THE LABOUR AND EMPLOYMENT DISPUTES REVIEW

Third Edition

Editor
Nicholas Robertson

THE LAWREVIEWS

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PREFACE

It is commonplace for the senior management of a business to describe their employees as the best assets that the business has. Equally, in troubled times, it not unusual to find employers voicing concern that employees may vote with their feet and leave the organisation (irrespective of any legal claims they may have) to work for competitors.

However, the truth of the matter is that, in many jurisdictions, fine words about the rights of employees are mixed with an increasingly uncertain future for employees. One frequently hears comments about the future impact of technology on many types of jobs. This technology will know no boundaries and the only safe prediction is, I think, that the jobs most affected will include some surprises. Already we see significant friction between the attempts by businesses to organise employees into a low-cost, allegedly lower-skilled and fully flexible workforce and the conflicting desires of employees and, in many countries, legislators to have stable employment relationships underpinned by statutory and contractual rights. The battles that Uber and other 'disrupters' are facing are symptomatic of that tension.

In the United Kingdom, of course, we have now seen Brexit, finally, become a reality, although the detail of what this will mean for employers and employees remains frustratingly vague.

A similar phenomenon is at play in relation to the #MeToo movement, and its impact on workplace behaviours and relationships. The desire for those in the workplace to inhabit an environment free of unlawful discrimination has undoubtedly made progress, giving voice to employees who might previously have felt, for legal, cultural or commercial reasons, that they had no option but to accept inappropriate behaviour. The corollary of this strengthening of employees' rights is that it makes the workforce less insecure.

Indeed, in the United Kingdom, the extended debate about the degree to which it is ever permissible for employers to use non-disclosure agreements to resolve matters privately is an indication of how far the debate has moved. A time-travelling employment lawyer from 10 years ago (if such an individual existed) would be astonished at the pace of change.

In these circumstances, a book such as *The Labour and Employment Disputes Review* offers an opportunity not only to look at the bigger themes, but also to measure some of the changes taking place, year on year, as the world of work continues to evolve.

Nicholas Robertson
Mayer Brown International LLP
London
February 2020

Chapter 1

BELGIUM

Nicolas Simon[1]

I INTRODUCTION

Labour and employment disputes in Belgium fall within the specialised jurisdiction of the labour courts. There are nine labour courts, each territorially competent in its own judicial district (Antwerp, Ghent, Leuven, Brussels Dutch, Brussels French, Walloon Brabant, Hainaut, Liège, Eupen).

Regarding the content of disputes, the labour courts are mainly competent for four types of disputes: (1) individual employment disputes; (2) social security issues; (3) disputes regarding the establishment and running of corporate bodies with employees' representatives; and (4) disputes arising from administrative fines imposed by the authorities for infringements of the Social Criminal Code.[2]

The president of a labour court can also assert jurisdiction in specific urgent matters, such as the authorisation to dismiss, for serious reasons, an employee representative from a works council or health and safety committee (the workplace prevention and protection committee), or for prohibitory injunctions in cases of discrimination or harassment.

An appeal can be lodged with the territorially competent labour court of appeal against the judgment of a labour court. There are five labour courts of appeal (Antwerp, Ghent, Brussels (Dutch and French), Liège, Mons). The labour court of appeal will examine the case in its entirety (facts and legal arguments).

The final level of jurisdiction is the Supreme Court, which will only assess the lawfulness of a decision of a labour court of appeal, without re-examining the merits of the case.

As the purpose of employment legislation is to protect the employee, the labour courts tend to favour the employee more than the employer. This reflects particularly in the burden of proof of the elements advanced by the employer and in the interpretation of the terms of a contract or other documents in favour of the employee.

II PROCEDURE

i Labour and civil courts

The basic procedure for resolving employment disputes is to go to the labour court.

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1 Nicolas Simon is a partner at Van Olmen & Wynant.

2 The labour courts are also competent for consumer over-indebtedness cases, but this competence has only to be transferred from the courts of first instance to the labour courts to reduce the caseload of the first instance courts. As such, it is not a matter relating to labour or employment law.

A party who believes that his or her rights have not been respected can initiate a procedure before the labour court through a writ of summons served by a bailiff (for which a draft is generally prepared by a lawyer) or through a petition (which is less expensive) introduced to the court office and notified by the court office to the other party. The writ of summons or petition must mention the claim and the date and location of an introductory court hearing.

Following a short delay (from a minimum of eight days up to a maximum of a couple of weeks), the introductory court hearing will be on a date set by the court office.

Simple cases will normally be decided upon at this introductory hearing or at a hearing fixed shortly thereafter. For most cases, a schedule will be agreed between the parties or set by the court, including the dates by which the written pleadings with each party's arguments and pieces of evidence must be submitted. Documents sent after the specified date will not be considered by the court, unless this is agreed to by the other party.

After the exchange of written statements, oral pleadings take place before the labour court. Most of the time, the oral pleadings are fixed for one year after the introductory court hearing, but the caseload of the court can justify a longer delay. In the majority of cases, the hearing will last an hour to an hour and a half (if the case is not too complex).

Under the Judicial Code, the labour judge will direct the parties to make a compulsory attempt at conciliation before the pleadings, or else the court action will be nullified, but this is largely a formality and will not bring the parties to an agreement.

The labour courts are presided over by a professional judge, assisted by two lay judges, one of whom is an employer representative and the other a union representative or a representative of the independent contractors. There is also a labour prosecutor, who represents the public interest and intervenes specifically in social security matters or cases involving discrimination, harassment or violence.

Regarding language, proceedings conducted in the Flemish Region (Antwerp, Ghent, Leuven) take place in Dutch, those in the Walloon Region (Walloon Brabant, Hainaut, Liège) are conducted in French and those in the German-speaking municipalities (Eupen) are conducted in German. In the Brussels-Capital Region, the claimant may choose to initiate proceedings in French or Dutch, but the defendant can ask – under certain conditions – to have the proceedings transferred to the court where the other language is used.

The written judgment will normally be rendered one month after the pleadings, although it can take more time, depending on the size of the caseload. The court will first examine the compliance with formal requirements for proceedings (e.g., the claim being filed in due time) and, if the legal requirements are met, the merits of the case. If the court estimates that it has insufficient information, it can render an interim judgment, asking the parties to provide extra information or produce more documents.

To remedy an adverse judgment of the labour court, a party can file an appeal. This must be lodged within one month of the notification of the decision by the winning party's bailiff, except for social security cases, for which the term to lodge an appeal starts running at the moment the court's clerk sends the judgment. Appeals that are filed late will be dismissed by the labour court of appeal.

The procedure before the labour court of appeal is like the procedure at first instance. In fact, the whole case is heard again and is left to the appreciation of a higher court.

When a labour court of appeal decision has been reached by default, that is to say the losing party failed to appear, this party can apply the remedy of opposition. The case can then be brought back to the same court and a new decision can be requested. Since 2017, opposition has no longer been possible against first-instance judgments.

A party can decide to appeal a labour court of appeal decision before the Supreme Court. A petition must be filed within three months of the notification of the appeal decision. However, the Supreme Court will not re-examine the merits of the case, but will only pronounce a decision on questions of law. After its judgment, the Supreme Court will send the case back to a different labour court of appeal to decide on the merits.

The civil court procedure is *mutatis mutandis*, as with the labour courts. However, there are two major differences: the procedure must be initiated by writ of summons, not through petition, and the civil court has no lay judges. In the context of employment litigation, civil courts are not often used.

ii Alternative dispute resolution

There are three types of alternative dispute resolution modes foreseen by the Belgian Judicial Code: conciliation, mediation and arbitration.

Conciliation is organised by the court. Either party can ask the court to start a conciliation procedure, whether before the court procedure has started or at any time during the court procedure or, at the latest, during the oral pleadings. The judge can also propose conciliation to the parties, rather than a trial, subject to the parties' agreement. Conciliation is free of charge; however, it is little used.

In mediation, an impartial third party (the mediator) helps the parties to reach an agreement regarding their dispute. The mediation can be voluntary (i.e., outside legal proceedings) or judicial (i.e., initiated by the court within the framework of existing legal proceedings, but only if the parties consent). The mediator must be agreed by the Ministry of Justice.

If the parties reach a settlement agreement, this will be binding on the parties but not enforceable without obtaining ratification by the court.

The documents and communications arising from the mediation are confidential and cannot be used in a judicial or similar procedure (i.e., administrative or arbitral). In the event of a violation of this duty of confidentiality, the judge can award damages.

The advantages of mediation over a standard judicial proceeding are that it is both faster and cheaper; indeed, the only costs are the mediator's fees and expenses. However, this is a voluntary process, so both parties must be prepared to engage to find a solution.

Finally, any case of a patrimonial or non-patrimonial nature that can be concluded by a settlement agreement (and therefore is not linked to public order provisions) can be submitted to arbitration.

However, an arbitration agreement that was entered into prior to any dispute that falls within the competence of the labour court is automatically null and void. An arbitral clause in an employment contract is therefore invalid. There is an exception for employees who earn at least €71,523 gross per year[3] and are in charge of the daily management of the company, or discharge a similar function for a division of the company or a production unit; in such cases, an arbitral clause in the employment contract is valid.

3 Amount applicable as from 1 January 2020 (subject to indexation each year).

An arbitral award is final and binding for the parties, without the possibility of appeal before a court unless the parties have agreed the possibility of appeal before the court of first instance. Even in such a case, the competence of the court of first instance is limited to verification of the correct observance of procedural rules.

Compulsory enforcement of the arbitral award can only take place with the authorisation of the court of first instance, which will only refuse consent for formal reasons limited by law.

Arbitration is rather expensive because of the fees of specialised arbitrators. Few employment disputes in Belgium are presented to arbitrators.

iii Collective actions and labour disputes

Labour courts have no jurisdiction for collective actions as the legislature prefers collective disputes to be resolved by negotiation between the employer and the employees' representatives in special bodies created for this type of negotiation.

At company level, and depending on the number of employees, there will be a works council (minimum 100 employees) or a health and safety committee (minimum 50 employees) where representatives of both employer and employees can discuss and conclude collective bargaining agreements to avoid or resolve collective conflicts.

At sectoral level (for each kind of industry), there are joint committees at which representatives of employers and employees can negotiate and conclude sectorial collective bargaining agreements.

Despite being essentially excluded from intervening, the courts can intervene in certain associated matters. For instance, the labour courts can intervene in conflicts relating to the installation and functioning of the works council or the health and safety committee, disputes relating to collective dismissals or the closure of a company, and individual claims relating to the benefits established by collective bargaining agreements. The courts of first instance can also intervene in cases of criminal infringement or of threats to personal security during strikes or lockouts.

In addition, the labour courts are competent for all claims relating to social security issues involving employers (e.g., the payment of social security contributions), employees (e.g., unemployment benefits) or self-employed workers (e.g., disability benefits), as well as for all social assistance matters.

III TYPES OF EMPLOYMENT DISPUTES

The Belgian Judicial Code lists the employment disputes that fall within the competence of the labour courts. Among others, these are disputes relating to employment contracts, individual disputes regarding the application of collective bargaining agreements, disputes between employees during work time, civil disputes arising from infringements of criminal employment legislation (without prejudice to the competence of the criminal jurisdictions), disputes relating to transfers of undertakings, or to discrimination (including equality between women and men, racism and xenophobia) and psychosocial risks (e.g., violence or harassment), and disputes relating to medical examinations in the context of employment relationships.

Typical individual employment disputes arising from contracts concern the conditions of employment (such as salary, fringe benefits, working time with overtime and pay), privacy, or the termination of an employment contract (i.e., calculation of the notice period or indemnity in lieu of notice, constructive dismissal, judicial rescission, unfair dismissal and dismissal for serious reasons).

In the framework of employment disputes, it is unlikely that an employee will initiate a procedure before the courts of first instance (civil courts), because the labour courts have special competence for employment disputes (in comparison with the general competence of the courts of first instance) and also the labour courts tend to favour employees more than the courts of first instance do.

Therefore, only civil servants (who fall within the ambit of the Council of State rather than the competence of the labour courts) could initiate a procedure before a court of first instance to obtain damages because of alleged faults in their employment relationship.

In the case of a dispute concerning the right to privacy, employees can also file a complaint to the Belgian Data Protection Authority. The Litigation Chamber of the Data Protection Authority is an administrative disputes body that can propose settlements, issue orders, impose penalties and administrative fines, and freeze or prohibit processing of data. The procedure can be initiated by one of the parties involved or by the Inspection Service after it has concluded an investigation. The decisions of the Litigation Chamber can be appealed to the Market Court (a specialised chamber of the Court of Appeal of Brussels), which deals with cases of this kind in summary proceedings.

IV YEAR IN REVIEW

As the purpose of this section is to highlight interesting decisions from the past year, this is not an exhaustive review of the case law in 2019.

i Urgent cause

Dismissal because of urgent reasons (without notice) is, in principle, only possible if the employer who invokes it is aware of the facts justifying the dismissal and carries it out within three working days of being made aware of the facts. However, if the employer invokes a persistent breach of the employment contract as a reason for terminating the contract of employment for urgent reasons, the employer himself or herself shall determine the time from which this breach shall immediately and definitively render any professional cooperation impossible. To assess the timeliness of the dismissal given for an urgent reason, the judge in a case of this kind must verify whether the accusation continued until three working days before the dismissal.

According to a judgment of 27 May 2019,[4] by the Belgian supreme court, the Court of Cassation, the immediate dismissal of an employee because of continuous shortcomings can be lawful if the immediate dismissal is given within three working days of the termination of the shortcomings, even if, in the judge's opinion, the employer could have invoked the shortcomings as an urgent reason at an earlier stage. The Labour Court of Appeal had ruled incorrectly that in the event of continuous shortcomings the three-day period starts from the moment that one of the dismissed persons becomes aware of the facts.

In a judgment of 4 March 2019,[5] the Labour Court of Liège ruled on a dismissal for urgent cause relating to an employee who had used a company car for private purposes, which was explicitly prohibited by company policy. Of particular interest is the fact that the employer delivered the proof of this misconduct by submitting data from the car's geolocation

4 Court of Cassation, 27 May 2019, S.18.0025.N/4.

5 Labour Court of Liège, 4 March 2019, AR 18/245/A.

system. The dismissed employee argued that this proof could not be accepted by the Court as it violated his right to privacy.[6] The Labour Court accepted the use of the geolocation system data as its use fulfilled the conditions of legality, transparency, finality and proportionality, in view of the references to the company's car policy. However, while certain aspects of the conduct of the employee were certainly incorrect, this behaviour was by no means so serious that it had to result in the immediate termination of the employment relationship. The dismissal because of urgent reasons was therefore not justified.

ii Reasons for dismissal

If an employee, in accordance with national Collective Bargaining Agreement (CBA) No. 109, requests the concrete reasons for his or her dismissal by registered letter, the employer must also provide them by registered letter. If the communication has been made by other means, the employee can claim payment of a fixed fine. In a judgment of 17 May 2019,[7] the Labour Court of Appeal of Brussels clarified that this does not constitute an abuse of rights. The employer had claimed an abuse of rights, because the employer had indeed communicated the concrete reasons and the employee had actually taken note of them. The employer relied on a disputed point of view in legal doctrine that demanding such a fine when the employee has acknowledged becoming aware of the reasons for the dismissal by other means constitutes an abuse of law. The Labour Court ruling, however, refuted this. In fact, the purpose of CBA No. 109 is not to impose an overly formalistic framework. The CBA also allows the employer to communicate the concrete reasons for the dismissal on the employer's own initiative (e.g., during or shortly after the dismissal), in which case the formal requirements do not apply. The fact that, in this case, the employer did not communicate the concrete reasons of its own accord, and the employee did submit an application by registered letter, meant that there could be no deviation from the formal requirements imposed on the employer. In the circumstances, the communication had to be made by registered letter.

iii Discrimination based on age

The Labour Court of Leuven, in a judgment of 11 April 2019,[8] declared a sectoral collective agreement non-applicable as it linked wage increases to the seniority of the employee, which the Court deemed to be contradictory in relation to the prohibition of discrimination based on age. In this case, in the eyes of the Labour Court, the collective bargaining agreement stretched the concept of seniority too far, as it interpreted as relevant professional experience any professional experience in any profession (even if completely different from the function discharged in the current company) and of any nature (including small part-time jobs), and it equated periods of incapacity (such as absences due to illness, accidents, unemployment and thematic leave) with actual professional experience.

6 Article 22 of the Constitution and Article 8 of the European Convention on Human Rights.

7 Labour Court of Appeal Brussels, 17 May 2019, AR 2018/AB/366.

8 Labour Court Leuven, 11 April 2019, AR 18/457/A.

iv Domestic work versus telework

Although the concepts of domestic work and telework are often confused with each other because in both situations the worker does not work from the office of the employer, there are important differences. In a judgment of 2 July 2019,[9] the Brussels Labour Court of Appeal repeated the provisions of Title VI of the Law of 3 July 1978 on domestic work, making it clear that, as mentioned in Article 119.1, Section 2, these provisions do not apply to workers targeted by the collective agreement on telework concluded in the National Labour Council. Teleworkers cannot therefore claim the lump-sum allowance of 10 per cent of their salary as reimbursement of costs. In this case, after the closure of an office, the employee chose voluntarily to work from home, using the necessary information technology made available to her by the employer, instead of moving to another office of the company. After the ending of the employment contract, the employee demanded payment of the lump-sum allowance for domestic workers. The Labour Court of Appeal reiterated that telework may be carried out at the home of the teleworker or at any other place chosen by the teleworker. According to the Court, the essential difference between a domestic worker and a teleworker is that the latter makes use of the necessary modern means of telecommunication, which is not the case for the domestic worker. Moreover, the person concerned was under the authority of the employer, who was able to follow her activity precisely by means of the computer tools made available to her, while domestic workers are normally not under the direct supervision of an employer. The Court also referred to the voluntary nature of the teleworking arrangement for the employee and employer concerned. As the employee chose to work from home using the means made available to her by her employer (instead of moving to another office), the teleworking arrangement was voluntary. The Court therefore rejected the claim that she was a domestic worker.

v Wages

In a judgment of 20 May 2019,[10] the Court of Cassation answered the question of whether benefits provided by a third party to an employee should be seen as part of the employee's wage, on which social security contributions must be paid. Pursuant to Article 2 of the Wage Protection Act of 12 April 1965, on the protection of the remuneration of workers, remuneration should be understood to mean the salary from the employer that the worker is entitled to be paid, because of the worker's commitment. The remuneration allocated to workers for work performed in performance of their employment contract therefore constitutes remuneration within the meaning of the Wage Protection Act, and it is this concept of remuneration that is taken into account for the calculation of social security contributions. Thus, the benefits that a third party pays to the employees of a company, for them to sell the third party's products at their place of work to the customers of their employer, constitute 'compensation for the work performed in execution of the existing employment contract between the employees and the company'.

On 16 September 2019,[11] the Court of Cassation had to rule on the question of whether the employee has to pay back undue wages in gross or net form to the employer. Specifically, the question arises as to whether, in addition to the net salary, the employee

9 Labour Court of Appeal Brussels, 2 July 2019, AR 2018/AB/278.

10 Court of Cassation, 20 May 2019, AR S. 17.0063.F.

11 Court of Cassation, 16 September 2019, AR S.17.0079.F – S.18.0042.F.

must first reimburse the withheld tax on wages and, second, the employee's social security contributions. The Court stated that the withheld tax on wages should be reimbursed by the employee, but not the employee's social security contributions, as the relevant laws have explicitly foreseen a claim for employers against the National Social Security Office.

vi Bonuses and commission

The Labour Court of Appeal of Brussels ruled on 8 January 2019[12] that if the employer does not fix the targets to be reached for a bonus to be paid to its employees, it should pay the bonus anyway. According to the employment contract in this case, an employee was entitled to a bonus of 16 per cent of the target salary if objectives that were to be determined 'on an annual basis and by mutual agreement' were achieved. However, no targets were agreed for four years (2009–2012), so the employer paid a fixed bonus. In 2013 and 2014, there was again no agreement on the targets to be achieved, but at that time the employer refused the payment of any bonus because there was no agreement to pay a lump sum. After termination of the employment contract on account of reaching retirement age, the employee filed a claim for the overdue bonus payments. In respect of the bonuses for 2013 and 2014, for which no fixed amount had been agreed, the Labour Court stated that by not setting objectives the employer had prevented an essential condition for obtaining the variable salary from being met. In this context, Article 1178 of the Civil Code stipulates that a condition is deemed to have been fulfilled if a debtor who has committed himself or herself under that condition has in fact prevented it from being fulfilled. An error is required for this, but the failure to establish the objectives was, according to the Court, a contractual error on the part of the employer. As a result, the employee was deemed to have fulfilled the objectives.

In a similar judgment, the Labour Court of Appeal of Antwerp[13] awarded a commission to an employee when the employer had not set any objectives. In this case, the employee in question had concluded an employment contract with a fixed gross monthly salary and a commission 'with a guaranteed minimum of €250 per month only during the first 12 months and a maximum of €1,500 per month'. In the years following the conclusion of the contract, the fixed gross monthly salary was increased several times. In 2016, an addendum was drawn up with the intention of abolishing the commission, but this addendum was never signed by the employee. In 2017, following a conflict over a unilateral change of position, the employee claimed arrears of salary on account of the fact that the commission objectives had not been determined. The employment contract was eventually terminated. According to the Labour Court, the employer was obliged to provide the employee with a commission scheme, because of Article 1134 of the Civil Code, which states that the contracting party who alone is able to bring about the fulfilment of the suspensive condition must, according to the rules of good faith, do everything in his or her power to make this possible. The employer made a mistake, as a result of which, in accordance with Article 1178 of the Civil Code, the conditions for entitlement to the maximum commission were deemed to have been met.

12 Labour Court of Appeal Brussels, 8 January 2019, AR 2017/AB/661.

13 Labour Court of Appeal Antwerp, 19 June 2019, AR 2018/AA/370.

V OUTLOOK AND CONCLUSIONS

In what seems to be a general trend, the total amount of litigation cases before labour courts is decreasing slightly. This could be related to alternative forms of dispute resolution. This trend is likely to continue.

As 2020 is a year of social elections, the rather technical and complicated procedure required to organise social elections will certainly result in a lot of cases being brought before the labour courts, which can render decisions on disputes relating to the specific points of the election procedure. Based on the previous social elections, 150 to 200 cases can be expected.

Further, although the Litigation Chamber of the Data Protection Authority has commenced activities, until now it has barely touched upon privacy rights of employees under the EU General Data Protection Regulation. Nevertheless, privacy continues to be an important issue raised before the labour courts and it is certainly possible that the activities of the Data Protection Authority will result in greater significance being attached to employees' privacy rights.

Also, the issue of sexual harassment has been in the news, but until now cases relating to sexual harassment at work have been relatively rare. This low amount of case law could be attributable to the fact that there are internal intervention procedures within companies (led by a prevention adviser), which are usually followed before any external remedies are sought.

Finally, in 2019 in the *CCOO* case,[14] the Court of Justice of the European Union (CJEU) delivered a remarkable judgment with regard to the obligation for employers to register working time. As Belgium does not recognise a general legal obligation to register working time, many employers do not have a registration system. It is plausible that, in future cases, labour courts could award overtime pay when the employer does not have a registration system, by referring to the case law of the CJEU.

14 Court of Justice of the European Union, 14 May 2019, C-55/18, *Federación de Servicios de Comisiones Obreras (CCOO) v. Deutsche Bank SAE*.

Chapter 2

BRAZIL

Rogério Podkolinski Pasqua[1]

I INTRODUCTION

Labour law in Brazil is based on the Constitution of the Federative Republic (the Constitution). Inspired by the European social welfare state, the Chapter focusing on social rights is included in Title II: Fundamental Rights and Guarantees, alongside public freedoms and political rights. This Chapter has a special focus on the right to work (i.e., the elevation of labour as a fundamental value of society, as the basis of social justice and human dignity); the protection of workers and their dignity, including a detailed list of basic labour and social security rights (Article 7); and public warranties regarding collective representation and trade associations (Articles 8 and 9).

Based on these constitutional provisions and on the prominence attributed to the value of labour, a very complex system has developed regarding labour relations, including: (1) a labour law regime of significant proportions and reach, which addresses in detail individual and collective labour relationships, and which is constituted by the Consolidated Labour Laws (or CLT – a type of labour code, published in 1943), by several laws and by technical standards set by the public authorities, primarily in relation to occupational health, hygiene and safety; (2) labour oversight bodies and inspectorates, such as the Ministry of Labour and the Labour Public Prosecutor's Office; and (3) the labour courts, a dedicated arm of the judicial branch, specialising in both individual and collective labour relationships.

The labour courts consist of the Superior Labour Court (TST), which is in charge of standardising the application of law in labour matters; 24 regional labour courts, virtually one per state; and the labour judges, who work in labour courts throughout the entire national territory. This is the busiest branch of the judicial system in Brazil.

The thirteenth issue of the annual statistical report by the National Council of Justice[2] lists the following as the most popular matters in the cases filed at the labour courts: (1) issues relating to the termination of an employment contract and severance pay; (2) employers' civil liability, notably indemnification by way of moral damages; (3) issues associated with the composition of remuneration, wage differences, indemnification payments and benefits; and (4) unemployment insurance.

1 Rogério Podkolinski Pasqua was formerly a partner at Pessoa Advogados. The information in this chapter was accurate as at February 2018.

2 National Council of Justice, Justice in Numbers 2017 (Base Year 2016) (www.cnj.jus.br/programas-e-acoes/pj-justica-em-numeros).

In addition to the bodies that form the labour courts, labour law matters may also be dealt with by the Supreme Federal Court (STF). The STF is Brazil's constitutional court and is vested with the power to interpret the provisions of the Constitution in relation to any matter, whether it is to provide a final decision in a case or regarding a point of law.

II YEAR IN REVIEW

The year 2017 was particularly important for labour relationships in Brazil. The serious economic crisis – with high unemployment rates and permanent loss of jobs because of the failure of industry to compete effectively and contribute to the national economy – required a prompt response. It was necessary to reverse this process and create new jobs. In response to the pressure of this grave situation, the central government proposed a series of laws to introduce significant changes to the labour law then in effect.

Law No. 13,429, which was enacted on 31 March 2017, eliminated the legislative vacuum on outsourcing. This matter, which had been governed for decades on the basis of precedents drawn from case law of the TST, required legislative action that could, once and for all, clarify the legality of hiring contractors, establish the limits and conditions of this type of contract and define the liabilities of those involved, particularly the hiring company. Notably, once the Law was enacted, the Attorney General's Office – a division of the Public Prosecutor's Office – filed a direct claim of unconstitutionality with the STF.

Law No. 13,467/2017 (the Labour Reform), which was enacted on 13 July 2017, introduced hundreds of amendments to the CLT. More recently, Provisional Measure No. 808, issued on 14 November 2017, has already amended provisions of the Labour Reform that were either unwanted or required clarification.

During the course of 2017, Brazilian labour law underwent broad and significant changes, and these are giving both law practitioners and parties in labour relationships sleepless nights, primarily because of the degree of uncertainty the changes have introduced.

Any legislative change of this magnitude brings legal insecurity, especially when it concerns such a sensitive and prominent matter as labour relations. Discussions on the validity of the new provisions (their compliance with the Constitution), on the application of the new rules over time, on the effects of these changes in relation to existing situations, on the existence or absence of acquired rights or a perfect legal act to determine the applicability of rules, etc. are always expected. However, in the case of the new Brazilian laws, the difficulties inherent in any legislative amendments are compounded by many others because of the lack of conceptual rigour in tackling this reform.

The fact is that no clear, coherent project for the adoption of a new labour law model is discernible from the various changes. It is, in effect, an inharmonious set of case-by-case changes to the previous legislation, and especially to some uniform jurisprudential positions adopted by the TST, which were considered excessively protective (in fact, one of the provisions attempts to set limits on any legal standard-setting activity by the labour courts, prohibiting them from 'creating obligations not set out in law', whatever that means).

Once again, Brazil has missed an opportunity to discuss as deeply as necessary the labour law model that would be most appropriate, wasting the chance of ensuring at least unity and coherence in the set of standards that comprise Brazilian labour law, which for decades has been characterised by the overlapping of legislative texts, which only gain force after years of conflict over their interpretation in the courts.

The new laws do not make the lives of entrepreneurs, employees or law practitioners any easier; years of uncertainty and instability in labour relationships are expected to result, and a potential increase in the amount of litigation cannot be ruled out. The legal landscape is unpredictable and anything that may be said now will be temporary and subject to questioning and review.

Of all the changes brought by the Labour Reform, the emphasis given to individual or collective bargaining deserves special focus. An advance was made in the sense of allowing the parties, whether directly or through their trade associations, to establish remuneration and working conditions.

Brazilian labour law, which was institutionalised and consolidated in the 1930s and 1940s, is based on fascist and corporate doctrines in force at that time. Soviet communism was inadmissible and had to be avoided at all costs, but liberal democracy was not welcome either. To Getúlio Vargas (the autocratic president at the time) and his collaborators, providing freedom to private persons to determine and defend their own interests would only generate social upheaval and cause private interests to prevail over public interests. A strong federal government was required to counterbalance the demands of private individuals and harmonise their activities for a 'greater good'. Thus the role of the federal government was to suppress the freedom of private parties and direct their behaviour, so that they could contribute to the nation's prosperity.

To advance these ideas, the federal government intervened in labour relationships on a massive scale. To prevent the consolidation of free syndicalism in Brazil, the government repressed the workers' movement that was spontaneously arising in São Paulo and Rio de Janeiro. It suppressed the freedom to strike and created state structures – the Ministry of Labour and Industry and the labour courts – to keep the means to resolve individual and collective labour conflicts within the scope of the federal government. The government, through intensive legislative activity, also sought to comprehensively regulate individual labour relationships, restricting as much as possible the space for negotiations between employees and employers and the entities representing them.

Because of this brutal state intervention in labour relationships, Brazilian labour law developed peculiar characteristics, different from those in countries with a democratic tradition. Instead of limiting the establishment of minimum mandatory working conditions (minimum working age, establishment of a minimum wage, limits to working hours, establishment of health and hygiene standards in the workplace and protection against accidents), the law regulated individual labour relationships exhaustively, to such a level of circumstantial detail and formal specification regarding the particularities of certain types of work that it denied employers and employees, considered individually, the possibility of contractually establishing working conditions.

