mess".
On January 26 2000 one of the directors of respondent notified appellant that the new manpower company would not employ her, and recommended that she receive consultation regarding her rights. When appellant said that she would like to be a full standing employee of respondent, she was told that there are no budgeted positions, and that in any case, she would have to compromise regarding her past rights. At the time the motion was submitted, the Adam Lyyn Bichler manpower company had won the tender, and new workers were interviewed by respondent. Until the time the motion was submitted, to the best knowledge of appellant, no other worker had been accepted in her place. Respondent declared before us that "there is another worker who has been working for two weeks via the Lyyn Bichler Company". It is noteworthy that appellant received severance pay from both of the first two manpower companies. It is to be further noted that the motion was apparently submitted on February 2 2000, the day that Judge Sarah Meiri made a ruling in the motion and set a date for its hearing within a very short period.

The Regional Labour Court's Reasoning for Rejecting the Motion
As previously mentioned, The Regional Labour Court rejected the motion. I shall briefly summarize its reasoning. The Court noted that since the motion before it was for temporary relief, its findings are *prima facie* only.

1. The relations are not clear employee-employer relations. That is shown by the very fact that applicant filed a suit requesting that she be granted the social benefits of a state worker with identical seniority and position. Thus it is clear to her as well that the relations are not clear employee-employer relations. The Regional Labour Court found that for 11 years appellant had Long Term Employment in Unconventional Forms for Avoiding Application of Workers' Rights worked as an independent contractor, after which she had worked via various manpower companies. She had also received severance pay from those companies. The Court mentioned that applicant [the appellant before us] noted that respondent – the State – had throughout the years avoided recognizing employee-employer relations, and at the end of the period had notified her that she would not be continuing her relations with the "Tigboor" manpower company. The statement that respondent had avoided determining the existence of employee-employer relations raises doubt whether or not such relations existed between appellant and respondent. Wages were not paid by respondent, respondent did not employ her or terminate her, and did not pay her severance pay when the manpower companies alternated and appellant was terminated by the exiting company. She had not been employed as a full standing employee according to the Civil Service Bylaws [*Takshir*]. Appellant, according to the Regional Labour Court, cannot argue that she is a full standing employee, when she was not employed according to the provisions of the Civil Service Bylaws. The Regional Labour Court relied upon a precedent set out in the High Court of Justice's judgment in the *Nakash* case (HCJ 6194/97 *Nakash v. The National Labour Court*, 53 PD (5) 433).
2. Applicant was not terminated by respondent.
3. Appellant's termination has become irreversible, and the motion was submitted a month after that termination.
4. Regarding the balance of convenience, the Regional Labour Court notes that there is no doubt that appellant was harmed, but as a very experienced worker, she can find alternate employment despite her age (appellant is 49), whereas if it turns out that appellant was

terminated by respondent and that the termination was not legal, respondent will honor the judgment, whether it be an order to return appellant to work or to pay monetary compensation. The Regional Labour Court again mentioned that the motion before it was for reinstatement and not for prevention of termination.

5. The motion was submitted with great delay. By December, appellant had already clarified her status. The Court rejected appellant's claim that only on January 25 2000 had respondent informed her of the termination of her employment. Even if her employment was continued due to a mistake, said the Court, that fact cannot incidentally grant appellant a right.
6. Appellant refrained from enjoining "Tigboor" as a defendant.
7. The motion is for an equitable remedy, and a proceeding whose objective is a declaration regarding status, in which estoppel arguments cannot be raised.
8. Appellant did not come before the Court with clean hands and good faith, as she had not mentioned that she had received social benefits over the years, including severance pay from her employers for the period during which she was an "independent contractor". The Court asked: "is it appropriate for status to be determined according to 'mercy', of all things?" The Court further said:

> "Applicant's contentions of termination in bad faith, and out of irrelevant considerations, while violating natural justice, are nothing other than an attempt to 'implement' on respondent, acts/behavior of which it was not guilty. It is uncontroversial that it was not respondent who terminated applicant, and it is uncontroversial that applicant has no budgeted position and is not a state employee in full standing. Applicant never went through the employment stages required by the Civil Service Bylaws. Thus, applicant's arguments in this case regarding termination seem to be unfounded. Applicant attempts to crown her relations with respondent with a 'tiara' she does not have – as if to say now I ask to be considered a state employee, and Long Term Employment in Unconventional Forms for Avoiding Application of Workers' Rights therefore my termination is at odds with the law binding the state. Her petition 'puts the cart before the horses'".

Appellant was Entitled to the Requested Order

I cannot accept the Regional Labour Court's reasoning. I shall examine it.

Delay

Before discussing the question whether the appellant should be granted the requested order, I shall brush aside the contention of delay. According to appellant, she heard a rumor that her work was going to stop when the

"Tigboor" Company finished its relations with respondent. This was not the first time that appellant's employment had been terminated by a manpower company. When that had happened in the past, another manpower company, who had won the tender, began to employ her. In one of the cases, there had even been a period of approximately one month between the termination of her employment by one company and the commencement of her employment by the other company, which had won the tender.

Appellant had continued working as usual. This time, she had been informed that the "Tigboor" company was terminating her employment at the institute, since that company had not won the tender. Only on *January 26 2000* had one of the directors of respondent, Mr. Malul, informed appellant that she would not be employed by the new manpower company, and recommended that she receive consultation regarding her rights. When appellant said that she would like to be a worker in full standing, she was told that there are no budgeted positions, and that in any case she would have to compromise regarding her past rights. Appellant's motion was submitted no later than *February 2 2000*, as on that day the Judge's decision was already handed down. A person who works for twenty years, and one day is notified out of the blue that his employment is being terminated after twenty years of employment, usually first asks if his employment is indeed being terminated, despite the long period of employment. First he clarifies the factual question, and only after that clarifies the

legal question, while consulting with a lawyer. Thus also recommended the director who informed her of the termination of her employment. It is therefore reasonable that a certain period of time passes until a worker of such seniority decides to consider her legal options. Therefore, delay has not been shown. I have no need to discuss the question whether in a case like this one delay would have prevented the granting of the requested order.

Irreversibility

Another hurdle which needs to be removed before I discuss the substantive questions is that this is a motion not for an injunction, rather for a mandamus, since the act being attacked has already been done. I have already discussed the fact that the argument that the motion was for a mandamus and not for an injunction is not relevant.

A mandamus and an injunction are one and the same. They both prevent the termination of a worker's employment until the main suit has been decided. Immediate termination, or termination effective before the worker manages to file suit, makes the motion a motion for mandamus. There is no difference between such a case and a case in which the terminated worker manages to file suit in the Labour Court prior to termination. The real question is whether alteration of the situation should be prevented, meaning keeping the worker on the job until the main suit is decided.

I shall now examine the balance of convenience, in light of the essence of the employment during appellant's various employment periods.

The Beginning of Appellant's Employment by the "Tigboor" Manpower Company

The relations between those parties began when appellant was employed for three months by the "Tigboor" manpower company. *Prima facie*, appellant was employed by respondent, working first via a manpower company until Long Term Employment in Unconventional Forms for

Avoiding Application of Workers' Rights respondent decided not to employ her in that way. Respondent then had appellant sign a contract as a "service provider".

Appellant's Period of Employment as an "Independent Contractor"

Respondent employed appellant for 11 years with a "service provider",

"independent contractor" contract. The contract was indeed originally signed as a temporary three month contract. However, those three months were extended from time to time, by signing a new contract with the same conditions, for a total of 11 years (not months!). The form of employment was, *prima facie*, one of employer-employee relations. Appellant continued working. She became integrated in respondent, and took instructions from it. She was an integral part of respondent's work arrangement. And, indeed, respondent felt that that form of employment was problematical, and that the Labour Court would be liable to see it as employee-employer relations. Thus, after eleven years, respondent ceased to employ appellant in that fashion. Regarding the eleven year period, respondent argues that employee-employer relations did not exist between it and appellant, and that in any case, appellant was not employed according to the Civil Service Bylaws and therefore she is not a permanent worker. I am unable to accept that argument.

Prima facie, these relations are to be seen as employee-employer relations. A trial period cannot continue for eleven years. And there is good reason for that. After the trial period defined in the Civil Service Bylaws, a worker receives status as a permanent worker. Therefore, appellant is not a temporary worker or a trial period worker. She is a worker who, according to the regular rules, was supposed to have already been a permanent worker for a long time. I discussed the problematic nature of such a form of employment in my opinion in the *Rehovot Worker's Council* case (National Labour Court Case Nun-Vav/15-4 *Rehovot Worker's Council v. The Weitzmann Institute for Science*, 30 PDA 163). In that case, a scientist was employed for short periods which were renewed from time to time. After seventeen years she was told that the last contract had expired. That appellant was told that the period of employment would not be extended further. I was of the opinion that it is not possible to create a status of long term temporary workers – in that case, seventeen years. I wrote:

> "Should a limit not be placed upon the period of work after which the institute is permitted to terminate the worker only according to the rules determined in the collective bargaining agreement? … Labour law intervenes in the autonomy of private will in order to attain social goals. A worker's waiver of his rights pursuant to the statutes for the protection of workers – contracting on those rights – is ineffectual. A worker's waiver of rights granted him in a collective bargaining agreement is ineffectual. In principle, labour law assigns greater weight to standards which society sees as more valuable than the autonomy of private will.
> The entirety of labour law is a change in the balance and in the greater weight assigned to the autonomy of private will; it is systematic paternalism, in the way that the system protects the worker's job security and his job, via the protective statutes, caselaw, and collective bargaining agreements. I have shown that therefore collective bargaining agreements safeguard a job by granting permanent status after a limited trial period, and protect
> the worker from being terminated. The meaning of a worker's status as 'temporary' is that the safeguards against termination and of job security do not apply to him. Labour law's protection of the worker against himself, in that no weight is assigned to contracts which he signs waiving his protection statutes and collective bargaining agreement rights, should also apply to a worker who from time to time signs employment contracts according to which he does not become a permanent worker, since by signing the contract he is ensuring the continuation of his employment. His bargaining position is weak in comparison to that of his Long Term Employment in Unconventional Forms for Avoiding Application of Workers' Rights employer, who is not willing to employ him any other way. There may be cases in which a worker is aware that he is employed in a fashion different that that of permanent workers and consents to that difference… the signing of temporary work contracts expresses not the autonomy of the worker's will, rather the constraints which obligate him to agree to waive the right to become a permanent worker".

Professor Frances Raday points out that temporary work holds an advantage
for a worker if it is indeed temporary. However, when that form of
employment becomes long term employment – when it becomes long term temporary employment – it holds no advantage for the worker (Frances Raday, *Mediniut Ha'asakat Ovdim b'Emtzaut Chevrot Koach Adam: HaMechokek, Batei haMishpat v'haHistadrut"* (The Institute for Social Economic Research, the New Workers' Organization).

The Policy of Employing Workers via Manpower Companies: The Legislature, the Courts, and the Workers' Organization.

I shall expand on the advantages and disadvantages of temporary work when I discuss appellant's employment via manpower companies. I thus wish to focus upon appellant's employment for eleven years as an independent contractor, by force of contracts signed from time to time. In our examination of appellant's form of employment, according to her own affidavits, it appears, *prima facie*, that the relations during this period were employee-employer relations. According to the Civil Service Bylaws, at the end of the trial period there are ways to employ a worker in a permanent position. Usually, except for positions which are tender-exempt, an internal or public tender is to be held. The Civil Service Bylaws do not have an unlimited trial period. Employment as an independent contractor, when, *prima facie* the relations are those of employee and employer, or employment by way of short term contracts
which are renewed from time to time, contravene the form of employment according to the Civil Service Bylaws. The idea behind employment according to the Civil Service Bylaws is that a worker is not to be employed as a temporary worker on a long term unlimited basis. Such a way of employing a non-permanent worker, in fact – a temporary worker, for an unlimited period, prevents application of

the Civil Service Bylaws to the worker, and thus he is stripped of the protection of labour law. It is a bypass of labour law; a bypass of the way a worker is employed and terminated. When a worker is employed with short term contracts, his employer can tell him at any time that one of the contracts has ended; that he is no longer interested in his services. *Prima facie*, he is not obligated by the termination procedure according to the Civil Service Bylaws. It is for that reason that that form of employment is objectionable, and in my eyes, such a worker is to be seen as a permanent worker after the temporary employment period as determined in the Civil Service Bylaws. In the *Rehovot Workers' Council* case, I ruled that the employer is not allowed to turn a worker into a temporary worker for an unlimited period. The period of temporariness of a temporary worker is limited.

> "Labour law should not allow him (a worker) to be a temporary worker forever, for an unlimited period. A temporary worker is as his title implies: he is a worker for a temporary, limited period. The concept of a temporary worker for an unlimited period of time is a complete paradox. Indeed, so it is regarding temporary workers in other countries. In France, for example, a temporary worker is hired in order to take the place of a worker who is temporarily absent from work, to immediately fill a permanent position to which no permanent worker has been appointed, or due to an unusual increase in the workload. The Government of France, after the 1981 elections, wished to arrange irregular employment, especially that of temporary workers, in bylaws. Employment of temporary workers is permitted, but the concern arose that it might lead to violation of labour law. Therefore, the government intervened. Rules were made, determining the way that temporary workers can be employed and the results of Long Term Employment in Unconventional Forms for Avoiding Application of Workers' Rights such employment. The rights of temporary workers were also determined. It was determined that temporary workers shall have the same social benefits as permanent workers. Permission to employ temporary workers was limited. It is permitted to employ temporary workers only in the following cases:
>
> 1. When a permanent worker is absent, or when his labour contract is suspended, only for the period of the suspension or absence, and no longer than six months.
> 2. When the contract of a permanent worker comes to an end and the temporary worker is brought in to fill in for the permanent worker who has finished working, only until the position is filled by a permanent worker.
> 3. Urgent work whose immediate performance is necessary in order to prevent failures and accidents, organization of rescue operations, or repair of foundations and buildings liable to pose danger to workers" (MichaelDespax & JacquesRojot (*Labour Law and Industrial Relations in France* (Kluwer, 1987

It was for good reasons that the ways of terminating employment were determined in collective bargaining agreements, and collective arrangements including the Civil Service Bylaws. The objective of collective labour law is to ensure that after the trial period, a worker is given permanent status, if he has successfully passed the trial period. A worker has a quasi-property right to his job, and the aforementioned arrangements protect that right. Employing a worker for years as a temporary worker is completely paradoxical, and it is a severe violation of the entire labour relations system. It thus seems to me, *prima facie,* that regarding the first period of employment, by "service provider" contracts, appellant's motion for temporary relief should be granted. That is sufficient in order to allow the motion. However, I shall also examine the period of her employment by various manpower companies.

<u>The Period of Employment by Manpower companies</u>

What we have said generally, regarding temporary employment by way of contracts extended from time to time, goes for employment via manpower companies as well. *Prima facie* there was no

difference between appellant's employment when she worked according to short term contracts as a "service provider" and her employment by manpower companies. *De facto*, she was an integral part of the labour force of respondent, which, *prima facie*, found various ways to employ her in order to avoid her becoming a permanent worker, and in order that respondent could terminate her work immediately, despite the fact that she was a long term worker, and not a temporary worker of the type for which manpower companies of the kind which employed appellant were intended.

There are three types of manpower companies in the world: *one*, a brokering company intended to link persons seeking work with employers seeking workers, without the manpower company being a party to the employment relations; the *second*, companies whose role is to find workers and supply them to third parties – to users. The *third* type consists of companies which provide direct information, consulting, compatibility examination, professional training, and other services. The latter type of company is not intended to directly link supply to demand in the labour market (*see* Leah Achdut, Yulti Sola, and Tzvi Eisbach, *Ha'asakat Ovdim b'Emtzaut Chevrot Koach Adam: Heikef haTofa'ah u'Ma'afieneiha,* The Institute for Economic and Social Research of the New General Workers' Organization)

Employing Workers via Manpower Companies: The Scope of the Phenomenon and its Characteristics.

The manpower companies which employed appellant belong to the second type, which provides workers to employers, in this case to the State of Israel. Their historic role was, as mentioned, to provide temporary workers. These temporary workers turn to a manpower company and request to be sent to a Long Term Employment in Unconventional Forms for Avoiding Application of Workers' Rights user. Since those temporary workers are usually sent to different users from time to time, as they are performing temporary jobs, the manpower company is considered the employer, so that the worker will have a "patron"; so that the worker can benefit from continuation of rights. That is not a typical form of employee-employer relations, since the worker does not become integrated into the manpower company. *Au contraire*: the worker is integrated into the user, and is under its supervision. However, the purpose of the arrangement is to create continuation of workers' rights. The worker does not become integrated into manpower company; the opposite is true – he is integrated into and is supervised by the user. However, since they are workers who pass from employer to employer according to supply and demand, they are considered employees of the manpower companies, which are the suppliers of the employees. Today there is liberalization in the form of employment by manpower companies, as today workers sent by manpower companies sometimes work for one user for long periods.

There are countries which do not yet allow that form of arrangement. There are countries which do. The question of the legitimacy of such an arrangement does not arise in this case. In all such cases, the worker is referred by the manpower company to the user, and if either of the parties is temporary, it is surely the worker. That is not the case before us, as I shall show. However, even in those cases the question of protection of the

workers' rights arises. *Adler V.P.* noted in the *M. B. National Kibbutz Construction Conglomerate Ltd.* Case (National Labour Court Case Nun-Dalet/96-3 *M. B. National Kibbutz Construction Conglomerate Ltd. v. Abad*, 29 PDA 191):

> "without statutes protecting the workers who are employed in complex labour relations which include a number of legal personalities, the caselaw must break loose from the formal approach, to strive to ensure the rights promised to workers in the protective statutes of labour law, and to advance the goals of those laws. The Court does not have to wait for legislation or *secundum legem* in order to solve the problem of a worker employed in complex labour relations. The Court has the responsibility to make rulings while considering the objective behind the protective statutes of labour law, even if that means finding new solutions to new problems. The Court must assist both in enforcement of the protective statutes and in attainment of their objectives, and must not contribute to their violation and bypass" (paragraph 22 of the judgment).

In this case, the issue is different and even more severe. In this case, it was respondent who gave appellant her job, and it was respondent who employed her as an "employee". However, she purported to do so via the "Tigboor" manpower company. After three months, respondent continued to employ her in the same form, but by different means, which were intended, *prima facie*, to prevent the existence of employee-employer relations between her and respondent. In the *Osnat Dafna Levin* case (National Labour Court Case Nun-Hey/02-109 *Levin v. The National Insurance Agency*, 28 PDA 326) I noted that a decade prior, the National Labour Court had already sensed the problematical situation which had been created. A worker sent to "Egged" by an employment company was completely integrated into "Egged" by all criteria, but he received his salary from the employment company. It had been "Egged" who had hired him, and it was "Egged" who fired him. The Court ruled that the determining factor is who hired and fired the worker (National Labour Court Case Mem-Hey/25-3 Kipnis v. "Egged" Ltd., 17 PDA 14). *Judge Adina Porat* in *Elharinat* (National Labour Court Case Nun-Bet/142-3 *Elharinat v. Kfar Rut*, 24 PDA 535, 541) discussed the case of a worker who worked as a guard in the Kfar Rut vineyard, and his employment continued after the vineyard was transferred to another owner. After nine years of work he was fired by the new owner of the vineyard. It was contended that he was employed by "Reis" and not by the vineyard owner.
Thus stated the Court:

> "The point of departure naturally will be that the worker and the party using his labour are the real sides standing Long Term Employment in Unconventional Forms for Avoiding Application of Workers' Rights on the two sides of the labour contract, and whoever wishes to refute that assumption and contend that the third party is the true employer, must prove his claim. He proves such a claim if he can show that, on two levels, there is a legal (express or implied) contract to provide labour for consideration: between the third party and the worker, and between the third party and the user of the labour. He must further show that the legal contract between the user of the labour and the third party was not intended to bypass or avoid an employer's obligations, and that it neither contravenes public policy nor is tainted by bad faith or any other fault which would make it void (article 30 of The Contracts Law (General Part) 5733- 1973)".