From the standpoint of collective labour relationships, state intervention was even deeper. The idea of trade union freedom was simply disregarded. Unions were no longer those spontaneous workers' associations, constituted according to what seemed to be most appropriate to safeguard their interests. They became semi-public entities with little or no autonomy whatsoever. Their existence was conditional upon them being controlled by the public authorities, which rather than take into account the unions' relevance for the groups being represented were concerned instead with the fulfilment of formal requirements provided for in law (trade union classification and union solidarity). The unions' power of representation was a result not of recognition by the workers of their importance in defending the workers' interests but of state warrant. The funding of their activities came

from taxes, the 'union contribution', which all employees were obliged to pay, including those who were not members of the entity. Collective negotiations were limited to what was not set out in law and did not contradict it. Strikes were considered to be antisocial conduct, contrary to the interests of national production, and the judicial branch was in charge of the compulsory arbitration of collective conflicts within the scope of an action referred to as 'collective bargaining'.

With rare and laudable exceptions, unions – isolated by the federal government and with no need to obtain their legitimacy from the groups of workers – became artificial structures that were more concerned about issues regarding the entity itself than about the interests of the workers they supposedly represented.

Finally, a Labour Law was established, providing basic legal regulation of employment relations. The Labour Law had to be observed blindly and unquestioningly, without thought of any adaptation to the conditions and circumstances of each legal instance or to the peculiarities of each relationship. This Labour Law, which was of a general, abstract and impersonal nature, was imposed uniformly, allowing for little in the way of alternatives to provide distinct treatment to labourers and managers, trade and industry workers, workers with different levels of education or collaborators in small businesses and large corporations, etc. There was only one employment contract for the entire universe of workers in Brazil; this supposed that all workers, regardless of the peculiarities inherent in their work and position, were in a disadvantageous position and unable to challenge the interests of their employers.

As regards the concept of negotiated agreements providing a basis for law (whether employment contracts or collective bargaining agreements), these were given a secondary role that tended to irrelevance. Even worse than this, they were seen with scepticism and it was supposed that all negotiations, unless clearly favourable to workers, consisted of a stratagem by employers to avoid the labour commitments provided for in law.

The 1988 federal Constitution provided some relief to this situation. It took important steps by eliminating the federal government from labour relationships and assigning workers and employers an important role in defining working conditions and resolving conflicts:

a it adopted a pluralist vision of law by imposing 'recognition of collective labour conventions and collective bargaining agreements' (Article 7, Item XXVI) and by determining that through collective negotiations it is possible to reduce wages (Article 7, Item VI) and change working hours (Article 7, Items XIII and XIV);

b it guaranteed trade union freedom (Article 8, main paragraph), so that the 'law cannot require authorisation by the federal government for the foundation of the trade union . . . considering that the public authorities are prohibited from interfering with and intervening in trade union organisations'; and

c it recognised the right to strike (Article 9, main paragraph).

However, the transition to a labour law that is typical of democracies (i.e., based on negotiations between employers, employees and their respective trade associations) was not completed at that time. Legislation remained a crucial source of labour law. Although collective conventions and bargaining agreements gained relevance, they were still regarded with scepticism and the courts were granted the power to decide whether to validate clauses that contradicted legal provisions or attempted to eliminate their application. Although now autonomous, trade unions continued to seek a legal foundation for their power of representation and to have their activities funded from a tax source.

Negotiations between employers and employees, at an individual level, were still not even mentioned, except for provisions that were clearly favourable to employees (i.e., those adding to advantages provided in law) with very rare exceptions.

This was the situation at the time of the publication of the recent new laws, especially the Labour Reform. Among the several articles of law dealing with circumstantial issues, which, as mentioned above, limit the prospects for the establishment of a clear unified labour law project, some provide encouragement about the possibility of the definition of working conditions by the actual parties and their trade unions, without the intervention of the federal government.

By amending the text of Article 8 of the CLT, the Labour Reform determines that 'during review of the collective labour conventions and collective bargaining agreements, the labour court will exclusively analyse compliance with the crucial elements of the juristic act . . . and will base its activity on the principle of minimum intervention in the autonomy of the collective will'.

In this context, Article 611-A of the CLT, introduced by the Labour Reform, provides that:

> *[C]ollective labour conventions and collective bargaining agreements prevail over the law, when providing for the following, among other things: I – agreement regarding work shifts; II – yearly time bank; III – breaks during shifts, within the minimum limit of 30 minutes for shifts of over six hours; . . . V – job plan, wages and functions compatible with the employee's personal condition, as well as identification of trust positions; VI – corporate regulation; . . . VIII – telework, on-call system and intermittent work; IX – remuneration according to productivity, including tips received by the employee and remuneration according to individual performance; X – work shift registration system; XI – bank holiday transfer; XII – hazard degree classification; XIII – extension of work shift in unhealthy environments, without prior licensing from the relevant Ministry of Labour authorities; XIV – incentive award in goods or services, eventually granted in incentive programmes; XV – profit sharing.*

Finally, virtually all issues associated with labour relationships – personnel organisation, duration of work, categories of remuneration and other financial advantages – can be the subject matter of free collective negotiations, including determining clauses against legal provisions on the same topics.[3]

Also introduced by the Labour Reform, Article 477-B of the CLT creates the possibility of full discharge of the employment contract, provided that it is expressly set out in a collective labour convention or collective bargaining agreement that introduces a 'voluntary dismissal plan'. At first, this provision seems misplaced in the discussion on the prevalence of negotiated rights over legal provisions; however, one cannot underestimate its importance. The inclusion of the provision in the CLT is a symbolic stand by the legislative branch, favouring the prevalence of collective labour conventions and collective bargaining agreements. In contrast to the consolidated case law of the TST, the STF considered such a broad settlement possible

3 Article 611-B of the CLT as amended by the Labour Reform includes a list of the topics that cannot be the subject matter of collective bargaining, which, with only a few variations, coincides with the list of workers' fundamental rights, provided for in the federal Constitution; among these are unemployment insurance, minimum wage, night shift remuneration greater than that for day shifts, weekly paid day off, paid annual holidays, maternity leave, paternity leave, occupational health, hygiene and safety, and retirement.

and did so based on a broad interpretation of Article 7, Item XXVI of the Constitution, which sets out 'acknowledgment of the collective labour conventions and collective bargaining agreements'. The validity of the general discharge of the employment contract based on collective labour conventions or bargaining agreements is a historical milestone and represents a paradigm shift.

From the perspective of the individual relationships, the changes introduced by the Labour Reform broke the old taboos, setting out the possibility of freer negotiations between employers and employees; for example:

a Article 59 (main section and Paragraph 5) allows that an hour compensation scheme can be established on a case-by-case basis, even with the adoption of a time bank (previously only possible through collective labour conventions or bargaining agreements);

b Article 59-A allows the adoption of the 12 x 36 system (12 hours of work followed by 36 hours of rest) (also previously only possible through collective negotiation); and

c Article 134 allows the division of holidays into three blocks (previously forbidden).

The Labour Reform also mitigates the presupposition of financial disadvantage. It establishes that workers with a higher level of education and who earn higher wages[4] do not need such overt legal protection and may enjoy greater freedom to negotiate, and to establish practically all their working conditions directly with their employer. The Article 444 Labour Reform amendment to the CLT sets out this freedom to negotiate, attributing validity to contracts that the employees may enter into with their employers, even if they address matters specific to collective negotiation. This provision makes express reference to Article 611-A (see above), allowing that those employees with a higher educational degree and higher wages discuss the matters already listed directly with their employers, without the need for intervention by the union.

Also in relation to such employees, Article 507-A of the CLT introduced by the Labour Reform highlights the circumvention of the judicial branch in labour matters, as it admits the possibility of conflicts between such employees and their employers being submitted to private arbitration as an alternative to a judicial solution.

It is also necessary to put the principles of inalienability and non-waiver of labour rights into perspective, as they were fully in force in Brazilian law prior to the 2017 reform. The new wording of Article 652 of the CLT sets out the possibility of the labour court 'deciding about the ratification of extrajudicial agreements in matters under the jurisdiction of the labour courts'. Therefore, it creates the possibility of employee and employer resolving conflicts and reaching agreement through negotiation, with mutual concessions, and the judiciary attributing to the agreement the immutability typical of final and non-appealable court decisions. In a similar vein, the Labour Reform makes provision for the possibility of employees and employers entering into a settlement mechanism regarding labour obligations before the relevant union, whether the employment contract is actually in effect or not.[5]

The emphasis on negotiated agreements as sources of law and a basis for resolution of conflicts is certainly what is most important in the Labour Reform. It proposes a paradigm shift, establishing in law the definition of what is basic and non-negotiable (i.e., what constitutes

4 Those who earn a salary equal to or greater than twice the highest social security benefits – approximately 11,000 reais.

5 Labour Reform amendment of Article 507-B of the CLT.

the ethical boundaries of labour exploitation); the foundational negotiated agreements, on an individual or collective level; and the definition of the other labour conditions, with power to overrule any legal provisions on the same matters.

In this respect, the Labour Reform is on the right path, creating conditions for employment relationships to be flexible and adaptable to new situations and circumstances, notably in times of crisis.

There remain other steps to be taken for this shift to be complete and for Brazil finally to have a labour law system that is compatible with the democracy it intends to be.

It is especially necessary that the union structure be reviewed and a system of full union freedom be adopted. It is not enough to encourage collective negotiations and privilege negotiated rules over those made into laws if the unions – the entities responsible for such negotiations and collective contracts – do not truly represent the workers and remain insensitive and distant from their concerns and interests.

Unfortunately, this measure is not within sight. The union system, with the defects stemming from its corporate origins still in place, is set out in the Constitution. Any change will require an extremely qualified quorum, and at present that degree of consensus does not exist.

To the maximum extent possible, the Labour Reform has attempted to advance the emancipation of the unions. Articles 545, 578, 579, 582, 583, 587 and 602 of the CLT, in wording provided by the Labour Reform, allow for an optional union contribution, instead of the previous obligatory contribution.

This change – the only one that did not require a constitutional amendment – is welcome, but ideally it would be accompanied by many other measures that would bring coherence to the union system.

III OUTLOOK AND CONCLUSIONS

Intense discussion is expected regarding the amendments set out in the Labour Reform, both with respect to their validity and conformity with the Constitution and with regard to the meaning that should be given to them to guarantee the uniformity of the system.

The discussions have already begun. The National Association of Labour Court Judges has published its view on the main aspects of the reform. The TST, on 30 November 2017, published notice of a consultation, stating that it will evaluate proposals for amendments to adapt TST precedents to the wording of the new legislation, and calling for entities representing the union movement, companies and attorneys to contribute to the debate.

A dozen direct actions challenging the constitutionality of the reform – an instrument of concentrated constitutionality control – are in progress at the STF, requesting an abstract analysis of the conformity of legal texts with the Constitution.

The various direct actions regarding unconstitutionality filed by the Attorney General's Office and by workers' federations and confederations (bodies that integrate the union system and link primary entities at regional and national levels) address the ending of obligatory union contributions and other matters addressed by the Labour Reform (e.g., intermittent work and a procedural matter relating to attorney's fees).

As if the intense legal writing and case law debate were not enough, the legislative branch, which approved the Labour Reform, is divided and unable to take a clear position on the new legislation. This can be seen in the progress of Provisional Measure 808/2017, which makes a few adjustments to the original legal text of the Labour Reform, and is at

risk of losing effectiveness if it is not voted on and approved by 15 May 2018. To date, the executive branch has proposed more than 900 amendments to the text of Provisional Measure 808/2017, which clearly demonstrates the lack of consensus regarding the changes to the labour law.

Given that the entire situation is quite volatile, it is still too early to say how these changes to Brazilian labour law will be received. The Labour Reform was possible because it was established through an ordinary law; however, this is an inappropriate type of legislation for amendments or revocations of constitutional provisions. The coming months (maybe years) will be characterised by intense discussion in legal, corporate and union circles about the provisions of the Labour Reform, its reach and appropriate meaning.

It will take some time until the most controversial aspects of the case law of the STF and the TST are reconciled, especially as regards adapting to a culture in which collective negotiation is the main instrument for defining working conditions and resolving labour conflicts.

The unions will need to reinvent and legitimate themselves to take part in effective negotiations to maintain job positions and good working conditions and to guarantee the material conditions necessary for their own livelihood.

It is necessary to break the habit of looking to the law for answers to resolve deadlocks and labour conflicts. It is necessary to see negotiated agreements as the legal basis for and legitimate means of governing labour relationships.

The Labour Reform, with all its defects, brings important advances, procedures and institutions that can contribute to the modernisation of labour relationships in an increasingly complex and competitive international situation and, especially, to the reduction of litigation in labour relationships.

With respect to the sense of uncertainty, which will require maturity on the part of those concerned, caution certainly does not mean coming to a standstill, conformism or inertia. It is important that the innovations and concepts introduced by the Labour Reform are put into practice by business owners to ensure that labour relationships adapt to the demands of the economic moment, with the lowest social cost possible.

Chapter 3

CHINA

Zhenghe Liu, Hongquan (Samuel) Yang and Kaitian (Kai) Luo[1]

I INTRODUCTION

Labour disputes in China mainly show the following characteristics:

a Since the implementation of the Labour Contract Law in 2008, the number of labour dispute cases has surged and remains high. According to data published by the National Bureau of Statistics of China, the total number of national labour dispute arbitration cases was 828,410 in 2016, 785,323 in 2017 and 894,053 in 2018.[2]

b The success rate for employees in labour dispute cases is relatively high. According to data published by the National Bureau of Statistics of China relating to labour dispute arbitration cases that closed in 2018, employees were successful in 31 per cent of cases and employers were successful in 10 per cent of cases. In the remaining majority of cases (59 per cent), there was partial success for the two sides.

c Labour dispute cases are still mainly about remuneration, termination of employment contracts and benefits disputes, although disputes regarding non-compete agreements and confidentiality are continuously increasing.

d The handling of labour dispute cases is subject to mandatory labour dispute arbitration as a first procedure.

e Regarding the handling of labour dispute cases, the relevant provisions of local regulations, normative documents and the judging standards of local labour arbitration and courts vary.

The substantive legal basis for resolving labour disputes includes:

a laws (including the Labour Law, the Employment Contract Law, the Trade Union Law, the Law on Mediation and Arbitration of Labour Disputes, the Social Insurance Law, the Employment Promotion Law, the Law on Prevention and Control of Occupational Disease and the Work Safety Law);

b the relevant judicial interpretation of the Supreme People's Court on employment law;

c administrative regulations;

d local regulations and rules;

e administrative regulations of state administrative departments of labour; and

f normative documents issued by local labour administrative departments.

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2 From the data published by the National Bureau of Statistics of China, available at http://data.stats.gov.cn/easyquery.htm?cn=C01 (in Chinese only).

In addition, the Civil Procedure Law, the Law on Mediation and Arbitration of Labour Disputes and the relevant judicial interpretations set out detailed provisions on the procedural aspects of labour dispute resolution.

China's labour legislation adopts the principle of 'inclined protection', which is to say that while it does take into account the interests of employers, it is more inclined to protect the interests of employees. The principle of inclined protection is reflected in some legislative content and in the standards observed in judicial practice.

II PROCEDURE

The resolution of labour disputes in China can involve consultation, mediation, arbitration and litigation.

Consultation is mostly used to settle labour disputes within an enterprise. When a dispute arises, an employee may consult with his or her employer, or request the trade union or a third party to jointly consult with the employer, to reach a settlement agreement.[3] If the procedures used and the content of the settlement agreement are found to be lawful and effective, the arbitral tribunal may use the settlement agreement as evidence.[4]

When a labour dispute arises, if one party does not desire a consultation, if both parties fail to settle the dispute through consultation, or if one party does not comply with the concluded settlement agreement, either party may apply for mediation by the labour dispute mediation committee within the enterprise, or a legally established grassroots people's mediation organisation, or an organisation established in a township or neighbourhood community that has a labour dispute mediation function. Where an agreement is reached through mediation, a mediation agreement paper shall be drawn up. That paper shall be signed or sealed by both parties and take effect after the mediator signs it and the seal of the mediation organisation is affixed thereon. The executed mediation agreement paper is binding upon both parties. If one party fails to perform the concluded mediation agreement within the time prescribed in the agreement, the other party may apply for arbitration. If a mediation agreement is drawn up on a matter of delayed payment of labour remuneration, medical expenses for a work-related injury, economic compensation or damages, and the employer fails to comply within the time prescribed in the mediation agreement, the employee may apply to the people's court for a payment order based on the mediation agreement and the people's court shall issue a payment order according to the law.

Consultation or mediation is not a legally mandatory procedure for resolving labour disputes. When a dispute arises and the parties are not willing to make use of consultation or mediation, or the consultation or mediation fails, or one or both parties fail to comply with the settlement or mediation agreement, the parties may apply directly to the labour dispute arbitration commission that is responsible for arbitrating disputes arising within the district under its jurisdiction.

The statute of limitations for applying for labour arbitration shall be one year, from the date when the party concerned becomes or should have become aware of the infringement upon its rights. The one-year statute of limitations shall be suspended if one party raises

3 See Article 4 of the Law on Mediation and Arbitration of Labour Disputes.

4 See Article 11 of the Provisions on Negotiation and Mediation of Labour Disputes of Enterprises.

any claim against the counterparty. For example, if the employee seeks any remedy from the competent authorities, or if the employer agrees to perform its obligations, the one-year statute of limitations shall be recalculated.

In the case of a dispute arising from a default in payment of labour remuneration during the existence of an employment relationship, the employee may apply for labour arbitration without being restricted by the one-year time limit. However, if the employment relationship ends, the labour arbitration application for the dispute must be submitted within one year of the end date of the employment relationship.

The arbitration tribunal shall be composed of three arbitrators, although simpler cases may be arbitrated by one arbitrator.

When a labour dispute arbitration tribunal hears a labour dispute case, the procedure is in five stages: the applicant's statement on the claims and facts; the respondent's defence; adducing the evidence and cross-examination; the arbitrator's inquiry; and the debate. The arbitral tribunal shall mediate before making an award. It will render the award within 45 days of the date on which the labour dispute arbitration commission accepts the arbitration application.

If any party is dissatisfied with the arbitral award, or the labour dispute arbitration commission rejects an application or fails to make a decision within the specified time limit, the labour dispute in question may be submitted to a people's court that has jurisdiction to judge. In the case of trial of first instance of a civil case by a people's court, the judges and the jurors shall jointly constitute a collegiate or the judges shall constitute a collegiate. There shall be an odd number of collegiate members. Civil cases using the simplified procedures shall be tried by one judge. The procedure for hearing labour dispute cases is conducted in six stages: the plaintiff's statement on the claims and facts; the defendant's defence; adducing the evidence and cross-examination; the court investigation; a debate between the parties; and final statements by the parties. When a civil dispute lawsuit lodged by a litigant with a people's court is suitable for mediation, mediation shall be carried out first, except when a litigant refuses mediation. If a litigant disagrees with a judgment of first instance by a people's court, the litigant shall have the right to file an appeal with the higher-level people's court within 15 days of the date of the judgment letter being served. If a litigant disagrees with a ruling of first instance by a people's court, the litigant shall have the right to file an appeal with the higher-level people's court within 10 days of the date of the ruling letter being served.

China's labour law provides for a collective negotiation system, in which the employees and the employer may enter into a collective contract on labour remuneration, working hours, rest days and holidays, labour safety and hygiene, insurance and welfare and other related matters. Concluded collective contracts shall be submitted to the labour administrative authority; where the labour administrative authority raises no opposition within 15 days of receipt of the text of a collective contract, the collective contract shall come into force. A collective contract concluded according to the law shall have binding force upon both the employer and the employees.

If a dispute arises in the course of collective consultation and it cannot be resolved by the parties through consultation, one or both parties may apply in writing for the administrative department of labour security to coordinate a resolution of the dispute. The administrative department of labour security shall bring together the relevant personnel from three sides, such as the labour union and the enterprise organisation, at the same level to jointly coordinate a resolution of the dispute.

If there is a dispute about the implementation of a collective contract, an application may be filed with the labour dispute arbitration committee to seek arbitration under the law. The resolution procedure is basically the same as that used for individual labour disputes.

III TYPES OF EMPLOYMENT DISPUTES

According to the Law on Mediation and Arbitration of Labour Disputes, disputes that arise between employers and employees within the territory of China mainly fall within one of the following categories:

a disputes arising from the confirmation of labour relations;
b disputes arising from the conclusion, performance, alteration, cancellation or termination of labour contracts;
c disputes arising from expulsion, charge, resignation or severance;
d disputes that arise relating to working hours, periods of rest and vacation, social insurance, welfare benefits, training and occupational protection;
e disputes arising from labour remuneration, medical expenses for job-related injury, economic compensation or damages, inter alia; and
f other labour disputes prescribed by laws and regulations.

To facilitate litigation and to standardise the work of the people's court on filing, trial and judicial statistics, the Supreme People's Court has formulated the Provisions on Causes of Action for Civil Cases to classify and manage civil cases. According to these Provisions, labour dispute cases largely fall into one of two categories: labour disputes and personnel disputes.

Labour disputes can be subdivided into disputes about employment contracts, social insurance or benefits. Disputes about employment contracts can be further divided into disputes about confirmation of employment relations, collective labour contracts, labour dispatch contracts, disputes about part-time employment, disputes about claims for labour remuneration, disputes about financial compensation and disputes about non-compete agreements. Disputes about social insurance can be further divided into disputes about pension insurance, work-related injury insurance, medical insurance, maternity insurance and unemployment insurance.

Personnel disputes refer to those between public institutions and their employees regarding resignation, dismissal or the performance of employment contracts.

Notably, since December 2018, 'equal employment' has been added as a new cause of action for civil cases and it will be worth monitoring to see whether more anti-discrimination cases arise.

IV YEAR IN REVIEW

i Labour disputes

As a result of the overall recession, labour disputes have been increasing continuously over the past year. As the most important law in the employment field, the Employment Contract Law has now been promulgated for 12 years and employees are familiar with using it to raise their claims through labour arbitration and litigation. The financial burden is comparatively low for employees, because labour arbitration is free.

In addition to the 'traditional' rights disputes (i.e., labour remuneration, termination, and work-related injury), non-compete, confidentiality, employee stock rights and senior

employee disputes are occurring increasingly more often and involve many topical and complex issues. For example, on 22 October 2019, Beijing No. 1 Intermediate Court published its '10 Model Non-Compete Labour Dispute Cases'. It is reported that from 2014 to June 2019, Beijing No. 1 Intermediate Court concluded 211 non-compete cases, the features of which can be summarised as follows:

a cases arising from the technology and education industries were the most frequent, accounting for 18.01 per cent and 10.9 per cent of all non-compete cases respectively;

b the variety of industries involved is expanding;

c cases regarding technical, sales and training positions are common;

d about 70 per cent of non-compete cases focus on the payment of non-compete compensation and liquidated damages for breach of non-compete obligations, and the value of the amounts concerned is relatively high; and

e the percentage of non-compete disputes that reach settlement is no more than 5 per cent, which is markedly lower than the settlement percentage for other labour disputes.

ii Termination

In cases arising from unilateral termination by a company for an employee's breach of contract, the business entity bears a heavy burden of proof, as required by the legal provisions and in judicial practice, which puts the business entity at great risk of losing the case. For example, as well as having to prove the employee's breaches, the entity is required to have written rules and regulations which specify that the irregularity performed by the employee falls under the provisions whereby the enterprise has the right to unilaterally terminate the contract of employment. Besides, during the course of formulating their rules and regulations, business entities must follow the legal procedures for seeking advice from employees or trade unions, publicising the rules and regulations, and keeping employees informed. In recent cases, courts and arbitral tribunals have paid more attention to good faith and the professional ethics of the employees, and if employees have been found to have committed serious irregularities, the courts and arbitral tribunals have upheld the enterprise's unilateral termination.

iii Social security

In 2019, China promulgated the Interim Provisions for Hong Kong, Macao and Taiwan Residents' Participation in Social Security Schemes in Mainland China, requiring employees who are Hong Kong, Macau or Taiwan residents working in Mainland China to participate in the mainland social security insurance scheme.

iv Judicial practice

In judicial practice, opinions and standards implemented by courts in different regions regarding the same issue may differ a lot. In recent months, a few provinces, such as Jilin, Guangdong and Anhui, have issued legal documents regarding the application of law in labour dispute trials. These legal documents do not have the same binding force as laws and regulations, but courts in these provinces do refer to these documents when judging cases.

v Equal employment

Equal employment has been given increasing attention. To protect the right of equal employment, and particularly to safeguard women employees' right to equal employment, Beijing has promulgated the Notice on Further Reinforcing the Administration of Recruitment Activities and Promoting Employment of Women in relation to the preparation of recruitment plans, publishing of recruitment information and recruitment of candidates.

V OUTLOOK AND CONCLUSIONS

The latest Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trials of Labour Dispute Cases (V) was expected last year but has still to be introduced. However, according to sources, this judicial interpretation may provide judging standards for practical issues such as employment models for internet platform enterprises, cohesion between labour arbitration and court adjudication, and disputes about amendment or termination of employment contracts. In response to the economic recession and increasing disputes about senior employees with stronger employment bargaining power, the judicial interpretation may also reflect the shift from inclined protection of employees (see Section I) to 'balancing the interests between enterprises and employees', which has been evident in some labour disputes in recent years.

Given that the competition between enterprises for talent and technology is increasingly intense, dispute cases involving trade secrets and competition restrictions will continue to increase. These types of disputes involve many legal areas, including labour law, competition law, intellectual property law and criminal law, and the handling of cases in these areas is relatively complex.

Affected by the tense China–United States trade relationship and the increasing risk of economic recession, business operations are facing difficulties, with bankruptcies, liquidations, closures and business relocations happening more often. Enterprises need to make adjustments, while, for organisational institutions, business strategy adjustments may trigger staff redundancies or reorganisations. As a result, the number of collective dispute cases relating to staff redundancy placements is highly likely to increase.

Finally, employees are now paying greater attention to social security insurance and social security-related disputes are therefore likely to increase substantially.

Chapter 4

CYPRUS

Christina Ioannou and Anna Charalambous-Katsaros[1]

I INTRODUCTION

Cyprus is characterised as a mixed legal system,[2] albeit a unique mixed legal system, whereby common law dominates in the field of private law, whereas continental law dominates in the field of public law. Labour law is generally classified as part of private law[3] and, accordingly, is common law oriented. Employment relationships in Cyprus are governed by ordinary contract law principles and are supplemented by statutory rights and obligations where appropriate.[4] Thus, labour law is closely associated with contract law. However, there are also aspects of labour law that are governed by public law, such as the constitutional safeguards for the right to strike and the freedom of workers to organise. Furthermore, the government, through the Ministry of Labour, Welfare and Social Insurance, actively participates in the mediation procedures for resolving disputes between employers and trade unions. In light of the peculiarities of labour law, specialised courts, specifically the industrial disputes tribunals (IDTs), were introduced for the adjudication of labour law disputes.[5]

The most typical category of employment in Cyprus is an employment contract of indeterminate or indefinite duration. During the first 26 weeks of employment under such a contract, the employee is considered to be on probation and can, subject to specific provisions in the contract of employment or special grounds, be dismissed without notice and without cause. A contract of employment is a contract and, as such, the conditions for its conclusion are governed by the provisions of the Contract Law, Cap 149, to the extent that there are no conflicting provisions in other specific legislation. No formality is required for the conclusion of employment contracts. As far as the content of an individual employment contract is concerned, all statutory rights and obligations are generally implied

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2 A Emilianides, 'Cyprus: Everything Changes and Nothing Remains Still' in S Farran, et al., *A Study of Mixed Legal Systems: Endangered, Entrenched or Blended* (Aldershot: Ashgate, 2014), 215–240; S Symeonides, 'The Mixed Legal System of the Republic of Cyprus' (2003) 78 *Tulane Law Review*, 441.

3 In A Emilianides, *An Introduction to the Bibliography of Cypriot Law* (2nd Edition, Nicosia: Hippasus, 2017), the employment law references are subcategorised under the general heading of 'Private Law'.

4 For a more detailed analysis of labour law in Cyprus, see A Emilianides and C Ioannou, *Labour Law in Cyprus* (The Hague: Kluwer, 2016), P Polyviou, *The Contract of Employment in Cypriot Law* (Nicosia: Chrysafinis and Polyviou, 2016, in Greek) and S Yiannikourou, *Cypriot Employment Law* (Athens: Nomiki Vivliothiki, 2016, in Greek).

5 An industrial disputes tribunal is composed of two lay members who have knowledge of industrial relations from the view of both the employer and the employee.

into employment contracts and the parties may not waive mandatory statutory provisions by agreement. However, they may agree to terms or conditions of employment that are more favourable for the employee than those provided by statute or by existing collective agreements.

Collective agreements are an important source of labour law; however, the general rule is that collective agreements between trade unions and employers are not legally binding upon them. One of the most defining characteristics of the Cypriot corporatist model[6] is its reliance on collective bargaining agreements, which involve negotiations between the parties concerned. The Industrial Relations Code (IRC), which was adopted in 1977, incorporated the main conventions of the International Labour Organisation. The IRC is essentially a soft-law document, a gentlemen's agreement that regulates the collective bargaining process, and provides a conflict resolution mechanism when employers' and employees' representatives fail to reach a mutually acceptable outcome. While a violation of the IRC does not involve any legal sanctions, deviations from it have been relatively rare. The IDTs have judicial knowledge of the IRC and matters of good industrial relations practice need not be proven before an IDT.[7]

Collective agreements that have not been incorporated in legislation do not, as a principle, create rights and obligations under public law.[8] Accordingly, a collective agreement may not amend the rights of the employee under public law, unless it has become part of the practice of the administrative body in question.[9] However, their terms may be incorporated into individual employment contracts and thus become binding on the parties thereto.[10] Moreover, a collective employment agreement may not prevail over an individual employment agreement, unless the terms of the collective agreement have been incorporated, expressly or implicitly, in the individual employment agreement.[11]

II PROCEDURE

The IRC provides that personal complaints, including complaints about dismissals, should be presented in the first instance by the employee to his or her immediate supervisor and if the complaint is not settled, or if it is of such a nature that direct discussion between the employee and his or her immediate supervisor is not considered appropriate, the employee has the right to demand that the complaint may be examined at one or more higher levels, depending on the nature of the complaint and the structure and size of the undertaking, provided that there is a real possibility of settling it. A grievance not settled at the stage of direct negotiations may be submitted for mediation to the Ministry of Labour, Welfare and Social Insurance, in which case the Ministry undertakes to deal with it within a reasonable time and in any case not later than 15 days from the date of submission. If no settlement of

6 C Ioannou, 'The Development of the Cypriot Corporatist Model, the Emergence of a Corporatist Culture and its Impact on the Process of Europeanization' (2009) 10 *Cyprus and European Law Review*, 700–736.

7 *United Hotels Ltd v. Stavrou and others* [2003] 1 CLR 515 (in Greek).

8 *Kontemeniotis v. CyBC* [1982] 3 CLR 1027; *Papadopoulos and others v. CyBC* [1996] 3 CLR 1 (in Greek), *Evangelou and others v. CyBC* [1985] 3 CLR 1410; *Angelides v. CYTA*, Case 46/2011, dated 1 September 2014 (in Greek); *Mesaritis and others v. TEPAK*, Case 1322-1333/2011, dated 11 June 2015 (in Greek).

9 *DerParthogh v. CyBC* [1984] 3 CLR 635.

10 *Lanitis Bros Co Ltd v. Ioannides and others* [1979] 1 CLR 815.

11 *Hatzikonstanti v. Golden Coast Ltd*, Civ. Appeal 314/08, dated 24 January 2012 (in Greek); *Loizou v. Stylson Engineering Co Ltd* [1998] 1 CLR 2077 (in Greek).

the dispute is achieved by the Ministry within 15 days of the date it began dealing with it, the dispute should be submitted to binding arbitration. Grievances about dismissals should be dealt with as expeditiously as possible and the time limits should be half as long as those provided for the resolution of other grievances.

The IDTs have exclusive jurisdiction to adjudicate on private industrial disputes arising by virtue of labour law legislation. Except in a case of a claim for damages for wrongful dismissal exceeding two years' emoluments (for which the district court has jurisdiction), the IDTs have exclusive jurisdiction to decide on all industrial disputes. The IDTs therefore have jurisdiction with regard to contracts of employment of both definite and indefinite duration,[12] as well as part-time contracts.

The district courts, which are the general jurisdiction courts of the Republic of Cyprus, do not have jurisdiction to adjudicate disputes by virtue of specialised labour law legislation; yet they retain their general jurisdiction to adjudicate private law disputes arising out of contracts of employment on the basis of general legislation, such as the Contract Law, Cap 149, or even the principles of common law. The district courts have jurisdiction for claimed damages in excess of the employee's emoluments for two years, which an IDT is empowered to award. In addition, the district courts have jurisdiction for all criminal prosecutions for violations of labour law legislation; the IDTs do not exercise criminal jurisdiction.

With regard to collective labour law, the two main ways of resolving disputes are mediation and arbitration. The Department of Labour Relations (Industrial Relations Service) of the Ministry of Labour, Welfare and Social Insurance is responsible for providing mediation assistance by intervening in a dispute after negotiations have reached a deadlock and the two sides (employers and trade unions) have formally requested the mediation of the Ministry. The Industrial Relations Service mediates approximately 250 to 300 such cases annually and has succeeded in resolving more than 90 per cent of cases without a strike; the low number of strikes registered in Cyprus confirms that the existing conflict resolution mechanisms enjoy a high degree of effectiveness. The mediation process is governed by the procedures of the IRC, which provides detailed procedures for dispute resolution in the private and semi-public sectors; the public sector adheres to a different set of rules. The mediation process governed by the IRC is not a mandatory procedure and is not governed by legislation; however, collective agreements between employers and their employees may expressly provide that any labour law dispute is to be subject to mediation. The aim of mediation is to assist employers and employees in reaching a mutually acceptable solution.

There are two types of industrial relations disputes that the Ministry mediates: industrial disputes about interests (concerning the conclusion of a collective agreement or the renewal of an existing one); and industrial disputes about rights that refer to the interpretation of a collective agreement (grievances). If mediation fails to produce results in disputes about interests, then the unions may go on strike or employers may lock out their employees. However, this is not an option in the case of grievances, as both parties have agreed not to proceed to strike or lockout for disputes over grievances; in these cases, the mediator shall refer the matter to binding arbitration.

In relation to arbitration, the IRC provides that, where both parties so agree, they may refer all or any of the issues of a dispute about interests to arbitration instead of mediation, at any time either before or after the submission of the dispute to the Ministry. By so doing, they both accept that the decision of the arbitration shall be binding on the parties. A dispute

12 *Panayiotou v. DS Artokoulouropoieion Ltd* [2002] 1 CLR 1381 (in Greek).

about grievances may be referred to arbitration instead of mediation, if the parties so wish; if a dispute about grievances has been submitted for mediation, and no settlement of the dispute by mediation has been achieved, the dispute is submitted to binding arbitration.

III TYPES OF EMPLOYMENT DISPUTES

The most important types of disputes relate to dismissal. If the employer dismisses, without just cause, an employee who has been continuously employed by that employer for not less than 26 weeks, the employee shall have a right to compensation calculated in accordance with the First Schedule of the Termination of Employment Law.[13] However, the minimum period of continuous employment required may be extended from 26 weeks to a maximum of 104 weeks, by a written agreement made at the time the employee commences employment. The calculation of continuous employment is therefore of importance for determining whether an employee has a right to compensation; further, it remains relevant to assess the amount of the compensation to be awarded. The principles for calculating continuous employment remain the same in cases of redundancy, where the employee has a right to compensation from the Redundancy Fund if he or she had been continuously employed for at least 104 weeks.

The IDTs have a wide discretion in determining the compensation awarded; in exercising its discretion, an IDT should take into account the daily wages and other earnings of the employee, the period of employment, the employee's loss of career, the factual circumstances of the termination of employment and the employee's age. The discretion of the IDTs to award compensation does not depend upon the general contractual principles for awarding compensation, but is wider.[14] The compensation shall be further calculated on the basis of the salary the employee received on the day employment was terminated.[15]

A termination of employment shall not provide a right to compensation, if the employer dismissed the employee for a just cause, namely where:

a the employee fails to carry out his or her work in an adequately satisfactory manner;

b the employee's post becomes redundant;

c the termination of employment is due to *force majeure*, warfare, insurrection, disaster or destruction of the facility due to fire not intentionally or negligently caused by the employer;

d the employment is terminated at the end of a fixed-term contract of employment, or when the employee attains the normal age of retirement on the basis of the law, custom, collective agreement, contract, employment regulations or otherwise; or

e the employee so conducts himself or herself as to render himself or herself liable to dismissal without notice.

When the employment of an employee, who was continuously employed for at least 104 weeks by the same employer, has been terminated on grounds of redundancy, the employee shall be compensated by the Redundancy Fund.[16] Accordingly, redundancy can only be justified if

13 Law 24/67.

14 *Louis Tourist Agency Ltd v. Elia* [1992] 1 CLR 98 (in Greek).

15 *Famalift Shipyard Ltd v. Pavlides and others* [1991] 1 CLR 161 (in Greek).

16 See in general A Emilianides, 'Redundancy Law in Cyprus' in Van Kempen, et al., eds., *Redundancy Law in Europe* (The Hague: Kluwer, 2009), 29–37.

the employee has been continuously employed by the same employer for a continuous period of at least 104 weeks. Redundancy will only be declared if it is based upon at least one of the following grounds:

a the employer has ceased, or intends to cease, to operate the business or the place (location) where the employee is employed;
b modernisation, mechanisation or any other change in the method of production or organisation;
c abolition of a specific department;
d reduction in the turnover of the business; or
e difficulties in placing products in the market, or credit difficulties, or lack of orders or raw materials.

These are the only grounds on the basis of which redundancy may be declared.

Other than dismissal cases, cases dealing with the protection of certain categories of worker are also important.

Maternity rights are safeguarded by the Protection of Maternity Law (Law 100(I)/1997), which implemented Directive 92/85/EEC. The rights under Law 100(I)/1997 are safeguarded only for mothers, not for fathers. In the event of conviction for violation of any of the provisions of Law 100(I)/1997, the employer is subject to a fine not exceeding €6,834. The IDTs are the competent courts for adjudicating disputes of a civil nature, whereas the Minister of Labour, Welfare and Social Insurance may appoint inspectors to monitor the application of Law 100(I)/1997. An employer is prohibited from terminating the employment of a woman from the time she has notified her employer of the fact that she is pregnant by producing the relevant medical certificate. The prohibition lasts for a period of three months following the expiry of maternity leave.

The Equal Treatment of Men and Women in Employment and Vocational Training Law (Law 205(I)/2002) partly harmonises Cypriot law with Directive 2006/54/EC. Law 205(I)/2002 provides for the application of the principle of equal treatment of men and women in the field of employment and, in particular, as regards access to vocational guidance, vocational education and training (as well as the terms and conditions under which they are carried out), access to employment, the terms and conditions of employment (including career development) and the terms and conditions of dismissal. There are certain exceptions in occupational activities where, by reason of the context in which they are carried out, gender constitutes a determining factor.

The Equal Pay between Men and Women for the Same Work or for Work to which Equal Value is Attributed Law (Law 177(I)/2002) partly harmonises Cypriot law with Directive 2006/54/EC. The purpose of Law 177(I)/2002 is to ensure the application of the principle of equal pay between men and women for equal work or equal value work. It applies to all employees, for all activities relating to employment. Every employer must provide equal pay to men and women, by virtue of Section 5 of Law 177(I)/2002, for the same work or for work to which equal value is attributed, irrespective of the gender of the employee. If a system of professional classification is used for the determination of pay, the system must be based on common criteria for male and female employees and must be designed in such a manner that discrimination based on gender is excluded.

The Republic of Cyprus has further enacted non-discrimination legislation in harmonisation with EU law that prohibits discrimination, such as the Equal Treatment

(Racial or Ethnic Origin) Law,[17] which harmonised Directive 2000/43/EC, and Law 58(I)/2004, which harmonised Directive 2000/78/EC. Law 58(I)/2004 prohibits discrimination, specifically in the spheres of employment and occupation. According to Section 3 of Law 58(I)/2004, the purpose of the Law is to set out a framework to prevent discrimination on grounds of race or ethnic origin, religion or belief, disability, age or sexual identity in the area of employment and occupation such that the principle of equal treatment might be effected. However, different treatment on grounds of nationality is not prohibited, in principle.

IV YEAR IN REVIEW

The cases described in this section are considered to be the most significant in the past 12 months.

In the *Iacovides* case,[18] the respondent submitted an application to the IDT claiming that he had been wrongfully dismissed from the position of general manager. The respondent held the position of general manager at the appellants' business on the basis of successive contracts of definite duration. Prior to the termination of the respondent's employment, all of the appellants' shares were obtained by the Republic of Cyprus. The main grounds upon which the appellants based their action to terminate the respondent's employment were the mismanagement of the company, the respondent's failure to carry out his work in an adequately satisfactory manner and, in general, the serious misconduct of his duties, which led the company to the brink of bankruptcy and to financial disaster.

The IDT held that the appellants had failed to prove their allegations with a clear, convincing and acceptable testimony. However, even if the IDT was of the opinion that any of the reasons that led to the respondent's dismissal were proven and accepted, the time that had elapsed from the day that the alleged facts had taken place until the respondent's actual dismissal was sufficient for the appellants to lose their right to dismiss the respondent, according to the proviso of Section 5(e) of the Termination of Employment Law 24/67. The decision of the IDT was appealed before the Supreme Court.

The Supreme Court noted that the IDT had not applied the test adopted by the relevant case law[19] (i.e., whether the dismissal fell within the ambit of the reaction of a reasonable employer on the basis of the material available before him), bearing in mind that the burden on the employer is to prove this on the balance of probabilities. However, it was held that this was not sufficient for the appeal to succeed. The Supreme Court held that the time that had elapsed from the actual occurrence of the alleged facts until the final dismissal of the respondent should lead to the conclusion that the appellants did not have a right to dismiss the employee.[20]

In the *Erotokritou* case,[21] the Supreme Court rejected the appellant's application that he had been wrongfully dismissed by the respondent company – of which Erotokritou owned 50 per cent of the share capital and was one of the two directors. It was held that

17 Law 59(I)/2004.

18 Iacovides as receiver of the company Eurocypria in *Eurocypria Airlines v. Souroulla*, Supreme Court of Cyprus, Civil App. 188/2012, 18 November 2018.

19 *Kakofeggitou v. Cyprus Airways Ltd* [2005] 1 CLR 1478.

20 *Thanos Hotels Ltd v. Andreou* [2002] 1 CLR 1000.

21 *Erotokritou v. Elva Medical Imports Ltd*, Supreme Court of Cyprus, Civil App. 289/2011, 4 April 2018.

her alleged coercion to relinquish her shares to the third respondent – who was an employee of the company – could not lead to a decision that there had been constructive dismissal, when taking into account the company structure of the appellant. In view of the appellant's participation to the board of directors of the defendant, which acts as a collective organ, the Supreme Court held that it was not sufficient to consider the status of the appellant as an employee of the defendant. Such a dispute should be resolved by virtue of the relevant provisions of the Companies Law Cap 113. Consequently, the Supreme Court rejected the appeal.

In *Askanis*[22] and *Gregoriou*,[23] the Supreme Court reiterated the well-established principle that the assessment of factual evidence by the IDT falls within its exclusive jurisdiction and that accordingly the Supreme Court shall not intervene, since IDT decisions are subject to appeal only on the basis of legal grounds.[24] However, such intervention is possible where the assessment is the result of improper legal guidance.

The *Koukoutsika* case dealt with the repudiation of the employment contract.[25] The respondent had been employed for years by the appellants as general manager. During a meeting of the board of directors, the chairman of the board blamed him for having irrevocably exposed the appellants and suggested that the respondent should tender his resignation. The latter submitted his resignation and left. During the assessment of the evidence presented before it, the IDT found that there had been no evidence of reprehensible behaviour by the respondent and concluded that the appellants, with their behaviour and for the reasons they submitted, expressed their desire to the applicant that it was impossible to continue the employment relationship. In view of this, the IDT held that, from a legal perspective, the appellants had violated the relationship of trust and confidence the employee is reasonably entitled to have in his employer and, thus, the respondent justifiably considered that he was forced to resign.

The Supreme Court upheld the IDT judgment, pointing out that the appellants, during the aforementioned meeting of the board of directors, had irrevocably violated the implied obligation of trust and confidence that the employee is reasonably entitled to have in his employer. Furthermore, the Supreme Court accepted that the implied obligation of trust between the employee and the employer governs every employment agreement and it dictates that the parties should not behave in a manner that can shake the foundations of the employment relationship or destroy that relationship. The Supreme Court concluded that the respondent's belief that he was not desired as general director of the appellants was justified, and it was upon him to decide whether he should insist on the continuation of the employment relationship or to choose to terminate it. His choice to terminate the employment relationship amounted, under the circumstances, to constructive dismissal pursuant to Section 7(1)(2) of the Termination of Employment Law 24/67.[26]

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22 *Antonis Askanis Ltd v. Avgoustinou Avgousti*, Supreme Court of Cyprus, Civil App. 265/2012, 2 February 2018.

23 *Pollis Gregoriou Ltd v. 1. Michael Kounnafi 2. Redundancy Fund*, Supreme Court of Cyprus, Civil App. 321/2012, 25 January 2018.

24 *The United Automotive Dealers Ltd v. Petrou*, Supreme Court of Cyprus, Civil App. 442/11, 25 October 2017; *Sourailidou v. Kikis A. Demetriou Properties Ltd*, Supreme Court of Cyprus, Civil App. 239/2012, 22 November 2017.

25 *Sport Union of 'Nea Salamina' Famagusta v. Koukoutsika*, Supreme Court of Cyprus, Civil App. 240/12, 28 November 2018.

26 See *Alouet Clothing v. Athanasiou* [1988] 1 CLR 626 and *Louis Tourist v. Elia* [1992] 1 CLR 98.

V OUTLOOK AND CONCLUSIONS

In last year's edition, we noted that many employers had viewed the economic crisis as an opportunity to restrict the rights of employees previously established by collective agreements, and to violate their obligations towards them.[27] Moreover, fear of unemployment has led many employees to accept various forms of violations of their rights. At the same time, the maintenance of industrial peace in a period of economic crisis remains a major challenge for the future of the Cypriot corporate model. Whereas the financial situation has definitely improved and the unemployment rate has been reduced significantly, with the memory of the financial crisis and the bank collapse that followed the decisions of the Eurogroup meetings in March 2013 still vivid, the Cypriot labour market is still in turmoil and now trying to get back on its feet.

27 C Ioannou and A Charalambous-Katsaros (2018), Cyprus chapter in *The Labour and Employment Disputes Review*, N Robertson (editor), (London: Law Business Research, 2018): pp. 27 to 32.

Chapter 5

FRANCE

Julien Boucaud-Maître and Jean Gérard[1]

I INTRODUCTION

In France, as in many Western countries, the salaried employee, who is economically weak, is regarded as being legally favoured in any employment relationship. French labour law therefore decisively favours the employee rather than the employer. In the litigation area, examples abound of legislators showing such favour. Thus, in the event that a dismissal is challenged, the employee is given the benefit of the doubt. In other words, if the judge has not been able to decide in the light of the elements submitted by the parties and despite, if necessary, the initiation of investigative measures, the judge must consider the dismissal to be devoid of actual and serious cause and subsequently grant damages to the employee.

Similarly, when an employee alleges a prohibited discrimination, either in the termination or even the performance of the employment contract, the burden of proof is clearly reversed. The same applies to allegations of moral or sexual harassment. It is up to the employer to show that the decision he or she made was not influenced by a discriminatory ground. If the employer cannot prove this, the alleged discrimination will be upheld against him or her. This mechanism is particularly unfavourable towards companies since, as we shall see, damages paid for discrimination must be awarded in full, in all cases.

In France, however, it has always been considered that the determination of the standards that govern employment relationships should be left to the social partners. Labour law (and, more generally, social law) is therefore widely composed of rules that derive from collective agreements negotiated by employers' groups on the one hand and employee unions on the other. In this context, the role of the state should be limited, through government action, to giving the social partners the impetus – and sometimes the injunction – to negotiate. In addition, the state should, through the action of the legislature, limit its role to determining the general principles that are binding in all cases, and that the social partners cannot exclude, while ensuring the effectiveness of collective agreements – again through appropriate legislation.

II PROCEDURE

The principles discussed in Section I explain why the resolution of individual labour disputes between an employer and an employee falls, in the first instance, not to state courts but professional and specialised ones, namely the labour courts. These are presided over by an equal representation of non-professional judges who are appointed by trade union

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organisations of employers and the trade unions of employees. The labour courts are divided into professional sections: industry, trade and trading services, agriculture and miscellaneous activities. There is also an inter-professional section – the management section – before which all disputes between members of management and their employer, whatever the nature of the activity, are brought.

Wherever possible, conciliation is the preferred resolution. The procedure therefore begins, in the vast majority of cases, with an attempt at conciliation. This is entrusted to the conciliation board of the court, which is composed of two judges: an employer and an employee.

For a long time, the role of the conciliation board was limited to seeking an agreement between the parties to put an end to the dispute, in whole or in part, at a conciliation hearing. Since 2016, the conciliation board has been renamed the conciliation and orientation board. Its role has been extended beyond an attempt at conciliation to include preparation of the case and its orientation before the judgment board. The conciliation and orientation board thus plays the part of an examining magistrate, and is comparable, in many respects, to the role of a pretrial judge in procedures before the judicial tribunals (formerly regional courts).

Thus the board may order, even *ex officio*, all appropriate means of inquiry. From this perspective, it can, at the outset of a conciliation hearing, order the disclosure of a particular piece of evidence, organise a consultation measure or even seek specialist knowledge, authorise an inquiry, order the personal appearance of the parties or visit the place of work, inter alia. Where the existence of the obligation is not seriously challengeable, the board may order payment by the employer to the employee of a provision on the wages and damages relating to the termination of the employment contract. Similarly, the board may order delivery of the documents relating to the termination of the employment contract (such as the certificate of work or certification for the unemployment agency).

As part of its examination of a case, the conciliation and orientation board should ensure there is an exchange of arguments and evidence between the parties. In this regard, the procedure before the labour courts, which was purely oral until 2016, has since undergone an important evolution, which increases very significantly the quantum of writing. Henceforth, a labour court must be seised of a signed and dated written petition, which must state the legal and factual grounds supporting a claim. This petition must also set out the documents on which the claim is grounded and must be filed with the labour court registry in as many copies as there are parties to the proceedings plus one, with a copy of the documents. For the remainder of the proceedings, if the parties have decided to be assisted or represented by lawyers, those lawyers, if they decide to use written documents to develop their argument, must now do so in the form of legal submissions.

When it appears to the conciliation and orientation board that the case has reached a state in which it can be judged, the parties are referred to the judgment board, which will hear the pleadings. Composed of four judges specialising in labour law – two employers and two employees – the board then deliberates before rendering its decision. Note that the parties are not present during the judgment board's deliberations. In approximately 20 per cent of cases, these four persons do not succeed in adopting a decision by a majority of the votes cast, with ballots equally divided for and against the claimant. In these cases, a professional judge is called upon to assume the role of 'tiebreaker'. She or he hears the pleadings again, if possible in the presence of the initial four judges who specialise in labour law, and the decision is then adopted in this tiebreaker setting with five members. If she or

he is not assisted by the judges with specialised experience in labour law and who originally heard the pleadings, the professional judge rules on the matter alone, after having heard the opinion of the attending judges.

Judgments rendered by a labour court may be appealed before a court of appeal. Again, for a long time, these proceedings were oral, even at the appeal stage, but there has been a move towards a written, more formal procedure. As of 2016, all stages of the procedure are in writing, including hearings at courts of appeal. The parties must be represented either by a lawyer or by a union representative. All the rules applicable to civil case procedures before a court of appeal – which are sometimes very stringent – now apply to labour law procedures. In turn, decisions rendered by courts of appeal can be appealed before France's supreme court, the Court of Cassation.

In the courts of the highest degree (courts of appeal, the Court of Cassation), the specificities of labour law dispute disappear: these courts are presided over by professional judges who adjudicate on labour law disputes according to the same procedures and in the same way that they rule on all other types of litigation (family law, civil liability law, commercial law, etc.).

Other types of conflict resulting from the application of employment laws and more generally social laws fall within the jurisdiction of common law courts. These include collective disputes between either groups of employees and an employer or a group of employers. One should also mention disputes related to the application of collective bargaining agreements, between employee trade unions and an employer or between different employee trade unions or even between employee trade unions and employer trade unions. Disputes related to the operation of employee representative bodies are also included. Finally, one should not disregard the significant weight of disputes relating to professional elections and the appointment of union representatives, as well as social security litigation subject to specific procedures brought before common law first instance courts.

More specifically, with respect to this type of conflict, the year 2019 witnessed the finalisation of an important structural reform, resulting in fundamental changes to the judicial organisation in France (other than labour courts). Established in 1958, the regional courts, which ruled on the most important disputes, and the district courts, hearing the other disputes, were wound up on 31 December 2019. As from 1 January 2020, there is in place a new and single first instance court: the judicial tribunal. Each regional court has been replaced, at its current seat, by a judicial tribunal and each district court by a district division. The judges working at the former regional and district courts were assigned to the new courts and now pursue their former duties under the new court system.

Furthermore, the judicial tribunal is divided into specialised departments. A social department deals with disputes related to employment law. The judges whose duties are more specifically related to social law in a broad sense (employment, social security and social welfare law) are assigned to this department. The new organisation will thus highlight the specialisations of the professional judges. By planning ahead, some courts had already implemented a social department to which those judges specifically ruling on employment and social security law issues were assigned. These specialised judges also assume the role of tiebreaker before the labour courts. The 1 January 2020 reform is therefore a form of acknowledgment of these practices.

Finally, the substantial role played by administrative courts in employment relationships must be mentioned, namely administrative courts, administrative courts of appeal and the highest administrative court, the Council of State. In a nutshell, they are called to rule on two

different types of disputes. They traditionally hear the claims lodged against decisions taken by the labour inspectorate with respect to employees benefiting from special protection, mainly those holding a union mandate or an elective office, the dismissal or even certain modifications to the employment contract of whom must be authorised by the administration prior to their implementation. If unlawful, the authorisation or refusal may be referred to the administrative judge.

In addition, all disputes resulting from collective redundancies when the procedure targets more than 10 employees over a period of 30 days also fall within the jurisdiction of the administrative courts. For these procedures, to limit the number of redundancies, an employment safeguarding plan must be certified or approved by the labour administration. All claims arising in the framework of these procedures must be brought before the administrative courts.

III TYPES OF EMPLOYMENT DISPUTES

The vast majority of cases that come before the labour courts arise from the termination of an employment contract or, more specifically, a dismissal. The proportion of cases relating to dismissal on personal grounds fluctuated between 66 per cent and 76 per cent between 2004 and 2013. During the same period, dismissals grounded on economic reasons represented only 3 per cent of cases.

Since 1973, a dismissal must be justified by an 'actual and serious' cause (Article L.1232-1 of the Labour Code). Therefore, when an employee is dismissed for a reason that is neither actual nor serious, he or she is entitled to damages. Article L.1232-1 of the Labour Code has been in effect for more than 45 years now and – in its current codification – has given rise to very abundant case law which, given the French legislature's bias towards elaborate rules that are increasingly favourable to employees, has resulted in the courts increasingly allowing the appeals of interested parties. Thus, according to the official statistics of the Ministry of Justice for 2017 (the last full year for which statistics are available), the labour courts have been seised of 126,693 new cases (including emergency procedures).

The remainder of cases relate to other forms of dismissal (including collective or individual redundancy or dismissal invalidity) or termination of employment contracts (such as abusive resignation and formal record of termination). We should also mention disputes arising from the performance of the employment contract (amount of salary, application of the relevant clause of a collective agreement, disputes relating to paid leave or other types of leave, or to fixed-term and temporary employment contracts).

IV YEAR IN REVIEW

During the past 12 months, labour law disputes have been affected by the continued challenge presented by the 'Macron Scale'. By way of a reminder, the Macron Scale introduced a ceiling for the amount of damages awarded by judges in the event of dismissals devoid of actual and serious cause. Article 2 of Ordinance No. 2017-1387 dated 22 September 2017 significantly amended the wording of Article L.1235-3 of the Labour Code. This text provides that the judge, when a dismissal has no actual and serious cause, may propose (but not impose) reinstatement of the employee concerned. However, the new wording of the Article adds: 'If

either of the parties refuses this reinstatement, the judge grants the employee damages paid by the employer the amount of which ranges between the minimum and maximum amounts set in the tables here below.'

The first of these two tables applies to employees dismissed by a company that normally has 11 or more employees. It provides for minimum and maximum damages payments that vary according to the employee's length of service. The maximum amount ranges from two months' salary for an employee with one year of service to 20 months' salary for an employee who has been with the same company for more than 30 years. The minimum amount ranges from one month's salary to three months' salary. The second table applies to all other companies.

In comparison with the law that applied previously, this double limitation constitutes a major change. Formerly, an employee with more than two years of service at a company with 11 or more employees automatically received a minimum indemnity equivalent to the salary paid during the previous six months; there was no maximum amount. In all other cases, the employee received compensation for proven damage and there was no maximum amount.

Over the years, the old system has increasingly been subject to criticism. In particular, the old legislation was criticised for fostering unpredictability in labour and employment disputes. Since there was no maximum level of compensation, each labour court and, more importantly, each court of appeal could freely determine the amount of damages granted to an employee dismissed without any actual or serious cause, and in a completely different way from the labour court or another court of appeal. In addition, there were objections to the payment of six-month minimum damages as a lump sum, as could happen in certain cases. In fact, some critics said these damages payments could be disproportionate to the amount of harm suffered, especially if the employee found work immediately after being dismissed without any actual or serious cause and, as a result, suffered no economic loss.

The former legislation (unchanged since 1973) was also said to be at fault for having generated a veritable explosion of labour court disputes. Ministry of Justice statistics show 200,000 new cases coming before the labour courts each year. Worse still, the appeal rate (around 60 per cent) had destabilised the operation of the courts, some of which were no longer able to judge cases within a reasonable amount of time, in line with France's international commitments. In this context, the current government, appointed by President Emmanuel Macron after his election, modified Article L.1235-3 of the Labour Code, which is why the progressive limitation of the damages granted by judges to employees is commonly referred to as the Macron Scale.

The capping of damages applies to all disputes relating to dismissals notified after the Ordinance that created it entered into force, which is 23 September 2017 in Paris and the day after that in all other French regions. As a result, all labour court cases that arose during 2019 further to a dismissal are affected by the limitations of the Macron Scale. However, these limitations only affect dismissals found to be without actual or serious cause. There is no ceiling for damages granted when the dismissal is void because of the violation of a fundamental freedom, an act of moral or sexual harassment, when the dismissal is deemed discriminatory or when it follows to legal action. In the same way, no limitation can affect compensation for the harm suffered as the result of an infringement of professional equality between men and women, the denunciation of a crime or offence, the exercise of a mandate by a protected employee or protection allowed to certain employees. In these latter cases, compensation for the harm suffered must be full.

The Macron Scale has also been heavily criticised. Even before the enactment of Ordinance No. 2017-1387, the employee and employer members of the labour courts expressed their concern at what they considered genuine interference by the legislature in the traditionally consensual operation of the labour courts, whose impartiality and objectivity, they say, are necessarily guaranteed by the composition of the court being based on an equal representation of judges. They pointed out that this equality created balance and had resulted, since 1973 and contrary to what could have been said, in the homogenisation of the awarded damages from one labour court to another and even from one court of appeal to another.

Subsequent to President Macron's commitment, once the Ordinance was ratified by Parliament, the anti-Macron Scale 'judicial saga' started. Indeed, the law of ratification was referred to the Constitutional Court right after its adoption. (Note that this Court – the highest constitutional authority in France – can be seised by the President, members of Parliament or senators after the passing of a law but before its enactment.) Parts of the text found to be inconsistent with the Constitution were deleted and only those that were declared compliant or were not challenged were published in the Official Journal and acquired the force of law.

In their referral, members of Parliament raised three questions. First, they said the capping of damages would be contrary to the constitutional principles of the 'guarantee of rights' according to which, in their view, the low ceilings of compensation provided would be insufficiently dissuasive and would thus allow an employer to wrongly dismiss an employee. Second, the limitation would also be contrary to the principle of full compensation for the damage suffered. Finally, according to members of Parliament, by limiting the indemnity solely on the basis of length of service, the legislature would disregard the principle of equality before the law.