In light of the social objective, which is the objective of labour law, one must examine what are the true relations, and not the formal ones, which realize the purpose of labour law. Professor Ruth Ben Yisrael discussed that in her article "Outsourcing: Employment of Workers by Manpower Contractors: A Different Interpretation: Limiting the Formal Deal with The Authentic Deal", 7 *The Labour Law Yearbook* 5, 15]:

> "It seems that the accepted view of the labour contract as
> a regular commercial contract is too narrow, and fundamentally misguided, since it ignores the real characteristics of the contract for labour which are connected, in a way which cannot be detached, to the moral aspects upon which the relations between worker
> and employer are built. The basic and obvious assumption is that labour is the property of the worker. However, the human resource cannot be treated as an entity which is separate and independent of the personality of the worker, and one cannot ignore the person who stands behind the labour. The connection between labour and the personality, needs, and human emotions of the labourer, creates a special link between labour as a human resource, and the labourer".

In this case, the form of employment was different from that of a manpower company supplying the workers. In this case it was not the manpower companies who "provided" the labour of the worker – the appellant. It was not they who referred appellant to the user – the State. Respondent – the user – "provided" the worker to the manpower company. The worker was already employed by the State – the user. It was she who was the permanent factor in this relationship, whereas manpower companies

came and went according to tenders run by respondent. Appellant was a constant variable – she was employed by respondent at the same place, in the same position, and only formally was considered the employee of a different tender-winning manpower company each time. It was at the user – respondent – and not at the manpower company, that the employee gained seniority. Thus, the main objective of seeing the manpower company as the employer, so that the
employer will be permanent even if the workplace and the user alternate, is not relevant in this case. In light of that, it is doubtful whether the manpower companies can be seen as employers. It is doubtful that the Government of Israel shouldn't be seen as the employer. Employment was arranged via manpower companies, even according to the arguments of respondent, in order to employ appellant without hiring her in the accepted way, and without granting her permanent status despite the long work period. The concern that as a "service provider" appellant would ultimately be considered an employee brought about the change in the way she was employed. The doubt whether the manpower companies should be seen as the employers certainly requires preventing alteration to the existing situation, and that appellant should not be terminated before decision of her suit.

Clean Hands and Good Faith

In light of the above discussion, it is difficult to see appellant as a person who came to the Court with unclean hands. It is the form of employment, which attempts by all means to bypass the accepted ways of employment and the protection which labour law grants to workers, which raises suspicion here. It is doubtful whether the form of employment is *bona fide*. *Prima facie*, there is bad faith in the various attempts to find a way to employ appellant permanently, *de facto*, without her receiving permanent status as required by the Civil Service Bylaws, regarding an employee in full standing. In any case, an employee who has worked for twenty years in one workplace, where the relations are *prima facie* employee-employer relations, should not be considered to be acting in bad faith when requesting to delay her termination until decision of her suit. There is doubt regarding the identity of the employer. Therefore, it should not be said that she comes with unclean hands since it is clear that the State is not the employer. Furthermore, bad faith can no longer be a consideration for not examining the balance of convenience on its merits, when bad faith can be considered by awarding legal costs.

Regarding the Argument that Appellant was not Hired in the Accepted Way According to the Civil Service Bylaws

Such an argument is astonishing when raised by the employer who employed appellant in an unconventional way. The transgressor is relying upon his transgression in order to deny the other side its rights. In one case, in which the local planning and building committee illegally granted a permit, and later asked not to be obligated to compensate for damage to the building by arguing that the permit was not legal, *Zamir J.* wrote:

> "Appellant's argument on this point is astonishing. If it was right in its argument, it can only blame itself; and that's not all. Appellant doesn't raise that argument in order to say it transgressed, but rather in order to profit from its transgression. It claims that respondent – he, not it – must pay the price for the transgression he did not commit: appellant's illegal actions, regarding an issue which at the time was completely under its control, are now supposed to be a reason for exempting it from compensating respondent. Is that the face of justice? Moreover, administrative agencies are supposed to act according to the fundamental principles of the legal system, and those principles include, in the words of this Court, 'principles of equality, justice, and morality' (see CrimA 677/83 *Borochov v. Yefet*, 39 PD (3) 205, 218). An administrative agency is, as is well known, a trustee of the public. Public trusteeship, like private trusteeship, is a source both of power and of responsibility. The responsibility requires restraint and fairness in employing the power. *Inter alia*, there are circumstances in which an administrative agency would do well by refraining from raising a certain argument before the court, even if it has a legal basis, if it is at odds with the fundamental principles of proper

> administration or clearly contravenes justice. *Compare* HCJ 4539/94 *Nabil v. The Minister of Health* (yet unpublished), paragraph 19 of the judgment" (CA 1188/92 *The Jerusalem Local Planning and Building Committee v. Barali*, 49 PD (1) 463, 471-472 at paragraph 9).

Articles 12 and 39 of The Contracts Law (General Part), 5733-1973 require good faith in negotiation and contract performance. It is doubtful whether the form of appellant's employment is in good faith, and in any case, it justifies relief in order to preserve the situation which existed prior to her termination, in the form and status that she was employed by the state, until her case is heard and decided.

Hiring and Firing

The argument that appellant was not hired or fired by respondent does not, *prima facie*, reflect reality. Long Term Employment in Unconventional Forms for Avoiding Application of Workers' Rights.

Conclusions

Prima facie, appellant was an employee during the first eleven years, and her employment as a "service provider" was, *prima facie*, a fiction. Her later nine year employment as the employee of various manpower companies also contravenes the form of employment by manpower companies as employers. In appellant's case, she was not the temporary worker who moved from user to user from time to time – and in such cases the manpower company is considered the employer – rather the manpower companies were the ones that were temporary; they were the ones who alternated from time to time, and appellant was the one who was constant. Appellant was hired by respondent, and it was the latter who also terminated her employment. Thus the balance of convenience instructs us to keep her at work, until it is decided, in her main suit, whether her termination by respondent was legal. The declaration that respondent will obey any verdict given is insufficient. It is obvious that it will honor any verdict, since if it does not do so it will be in contempt of court, and that it shall not be. However, in the case of someone the appellant's age who must find work until a final verdict, the temporary order will usually become a permanent order, and if the order is not given, and she is victorious in the final verdict, it is doubtful whether she will be able to return to work.

Ruling

Appeal is allowed, such that a temporary order is hereby issued, instructing that appellant be reinstated and employed in the same way, and with the same status, that she was employed prior to termination, until decision of her main suit. The question of appellant's rights during the period between the termination of her employment and her said reinstatement shall be decided in the Regional Labour Court, to the extent that arguments are raised on that issue.

Respondent no. 1 shall pay appellant costs and legal fees for proceedings in both instances, in the amount of 4,000 NIS plus value added tax, within 30 days.

Netherlands

Reporter: Gerrard Boot, Senior Judge, Amsterdam Court

Introduction

The First case is the Albron one. Beer brewer Heineken did put all its employees in a 'Personnel BV'. Nobody objected, and for they employees this had no immediate consequences. The moment that a part of the activities of Heineken was outsourced to a 'new company' (Albron in this case), this changed. Normally the employees of the outsourced activities would automatically have got an employment agreement with the new company (EU dir. 2001/23). However, the new company Albron

objected and claimed that this was not a TUPE, because the outsourcing company ('Heineken NV') had no employees who worked for them because all employees were employed by Heineken Personeel BV. The EU CofJ decided that the scope of Directive 2001/23 is not limited to companies with their own employees who outsource activities.

Facts

The reason for the European Court's decision was the outsourcing of catering work by Heineken to Albron. Within the Heineken group, all employees are in the service of Heineken Nederland Beheer B.V. (Heineken Personnel BV). Heineken Beheer seconds them to other operating companies forming part of the Heineken concern. In 2004 Heineken decided to outsource the catering activities of Heineken Nederland B.V. (Heineken Nederland) to Albron. As part of the outsourcing, Albron offered the catering staff an employment contract with less favourable employee benefits. They also received a dismissal allowance from Heineken. However, the catering staff, represented by the FNV Bondgenoten union, took the view that, pursuant to the transfer of a business, their employment contracts had transferred to Albron and that therefore their former (better) Heineken employee benefits still applied. Albron took the position that the employment contracts of the catering staff had not been transferred pursuant to the Transfer of Businesses Act, as these employees' employment contracts were with Heineken Beheer, not with Heineken Nederland. According to Albron, they were therefore not in the employ of the business that was transferred.

Prevailing doctrine

The prevailing doctrine in the Netherlands has always been that employees should have an employment contract with the 'disposer' - i.e. the actual operator of the business being transferred. This means that the employees of a business forming part of a group and operated by a legal person, but who have employment contracts with a different (central) employer within the group (e.g. a personnel B.V.) are not transferred on the sale or outsourcing of that business.

European Court

In the first instance in the Heineken case the District Court found in interim injunction proceedings, with reference to the prevailing doctrine, that the employees had not been lawfully transferred. However, in proceedings on the merits of the case, the sub-district court then found that a lawful transfer had taken place. The case was then filed for appeal before the Amsterdam Court of Appeal. The Court of Appeal established in its interlocutory decision that according to the prevailing doctrine and the applicability of the Transfer of Business Act, it is required that the disposer of the business to be transferred is also the employer of the relevant employees. However, the consequence of this, according to the Court of Appeal involves avoidance of the Directive, since the employees concerned in fact worked only for Heineken Nederland and were not also deployed elsewhere. As the parties disagreed on a correct interpretation of the Directive, the Court of Appeal formulated a pre-judicial question for the European Court, which asked, in short, whether the aforementioned Directive also applied in the Heineken situation.

On 21 October 2010 the European Court dismissed the prevailing doctrine. The Court based its view on a broader interpretation of the definition of 'employer' in the Directive. On the basis of this broader interpretation the Court of Appeal found that the definition of an employer also applies in the case of permanent intra-group secondment. The employees had therefore lawfully entered the service of Albron, retaining all their rights and obligations. Albron was therefore not permitted to offer them employment contracts with less favourable employee benefits.

The Albron case was a ground-breaking case for Dutch labour law. The European Court 'expanded' the definition of 'employer' as it were. After all, according to the decision of the Court, intra-group secondment, as in the Albron case, involves two employers within the meaning of the aforementioned Directive. On the one hand there is an employment contract with a contractual employer, while on the other there is employment by a non-contractual employer, the 'material employer'. Dutch law does

not include the term 'material employer'. The Court has therefore also expanded the definition of 'employer' of the Directive in relation to our national law.

In April 2013 the Dutch Supreme Court followed this decision of he European Court.

The second case is about payrolling. Payrolling in this sense means that an employee comes into contact with a company. The company selects him or her, but when the employment agreement is signed, it is not with that company (‚the company'), but with a payrolling company. When at work, the company behaves like an employer: gives orders to the employee etc. So the only contact with the payrolling company is the contract, the payment and the salary slips.

A few cases had come to court about the relationship between the employee and the payrol company. In these cases the court had considered the payrol company as ‚the' employer. However, in these cases that was not a disadvantage for the employee. F.e the employee was entitled to a normal severance payment.

In two recent cases the cantonal court of Rotterdam and the cantonal court of Almelo decided differently. The judge in Rotterdam had to decide about a dismissal case. The company told the payrol company that they did not need the employee anymore for economic reasons. The payrol company told the employee that there was no work for him anymore, because they had lost their client (‚the company') and there were no alternatives. The employee did not agree. The court decided that it had to be considered whether the employee should have been dismissed IF he had been an employee of ‚the company' (lifo). This had not been the case, so the dismissal was not allowed.

In Almelo the payrol company asked for the dismissal of the employee. The judge denied this request and wrote that the payrol company is not the employer, because ‚the company' is the employer.

The discussion is about the scope of art. 7:690 DCC. According to this article it is possible to employ an employee and let this employee work for a third party. This article was written for twa-situations. Twa means that an employ consults a twa, and this twa brings you in contact with a company who needs workers. So the twa fulfills an ‚allocation fonction'. According to the wording of art. 7:690 DCC a payrol company is a twa; however a payrol company does not fulfill an allocation fonction: the employee comes into contact with the company by him- or herself. The payrol company is just a vehicle between the company and the employee, as soon they have agreed to work with each other.

It is relevant to note that the Ministry of Social Affairs in 2011 had made a rule, which meant that the payrol construction was accepted. It must also be mentioned that the biggest trade union (FNV) in 2007 had agreed with a CLA about payrol work. In 2011 they had stopped this CLA, as the trade union realised that payrol workers are misused. Normally they do not fall under the scope of the CLA of ‚the company'. Often, the payrol employee receives the same salary as employees of ‚the company' do, but they are not entitled to severance payments normal employees are. And sometimes they even do not receive the normal salary.

A decision of the court of appeal and the supreme court are to be expected.

Norway

National reporter: Marit B. Frogner, Judge, Labour Court of Norway

28 June 2013
Labour law. Construction contract. Labour leasing.

An employee demanded permanent employment based on an employment situation which he believed was comprised by section 14-12 subsection 4 cf. section 14-9 subsection 5 of the Working Environment Act relating to labour leasing. The former employer believed that the work was carried out as a construction contract. The Supreme Court stated that the distinction between leasing and construction contracts shall be based on an overall evaluation where the decisive point must be which of the parties is responsible for the

management and the result of the work to be performed. For the distinction between construction contracts and labour leasing the crucial point cannot be whether the commission is to deliver a product or an ongoing service in the form of manning. Based on a concrete assessment of evidence the Supreme Court held that the disputed work, which was the delivery of intra-company postal service, was carried out as part of a construction contract. The appeal against the Court of Appeal?s judgment in favour of the defendant was quashed.

Reference: HR-2013-1391-A, case no. 2013/4, civil appeal against judgment.

JUDGMENT[1]
5 March 2013
Labour law. EEA law. General Application of Wage Agreement

By the Tariff Board's adoption of **Regulations of 6 October 2008 concerning partial general application of the Engineering Industry Agreement to the maritime construction industry** -

later superseded by corresponding Regulations of 20 December 2010 no. 1764 – unorganised and foreign employees acquired a right to wage and working conditions which are equal to those that Norwegian employees have within the scope of the wage agreement. A group of industrial companies filed a legal action to have the regulations found invalid. They argued that Article 36 of the EEA Agreement and Directive 96/71/EF relating to seconded employees prevent a general application of contract conditions relating to out-of-town allowance, working hours, overtime allowance and compensation for costs of overnight stays away from home. The Supreme Court unanimously concluded that the conditions for a general application contained in the Act relating to the General Application of Wage Agreements were met, that the disputed provisions in the Regulations were compatible with Article 36 of the EEA Agreement and Article 3 of the Directive and that the Regulations were accordingly valid. Statements about the significance of advisory statements from the EFTA Court.

Reference: HR-2013-496-A, Case no. 2012/1447, civil appeal against judgment.

28 June 2013

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[1] http://www.domstol.no/en/Enkelt-domstol/-Norges-Hoyesterett/Summary-of-Recent-Supreme-Court-Decisions/Summary-of-Supreme-Court-Decisions-2013/

Slovenia

National reporter: Miran Blaha, Supreme Court Judge, Supreme Court of the Rep. of Slovenia

Important and fundamental recent (2012 or 2013) decisions which have a cross border or European legal background

Explanation as to why this decision to be of particular importance for the jurisdiction in Slovenia and/or maybe for other participating countries.

In 2012 Supreme court decided in larger number of disputes, that referred to decisions of Institute for Health insurance of Slovenia (that is policyholder of obligatory health insurance), who rejected claims for the refund of costs for treatment carried out in another EU country.

In some cases there were claims for return of costs for urgent treatment between travel and provisional residence abroad – concretely for return of costs of the childbirth in Austria. It was found out in some cases, that it was actually planned departure of insured person in Austria right before a childbirth, with clear intention of the childbirth in a concrete maternity hospital and to gain possibility of return of costs without prior authorisation for such treatment.

In one case it was question whether it is hospital or non-hospital (ambulant) treatment (in Italy, at a Slovene physician) and with this connected obligation of insured person to gain prior authorisation (approval). It was question of definition of hospital and non-hospital (ambulant, outpatient) treatment, and on the other hand for question, how to decide in case, when it is combination of both.

Number of patients who would want to go on treatment abroad is increasing. Because this is connected with elementarily higher costs, also number of requests for their refund is increasing (or will increase).

Summary with the facts and legal aspects of the case including the international/ European implications.

Insured person (the plaintiff in dispute) was in 2006 operated because of the cancer on left breast in Slovenia. After treatment (also with chemotherapy), she was advised mastectomy**.** At the end of year 2008 cancerous constructions were discovered again in both breasts. Because of distrust in a hospital in which she was treated by then, she decided for further treatment (and operation) at the well known Slovene physician in Trieste. In explanations about the treatment physician certain service determined as hospital, and certain as non-hospital (ambulant).

Labour and socilal Courts on first and second instances decided, that it was a case of hospital treatment. They rejected claim for return of costs, because the plaintiff didn't insert proposal for an approval before went on treatment in foreign country and, that equaly efficient treatment can be ensured also in Slovenia within suitable time. Both Courts are convened on Slovene legislation and on Decree EEC 1408/71.

Supreme Court agreed, that for repayment of costs for hospital treatment it is admissible to determine certain conditions, including the preliminary approval of competent authority.

But decision was too quick and unfounded about the question that went only for hospital treatment. Because of the same disease (of the same cause and/or diagnoses) was at an insured person finished a number of interventions and medical services (treatments), that were finished partially in a hospital, partially non-hospital. Court must find out, if it is possible in such cases to separate treatment on hospital and ambulatorily, and if it is, of which service is to consider of ambulant, for which (preliminary) approval is not necessary. An plainiff didn't demand only returns of all costs, but also at least costs for ambulant treatment.

Legal basis for decision was domestic law (Health Care and Health Insurance Act and Compulsory

Health Insurance Rules), Decree EEC 1408/71 and court practice of SEU. Question will be relevant also if we consider Decree 883/2004 and Directive of European Parliament and Council on enforcement of rights of patients at cross-border health care.

Important provisions of domestic law.

Law ensures insured persons from obligatory health insurance the payment of medical services for treatments in foreign countries within height at least 95 % of value.

Insured person has right to an examination, investigation or treatment abroad and/or to repayment of costs of these services, if possibilities for treatment and the examination are used up in Slovenia, and that treatment and the examination in other state is to expect cure or the improvement of state of health and/or to make further aggravation of state of health impossible. Repayment of costs can be approved exceptionally for medical services, finished abroad, if it isn't possible to ensure these services in Republic of Slovenia in sufficient scope.

Procedure of deciding is determined about a preliminary approval for (hospital) treatment within foreign countries, that is condition for the refund of costs as a rule.

Regulations on health insurance contain also some provisions about hospital or non-hospital (ambulant, outpatient) treatment.

Ambulant (non-hospital) treatment comprise:

1. specialist examinations;

2. more demanding services from field of diagnostics, treatment and rehabilitation, that don't fit in with rudimentarily health activity and they are finished easily per ambulant manner.

Hospital treatment comprises:

1. professionally, technological and organizationally more demanding services of diagnostics and treatment and medical rehabilitation, that are is not possible to finish in basic or ambulant activity and/or in health resorts;

2. nursing care between hospital treatment;

3. accommodation and diet between residence in a hospital;

4. accommodation and diet in a hospital alone by day (daily hospital);

5. ensuring of medicines and medical material;

6. gadgets, that need for performance services, because of which a insured person was admitted on treatment;

Hospital treatment is restricted to shortest possible time that is needed for an execution of interventions and services. Right to hospital treatment stops, when is possible to ensure diagnostic, therapeutic and of rehabilitation service to insured person in basic, ambulant or health resorts activities and/or with treatment on home.

Court decision

Reference no.: VIII Ips 295/2011

Session date: 4 December 2012

Legal basis:

Health Care and Health Insurance Act

Compulsory Health Insurance Rules

Treaty Establishing the European Community (TEC), Article 46, 49

Treaty on the Functioning of the European Union (TFEU), Articles 52, 56

Civil Procedure Act, Articles 339/2-15, 379/1

The revision is granted, the rulings by the courts of first and second instance are annulled and the case returned to the court of first instance for re-trial.

Headnote:

In accordance with the case law of the ECJ, health services provided for payment fall within the provisions on the freedom to provide services. However, this system which allows the insured to request from the national compulsory health insurance company reimbursement of the cost of medical services carried out in another EU Member State in accordance with the rules (and at the price) of the home country, in principle applies only to outpatient (non-hospital) health services. Member States may require prior authorisation for reimbursement of hospital treatment in another Member State from the national system.

In each case it has to be assessed whether hospital or outpatient (non-hospital) care is at issue, and if a "yes or no" answer is not possible, it has to be established what is the share of the former and of the latter.

Reasoning

1. The court of first instance rejected the claim by the plaintiff to annul the decisions by the defendant no. … of 8 April 2009 and no. … of 6 May 2009, and that the defendant should reimburse her the cost of medical treatment in the amount of EUR 25,129.14 with statutory default interest.