In its Ruling No. 2018-761 of 21 March 2018 (published in the Official Journal dated 31 March 2018), the Constitutional Court dismissed these grievances. First, the Court considered that, for reasons of general interest, the legislature may adjust the conditions under which liability may be incurred and thereby make exclusions or limitations to the right to damages, provided that these do not result in disproportionate harm to the victim of a wrongful act.

By setting a mandatory reference for the damages awarded by the judge in the event of dismissal without actual and serious cause, the legislature, according to the Constitutional Court, intended to reinforce the foreseeability of the consequences attached to the termination of an employment contract and thus pursued an objective of general interest.

Moreover, the derogation from the liability under common law resulting from the maximum amounts provided does not constitute a disproportionate restriction of the general interest objective pursued. Indeed, on the one hand, these amounts were determined in line with the preparatory work, depending on the average compensation granted by the courts and, on the other hand, certain types of dismissals are not subject to any limitation (void dismissal, violation of a fundamental freedom, harassment, etc.).

As regards equality, this has not been breached. In fact, the legislature may, without disregarding the principle of equality, adjust the maximum compensation due to an employee when he or she retains, for this adjustment, the criteria relating to the harm suffered. This is precisely the case for the criterion of length of service with the company. In addition, the legislature was not required to set a scale taking into account all the criteria that determine the harm suffered by a dismissed employee, as the principle of equality does not require the legislature to treat persons in different situations any differently.

Compliance with the Constitution was therefore unambiguously upheld by the Constitutional Court. On this point, the debate is definitively closed. It is therefore no longer possible to argue before a labour court, a court of appeal, or even the Court of Cassation, that capping resulting from the Macron Scale is unconstitutional. On 25 September 2019, the Reims Court of Appeal issued a ruling aligned with this position. Noting that the constitutionality review had been carried out once and for all by the Constitutional Court, it dismissed a claim lodged by an employee who asserted that the Macron Scale was contrary to the Declaration of the Rights of Man and Citizen of 26 August 1789, which forms an integral part of the preamble of the Constitution of 4 October 1958.

Faced with this first obstacle, opponents of the Macron Scale have raised their grievance on other grounds – compliance of the revised Article L.1235-3 of the Labour Code with the international conventions that bind France. The Constitutional Court has no jurisdiction over control of this compliance, whereas the judicial and, more rarely, the administrative courts are competent to exercise this control. Convention No. 158 of the International Labour Organization and Article 24 of the European Social Charter have thus been invoked before these latter courts.

It should be recalled that Article 10 of Convention No. 158 provides that where a judge of a signatory state is led to conclude that a dismissal is wrongful, he or she must be entitled, in the absence of reinstatement or nullification of the dismissal, to award an employee adequate damages or any other form of compensation considered appropriate. By the mere fact that it is capped by the Macron Scale, the compensation would no longer be adequate or appropriate. Consequently, as early as December 2018, the labour courts of Troyes and Amiens granted employees a greater amount of compensation than that afforded by the Scale, to provide the employee, from the courts' point of view, with appropriate damages for the harm suffered in the cases at bar.

Article 24 of the European Social Charter states, more simply, that 'all workers are entitled to protection in case of dismissal'. For the Labour Court of Troyes, which explicitly referred to this text in its decision, the Macron Scale would again deprive the dismissed employee of protection.

In the year 2019, several labour courts followed suit. Conversely, during the same year, other labour courts confirmed the Scale's compliance with France's international commitments. In short, the first instance labour courts gave the unfortunate impression that law was not uniformly applied in France.

Faced with this judicial confusion, the Court of Cassation, the highest court in the French judicial order, was called upon by the Louviers and Toulouse labour courts to issue an opinion on the compliance of new Article L.1235-3 of the Labour Code with these two international conventions. It issued two decisions on 17 July 2019 (opinions Nos. 15012 and 15013) stating very clearly that the Macron Scale is not contrary to Convention No. 158. As for Article 24 of the European Social Charter, the solution is even simpler for the Court of Cassation: it has no direct effect in internal law and consequently, cannot be invoked in the framework of disputes between private parties. However, in both its opinions, the Court of Cassation made sure to specify that it had refrained from analysing any facts falling within the jurisdiction of the lower courts. It underlined that its control remained 'hypothetical'.

In this context, two courts of appeal in turn issued much anticipated decisions. First, the Reims Court of Appeal, in the aforementioned order dated 25 September 2019, ruled that the Scale is not per se contrary to France's international commitments. Thereafter, Division 6-8 of the Paris Court of Appeal also decided that the Scale complies both with

Convention No. 158 and Article 24 of the European Social Charter. However, for both appellate jurisdictions, this compliance in principle does not prohibit judges to whom the challenge of an employee's dismissal has been referred from effectively verifying that the damages that may be granted to the claimant, despite their limitation by the Scale, really provide him or her with fair compensation in light of the case's specifics.

When reading the orders, one has the feeling that the judge's rationale is twofold. He first determines the extent of the prejudice suffered by the employee and calculates the amount of the damages that accurately compensate the prejudice. He then compares this amount with the Scale. If indeed the amount of the damages falls between the Scale's minimum and maximum amounts, the Scale can be applied. But if the damages are greater than the maximum amount, the Scale would ultimately be disregarded.

This method has the advantage of complying with the Court of Cassation's opinion, which deems that the Scale complies with both international conventions, while granting the employee the benefit of compensation determined according to the prejudice suffered. However, one can only note that in practice, the position adopted by the courts of appeal would mean that the Scale would be both enforceable and unenforceable, depending on the case's specifics.

It goes without saying that a decision (and not merely an opinion) from the Court of Cassation is very much expected. There is currently a lot of confusion on the matter. The highest French court must assume its regulatory role and put an end to remaining qualms.

V OUTLOOK AND CONCLUSIONS

The question that should be raised at the beginning of 2020 is that concerning the continuance of the transformation of labour law disputes, both from a quantitative and a qualitative point of view. First, with regard to quantity, the fall in the number of incoming cases occurred well before the Macron Scale was implemented and even before the reforms to the labour law procedure that took effect on 1 September 2016. The peak was reached in 2009 when the number of new cases rose to the unparalleled level of 228,578 cases. The number has fallen steadily since: to 184,343 cases in 2015, 149,806 in 2016 and, as already stated, 126,693 in 2017. It is clear that the reform only accompanied an underlying trend that was already downward, and certainly did not trigger the decline or even accelerate it.

On the other hand, it is certain that the nature of the cases of which the French labour courts are now seised has evolved significantly. Litigation may certainly remain overwhelmingly made up of disputes over individual dismissals, but it will gradually occupy the territory of discrimination in all its forms. Indeed, one should note that when it is discriminatory, a dismissal is void and, when deemed void, a dismissal entitles the claimant to compensation without limit. The ongoing debates on the enforceability or unenforceability of the Macron Scale shall thus be definitely avoided.

However, this type of case is much more burdensome than cases based solely on challenging the actual and serious cause. In itself, despite the benefits to the employee in terms of the burden of proof, when the discrimination falls within the scope of a legal prohibition, it must be carefully alleged, and the elements that make it likely and presume its existence must be collected carefully. Conversely, an employer must be very specific when challenging allegations made by an employee, as it does so without being able to take shelter behind its power of control.

In this respect, litigants could make judicious use of the new powers of investigation and guidance now granted to the conciliation and orientation boards. Likewise, they will have to ensure, in a precise written and legally based argument, the development of all the legal means necessary to convince the judge. In a nutshell, the work done by their lawyers will become more and more important.

Chapter 6

HONG KONG

Paul Kwan and Michelle Li[1]

I INTRODUCTION

Employment relationships in Hong Kong are primarily governed by the Employment Ordinance (Cap. 57), which provides the minimum statutory protection for employees. It is a comprehensive piece of legislation that sets out the statutory framework for the rights and liabilities of the parties in an employment relationship, in addition to the terms and conditions laid down in any employment contracts made between employers and employees. Any term or condition in any employment contract that purports to extinguish or reduce any right, benefit or protection conferred upon the employee by the Employment Ordinance is void. In addition, as Hong Kong is a common law jurisdiction, much of the development in employment law has been driven by the ever growing body of case law, the latest developments of which are the focus of Section IV of this chapter.

Apart from employment contracts and the application of the Employment Ordinance, employment law in Hong Kong also covers a broad range of other matters, including health and safety, compensation for employees for work-related injuries, and discrimination in the workplace. Thus, it is no surprise that there is a wide variety of employment disputes in Hong Kong. The majority of these are resolved by conciliation or at the Labour Tribunal, which is a specialised tribunal established to provide an informal and efficient means for employers and employees to resolve their monetary disputes. There are also high-end court cases concerning team moves that are in breach of restrictive covenants or confidentiality and injunctive relief (including springboard injunctions in relation to the setting up of new competitive businesses), and enquiries as to damages. An account could also be sought from the formal courts against an employee who makes a secret profit out of an employment relationship.

II PROCEDURE

The forum and procedures established to assist employers and employees engaged in labour and employment disputes of a monetary nature under an employment contract and governed by the Employment Ordinance are in general informal, cost-effective and efficient, and they are primarily dealt with by the Labour Tribunal. Parties in disputes that involve claims for non-monetary relief, such as injunctions, specific performance or damages, need to apply to the formal courts. As regards discrimination claims (on the grounds of gender, disability, family status or race), special procedures apply and the District Court has exclusive jurisdiction to hear such cases.

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i Labour Relations Division

The Labour Relations Division is often the first point of contact for an intended claimant to advance a claim arising from an employment contract governed by the Employment Ordinance. It is a division under the Labour Department that is responsible for providing consultancy services to employers and employees regarding their rights and obligations under their employment contracts and the Employment Ordinance. It also provides voluntary conciliation services to help employers and employees settle their disputes and claims. Claims that cannot be resolved by conciliation by the Labour Relations Division may then be referred to the Labour Tribunal or the Minor Employment Claims Adjudication Board, depending on the monetary amount involved.

ii Labour Tribunal

The Labour Tribunal is the main forum in Hong Kong for resolving employment disputes governed by the Employment Ordinance. It has exclusive jurisdiction to hear monetary claims exceeding HK$8,000[2] arising from the breach of a term of an employment contract or apprenticeship, or arising from non-compliance with the provisions of the Employment Ordinance or the Apprenticeship Ordinance (Cap. 47). The Labour Tribunal does not have jurisdiction to hear claims for non-monetary remedies.

Parties are encouraged to attempt conciliation before filing a claim. The Labour Tribunal will not normally hear a claim until a certificate of conciliation has been signed. Should conciliation fail and a claim be filed, a hearing date will be fixed that will normally be between 10 and 30 days after the date of filing. The tribunal officer will then issue notice for the defendant to submit a defence and relevant documentary evidence.

Hearings at the Labour Tribunal are heard by a presiding officer or deputy presiding officer. They are conducted in public and in an informal manner. No legal representation is allowed and the usual civil court procedures do not apply (e.g., the rules of evidence do not apply and the Labour Tribunal is entitled to receive any evidence that it considers relevant). There will be several call-over hearings, at which the presiding officer will try to identify the issues in dispute, and direct for the filing of witness statements and supporting evidence before the formal trial is conducted; a decision will normally be made immediately after the formal trial. In more complicated employment disputes, judgment may be reserved and delivered later, on an appointed day, following the closing submissions by the parties as directed by the presiding officer.

Either party may apply to the Labour Tribunal for a review of the decision within seven days of its issuance date. Alternatively, either party in pursuing an appeal shall first apply to the Court of First Instance for leave to appeal against the decision within seven days of the date on which the award of the Labour Tribunal was served on them, or within such extended time as may be allowed by the Registrar of the High Court with good cause. Upon obtaining leave from the Court of First Instance, a formal appeal could then be submitted to and be heard by a judge of the High Court.

2 For monetary claims under HK$8,000, see Section II.iii.

iii Minor Employment Claims Adjudication Board

While most employment claims are resolved by the Labour Tribunal, small monetary claims will be heard by the Minor Employment Claims Adjudication Board (MECAB). MECAB adjudicates claims that involve not more than 10 claimants and for a sum of money not exceeding HK$8,000 per claimant. Hearings before MECAB are heard by an adjudication officer. As with Labour Tribunal hearings, MECAB hearings are conducted in an informal manner without legal representation.

Any award or order made by MECAB is legally binding. Any party who is dissatisfied with the award or order may apply for review or apply to the Court of First Instance for leave to appeal before formally lodging an appeal.

iv High Court

The High Court has jurisdiction to hear labour and employment claims for non-monetary remedies and equitable relief (e.g., a claim for an injunction to prevent a breach of post-employment restrictive covenants, a determination or adjudication on an employee's entitlement to a bonus or incentive scheme outside the scope of the Employment Ordinance). Further, as mentioned above, the High Court also has jurisdiction to hear appeals from the Labour Tribunal and MECAB.

v Equal opportunities-related claims

The Equal Opportunities Commission (EOC) was established to implement the four anti-discrimination ordinances, namely the Sex Discrimination Ordinance (Cap. 480), the Disability Discrimination Ordinance (Cap. 487), the Family Status Discrimination Ordinance (Cap. 527) and the Race Discrimination Ordinance (Cap. 602). There is no legislation in Hong Kong relating to age discrimination. Once a complaint has been lodged with the EOC, the EOC may then investigate the matter and assist parties to resolve their disputes by conciliation.

The claimant on his or her own initiative, or with the assistance of the EOC, could also initiate legal proceedings at court. The District Court has clarified in the case of *Cheuk Kit Man v. FWD Life Insurance Co Ltd & Ors*[3] that although the District Court would be the natural forum to commence discrimination-related claims, it does not have exclusive jurisdiction over such claims and a claim may be transferred to the Court of First Instance where appropriate. Special rules and procedures have been set up to simplify and improve the cost-effectiveness of the procedure in adjudicating such claims. Parties are also encouraged to attempt settlement negotiations or alternative dispute resolution at all stages of the proceedings.

vi Arbitration

If a dispute arises from a contract of employment containing a valid arbitration clause, provided that the dispute involves a claim that is within its jurisdiction, the Labour Tribunal may, upon a party's request, refer the parties to arbitration if it is satisfied that (1) there is

3 [2018] 6 HKC 129. In this case, the claim was transferred to the Court of First Instance because there was a related contractual dispute at the Court of First Instance that essentially covered the same factual disputes; the transfer was made to ensure fairness and for a speedy and cost-effective disposal of the matter.

no sufficient reason why the parties should not be referred to arbitration, and (2) the party requesting arbitration was ready and willing at the time the action was brought to do all things necessary for the proper conduct of the arbitration, and remains so.[4]

In exercising its discretion, the Labour Tribunal may consider various factors, including whether the dispute can be resolved more efficiently by arbitration or by litigation, and the financial position of the parties. Where the parties are referred to arbitration, any existing litigation proceedings covering the same subject matter will be stayed.[5]

Given its cost-effective and efficient procedures, the Labour Tribunal may be more inclined to assume jurisdiction than to refer the parties to arbitration. It may be beneficial for the parties to resolve their disputes promptly at the Labour Tribunal instead of having to endure the arbitration process, which is often more costly and time-consuming.

III TYPES OF EMPLOYMENT DISPUTES

Employment disputes commonly arise from a breach of a term under the contract of employment (e.g., breach of restrictive covenants, breach of confidentiality clauses, misuse of a trade secret or confidential information to further oneself or for the benefit of a third party, for non-payment of wages or discretionary bonuses, or termination of employment without proper terminal payment and compensation).

Other types of employment disputes arise from a failure to comply with the provisions of the Employment Ordinance (e.g., claims for statutory entitlements, such as severance payment, and claims for damages arising from wrongful or unlawful termination of an employment contract). Part VIA of the Employment Ordinance also provides specific protection for employees in relation to unreasonable dismissal and unreasonable variation of employment contracts. An employee who has been continuously employed for at least 24 months may bring a claim for unreasonable termination or variation of employment contract if the termination or variation was carried out by the employer without a valid reason and with a view to extinguishing or reducing the employee's rights, benefits or protections under the Employment Ordinance. As of 19 October 2018, there is a new remedy under the Employment Ordinance that gives the Labour Tribunal the power to make an order for reinstatement of an employment contract without the need to secure the employer's agreement if the Tribunal considers that the order is appropriate.

Moreover, discrimination, harassment and victimisation disputes often arise in the employment context. Under anti-discrimination legislation, it is unlawful to discriminate directly or indirectly in employment on the grounds of gender, marital status, pregnancy, disability, family status or race. Employees are also given statutory protection from sexual, disability and racial harassment in the workplace under specific provisions of the anti-discrimination legislation.[6] The Discrimination Legislation (Miscellaneous Amendments) Bill 2018, which was gazetted in November 2018, introduces new employment-related provisions to extend anti-discrimination protection in the employment context, such as

4 Section 20(2), Arbitration Ordinance (Cap. 609).

5 Section 20(5), Arbitration Ordinance (Cap. 609).

6 See Part 3, Sex Discrimination Ordinance (Cap. 480), Part 3, Disability Discrimination Ordinance (Cap. 487) and Part 3, Race Discrimination Ordinance (Cap. 602).

extending protection to service providers from disability and racial harassment, and to persons working in a common workplace even if there is no employment relationship between them. This Bill is currently being considered by the relevant bills committee.

IV YEAR IN REVIEW

This section discusses some of the more significant cases and developments concerning employment law in recent years.

i Termination before commencement of employment

In *Law Ting Pong Secondary School v. Chen Wai Wah*,[7] the court held that the employee (a teacher) was not liable to make payment in lieu of notice to his employer (the school) for backing out of his employment contract before the employment commencement date. This case demonstrates the potential problems when the employment relationship is governed by various documents with differing terms and conditions.

In this case, there were three documents in question, namely the offer of appointment, the conditions of service and the letter of acceptance. The conditions of service and the letter of acceptance were both signed by the employee on 17 July 2017, but these documents contained contradictory terms regarding the employment commencement date. The former specified 1 September 2017 as the employment commenced date whereas the latter provided that the 'conditions of the new contract will come into immediate effect'. The employee sought to terminate the employment contract in August 2017 and he was initially ordered by the Labour Tribunal to make payment in lieu of three months' notice. When the case went to appeal before the Court of First Instance, upon proper construction of the employment documents, the Court reached the conclusion that the letter of acceptance, which specified that the contract would come into immediate effect, did not form part of the employment contract as the offer of appointment only specified that the employment offer was subject to the conditions of service and made no mention of the terms under the letter of acceptance. Consequently, the Labour Tribunal decision was overturned and the Court of First Instance held that the employee was not liable to make any payment in lieu of notice as his employment had not commenced.

ii Restrictive covenants and injunctive reliefs

Cases relating to enforcement of restrictive covenants are highly fact-sensitive and the court is entitled to take into account all facts and circumstances in balancing the interests of the parties. In the Court of First Instance's decision in *Greater China Appraisal Ltd v. Tsang Kang Po*,[8] the principles concerning injunctive reliefs to protect an employer's confidential information were considered. In this case, the employer applied for, inter alia, an interlocutory injunction based on restrictive covenants to restrain three former employees from using the employer's confidential information, and a springboard injunction to ensure that the ex-employees would not get an unfair start in their new competing business with that confidential information.

The employer alleged that the ex-employees diverted a maturing business opportunity with a client to their new competing business and took away confidential documents, namely

7 HCLA 22/2018, [2019] HKCFI 2236 (date of judgment: 12 September 2019).

8 HCA 1849/2018, [2018] HKCFI 2552 (date of judgment: 29 November 2018).

certain billing records and a company manual, which the employer alleged were used by the ex-employees to give them a head start in their new business. The employer sought to enforce restrictive covenants in the employment contracts relating to confidentiality and non-competition and the confidentiality agreement signed by the ex-employees.

It was held that when enforcing a restrictive covenant, the confidential information that the covenant seeks to protect need only be sufficiently particularised and that the covenant ought to be read with common sense to see whether a person of ordinary honesty and intelligence would recognise the information to be the property of the employer and that he or she is not entitled to do as he or she likes with it. The Court agreed with the employer that the confidential information in question was covered by the confidentiality clause and that the ex-employees were bound by the clause. An injunction against the ex-employees to use the confidential information was therefore granted.

As regards the springboard injunction, the Court took the view that it was not warranted as the precise ambit of the confidential information had yet to be clarified and there was no evidence that the information had been divulged to anyone or in any way misused by the ex-employees. The employer's claim for diverting business opportunities also failed as there was no evidence of solicitation by the ex-employees.

In the case of *McLarens Hong Kong Ltd v. Poon Chi Fai Corey & Or*,[9] the issue of whether a springboard injunction should be granted was considered again. The application for a six-month springboard injunction by an employer was dismissed as the Court was not satisfied that the employer had demonstrated either the precise nature of how the confidential information taken by the ex-employees had been used as a springboard or the period of the alleged competitive advantage enjoyed by the ex-employees.

The employer in this case was an insurance claims and loss-adjusting service provider and the case concerned a team move by a group of employees to a competitor company. Before the employees resigned from the company, they removed a wide range and volume of documents in electric form amounting to over 200,000 data files containing a variety of confidential information, such as client lists and ongoing project files. It should be noted that the ex-employees had already given interim undertakings up until trial not to use the confidential information and to deliver up and destroy the information in their possession.

The remaining issue was then whether an additional six-month springboard injunction should be granted to restrain these ex-employees from joining a competitor and soliciting customers and suppliers. An important factor here was that the ex-employees' employment contracts did not contain a restrictive covenant. In refusing the springboard injunction, the Court specifically noted that 'a springboard injunction will not be granted as a substitute to assist an ex-employer who has not troubled to take an express covenant to protect his confidential information'.[10] Further, there was no evidence that the alleged advantage was still being enjoyed by the ex-employees as the relevant information and documents had already been returned and the Court was satisfied that the employer's interests would be sufficiently protected by the interim undertakings given by the ex-employees.

9 [2019] 3 HKLRD 403, HCA 514/2019, [2019] HKCFI 1550 (date of judgment: 14 June 2019).

10 See paragraph 55 of the judgment.

iii Dishonest assistance and procuring breach of employment contract

In *South China Media Ltd v. Kwok Yee Ning & Ors*,[11] the employer company claimed against an ex-employee for breach of fiduciary duties and for breach of non-solicitation clause by diverting business opportunities to competitors and by using the employer's logo and name without authorisation. More interestingly, though, the employer company joined the ex-employee's husband and his two companies as a co-defendant for dishonest assistance and for procuring the breach of contract.

The ex-employee was the advertising director of the employer company and was subject to a 12-month non-solicitation clause in her employment contract. In deciding whether or not she owed fiduciary duties to the employer, the District Court found her to be a de facto director given the extensive powers she had over the employer's clients and held that she owed fiduciary duties to her employer. The Court was satisfied on evidence that the ex-employee had used the employer's logo and name without consent and diverted maturing business opportunities to the competitor companies controlled by her husband, which amounted to a breach of fiduciary duties of loyalty and good faith and a breach of the non-solicitation clause in her employment contract.

Having established the ex-employee's liability, the Court then considered the employer's claims against the other co-defendants (i.e., the husband and his companies). For dishonest assistance, the Court helpfully summarised the four elements for the imposition of liability for dishonest assistance, namely (1) breach of trust or fiduciary duty by someone other than the defendant, (2) assistance, (3) dishonesty, and (4) resulting loss. The Court held that the co-defendants had dishonestly assisted the breaches by the ex-employee as they ought to have been aware of the ex-employee's position and responsibilities as advertising director and ought to have known that it is unlawful for such a high-level employee to divert business opportunities to a competitor, but they had nonetheless carried out negotiations with the clients and potential clients of the employer company and participated in discussions that resulted in the unauthorised use of the employer's logo. The co-defendants' relationship as husband and wife and the nature and timing of the business set up by the husband were also factors the Court took into account when drawing an adverse inference against the husband for dishonest assistance.

For procuring the breach of contract, the Court was satisfied on evidence that by agreeing to provide their services, the competitor companies had procured the breach of the non-solicitation clause. It was held that the co-defendants had turned a blind eye to the existence of the clause and that they must have realised that their conduct would induce a breach of contract. As a result, the ex-employee, her husband and his companies were found to be jointly liable to compensate for the employer's loss of business opportunities and loss of profits.

iv Employers' implied duty of good faith in exercising discretionary powers

Apart from some long-recognised implied terms in employment contracts (such as an employer's implied duty to provide a safe working environment and that of mutual trust and confidence), there is also now judicial support for implying into the contract an anti-avoidance

11 DCCJ 1751/2015, [2018] HKDC 194 (date of judgment: 15 February 2018).

term to the effect that employers cannot dismiss employees to avoid the obligation to make bonus payments and the power to terminate or demote an employee should be exercised in good faith.

In the Court of Appeal's decision in *Tadjudin Sunny v. Bank of America, National Association*,[12] the employee claimed that the termination of her employment was orchestrated by her employer to avoid paying her an annual bonus. In upholding the lower court's decision, the Court of Appeal affirmed that the employer was in breach of an implied anti-avoidance term in the employment contract by dismissing the employee to avoid paying her the discretionary annual performance bonus. It was held that the termination could not have been for genuine reasons as the performance evaluation of the employee was not carried out in good faith this it was found that the dominant intention in dismissing the employee was to avoid her being eligible for her annual bonus.

The Court of Appeal made it clear that it was not called upon to decide if an anti-avoidance term should be implied into employment contracts generally, only whether an anti-avoidance term ought to be implied in the particular case, given the facts and circumstances. In doing so, it took into account various factors, including the performance bonus forming a substantial part of the employee's overall remuneration package[13] and that the employer had made it clear to its employees that their performance was key in determining their remuneration. Accordingly, the Court of Appeal held that an implied anti-avoidance term was necessary to give effect to the common, reasonable expectation of the parties that the employer could not exercise the power of termination to avoid the employee being eligible for the performance bonus.

An employer's implied duty of good faith was further considered by the Court of Appeal in *FWD Life Insurance Co (Bermuda) Ltd v. Poon Cindy*.[14] In this case, an insurance agent's employment was terminated by the employer insurance company after around six months of employment. Various sums had been paid to the employee, including a lump-sum signing fee, monthly special bonus and performance bonus. There was a term under the employment contract which provided that the employee would have to repay the employer the signing fee and monthly special bonus if the employment was terminated within 30 months of the starting date, and repayment of the performance bonus if the employment was terminated within 12 months. After terminating the employment, the insurance company claimed against its ex-employee for the repayment of these sums.

The Court of Appeal accepted the trial judge's finding that the real reason the employee was terminated by the employer was her refusal to accept a demotion and it upheld the trial judge's rejection of the employer's contention that the termination was due to the employee's failure to meet her performance target. It was argued on appeal by the employee as a counterclaim that the employer had breached its implied duty to exercise its power of termination and power of demotion in good faith and rationally. As this implied-term argument had not been raised in the lower court, the Court of Appeal remitted the case back to it.

These cases confirm that any unqualified power of discretion given to an employer under an employment contract (e.g., in determining discretionary bonuses, power to terminate or

12 CACV 12/2015; unreported (date of judgment: 28 September 2016).

13 id. The Court of Appeal noted at paragraph 63(5) of the judgment that the employee's bonuses for the years from 2002 to 2006 were between two and three and a half times her annual salary and that the basic salary was the 'sauce' while the performance bonus was the 'meat'.

14 [2019] 3 HKLRD 455, CACV 181/2015, [2019] HKCA 697 (date of judgment: 24 June 2019).

demote) should be construed as being subject to some implied restrictions and not completely unfettered, such that it 'can only be exercised in good faith, rationally and for a proper purpose, and not arbitrarily or capriciously or in a manner which is not bona fide'.[15]

v High threshold for summary dismissal

The courts have recently clarified the employer's right to summarily dismiss an employee under Section 9 of the Employment Ordinance. In *Cheung Chi Wah Patrick v. Hong Kong Cement Company Limited*,[16] the Court of First Instance held that unless it is a case of serious neglect of duty or breach of confidence or incompetence, an employer can only summarily dismiss an employee if the employee manifested an intention not to be bound by the employment contract. To do so requires consideration of the employee's intention to ascertain the employee's reasons for the conduct in question and where the employee has acted faithfully and without the intention not to be bound by the employment contract, summary dismissal is not justified and the employer can only terminate the employment contract by giving the necessary notice or paying wages in lieu of notice.

In *Cheung Chi Wah Patrick*, the employee was the financial controller of the employer company and had 15 years of professional experience in the field. It was his duty to assist the parent company of his employer, a listed company in Hong Kong, in relation to its issuance of rights shares. Although the employee did consult the employer's then legal advisers, he misinterpreted the legal advice and applied for the issuance of a number of rights shares that would have the effect of causing the public holding of the parent company to fall below 25 per cent, which would be a violation of the Hong Kong Listing Rules. Subsequently, this matter was rectified by the parent company, which sold extra shares to maintain the 25 per cent public holding. The employee was summarily dismissed and he claimed against the employer for his wages in lieu of notice and end-of-year payment.

In upholding the Labour Tribunal's decision in favour of the employee, the Court of First Instance held that, despite the prima facie case shown by the employer to support its decision for summary dismissal, the Court was not satisfied that this was a case of serious neglect of duty in which the employee's intention need not be considered. Upon consideration of the employee's intention, the Court held that he had acted faithfully and had made an honest mistake. It was not a case of wilful disobedience and did not justify summary dismissal.

In *Sarniti v. Lee Suk Ling*,[17] the District Court took the view that the employee's habitual neglect and failure to perform her basic duties justified summary dismissal. This case concerned a dispute between a domestic helper and her employer and was originally commenced as a discrimination claim. The employee claimed that she had been unlawfully dismissed on account of her pregnancy and the dismissal amounted to a discriminatory act under the Sex Discrimination Ordinance. Conversely, the employer claimed that the employee's pregnancy was irrelevant to her dismissal as the employer was unaware of her pregnancy, but rather the dismissal was due to the employee's repeated disregard for basic instructions, failure to properly perform her duties, and her unsatisfactory attitude.

In concluding that summary dismissal was justified, the Court accepted the evidence given by the employer and took into account the numerous complaint messages sent from

15 id., paragraph 66 of the judgment.

16 [2017] 5 HKC 515.