2. The court of second instance rejected the appeal by the plaintiff and affirmed the ruling by the court of first instance. It agreed with the finding of fact and legal conclusions of the court of first instance.

3. Against the final ruling issued at the court of second instance the plaintiff filed a revision for revision grounds of substantive breach of the civil procedure and erroneous application of substantive law. The plaintiff gives as decisive the following two questions, namely (1) whether in the case under discussion the medical treatment of the plaintiff in Italy was a hospital or outpatient treatment, or, if a "yes or no" answer is not possible, in what part the former or the latter type of medical treatment took place; and (2) if it was a case of hospital treatment, whether it is in conformity with the *acquis communautaire* of the EU to put prior authorisation by the defendant, as stipulated in the Rules on the Obligatory Health Insurance (Official Gazette of the RS, nos. 79/94 to 7/09), as a condition for the reimbursement of medical treatment costs in another Member State of the European Union (hereinafter: the EU) In relation to the first question the plaintiff states that she alleged in a timely and well substantiated manner that in her case it was an outpatient treatment. Several individual interventions were conducted and Prof. Dr A. classified even five of them as outpatient treatments. The court of first instance summed up his opinion in an erroneous manner and in consequence wrongly concluded that in the case under discussion hospital treatment was at issue. By doing this it not only established the actual situation but also committed a substantive breach of the civil procedure pursuant to item 15 of the second paragraph of Article 339 of the Civil Procedure Act (hereinafter: the CPA) which the plaintiff put forward already in the appeal. Because the court of second instance unjustifiably rejected such statements in the appeal, saying that they were inadmissible appellate novelties, the court itself repeated the absolute substantive breach of procedure. In relation to this the plaintiff also reproaches the court of second instance for substantive breach of the provision of civil procedure pursuant to the eighth and fourteenth item of the second paragraph of Article 339 of the CPA and substantive breach of civil procedure provision pursuant to the first paragraph of Article 339 in relation to Article 337 and first paragraph of Article 360 of the CPA, and she further reproaches both lower courts that they in the entirety failed to conduct the assessment whether in relation to the criteria established by the case law of the Court of Justice of the European Communities (hereinafter: the ECJ), individual performed medical service falls within hospital or outpatient treatment. In relation to the second question the plaintiff states that considering the case law of the ECJ, the reimbursement of the cost of hospital

treatment in another Member State is a rule, exceptions are possible only if certain conditions are fulfilled. The lower court failed to assess the fulfilment of these conditions. She emphasizes that the exceptions have to be interpreted restrictively and the eligibility of the request for prior authorisation of hospital treatment should be assessed on a case by case basis, depending on the circumstances of each individual case. The burden of proof is on the side of the defendant. The plaintiff believes that the existing system of prior authorisation in the national legal order is not in conformity with the Community law, therefore the courts of first and second instance should have rejected the use of the Compulsory Health Insurance Rules and based their position directly on the Community law. Because the compliance of the Slovenian legal system regarding the prior authorisation for the reimbursement of the medical treatment costs in another Member State with the Community law has not yet been assessed by the ECJ, the she proposes to Supreme Court that this legal issue should be sent to the ECJ for preliminary decision.

5. The revision is justified.

6. Pursuant to the provision of Article 371 of the CPA the revising court tests the challenged ruling only in that part in which it is challenged by the revision and within the grounds that are put forward. Regarding the assessment of substantive law of the challenged ruling the revising court is bound by the actual situation as it was established by the court of first instance and tested by the court of second instance. Pursuant to the explicit provision of the third paragraph of Article 370 of the CPA a revision cannot be filed for erroneous or incomplete establishing of the actual situation.

7. The Constitution of the Republic of Slovenian (hereinafter: the CSR) stipulates that everyone has the right to health care under the conditions provided by law and that the law regulates the rights to health care from public funding. Similarly as with the right to social welfare, the CSR regarding the specification of the right to health care refers to the law that has to specify how the right is implemented. This law is the Health Care and Health Insurance Act, while its provision and the manner of implementation are even in greater detail regulated by the Compulsory Health Insurance Rules. Furthermore, the EU law has to be considered, and the free movement or freedom to provide services within the EU taken into account. Pursuant to the position of the ECJ health services are also included in such services.

8. The plaintiff justifiably points out the case law of the ECJ, which did not base its assessment only on the coordinating regulation (Regulation (EEC) no. 1408/71 on the application of social security schemes to employed persons and their families moving within the Community), but by means of the provisions on the free movement and freedom to provide services (Article 49 of the Treaty establishing the European Community: hereinafter: the TEC)[1] it put in place a parallel system of exercising rights to health services in another Member Country of the EU, which allows the insured to request from the national compulsory health insurance company to reimburse the cost of medical services carried out in another EU Member State in accordance with the rules (and at the price) of the home country.[2] In accordance with the case law of the ECJ, health services provided for payment fall within the provisions on the freedom to provide services.[3] However, in principle, this system is in place only for outpatient (non-hospital) services. The ECJ interprets the EU law, i.e. Article 49 of the TEC as meaning that it does not preclude reimbursement of the cost of hospital treatment to be provided in another Member State from being made subject to the grant of prior authorisation by the competent institution.[4]

9. The ECJ assessed that it is possible for the risk of seriously undermining the financial balance of a

[1] Since 1 December 2009, when the Lisbon Treaty came into force , the Treaty establishing the EU has been renamed the Treaty on the Functioning of the European Union (hereinafter: the TFEU), and Article 49 has become Article 56.

[2] For more on this see: *Grega Strban, Pravica do zdravljenja v drugi državi članici EU, Pravna praksa, št. 11/2009,* p. 54 and the following.

[3] See ECJ judgements in the case C-158/96 of 28 April 1998, C-173/09 of 5 October 2010, C-368/98 of 12 July 2001, C-385/99 of 13 May 2003, and C-372/04 of 16 May 2006.

[4] ECJ ruling in the Case C-372/04 of 16 May 2006.

social security system to constitute an overriding reason in the general interest capable of justifying an obstacle to the freedom to provide services. It likewise acknowledged that the objective of maintaining a balanced medical and hospital service open to all may also fall within the derogations on grounds of public health under Article 46 TEC,[5] in so far as it contributes to the attainment of a high level of health protection. The ECJ also held that Article 46 TEC permits Member States to restrict the freedom to provide medical and hospital services in so far as the maintenance of treatment capacity or medical competence on national territory is essential for the public health, and even the survival, of the population.[6] Furthermore, the ECJ took the position that the number of hospitals, their geographical distribution, the way in which they are organised and the facilities with which they are provided, and even the nature of medical services which they are able to offer, are all matters for which planning, generally designed to satisfy various needs, must be possible. On one hand such planning seeks to ensure that there is sufficient and permanent access to a balanced range of high-quality hospital treatment in the State concerned. On another hand, it assists in meeting the desire to control costs and to prevent, as far as possible, any wastage of financial, technical and human resources. Such wastage would be all the more damaging because it is generally recognised that the hospital care sector generates considerable costs and must satisfy increasing needs, while the financial resources which may be made available for healthcare are not unlimited, whatever the mode of funding applied.[7] The ECJ further pointed out that the Community law does not preclude the system of prior authorisation, however it is still necessary that the conditions attached to the grant of such authorisation must be justified in the light of the overriding considerations mentioned above, that they do not exceed what is objectively necessary for the purpose, and that the same result cannot be achieved by less restrictive rules. Such a system must furthermore be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily.[8]

10. Considering the outlined established case law of the ECJ, the answer to the second posed question (whether in the case of hospital treatment, it is in conformity with the *acquis communautaire* of the EU to put prior authorisation of the defendant, as stipulated in the Rules on the Obligatory Health Insurance, as a condition for the reimbursement of medical treatment in another EU Member State) is clear – EU Member States may demand a prior authorisation in order to cover the cost of hospital treatment in another Member State from the national system. The ECJ is of the opinion that such a requirement is reasonable and necessary. It is true that in relation to that the ECJ put forward certain limitations for the EU Member States, however these issues in the case under discussion surpass the factual basis of the dispute. The defendant alleges that the eligibility of the requirement for a prior authorisation of hospital treatment has to be assessed considering the circumstances on a case by case basis and that the Slovenian health care system was not and could not be in danger due to the treatment of the plaintiff in Italy, however these statements are unjustified. It is understandable that taking over of the cost of one treatment in another Member State, in which the health insurance company of an insured person does not have a registered seat, cannot have significant consequences for the financing of the social welfare insurance. Regarding the consequences of the free movement of service in the health care sector a global approach[9] should therefore be taken, and the mobility of a higher number of patients should be taken as the starting point.

11. The defendant unjustifiably advocates that the legal issue regarding the compliance of the Slovenian legal order with the Community law should be put to the ECJ for a preliminary ruling. The scope of a preliminary ruling is limited exclusively to the Community law and does not cover the national law of the EU Member States. From the division of jurisdiction between the ECJ and the

[5] Now Article 52 of the TFEU.

[6] See judgements in the ECJ cases C-158/96 of 28 April 1998, C-157/99 of 12 July 2001, C-385/99 of 13 May 2003, and C-372/04 of 16 May 2006.

[7] See ECJ judgements in the cases C-157/99 of 12 July 2001, and C-372/04 of 16 May 2006.

[8] See ECJ judgements in the cases C-157/99 of 12 July 2001, C-385/99 of 13 May 2003, and C-372/04 of 16 May 2006.

[9] For this, see the ECJ judgement in the Case C-385/99 of 13 May 2003.

national court of EU Member States it follows that the ECJ in the preliminary ruling proceedings cannot deal with the issues of national law. Its jurisdiction is limited exclusively to addressing the legal issues regarding the interpretation or validity of the Community law. The ECJ cannot rule either on the compliance of national regulation with the Community law, nor on the validity of national rules, that are in the exclusive jurisdiction of national courts.

12. The resolving of the collision between the national law (Compulsory Health Insurance Rules) and the Community law (free movement and freedom to provide services, as interpreted by the ECJ) is a task for a national court. It should, however, take into consideration the fundamental principles of the Community law which have been developed by the ECJ in its case law. Doubts about what is the aforementioned assumption of legal syllogism should be resolved by taking into account the hierarchy of legal norm as stipulated by the principle of primacy. This gives in all aspects precedence to the Community law over national law in areas in which Member States waived their sovereign rights and conferred them on the EU. In relation to this is, in addition to the principle of primacy, is important also the duty of loyalty or consistent interpretation which requires from national courts that the collision of legal norms of national law and Community law is resolved by considering the purpose of the Community law. If the legal norm of the national law is not in line with such an interpretation, it has to be put aside,[10] and the legal void that comes into being has to be filled with the Community law.

13. Considering the aforementioned established case law of the ECJ, the plaintiff in the revision as the decisive justified question posits the first question (whether in the case under discussion the medical treatment of the plaintiff in Italy was a hospital or outpatient medical treatment, or, if a "yes or no" answer is not possible, in what part the former or the latter type of treatment took place). The courts of second and first instance assessed that in the case under discussion hospital treatment is at issue, however, such an assessment was excessively anticipatory, as will be explained later, and in consequence the decision to reject the claim was also taken too early.

14. The revision statement regarding the alleged substantive breach of the civil procedure provisions has to be agreed with. The statement by the court of first instance that from the letter of Prof. Dr A. titled *Clarification regarding the treatment of the plaintiff*, which the court received by e-mail it is evident that treatment of the plaintiff was a hospital treatment, is contrary to the contents of this document. From the notice it clearly follows that Prof. Dr A. classified as outpatient treatment and not as hospital treatment several treatments for which the plaintiff submitted the request for reimbursement and are the subject of these proceedings. In the grounds of the ruling by the court of first instance there is in consequence contradiction between what is given as the contents of the document, and the document itself, which represents in the revision alleged absolute breach of the civil procedure provisions pursuant to item 15 of the second paragraph of Article 339 of the CPA. This breach was put forward by the plaintiff already in the appeal, however, the court of second instance failed to remedy it and by doing this repeated the breach itself. The revising court establishes that the plaintiff in these proceedings in a timely and substantiated manner stated that in her case outpatient treatment was at issue.[11] Considering this fact, and the contents of the letter by Prof. Dr. A., who classified several medical services in the procedure as outpatient treatment, it is not possible to follow the reasoning of the court of second instance in item 14 of the grounds of the challenged ruling, where it is stated that the plaintiff's claims in the appeal are inadmissible appellate novelties.

15. In accordance with the first paragraph of Article 379 of the CPA, the revising court therefore granted the revision, annulled the challenged ruling and the ruling by the court of first instance, and returned the case to the court of first instance for retrial.

16. The court of first instance will have to remedy the established substantive breach of procedure and evaluate again the already viewed letter by Prof. Dr A., and other already taken evidence. Pursuant to

[10] Non-compliance with the Community law in itself does not render a legal norm of national law invalid, because it may be applied in other cases to which the Community law does not apply.

[11] First in the preparatory application which was submitted to the court on 9 August 2010 (the first hearing of the main hearing took place on 26 August 2010).

the provision of Article 8 of the CPA, it will have to weigh them again, and justify the weighing in an ascertainable manner. If the court will be unable to assess on the basis of already taken evidence whether treatment or individual medical service for which the plaintiff filed a request for the reimbursement and are the subject of these proceedings should be classified as hospital or outpatient (non-hospital) treatment, it will have to take into account the proposal for evidence of the parties to the dispute and the provision of Article 62 of the Labour and Social Courts Act (ZDSS-1), and amend accordingly the evidence-taking procedure. In doing this it will have to take into consideration the provisions of Articles 37 to 39 of the Compulsory Health Insurance Rules[12] and the positions that stem from the ECJ case law. There is given also the opportunity that in certain circumstances the request for prior authorisation is justified for aforementioned reasons, when hospital treatment or health care services are at issue which – despite being conducted outside hospitals – require the use of major and costly equipment exhaustively listed in the national legislation,[13] and at the same time emphasized that some services that are usually carried out in hospitals may fall within the category of outpatient (non-hospital) treatment.[14]

Spain

National reporters: Antonio Martín Valverde (Supreme Court Judge), Miguel Angel Limón Luque (Court of Las Palmas de Gran Canaria Judge)

Roj: STS 4641/2012
Body: Supreme Court. Social Chamber
Headquarters: Madrid
Section: 1
Appeal No.: 2724/2011
Date of Decision: 23/04/2012
Procedure: SOCIAL
Speaker: His Honour Justice JOSE MANUEL LOPEZ GARCIA DE LA SERRANA
Type of Resolution: Judgment

SUMMARY: Boundaries of the collective dismissal and the individual or plural dismissal due to economic reasons.- Threshold established in European Directive 98/59 EEC and in section 51 of the Workers' Statute.- Aim of the rule of the rule of the "ninety days period".-Account of the "ninety days period".- Dismissal operated two days after the ninety day is, in the case, in fraud of the law.

JUDGMENT

In the city of Madrid, on April 23th, two thousand twelve.

According to the proceedings pending before this Court, under appeal for unification of doctrine brought by Lawyer Mr. Enrique Cabral Gonzalez-Sicilia on behalf of Mr. Eulalio against the judgment delivered on May 10th, 2011 by the Board of the Social Court of Justice of Andalusia, based in Seville, in supplication appeal n. 3810/10, brought against the judgment dated on July 27th, 2010, issued by the Labour Court No. 4 of Seville in proceedings N. 684/10, followed by Mr. Eulalio against GALLETAS ARTIACH SLU, PANRICO SLU, PRODUCTOS ALIMENTICIOS LA BELLA EASO SAU on DISMISSAL.

He has appeared as defendant on appeal PRODUCTOS ALIMENTICIOS LA BELLA EASO, SAU represented by Lawyer Mr. José Antonio Domínguez López.

[12] Article 37 defines the service of specialist outpatient service, Article 38 defines hospital treatment, Article 39 stipulates that hospital treatment should be limited to the shortest possible period of time that is needed to carry out the interventions and services, and that the right to hospital treatment ends when diagnostic, therapeutic and rehabilitation services can be provided to the insured person in a primary health care level, specialist outpatient clinic level or rehabilitation facility, or while recuperating at home.

[13] For this see the ECJ judgement in the Case C-255/09 of 27 October 2011.

[14] For this see the ECJ judgement in the Case C-385/99 of 13 May 2003.

It is acting as Magistrate Speaker, His Honour Justice Jose Manuel Lopez Garcia de la Serrana.

FACTUAL BACKGROUND

FIRST. – On July 27th, 2010 the Labour Court No. 4 of Seville gave judgment, in which it declared the following facts: "1. – D. Eulalio, NIF NUM000, was carrying out his work under the orders and the dependence of the company Bella Easo SAU, starting on 05/11/2004, having as professional-grade, commercial developer, at the workplace located in Avenida Alcalde Luis Uruñuela S / N, Edificio Congreso. Modulo 105, Seville, and earning a daily wage for calculating compensation for dismissal of euros, 65.63. 2. – The plaintiff is not or was not legal or union representative of the workers. 3 . – The company communicated to the worker on date 3/16/2010 that their dismissal will take place on 5.05.2010, in terms stated in the letter of dismissal, -on pages 10-21 of the proceedings, letter that is considered reproduced from there because of its extension-, attaching to it a check in the amount of EUR 8.762.64 that was not accepted by the worker (Document No. 3 of the defendant). The real economic data, accounting and business mentioned in the document of termination of the contract is proven through the documentation on accounting, tax and financial matters provided by the defendant. 4 . – Indeed, as stated in the letter, after the acquisition of La Bella Easo by Iberian Foods, an analysis took place in order to become more competitive and trade integration was agreed: – Annual Accounts: They integrate the sales forces of Pan Rico and La Bella Easo, keeping Artiach separate into the biscuit category. Celestino was maintained in charge of his responsibilities for Panrico / La Bella Easo so Ovidio was for Artiach. Accounts Regional: It creates a single sales force whose goal is to optimize the market presence of Panrico, La Bella Easo and Artiach. The leader of this unit is Jesus Carlos. Jesús Carlos reports to Celestino regarding Panrico / La Bella Easo and to Leandro for Artiach issues. Management of sales places: It creates an only sales force whose goal will be to maximize the presence of Artiach and Bella Easo products in stores of major national and regional accounts that get supply of the company's brands from platform. The leader of this unit is Carlos José, who reports to Ezekiel for Artiach and to Celestino regarding La Bella Easo (Document No. 9 of the defendant) .5.- For these purposes the company commissioned Europraxis the making of a report, which is the document n ° 19 of the defendant, and that it is considered hereby reproduced; The reporting company advised precisely trade integration, in order to be more competitive and to avoid "self-competence." Guidelines set forth in that report were put into practice by the companies.6 . – On date 03/07/2008 Artiach (formerly Nabisco Iberia SL) and Metaphase signed a contract for rendering services, by which the latter will take charge of advocacy, collection of useful information for the Company, presales activities, sales etc. (documents 11 and 12 of the defendant) .7. – In Document N. 13 of the defendant, which is considered reproduced, it is stated the list of the termination of employment relationship for objective reasons made by the company La Bella Easo SAU during the period between 11.7.2009 and 5.5.2010 and amounting up to 19 workers affected. 8. – On date 4.01.2010 Artiach and La Bella Easo signed a contract of collaboration, under which they agreed to collaborate together to develop their respective management activities at places of sale and, in this regard, agreed to pool their teams dedicated to this activity in a common team performing these services in relation to the customers mentioned on the aforesaid contract. (Document N. 10th of the defendant) .9. – The company La Bella Easo SA requested, by letter dated on 12.4.2009, to make a layoff at the workplace located in Zaragoza in order to terminate 115 employment contracts. After the corresponding procedures was issued a Resolution dated on 2.02.2010 authorizing the company above mentioned to terminate 14 employment contracts, to suspend 206 work contracts for a maximum period of 196 calendar days, between the period of 01.02.2010 to 12.31.2011.10. – On date 07.25.2008 was created Galletas Ártica, SLU by Panrico, S. L. U. Its sole Board member is Mr Anton and its purpose is set out in Clause 2 of its Statutes, considered hereby reproduced. The legal registered address is located at Santa Perpetua de Mogoda (Barcelona), Mollet to Sabadell Road, km. 43.2 (Document Number 6 of the defendant) .11. – The plaintiff filed complaint for conciliation on 5.5.2010, that was held without agreement on 05.13.2010 (page 22), so the lawsuit origin of this proceeding was finally filed".

The decision in the case was the following: "I dismiss the lawsuit filed by Mr. Eulalio, against GALLETAS ARTIACH SLU, PANRICO, SLU, PRODUCTOS ALIMENTICIOS LA BELLA EASO SAU, on DISMISSAL, and then I must declare that the dismissal was fair, acquitting the defendants of the claims made against them."

SECOND. – The judgment was appealed in supplication by Mr. Eulalio before the Social Chamber of the Superior Court of Justice of Andalusia, based in Sevilla, which ruled on date May 10th, 2011, the following decision "We must reject and dismiss the appeal filed by Eulalio on supplication against the judgment of the Labour Court number four of dated on July 27th, 2010, handed down in the proceedings taken place in order to solve the suit made by Mr. Eulalio against PANRICO SLU, GALLETAS ARTIACH, S.L.U. y PRODUCTOS ALIMENTICIOS LA BELLA EASO SAU on DISMISSAL and, accordingly, we confirm and uphold that decision."

THIRD. – The representation of Mr. Eulalio formalized this appeal for unification of doctrine which was received at the General Registry of this Court on July 22nd, 2011. It provides as contradictory judgment the one made by the Social Chamber of the Superior Court of Justice of Aragon on December 30th, 2010.

FOURTH. – By Order of this Court dated on November 17th, 2011 it was declared admissible the present action, and the brief filing was forwarded to the representation of the respondent to formalize its opposition within ten days.

FIFTH. – Evacuated the brief filing to the prosecutor, a report was issued by the office of the prosecutor in the sense of considering the appeal against Law, and after being informed the Hon. Magistrate Speaker, the procedures were declared conclusive, scheduling to vote and make a decision on March 7th, 2011, date in which it took place.

LEGAL ARGUMENTS

FIRST.

- 1. The issue raised in this appeal is to determine the boundaries between individual and collective dismissals and, more specifically, how it should be counted the period of ninety days provided for in art. 51-1 of the Statute of Workers in order to determine the number of dismissals that leads to the qualification of the same as collective.

2. The judgment refers the case of a worker, commercial developer, fired for objective reasons the May 5th, 2010, by letter received on preceding 16th March. On February 2nd the Company terminated 14 employment contracts, as it was authorized by the employment regulation procedure that took place. The operator plaintiff sued for wrongful dismissal, having been made in fraud of law according to him, but the claim was denied. The judgment only takes into account for theses purposes the 19 workers dismissed on May 5th, 2010, as the plaintiff was, but refuses to take into account layoffs and contractual terminations after termination thereof, that the party alleges to be twelve in the appeal. The Judge decision was based on the fact that only six terminations were proven after the date and there was no evidence on what was the cause for these terminations; in addition, according to the decision, it is only possible to take into account terminations after the dismissal based in the same cause and that the last paragraph of Article 51 ET -1 shows that law fraud and the subsequent invalidation only affect new extinctions, i.e. the dismissals made after the one that is being judged in theses procedures and only when surpass the legal limit, but not to those decision of dismissal taken initially, when the company ignored that the number of dismissals were going to be surpassed.

3. Against this statement the plaintiff stands as a judgment that opposed to it, in order to prove the existence of doctrinal contradiction that allows appealing for unification of doctrine, quoting the decision issued by the Superior Court of Justice of Aragon on December 30th, 2010, appeal of supplication 954/2010. This judgment includes a course similar to the present appeal: it is the same company and although the employee was located in another workplace, plaintiffs, commercial developers were part of the group of 19 workers whose contracts were terminated on May 5th, 2010. However, the judgment take into account the 12 terminations made at a later date in relation to management staff, to determine that it is a collective dismissal as it overcomes the limits of Article 51-1 of the ET. It should be added that the company extinguished on May 7th, 2010 the contracts of all staff management (12) workers and that it was agreed between workers and company to pay them

compensation of 30 days' salary per year of service. As a result of taking into account these dismissals is that the contrasting decision considered to have surpassed during a period of ninety days the maximum number of contractual terminations required for filing an employment regulation procedure. Such a solution, that the ninety-day period could be taken into account either back, either forward, is based on the need to prevent fraud of the law.

4. Compared decisions are contradictory in the terms required by art. LPL 217, for the viability of the appeal before us, because they have solved the same issue differently: one has taken into account the post-extinction of the plaintiffs and the other did not. The fact that the contested judgment did not have declared proven that twelve additional contractual terminations happened on May 7th, 2010, is irrelevant for the purpose of contradiction, as this fact was considered real although not incorporated into the facts as deemed irrelevant, and this cannot be an obstacle for the existence of contradiction, since the data exists and deserves to be valued, as it will be evaluated in the next legal argument. It is therefore necessary to enter to the substance of the matter and resolve the existing doctrinal contradiction.

SECOND. –

1. The appeal alleges infringement of Articles 51-1, 52-c) and 53-4 of the Statute of the Workers in relation to Articles 3-1and 6-4 Civil Code with European Directive 98/59 EEC.

The question to be resolved is how to take into account the ninety-day period provided for in Article 51-1 of the ET to delineate what it calls collective redundancy and that requires to start an employment regulation proceeding, since the aforementioned rule does not establishes how the period should be counted: whether backwards, then looking at what happened in the previous period; whether looking to the future, so starting the day in which the extinction takes place and go forward or, finally, whether it would be possible the simultaneous take into account of the past and the future, as long as it is counted only a period of ninety days and that all the contractual terminations – especially those affected by the suit- remain within that period; or whether even it must be taken a period of ninety days prior and another one after dismissal.

First of all it should be noted that the statutory provision shows that it must be taken into account all terminations in the period that are beyond the control of the worker and come motivated by reasons other than those provided for in Article 49-1, c) ET, according establishes the penultimate paragraph of Article 51-1 of the ET. The entrepreneur, according to numbers 3 & 7 of Article 217 of the LEC bears the burden of evidence in order to justify the cause of contractual extinctions produced during the reference period, in order to prove whether or not must be taken into account, and the lack of evidence of that fact does not favour him. Therefore, accepted by the judgment under appeal that twelve additional contracts were finished on May 7th, 2010, these extinctions must be counted, no matter it would not be added this fact to the list of facts of the decision as it was deemed irrelevant because it was not proven what was their cause; the data is accurate and its relevance might not escape the knowledge of this Court. Consequently, as the extinctions are a fact, although the cause is not proven, they must be taken into account as the burden of the cause pertains to the employer, who has to prove that the new dismissals were not included in the penultimate paragraph of art. 51-1 of E.T. and the Company failed to do so.

2. Resolving the question of how the period must be taken into account it should be noted at the beginning that this Court, at the time of setting the correct estimated doctrine is free, which means that it is not obliged by the decision of the compared judgments, or even for some other solution eventually suggested by the parties, so this decision can create its own doctrine. In this regard, the Chamber has pointed << overcome the requirement of contradiction, it is clear that this Court is not bound to accept one of the two doctrines formulated by the judgments compared >> (01/30/03 STS-rec. 1429 / 01 -), or what it is the same, << the Chamber must decide on the best solution for the case controversial law, which can be any of the statements or a different solution compared to the existing set of solutions made by lower Courts> > (SSTS-rec 7.14.92. 2273/91-; 09/22/93-rec. 4123/92-, and 12/21/94-rec. 1466/94-). The criteria was ratified by the Constitutional Court, noting that such

behaviour in any way supposed incongruity, as << the Supreme Court does not have the burden of having to choose one of the made two options, it can recreate a totally different own doctrine as held by the lower courts >>, STC 172/1994.

A systematic logical interpretation of Article 51-1 of the Statute of the Workers shows that, in order to define and differentiate the collective dismissal from individual dismissals, the article states in its first paragraph the general rule, while in the latter establishes a fraud standard, aimed to prevent circumvention of the rule. The general rule is connected with the number of contractual extinctions in place "in a period of ninety days," a term whose definition is the cause of this appeal. Antifraud rule is contained in the last paragraph of the provision interpreted which provides: "When in successive periods of ninety days in order to circumvent the provisions contained in this Article, the company would perform terminations of contracts under the provisions Article 52 c) of this Act in a number less than the tiers indicated, and unless there are new reasons to justify such action, these new extinctions should be treated as made in fraud of the law, and will be declared null and void. "

Given the wording of the provision, a first approximation shows that the day of dismissal will be the final day of the term (the "dies ad quem") to the contractual extinctions that will take place that day, as well as the initial day ("dies a quo ") for taking into account the next period of ninety days. This interpretation of a provision that ameliorate the limits set forth by Article 1 of Directive 98/59 of the Council of the European Communities, is based on the wording of the rule: If the dismissal is collective when it exceeds certain limits, it is clear that the "dies ad quem" for computing ninety days must be the one in which it is agreed contractual extinction, as it is the day in which you exceed the limits that determine the existence of the collective dismissal, figure that does not exist, that does not occur until the number of extinctions surpass the limits of mathematical calculation of the standard. This solution supports the fact that the future is not known and it is very difficult for the Parliament to presume guidelines and punish what someone will do or what intends to do. Therefore, fixing the "dies ad quem" on the date on which the termination is agreed, on the date on which the facts are true without any doubt, allows to qualify the dismissal as collective under the law and not according to an uncertain future, as the rule is made to generate legal certainty and not uncertainty.

Strengthen this answer the last paragraph of art. 51-1 of E.T. as states that "When in subsequent periods ninety days ... the enterprise make extinctions ...", indicates that the calculation should be done for "successive" periods of ninety days, which means that it is not a variable counting (changeable or movable) of a ninety-day period; on the contrary there should be a specific day to determine the initial and final day of each period with the particularity that the final day of a period is the "dies a quo" for taking into account the next period. If so, the solution would not be other than the already explained: the day that the termination takes place is the final day of the first period of ninety days and the start of the next period.

3. The implementation of the case doctrine set forth would require here to dismiss the appeal and confirm the judgment to be the right decision to take into account only the contractual terminations prior to May 5th, 2010, the date of cessation of the appealing worker and in which the 19 redundancies did not exceed the limits of a collective dismissal that day, according to the first paragraph of Art. The E.T. 51-1. It is true, some days afterwards the company agreed other twelve contractual terminations that if it were taken into account it would exceed the limits that determine the existence of collective dismissal, but as it was said before, for certainty reasons, there is no chance of taking into account dismissal occurred afterwards, except in cases of fraudulent decision-making. But the standard antifraud rule provided in the last paragraph of art. 51-1 of E.T. cannot base the success of an action brought by the plaintiff because under the last paragraph of the same, it is only considered fraudulent and void "new terminations", that means, the ones subsequent to the cessation of actor, corresponding to the period of ninety days started running after his contract was extinguished. This solution is logical because until there are no "new terminations" the limits which determine the existence of a collective dismissal are not surpassed, and this is why the rule invalid only punishable extinctions that were delayed in order not to exceed the tiers, provided, further, that terminations would not be justified for other reasons.

This general doctrine would not apply in cases of fraudulent act contrary to Article 6-4 of the Civil Code, as happens when the proximity between successive terminations is so light that it can be presumed that the employer knew that agreed extinctions would join in the near future others that are above the tier of collective redundancies. This has occurred in this case in which the proximity of the "new extinctions" and one of the plaintiff was so short, two days, so a narrow space of time is indicative of a course intended by the company that acted knowing what it would do two days later and agreed not to do all extinctions simultaneously in order to avoid the application of the general rule of Article 51-1 of the ET. Such a procedure should be set aside as fraudulent, pursuant to Article 6-4 of the Civil Code, since the short time between the various contractual terminations reveals that the decision to terminate multiple contracts simultaneously took their execution is delayed in the time to avoid collective dismissals procedures, and this behaviour can not prevent the application of the rule which was sought to circumvent.

The appeal should, therefore, be upheld, declare null the previous judgment and resolve the debate raised in supplication to the effect of declaring the nullity of the dismissal of the plaintiff and to declare that the defendants, jointly and severally, must reinstate him with payment of back pay wages from the date of dismissal, May 5th, 2010. No costs.

For these reasons, in the name of H. M. The King and the authority of the Spanish people.

STATEMENT

We upheld the appeal for unification of doctrine brought by Lawyer Mr. Enrique Cabral Gonzalez-Sicilia on behalf of Mr. Eulalio against the judgment delivered on May 10th, 2011 by the Chamber of the Superior Court Justice of Andalusia, based in Seville, in supplication appeal n. 3810/10, brought against the judgment dated on July 27th, 2010, issued by the Labour Court N. 4 of Seville, in the case n. 684/10, followed by Mr. Eulalio against GALLETAS ARTIACH SLU, PANRICO SLU, PRODUCTOS ALIMENTICIOS LA BELLA EASO SAU. We declare null the judgment appealed and resolve the debate raised in supplication to the effect of declaring the nullity of the dismissal of the plaintiff and to declare that the defendants, jointly and severally, must reinstate him with payment of back pay wages from the date of dismissal, May 5th, 2010. No costs.

The proceedings must be brought back to the jurisdictional body of origin, along with the certification and communication of this resolution.

So by this our decision, to be inserted in the LEGISLATIVE COLLECTION, we pronounce, sign and send.

PUBLICATION. – On the same day the date was read and published the above statement by the H. Hon. Justice Mr. Jose Manuel Lopez Garcia de la Serrana, in a Public Hearing that took place at the Social Chamber of the Supreme Court, what as Registrar thereof, I certify.

SUPREME COURT
Social Chamber
Judgment Date: 07/09/2013
Appeal No.: UNIFICATION OF DOCTRINE 2569/2012
Voting date: 07/02/2013
Original proceedings: SOCIAL LABOUR COURT.MADRID
Speaker H. Hon. Justice Antonio Martín Valverde
Appeal No.: 2569/2012
Speaker Hon. Mr. D.: Antonio Martín Valverde
Voting: 02/07/2013

Summary: “Contract work” or “contract for services”: legal status corresponding to a particular services relationship between an insurance company in the industry of traffic accident and an expert appraiser that performs reports on damage to car wrecks.- Definition and signs (generic and specific for certain

professions) of the notes of subordination and alienation that are characteristics of the “contract work”.- In the case the expert appraiser was a not subordinated “external collaborator”.

JUDGMENT

In the city of Madrid, on July 9th, two thousand and thirteen. Watched these proceedings pending before this Court under appeal for UNIFICATION OF DOCTRINE, brought by PELAYO MUTUA DE SEGUROS Y REASEGUROS A PRIMA FIJA, represented and defended by Lawyer Mr. Carlos Molero Manglano, against the judgment delivered by the Social Chamber of the Superior Court of Justice of Madrid, dated on June 6th, 2012 (proceedings n. 1606⁄2010) on DISMISSAL. Respondent is Mr. PEDRO ANTONIO ÁVILA SANCHEZ, represented and defended by Lawyer Mr. Rafael Tornero Moreno.

It is acting as Magistrate Speaker His Honour Justice Mr. ANTONIO MARTIN VALVERDE,

FACTUAL BACKGROUND

FIRST. – The Labour Chamber of the Superior Court of Justice of Madrid issued a decision, in supplication appeal filed against the judgment delivered on February 17, 2011, by the Labour Court No 36 of Madrid, between the litigants mentioned above in the heading, on dismissal.

The proven facts of the judgment at first instance were the following: <<FIRST. – It is exercised in these proceedings action on unfair dismissal and it declares as proven the following facts: 1. – That the actor is an independent contractor since 11⁄1⁄1991 (document 8 of the plaintiff). 2. – The Actor PEDRO ANTONIO AVILA SANCHEZ, is the sole Board Member of the company AVILA PERITACIONES SL, with CIF B81078057, which began operations on January 13th, 1995 (Document 9 of the defendant); on January 11th, 2000 it is made a document certified by notary public granting re-election of Board Members and adapting Statutes, in which the agreements of the general meeting of the corporation are declared public, as well as the plaintiff is re-elected indefinitely as Board Member, and adapt the statutes (document brought by the plaintiff). 3. – That in the Annual Statement of Operations with Third Parties Form 347 for years 2004, 2005, 2006 , 2007, 2008 and 2009, of the Company PELAYO MUTUA DE SEGUROS Y REASEGUROS A PRIMA FIJA (document n. 2 of the defendant providing evidence documentation), are included the following amounts for AVILA PERITACIONES SL:

- year 2004: 57,541.40 euros
- year 2005: 71,989.37 euros
- year 2006: 3,847. 94 euros
- year 2008: 43,311.40 euros
- year 2009: 70,893,25 euros

SECOND. – On 11.17.2010 an inspection is performed to the Surveyors Management Centre, and as a consequence of it a Verification Technical Report is made (document 12 of the defendant), which declares, in short, the poor performance and practice of expert contributor Peritaciones Avila. THIRD. – Actor Mr. PEDRO ANTONIO ÁVILA SANCHEZ, through the company AVILA PERITACIONES SL billed to the company MAPFRE FAMILIAR the amount of 171,652.35 euros from 7.1.2008 to 12.2.2008, and the amount of 129,068.78 euros, from 1.8.2009 to 9.21.2010 (document submitted to court by MAPFRE FAMILIAR dated on 2.10.2011). FOURTH. – Mandatory conciliations were held, with the result of sought and void >>.

The judgment of the first instance Judge reads as follows: "Statement: “It is completely dismissed the application filed by Mr. PEDRO ANTONIO ÁVILA SANCHEZ, against PELAYO MUTUA DE SEGUROS Y REASEGUROS A PRIMA FIJA, so I absolve PELAYO MUTUA DE SEGUROS Y REASEGUROS A PRIMA FIJA of all claims contained in the suit. "

SECOND. – The proven facts of the first instance judgment has been kept entirely in the judgment of the Labour Chamber of the Superior Court of Justice of Madrid, that was appealed for unification of doctrine, being part of the statement the following: "STATEMENT: We upheld the supplication appeal filed by the legal representation of the plaintiff against the judgment dated on February 17th, 2011

given by the Labour Judge No 36 of Madrid, in the proceedings n º 1606/2010 , followed at the request of PEDRO ANTONIO ÁVILA SANCHEZ against PELAYO MUTUA DE SEGUROS Y REASEGUROS A PRIMA FIJA claiming for DISMISSAL, we declare null the first instance decision and declare that the social jurisdiction must hear the dispute between the parties. "

That ruling was clarified by Order dated on July 4th, 2012, part of which is worded as follows: "THE CHAMBER STATED: That we clarify the judgment of this Court made on 6/06/2012, in the appeal N. 5166/2012 , whose decision is now worded as follows: " We upheld the supplication appeal filed by the legal representation of the plaintiff against the judgment dated on February 17th, 2011 given by the Labour Judge No 36 of Madrid, in the proceedings n º 1606/2010, followed at the request of PEDRO ANTONIO ÁVILA SANCHEZ against PELAYO MUTUA DE SEGUROS Y REASEGUROS A PRIMA FIJA claiming for DISMISSAL, we declare that the social jurisdiction must hear the dispute between the parties, and we declare null the judgment at first instance, with replacement of the proceedings to the time prior to delivery of the first instance decision in order to resolve with freedom of judgment, the merits of the dispute between the parties. "

THIRD. – The appellant considered the judgment of the Superior Court of Justice of Catalonia, dated on December 20th, 2010 contradictory to the appealed decision. The mandatory part of that judgment is worded as follows: "STATEMENT: We uphold the supplication Appeal filed by the company AXA SEGUROS GENERALES, S. A. DE SEGUROS Y REASEGUROS (AXA Winterthur), while we dismiss the appeal for Supplication formulated by plaintiff Andrés Villa Moraga, both against the judgment, dated on December 2nd, 2009, issued by the Labour Judge No. 24 of Barcelona in proceedings N. 608/09, followed upon suit made by the plaintiff against the enterprise for declaring to be dismissed in an employment relationship and, therefore, reverse the judgment at first instance estimating the plea that the social courts could not hear on the matter, and then, dismissing the action brought by Andrés Villa Moraga, against AXA SEGUROS GENERAL, S. A. DE SEGUROS Y REASEGUROS (AXA Winterthur) that we absolve to the claims made against him, without prejudice to the right of the plaintiff to exercise a different legal action that may be entitled to against the enterprise in the civil jurisdiction "

FOURTH. – The statement of this action is dated on September 20th, 2012. It is alleged as grounds for appeal under Art. 223 of the Act Regulating Social Jurisdiction, that the judgment outlined above and the one appealed here are contradictory. The appellant also alleges violation of art. 1.1 Of the Statute of Workers in relation to art. 38 of the Spanish Constitution and art. 1255 of the Civil Code. Finally alleges that a breach in unifying the interpretation of law and to the case-law formation happened.

The applicant has provided the required certification of the judgment of the Superior Court of Justice, which considers contradictory for the purpose of this action.