17 DCEO 2A/2018, DCEO 2/2018, [2019] HKDC 11458.

the employer to the employee regarding her work performance, and a previous warning letter issued to the employee, as well as a video recording of an incident showing the employee's poor attitude.

vi Labour Tribunal's power to order a party to provide security

Pursuant to Section 30(1) of the Labour Tribunal Ordinance (Cap. 25), the Labour Tribunal has the power to order a party to give security for the payment of an award or order that has been or may be made if it considers just and expedient to do so. The Court of First Instance decision in *Hon Sau Har v. Lo Woon Bor Henry T/A Henry Lo & Co Solicitors*[18] gives some helpful guidance as to how this statutory power should be exercised.

In this case, the employee, who had been employed as a secretary at a law firm for less than two years, was dismissed by her employer. After her dismissal, she commenced proceedings at the Labour Tribunal to claim against her former employer for payment of annual bonus, unused annual leave and termination payment. Before the case went to trial, the employer applied for security to cover its costs. When considering whether or not to grant security, the presiding officer of the Tribunal took the view that the employee's claim did not have strong merits and ordered the claimant to pay into the Tribunal a sum of HK$10,000 as security for the employer's costs (after taking into account the time already spent by the employer in handling the claim and the estimated time yet to be incurred), failing which the employee's claim may be dismissed. The employee failed to make payment by the deadline and her claim was consequently dismissed by the Tribunal. The employee appealed to the Court of First Instance against the Tribunal's decision to order security and to dismiss her claim.

The Court of First Instance affirmed that the Tribunal was entitled to make a preliminary assessment of the merits of the parties' cases to decide whether or not security should be granted. Further, the Court of First Instance agreed with the presiding officer's view that the employee did not have a strong case and that an order of security should be made to protect the employer's costs.

It would seem that the Tribunal is prepared to make an order for security against a party where that party's claim or defence appears to the Tribunal to be weak or groundless. It should also be noted that while, in this case, the employer made an application to the Labour Tribunal for security, the Tribunal has the statutory power to make an order for security on its own motion as well,[19] though the power is only exercised sparingly.

vii Employers cannot ask employees to take a pregnancy test

Issues concerning direct sex and pregnancy discrimination involving a foreign domestic helper were discussed in *Waliyah v. Yip Hoi Sun Terence*.[20] In this case, the District Court reaffirmed that anti-discrimination legislation in Hong Kong is social legislation that should be interpreted purposively and that a generous and liberal interpretation should be adopted.

The employee, an Indonesian domestic helper, was requested by her employer's wife to take a home pregnancy test. The employee did so voluntarily and the result was positive. The employee then asked the employer's wife about having an abortion in Hong Kong and the

18 HCLA 17/2018, [2018] HKCFI 2509 (date of judgment: 14 November 2018).

19 Section 30(2), Labour Tribunal Ordinance (Cap. 25).

20 [2017] 1 HKLRD 1082.

employer's wife accompanied her to see a doctor, from where she was referred to a government hospital. However, the employee was unable to obtain an abortion and the employer found out about her pregnancy and terminated her employment with one month's notice. He later made the employee move out of the home about one week before expiry of the notice period.

The employee claimed against her employer for damages for discrimination, breach of contract, breach of statutory maternity protection and unlawful dismissal. Although the District Court found that the employee took the pregnancy test voluntarily, as she too was eager to know whether she was pregnant, it held that the act of requesting the employee to take the pregnancy test in a supervised manner and without giving the employee the option not to inform the employer of the result, amounted to direct sex discrimination under the Sex Discrimination Ordinance (Cap. 480) as the act constituted 'less favourable treatment' on the ground of her gender. The District Court emphasised that whether or not a female employee is pregnant is a private matter that her employer does not have the right to know.

This case highlights that an employee's response is not determinative in deciding whether the employer's act is discriminatory. Even though the employee took the pregnancy test voluntarily, the District Court noted that the employee's consent is not determinative as the spirit of the anti-discrimination legislation in Hong Kong calls for a look into the nature of the employer's conduct rather than the employee's response. One relevant factor in this case was that, as the employee was a foreign domestic helper, her consent or compliance could have been the result of her general servile and subservient character or ignorance of her legal rights. This case also confirms that for an act to be discriminatory, the employer does not need to have the subjective intention or motive to discriminate, although that may be relevant to the assessment of damages.

As for the subsequent termination of employment by the employer and making the employee move out one week before expiry of the notice, the District Court held that the employer would not have done so but for the employee's pregnancy. Not only did the act amount to pregnancy discrimination, it also constituted a breach of the implied term of mutual trust and confidence under the employment contract, a breach of the Employment Ordinance regarding pregnancy protection and unlawful dismissal.

viii Discrimination on the grounds of sexual orientation

Although Hong Kong does not currently have specific legislation against discrimination on the grounds of sexual orientation, there have been significant developments in this area. Hong Kong's top court recently delivered a unanimous decision in *Leung Chun Kwong v. Secretary for Civil Service*,[21] ruling that the government's decision not to grant spousal and tax benefits to a same-sex couple was unjustified and that such differential treatment based on sexual orientation amounts to unlawful discrimination. This decision by the Court of Final Appeal overturned the previous Court of Appeal decision in which it was held that such differential treatment was justified by the need to uphold the status of marriage accepted in the local context and to do otherwise would undermine the community's prevailing view that the only acceptable form of marriage is heterosexual marriage.

The applicant in this case was a Chinese national and a permanent resident of Hong Kong who was employed by the government as a senior immigration officer. As same-sex marriages are not allowed in Hong Kong, the applicant married his same-sex partner in

21 For the Court of First Instance judgment, see [2017] 2 HKLRD 1132. For the Court of Appeal judgment, see [2018] 3 HKLRD 84, [2018] HKCA 318.

New Zealand in 2014. The applicant launched a judicial review against two decisions by the government: (1) not to extend certain spousal medical and dental benefits for civil servants to same-sex marriage (the Benefits Decision); and (2) that he and his spouse were not entitled to opt for joint assessment of taxes, on the basis that they were not 'married' for the purposes of the Inland Revenue Ordinance (Cap. 88) (the Tax Decision).

The applicant's challenge was based primarily on constitutional grounds; in particular, that the decisions infringed his right to equality or the right not to be discriminated against. The difference in legal treatment was accordingly based on the applicant's marital status as well as his sexual orientation.

In considering whether the local legal landscape and societal circumstances, including prevailing socio-moral values of society on marriage, would justify the differential treatment, the Court of Final Appeal ruled that such considerations were irrelevant. It was held that the absence of majority consensus could not be a reason to reject a minority's claim as this would be a threat to fundamental rights, especially minority rights. The Court further rejected the argument that the differential treatment was rationally connected with the aim of promoting the concept of a 'traditional family' constituted by heterosexual marriage, and rejected the notion that heterosexual marriage would be undermined by extending employment and tax benefits to same-sex married couples.

By way of procedural background, the Court of First Instance had held that the differential treatment in the Benefits Decision was not justifiable and amounted to indirect discrimination, and it took the view that granting spousal benefits to such couples would not undermine the integrity of the institution of marriage (as understood in Hong Kong) or the traditional family. As regards the Tax Decision, the Court of First Instance held that it was a matter of statutory construction as to whether the applicant's marriage fell under the definition of marriage under the Inland Revenue Ordinance (Cap 88). The Court of First Instance held that this definition accorded with the well-established meaning given to it for common law and constitutional purposes (i.e., marriage was the voluntary union for life of one man and one woman to the exclusion of all others). Therefore, to construe marriage as covering same-sex marriages would be contrary to established law.

When the case came before the Court of Appeal, the Court took the opposing view and held that the differential treatment in the Benefits Decision and the Tax Decision was justified by the need to uphold the status of marriage as understood and accepted in the local context. The Court held that the grant of spousal benefits to same-sex couples would undermine or be perceived to undermine the status of marriage, and that both the law and the community's prevailing views on marriage remain that the only acceptable form of marriage is heterosexual marriage and thus there is immense public interest in protecting the institution in this form. The differential treatment was held to be proportional and rationally connected to the legitimate aim of protecting the traditional concept and institution of marriage.

In another landmark case – *QT v. Director of Immigration*[22] – a judicial review challenge was brought by a British national against the Director of Immigration in Hong Kong for unlawful discrimination on the grounds of sexual orientation in administering its dependant visa policy. The applicant's same-sex partner (with whom she entered into a civil partnership in England under the Civil Partnership Act 2004) was offered employment in Hong Kong

22 (2018) 21 HKCFAR 324, [2018] HKCFA 28.

and was granted an employment visa to work in Hong Kong. The applicant then applied for a dependant visa, but her application was refused as she was not considered a spouse under Hong Kong law.

The Court of Final Appeal (the highest court in the Hong Kong court hierarchy) held that there was indirect discrimination by the director in exercising the policy as the differential treatment could not be justified. The Court took the view that such differential treatment was not rationally connected to the legitimate aims of attracting foreign talents to Hong Kong and maintaining strict immigration control and noted that the refusal of dependant visas to same-sex spouses or partners is in fact counter-productive to achieve that aim. As to the second aim of administering immigration control, the Court of Final Appeal noted that same-sex couples are just as conveniently able to produce their civil partnership certificates and would not cause any inconvenience and it was therefore irrational to treat same-sex couples differently on the basis of administrative convenience. This landmark decision of the Court of Final Appeal has led to an official change in Hong Kong's immigration policy in relation to same-sex dependant visas.[23] The principles in this case were also considered in the Court of Final Appeal decision in the *Leung Chun Kwong* case mentioned earlier.

The Court of Final Appeal left open the question of whether differential treatment of same-sex couples may be justified if the legitimate aim of the policy is to uphold the traditional concept of heterosexual marriage, and this was subsequently considered in its decision in the *Leung Chun Kwong* case, as discussed above.

V OUTLOOK AND CONCLUSIONS

This year has seen some development in the area of employment law concerning team moves. Given the highly competitive employment scene in Hong Kong, employees often leave an employer in groups to set up a new business in competition with their former employer. It is also common for a competitor company to hire an entire team from another company for their specialised skills and knowledge in a particular field. Employers have been relying on various means to protect their interests, including reliance on the implied duty of fidelity, the enforcement of any restrictive covenants and clauses against the misuse of trade secrets provided under employment contracts, and applications for injunctive reliefs, including springboard injunctions. It is expected that the relevant law concerning the potential rights and liabilities of employers and employees involved in team moves will continue to develop as, increasingly, employers seek better protection for their businesses.

23 See Government Press Release dated 18 September 2018 at https://www.info.gov.hk/gia/general/201809/18/P2018091800579.htm.

Chapter 7

INDIA

Swarnima and Amulya Chinmaye[1]

I INTRODUCTION

In 1947, with the end of the British regime, India was constituted as a sovereign, socialist, secular, democratic republic. Through the formative years of independent India, societal consciousness developed in relation to the nature of the country's economic fabric.[2] Socioeconomic welfare thus came to be of paramount importance for the Indian legislature and, accordingly, several laws were enacted in the period around Indian independence.[3] A chief factor in the labour-related legislative reforms was the realisation that the British rulers had intervened in labour matters merely to protect their individual or collective commercial interests.[4] The reforms sought to safeguard workers' interests, especially in the inflationary aftermath of the Second World War. A climate of unemployment, and the burgeoning trade union movement[5] propelled state intervention in favour of the labourers.[6] Against this backdrop, the Industrial Disputes Act 1947 (the ID Act) was enacted to provide for investigation and settlement of industrial disputes.[7] Under the ID Act, 'workmen' are empowered to use its mechanisms effectively against the oppressive tactics of employers. They can take a host of labour issues ranging from payment of minimum wages and social security benefits to unfair labour practices such as arbitrary dismissal, discharge and retrenchment to

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2 Report of the National Commission on Labour, Ministry of Labour and Employment and Rehabilitation, Government of India, 1969.

3 Constituted as a federal republic, India has legislative branches at both central government and state government level. Further, under the Constitution of India, 'labour' is classified as a subject on which both the central and state governments are empowered to legislate. Most state legislatures have either enacted amendments to central legislation on this particular subject, or created their own rules for implementation. Further, several state governments have enacted independent statutes resulting in diverse state legislation on labour matters.

4 See footnote 2.

5 Kennedy, Van D, 'The Sources and Evolution of Indian Labour Relations Policy', *Indian Journal of Industrial Relations*, at pp. 15 to 40, Vol. 1, No. 1 (1965) (available at www.jstor.org/stable/27760575) (last accessed on 2 January 2018).

6 Several giant trade unions, such as the Indian National Trade Union Congress, the Hind Mazdoor Sabha and the United Trade Union Congress, were formed in this era. (Nitin Sehgal, 'Brief History of Trade Union Movement in India', *Important India*, 21 November 2013, www.importantindia.com/8419/brief-history-of-trade-union-movement-in-india/).

7 Statement of Objects and Reasons, Industrial Disputes Act 1947.

the industrial tribunals and labour courts set up under the ID Act. The ID Act thus forms the primary legislation in India that seeks to preserve harmonious industrial relations between employers and employees.

The ID Act and most other labour statutes in India do not apply uniformly to all establishments or levels of employees. Typically, the applicability of each statute has to be assessed at two levels: (1) to an establishment as a whole; and (2) to all employees or a specific section of employees. The first level of assessment needs to be through the definitional clauses of each statute. All labour law statutes contain separate definitions of 'establishment', 'factory', 'industry', 'employer', 'mine' and 'plant', among other terms. To qualify under the statute, these definitions typically require the establishment to carry on some systematic activity, have a certain strength of workforce, be a shop or a specific type of establishment. In respect of the second assessment, various central and state laws categorise employees according to their wages, their role within the organisation, length of service, among others. The applicability of labour legislation to a specific employee depends on the category of that employee. For example, the ID Act is applicable only to employees at the level of 'workman' and thus whether or not an employee is a workman under the ID Act becomes a very important determination.

The ID Act defines a 'workman' as:

> *any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied . . . but does not include, inter alia, any such person who is employed mainly in a 'managerial or administrative capacity'; or who, being employed in a 'supervisory capacity', draws wages exceeding 10,000 Indian rupees per month.*

Further, Section 2(k) of the ID Act requires that industrial disputes are limited to those disputes or differences between employers and workmen, between workmen and workmen, or between employers and employers that are connected with the employment or non-employment or the terms of employment or with the conditions of labour of any person. Typically, Section 2(k) requires the involvement of workmen or members of the union to raise an industrial dispute. However, under Section 2A, the ID Act provides leeway for an individual workman to raise an industrial dispute, provided that the dispute connects with or arises out of a discharge, dismissal, retrenchment or termination. Several courts have settled that an individual dispute does not require the espousal or backing of other workmen or any union, provided that its subject matter pertains to the specific types of disputes under Section 2A.

The ID Act focuses on regulating industrial relations, but there are several other labour law statutes that also provide for dispute resolution mechanisms or the appointment of authorities to adjudicate claims under the statute concerned.[8] For example, the Minimum Wages Act 1948 provides that the appropriate government may appoint an officer at the level of regional labour commissioner or assistant labour commissioner to decide claims arising out of deductions from wages or delays in payment of wages. Similarly, the Employees' Provident Fund and Miscellaneous Provisions Act 1952 (the EPF Act) provides for the appointment of authorised officers such as the central provident fund commissioner and the regional provident fund commissioner to decide disputes relating to the application of the EPF Act, determination of the amounts due from an employer, inter alia. The EPF Act also provides

8 Labour laws in India are divided into more than 200 statutes governing subjects ranging from conditions of employment to social security, health, safety, welfare, etc.

for the constitution of the Employees' Provident Funds Appellate Tribunal as an appellate forum. Despite the existence of similar adjudicatory bodies under other labour statutes, a significant amount of labour litigation is actively pursued before the industrial tribunals and labour courts set up under the ID Act. This is because labour issues predominantly relate to issues such as undue discharge or dismissal, non-observance of exit procedures, employee entitlements to retrenchment compensation, oppositions to disciplinary action taken against misconduct or sexual harassment, disputes over whether an employee is a workman or not, whether the individual is an 'employee' or not, and non-payment of social security benefits.

As to the general tenor of employment litigation in India, courts prefer to maximise employees' interests in labour disputes while balancing employers' interests. Courts and tribunals generally seek to secure for employees a degree of basic sustenance or livelihood, protect them against exploitation by employers and equalise the relative bargaining capacities of employers and employees. In this context, courts may appear inclined towards protecting employees' interests. This tendency arises from the socioeconomic context of several labour law enactments, and the disparity in the relative bargaining capacities of employers and employees. For example, in cases relating to procedural impropriety during dismissal, unfair termination, etc., it is often noticed that industrial tribunals or labour courts do not hesitate to take an employee-friendly view. In several cases, tribunals or courts have ordered reinstatement with full or part back pay for the employee's period of unemployment.

II PROCEDURE

As indicated in Section I, the ID Act and other statutes provide for the constitution of labour courts or industrial tribunals. These forums are dedicated to conciliation and adjudication of labour disputes, and are distinct from the traditional civil courts that handle matters under the Code of Civil Procedure 1908 (CPC). Of the labour law adjudicatory bodies, the conciliation officers, boards of conciliation, industrial tribunals and labour courts are those before which labour disputes are most frequently raised. The ID Act confers upon these adjudicatory bodies powers similar to those of the civil courts under the CPC in relation to:

a summoning witnesses for examination;
b compelling production of evidence;
c enforcing the attendance and examination of persons;
d discovery and inspection;
e granting adjournments; and
f reception of evidence taken on affidavit.

Prior to filing a suit or raising a dispute under various labour laws, the two most important assessments are whether the employee concerned in the matter is a workman under the ID Act and whether the dispute is in the nature of an industrial dispute or an individual dispute. The number of workmen involved, as well as the nature of the dispute, chiefly determines an employee's ability to raise the dispute before an industrial tribunal or a labour court. Thus, labour dispute procedures vary depending on this assessment. As stated earlier, a workman may separately raise an individual dispute as an industrial dispute. However, for the dispute to be valid, it must pertain to the discharge, dismissal, retrenchment or termination of the

individual workman. If no relation is found, courts generally require the sponsorship of the individual's fellow workmen or union members before admitting matters unconnected in this respect.[9]

i Resolution procedures in respect of workman-level employees

The ID Act requires the parties to an industrial dispute to apply to the appropriate government to refer the matter for adjudication. If the appropriate government is satisfied that an industrial dispute has occurred or is apprehended, it may refer the dispute to a board of conciliation, to a court of inquiry, to a labour court (provided the dispute relates to a matter specified in Schedule II to the ID Act) or to an industrial tribunal (provided the dispute relates to a matter specified in Schedule II or Schedule III to the ID Act).

When the dispute is before the conciliation officers,[10] each party to the dispute can lay out his or her demands or requirements separately before the conciliation officer and jointly with the opposite parties. Using this mechanism, the parties or their representatives in the unions can seek to collectively bargain and resolve the differences between them. In fact, it is the duty of the conciliation officer to investigate or resolve the matter amicably, and induce the parties to come to a fair settlement. Where the conciliation proceeding succeeds, the conciliation officer is required to submit notice of this to the government concerned, with his or her report[11] and a memorandum of settlement. Where the conciliation fails, the officer is required to submit to the government a detailed report on the steps undertaken to resolve the dispute, and to give his or her opinion of why the settlement could not be achieved.

Where the conciliation fails and a report is submitted, the government concerned is required to satisfy itself of a need to make the order of reference to either a labour court or an industrial tribunal. Where an industrial dispute is referred to either of these forums, it is required to complete its proceedings expeditiously, within the time prescribed in the order of reference,[12] and submit its award to the government. The government is required to publish the forum's report within 30 days of its receipt. Published awards of labour courts or industrial tribunals will be deemed final and binding on the parties to the dispute. Despite

9 This is because the Industrial Disputes Act 1947 (the ID Act) was conceptualised to provide a mechanism to settle disputes between an employer and its employees, or a substantial section of the employees. The object of the ID Act is to maintain industrial peace and achieve collective amity by preventing industrial strikes or lockouts. It is not intended for the ID Act to take the place of an ordinary tribunal of the land for enforcing the contracts between an employer and an individual workman. Thus, the application of the ID Act to an individual dispute is excluded unless it acquires the general characteristics of an industrial dispute (i.e., espousal or backing of the workmen as a body to make common cause with the individual workman) (*PM Murugappa Mudaliar Rathina Mudaliar & Sons v. Raju Mudaliar (P) and Ors* (1965) 1 Kant LJ 489). Hence, it is determined that if an individual raises a dispute, it can only be for a removal, termination or dismissal. If the workman wants to raise a dispute relating to other claims, it can only be done by the union on behalf of the workmen or workman (*Prakash and Ors. v. Superintending Engineer (Eel)* (2001) 1 Kant LJ 490).

10 The ID Act requires the appropriate government to make an order of reference to the relevant board of conciliation. However, practically, either party can directly request in writing that a conciliation officer commence the conciliatory process.

11 To be submitted within 14 days of the commencement of the conciliation proceedings.

12 However, when the industrial dispute referred is in the nature of an individual dispute under the ID Act, the period for submission of the award must not exceed three months.

the finality of the award, a writ can be filed before the high court under Article 226 of the ID Act if the award suffers from patent perversity or grossly flouts the basic principles of natural justice.

ii Resolution procedures in respect of non-workman-level employees

The above-listed dispute resolution procedures under the ID Act are not applicable to non-workman-level employees. Their terms of employment are guided by the relevant state-specific shops and commercial establishments acts[13] (the S&E Acts), provided they qualify as employees under the S&E Acts. Further, the S&E Acts typically require employers to have a reasonable cause for terminating an employee's employment and to give at least one to two months' notice prior to termination (based on the length of the employee's service) or to make payments in lieu of the notice period.

Thus, under the S&E Acts, employees can file complaints with the inspectors (who are appointed under the Acts) against their employers for depriving them of their statutory entitlements or for violating the provisions of the S&E Acts. The disputes of such employees that progress to the civil or higher courts commonly relate to non-observance of the exit procedures prescribed under these pieces of legislation. Generally, the procedures under the CPC would apply to employees taking this route for dispute resolution. Similarly, employees such as supervisors, managers and other senior-level employees can have recourse to the civil courts to address their employment-related disputes; typically, disputes by these employees would involve breach-of-contract claims based on contractual rights and obligations or conditions of service.

III TYPES OF EMPLOYMENT DISPUTES

Industrial tribunals and labour courts in India adjudicate on a plethora of employment-related disputes, ranging from issues such as redundancies, disciplinary action because of misconduct or allegations of sexual harassment, procedural impropriety in conducting disciplinary enquiries, non-payment of exit payments and performance-based terminations to regularisation claims in the context of contract labour. In all these cases, courts stringently require employers to observe statutory procedures before taking any penalising action or discharging the employee from his or her position. Further, Indian courts do not recognise 'at-will' terminations, and typically require that termination of employment should be for a 'reasonable cause' (which must be mentioned in the termination notice). For example, unilateral terminations or redundancies for genuine business reasons would be considered as terminations based on a reasonable cause, as would terminations based on poor performance. However, even terminations based on a reasonable cause should be attended by statute-prescribed procedures or judicially evolved principles for termination. We have briefly set out below the procedures that result in disputes that are frequently seen before the adjudicatory bodies.

13 The state-specific shops and commercial establishments acts are the primary legislation governing several aspects of the employer–employee relationship, such as working conditions of employees across the state, termination of employment, work timings, leave entitlement, resolution of disputes and other rights.

i Redundancies

In the event of a retrenchment (including a redundancy), the ID Act requires employers to notify both the government authorities and the workmen that they intend should be retrenched, follow the 'last-in-first-out'[14] rule, and publish a seniority list of the workmen. Further, upon termination, employers are required to make certain statutory payments, such as accrued but unpaid wages (until the termination date), notice pay (if applicable), retrenchment compensation,[15] wages in lieu of accrued privilege leave that has not been taken, any contractual dues and gratuities (if payable). Thus, disputes in this respect typically arise when employers fail to follow the mandatory processes or make the requisite payments.

ii Poor performance and misconduct terminations

Terminations based on poor performance are referred to as 'termination simpliciter' and those based on misconduct are known as 'stigmatic terminations'; each type is treated differently by the courts. Although there is no statutory process for terminating employment on the ground of poor performance, courts generally require employers to provide the underperforming employee with a 'reasonable opportunity' to improve. This typically includes providing them with targets or goals to achieve, offering assistance or the support needed to improve their performance, and monitoring their performance for a specified period. Despite this, if the employee's performance does not improve, then companies may proceed with termination. Even here, employers are required to ensure that the termination letter is not stigmatic in nature and that severance payments are made. This is because courts view poor performance not as a 'fault' of the employee, but as a mismatch between the skills or competence of the employee and the expectations of the employer.

In cases of misconduct, issues mostly relate to the quantum of punishment or the failure to adequately hear the parties. Courts require that the punishment is proportionate to the offence. Further, if an employee is to be dismissed, courts require that before any action is taken, the employee is given a fair hearing to respond to the charges levelled against him or her, in accordance with the basic principles of natural justice. The fair-hearing requirement includes issuing a charge sheet, appointing an enquiry officer and conducting an enquiry.

In both the above situations, if courts find that due process was not followed, they may order the reinstatement of the employee with or without back pay.

Although sexual harassment in the workplace constitutes misconduct, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 (the SH Act) requires employers to address complaints of this type through a committee process. Under the SH Act, all establishments with 10 or more employees are required to constitute an internal committee, comprising a presiding officer, two employee members and one external member from a non-governmental organisation or association. The law also prescribes specific qualifications for each member of the internal committee. Challenges raised under the SH Act commonly pertain to improper constitution of the internal committee, and the

14 The last-in-first-out rule, inter alia, requires employers desirous of retrenching workmen to first terminate the workman who was the most recently employed in a particular category in the establishment and is a citizen of India.

15 Upon termination, the ID Act requires employers to pay employees retrenchment compensation (calculable according to the method laid down under the ID Act).

internal committee's failure to follow due process during inquiries. When the challenge is successful, courts often direct the company to conduct a fresh inquiry and, in some cases, order payment of compensation.

IV YEAR IN REVIEW

There have been no significant legislative developments in India (under the ID Act, the S&E Acts or the SH Act) that affect the way in which the judiciary currently resolves employment disputes. Having said that, in recent months, the Indian legislature's overarching efforts towards consolidating and streamlining various central labour laws have gained some momentum. The Industrial Relations Code 2019 (the IR Code) was introduced in the Lok Sabha (the lower house of the Parliament of India) in November 2019 to revamp the law on industrial relations, among others. When the IR Code is passed by both parliamentary houses and receives presidential assent, the ID Act would be repealed.

While these legislative changes are underway, Indian courts have continued to reaffirm their commitment to balancing employer and employee interests when adjudicating disputes based on extant laws.

i Union Bank of India v. CG Ajay Babu

Under the Payment of Gratuity Act 1972 (the PG Act), employees with five years of continuous service are entitled to receive a gratuity (a long-service payment) at the time of their exit. However, employers can wholly or partially withhold a gratuity, in limited circumstances, if the services are terminated for reasons such as the employee's riotous or disorderly conduct, or if the employee's acts (during the course of employment) constitute an offence of 'moral turpitude'. The Supreme Court has confirmed the additional procedure employers need to follow before imposing the forfeit of a gratuity on an employee on account of moral turpitude.

In this case,[16] disciplinary proceedings were initiated against an employee for his failure to discharge his duties, and for committing certain acts that were 'unbecoming of a bank officer'. The employer bank imposed a partial forfeit of the employee's gratuity, reasoning that his misconduct constituted an act of moral turpitude. Since the high court had ruled that, under the PG Act, gratuity could be forfeited for misconduct only if the misconduct caused financial loss to the employer, the employer bank raised an appeal before the Supreme Court. Dismissing the employer bank's appeal, the Supreme Court clarified that misconduct (established during the disciplinary inquiry) was insufficient grounds for the forfeit of a gratuity for 'an offence of moral turpitude'. The rationale here was that only a court of competent jurisdiction could convict an individual for an offence involving moral turpitude. As the employer bank had not even set in motion the criminal law machinery to establish that the employee had committed an offence of moral turpitude, it could not require the employee to forfeit his gratuity; thus, forfeiture of gratuity would not be automatic on dismissal from service, and would depend on whether the employee's act or omission were punishable under law.

16 C.A. No. 8251/2018 (S.L.P. (Civil) No. 3852/2017).

Previously too, the Supreme Court and some high courts have endorsed the view[17] that misconduct proved through a disciplinary proceeding cannot be construed as a punishable offence under law. Despite this, a few high courts have taken a contrary view on the grounds that the standards of proof for establishing guilt under a criminal proceeding and under a company's disciplinary inquiry vary.

With the Supreme Court's latest ruling on this issue (in the employer bank case), it is now clear that unless an employee has been convicted by a court of law, employers will not have the ability to impose a forfeit of gratuity on account of moral turpitude. While this is the current legal position, imposing a conviction as a precondition to forfeiture can prove rather onerous for employers, as the expense incurred for the litigation process may itself far exceed the gratuity intended to be forfeited. Further, in cases of grave misconduct (such as sexual harassment), the complainant may prefer not to file a criminal complaint against the accused employee. In such cases, employers could face practical difficulties in imposing a forfeit of the accused's gratuity.

ii Tushar and Ors v. Internal Complaints Committee, Christ University and Ors

Two male students reportedly sent an offensive image to a female student on a phone application. The female student first raised a complaint with university officials and later also raised a sexual harassment complaint with the university's internal committee. It is undisputed that the students confessed to the university officials. Accordingly, they were debarred from appearing in the semester examinations. Since a confession had already been made before the university officials, the internal committee found the students to be guilty without observing the inquiry processes prescribed under the university regulations and the SH Act, such as sharing a copy of the complaint with the accused and assessing their replies. Following the internal committee's report, the students were suspended for one year. A single judge of the Karnataka High Court subsequently quashed the suspension order for failing to conform with the prescribed inquiry processes. The university was directed to conduct proceedings afresh and give the students an opportunity to make representations and furnish evidence.

This case addresses an interesting legal issue on the validity of a confession during a sexual harassment inquiry – specifically, whether a confession can solely be relied on such as to abandon the regular inquiry processes. It is entrenched in jurisprudence that following the principles of natural justice is imperative before taking any disciplinary action. As the principles of natural justice are indispensable to an inquiry, the legislature has even cautiously embodied those principles in the SH Act.