FIFTH. – By order dated on January 15th, 2013, it was agreed to hear the appeal. Being party the respondent, it was made the corresponding transfer to him, who replied in a letter dated on February 13th, 2013.

SIXTH. – Transferred the case to the Public Prosecutor to report, it ruled in the sense of considering that the appellation should be upheld. On July 2nd, 2013, previously established for that purpose, the vote and the decision of this case took place.

LEGAL ARGUMENTS

FIRST. – The issue in the present appeal for unification of doctrine is to determine the legal status corresponding to a particular services relationship between an insurance company in the industry of traffic accident and an expert appraiser that performs on behalf of the insurance company technical reports on damage to car wrecks. On this issue there are several previous legal decisions from the Social Chamber of the Supreme Court; the latter, STS November 26, 2012 (RCUD 536/2012), in which defendant was the company itself that claims here on appeal unifying.

Normally, as it has been pinpointed by our ruling of October 8th, 1992 (RCUD 2754/1991), there are to different ways of solving these kind of litigation; either stating that it is a civil service lease either an

employment contract. As stated by the decision above mentioned, "the work of assessing the damage insurance adjusters can be both working arrangements (contract work) and independent exercise of the profession (contract for services) or, from the perspective of insurance companies, expert appraisal of damages can be done with its own personal resources or by external collaborators or loss adjusting companies, corresponding the choice between the two chances to companies and loss adjusters according to both the free enterprise and professional freedom principles, respectively ". From the resulting outcome depends logically knowledge of litigation by civil jurisdiction when the relationship was deemed a lease of the kind as referred to in Article 1544 of the Civil Code (CC), and governed by Articles 1583 to 1587 CC or jurisdiction over social services if the relationship meets the special characteristics of the employment contract referred to in Article 1.1 of the Statute of Workers (ET).

In particular, in regard to professional vehicle accidents claims adjustment, often the decisive note, again according to decision of 8.10.1992 and subsequent Supreme Court decisions, should be subordination or insertion of the provision of services in the control and disciplinary circle of the company. But it can also be, at times, an example of alienation, when the insurance adjuster acts for itself in the market for this profession, trying to acquire a special profit through his own labour organization.

However, as also pointed out many times by social case law, i.e. Supreme Court decision of December 26th, 2004 (RCUD 5319/2003) and several others that followed (the aforementioned latter Supreme Court decision of 11-26-2012), the appreciation of the notes of subordination and alienation is not always easy, since those are legal concepts of a certain level of abstraction, whose realization often requires finding and assessment of different signs, sometimes generic for different work activities and other accurate for specific professions.

The first of these tasks-finding signs will devote the next argument. We will see then examined together once the facts of the case, if there is a contradiction between the judgment and the one provided for comparison, which is essential in this special form of appeal for unification of doctrine. The last step of the argumentation will be, once proven to be going into the merits, the decision of the substantive issue.

SECOND. – List of the facts proven for instance resolution is brief. But the Labour Judge, in a systematic behaviour that could negatively affect the judgment but not invalid it, has completed the facts through numerous factual assertions contained in the section on legal grounds. The judicial version of events has to have, in addition, the data provided in the statement of supplication of the Social Chamber of the Superior Court of Justice, which has examined the entire evidence in order to determine its own subject matter jurisdiction. From all these facts some are relevant to the assessment of whether or not the subordination feature of the employment contract exists, and others may serve, however, to assess whether the actor is actually a self-employed or employed. But for now we are going to limit the provision of factual data, leaving the legal assessments for the later time when determining the kind of relationship in which the parties are engaged.

The proven facts of the judgment highlights: a) that the plaintiff does not seem to be set for a pay check, but refers to "bill" for services rendered to the defendant (proven fact 1), b) that their services expert opinion are offered and lend to other insurance companies (proven fact 3rd), c) that bills for services referred by the plaintiff to the defendant rather than in his status as workers in his capacity as "board member" of a corporation ("Peritaciones Avila SL) (proven fact 1), d) the amounts charged to the defendant have varied considerably from one year to the other (no turnover in 2007, the turnover of 2006 is less than four thousand euros, and 2005 and 2009 exceed seventy thousand euros) (1 proven fact) e) the amounts charged by Peritaciones Avila SL to other insurance companies are high (more than one hundred seventy thousand euros in the second half of 2008 and almost one hundred thirty thousand euros in 2009 to Mapfre Familiar) (proven fact 3rd), f) that the actor's work has been monitored a posteriori by the defendant insurance company, as a result of which list of services were terminated in October 2010, for "poor performance and expert praxis" (proven fact 2nd).

From the data with factual value on the part of "legal arguments" for the first instance judgment are relevant: g) Peritaciones Avila S. L. work is made "in exchange for a payment of all services", h) the actor "would have served other businesses and professionals", which "billed as suppliers", i) "material means" work (camera, own vehicle, computer, etc..) belong to Peritaciones Avila, j) Mutua Pelayo, the defendant company, employs staff considered "experts under labour regime", who are "supplied with all the materials" and that, unlike the actor, "have a physical location in the company" k) "the actor may reject any expert opinion, unlike experts formally engaged by an employment contract" l) "the plaintiff has not established that the company would have granted to him any vacation, however, vacations "were requested by experts formally engaged in an employment contract", ll) casualty reports are sent by the actor in the “company’s own model” to "adapt the expert opinions “to the company’s computer system”.

The appealing judgment, by also considering the evidence available in the case, has accepted the statement of facts that was contained in the first instance judgment, but adding to the above additional data to consider: m) the insurance company established since 2002 a program for quality control of external experts collaborators, n) the company itself gave instructions on submission of "fee notes", on the "modus operandi" for certain appraisals, and release of report "the same day that the message is received", o) the respondent company sent to experts collaborators, including actor, "average cost reports" and "evolution" of the results of his work, p) "from August 2007 "is payable "to each appraisal” a fixed closed price for pictures taken."

THIRD. – As already noted in the background, the contested decision adopted at the Social Chamber of the Superior Court of Justice of Madrid has been upheld supplication of the plaintiff and declared that the labour jurisdiction must hear the dispute. In order for clarification has been added to the previous decision the "replacement of the proceedings so far issued before", returning the case to the Labour Judge for a ruling in which it has to solve "with freedom of judgment the merits" of matter.

The judgment provided for comparison, issued by the Social Chamber of the Superior Court of Justice of Catalonia on December 20th, 2010, decided in the opposite direction of the contested litigation a substantially identical case. This is also a balance judgment of an expert insurance appraisal who provides services as an outsource partner to an insurance company, which also has "internal staff appraisers". And the same or similar circumstances in the performance of work are present, namely: non-exclusivity of services, telematics remission appraisals, monitoring of certain modus operandi instructions without "direct control" of the activity, scale of fees for act, call for briefings, tools and material of expert property, communication of vacations but not setting an application or deciding the dates by the company, and lack of schedule or work time (unlike hired experts under a formal employment relationship). It is noted, moreover, that since 2005 the actor in the contrasting decision created his own work organization: the "GVP cabinet," which he is "leading", and that, as in the case now on trial, the insurance company "commission expert reports" (5th proven fact of the judgment of contrast).

There is contradiction between the compared statements, therefore the merits of the substantive issue must be considered.

FOURTH. – The outcome of this case under the law is the same as we have in our above mentioned judgment of November 26th, 2012, where the decision provided for comparison was the same as that was invoked in this case, and where the defendant has been also Mutua Pelayo de Seguros y Reaseguros S. A. We therefore estimate the unifying appeal brought by the company, which is also the solution proposed by the prosecution in its mandatory opinion.

The existing data and the evidence examined in the previous argument credited that we are in the reality under the facts of an external collaborator of the insurance company, not subordinate or subject to the powers of direction and discipline of the employer; the external collaborator provided professional services in an independent status and by running their own organization. Furthermore, there is enough evidence in the case to conclude the absence of subordination, that by itself would be sufficient to conclude that we are in presence of a contract for services and not under an employment

contract; it must be added too the own lack of alienation note, item also characteristic, although not exclusively, of work relations under employment regime.

There are generic data that point to the fact that the services were performed as independent work; as it happens regarding the place of rendering services (outside the workplace of the insurance company), time (lack of schedule, no request vacations) and mode (lex artis) of the way to perform services. The main data or specific indicators of self-employment are in case the performance of work by their own organization, clearly separated from the "management experts" of the company to respect the proven fact 2 of the judgment at first instance held in supplication. This actor's own work organization was commissioned by the company, having the will of accepting or rejecting the commission, and in any case lacking a commitment to providing professional services in a personnel way of performance.

It must be added the lack of submission to control or even to the management of the job execution by the insurance company. In this sense, the evidence that led to the judgment to declare a labour regime is inconclusive. The use of models or instructions on the reports done directly relates to reports that are the object of the contract, and only in an indirect way to the mode of carrying out the work. The same conclusion is valid for procedures and quality controls, which are obviously not exclusive of an employment contract, and the setting of a very short time ("in the day") for the execution of the expert reports of damage, which seems a demand logic in a sector of activity that does not allow delays in damage assessment and implementation of appropriate repairs on damaged vehicles.

The very abundant circumstantial evidence provided in this litigation leads us also to say that note of alienation at work is not fulfilled in the case. In view of these data, additionally to and independent contractor, the plaintiff was for years a self-employed worker. Indeed, annual fluctuations in orders from various insurance companies reveal an active presence in the market for vehicle damage appraisals, and the considerable complexity of the own work organization's actor, who employed other insurance professionals as well as the high level of work completed, highlight the absence of alienation in net assets and assuming the risks of the work done, and reflects the search for special remuneration or profit in the exercise of his profession that is typical for the self-employee work.

FIFTH. – The unification judgment should settle the debate of supplication according to unified doctrine. This implies in the case, taking into account that the instance Judge Statement dismissed the lawsuit for not appreciating the existence of an employment contract, confirmation of that judgment, with dismissal of the supplication of the actor and once declared that the labour jurisdiction must no hear the case, state the acquittal in the instance of the defendant.

For these reasons, in the name of S. M. The King and the authority of the Spanish people.

STATEMENT

We estimate the appeal for unification of doctrine brought by PELAYO MUTUA DE SEGUROS Y REASEGUROS A PRIMA FIJA, against the judgment of the Superior Court of Justice of Madrid, dated on June 6th, 2012, in the appealing brought against the judgment delivered on February 17th, 2011 by the Labour Judge No 36 of Madrid, in proceedings followed at the request of DON PEDRO ANTONIO AVILA SANCHEZ, against the appellant on DISMISSAL. We declare null the judgment. Resolving the debate of supplication, we dismiss the appeal of this kind brought by the plaintiff, we uphold the first instance judgment against the applicant, and once declared that the Labour jurisdiction must not hear the case, acquit in the instance the defendant. Be returned to the appellant the fee to appeal. No costs.

The proceedings must be brought back to the jurisdictional body of origin, along with the certification and communication of this resolution.

So by this our decision, to be inserted in the LEGISLATIVE COLLECTION, we pronounce, sign and send.

PUBLICATION. – On the same day the date was read and published the above statement by the H. Hon. Justice Mr. Antonio Martín Valverde, in a Public Hearing that took place at the Social Chamber of the

Supreme Court, what as Registrar thereof, I certify.

Sweden

National reporter: Carina Gunnarsson, Cathrine Lilja Hansson, Swedish Labour Court

Summary of the Swedish case

The dispute

The case concerns mainly if a provision in a collective agreement conflicts with the European Convention on Protection of Human Rights and Fundamental Freedoms (ECHR) and if the ECHR is applicable in a dispute between private parties.

Plaintiff in the case is the Swedish Electricians Union (the Union), and the Respondents are Organisation of Electrical Installers, EIO, and some companies that are members of the EIO (the Employers). The parties are bound by a Collective Agreement according to which work shall, as far as possible, be allocated as piecework. Between the parties also exists a Collective Agreement on the collection of trade union fees and monitoring fees (Collection Agreement). This Agreement requires the employer to make a deduction from the wages of every fitter employed whether the fitter is a member of the union or a non-union member. These so called monitoring fees are paid to the Union and are intended to cover the Union´s costs for monitoring piecework.

The companies have failed to pay in the monitoring fees concerning a number of non-union members. The Union claimed that the companies were guilty of infringing the terms of the Collective Agreement and therefore asked the Labour Court to order the companies to pay punitive damages according to Swedish Co-Determination Act. The Employers objected that that the deduction of monitoring fees deprives the non-union member they employ of their property and therefore contravenes the ECHR, which has been adopted as statute in Sweden, as the measure is not proportional to the aim of the monitoring or the work involved. The Employer also contended that the monitoring fees mean that each and every one of the non-union member is subjected to unlawful pressure to join the Union, which contravenes their negative freedom of association. The Employers referred to the judgement handed down by the European Court of Human Rights on 13 February 2007 in case 75252/01, the Evaldsson judgement.

The Labour Court‘s assessment concerning the question if the monitoring fees are in breach of the ECHR

The Labour Court found that a deduction for monitoring fees according to the Collection Agreement constituted a deprivation of possessions in the sense intended in Article 1 in the first supplementary protocol to the ECHR. In addition the court found that the monitoring fees are not in reasonable proportion to the measure. The grounds for that latter conclusion were the following. The court concluded from the (extensive written and oral) evidence that there had not been any clear demarcation between the piecework monitoring and the general union activities, that the monitoring fees had to some extent contributed to general union activities and that it had not been possible for the non-union members to gain insight into what the money had been used for. If the Employers had made deductions for monitoring fees from employees who were not members of the Union, this would have therefore been in conflict with the protection of possessions provided by the ECHR. Given this standpoint the court found no need for determining whether the procedure could also have been considered in breach of Article 11 of the ECHR.

The Labour Court‘s assessment concerning the question of damages

The Union claimed that the courts standpoint above did not prevent the Employers from being liable for damages for non-compliance with the Collective Agreement. In the opinion of the Union the ECHR could not be applied directly in a dispute between private parties. The Employers maintained that the

ECHR had "drittwirkung" and at least could be invoked as protection against demands that were in conflict with it.

The Labour Court stated, with reference to case law from the Swedish Supreme Court, that a civil party could not base a claim for damages against another civil party directly on the ECHR. The case before the Labour Court, however, concerned rather whether the Employers were obliged to comply with the undertaking in the Collective Agreement on deductions for monitoring fees when this would have meant an infringement of the rights of the employees concerned laid down in the ECHR.

The Labour Court noticed that the ECHR has been adopted as statute in Sweden. According to the Labour Court, the interest of preventing infringement of the ECHR, strongly supported that the Employers should not have to pay damages to the Union for not complying with provisions in the Collective Agreement that would have involved violation of the rights laid down in the ECHR for some employees. The Union´s claim was therefore dismissed.

See Annex 2.

Annex 1. Belgium

See next page

Grondwettelijk Hof - Cour constitutionnelle

vrijdag 2 augustus 2013
11:16

Judgment number: 125/2011	***Judgment date: 07-07-2011***
Summary: The Constitutional Court was once again invited to examine a preliminary question on various provisions of the Law on employment contracts establishing differential treatment for workers and employees based on the length of notice. Since 1993, it ruled that differentiating between workers and employees based on whether their work was categorised mainly as manual or intellectual was a criterion difficult to justify objectively and reasonably [BEL-1993-2-026]. The Court considers that this is still the case today, indeed even more so. In 1993, it agreed that the legislature was gradually eliminating this inequality. The process had already been initiated and would continue in successive stages. Now the Court considers whether the time available to the legislature to remedy a situation, deemed unconstitutional, is limited. The legislature aimed to gradually harmonise worker and employee status, rather than suddenly abolishing the distinction between these occupational categories especially because standards may change under the collective bargaining process. This approach may no longer be justified. Eighteen years after the Court found that the relevant criterion for distinction could no longer be deemed relevant, retaining certain differences in treatment, such as those adduced before the Court, for much longer would only perpetuate a blatantly unconstitutional situation. The Court goes on to compare the authority of a preliminary judgment, finding the authority of a rescissory judgment unconstitutional. The latter removes the unconstitutional provision from the legal system ab initio, something which a preliminary judgment does not do under the terms of Article 28 of the Special Law of 6 January 1989 on the Constitu-tional Court. Yet the Court notes that a preliminary judgment has an effect that transcends the proceedings pending before the judge who posed the preliminary question. It therefore considers that it must analyse the extent to which the impact of its decision must be moderated to avoid hampering the gradual harmonisation of the statuses of workers and employees, as authorised under its previous judgments. The Court then points out that when a preliminary question has been posed, the Special Law of 6 January 1989 does not empower it through a general provision to determine which of the effects of the unconstitutional provision must be considered as definitive or provisionally retained for a period it determines, as it can do when ruling on an application for a judicial review. Nevertheless, the Court opines that in light of principles of legal uncertainty and legitimate confidences, it may be justified in certain, limited cases that the retroactive effect can derive from such a finding. To this end, the Court draws on the Marckx judgment of 13 June 1979 of the European Court of Human Rights, which itself refers to the Defrenne judgment of 8 April 1976 of the Court of Justice of the European Union. The Court does, however, explain that retaining the effects must be considered an exception to the declaratory nature of the judgment given in preli-minary proceedings. Before deciding to retain the effects of such a judgment, it must ascertain that the advantage stemming from the effect of the unqualified finding of unconstitutionality is disproportionate to the disruption it would cause to the legal system. In the instant case, the Court considers that an unqualified finding of unconstitutionality would, in many pending and future cases, lead to considerable legal uncertainty, and might cause serious financial difficulties for a large number of employers. It could also hamper the harmonisation efforts that the Court has urged the legislature to conduct. The Court therefore decided to maintain the effect of the provisions at issue until 8 July 2013 at the latest.	

ÜBERSETZUNG

Geschäftsverzeichnisnr. 5008
Urteil Nr. 125/2011 vom 7. Juli 2011

U R T E I L S A U S Z U G

In Sachen: Präjudizielle Fragen in Bezug auf die Artikel 52 § 1, 59, 70 und 82 des Gesetzes vom 3. Juli 1978 über die Arbeitsverträge, gestellt vom Arbeitsgericht Brüssel.

Der Verfassungsgerichtshof,

zusammengesetzt aus dem Richter und stellvertretenden Vorsitzenden J.-P. Snappe, dem Vorsitzenden M. Bossuyt, und den Richtern E. De Groot, L. Lavrysen, J.-P. Moerman, E. Derycke, J. Spreutels, T. Merckx-Van Goey, P. Nihoul und F. Daoût, unter Assistenz des Kanzlers P.-Y. Dutilleux, unter dem Vorsitz des Richters J.-P. Snappe,

verkündet nach Beratung folgendes Urteil:

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* *

I. *Gegenstand der präjudiziellen Fragen und Verfahren*

In seinem Urteil vom 22. April 2010 in Sachen Georges Deryckere gegen die « Bellerose » AG, dessen Ausfertigung am 16. Juli 2010 in der Kanzlei des Hofes eingegangen ist, hat das Arbeitsgericht Brüssel folgende präjudizielle Fragen gestellt:

1. « Verstoßen die Artikel 59 und 82 des Gesetzes vom 3. Juli 1978 über die Arbeitsverträge gegen die Artikel 10 und 11 der Verfassung, indem sie bei gleichem Dienstalter eine unterschiedliche Kündigungsfrist festlegen, je nachdem, ob einem Arbeiter oder einem Angestellten gekündigt wird? »;

2. « Verstoßen die Artikel 52 § 1 und 70 des Gesetzes vom 3. Juli 1978 über die Arbeitsverträge gegen die Artikel 10 und 11 der Verfassung, indem im Gegensatz zu einem Angestellten mit einem unbefristeten Arbeitsvertrag, dessen Probezeit beendet ist, für einen Arbeiter, der sich in der gleichen vertraglichen Situation befindet, im Falle einer Arbeitsunfähigkeit infolge einer Krankheit, die keine Berufskrankheit ist, oder infolge eines Unfalls, der weder ein Arbeitsunfall noch ein Wegeunfall ist, ein Karenztag gilt, wenn die Arbeitsunfähigkeit keine vierzehn Tage dauert? ».

(…)

III. *In rechtlicher Beziehung*

(...)

B.1.1. Die erste präjudizielle Frage bezieht sich auf die Vereinbarkeit der Artikel 59 und 82 des Gesetzes vom 3. Juli 1978 über die Arbeitsverträge mit den Artikeln 10 und 11 der Verfassung, insofern sie unterschiedliche Kündigungsfristen für Arbeiter und Angestellte mit dem gleichen Dienstalter festlegen. Die zweite präjudizielle Frage bezieht sich auf die Vereinbarkeit der Artikel 52 § 1 und 70 desselben Gesetzes mit den Artikeln 10 und 11 der Verfassung, insofern für einen Arbeiter, der sich in der gleichen vertraglichen Situation wie ein Angestellter befindet, im Gegensatz zu diesem, im Falle einer Arbeitsunfähigkeit infolge einer Krankheit, die keine Berufskrankheit ist, oder infolge eines Unfalls, der weder ein Arbeitsunfall noch ein Wegeunfall ist, ein Karenztag gilt, wenn die Arbeitsunfähigkeit keine vierzehn Tage dauert.

B.1.2. Artikel 59 des vorerwähnten Gesetzes vom 3. Juli 1978 bestimmt:

« Die in Artikel 37 erwähnte Kündigungsfrist beginnt am Montag nach der Woche, in der die Kündigung notifiziert wurde.

Die Kündigungsfrist ist auf achtundzwanzig Tage festgesetzt, wenn die Kündigung vom Arbeitgeber ausgesprochen wird, und auf vierzehn Tage, wenn sie vom Arbeiter ausgeht.

Diese Fristen verdoppeln sich, wenn es sich um Arbeiter handelt, die mindestens zwanzig Jahre lang ununterbrochen im Dienst desselben Unternehmens gestanden haben.

Diese Fristen müssen auf der Grundlage des Dienstalters zum Zeitpunkt, zu dem die Kündigungsfrist beginnt, berechnet werden.

Wird die Kündigung von einem Arbeitgeber ausgesprochen, auf den das Gesetz vom 5. Dezember 1968 über die kollektiven Arbeitsabkommen und die paritätischen Kommissionen keine Anwendung findet, wird die Kündigungsfrist in Abweichung von den Absätzen 2 und 3 wie folgt festgelegt:

1. fünfunddreißig Tage für die Arbeiter mit einem Dienstalter im Unternehmen von sechs Monaten bis unter fünf Jahren,

2. zweiundvierzig Tage für die Arbeiter mit einem Dienstalter im Unternehmen von fünf Jahren bis unter zehn Jahren,

3. sechsundfünfzig Tage für die Arbeiter mit einem Dienstalter im Unternehmen von zehn Jahren bis unter fünfzehn Jahren,

4. vierundachtzig Tage für die Arbeiter mit einem Dienstalter im Unternehmen von fünfzehn Jahren bis unter zwanzig Jahren,

5. hundertzwölf Tage für die Arbeiter mit einem Dienstalter im Unternehmen von zwanzig Jahren oder mehr ».

Artikel 82 desselben Gesetzes bestimmt:

« § 1. Die in Artikel 37 festgelegte Kündigungsfrist beginnt am ersten Tag des Monats nach dem Monat, in dem die Kündigung notifiziert worden ist.

§ 2. Wenn die jährliche Entlohnung 16.100 EUR nicht übersteigt, beträgt die vom Arbeitgeber einzuhaltende Kündigungsfrist für Angestellte, die seit weniger als fünf Jahren angestellt sind, mindestens drei Monate.

Mit Beginn jedes weiteren Zeitraums von fünf Dienstjahren beim selben Arbeitgeber verlängert sich diese Frist um drei Monate.

Wird die Kündigung vom Angestellten ausgesprochen, werden die in den Absätzen 1 und 2 vorgesehenen Kündigungsfristen um die Hälfte verkürzt, ohne dabei drei Monate überschreiten zu dürfen.

§ 3. Wenn die jährliche Entlohnung 16.100 EUR übersteigt, werden die vom Arbeitgeber und vom Angestellten einzuhaltenden Kündigungsfristen entweder durch eine frühestens zum Zeitpunkt der Kündigung zu treffende Vereinbarung oder vom Richter festgelegt.

Wird die Kündigung vom Arbeitgeber ausgesprochen, darf die Kündigungsfrist nicht kürzer sein als die in § 2 Absatz 1 und 2 festgelegten Fristen.

Wird die Kündigung vom Angestellten ausgesprochen, darf die Kündigungsfrist, wenn die jährliche Entlohnung mehr als 16.100 EUR beträgt, ohne jedoch 32.200 EUR zu übersteigen, nicht länger als viereinhalb Monate und, wenn die jährliche Entlohnung 32.200 EUR übersteigt, nicht länger als sechs Monate sein.

§ 4. Die Kündigungsfristen müssen entsprechend dem zu Beginn der Kündigungsfrist erworbenen Dienstalter berechnet werden.

§ 5. Wenn die jährliche Entlohnung bei Dienstantritt 32.200 EUR übersteigt, dürfen die vom Arbeitgeber einzuhaltenden Kündigungsfristen in Abweichung von § 3 auch durch eine spätestens zu diesem Zeitpunkt zu treffende Vereinbarung festgelegt werden.

Die Kündigungsfristen dürfen auf jeden Fall nicht kürzer als die in § 2 Absatz 1 und 2 festgelegten Fristen sein.

Bei Nichtvorhandensein einer Vereinbarung bleiben die Bestimmungen von § 3 anwendbar.

Die Bestimmungen des vorliegenden Paragraphen sind nur anwendbar, sofern der Dienstantritt nach dem ersten Tag des Monats nach dem Monat der Veröffentlichung des Gesetzes vom 30. März 1994 zur Festlegung sozialer Bestimmungen im *Belgischen Staatsblatt* stattfindet ».

Artikel 52 § 1 desselben Gesetzes bestimmt:

« Bei Arbeitsunfähigkeit infolge einer Krankheit, die keine Berufskrankheit ist, oder infolge eines Unfalls, der weder ein Arbeitsunfall noch ein Wegeunfall ist, hat der Arbeiter zu Lasten seines Arbeitgebers Anrecht auf seine normale Entlohnung während eines Zeitraums von sieben Tagen und während der sieben darauf folgenden Tage auf sechzig Prozent des Teils dieser Entlohnung, der den Höchstbetrag nicht übersteigt, der für die Berechnung der Leistungen der Kranken- und Invalidenversicherung berücksichtigt wird.

Wenn die Arbeitsunfähigkeit keine vierzehn Tage dauert, ist der erste Werktag des Arbeitsunfähigkeitszeitraums ein Karenztag; der Zeitraum garantierten Lohns beginnt am darauf folgenden Tag. Wenn der Arbeitgeber in Anwendung von Artikel 27 jedoch dazu verpflichtet ist, für den Tag, an dem die Arbeitsunfähigkeit begonnen hat, die Entlohnung zu zahlen, ist der Karenztag der nächstfolgende Werktag, während der in Anwendung von Artikel 27 bezahlte Tag als erster Tag des Zeitraums garantierten Lohns betrachtet wird.

Im Falle einer Teilzeitarbeit ist der Karenztag der erste Arbeitsunfähigkeitstag, an dem der Arbeitnehmer normalerweise gearbeitet hätte.

Für die Festlegung des Karenztages gilt der gewöhnliche Inaktivitätstag, der sich aus der wöchentlichen Verteilung der Arbeit auf fünf Tage ergibt, nicht als Werktag.

Der Anspruch auf Entlohnung hat zur Bedingung, dass der Arbeiter mindestens einen Monat lang ununterbrochen im Dienst desselben Unternehmens gestanden hat.

Erreicht der Arbeiter dieses Dienstalter während des Zeitraums garantierten Lohns, kann er die in Absatz 1 erwähnte Entlohnung für die verbleibenden Tage beanspruchen ».

Artikel 70 desselben Gesetzes bestimmt:

« Der Angestellte, der unbefristet, befristet für eine Dauer von mindestens drei Monaten oder für eine genau bestimmte Arbeit, deren Ausführung normalerweise eine Beschäftigung von mindestens drei Monaten erfordert, eingestellt worden ist, behält das Anrecht auf seine Entlohnung während der ersten dreißig Tage einer Arbeitsunfähigkeit infolge Krankheit oder Unfall ».

B.2. Aus der Begründung des Urteils geht hervor, dass der Hof in den beiden Fragen gebeten wird, sich zu der in verschiedenen Punkten unterschiedlichen Behandlung der Arbeiter und der Angestellten ihren jeweiligen Arbeitgebern gegenüber zu äußern.

B.3.1. Wie der Hof bereits in seinem Urteil Nr. 56/93 vom 8. Juli 1993 angemerkt hat, hat der Gesetzgeber dadurch, dass er den Unterschied zwischen Arbeitern und Angestellten auf die hauptsächlich manuelle bzw. intellektuelle Art ihrer Arbeit gegründet hat, Behandlungsunterschieden ein Kriterium zugrunde gelegt, das für diesen Unterschied, würde er zu diesem Zeitpunkt eingeführt, kaum eine angemessene Rechtfertigung bieten könnte (B.6.2.1).

Dies gilt *a fortiori* heute, insbesondere für die Behandlungsunterschiede, die im vorliegenden Fall hinsichtlich der Kündigungsdauer oder des Karenztags beanstandet werden. Diese Behandlungsunterschiede stehen folglich im Widerspruch zu den Artikeln 10 und 11 der Verfassung.

B.3.2. In dem oben zitierten Urteil hat der Hof ebenfalls festgestellt, dass der Gesetzgeber Maßnahmen ergriffen hat, um das Maß des Kündigungsschutzes für Arbeiter und Angestellte anzunähern (B.6.2.2) und geschlussfolgert, dass « die seit Jahrzehnten in Gang gekommene

Verblassung des beanstandeten Unterschieds nur allmählich erfolgen » kann. Der Umstand, dass es ungerechtfertigt wäre, zu diesem Zeitpunkt einen solchen Unterschied einzuführen, wurde als unzureichend angesehen, um seine plötzliche Abschaffung zu rechtfertigen (B.6.3.1), und daher wurde die Aufrechterhaltung des Unterschieds als « einem Ziel, das erst stufenweise erreicht werden kann » nicht offensichtlich unangemessen angesehen (B.6.3.2).

B.3.3. Seit dem Zeitpunkt, als der Hof das vorerwähnte Urteil gefällt hat, sind neue Maßnahmen ergriffen worden, um die beiden Kategorien von Arbeitnehmern stärker anzunähern. So sind auf der Grundlage von Artikel 61 § 1 des Gesetzes vom 3. Juli 1978 in mehreren sektoriellen königlichen Erlassen günstigere Kündigungsfristen vorgesehen als diejenigen, die das vorerwähnte Gesetz im Kündigungsfall vorsieht. Außerdem wurde mit dem kollektiven Arbeitsabkommen Nr. 75 über Kündigungsfristen für Arbeiter, das am 1. Januar 2000 in Kraft getreten ist, ebenfalls eine Abweichung zu Artikel 59 des Gesetzes vom 3. Juli 1978 eingeführt, indem die im Falle der Kündigung eines Arbeiters entsprechend seinem Dienstalter einzuhaltende Kündigungsfrist verlängert wurde.

Dieses intersektorielle kollektive Arbeitsabkommen, das innerhalb des Nationalen Arbeitsrates geschlossen wurde, gilt für alle Arbeitgeber des Privatsektors.

Schließlich wurden durch das Gesetz vom 12. April 2011 « zur Abänderung des Gesetzes vom 1. Februar 2011 zur Verlängerung der Krisenmaßnahmen und zur Ausführung des überberuflichen Abkommens sowie zur Ausführung des Kompromisses der Regierung in Bezug auf den Entwurf eines überberuflichen Abkommens », das im *Belgischen Staatsblatt* vom 28. April 2011 veröffentlicht wurde, die Kündigungsfristen wesentlich abgeändert und wurde der ausdrückliche Wille des Gesetzgebers bekundet, die schrittweise Harmonisierung des Statuts der Angestellten und Arbeiter fortzusetzen.

B.4.1. Angesichts der weitgehenden Ermessensbefugnis des Gesetzgebers bei der Festlegung seiner Politik in wirtschaftlich-sozialen Angelegenheiten spricht der Grundsatz der Gleichheit und Nichtdiskriminierung nicht gegen eine schrittweise Verringerung der festgestellten Behandlungsunterschiede. Wenn eine Reform, die zur Wiederherstellung der Gleichheit dient, zu bedeutenden und schwerwiegenden Auswirkungen führt, kann dem Gesetzgeber nämlich nicht vorgeworfen werden, diese Reform überlegt und in aufeinander

folgenden Schritten durchzuführen (siehe *mutatis mutandis* EuGHMR, Große Kammer, 12. April 2006, *Stec u.a.* gegen Vereinigtes Königreich, § 65).

B.4.2. In dem vorerwähnten Urteil Nr. 56/93 hat der Hof ferner angemerkt, dass die unterschiedlichen Regelungen Angelegenheiten betreffen, die mal für die Arbeiter, mal für die Angestellten günstig sind (B.6.3.2). Dies trifft im Übrigen auf den vorliegenden Fall zu, da der Kläger vor dem Tatsachenrichter in den Genuss von Artikel 63 des Gesetzes vom 3. Juli 1978 gelangen konnte, der lediglich den Arbeitern, die Opfer einer willkürlichen Entlassung wurden, den Vorteil einer Umkehr der Beweislast und einer pauschalen Ausgleichsentschädigung in Höhe von sechs Monaten Lohn vorbehält. Es wäre nicht kohärent, die Unterscheidung nur im Bereich der Kündigungsfrist zu betrachten angesichts ihrer Auswirkungen auf andere Bereiche des Arbeitsrechts und der sozialen Sicherheit, die auf derselben Unterscheidung beruhen.

B.4.3. Die Zeit, über die der Gesetzgeber verfügen kann, um eine als verfassungswidrig angesehene Situation zu beheben, ist jedoch nicht unbegrenzt. Das Ziel einer schrittweisen Harmonisierung des Statuts der Arbeiter und der Angestellten, das in den Augen des Gesetzgebers einer plötzlichen Abschaffung des Unterschieds zwischen diesen Berufskategorien vorzuziehen ist, insbesondere in einer Angelegenheit, in der die Normen sich dank der kollektiven Verhandlungen entwickeln können, rechtfertigt es nicht mehr, achtzehn Jahre nach der Feststellung des Hofes, dass das betreffende Unterscheidungskriterium nicht mehr als sachdienlich angesehen werden konnte, dass gewisse Behandlungsunterschiede, wie diejenigen, die vor dem vorlegenden Richter angeführt werden, noch lange aufrechterhalten werden, und dass man somit eine eindeutig verfassungswidrige Situation fortdauern lässt.

B.5.1. Ein präjudizielles Urteil, in dem festgestellt wird, dass eine Bestimmung gegen die Verfassung verstößt, hat nicht die gleiche Wirkung wie ein Nichtigkeitsurteil, wodurch die verfassungswidrige Bestimmung *ab initio* aus der Rechtsordnung verschwindet. Während die Artikel 10 bis 17 des Sondergesetzes vom 6. Januar 1989 vorsehen, dass rechtskräftig gewordene Entscheidungen, die Rechtsprechungsorgane auf der Grundlage einer vom Hof für nichtig erklärten Bestimmung getroffen haben, zurückgezogen werden können, und während Artikel 18 desselben Gesetzes vorsieht, dass eine neue Frist zur Klageerhebung gegen Verwaltungshandlungen und -verordnungen, die auf der Grundlage einer für nichtig erklärten

Bestimmung ergangen sind, einsetzt, sind die Erklärungen der Verfassungswidrigkeit auf präjudizielle Fragen hin nicht Gegenstand vergleichbarer Bestimmungen.

Ein präjudizielles Urteil hat jedoch, auch wenn dadurch nicht die verfassungswidrige Bestimmung aus der Rechtsordnung verschwindet, eine Wirkung, die über die bloße Streitsache vor dem Richter, der die präjudizielle Frage gestellt hat, hinausgeht. Dieser muss, ebenso wie jedes andere Rechtsprechungsorgan, das in derselben Sache zu befinden hat, die Anwendung der für verfassungswidrig befundenen Bestimmung ausschließen (Artikel 28 des Sondergesetzes vom 6. Januar 1989 über den Verfassungsgerichtshof). Diese Wirkung gilt außerdem für andere Rechtssachen, wenn infolge eines solchen Urteils des Hofes die Rechtsprechungsorgane von der Verpflichtung befreit sind, eine präjudizielle Frage, deren Gegenstand identisch ist, zu stellen (Artikel 26 § 2 Absatz 2 Nr. 2 desselben Sondergesetzes).

Daraus ergibt sich, dass der Hof prüfen muss, inwiefern die Auswirkungen seiner Entscheidung abgemildert werden müssen, um der in seinen früheren Urteilen erlaubten schrittweisen Harmonisierung der Statute nicht im Wege zu stehen.

B.5.2. Artikel 8 Absatz 2 des Sondergesetzes vom 6. Januar 1989 über den Verfassungsgerichtshof ermächtigt den Hof, wenn eine Nichtigkeitsklage für begründet befunden wird, im Wege einer allgemeinen Verfügung die Folgen der für nichtig erklärten Bestimmungen anzugeben, die als endgültig zu betrachten sind oder die für die von ihm festgelegte Frist vorläufig aufrechtzuerhalten sind.

Das Sondergesetz enthält keine analoge Regel, wenn der Hof in einem präjudiziellen Urteil feststellt, dass eine Bestimmung gegen die Verfassung verstößt.

B.5.3. Während der Vorarbeiten zum Sondergesetz vom 9. März 2003 zur Abänderung des Sondergesetzes vom 6. Januar 1989 wurde ein Abänderungsantrag, der bezweckte, es dem Hof ausdrücklich zu erlauben, die zeitliche Wirkung seiner präjudiziellen Urteile zu bestimmen, abgelehnt. Diese Ablehnung wurde wie folgt begründet:

« *Der Vizepremierminister* macht darauf aufmerksam, dass jeder Interessehabende im Rahmen einer Nichtigkeitsklage intervenieren kann, während in einem Verfahren der präjudiziellen Frage, das auf einen individuellen Fall ausgerichtet ist, die Möglichkeit einer

Intervention von Dritten nicht im Gesetz vorgesehen ist. Wenn die Klageerhebungsfrist wiedereröffnet wird, können andere Personen intervenieren und hat der [Verfassungsgerichtshof] die Möglichkeit, das, was er bereits auf eine präjudizielle Frage geantwortet hat, zu nuancieren. Wenn man hingegen dem [Verfassungsgerichtshof] die Befugnis erteilt, selbst allgemeine Schlussfolgerungen aus seinen Urteilen in Bezug auf präjudizielle Fragen zu ziehen, werden die Rechte der Dritten, die gegebenenfalls intervenieren könnten, nicht mehr beachtet » (*Parl. Dok.*, Senat, 2002-2003, Nr. 2-897/6, S. 217; ebenda, S. 232).

Seit seinem Urteil Nr. 44/2008 vom 4. März 2008 erkennt der Hof jedoch unter Berücksichtigung von Artikel 4 Absatz 2 und Artikel 26 § 2 Absatz 2 Nr. 2 des Sondergesetzes vom 6. Januar 1989 über den Verfassungsgerichtshof an, dass die Personen, die einen ausreichenden Nachweis der direkten Auswirkung der anstehenden Antwort des Hofes auf eine präjudizielle Frage auf ihre persönliche Lage erbringen, ein Interesse an der Intervention vor dem Hof nachweisen.

Indem es jeder Person, die ein Interesse nachweist, erlaubt wird, die Nichtigerklärung von Bestimmungen zu beantragen, bezüglich deren der über eine präjudizielle Frage urteilende Hof festgestellt hat, dass sie gegen die Verfassung verstoßen, wurde durch Artikel 4 Absatz 2, der durch das Sondergesetz vom 9. März 2003 in das Sondergesetz vom 6. Januar 1989 eingefügt wurde, die Möglichkeit erweitert, später die Auswirkungen der für verfassungswidrig befundenen Bestimmungen aufrechtzuerhalten (siehe zum Beispiel Urteil Nr. 140/2008 vom 30. Oktober 2008).

Die mit der zeitlichen Anwendbarkeit der für verfassungswidrig befundenen Bestimmungen verbundene Ungewissheit kann es rechtfertigen, dass der Hof diese Rechtsunsicherheit in diesem präjudiziellen Urteil vermeidet.