In the context of sexual harassment matters, this may be one of the few cases in which the accused overtly admitted to the wrongdoing. However, in a considerable volume of case law involving regular misconduct, Indian courts have established that a detailed inquiry is unnecessary if there has been an admission, with the rationale being, of course, that it would be an empty formality to compel an employer to hold a detailed inquiry if an express admission has already been made. While courts have been practical here, to avoid reducing the principles of natural justice to a mere technicality, they have also strived to achieve a balance between practicalities and due process in such cases. That is, a simple admission of guilt would not be adequate. This is because there could be several facets to an admission that should be considered, such as the circumstances in which it was made, the authorities before

17 *Jaswant Singh Gill v. Bharat Coking Coal Limited and Ors* (2007)1 SCC 663.

whom the accused confessed, conditionalities associated with the admission, specific aspects of the charges to which the admission relates, the presence of any coercion, the manner of the confession (whether verbal or written), and the extenuating factors that led to the confession.

Courts are also keen that the principles of natural justice should not be disregarded, unless there is certainty that a detailed inquiry would neither change the outcome nor cause the employee any prejudice. For instance, the judicial exception to holding a detailed inquiry (in the case of a confession) could have squarely applied even in the law students' case. However, the single judge insisted that the internal committee should have followed due process because the confession itself was not made to the internal committee. Further, the suspension (which was the second punishment imposed) was predicated on the internal committee's inquiry report. Had the students been given the opportunity of a hearing, the outcome might have been different. Thus, it was essential in this situation for the internal committee to follow the procedural regulations and provide the opportunity of a hearing.

The key takeaway for employers from this case is undoubtedly that extreme caution must be exercised in handling cases involving an admission of guilt. It must be borne in mind that a confession alone does not fulfil the legal requirement to conduct an inquiry. There can be various nuances to a confession, each of which tends to be closely scrutinised by courts. Thus, to avoid legal complications, it is crucial that internal committee members and also human resources personnel are well versed in the inquiry procedures – both for sexual harassment and general misconduct matters; for this, the importance of training on the basic legal principles governing such inquiries cannot be stressed enough.

V OUTLOOK AND CONCLUSIONS

All litigation in India is typically a drawn-out, expensive process, owing to factors such as procedural lags, backlogs and non-appearance of parties. Because of the general misconception that the term 'workman' under the ID Act relates only to employees in blue-collar jobs, traditionally most labour litigation has pertained to the disputes of unions and the labour masses. However, given the increased awareness among the educated classes, especially in the information technology (IT) sector, of their rights under the ID Act, the S&E Acts and the SH Act, individual labour disputes have been on the rise. The Forum of Information Technology Employees (FITE) has taken the initiative to form IT trade unions in the Indian states of Tamil Nadu, Karnataka and Maharashtra. FITE's efforts are also concentrated on setting up similar unions in other states, such as West Bengal. This emerging IT trade unionism movement is catalysing the pursuit of labour disputes by white-collar employees. Further, the involvement of unions is likely to strengthen the collective bargaining powers of IT employees against unfair retrenchment.

Following the reignition of the #MeToo movement in India in 2018, there has been a considerable spike in the number of sexual harassment complaints filed with internal committees – specifically time-barred and anonymous complaints. Given the various nuances inherent in such complaints, it is likely that litigation will multiply if employers do not handle the complaints in accordance with the law.

While no immediate legislative changes may follow in the field of dispute resolution, the central government has laid the foundations of the IR Code, which would repeal the ID Act – although it may well take one to two years for the IR Code to be enacted.

The scheme of dispute resolution under the IR Code would largely mirror the current mechanisms of the ID Act, although the IR Code proposes to do away with the

various adjudicating forums under the ID Act. With the enactment of the IR Code (in its current form as introduced in the Lok Sabha), some forums provided for under the ID Act, namely the boards of conciliation, courts of inquiry and labour courts, would be abolished. Instead, industrial tribunals would act as the sole adjudicating bodies in deciding appeals over the decisions of conciliation officers. The IR code would also dispense with the current order-of-reference concept (the requirement for an order to be made by the government before an industrial dispute can be adjudicated by an industrial tribunal), thereby allowing individuals to apply directly to a tribunal if a conciliation is not successful. In addition to simplifying these processes, the IR Code would introduce an element of transparency to the resolution of disputes, in that it provides for the digitisation of various compliance mechanisms (including the submission of conciliation reports in electronic formats).

Chapter 8

ITALY

Francesco d'Amora and Andrea Patrizi[1]

I INTRODUCTION

In Italy, employment courts are the sole forum for resolving employment disputes. The only employment-related matters handled by the civil courts are those between social security institutions and employers for fines arising from the absence of social security payments.

Civil matters that should ordinarily be decided by a civil court will be resolved by an employment court if they are connected to an employment matter (for example, insurance matters relating to an accident at work).

Employment law is a separate set of laws (which sometimes disregards the ordinary principles of civil law) and is based on the principle of the 'weakness' of the employee with respect to the employer's position of strength.

The following constitute the sources of Italian employment law:

a the Italian Constitution, which established the framework and principles of Italian law in 1948;

b Law No. 300/1970 (the Workers' Statute), which was significantly amended in May 2015 by Law No. 183/2014 (part of a set of laws and legislative decrees known as the Jobs Act) – a wide-ranging reform implementing a number of legislative decrees;

c other mandatory employment laws, such as Legislative Decree No. 81/2008, dealing with health and safety at work; the maternity law; the working-time law; the 'smart working' law; and several other laws regarding pensions and accidents at work;

d Law No. 68/199, regarding mandatory recruitment of disabled employees, amended with effect from 1 January 2018, and Law No. 104/1992 regarding paid leave to assist disabled relatives, amended in 2015 (Italian labour lawyers are very often asked to assist employers with both of these);

e collective bargaining agreements at national, regional or company level in national collective labour contracts (CCNLs) and local company-level collective bargaining agreements (CBAs): such contracts can derogate from mandatory employment law in certain cases, including when dealing with important crises (for example, the *Alitalia* case). These agreements set out the main common rules for each industrial sector regarding matters such as salary levels, working hours, overtime, annual paid leave, sick leave and disciplinary rules; and

f individual contracts: these generally contain one or two pages dealing only with the applicable CCNL; the employee's job title and grade (executive, middle manager or

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white-collar or blue-collar employee); the mandatory basic salary level (chosen from those stated in the CCNL); the starting date; the working hours and place of work; trial period, if any; the salary structure; job description; and post-employment restrictions (non-compete and non-solicitation covenants) if any.

II PROCEDURE

i Employment courts

The claims to be decided by the employment courts are those between the following parties: the employee and employer; the sales agent (a physical person) and company manager; a freelance worker (individual subcontractor) and company manager; and a member of the board of directors and the company (for fees).

In Italy, employment claims can now be filed with the courts without any prior attempt at conciliation. However, a prior attempt at conciliation remains mandatory in the case of dismissal of an employee hired before 7 March 2015.

This mandatory procedure is necessary only for dismissals for economic reasons; in such cases, an employer with more than 15 employees who is going to dismiss fewer than five employees within the same 120 days must deliver a preliminary notice of dismissal both to the regional labour office (ITL) and to the employee being dismissed and wait for a hearing before the ITL (within 20 days), which is a local office of the Ministry of Employment and Social Security.

If one of the parties refuses the conciliation attempt, or if the attempts to find a solution within the applicable time frame (20 days) are unsuccessful, a certificate is issued confirming that the conciliation requirement has been complied with. The claimant can then proceed to dismiss the employee.

The minutes of the conciliation attempt can be used by the employment court to charge the trial costs and legal expenses to the party that refused conciliation, although the final court decision may result in a lower amount being imposed.

ii Court proceedings

Court proceedings follow two distinct sets of procedural rules:

a the Employment Court Rules of Procedure 2012 (the Fornero Rules), which apply only to employees hired before 7 March 2015 by employers with more than 15 employees, and who challenge their dismissal in court; and

b the ordinary employment rules of the Italian Code of Civil Procedure (Article 414).

The Fornero Rules for dismissals are intended to speed up the start of the trial and the time it takes to obtain a decision. To avoid delay in obtaining the main decision regarding the potential reinstatement of the employee at work, the Fornero Rules procedure cannot deal with ancillary claims (for example, salary disputes connected with the former employment relationship).

In accordance with the Fornero Rules, the plaintiff must challenge the dismissal in writing within 60 days and file a lawsuit within 180 days of the letter challenging the dismissal being received.

Once the court has set the hearing date, the plaintiff shall notify the date and lawsuit to the defendant at least 25 days prior to the hearing, while the defendant must file its defence brief with the court at least five days before the hearing.

The lawsuit and the claimant's brief must be as accurate as possible, given the strict time constraints, but they can be modified slightly in response to an unexpected defence strategy by a counterparty.

Ideally, the first phase of the trial is very speedy and is concluded with one of three possible decisions: (1) reinstatement of the employee at work; (2) imposition of a fine of up to two years' salary; or (3) a declaration that the dismissal is correct and rejection of the claim.

This quick decision can be opposed by the losing party by filing a lawsuit before the same court within 30 days. A date will then be set for the opposition hearing, which is conducted pursuant to the Article 414 rules (i.e., an ordinary proceeding).

If, at the end of this opposition phase, the losing party intends to challenge the decision, an appeal must be lodged with the court of appeal within 30 days. During the appeal, only new information may be added or information that the party could not have known before. The appeal can be challenged before the Supreme Court, but only on questions of law or in relation to a misinterpretation of the CBA.

For all other employment claims (mainly salary claims, but also dismissal of senior managers, dismissal of employees working for employers with fewer than 15 full-time employees, or dismissal of employees hired after 15 May 2015, depending on the size of the employer), the claimant must file a lawsuit with an employment court, according to Article 414.

In general, the time limits for bringing claims are as follows:

a contracts null and void: no time limit or 10 years;

b salary claims: five years; and

c dismissal or change of contract (from temporary to permanent, or freelance to permanent employment) or change of employer (for example, agency workers who claim to have been hired by the customer): 180 days from the date of the letter challenging the decision being received.

However, during the voluntary conciliation period, the time limit is suspended and resumes the day after the parties deem the conciliation attempt to have failed.

The writ of summons shall be full and complete. This means that nothing can be changed subsequently, including any attached documents, the names of the witnesses and the circumstances testified to by the witnesses.

Upon receipt of the writ of summons, the court will open a file and add all the documents. The president of the court will then assign the claim to a single judge, who will schedule a date for the first hearing through a case management order.

It is the claimant's responsibility to obtain the judge's order and serve the writ of summons, together with the court order, on the defending party (the respondent).

The respondent shall then file the defence brief with the court at least 10 days prior to the hearing. The defence brief shall be complete and cannot be changed subsequently, including any attached documents, the names of the witnesses and the circumstances testified to by the witnesses.

The main hearing is heard by a single employment judge and is open to the public, but the judge can restrict access. During the first hearing, the judge must try to help the parties reach a settlement agreement. Again, should one of the parties disregard the judge's suggestion and refuse unreasonably to settle the claim, that party may be sanctioned by

imposing the payment of the other party's legal fees, even if that party wins the case (albeit, in the latter case, for an amount lower than the one suggested by the judge and accepted by the counterparty).

The judgment can either be announced orally or taken under advisement to be issued in writing as soon as practicable. In either case, the court ultimately must publish a decision and provide the reasoning for it.

If the worker is the successful party, he or she automatically obtains an order for payment of all claims and legal costs, sometimes even before the reasoning for the decision is written and made available to the parties.

A court judgment can be challenged by filing an appeal with the court of appeal within six months of the date on which the reasoning for the judgment is made public. Should the court judgment be served on the counterparty's lawyer by the winning party's lawyer, the term for filing the appeal is only one month. The appeal can only be filed without further witnesses being heard or new documents being acquired (except for specific objections). Beyond the court of appeal, further appeals can be made to the Supreme Court, but only on questions of law.

III TYPES OF EMPLOYMENT DISPUTES

i Unfair dismissal

Under the Workers' Statute, no employee can be dismissed without a qualified reason (objective or subjective). It is up to the employer to show that the dismissal was reasonable and that it was carried out in accordance with fair procedures.

For employers with more than 15 full-time employees and employees hired before 7 March 2015, the following unfair dismissal awards apply:

a Reinstatement at work plus a maximum of one year's gross salary (depending on the duration of the trial), plus the option to resign with an upfront payment of 15/12 of the annual gross salary. This may occur in cases of false accusations or false economic or organisational reasons, or if an alternative to dismissal was available but not considered.

b A fine of between one and two years' gross salary. This lesser sentence is generally handed down by the court when the accusations are true, but not particularly serious, or the economic or organisational reasons are true.

c A fine of between six months' gross salary and one year's gross salary is levied when the reasons for termination are true and valid but the procedure was defective.

d Reinstatement at work plus damages equal to the full salary and social security costs for the period from dismissal to the reinstatement order, without any time limit, when the dismissal is found to be retaliatory (for example, a whistle-blower has been dismissed because of his or her accusations) or discriminatory, or in the case of dismissal of a working mother or of a woman within one year of her marriage.

For employees hired after 7 March 2015 by an employer with more than 15 full-time employees, the awards start from a minimum of 6/12 of the annual gross salary up to a maximum of three times the annual gross salary.

ii Employment status

Whether an individual is an employee, temporary staff on a coordinated and continuous collaboration contract (known as a collaborator or 'co.co.co.') or self-employed is of key importance in relation to any employment benefits or rights he or she may have.

For example, certain rights are available to employees, such as the right to the national minimum wage and paid annual leave, and the right not to be unfairly dismissed. In addition, the tax and social security treatment of an individual will depend on their employment status.

On the other hand, collaborators and consultants (self-employed workers) are entitled to fewer rights.

In general terms, an employee is a worker who has entered into or works under an employment contract, whose job is determined unilaterally by the employer and who is mainly paid on a time basis (*locatio operarum*): he or she sells his or her job skills on an hourly basis to a sole customer and can be redirected by the employer from one job to another, every day, in accordance with the business needs.

An individual is self-employed if his or her work is self-managed according to the target agreed with the customer, without any limitation on assisting other customers and without any time constraints or place of work determined by the customer. The self-employed individual can be a freelance professional (such as a lawyer, an accountant, a medical doctor) with a qualification from a state exam and registered in a mandatory register, or a free consultant without any specific enrolment in a mandatory register. What is crucial is that all these individuals are 'entrepreneurs on their own behalf', undertaking some sort of entrepreneurial risk on their own account.

On the other hand, a collaborator is an individual who has entered into or works under a work contract or any other contract whereby the individual performs the work personally, for another party to the contract, by coordinating the work to meet the customer's needs and targets; on a continuous basis; without carrying out business through his or her own organisation of capital and tools; without undertaking a proper entrepreneurial risk on his or her own account; but without the customer being able to change his or her job unilaterally and ask that different tasks be performed.

In determining employment status, the courts will look at many factors regulating the arrangement between the parties. There is no single conclusive test to determine an individual's employment status.

iii Other disputes

Other common disputes heard in court are in relation to:

a minimum wages because of a lower level of classification with respect to the CBA provisions;

b paid leave and wages;

c overtime (work performed after the hours ordinarily provided for by the national collective contract);

d remote control of workers without any trade union agreement;

e 'black' work (working off the books without a contract and receiving payment without a payslip and proper taxation);

f dismissal of senior managers;

g stock options and restricted stock units;

h calculation of severance packages (the deferred payment, accrued on an annual basis by the employer, paid out in all cases of employment termination);

i violation of temporary contract rules and requests to be hired on a permanent basis;
j violation of collaborator rules, and requests to be considered as an employee from the beginning of the relationship; and
k mobbing, and injury to mental and physical health.

IV YEAR IN REVIEW

i Decree No. 101 of 3 September 2019, and Law No. 128 of 2 November 2019,

The year 2019 was not characterised by new regulations in employment law. Indeed, political and social opinions were both focused on the recent government crisis and the formation of a new government. The only relevant new regulation related to 'gig economy' issues.

Decree No. 101 of 3 September 2019, which was published in Official Gazette No. 207 of 4 September 2019, was converted, with amendments, into Law No. 128 of 2 November 2019, and contains 'urgent provisions for the protection of employment and for the settlement of corporate breakdowns'. The new Law regulates 'Riders', which are defined by the new Article 47 *bis*, Paragraph 1 of Decree No. 81/2015 as 'self-employed workers who perform activities of delivery of goods on behalf of third parties in urban areas with bicycles or motor vehicles, through the use of platforms, including digital platforms'.

The Decree finally defines the employment relationship of Riders as one of the 'hetero-organised' collaborations indicated in Article 2 of Decree No. 81/2015. Thus, the new provisions confirm the decision of the Court of Appeal of Turin in the well-known ruling of 4 February 2019, which amended the ruling issued by the Turin Court of First Instance (which, in contrast, had recognised the Riders' employment status as being completely autonomous in nature).

Indeed, Article 2, Paragraph 1 of Decree No. 81/2015[2] provides that 'As of 1 January 2016, the rules of the subordinate employment relationship shall also apply to collaborations that are mainly personal, continuous and whose execution methods are organised by the client'; at the end of Article 2, Legislative Decree No. 101/2019 has further provided that 'the provisions set out in this paragraph shall also apply if the performance of the service is organised through digital platforms'.

Undoubtedly, the fact that when converting Decree No. 101/2019 into Law No. 128/2019 the legislature replaced the adverb 'exclusively' with 'mainly' (referring to the personal nature of the worker's services) and eliminated the reference to 'time and place of work' with regard to the organisation by the client of the service performance methods suggests that the difference between the categories of coordinated and continuous collaboration (as defined in Article 409 of the Italian Code of Civil Procedure) has become even less distinct, making the two categories of collaboration almost identical. Therefore, the sole element that distinguishes the hetero-organised collaboration continues to be the organisation of the work performance by the client.

The result is that for the collaborator–Rider, it will be even easier to provide evidence in court that his or her work performance is hetero-organised to obtain the application of the subordinate employment provisions pursuant to the new Article 2, Paragraph 1 of Decree No. 81/2015, although technically he or she remains a self-employed worker. To avoid

2 As last amended with the conversion of Decree No. 101/2019 into Law No. 128/2019, which came into force on 4 November.

applying the subordinate employment relationship provisions, the only possible alternative would be to refer to the national collective agreements mentioned in Article 2, Paragraph 2(a) of Decree No. 81/2015 (as decided by the Court of Rome on 14 May 2019 and which excluded, with regard to the coordinated and continuous collaboration relationships under examination, the application of the subordinate employment relationship provisions demanded by the workers, since the economic and regulatory conditions of the relationship, although characterised by the presence of a hetero-organisation, were already regulated by specific collective agreements).

With regard to the regulatory provisions concerning the treatment (i.e., the 'minimum levels of protection') of Riders, Law No. 128/2019 introduces Chapter V *bis* ('Protection of work through digital platforms') into Decree No. 85/2015, with the new Articles 47 *bis*, 47 *ter*, 47 *quater*, 47 *quinquies*, 47 *sexies*, 47 *septies* and 47 *octies*. However, the provisions concerning remuneration (Article 47 *quater*) and compulsory insurance cover for accidents or injuries in the workplace (Article 47 *septies*) will only enter into force from 2 November 2020. In particular, remuneration shall be determined by collective agreements stipulated by the most representative trade unions and employer organisations at national level, and these are allowed to establish criteria for determining the overall remuneration based on service performance methods and the organisation of the client.

Should the above-mentioned collective agreements not be stipulated, riders cannot be remunerated on the basis of deliveries made but must be guaranteed a minimum hourly fee according to the minimum tabular amounts established by national collective agreements in similar or equivalent sectors. In addition, cyclist Riders will also be paid a supplementary indemnity of not less than 10 per cent for work done at night, during holidays or in bad weather conditions.

ii Decree No. 14 of 12 January 2019: employment consequences in cases of corporate bankruptcy

In cases of bankruptcy, the law provides for a specific procedure to convert the rights and assets of the debtor into liquid funds and to define legal relationships resulting from agreements stipulated by the debtor and still in force at the start of the bankruptcy procedure.

An interpretative issue arising under previous legislation concerned the effects of the bankruptcy declaration on employment contracts still in force. In anticipating the new bankruptcy code, the Italian Supreme Court ruled in a recent decision that: 'In cases of the employer's bankruptcy, unless a temporary exercise of business is authorised, the employment relationship is suspended for a period, so that the employee may not claim the wages due for the period between the beginning of the bankruptcy procedure and the date on which the trustee in bankruptcy has made the declaration pursuant to Article 72, Paragraph 2 of the Bankruptcy Law, since the remuneration right does not exist because of the existence and continuation of the employment relationship, but requires the work performance, as a consequence of the bilateral nature of the contract'. In contrast, labour law literature held a different opinion, according to which the former Article 72 of the Bankruptcy Law could not be applied to employment contracts on account of Article 2119, Paragraph 2 of the Civil Code, which provides that 'an entrepreneur's bankruptcy or company's compulsory administrative liquidation do not justify the termination of the employment relationship'. Consequently, even if employees had not performed their work, but had remained at the disposal of the bankruptcy authorities, they had the right to receive remuneration.

Now, however, the introduction of Decree No. 14 of 12 January 2019, which contains the Bankruptcy Code, has put an end to the legal uncertainty on the matter, as Article 189 of this piece of legislation has confirmed the orientation indicated by the Italian Supreme Court.

Specifically, while maintaining the basic structure of the former Article 72 of the Bankruptcy Law, Article 189 of Decree No. 14 has introduced a separate regulation on employment relationships still in force at the start of the bankruptcy procedure, providing that: 'the opening of a judicial bankruptcy procedure against the employer does not justify dismissal. Employment relationships still in force on the date of the decision shall remain suspended until the trustee, with the authorisation of the appointed judge and after consulting the creditors' committee, informs the employees that the bankruptcy administration will take over the employment relationships, fulfilling the relevant obligations, or communicates their termination'.

The compulsory suspension of employment relationships pursuant to Article 189, during the period between the start of the procedure and the trustee's decision to take over or terminate the relationships, removes the trustee's obligation to provide both remuneration and social security contributions. This is in compliance with the bilateral nature of the employment contract, which in the absence of work performance excludes the right to remuneration and any other right connected with and consequent thereto.

However, the importance of the provisions of Article 189 in practice is particularly evident given that point three of the Article also introduces a limit applicable in the event that the trustee does not decide within a reasonable period whether to take over or terminate the relationships. In fact, point three of Article 189 provides that 'in any case, except where the provisions of paragraph 4 apply, after four months from the opening date of the judicial bankruptcy procedure without the trustee having communicated [a decision on] the employment relationships takeover, employment relationships which have not already terminated shall be deemed to be terminated by law with effect from the opening date of the judicial bankruptcy procedure, except where the provisions of paragraphs 4 and 6 apply'.

The automatic termination of employment relationships in the event of trustee inactivity referred to in Article 189 implies that the employee is no longer required to give notice requesting that the trustee assign a term within which the trustee should take a decision in relation to the employment relationship and at the expiry of which the contract should be terminated.

iii Relevant cases

Supreme Court No. 5372/2019, case SCM GROUP SPA v. RSG

The case decided by the Italian Supreme Court with Judgment No. 5372/2019 concerns compensation for the unlawful dismissal of executives. The Supreme Court expressed an innovative principle: 'where, on the basis of the sectoral national collective labour agreement, the payment of indemnities for termination of the employment relationship of the executive presupposes that the dismissal is unjustified, the unfairness of the dismissal may be subjected to an interlocutory decision in the assessment of the amount of the economic compensation due by the employer, without requiring a specific challenge of the dismissal by the executive. Consequently, the non-filing or expiry of the limitation period in relation to the possible claim of unfairness of the termination of the executive does not prevent the claim for compensation from being judged'. Before this decision, the courts used to reject claims for compensation for unjustified dismissal if the executive did not challenge the dismissal itself.

Supreme Court No. 3147/2019, Case FP v. ALMECO SPA

This case concerns the absence of motivation for an executive's dismissal. The Supreme Court expressed an important principle in favour of the employer. In fact, every dismissal shall be specifically motivated pursuant to Italian law otherwise, it is deemed to be unlawful. This is because the employee is entitled to know the specific motivation for his or her dismissal to verify its lawfulness. Nevertheless, because of the specific features of executive employment relationships, the Supreme Court has stated the following principle: should the reason for the dismissal of an executive not be given (i.e., should it be deemed insufficient or generic), in accordance with adversarial principles, the employer must specify or include it in the arbitration procedure. If the executive has decided to sue the employer directly before the ordinary courts, in accordance with the principle of alternative protection for employment disputes, equivalent rights shall be granted to the employer within the judicial proceedings because otherwise the position of the employer would be compromised as a result of an autonomous and unquestioned assertion by the counterparty. Before this decision, some courts would declare any unmotivated dismissal unlawful.

Supreme Court No. 19660/2017, Case FS v. UNICREDIT SPA

The case under examination related to the inclusion in the terms of a local collective agreement signed by the social parties and the employer of a waiver of the payment of an indemnity in lieu of notice, paid by the employer to the employees in the event of dismissal. Pursuant to constitutional principles of Italian law, the social parties may not waive employees' constitutionally protected rights. Nevertheless, employees' rights shall be balanced with other constitutionally protected interests, such as a wider and more general protection of employment levels, and this often produces differences of legal interpretation with the result that some courts may give more importance to specific employee rights and others may give more importance to wider public interests. In the decision under examination, the Supreme Court provided a specific orientation on the matter by declaring fully legitimate a local collective agreement signed pursuant to Article 8 of Decree No. 138/2011. In this agreement, the social parties agreed to waive the payment of the indemnity in lieu of notice to redundant employees to limit the negative consequences of the business crisis and reduce the negative effects of the crisis on employment levels. Since the above-mentioned indemnity is a pecuniary obligation, it may be negotiated and waived by social parties to prevent a negative and appreciable effect on general employment levels.

V OUTLOOK AND CONCLUSIONS

Following the formation of the new coalition government (which excluded the right wing League party), the Jobs Act and the Fornero Rules are no longer in the spotlight. Therefore, the reintroduction of Article 18 of Law No. 300/1970 may be abandoned, including such reforms as the lowering of the retirement age. Considering the very high average age in Italy, this may have positive effects in terms of financing retirement benefits.

Public opinion and, consequently, the legislature have focused strongly on 'gig economy' workers and their rights. In fact, during the past year there were multiple claims before the courts filed by Riders for the most famous food home-delivery companies. These claims drew a high level of media attention.

The main issue examined by the courts concerned whether such workers should be classified as employees or as autonomous workers, or even as a *tertium genus* presenting

features of both subordinate employment and autonomous work. The legislature seems to have resolved this issue with a regulation that relates specifically to a *tertium genus* that is very similar to the category of coordinated and continuous collaboration defined by Article 409 of the Italian Code of Civil Procedure. Although it is likely that legislation and case law will continue to evolve and will amend this first 'Riders-category regulation', the new regulation may be considered a positive development, at least for having put an end to the legal uncertainty on the matter.

Even if not has not been in the spotlight as much as the Riders regulation, the new amendment of the Bankruptcy Law grants more certainty to employees in cases of bankruptcy, which is an important development and one that may have a positive effect on employment and the economy, considering the high incidence of bankruptcy in small Italian companies.

In conclusion, with regard to the effects of the most important legislative act of employment law of the past three years, the Dignity Decree, the Italian Social Security Authority (INPS) issued a statistical report on the employment situation in Italy. The INPS statistical research shows that there has been an increase in the hiring of employees through open-ended employment agreements.

In looking at the numbers overall, we can see that in the first 10 months of 2019 6,154,000 people were hired by private employers. Compared to the same period in the previous year, there was an increase in hiring employees on permanent, seasonal and intermittent contracts, and on apprenticeships; on the other hand, there was a decrease in the hiring of employees on fixed-term, on-call and temporary contracts.

In the period January–October 2019, compared to the same period in 2018, there was a sharp increase in the volume of agreement-type changeovers from fixed-term to open-ended employment agreements, from 416,000 to 603,000 (an increase of 187,000, or 44.9 per cent); there was also an increase in the number of apprenticeship relationships confirmed at the end of the training period (from 54,700 to 68,100, or 24.5 per cent).

In any case, the positive trend towards new open-ended employment relationships is in line with 2017 and 2018 tendencies, indicating that this positive trend started before and independently of the Dignity Decree.

As at October 2019, the yearly balance (i.e., the difference between the number of employees recruited and the number of terminations in the past 12 months) is positive, equal to 224,000 more employees recruited than were terminated, although this is lower than the figure registered in the same period at the end of October 2018 (389,000) and lower than the figures registered in all the previous months. There is, therefore, a decreasing employment trend, even though the balance between recruitment and terminations is still positive on an annual basis.

In line with the trend that emerged at the beginning of 2018, there is a continuing clear difference between the trend in permanent employment relationships on one hand and fixed-term relationships on the other:

a the yearly balance for permanent employment increased: as at October 2018, there were 72,000 more new permanent employment relationships than terminated open-ended relationships; whereas in October 2019 this figure had increased to 385,000; and

b the yearly balance for fixed-term relationships over the same period decreased: as at October 2018, there were 152,000 more new fixed-term employment relationships than terminated fixed-term relationships; whereas in October 2019, there were 238,000 more terminated fixed-term relationships than new fixed-term employment relationships.

The yearly balance of the other types of relationships (in particular, apprenticeships and on-call work) continue to be positive, with the exception of temporary employment relationships, the negative balance of which is expected to increase.

In conclusion, we underline the fact that the reduction of the maximum duration of contracts from 36 months to 24 pursuant to the Dignity Decree leads to a mechanical increase in the turnover of employment contracts. A company may decide to hire an outgoing employee under a permanent employment agreement or to hire another employee under a new fixed-term or temporary employment agreement. It may also decide to terminate the employment.

The first option, hiring the employee under a permanent employment agreement, is less attractive for companies because of the increased cost of terminating permanent employment agreements introduced in the Dignity Decree and in light of the 2018 Constitutional Court decision that the rules under the Jobs Act for determining compensation for unlawful dismissal solely on the basis of seniority were unconstitutional. In fact, there is considerable empirical proof that the increased costs incurred through interruptions of employment relationships result in a reduction in recruitment.