B.5.4. Es obliegt dem Hof, in den ihm unterbreiteten Rechtssachen ein gerechtes Gleichgewicht zwischen dem Interesse daran, dass jeder verfassungswidrigen Situation abgeholfen wird, und dem Bemühen, nach einer gewissen Zeit bestehende Situationen und hervorgerufene Erwartungen nicht mehr in Frage zu stellen, anzustreben. Obwohl die Feststellung einer Verfassungswidrigkeit in einem präjudiziellen Urteil eine erklärende Wirkung hat, können der Grundsatz der Rechtssicherheit und der Grundsatz des rechtmäßigen Vertrauens es folglich rechtfertigen, dass die sich aus einer solchen Feststellung ergebende Rückwirkung begrenzt wird.

In seinem Urteil *Marckx* vom 13. Juni 1979 hat der Europäische Gerichtshof für Menschenrechte unter Bezugnahme auf das Urteil *Defrenne* vom 8. April 1976 des Gerichtshofes der Europäischen Union (EuGH, 8. April 1976, *Gabrielle Defrenne* gegen Sabena, Punkt 71) sowie auf die Rechtsvergleichung im Bereich des Verfassungsrechts angemerkt, dass « die praktischen Folgen einer jeden gerichtlichen Entscheidung sorgfältig abzuwägen sind », dass man jedoch nicht soweit gehen kann, « die Objektivität des Rechts zu beugen und seine künftige Anwendung zu gefährden wegen der Auswirkungen, die eine gerichtliche Entscheidung für die Vergangenheit haben kann » und dass der Grundsatz der Rechtssicherheit es unter gewissen Umständen ermöglicht, davon abzusehen, dass Rechtshandlungen oder Rechtssituationen, die vor der Verkündung eines Urteils bestanden, mit dem ein Verstoß gegen die Europäische Menschenrechtskonvention festgestellt wird, in Frage gestellt werden (EuGHMR, 13. Juni 1979, *Marckx* gegen Belgien, § 58; siehe auch: Urteil Nr. 18/91 vom 4. Juli 1991, B.10).

Der Europäische Gerichtshof für Menschenrechte hat insbesondere angenommen, dass hinsichtlich des Grundsatzes der Rechtssicherheit ein Verfassungsgerichtshof dem Gesetzgeber eine Frist gewähren kann, um erneut gesetzgeberisch aufzutreten, was zur Folge hat, dass eine verfassungswidrige Norm während eines Übergangszeitraums anwendbar bleibt (EuGHMR, Entscheidung, 16. März 2000, *Walden* gegen Liechtenstein).

B.5.5. Die Aufrechterhaltung der Folgen ist als eine Ausnahme zur erklärenden Beschaffenheit der in präjudiziellen Streitsachen gefällten Urteile anzusehen. Vor der Entscheidung über die Aufrechterhaltung der Folgen eines solchen Urteils muss der Hof feststellen, dass der Vorteil aus der Wirkung der nicht modulierten Feststellung der Verfassungswidrigkeit unverhältnismäßig ist gegenüber der Störung, die sie für die Rechtsordnung mit sich bringen würde.

Bezüglich der dem Hof unterbreiteten Behandlungsunterschiede würde die nicht modulierte Feststellung der Verfassungswidrigkeit in zahlreichen schwebenden und künftigen Rechtssachen eine erhebliche Rechtsunsicherheit mit sich bringen und könnte zu schwerwiegenden finanziellen Schwierigkeiten für eine hohe Anzahl von Arbeitgebern führen. Im Übrigen ist daran zu erinnern, dass eine solche Feststellung der Verfassungswidrigkeit den Harmonisierungsbemühungen im Wege stehen könnte, zu denen der Hof den Gesetzgeber in seinem Urteil Nr. 56/93 aufgefordert hat.

B.6. Aus dem Vorstehenden geht hervor, dass die präjudiziellen Fragen bejahend zu beantworten sind, dass die Folgen der fraglichen Bestimmungen jedoch spätestens bis zum 8. Juli 2013 aufrechtzuerhalten sind. Der Gesetzgeber konnte nämlich seit dem vorerwähnten Urteil Nr. 56/93 vom 8. Juli 1993 über eine ausreichende Frist verfügen, um die Harmonisierung des Statuts von Arbeitern und Angestellten zu Ende zu führen.

Aus diesen Gründen:

Der Hof

erkennt für Recht:

- Die Artikel 52 § 1 Absätze 2 bis 4 und 59 des Gesetzes vom 3. Juli 1978 über die Arbeitsverträge verstoßen gegen die Artikel 10 und 11 der Verfassung.

- Die Folgen dieser Gesetzesbestimmungen werden aufrechterhalten, bis der Gesetzgeber neue Bestimmungen angenommen hat, und spätestens bis zum 8. Juli 2013.

Verkündet in französischer und niederländischer Sprache, gemäß Artikel 65 des Sondergesetzes vom 6. Januar 1989 über den Verfassungsgerichtshof, in der öffentlichen Sitzung vom 7. Juli 2011.

Der Kanzler, Der stellv. Vorsitzende,

(gez.) P.-Y. Dutilleux (gez.) J.-P. Snappe

Annex 2. Sweden

See next page

LABOUR COURT

JUDGMENT
24 October 2012
Stockholm

Reg. no. 74/12
Case no. A 31/10, A 32/10,
A 33/10 and A 34/10

PLAINTIFFS
Swedish Electricians' Union, Box 1123, 111 81 Stockholm

~~Robert Sjunnebo, LO-TCO Rättsskydd AB (Legal Bureau of the Swedish Trade Union Confederations Ltd.), Box 1155, 111 8-1 Stockholm~~

RESPONDENTS
1. Elektriska Installatorsorganisationen EIO (Organisation of Electrical Installers), Box 17537, 118 91 Stockholm *et al.*

THE CAUSE
Breach of collective agreement

There exists a collective agreement between EIO (EIO) and the Swedish Electricians' Union (The Union) that applies to work on electrical installations, known as the "Installation Agreement". Section 1 of Chapter 13 of the Installation Agreement states that the parties to the agreement have also agreed on the collection of trade union dues and penalty charges (Collection Agreement). Midroc Electro Aktiebolag, Bravida Sverige AB, APC Elinstallatoren Aktiebolag and Browik Installation i Stockholm AB (The Companies) are members of the EIO and bound by the Installation Agreement and the Collection Agreement with the union.

The Collection Agreement includes the following provisions.

> **Deduction of trade union dues from wages**
> *Deduction*
> Each time wages are paid the employer will deduct the percentage of the gross wage agreed with the contracting party,

both after submission of authorisation for the dues of members of the Swedish Electricians' Union
and also for the monitoring fee for all employees working in areas covered by the Swedish Electricians' Union's Installation Agreement.

The percentage figure is to be determined to one decimal point.

Deduction is made after
1. All statutory deductions have been made, and also
2. Immediately after all deductions required by the employer's liabilities, or
3. Are related to the terms of employment.

Then in the first hand for trade union dues and thereafter the monitoring fee.

- - - - -

Payment
The amount deducted is to be paid into the account specified by the union no later than 30 days after the latest payment of wages in the accounting period.
- - - - - -

The Collection Agreement requires the employer is to make a deduction from the gross wages of all those employed in the area covered by the union's Installation Agreement for the monitoring fee, which is then to be paid into the union. In the case of a number of fitters who are not members of any union (non-union members) the companies have failed to pay in the monitoring fees or paid them in arrears. Dispute has arisen as to whether this means the companies are therefore in breach of the Collective Agreement.

EIO and the companies (the Employers) have mainly contested that the provisions of the Collection Agreement requiring employers to make deductions for monitoring fees from the wages of non-union members is in conflict with the right to possessions and the negative freedom of association laid down in the European Convention on Protection of Human Rights and Fundamental Freedoms (the European Convention). This means, according to the Employers, that they have not violated the collective agreement.

The Union has initiated proceedings against the Employers and asked the Labour Court to order Midroc Electro Aktiebolag (Midroc), Bravida Sverige AB (Bravida), APC Elinstallatoren Aktiebolag (APC) and Browik Installation i Stockholm AB (Browik) to pay general damages to the union amounting to SEK 100,000 and also interest pursuant to Section 6 of the Act on Interest from the day on which their writ was served (Midroc, Bravida and APC 23 February 2010 and Browik 24 February 2010) until payment is made.

The Employers have contested these claims. No amount has been acknowledged as reasonable *per se*. The claims for payment of interest have been acknowledged in themselves.

The parties have claimed payment of their trial costs.

In presenting their cases the parties have mainly made the following submissions.

(Pages omitted here)

Grounds

Background

According to Section 1 of Chapter 9 of the Installation Agreement work shall, as far as possible, be allocated as piecework for application of the piecework rates agreed between the EIO and the Union. The extent to which work on electrical installations is actually carried out on piecework rates is disputed by the parties.

Since 1977 there has been an agreement between the EIO and the Union on the collection of trade union dues and monitoring fees (Collection Agreement). This agreement requires the employer to make a deduction each time wages are paid for monitoring fees from the wages of every fitter employed and to pay the amount into the Union within a specified time. The deduction for monitoring fees is to be made irrespective of whether the fitter is paid an hourly rate or for piecework and irrespective of whether the fitter is a member of the union or a non-union member. Some of the provisions of the Collection Agreement are accounted for in the introduction to this judgment.

The monitoring fees are intended to cover the Union's costs for its piecework monitoring. This work means that within the framework of this monitoring the union checks, for instance, piecework dockets and the calculation of piecework earnings.

In the case of a number of non-union members the companies have failed to pay in the monitoring fees or paid these fees in arrears. Disputes have therefore arisen as to whether the companies have infringed the terms of the Collective Agreement.

The dispute

It has not been disputed in this case that Midroc, Bravida and Browik have not collected the monitoring fees for a number of non-union members employed as fitters as prescribed in the Collection Agreement and that APC has failed to pay in the monitoring fee for one fitter who is not a member of a union in the time stipulated in the agreement (where APC is concerned, therefore, the monitoring fee has merely been paid in arrears). The Union claims that in acting in this way the companies are guilty of infringing the terms of the Collective Agreement and shall therefore pay general damages to the Union.

The Employers have objected that the provision of the Collection Agreement requiring employers to make deductions for monitoring fees from the wages of non-union members conflicts with the European Convention and therefore Swedish law. The Employers claim that the deduction for monitoring fees deprives the non-union members they employ of their property and therefore contravenes the European Convention, as the measure is not proportional to the aim of the monitoring or the work involved. In this respect the Employers claim that the system of monitoring fees is not transparent and it can be assumed that the money from the non-union members is used for the general operations of the Union. The Employers have further contended that the monitoring fees mean that each and every one of the non-union members is subjected to unlawful

pressure to join the Union, which contravenes their negative freedom of association.

The Union has responded that the provisions of the Collection Agreement on deductions for monitoring fees is not in conflict with the European Convention as these provisions do not involve depriving the employees of any property. The Union has also added that the accounts for the revenues and costs incurred in monitoring piecework are entirely separate from its other operations and that the system with monitoring fees is both transparent and proportional. With regard to negative freedom of association, the Union has contended that the Collection Agreement cannot be considered to constitute coercion or strong pressure to make any non-union member join the Union. The Union has also asserted that the European Convention cannot be invoked in a civil dispute.

The enquiry

This case has been decided after a main hearing. During this hearing testimony was given by the union officials Peter Jönsson, Jan Söderman, Morgan Andersson, Bertil Andersson, Tomas Jansson, Peter Back, Hans Nilsson, Peter Svensson, Mikael Pettersson, Bo Andersson, Urban Pettersson and Arne Dufåker, members of the union's administrative staff, Natalie Sanguineti, Inger Westerlund Ivarsson, Ingegerd Olsson and Eva Björkqvist, its head of finance Helena Eriksson, chief negotiator Ronny Wenngren, its former Secretary General Alf Norberg, principal fitters Christer Olsson, Mikael Norberg, Martin Ekwall and Tomas Hedlund, the electrician Mikael Karlsson, the union's former chief negotiator Staffan Holmertz, and the fitter Lars Erik Andersson.

The witnesses called by the employers were the chartered accountant Tommy Mårtensson, Anders Kågner, formerly responsible for piecework at EIO, Kenneth Andersson, responsible for piecework at EIO, Thomas Nilsson, corporate advisor with responsibility for piecework at EIO, Henrik Spångberg, formery responsible for the sector and a negotiator for EIO, Åsa Kjellberg-Kahn, EIO's chief negotiator and the fitter Christer Sjöberg.

In addition the parties submitted extensive written evidence. For instance the employers cited a study made by the auditing company Deloitte AB of the union's costs for piecework monitoring in 2007 and 2008.

The provisions of the European Convention cited in the case

The Act on the European Convention on the Protection of Human Rights and Fundamental Freedoms (SFS 1994:1219) (the Incorporation Act) came into force on 1 January 1995. This means that the European Convention has the force of law in Sweden.

To support their case the employers have cited article 1 in the first supplementary protocol to the European Convention. This provision, which deals with the enjoyment of possessions lays down the following (here the second paragraph has been omitted).

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in

> the public interest and subject to the conditions provided for by law and by the general principles of international law."

The employers have also cited Article 11 in the European Convention concerning the freedom of peaceful assembly and freedom of association, including the right for individuals to form and join trade unions to protect their interests. This article lays down the following (here the second paragraph has been omitted).

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

The Evaldsson judgment

In the main the Employers have referred to – and made comparisons with – the judgment handed down by the European Court of Human Rights on 13 February 2007 in case 75252/01 Evaldsson et. al. v. Sweden (the Evaldsson judgment). A summary of the case and the ruling of the European court is given below.

The background to the case can be briefly described as follows. The plaintiffs were five construction workers employed by a construction company. They were not members of any union. The company was bound by the collective agreement between the Swedish Construction Companies and the Swedish Building Workers' Union. The collective agreement entitled Byggettan (the local branch of the trade union) to continual supervision of payment conditions for piecework, payment by results and hourly wages. If an inspection was carried out in accordance with the collective agreement, Byggettan had the right to remuneration for its costs with a fee that was set at 1.5 per cent of the wage of every employee (inspection fee). The plaintiffs requested to be excluded from the system of inspection. The company agreed and therefore did not pay any inspection fees on their behalf to Byggettan. The Swedish Construction Companies then initiated proceedings in the Labour Court and requested the court to rule that the company was not obliged to make deductions for the inspection fee from the wages of non-union members. The Swedish Construction Companies claimed that deductions of this kind were incompatible with negative freedom of association. In a judgment handed down on 7 March 2001 the Labour Court dismissed the Swedish Construction Companies' application.

In the European Court of Human Rights the appellants claimed that deduction of an inspection fee violated their negative freedom of association as laid down in Article 11 of the European Convention and also that deduction of the inspection fee constituted an infringement of their enjoyment of their possessions enshrined in Article 1 of the first supplementary protocol to the European Convention. The European Court of Human Rights, which initially dealt with the appeal on the basis of Article 1 of the first supplementary protocol, began by declaring that collection of the inspection fee by deductions from wages meant that the five appellants had been deprived of possessions in the sense laid down in the second sentence of the Article. In view of the fact that in Sweden the social partners had been given the task of regulating wages and other terms of employment through collective agreements and that there was no state authority that exercised supervision of how these agreements were applied, the European Court of Human Rights

accepted that a fee to cover the costs of the union's inspections could be considered to have a legitimate aim in the public interest. The court also noted, however, that it was indisputable that the system was compatible with Swedish law. When it turned to the question of proportionality, the court pointed out that any infringement of the right to ownership must involve striking a reasonable balance between the public interest and protection of the rights of individuals. The court found that the appellants had received a certain service in return for the fees charged. The court went on to point out that the fees were intended to cover the costs of the inspection system and that they were not intended to be used to help to fund the union's other activities. On the basis of the information submitted in the case the court found that it was not possible to ascertain how the inspection fees had been used in practice. According to the court, the appellants were also entitled to exhaustive information to be able to check that the fees corresponded to the actual costs and that the money deducted from their wages was not being used for other purposes. The court found that the inspection system did not have the required transparency. Even given the limited amounts involved, the public interest was not in proportion to the wage deductions the appellants had been subjected to without their being given any real possibility of checking how the money was used. The court found therefore that an infringement of Article 1 in the first supplementary protocol had occurred and did not go on to examine the other aspects of the appeal. The court ruled that the Swedish state should pay a specific amount to each of the appellants for non-pecuniary damage.

The Swedish judge, Elisabeth Fura-Sandström, voted with the majority but pointed out that she herself, for the reasons adduced by the court to support its ruling that an infringement of the right to enjoyment of possessions had occurred, considered that an infringement of the negative freedom of association should have been determined instead, for one thing because of the relatively small amounts of which the appellants had been deprived.

Do monitoring fees mean that employees are deprived of their property?

The Labour Court chooses to examine first the Employers' contention that making a deduction for monitoring fees from the wages of non-union members would have constituted an infringement of the right to enjoy possessions laid down in Article 1 in the first supplementary protocol to the European Convention. The initial question on which the Labour Court has to rule is whether deductions for monitoring fees mean that employees are being deprived of their property in the sense laid down in the article.

Here the Union has claimed that the monitoring fees do not form part of the wages demanded by an employee and that the employers' obligation to implement the deduction for monitoring fees pursuant to the Collection Agreement, in accordance with the ruling in AD 1985, no. 108, is not a payment made on behalf of the individual employee but an undertaking in the Collective Agreement with the Union.

In AD 1985, no. 108, which also dealt with the provisions of the Collection Agreement, the case concerned two employees who were non-union members and who objected to the employer making deductions for monitoring fees on their behalf. The employer therefore made no such deductions for these employees. The issue in this case was whether the employer was for this

reason in breach of the Collective Agreement. In the case the Labour Court examined for instance whether the system of deductions for monitoring fees pursuant to the Collection Agreement was in conflict with the rule established through legal practice that an employee cannot transfer or otherwise dispose with binding effect of his or her wages before payment is due. In this case the Labour Court found that the employers' liability to make deductions for monitoring fees did not constitute an obligation to pay on behalf of the individual employee but was an undertaking that formed part of the collective agreement with the union. In other words according to the court this was a provision in the collective agreement that regulated the amount that could be claimed by employees in wages. The court's conclusion was that the provisions on deductions for monitoring fees were not therefore in conflict with the "prohibition of transfers".

The court determines as follows.

It can initially be established that the monitoring fees are similar in construction to the inspection fees that were at issue in the Evaldsson case. The monitoring fees laid down in the Collection Agreement are in other words calculated as a percentage of each employee's gross wages and are deducted from the amount before the wages are paid out. Nothing has been submitted to show that if no deductions are made, as in the cases this dispute concerns, the amounts paid out in wages to the employees will increase correspondingly. According to the Union, however, this procedure is incorrect as the inspection fee is not included in the earnings to which an employee is entitled.

The opinion of the Labour Court is that in view of the information submitted it would appear to be implausible not to consider the portion of the gross wage that corresponds to the monitoring fee as part of an employee's wage entitlement. It is admittedly correct that in AD 1985 no. 108, the Labour Court declared that the provisions of the Collection Agreement on the employers' obligation to make deductions for monitoring fees formed part of the determination in the collective agreement of the size of the employees' wage entitlement. What was at issue in that case, however, was whether the employer's liability to make this deduction was to be considered an undertaking to pay on behalf of the individual and, if so, it was then in conflict with the "prohibition of transfers". There was no appraisal on the basis of the provisions in the European Convention safeguarding the right to possessions, which, in any case, had not at that time become part of Swedish law.

The Collection Agreement naturally implies undertakings for the employers who are parties to the collective agreement with respect to the Union. These undertakings do not, however, at the same time preclude that employees are being deprived of their property. In the Evaldsson judgment the European Court of Human Rights declared that the deduction for the inspection fee that the appellants in the case were subject to did mean that they had been deprived of their possessions as laid down in Article 1 in the first supplementary protocol. The concept of "possessions" in the Article must also be ascribed an autonomous and extensive content (cf. Danelius, Hans, *Manskliga rättigheter i europeisk praxis* [*Human rights in European practice*], 4th ed., 2012, p. 539). The entire wage specified on an employee's wage-slip must therefore be considered as part of the employee's possessions in the sense intended in the provision concerned. That the employee may then need to accept some encroachment on this ownership is another matter.

To sum up, the Labour Court considers that a deduction for monitoring fees pursuant to the Collection Agreement constitutes deprivation of possessions in the sense intended in the second sentence of the first paragraph of Article 1 in the first supplementary protocol to the European Convention.

Other objections to the claim that deductions for monitoring fees are an infringement of ownership

The Union has also contended in response to the Employers' standpoint that deductions for monitoring fees are to be viewed as infringement of ownership that, as far as has been shown, none of the fitters concerned objected to the deduction. The Union has also pointed out that none of the non-union members at Midroc, Bravida and Browik have been deprived of their possessions during the period covered by the dispute as no deductions were made during this time. This means, in the Union's opinion, that no encroachment of ownership has occurred either.