The second option, hiring another employee, implies additional costs for the company in having to find substitute personnel who will accept non-renewable employment agreements. In this situation, the replacement is not immediate and the introduction of the requirement to provide a specific motive for fixed-term employment agreements with a duration beyond 12 months increases the employer's perceived costs in filling a temporary position in the company.

Chapter 9

JAPAN

Nobuhito Sawasaki[1]

I INTRODUCTION

Labour and employment disputes in Japan are classified as individual employment disputes or collective employment disputes. Individual employment disputes are those that relate to employment conditions, employment status and other matters regarding individual workers, such as dismissal and payment of extra wages. These make up the majority of labour and employment disputes in Japan. Examples of acts relevant to individual employment disputes are the Labour Standards Act (LSA), which prescribes the minimum employment conditions for workers, the Labour Contract Act (LCA), which prescribes the basic structure of labour contracts, the Act on Securing Equal Opportunity and Treatment of Men and Women in Employment (the Equal Employment Act), and the Child Care and Family Care Leave Act (the Care Leave Act).

Collective employment disputes are those that arise between employers and labour unions, and examples of relevant acts are the Labour Union Act (LUA) and the Labour Relations Adjustment Act.

Japan is a country with a continental law system and judicial precedents do not have legal binding force. However, in the field of labour and employment laws, judicial precedents are considered very important because it is often difficult to make decisions based only on the laws and regulations, as the provisions thereunder are abstract.

There are strict regulations on dismissal, working hours, extra wages and other matters, and the Japanese labour and employment laws are generally said to be more favourable towards workers than to employers.

II PROCEDURE

i Procedures for resolution of employment disputes

The procedures provided for the resolution of individual employment disputes before Japanese courts include civil litigation, labour tribunal proceedings, civil preservation and civil conciliation. In addition, labour bureaus provide conciliation proceedings for dispute resolution. However, an arbitration proceeding is not permitted to resolve individual employment disputes.

Generally, these proceedings are commenced by a petition from the worker's side. If the parties intend to resolve the dispute quickly through consultation, they tend to choose labour tribunal proceedings, civil conciliation or conciliation proceedings before the labour

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bureaus. In more complex cases, such as those concerning occupational accidents or where the conflict between the parties is so intense and complex that it is difficult to resolve it through consultation, then the parties tend to pursue civil litigation.

The following sections discuss civil litigation, labour tribunal proceedings and labour bureau conciliation proceedings in further detail.

Civil litigation

Civil litigation is used frequently to resolve labour disputes in Japan. The first instance is comprised of filing arguments and evidence and conducting witness examinations. It often takes at least one and a half years for a judgment to be passed at first instance. If either party appeals that judgment, it can take an additional six months or more until a judgment is rendered at the second instance – and much longer if the matter is appealed to the Supreme Court.

However, in practice, many cases are resolved by judicial settlements. The courts of first and second instance may encourage the parties to settle at any time while the case is pending. When a judicial settlement is reached, it is put on the record, which has the same effect as a final and binding judgment.

Labour tribunal proceedings

Labour tribunal proceedings are designed for prompt, appropriate and effective resolution of labour dispute cases between employers and workers, such as disputes over dismissal and employment contracts. Generally speaking, these proceedings constitute a combination of conciliation and formal lawsuit. Thus, they are often used by employees who prefer to settle their disputes amicably and promptly.

A labour tribunal committee, which is composed of one judge and two labour tribunal commissioners, deals with these cases. Labour tribunal commissioners are citizens selected for their specialist knowledge and experience in labour issues. The committee shall conclude the proceedings by the end of the third meeting it has convened unless it finds special cause for continuation. The committee works to reconcile both parties. If both parties do not reach an agreement in spite of the committee's advice, the committee makes a labour tribunal decision based on the legal consequences and the actual situation of the case to resolve the dispute. The parties may file an objection to the decision within two weeks. If an objection is filed, the decision loses its effect and the case is transferred to a civil litigation procedure (as explained above), on the basis of an action having been filed at the time of the motion for labour tribunal proceedings. Where no objection is filed, the effect is the same as a judicial settlement, which is valid and binding on both parties.

Labour bureau conciliation proceedings

Conciliation proceedings are provided by labour bureaus through a system in which members of a dispute coordinating committee, who are specialists in labour issues, mediate in the dispute, confirming the main point of the arguments of both parties, and coordinating and prompting them to consult each other to resolve the dispute. The members of a dispute coordinating committee are generally attorneys, university professors and licensed social interest consultants. A labour bureau conciliation proceeding is frequently used because there are no commission charges involved and its procedure is relatively simple compared with civil litigation and the labour tribunal proceedings.

ii Procedures for resolution of labour disputes

Examination of cases of unfair labour practice

Under the LUA, the following unfair labour practices of employers are prohibited:

a discrimination against employees based on union membership;
b refusal to engage in collective bargaining;
c control of and interference with unions; and
d other discriminatory treatment (for example, an employer's treatment of an employee is worse after the employee has filed a claim for an affirmative relief petition with a regional labour relations commission (LRC)).[2]

By contrast, there is no concept of unfair labour practices of unions.

If an employer has engaged in an unfair labour practice, a union or its members may file a claim for relief with the regional LRC. The regional LRC will then examine whether any unfair labour practices exist. If they do, the regional LRC can order the employer to take, or abstain from taking, an action to rectify the unfair labour practice. If no unfair labour practice is found, then the regional LRC will dismiss the claims. If either the union (or worker) or the employer is not satisfied with the decision issued by the regional LRC, it may file either an appeal for review with the Central LRC or a lawsuit in court for the revocation of the decision. If either party is not satisfied with the decision issued by the Central LRC, it may file a lawsuit in court for the revocation of the decision.[3]

Conciliation, mediation or arbitration proceedings of Labour Relations Commission

When a labour dispute needs to be resolved, parties to the dispute can use conciliation, mediation or arbitration proceedings of the LRC. These can be used not only when labour disputes, such as strikes, have occurred, but also when labour disputes are likely to occur as a result of confrontation between labour and management.

III TYPES OF EMPLOYMENT DISPUTES

The most common types of individual employment disputes are those that concern (1) termination of an employment contract, such as unilateral dismissal and refusal to renew a fixed-term employment contract, (2) payment of extra wages, and (3) human relations in the workplace, such as workplace bullying and sexual harassment.

i Disputes concerning termination of employment contracts

The most common disputes concerning termination of employment contracts relate to unilateral dismissals, unilateral dismissals due to redundancy, or refusals to renew fixed-term employment contracts. If a suit or a petition for the commencement of a labour tribunal proceeding is filed with a court by a worker, the employer is required to prove that the unilateral dismissal, unilateral dismissal due to redundancy or refusal to renew a fixed-term employment contract is valid, as discussed below.

2 Labour Union Act (LUA), Article 7.
3 LUA, Articles 27 to 27-21.

If the termination of an employment contract for any of the aforementioned reasons is determined to be null and void, the court will order the employer to pay the aggregate amount of the full salary that the employee would have received (up to the date of judgment) if he or she had not been dismissed, and to reinstate the dismissed employee.

Unilateral dismissal

Unilateral dismissal is where an employer terminates the employment contract unilaterally, against the employee's will. Unlike in the United States, there is no employment-at-will doctrine in Japan. It is generally very difficult for any employer to unilaterally dismiss an employee under their employment contract. To do so, the employer must give the employee at least 30 days' prior notice or make payment in lieu of the notice.[4] In addition, the employer must have an 'objectively and socially justifiable cause' for the dismissal.[5] Otherwise, it is deemed to be an abuse of right and would therefore be null and void. It is generally understood that the following five reasons constitute an objectively justifiable cause for a unilateral dismissal:

a inability of the employee to offer his or her labour to an employer, mainly because of physical or mental disability or extremely poor performance;

b infringement of the disciplinary rules in the workplace through the employee's serious misconduct;

c redundancy;

d termination through an agreement with a labour union; or

e termination as the result of an employer's liquidation if that employer is a corporate entity.

Unilateral dismissal due to redundancy

If an employer wishes to continue business operations in Japan with a substantial reduction in the number of employees, this constitutes unilateral dismissal due to redundancy. In this case, the employer must demonstrate an objectively justifiable cause by satisfying all of the following factors (the Four Factor Test):

a the shedding of employees is justified by a strong financial or business necessity, such that it would be extremely difficult for the employer to continue its business without implementing a reduction of employees (and not merely the fact that the employer would be more profitable if the employees were dismissed);

b the employer has already endeavoured to take all reasonable means to avoid such a dismissal of employees, such as intra-company transfers (or in some cases, associated-company transfers), offering voluntary resignation with a certain amount of severance compensation, and reduction of other operating costs;

c the selection of employees for termination was conducted fairly and in accordance with a reasonable and objective standard established by the employer. The selection criteria must be fair and based on a rational procedure, and not on the employee's gender, membership in a labour union, race, creed, or other discriminatory reason; and

d sincere attempts at discussion or negotiation were undertaken, either with employees or their representative (including a labour union, if applicable), but were unsuccessful.

4 Labour Standards Act (LSA), Article 20.

5 Labour Contract Act (LCA), Article 16.

Refusal to renew fixed-term employment contract

In principle, a fixed-term employment automatically ends upon expiry of the employment term. However, if the status of a fixed-term employment contract is not substantively different from an indefinite-term employment contract as a result of repeated renewals of the contract, or it is found that the continuation of employment even after expiry of the term of a fixed-term employment contract could reasonably be expected, the employer may not refuse a renewal of the fixed-term employment contract unless there is an objectively and socially justifiable cause for the non-renewal. If there is no such cause, the fixed-term employment contract will be deemed to be renewed as a fixed-term employment contract under the same terms and conditions of employment as the previous one.[6]

ii Disputes concerning payment of extra wages

The second most common types of disputes concern payment of extra wages for statutory overtime work,[7] work on statutory weekly holidays[8] and late-night work[9] under the LSA.[10]

If a company properly pays extra wages, these disputes should not occur. However, there are quite a few cases in which extra wages are not properly paid, and the supervising authority, the Labour Standards Inspection Office, is committed to correcting this issue.

The reasons why extra wages are not properly paid include: (1) companies do not manage their employees' working hours at all; (2) companies implicitly or explicitly refuse their employees' overtime work reports; or (3) employees voluntarily refrain from submitting overtime work reports.

There is no requirement to pay managerial employees any extra wages for their statutory overtime work or work on statutory weekly holidays.[11] The term 'managerial employees' is understood to refer to employees whose duties and authority are so important as to create an expectation of an unavoidable necessity to work beyond the normal stipulated working hours. However, the scope of the definition of managerial employees is extremely narrow under the LSA. Therefore, it is not uncommon that, even if a company treats an employee

6 LCA, Article 19.

7 Under the LSA, if the employer requires an employee to work more than eight hours per day or 40 hours per week (statutory overtime work), the employer must pay extra wages for that statutory overtime work, which must be 125 per cent or more of the employee's regular hourly wages for the statutory overtime work that does not exceed 60 hours per month and 150 per cent or more for statutory overtime work that exceeds 60 hours per month (LSA, Article 37).

8 The employer must provide its employees with at least one non-working day every week or at least four non-working days during a four-week period (the statutory weekly holiday) (LSA, Article 35, Paragraph 1). If the employer requires an employee to work on a statutory weekly holiday, the employer must pay extra wages for that work on a statutory weekly holiday, which must be 135 per cent or more of the employee's regular hourly wages (LSA, Article 37).

9 Further, if the employer requires an employee to work between 10pm on any given day and 5am the following day (late-night work), the employer must pay extra wages for that late-night work, which must be 125 per cent or more of the employee's regular hourly wages.

10 In the event of any overlap between these working hours, the hourly rate for the overlapping portion must be increased correspondingly to no less than 150 per cent of regular hourly wages for overlap between statutory overtime work and late-night work, 135 per cent for the overlap between work on a statutory weekly holiday and statutory overtime work, and 160 per cent for the overlap between late-night work and work on a statutory weekly holiday (LSA, Article 37).

11 LSA, Article 41, Item 1. Note that extra wages for late-night work must be paid to managerial employees.

as a managerial employee, the court determines that the employee does not fall within the definition of a managerial employee under the LSA, and orders the company to pay extra wages to that employee.

iii Disputes concerning workplace bullying and sexual harassment

Increase in workplace bullying, sexual harassment and other disputes

Workplace bullying, sexual harassment and other disputes relating to human relationships at work are on the increase. The most frequently alleged cases include workplace bullying, such as power harassment, and sexual harassment.

Harassment in the workplace that may be related to a worker's pregnancy, childbirth or child rearing, or exposure of an employee to disadvantage or unfair treatment by an employer on account of her pregnancy, childbirth or related issues, is often called maternity harassment (or *matahara*, a contraction of 'maternity' and 'harassment'). The term *matahara* has become prevalent among the Japanese public, partly because of an amendment to the Equal Employment Act and the Care Leave Act, which prohibits *matahara*.

Disputes regarding harassed employees or former employees

One type of harassment-related dispute is a claim for damages filed by a harassed employee or former employee against the harasser and the employer.

If the harasser's act against the harassed employee constitutes an illegal harassment, the harasser is liable to pay the harassed employee damages for a tort.

An employer is obliged to provide a good working environment as part of its duties to ensure workplace safety pursuant to the LCA.[12] An employer is also obliged to develop a workplace environment free of sexual harassment or maternity harassment under the Equal Employment Act.[13] An employer that fails to respond appropriately to harassment is violating these obligations and is liable to pay damages to any harassed employee or former employee.

Disputes regarding disciplinary action taken by employers against employees

Another common type of harassment-related dispute relates to disciplinary action taken by an employer against an employee who has harassed either another employee or other persons having business with the employer.

If an employee has committed some form of harassment, the employer is required to conduct a factual investigation and take disciplinary action, including dismissal. However, it is not uncommon for a lawsuit to be filed by an employee who is dissatisfied with the disciplinary or other adverse actions to which he or she has been subjected if the employer's factual investigation is insufficient, if the parties' claims contradict each other or if the action is too harsh.

IV YEAR IN REVIEW

Between January 2018 and the time of writing this chapter, there have been significant judgments, one after another, that have had a major impact on labour law practices in Japan.

12 LCA, Article 5.

13 The Equal Employment Act, Articles 11 and 11-2.

i Court rulings concerning reducing disparities in labour conditions

Among the most notable lawsuits in Japan are those for reducing disparities between the labour conditions of fixed-term employees and indefinite-term employees (i.e., regular employees). Since these lawsuits concern Article 20 of the LCA, they are called Article 20 lawsuits. The number of Article 20 lawsuits is relatively small compared with cases concerning unilateral dismissals or payment of extra wages. However, they attract a lot of attention, partly because the reduction of disparities between the labour conditions of regular employees and non-regular employees has been positioned as one of the key policies under the Act on the Arrangement of Related Acts to Promote Work Style Reform, which was promulgated on 6 July 2018.

If disparities between the labour conditions of fixed-term employees and indefinite-term employees are found to be unreasonable, the employer is required to compensate for the harm suffered by the fixed-term employees.[14] For example, if the court determines that the difference between the amounts of commutation allowances paid to indefinite-term employees and fixed-term employees is unreasonable, the court will order the employer to compensate for the difference. Whether a difference is unreasonable is determined in light of (1) the content of the duties of the workers and the extent of responsibility accompanying those duties (the content of duties), (2) the extent of changes in the content of duties and work locations, and (3) other circumstances.

Two relevant decisions were given by the Supreme Court on 1 June 2018.

In the *Hamakyorex* case,[15] the Supreme Court held that under Article 20 of the LCA, unreasonable differences in working conditions between regular employees and fixed-term employees are prohibited and whether the difference in a certain working condition is unreasonable or not is determined by taking into account the details of duties of the relevant regular employees and fixed-term employees, the extent of changes between their duties and work locations, and other circumstances. The Supreme Court then examined unreasonableness of the difference in six allowances and ruled that non-payment of a perfect attendance allowance, clean driving record allowance, special work allowance, meal allowance or commuting allowance to fixed-term employees is unreasonable, but non-payment of housing allowance is not unreasonable.

In the *Nagasawa-Unyu* case,[16] the Supreme Court held that non-payment of a perfect attendance allowance to fixed-term employees who have been rehired after their mandatory retirement age (rehired employees) is unreasonable, but the differences in base salaries, housing allowances and bonuses between regular employees and rehired employees are not unreasonable. Overall, regarding disparities of basic salaries, bonuses and retirement allowances, the courts tend to determine that they are not necessarily unreasonable. On the other hand, regarding disparities of commutation allowances and other allowances of

14 LCA, Article 20.

15 At issue were disparities in labour conditions among truck drivers; Osaka High Court, judgment of 26 July 2016, Rodo Hanrei, vol. 1143, p. 5; Supreme Court, 2nd Petty Bench, judgment of 1 June 2018, Rodo Hanrei, vol. 1179, p. 5.

16 At issue were disparities between the labour conditions of full-time employees and those of employees who were retired and rehired as fixed-term employees; Tokyo District Court, judgment of 13 May 2016, Rodo Hanrei, vol. 1135, p. 11; Tokyo High Court, judgment of 2 November 2016, Rodo Hanrei, vol. 1144, p. 16; Supreme Court, 2nd Petty Bench, judgment of 1 June 2018, Rodo Hanrei, vol. 1179, p. 34.

which the purposes are relatively clear, they tend to determine that they are unreasonable. The courts make decisions in consideration of the purpose of other kinds of allowance on a case-by-case basis.

ii Court rulings concerning payment of extra wages

In lawsuits relating to claims for the payment of extra wages, employers often argue that the amount equivalent to the extra wages is included in the base salary as a fixed overtime allowance and thus the claimed extra wages have already been paid. In this regard, the Supreme Court's judgment in the *Tec-Japan* case rendered in 2012[17] stated that one of the requirements for the validity of a fixed overtime allowance is that the portion of the base salary that is equivalent to the extra wages and the remaining portion must be clearly distinguished (e.g., a base salary of ¥400,000 can be divided into the extra wage portion of ¥100,000 and the remaining portion of ¥300,000) (the clear distinguishability requirement). The Supreme Court's judgment in the *Kokusai Motorcars* case rendered on 28 February 2017[18] reaffirmed this requirement.

However, there have been several judgments at a lower court level that validated an argument that the amount equivalent to extra wages was included in the base salary even when the clear distinguishability requirement was not satisfied, in cases where the relevant employee's base salary was extremely high and where the employee had discretion regarding his or her work hours (e.g., the *Morgan Stanley Japan* case).[19]

In *Medical Corporation Y*,[20] extra wages were demanded by a doctor who received an annual salary of ¥17 million. In this case, the employer argued that the amount equivalent to extra wages was included in the base salary and the extra wages had therefore already been paid. In spite of the non-fulfilment of the clear distinguishability requirement, the Tokyo High Court affirmed the validity of the employer's argument on the grounds that an exception to the requirement of this kind would not compromise the protection of the worker considering that the agreement between the parties was reasonable in view of the nature of the duties of a doctor, that the worker had the discretion to control the provision of work and that the amount of the worker's salary was substantially high, among other factors. In contrast, the Supreme Court ruled that as long as the clear distinguishability requirement was not satisfied, it could not be said that the extra wages had been paid.[21] This ruling reaffirmed that the clear distinguishability requirement must be met even if the relevant worker earns a high annual salary and non-application of the requirement would not compromise the protection of the worker.

Another requirement for the validity of a fixed overtime allowance is that it is paid as compensation for working overtime. In this regard, the Supreme Court's judgment in the *Japan-Chemical-Industries* case rendered on 19 July 2018[22] stated that whether a certain

17 A claim for overtime pay had been filed by a taxi driver; Supreme Court, First Petty Bench, judgment of 8 March 2012, Rodo Hanrei, vol. 1060, p. 5.

18 Supreme Court, Third Petty Bench, judgment of 28 February 2017, Rodo Hanrei, vol. 1152, p. 5.

19 Overtime payment was demanded by a former employee who was an executive director and whose annual base salary was not less than ¥20 million.
Tokyo District Court, judgment of 19 October 2005, Rodo Hanrei, vol. 905, p. 5.

20 Tokyo High Court, judgment of 7 October 2015, Hanrei Jiho, vol. 2287, p. 118.

21 Supreme Court, 2nd Petty Bench, judgment of 7 July 2017, Rodo Keizai Harei Sokuho, vol. 2326, p. 3.

22 Supreme Court, First Petty Bench, judgment of 19 July 2018, Rodo Hanrei, vol. 1186, p. 5.

allowance is paid as compensation for working overtime shall be determined by taking into account factors such as descriptions in the employment contract, the employer's explanation about that allowance and the employee's actual working hours.

iii Court rulings concerning workplace bullying, sexual harassment and other cases

Today's social climate requires employers to deal severely with employees who have committed sexual harassment. Consequently, employers often take severe action. However, there are cases in which the courts find that the action taken by an employer has been too harsh.

For instance, in the *Credit Suisse Japan* (disciplinary dismissal) case,[23] the employer took disciplinary dismissal action against an employee who made sexually harassing remarks to a colleague. The court stated that the acts for which the employee had been disciplinarily dismissed constituted a ground for disciplinary action and that the nature of the acts committed justified any due disciplinary action. However, the court ruled that the disciplinary dismissal was null and void on the ground that the disciplinary dismissal action was too severe considering the employer had failed to give the employee due warning and guidance (the court's opinion was that demotion would have been the appropriate level of disciplinary action).

There are also cases in which the Supreme Court's view is different from that of the lower court as to whether a disciplinary sanction is too harsh or not. For example, in the *Kakogawa-city employee* case, a city employee who sexually harassed a female worker at a convenience store was put on a disciplinary suspension of six months. Osaka High Court held that the disciplinary suspension was too harsh, but the Supreme Court ruled that the disciplinary suspension was not too harsh and, therefore, valid.[24]

V OUTLOOK AND CONCLUSIONS

It is still worth paying heed to Article 20 lawsuits in connection with employment disputes (see Section IV.i) during 2020.

For the period from December 2018 to February 2019, four important judgments were rendered by Tokyo High Court and Osaka High Court (i.e., the Japan Post (*Tokyo*) case,[25] the Japan Post (*Osaka*) case,[26] the *Metro Commerce* case,[27] and the *Osaka Medical and Pharmaceutical University* case[28]). Final appeals against these judgments were filed and the consequent Supreme Court judgments regarding the cases are expected to be rendered during 2020.

23 Tokyo District Court, judgment of 19 July 2016, Rodo Hanrei, vol. 1150, p. 16.

24 Supreme Court, Third Petty Bench, judgment of 6 November 2018, Rokeisoku, vol. 2372, p. 3; Tokyo High Court, judgment of 13 December 2018, Rodo Hanrei, vol. 1198, p. 45.

25 At issue were disparities in labour conditions among post office clerks.

26 Osaka High Court, judgment of 24 January 2019, Rodo Hanrei, vol. 1197, p. 5.

27 At issue were disparities in labour conditions between typical regular workers and fixed-term contract workers working as kiosk sales staff on the underground railway network; Tokyo High Court, judgment of 20 February 2019, Rodo Hanrei, vol. 1198, p. 5.

28 At issue were disparities in labour conditions between typical regular workers and a temporary worker working at the university; Osaka High Court, judgment of 15 February 2019, Rodo Hanrei, vol. 1199, p. 5.

Chapter 10

LUXEMBOURG

Philippe Schmit[1]

I INTRODUCTION

In Luxembourg, the labour court is responsible for resolving employment law disputes and has exclusive competence for all employment law disputes, regardless of the amount at stake. The labour court has jurisdiction for all complementary pension scheme disputes and disputes in relation to an apprenticeship agreement, among others.

There are three labour courts in Luxembourg; one in Diekirch (in the north of the country), one in Luxembourg City (the capital) and one in Esch-sur-Alzette (in the south). Each court covers all towns and cities within to its jurisdiction. To determine which court is competent to rule on a case, one has to verify the jurisdiction in which the employee performed his or her employment contract. If the employee has performed work all over the territory of Luxembourg, the Labour Court of Luxembourg City will have jurisdiction.

The parties do not need to be represented by a lawyer before the labour court. They may either defend themselves or be represented by a lawyer, their partner, a relative in the direct or collateral line up to the third degree, or a person from his or her company, as the case may be. If a party is represented by a person other than a lawyer, the representative will need a special mandate to represent one of the parties before the court.

Generally, a labour court is composed of one professional judge and two non-professional assessors. Litigation with respect to a dismissal is generally submitted to a labour court.

Luxembourg procedural rules provide for certain specific cases in which a labour court's decisions are made by a single judge. This is the case, for instance, concerning requests for reintegration of employees if a dismissal has been considered null and void (e.g., in cases of dismissal during a declared pregnancy, redundancy prior to the signing of a social plan or dismissal of a staff delegate), or in the case of a request for unemployment benefits following a dismissal with immediate effect or (since 2018) a resignation with immediate effect.

Proceedings before the labour court are oral, meaning that, in principle and except for the document introducing proceedings and the documentary proof, no written documents are submitted to the court and all arguments must be developed orally. Hence, the court will take into consideration and base its decision solely on what has been orally discussed between the parties during the pleadings.

If a party is not satisfied with a decision of the labour court, it may lodge an appeal up to 40 days after the notification of the judgment. Even though the Luxembourg territory has three different labour courts, it only has one court of appeal, which deals with any challenged

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judgment of the labour courts. The challenging party needs to introduce its appeal against the labour court's decision before the Luxembourg Court of Appeal, which includes two chambers that are exclusively competent to deal with labour law-related disputes.

Unlike the conduct of proceedings before the labour courts, proceedings before the Court of Appeal are made in writing and require the parties to be represented by attorneys-at-law to defend their respective interests. In written proceedings, the legal arguments are expressed through written submissions called 'conclusions', which are notified by the concluding lawyer to his or her constituted opponent. Through these conclusions, the parties alternatively take a position on the arguments and merits developed by their opponents.

As proceedings before the labour courts, and especially before the Court of Appeal, may prove to be cumbersome and may take several months, it is common practice in Luxembourg to solve disputes extrajudicially by way of a settlement agreement.

Finally, it should be noted that although Luxembourg employment law may be considered business-friendly, some of the Labour Code provisions are set out in a framework that is more favourable to employees than employers, given that employees are considered to be the 'weaker party' in the employment relationship, because of their subordination to the employer within the performance of their employment contract. Consequently, if there is any doubt, labour courts tend to rule in favour of employees.

As a general rule, no government bodies or quasi-government bodies assist in resolving employment disputes. In this respect, it should merely be noted that employees dismissed with notice are entitled to employment benefits if they are resident in Luxembourg and fulfil the applicable conditions. Employees residing in Luxembourg who are dismissed with immediate effect may file a request for unemployment benefits. In cases of dismissal, Luxembourg's Employment Development Agency (ADEM) must also be present, or represented, during related court proceedings, as one of its objectives is to pay unemployment benefits to the employee. If the termination is declared wrongful by the court, the employer will have to reimburse the ADEM with any unemployment benefits the employee received during the proceedings.

II PROCEDURE

i Process for resolution of individual actions and labour disputes

Individual disputes are conducted separately between an employer and an employee. Even if several employees have the same conflict with their employer, each employee will take legal action individually by bringing his or her own action. There is no collective action (i.e., class action) under Luxembourg law. Each procedure will thus be treated as a separate, individual case.

Before bringing an action before the labour court, employers and employees can try to reach an agreement, either by negotiating on their own or through public authorities in certain specific cases.

There are four public authorities that intervene in employment cases: (1) the labour courts (even though it is rare for a dispute brought before the court to result in conciliation, it should be noted that the judges have the preliminary task of reconciling the parties); (2) the Individual Conciliation Body, which was created in 2007 and can be consulted by mutual agreement between the parties to the dispute before legal proceedings are initiated to reach a settlement, although at present this body is not yet operational; (3) the Litigation Commission, whose role is to try to attempt mediation at the pre-claim stage in the area

of apprenticeships; and (4) the Labour Inspectorate, whose role at the pre-claim stage is to intervene informally by hearing the parties' explanations and attempting to find an extrajudicial solution.

In practice, the most common way to end litigation in an extrajudicial manner is to settle. In labour law, the settlement is a contract concluded by and between the employer and the employee to end any dispute (mostly in connection with the termination of an employment relationship), agreeing to make mutual concessions and covenants. Once the parties have reached a settlement, they can no longer bring an action before the labour court to resolve the questions raised in the settlement. Furthermore, the settlement agreement is strictly construed and relates only to the points it explicitly addresses. The parties can only take legal action to compel the other party to comply with the terms of the settlement agreement.

When individual disputes cannot be resolved before litigation, employers and employees must bring their actions before the labour court. In addition to the employer and employee, other parties may be involved. This is the case when, at the end of the procedure, the employer or employee is likely to have to reimburse unemployment benefits. In this case, the Luxembourg state intervenes and becomes a party to the dispute. Trade unions may also intervene if they are signatories to a collective bargaining agreement applicable to the employee who initiated the dispute and if the outcome of the case may be of collective interest to the members of the trade union.

Proceedings are initiated by the employer or employee (usually through a lawyer) by filing a simple request with the court clerk's office in as many copies as there are parties. It is not necessary, as in other proceedings, to notify the opposing party by bailiff of the filing of such a request. The court clerk's office will then contact the opposing party. The parties will subsequently be summoned to a first hearing, at which the hearing date will be set for oral pleadings. Cases are rarely pleaded at the first hearing.

There is also a rapid procedure, known as summary proceedings, which must be introduced before the president of the labour court (this mostly applies in cases of unpaid wages). This procedure is generally aimed at allocating a provision on a determined amount. The president of the labour court grants such a provision only in the absence of serious contestation (otherwise the president must automatically declare that he or she lacks competence and the case will be subject to the proceedings on the merits in accordance with the standard procedure).

Other specific procedures, subject to special rules, also exist, in particular an action for nullity of a dismissal for certain specific employees (e.g., pregnant employees, employees benefiting from professional reclassification and staff representatives) or action for interim maintenance of remuneration for protected employees who have been suspended.

Actions for payment of remunerations are barred after three years from the date on which the payment is due.

There are specific evidentiary requirements with regard to dismissals. The employee must prove that a valid employment relationship existed, that a dismissal has taken place (this is a challenging question specifically in the case of oral dismissal). The employee must also establish the damage caused by the dismissal and demonstrate that active steps have been undertaken to find a new job. The employer must prove that the reasons for the dismissal are precise, serious and real.

ii Process for resolution of collective actions and labour disputes

Collective actions are of two kinds: the promotion of rights (aiming to ensure that the employer complies with positive law) and the struggle for rights (aiming to improve an existing situation).