What is at issue, however, is whether the Employers were obliged to comply with the provisions of the Collection Agreement on deductions for monitoring fees even though this would have meant that the Employers were infringing on the rights of the employees laid down in the European Convention. There is no need, therefore, to establish that any non-union member was in fact deprived of possessions. Nor does it make any difference in appraising the issue whether the monitoring fees were merely paid in arrears or were not paid at all.

The requirements of public interest and legality

The second sentence of the first paragraph of Article 1 in the first supplementary protocol stipulates that a condition for the permissibility of deprivation of possessions must be that the measure is adopted in the public interest and subject to the conditions provided for by law and by the general principles of international law.

In the Evaldsson judgment the European Court of Human Rights pointed out that in Sweden the social partners had been assigned the regulation of wages and other working conditions through collective agreements and that there was no state authority that exercised supervision of how the agreements were applied. In view of this background the European Court of Human Rights accepted that fees to cover the costs of the wage supervision undertaken by the Swedish Building Workers' Union could have a legitimate purpose "in the public interest" as this supervision was intended to safeguard building workers in general.

The monitoring fees that are the subject of this case display, as has been pointed out, similarities with the inspection fees that were appraised in the Evaldsson case. The Labour Court does not consider that there any grounds where public interest is concerned to make any other assessment than that made in the case by the European Court of Human Rights. Irrespective of the size of the monitoring fees, the aim of monitoring piecework and the monitoring fees may be assumed to safeguard the interests of all fitters who are linked to the piecework payment system. For this reason the monitoring fees may be considered to have a legitimate purpose in the sense intended in Article 1. In addition the Collection Agreement was made with the support of the Codetermination in the Workplace Act and the deprivation of possessions may

be viewed as subject to conditions provided by law in the sense intended in the European Convention.

Is the measure proportional?

The Labour Court has concluded that the deduction for monitoring fees constitutes an infringement of the individual employees' enjoyment of their possessions. For such an infringement to be compatible with the European Convention it is required to be in reasonable proportion to its aim. In other words, there has to be a just balance between the public interest and the rights of individuals (cf. for instance Danelius, op cit., pp. 53 and 544 f. and the Evaldsson judgment).

In assessing whether the infringement of the ownership of the individual fitters is in reasonable proportion to its purpose the question arises of which tasks within the framework of piecework monitoring the fees are intended to finance. Here the parties are in agreement that the revenues from the monitoring fees must in their entirety defray the union's costs for piecework monitoring and not contribute to its general trade union operations. The parties do not agree, however, on the purpose for which piecework is monitored or to what extent it takes place.

According to the Union the Collection Agreement and the aim of monitoring piecework, if its general purpose is to be made clear, must be interpreted in the light of the Union's regulations on piecework monitoring. According to these regulations the aim of piecework monitoring is to provide members with the greatest possible remuneration for their work pursuant to the current agreement and otherwise to check that agreements and piecework tariffs are respected. In the opinion of the Union the revenues may therefore be used for counselling on piecework issues, resolving disputes about piecework, training in areas relating to piecework and piecework tariffs, drawing up piecework lists and calculating piecework earnings, etc.

The Employers maintain, on the other hand, that the tasks that devolve upon the Union within the framework of monitoring piecework are considerably more restricted. According to the Employers this monitoring only comprises the work of writing out piecework dockets, providing forms and computer systems for this purpose, and checking and drawing up piecework dockets and calculating piecework earnings.

On the basis of the information submitted about the history of the agreement, the application of the piecework monitoring, etc., there is scope to identify support for the opinions of both parties about the extent of piecework monitoring. In assessing whether the deduction for monitoring fees has been in proportion to its aim as laid down in the European Convention greater significance should, however, in the opinion of the Labour Court, be placed on how the money has in fact been used. The Union has submitted extensive oral evidence on this aspect, in the form of testimony from both officials and assistants to show what work is undertaken in its piecework monitoring. In the light of the evidence submitted there are no grounds for questioning that the Union carries out all of the tasks it claims to within the framework of piecework monitoring.

The Labour Court then proceeds to appraise the proportionality of the measure. As related above, the European Court of Human Rights came to the conclusion that the inspection fee, even though it involved a restricted amount, was not in proportion to the general aim of the wage deduction. The European Court of Human Rights found that the possibility that the money was allocated to activities which the non-union members did not endorse could not be excluded and also that there was no reasonable possibility for the employees to check what the money was used for.

Assessment of the proportionality of the measure therefore raises questions about the benefit derived by non-union members from piecework monitoring, whether the revenues are used to any extent for the Union's general trade union activities and whether the non-union members had any possibility of checking what the revenues from the inspection fees were used for (cf. the Evaldsson judgment).

Did the non-union members benefit in any way from piecework monitoring?

The Union has claimed that all employees benefit from the piecework pay system and piecework monitoring as all of them – even non-union members – are given training on piecework tariff rates and have access to advice on piecework issues. According to the Union the wages of both those working on piecework rates and those paid by the hour are higher because of the payment system in operation.

The Employers have pointed out, on the other hand, that the monitoring fees for the fitters who are paid by the hour are not matched by any compensatory action at all by the Union and that the benefits for the fitters working on piecework rates are not in any case proportional to the costs.

The court determines as follows.

The work carried out by the Union within the framework of piecework monitoring, for instance training and advice on piecework issues, checking piecework dockets and calculating piecework earnings is more than likely to be of great benefit for the fitters who work on piecework rates, irrespective of whether they are members of the union or not. The benefits for fitters who are paid by the hour are, however, considerably more limited. Even if the piecework rate system on the whole leads to higher wages, the monitoring fees for these employees are not matched by any direct action by the union. The question of whether the monitoring fees are in reasonable proportion to the aim of the monitoring is therefore more tangible with regard to employees who are non-union members and who are paid by the hour.

Some of the employees involved in this case were working on piecework rates and some were paid by the hour at the time the monitoring fees should have been paid to the union. The Labour Court will revert to the question of whether any differentiated judgments should be made in this case for the two separate groups.

Are the monitoring fees used for the general union activities?

The Union maintains that all of the work it does to maintain the piecework tariff system constitutes piecework monitoring. This means that within the parameters

of piecework monitoring the Union, for instance, provides training on the piecework tariff list and advice on piecework questions, updates piecework tariff rates and takes part in the resolution of disputes about piecework. The Union has stated that there is a clear division between piecework monitoring and its other trade union activities.

The Employers have claimed that many of these tasks should be regarded as general trade union activities, in other words of a kind that do not form part of its monitoring operations. Examples referred to by the Employers are collective bargaining, dispute resolution and training, even when these involve the Collection Agreement or piecework tariffs. Updating piecework tariffs and the work of providing information about the Union's activities in workplaces should also, in the opinion of the Employers, be categorised as lying within the framework of general union activities.

The court determines as follows.

The purpose of monitoring piecework, as it is defined in the regulations and in the way the piecework monitoring system has worked in practice, is to provide the members with the highest possible remuneration for their work and also otherwise to supervise compliance with agreements and piecework tariffs. In the opinion of the Labour Court this should be regarded as a typical trade union objective. The Union has, however, claimed that the word "members" refers to members of the piecework monitoring system and not members of the Union.

Monitoring fees are used, therefore, for everything related to the piecework system and which is intended to provide employees with the highest possible earnings as well as to ensure compliance with agreements that have been reached. The monitoring fee system is based on a collective interest in maintaining and supervising the piecework payment system. This interest can, however, conflict with the individual right to possessions that is enshrined in the European Convention. Even if the parties to the agreement were originally in accord that piecework monitoring was to have the extent that the Union claims, any appraisal of the proportionality of the measure should be based on what a reasonable contribution from the non-union members should consist of (and therefore irrespective of what the parties originally agreed). From this point of view, the Labour Court considers that much of the work carried out by the Union within the framework of piecework monitoring should be regarded as general union activities.

One example of the work that should be viewed as belonging to general union activities is collective bargaining and the process of updating current agreements. According to the Union's reports on its operations the work of updating piecework tariffs was undertaken by a working group comprising representatives from the Union and the EIO. The reports state that this working group has met on a number of occasions each year to negotiate on new tariffs. The costs for the Union's representatives in the working group have, to some extent, been charged to piecework monitoring. The process of updating piecework tariffs should, however, be regarded as a general union activity.

Another example can be found in the negotiations that take place in connection with disputes between employers and employees about which piecework rates

should be paid. According to the Union the involvement of its representatives in negotiations of this kind forms part of its piecework monitoring. The opinion of the Labour Court is, however, that this too should be considered a general trade union activity. Non-union members are not represented by the Union in negotiations about disputes. This reveals that union members and non-union members are treated differently in certain respects and do not benefit to the same extent from the piecework monitoring system.

Monitoring fees also account for ten per cent of the funding for the union's gazette. The reason for this is, according to the union, that it contains information about piecework monitoring. Profile articles that are used to advertise the piecework monitoring system are funded by the monitoring fees. This too, in the opinion of the Labour Court, is an example of expenditure that must be considered to have very close links with the union's other activities and which a non-union member cannot reasonably be expected to participate in or provide funding for.

In addition, a great deal of the cost for piecework monitoring comprises expenditure on training. It may in itself seem reasonable for all employees to contribute to these costs. But from what has been disclosed, however, this information and this training is mainly provided in circulars to members, on the website and in the Union's gazette. At any rate the fitter Christer Sjöberg, who is not a member of the Union, states that he has not received any information about this training.

Without having made any complete analysis of the total expenditure of the Union in connection with piecework monitoring, the Labour Court finds that the monitoring fees, at least to some extent, must be viewed as contributing to the general activities of the union.

The insight of employees into piecework monitoring

The Employers have referred to the European Court of Human Rights' reasoning in the Evaldsson judgment and claimed that the system for managing and accounting for the monitoring fees lacks transparency and that employees have received no information about what the money is used for. To support this claim the Employers commissioned Deloitte AB to undertake a study of the union's accounts for the costs of piecework monitoring during 2007 and 2008.

The Union has stated that all the revenues and expenditure that can be attributed to piecework monitoring have been booked in a separate account (account 92) and that the use of this money is totally separate from the funding for the rest of its operations. According to the Union, the accounting for the funds for piecework monitoring is transparent and employees who wished to gain insight into the management of the monitoring fees have been able to obtain it.

With regard to more detailed accounting for the expenditure on piecework monitoring the Union have stated the following. Expenditure that is directly attributable to piecework monitoring, for instance on training in piecework tariffs and the Ackcent computer software are booked in their entirety to account 92. Only 20 per cent of expenditure that is merely indirectly linked to piecework monitoring and involves administrative costs, such as human resources, premises, computer facilities, etc., is booked to account 92. The standard figure of 20 per cent used to calculate how large a proportion of indirect costs to charge to piecework monitoring has been used by the entire

union since 2008. The reason for using this figure is that revenues from monitoring fees amount to 20 per cent of the Union's total income. For this reason no more than 20 per cent of the expenditure can be charged to piecework monitoring even though its total expenditure on piecework issues is higher. All of its elected officials work with piecework questions and the principle is that 20 per cent of the salaries of the officials and administrative assistants are charged to account 92 even though their work involves piecework questions to a considerably greater extent. Instead of dividing salary costs in the accounting system so that 20 per cent of the cost for each employee can be charged to account 92, the union has opted to book the salary costs for the individuals who spend most of their time working with piecework monitoring. The outcome is the same, however. The list of individuals involved in piecework monitoring shows, in other words, the staff whose salaries have to varying extents been charged to account 92, not the individuals whose work has exclusively involved piecework monitoring.

The Labour Court determines as follows.

Initially it can be noted that the Union's reports and annual accounts for the operational years 2007 and 2008 only contain information about the total revenues and expenditure for piecework monitoring and what the money has been used for in general terms. No more detailed description of what the expenditure charged to piecework monitoring has comprised can be found.

One important question in assessing the possibilities of insight into how the monitoring fees are used is the way in which the demarcation line between piecework monitoring and other activities is drawn and how it is defined. Demarcation is also important in view of the fact that piecework monitoring, unlike other activities, is an operation that is subject to tax. Where the financial accounting of the monitoring fees is concerned, the parties have presented very extensive evidence. This has comprised, for instance, a detailed analysis of the Union's accounts for the years in question, the testimony of the union's head of finance, Helena Eriksson, as well as the auditor Tommy Mårtensson, who was responsible for the inquiry made by Deloitte AB submitted by the employers. Without taking any standpoint on how the accounting complies with financial requirements and what is considered good accounting practice, the Labour Court is able to determine that neither in the annual accounts nor anywhere else, judging from what has been submitted, is there any account or definition of the demarcation that has applied for the allocation of costs between piecework monitoring and other activities. There is no record or clarification of the way in which the indirect costs have been incurred by piecework monitoring, i.e. information about the allocation quotient that has been used, in either the annual accounts or anywhere else. The list of employees on which the allocation of staff costs has been based merely indicates, for example, which members of the staff have had their salary costs charged to account 92 but offers no information about which or how many of them have actually worked with piecework monitoring or what role they have played in any more detail. Instead, it has transpired, as described above, that in actual fact the list does not at all reflect the employees' work on piecework monitoring but has only been used as a practical means of accounting for the salary costs that the union has considered should be borne by piecework monitoring and paid for by the monitoring fees.

The enquiry that has been submitted does not in the Labour Court's opinion offer any support for the contention that detailed information about how the

monitoring fees were actually used has been available to employees. The system adopted to manage monitoring fees has not clearly separated them from funding for general union activities. The management of the funding for piecework monitoring cannot be described as having been transparent. To sum up, the assessment of the Labour Court, against the background of the above, is that the employees cannot be considered to have had any real possibility of identifying what they have been paying for.

Summary assessment of whether the measure was proportional

The Labour Court has concluded above that there has been no clear demarcation between piecework monitoring and general union activities, that the monitoring fees have to some extent contributed to general union activities and that it has not been possible for the non-union members to gain insight into what the money has been used for. Against this background, the Court finds that the monitoring fees have not been in reasonable proportion to the aim of the measure.

Are the monitoring fees in breach of the European Convention?

The Labour Court has found above that a deduction for monitoring fees according to the Collection Agreement constitutes a deprivation of possessions in the sense intended in Article 1 in the first supplementary protocol to the European Convention. In addition the court has found that the monitoring fees are not in reasonable proportion to the measure. If the Employers had made deductions for monitoring fees from employees who were not members of the union, this would, in the opinion of the Labour Court, have been in conflict with the protection of possessions provided by the European Convention. Given this standpoint, no differentiated judgment need be made for those who were paid by the hour or on piecework rates. Nor are there any grounds for determining whether the procedure could also have been considered to be in breach of Article 11 of the European Convention.

The significance of the European Convention in civil disputes

As stated above, the Labour Court found that it would have been a breach of the European Convention if the employers had applied the provisions of the Collection Agreement on monitoring fees for employees who were not members of the Union. The Union has claimed that this standpoint does not prevent the employers from being liable for damages for non-compliance with the Collective Agreement. In fact, in the opinion of the union, the European Convention cannot be invoked directly in a civil dispute and in this context the Union has cited a judgment of the Supreme Court, NJA 2007, p. 747. The Employers have, on the other hand, maintained that the European Convention has "third party effect" and that the Convention can at least be invoked as protection against demands that are in conflict with it.

The issue of whether the European Convention can be invoked in civil disputes was appraised in the Labour Court in its judgment 1998 no. 17. In this case the issue was whether notification of industrial action could be considered an infringement of Article 11 in the European Convention. On the subject of whether the Convention could be cited in civil disputes the Labour Court declared that this question had not been explicitly discussed in the *travaux préliminaires* to the Incorporation Act apart from the fact that these made it

clear that the Convention could be applied directly by courts of law and public authorities (see Govt. Bill 1993/94:117 p. 33). The Labour Court then went on to state its opinion that this incorporation of the Convention also meant that that articles in it that could have a bearing on a relationship between civil parties could be applied in disputes between them (a reference on this aspect was made to SOU 1993:40 Section B p. 107).

The possibility of invoking the European Convention in disputes between civil parties was also stated in the Swedish Evaldsson judgment (AD 2001 no. 20). It should be noted, however, that the parties in this case agreed that if the wage deductions were to be considered in breach of the European Convention, the company was not obliged according to the building agreement to make these deductions. For this reason no detailed appraisal of this issue was made.

NJA 2007 p. 747 dealt with the issue of whether one civil party could be required to pay damages to another civil party through direct application of Articles 8 & 13 in the European Convention. The Supreme Court declared that the state could be liable for damages if it failed to fulfil its obligations according to the Convention. On the other hand, the Supreme Court pointed out that the Convention contains no regulations that explicitly place any obligations on civil parties: even less does the convention lay down that civil parties can be liable to pay damages. If no liability arose by virtue of Swedish law on damages, not even within the framework of a ruling conforming to the convention could a civil party, in view of the fact that it should be able to predict the legal consequences of its actions, be ordered to pay damages because of an infringement of Article 8 of the Convention.

Against the background of NJA 2007 p. 747 it therefore appears clear that a civil party cannot base a claim for damages against another civil party directly on the European Convention. The case here does not concern, however, damages for infringement of the European Convention. The issue is rather whether the Employers were obliged to comply with the undertaking in the Collective Agreement on deductions for monitoring fees when this would have meant that their infringement of the rights of the employees concerned laid down in the Convention.

According to some pronouncements in the legal doctrine an action that according to the praxis of the European Court of Human Rights infringes an article in the European Convention (in particular if the state in question has already been found to be in breach) can hardly be cited by a civil party in a national court of law to justify claims based on this action (cf. Andersson, Håkan, *Den svenska EKMR-skadeståndsrätten [Swedish European Convention on Human Rights law on damages]* (III) — discussion of horizontal effects, offprint from InfoTorg Juridik, August 2011, p. 16). In this view the Evaldsson judgment means therefore that Swedish courts of law should refuse to apply those elements of collective agreements that include unlawful deductions from wages for monitoring fees (cf. Andersson, op. cit., p. 24, and Cameron, Iain, *Europadomstolen och granskningsarvodena [The European Court of Human Rights and monitoring fees]*, Nordiskt nyhetsbrev, Institutet for social civilrätt, EU & arbetsrätt no. 1 2007).

As already observed, the European Convention has the force of law in Sweden. The Labour Court has found above that the system of monitoring fees as practiced by the Union, in a corresponding manner to the inspection fees in the

Evaldsson judgment, was in conflict with Article 1 in the first supplementary protocol to the European Convention. In the interest of preventing infringement of the Convention, there is a great deal to be said, in the opinion of the Labour Court, for not requiring the Employers to pay damages to the Union for not complying with the provisions in the Collective Agreement that would have involved violation of the rights laid down in the European Convention for some employees. The Union's claim is therefore dismissed.

Trial costs

Given this outcome, the Union has lost and must therefore be ordered to remunerate the Employers for their trial costs. The Employers have requested compensation for trial costs totalling SEK 6,005,959, of which SEK 4,995,150 is for lawyers' fees. From the information submitted by the Employers the lawyers' fees comprise 1,746 hours of work. The Union entrusted the court with assessing whether the amounts requested are reasonable. Where lawyers' fees were concerned, however, the Union pointed out that counsel for the Employers had devoted almost twice as many hours as the Union's counsel. The Labour Court notes that the dispute has been extensive and protracted. In the opinion of the Labour Court, however, there has been no justification for devoting as much time to the case as the Employers' counsel have. The Labour Court finds that reasonable remuneration for the lawyers' fees would be SEK 3,800,000. The remuneration requested for the parties' own expenses and for the enquiry made by Deloitte AB is to be considered reasonable.

Judgment

1. The Labour Court dismisses the claim of the Swedish Electricians' Union.

2. The Labour Court orders the Swedish Electricians' Union to remunerate Elektriska Installatorsorganisationen EIO, Midroc Electro Aktiebolag, Bravida Sverige AB, APC Elinstallatoren Aktiebolag and Browik Installation i Stockholm AB for trial costs amounting to SEK 4,810,809, of which SEK 3,800,000 is for lawyers' fees, as well as interest as laid down in Section 6 of the Interest Act on the first of these amounts from the day on which this judgment was issued until payment has been made.

Members of the Court: Carina Gunnarsson, Lars Johan Eklund, Christer Mall, Claes Frankhammar, Gabriella Forssell, Maria Hansson and Anders Tiderman. Unanimous.

Secretary: Charlotte Svanstrom

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