Collective actions do not fall within the jurisdiction of the labour courts but lead to a conciliation procedure before the National Conciliation Office (ONC). When conciliation fails, it remains possible for employees to go on strike (although strikes are rare in Luxembourg). According to case law, a strike is lawful if it takes place once all possible conciliation means of settling conflicts have been exhausted and provided that a report of non-conciliation has been duly established.

There are three categories of collective disputes, subject to three different conciliation procedures: (1) disputes relating to working conditions; (2) disputes relating to collective bargaining agreements, in particular when the employer refuses to enter into negotiations or when negotiations do not result in a concrete result; and (3) disputes relating to collective dismissal, when the parties cannot reach an agreement on a social plan within the legally set conditions.

Disputes relating to working conditions

The ONC has jurisdiction to resolve collective disputes concerning working conditions (i.e., genuinely collective disputes concerning the collective interests of all, or most of, the company's staff), and disputes arising from problems of organisation, reorganisation or restructuring of the company that have an impact on the working conditions of all, or most of, the company's staff.

The ONC is composed of a president (the Minister of Labour), a joint committee composed of eight assessors (four employee representatives and four employer representatives) and an administrative service. The joint committee is assisted by delegates who are directly involved in the matter and who represent the employer or the employee of the company concerned respectively. This should allow the assessors to decide in full knowledge of the facts.

The employer or the representatives of the employees concerned in the dispute must refer to the ONC by submitting a written request stating the reasons for the referral and including any relevant documentation. The request must be accompanied by a file specifying the subject matter of the dispute and its context. The president of the ONC may request additional documents and forward the file to the members of the joint committee so that it can decide whether the file is complete and can be submitted for conciliation.

The joint committee investigates the case and then meets in camera for the first time no later than two weeks after the date on which the dispute was referred to the ONC. The two groups of assessors may jointly formulate a conciliation proposal. The relevant vote shall be taken by a group with a majority of the votes cast. If this proposal is rejected by at least one of the parties, the president may submit a proposal on his or her own initiative. The rejection of this proposal by at least one of the parties shall be deemed to constitute a declaration of non-conciliation. In the event of non-conciliation, the parties may decide to start a strike. In that respect, it should be noted that an employee's participation in a lawful strike does not constitute valid grounds for dismissal.

Disputes relating to collective bargaining agreements

During the term of a collective agreement, the parties are obliged to refrain from strikes and lockouts. Collective disputes regarding employment matters that are not subject to a collective agreement, or regarding the failure of the parties to reach a collective agreement (including cases in which an employer refuses to engage in collective bargaining when properly requested to do so), must be referred to the ONC before any party to the dispute can take industrial action. During the ONC conciliation process, the parties to the dispute must not hold a strike or lockout.

In disputes relating to collective bargaining, a first conciliation meeting must generally be held by the first day of the sixth week after the date on which the dispute was referred to the ONC.

During the conciliation process, the ONC will seek to broker an agreement between the parties to the dispute. Conciliation ends when a collective agreement is reached, or it is agreed unanimously that conciliation has failed. If no settlement has been reached 16 weeks after the first conciliation meeting, any party to the dispute may declare the conciliation to have failed. When conciliation fails, the ONC draws up a statement of the points still in dispute.

When conciliation fails, any party to the dispute may commence industrial action.

If conciliation fails, either party to the dispute may, in the following two weeks, ask the government to nominate an arbitrator (even while industrial action is under way). The government will then propose an arbitrator to the parties within two weeks of the request. The parties then have two weeks to accept or reject the arbitrator. If both parties accept, the arbitrator will make an arbitration award, which is binding on the parties and has the effect of a collective agreement.

Disputes relating to collective dismissal

Collective redundancies are defined as dismissals made by the employer, for reasons not inherent in the employees concerned, affecting at least seven employees over a period of 30 days or at least 15 employees over a period of 90 days.

Before initiating collective redundancies, an employer must hold negotiations with employee representatives with a view to reaching agreement on a 'social plan'. The negotiations must deal with means of avoiding the redundancies or reducing their number and of mitigating the consequences by recourse to accompanying social measures aimed, notably, at helping to redeploy or retrain redundant employees and to return them to the labour market immediately.

For the purposes of the negotiations for a social plan, the employee representatives are the employee delegation (an employee representative body that must be set up in all establishments employing 15 or more employees), the joint company committee, if one exists (enterprises with 150 or more employees are obliged to set up such a committee) and, in certain circumstances, trade unions.

If, after 15 days have passed since the negotiations started, no agreement on a social plan has been reached, the parties must draw up a document setting out their respective positions on the various issues negotiated and submit it to the public labour authorities. Then, within three days, the parties must jointly refer the matter to the ONC. Within two days of being notified, the ONC will invite representatives of the parties to a meeting, which must take place within three days of the invitation. The conciliation process, aimed at brokering agreement on a social plan, lasts a maximum of 15 days from the first meeting.

The employer may not notify employees affected by the planned collective redundancies of dismissal before a social plan is agreed or, where agreement is not possible, before the end of the conciliation process involving the ONC. Any notice of redundancy issued before the agreement is signed, or the process ends, is null and void, and any employee dismissed in these circumstances can obtain a court order to this effect under an expedited procedure.

When an employer notifies an employee of dismissal as part of a collective redundancy, the minimum period before the dismissal may take effect is generally 75 days – the public authorities may extend this to 90 days in some circumstances. If employees are entitled to a longer notice period by law, or as a result of their employment contract or an applicable collective agreement, this longer notice applies.

At the latest, at the time when it begins negotiations with employee representatives for a social plan, an employer contemplating collective redundancies must notify ADEM in writing, providing the same information that it is required to be given to the employee representatives (see above). The employer must give a copy of this notification to the employee representatives, who may make any observations they have about the planned redundancies to ADEM.

Furthermore, employers with 15 or more employees are obliged to report all redundancies to the national tripartite Economic Committee. If an employer reports more than five redundancies over a period of three months, or eight redundancies over a period of six months, or if the Committee foresees financial or economic difficulties at the company, the Committee can ask the employer and employee representatives to negotiate a job protection plan aimed at preventing further job losses. For the purposes of the negotiations, the appropriate employee representatives may be employee delegations, the joint company committee or trade unions. An employer or employee representatives may also take the initiative to negotiate a job protection plan, if they envisage financial or economic problems that may have a negative effect on employment.

The negotiations for a job protection plan must cover broadly the same issues as those covered for a social plan to accompany collective redundancies (see above), plus several additional topics, such as special measures for older employees. There is no obligation or deadline to reach an agreement on a job protection plan. If the negotiations lead to an agreement, that agreement must be sent to the Economic Committee, which will pass it on to the public authorities for approval. If a job protection plan is approved, the employer benefits from certain advantages, such as training subsidies and partial reimbursement of early retirement costs. Further, employers that are covered by an approved job protection plan are not required to negotiate a social plan if they proceed with collective redundancies in the six months following the approval of the job protection plan.

III TYPES OF EMPLOYMENT DISPUTES

i Dismissal matters before Luxembourg courts

Most of the court proceedings in Luxembourg handle unfair dismissal matters.

According to labour law provisions, an employee who is dismissed with notice may request within one month of the notification of the dismissal to be provided with the reasons for the dismissal (Article L124-5 of the Labour Code). Within one month of receipt of the request, the employer must provide the employee with the reasons for the dismissal, which must be precise, serious and real. Upon receipt of those reasons, the dismissed employee

has three months to challenge the dismissal before the court or to formally challenge the dismissal. If the employee formally challenges the dismissal, he or she will have one year from lodging a formal complaint to challenge the dismissal in court.

If the employee files a claim before a given court, the court will analyse whether the reasons for the dismissal are sufficiently precise, serious and real. If the court does not consider the reasons to be sufficiently precise, serious or real, it will declare the dismissal wrongful, thereby entitling the employee to damages.

In the event of unfair dismissal, the amount of the damages awarded by a court depends on the actual prejudice suffered by the employee as a result of the termination of his or her employment.

A distinction needs to be made between material prejudice and moral prejudice.

Material prejudice

The period between the date of termination and the date on which the employee has either found new employment or should have found new employment constitutes the reference period, which the labour court will set in the event that it declares the dismissal to be wrongful.

If the employee has not been able to find new employment, the duration of the reference period is determined by the courts based on different criteria, such as the duration of the notice period (if the employee has been exempted from work during the notice period, the notice period will be set off against the reference period), the employee's seniority, age, expertise, ability to find new employment and the situation on the employment market.

Throughout the reference period, the employee is entitled to damages for an amount equal to the compensation that the employee would have earned if he or she had not been dismissed. Unemployment benefits or income derived from a professional activity conducted by the employee during the reference period must be set off against the amount of damages. If the dismissed employee is living in Luxembourg, he or she will be entitled to unemployment benefits that will be paid by the Luxembourg state. If the termination is declared unfair, the employer will be ordered to reimburse to the Luxembourg state the amount of unemployment benefits awarded to the employee during the reference period.

Moral prejudice

In addition to material damages, the employee may be awarded damages to compensate for the moral prejudice suffered. In this respect, the circumstances surrounding the termination and the inconvenience caused to the employee (for example, in light of the employee's seniority, age or ability to find new employment) because of the termination of the employment constitute the key criteria. This assessment will be made by the courts on a discretionary and case-by-case basis.

ii Moral and sexual harassment claims

There has been a noticeable increase in claims before the labour courts relating to moral harassment in the workplace.

Dismissed employees frequently make these claims together with a request for financial compensation for unfair dismissal.

Although the Labour Code provides a framework for sexual harassment claims, despite the increase in moral harassment (or mobbing) claims before the courts, there is no legal framework as yet under Luxembourg law. Only one collective agreement has been concluded with the Luxembourg trade unions with respect to harassment and violence in the workplace.

Consequently, decisions on moral harassment are made on the basis of this convention and on the basis of Article 1134 of the Luxembourg Civil Code, according to which contracts must be executed in good faith.

It is very likely that because of the increase in harassment cases and the very few provisions that exist in this respect, the Luxembourg legislator will update existing laws and regulations on this matter.

iii Recharacterisation of the employment contract

Employment contracts are normally drawn up for an unlimited period, meaning that fixed-term employment contracts should be the exception. In this respect, the Luxembourg labour law provisions further foresee, among other things, that the reasons for recourse to a fixed-term employment contract must be precisely indicated in that contract. Moreover, the maximum duration of the employment contract shall be 24 months.

As these conditions are very often not respected, employees frequently request before the courts a recharacterisation of their fixed-term employment contract as an open-ended employment contract.

IV YEAR IN REVIEW

i Significant legal developments

Luxembourg labour law is in constant development for adapt itself to the changing circumstances of the social environment. In the past three years, several important legal developments have occurred, with the aim, among other things, of providing employees with a better work–life balance and to improve the quality of life in general.

Accordingly, the legal changes of the preceding years have resulted in several important court decisions, changing previous rulings and hence amending the general understanding of certain matters and aspects of Luxembourg labour law.

The time savings account

The Law of 12 April 2019[2] introduced 'time savings accounts' (CET) to the private sector. A CET allows an employee to accumulate paid leave on an ongoing basis to be used, for example, to organise longer periods of leave (on a full-time or part-time basis), to carry out a personal project or to follow vocational training. The establishment of a CET is at the discretion of the employer but can only be done within the framework of a collective agreement.

Employees with at least two years' tenure in the company can contribute to their CET. The CET is supplied in hours and is limited to 1,800 hours or 45 weeks at 40 hours. Upon the employee's written request, the CET can be supplied with several types of hours (overtime hours, unused days of recreational leave, compensatory days granted following work on Sundays or public holidays falling on a Sunday, etc.)

Each employee can freely use his or her CET by making a prior written request at least one month in advance. The use of rights accrued on the CET is considered working time.

2 Law of 12 April 2019 introducing a time savings account and amending the Labour Code, the Civil Code and the amended Law of 4 December 1967 concerning income tax.

One additional day of annual paid leave and one additional public holiday

The Law of 25 April 2019, amending Articles L. 232-2 and L. 233-4 of the Labour Code[3] increased the minimum paid annual leave from 25 days to 26 days and declared 9 May to be a new public holiday in Luxembourg, increasing the total of public holidays to 11 days per year. The date of entry into force of the Law has been set retroactively to 1 January 2019.

Increase of the minimum wage

The Law of 12 July 2019 amending Article L. 222-9 of the Labour Code applied retroactively from 1 January 2019. From 1 January 2019, the minimum social wage increased by 0.9 per cent. The new legal provisions entail an increase in the minimum wage for unskilled workers from €2,071.10 gross (index 814.40) to €2,089.75 gross (index 814.40).

Index increase

Since 1 January 2020, the index applicable to employees' wages has been increased from 814.40 to 834.76 this results in a 2.5 per cent rise in the gross salary paid to employees with employment contracts that are subject to Luxemburg law.

Henceforth the minimum wage for unskilled workers, which was previously €2,089.75 gross, will now be €2,141.99 gross, which represents a gross increase of €52.24.

Qualified employees who previously received a minimum wage of €2,507.70 gross also had their wages increased in the same proportion to €2,570.39 gross as of 1 January 2020 (i.e., a gross increase of €62.69).

ii Significant case law

Further to recent legal changes, notably following the reform of parental leave, the Labour Court of Luxembourg City maintained its position that protection against dismissal was inapplicable in cases of total cessation of the activities of the employer. On another note, the Luxembourg Court of Appeal restated its lack of competence in terms of social mandate in the absence of a subordinate relationship.

Labour Court of Luxembourg City, Order of 16 August 2019, Docket No. 2658/2019

This decision recalls that the special protection against dismissal during parental leave provided for in Article L. 234-47 (8) of the Labour Code 'is inapplicable in the event of the total cessation of the activity of the Luxembourg branch of a company governed by foreign law, if the employment contract stipulates that the workplace of the employee benefiting from parental leave is located exclusively at that branch'.

The Labour Court of Luxembourg held that 'it must be considered, on the one hand, that the employer's right to close a branch takes precedence over the right granted to an employee on parental leave and, on the other hand, that the employee cannot claim to maintain employment relations if he has been assigned exclusively to that branch'.

In the present case, the applicant was dismissed by registered letter during the applicant's parental leave and brought an application for a declaration that the dismissal was null and void and for an order that the employment contract be maintained. Since the applicant

3 Law of 25 April 2019 amending Articles L. 232-2 and L. 233-3 of the Labour Code and Article 28-1 of the amended Law of 16 April 1979 establishing the general status of civil servants.

was exclusively assigned to the service of the Luxembourg branch, which had definitively ceased its activities in Luxembourg with the resultant dismissal of all employees for economic reasons, the applicant's request was denied.

Luxembourg Court of Appeal, Judgment No. 90/19 of 27 June 2019, Docket No. CAL-2018-00011

This decision recalled that:

> *the employment contract is defined as the agreement by which a person undertakes to place his or her activity at the disposal of another, under whose subordination he or she places him- or herself, for remuneration, with the consideration that for there to be a relationship of legal subordination the contract must place the employee under the authority of his or her employer who gives orders concerning the performance of the work, monitors performance and verifies results. The existence of an employment contract depends neither on the will expressed by the parties nor on the name or qualification they have given to their agreement, but on the factual conditions in which the employee's activity is carried out*

and that

> *taking into account the absence of any written employment contract and the respondent's objections as to the existence of an employee activity in the appellant's favour, it is for the appellant, who relies on it in support of his request, to establish its reality*[4]

In this particular case, the appellant had been appointed chief executive officer of a company by the company's management board, and was responsible for the day-to-day management with general power of attorney. The Court of Appeal found that the appellant had received from the management board, in its capacity as representative of the company, a mandate to carry out the day-to-day management and to represent it. Contrary to what the appellant argued, the Court of Appeal considered that '[t]he pay sheet for [the appellant's] remuneration, as well as the fact that he benefited from a supplementary pension and a certain number of days of leave are not sufficient to establish, in the absence of any other evidence, that there was a relationship of subordination between the appellant and the respondent as an agent and his principal could freely agree on remuneration and the conditions under which the mandate must be exercised.'

The Court of Appeal also found that the appellant 'organised his own working time by not reporting to anyone, that he did not inform his colleagues of his absences, nor of their cause or duration, and that it was only following complaints from his colleagues (of whom he was the superior according to the organisation chart provided by the respondent) that the management board was informed of his absences and inappropriate behaviour'.

The Court of Appeal thus concluded that the appellant had failed to establish that he had performed the day-to-day management of the company in the context of a subordinate relationship.

4 Luxembourg Court of Appeal, Judgment No. 90/19 of 27 June 2019, Docket No. CAL-2018-00011, page 3.

V OUTLOOK AND CONCLUSIONS

In practice, employers tend to avoid court proceedings unless there is a matter of principle at stake. Hence many labour law cases are resolved by way of a settlement, particularly as a lawsuit may damage the reputation of both the employee and the employer, and sensitive information or sensitive incidents are likely to be debated in public hearings. In particular, in the event of dismissals, employers tend to favour settlements. Hence, we may expect to see more extrajudicial resolution of disputes in the coming months.

Otherwise, given the fact that Luxembourg is a stable country in which labour law is not over-regulated, no major upheavals are expected, either in procedure or litigation activity.

Chapter 11

MEXICO

Alfredo Kupfer-Domínguez, David Puente-Tostado and Sebastián Rosales-Ortega[1]

I INTRODUCTION

Labour and employment disputes in Mexico are extremely common, as access to justice is guaranteed free of charge by the state. Basically, the legal framework for labour and employment disputes is set out by the Mexican Constitution, the Federal Labour Law, the Social Security Law and all the applicable jurisprudence and criteria issued by the collegiate circuit courts and the Mexican Supreme Court of Justice.

The federal and local conciliation and arbitration labour boards (the labour boards) are the authorities in charge of resolving employment disputes, and they are formally part of the executive branch of the government. However, on 23 February 2017, the Constitution was reformed to create labour courts, which will replace the labour boards and will form part of the judicial branch of the government. This, of course, has entailed a major change from how labour processes were handled and resolved in the past and Mexico is now moving to a new paradigm.

Consequently, as of 1 May 2019, the Federal Labour Law has also been reformed and, in accordance with the transitory articles of the reformed Law, local labour courts will begin activities within three years and federal labour courts within four years (whether a local or a federal labour court hears a private sector matter will depend on the type of activity performed by the employer).

Although the Federal Labour Law reform represents a great change and presents significant challenges, in general, and at its substantive core, the spirit of the Federal Labour Law remains the same in many ways, as it largely favours the employee and places a heavy burden on the employer to provide evidence of employment conditions and the existence of certain documents, among other things. Furthermore, in as much as the law provides procedural protections and benefits for employees that are not granted to the employer (such as options not to attend preliminary hearings and to have lawsuits ratified as filed), conditions are not equal for both parties.

In principle, the practice of labour law should be prompt and expeditious, as guaranteed by the Constitution. However, this principle has not been duly observed by the labour boards, which have proved slow in exercising their authority, often taking as long as four years to resolve an employment dispute. This has served as an additional motive for putting the judiciary in charge of labour justice matters.

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The following sections address the general outline of the ordinary procedures in labour and employment law in Mexico, as well as the most relevant disputes arising within employment relationships, and they also provide a more detailed explanation of the above-mentioned labour law reforms and the factors that triggered them.

II PROCEDURE

Conflicts arising from employment relationships will now be resolved by federal or local labour courts. As mentioned above, the federal labour courts will start functioning within four years, while local labour courts will commence activities within three years. There is a proposal for local labour courts to start in 10 states in 2020.

Until the labour courts begin functioning, the labour boards will continue to oversee labour and employment cases through a process of hearings regarding conciliation, demands and exceptions, followed by stages for the offering and admission of evidence. However, the Federal Labour Law reform has created new institutions, introducing the following procedural stages to be undertaken before recourse is made to the new labour courts.

i The Federal Centre for Conciliation and Labour Registration

The Federal Centre for Conciliation and Labour Registration (the Federal Centre) will have, among others, the following two main functions:

a to register all collective bargaining agreements, internal regulations and union organisations, and any of their related administrative functions. The Federal Centre must initiate this function within two years of the enactment of the Federal Labour Law reform; and

b to provide at the federal level the conciliation function as a prerequisite to bringing a labour claim. The Federal Centre must initiate this function within four years of the enactment of the Federal Labour Law reform.

Similarly, on local matters, each state will create its own conciliation centres, which must start operating within three years of the enactment of the Federal Labour Law reform. These local conciliation centres will only exercise the pre-litigation conciliation function, and will not have responsibility for registering collective bargaining agreements, internal rules or union organisations.

ii Labour dispute procedures

Prior to bringing a claim in the labour courts, employees or employers, or both, must open a conciliation procedure. This procedure will last up to 45 days and will suspend the statute of limitations for bringing a labour claim. Should the employee and the employer fail to reach an agreement, either the Federal Centre or the local conciliation centre will issue a certificate stating that the procedure has been exhausted. This certificate is a requirement for initiation of a labour claim.

Disputes arising over discrimination, termination of pregnant employees, appointment of beneficiaries, collective bargaining agreement entitlement claims or challenges to union statutes will not require this pretrial procedure.

If the parties enter into litigation, the plaintiff will present the claim and evidence, so that the defendant can produce its answer and furnish evidence. Once that has been done and the parties have exercised their corresponding rights to object, the labour courts will summon

the parties to a preliminary hearing at which the case will be 'purged', meaning that the subsequent stages will focus only on those items that are in contention. The labour court will admit evidence and will schedule a trial hearing, in which all the evidence will be rendered and the parties allowed to present allegations.

Following the reform, there are also expedited special procedures for the appointment of beneficiaries of deceased parties; for cases of the disappearance of an employee due to a delinquent act; in relation to social security matters (which constituted around 80 per cent of the total workload of the current labour boards); and in respect of entitlement to collective bargaining agreements.

Another important development is the incorporation of electronic means of legal service for the parties to a dispute.

iii Collective matters

In full compliance with the 98th Convention of the International Labour Organization (ILO), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the signed and ratified North America Free Trade Agreement 2.0 (now known as the Agreement between the United States of America, the United Mexican States, and Canada, or USMCA), the Federal Labour Law reform deals with the freedom of association and unionisation (to belong or not to a union), effective negotiation of collective bargaining agreements, and the prohibition on employers inducing employees to support, or not support, a union. In all collective procedures involving voting, the relevant labour authorities must guarantee that employees can cast their votes in a free, personal, secret and direct manner. Before the Federal Labour Law reform, union voting was carried out by raising hands, a practice that was heavily criticised as undemocratic.

Unions that seek the execution of a collective bargaining agreement must obtain a certificate of representation from the Federal Centre showing that they represent at least 30 per cent of the employees subject to the collective bargaining agreement. If any other union requests a certificate of representation in respect of the same constituent body of employees, the employees will have to vote for the union of their choice and the one that obtains the majority vote will obtain the certificate.

The Federal Labour Law reform has also introduced a requirement for unions to hold a vote in which the employees must decide whether to accept any proposed revision of the applicable collective bargaining agreement or the scale of wages. If the majority of the employees do not accept the proposed revision, the union will be entitled to strike or to postpone the strike until reaching an agreement satisfactory to the majority of the employees.

Further, the employer will be obligated to deliver a copy of the collective bargaining agreement to each employee within 15 days of its presentation to the Federal Centre.

iv Other relevant matters

Private settlement agreements

Termination agreements between employers and employees that are executed without the intervention of the labour authorities will be valid; however, if a provision contains a waiver of a right, that provision will be null and void, but the rest of the agreement will continue to be valid.

Notice of rescission

The lack of a rescission notice to the employee or to the labour authorities will create the presumption of unfair dismissal. However, the employer may prove at trial that the termination was justified.

Payment of severance by consignment

In cases of a termination of an employee with service of less than one year, where it is impossible to continue the employment relationship under the requisite criteria of the labour authorities, where the employee is an 'employee of trust' (mainly administrative employees), or where the employee is a household or temporary worker, the employer will be able to consign the severance payment through the labour court according to the particular circumstances of the employee, so that the employer can conclude the employment relationship without incurring additional back wages.

III TYPES OF EMPLOYMENT DISPUTES

The Federal Labour Law identifies the categories of labour disputes to be resolved by the labour courts and the most relevant of these are listed below, along with their most important procedural characteristics.

i Unfair dismissal

The most common disputes in Mexico have their origin in unfair dismissals, as in Mexico the concept of 'employment at will' is not applicable.

Therefore, according to the Federal Labour Law, any employees that are unfairly dismissed are entitled to receive the following:

a payment of all accrued legal and contractual benefits up to the date of termination (such as vacations, vacation premium and year-end bonus);

b severance payment of three months of consolidated salary;

c payment of 20 days of consolidated salary per year of service; and

d Payment of 12 days per year of service with the salary capped at twice the daily minimum wage for the area.

An employee wishing to file a lawsuit for unfair dismissal has a period of two months from the date of the dismissal or service of the rescission notice (see Section III.ii) in which to file his or her claim. This type of claim is pursued through standard proceedings before the labour courts.

ii Employment rescission

The Federal Labour Law provides a list of justified causes for termination, which if duly proven, exempt the employer from paying severance. The following are justified causes for termination:

a The employee deceives the employer (or, where applicable, the union that suggested or recommended the employee) with false certification or references that attribute qualifications, aptitudes or abilities to the employee that he or she lacks. This reason for termination will lapse after the employee has rendered 30 days' service.

b The employee in performance of his or her job is not honest or honourable; commits violent acts; threatens or injures the employer, the employer's family, the management or administrators of the company, or damages the establishment (except where the employee has been provoked or acted in self-defence).

c The employee commits one of the acts stated at (b) against a co-employee and, as a consequence, the discipline and order of the workplace is affected.

d The employee commits any of the acts stated at (b) against the employer, the employer's family or the management or administration outside the workplace so seriously that it makes continuance of the employment relationship impossible.

e While discharging his or her duties, the employee intentionally causes material damage to the company buildings, machinery, instruments, raw materials or any other asset related to the job.

f The employee causes the damage stated at (e) not intentionally but negligently, provided that the negligence is the sole cause of the damage and the damage is serious.

g The employee, through imprudence or inexcusable carelessness, compromises the safety of the establishment or the people present inside it.

h The employee commits immoral acts in the establishment or place of work.

i The employee reveals industrial secrets or makes known private personal matters that damage the business.

j The employee has more than three absences in a period of 30 days without the employer's permission or a justifiable excuse.

k The employee disobeys the employer or its representative, without just cause, provided that the disobedience relates to the work for which the employee has been hired.

l The employee refuses to adopt preventive measures or to follow the procedures established for avoiding accidents and illnesses.

m The employee arrives at work intoxicated or under the influence of some narcotic or intoxicating drug, except where, in the latter case, there exists a doctor's prescription for the medication. Before beginning his or her service, the employee must bring his or her medical condition to the attention of the employer and present the doctor's prescription.

n Any implemented sentence that imposes prison time on the employee and prevents him or her from completing the employment relationship.

o The lack of documentation required by law for the performance of the contracted activity, whenever this documentation is imputable to the employee.

The Federal Labour Law provides that an employer that dismisses an employee for any of the above stated causes must deliver a written notice to the employee with a detailed explanation of the conduct that triggered the termination and the date or dates on which the conduct occurred.

If the employee does not agree with the rescission, he or she may file an action for unfair dismissal within two months of the rescission notice being duly served.

However, the employer is also allowed to dismiss the employee and present the rescission notice to the labour board (or, in future, the labour court), and the labour board then serves the employee with the causes for termination. In addition, following the 2019 Federal Labour Law reform, if, prior to any claim being served to the contrary, an employer demonstrates to the labour authorities that it terminated an employee with just cause, it does not have to comply with the formality of a written notice to the employee.

iii Payment of accrued benefits:

As employees are not legally obliged to give prior notice when terminating their employment voluntarily, in many cases they are not paid their accrued benefits immediately. Therefore, employees may claim their accrued benefits within one year of termination, including their year-end bonus, vacations and vacation premium, as well as any other contractual benefit that could be owed to them.

If the amounts at issue exceed the equivalent of three month's salary, the dispute is governed by the rules of the ordinary process detailed above. If the amounts are not greater than three month's salary, they are claimed by means of a special expedited procedure.

iv Beneficiary designation

According to the Federal Labour Law, employment contracts should contain a specific section for employees to designate the beneficiaries of their accrued benefits in the event of death or disappearance related to a crime. Nevertheless, an investigation must take place to designate beneficiaries in these cases, or if there is a dispute between alleged beneficiaries. Again, these matters are dealt with through a special procedure, to guarantee an expedited process.

v Work-related accidents and sickness

Pursuant to the Federal Labour Law, social security in Mexico is mandatory for all employees, regardless of their position or salary level. Therefore, employers and employees are obliged to pay a premium so that all employees are covered by the insurance provided by the Mexican Social Security Institute.

The benefits of this insurance include a severance payment or pension in the event of a work-related accident or sickness, which can be claimed through the special expedited procedure. Typically, these kinds of procedures involve both the employer and the Mexican Social Security Institute, on the basis that the Institute should meet the obligations imposed on the employer provided that the employer has been compliant in paying the requisite premiums.

vi Conflicts of an economic nature

From a labour standpoint, conflicts of an economic nature are those that have the intention of modifying, implementing, suspending or terminating employment conditions or relationships for economic reasons that make it impossible to continue the previous conditions or employment.

This kind of dispute may be filed by the union, the majority of employees in a workplace or by the employer itself. Labour courts should seek to arrive at a settlement between both parties.

vii Strikes

Pursuant to the Federal Labour Law, strikes are the temporary suspension of activities at a workplace, performed by a coalition of employees. All strikes shall have at least one of the following purposes:

a to achieve a balance between diverse production factors, harmonising employment rights with those of capital;

b to obtain from the employer a signature to a collective bargaining agreement or to force an agreement's revision;

c to enforce compliance with any of the clauses contained within a collective bargaining agreement;
d to enforce compliance with all profit-sharing related provisions;
e to support a third-party strike that has any of the above purposes (solidarity strike); and
f to enforce the revision of the collective bargaining agreement salary scale.

Strike claims will be resolved by the labour courts, ruling on the validity or invalidity of the claim. As in many labour disputes in Mexico, parties are invited to settle the claim, and this is very common in the case of strikes.

IV YEAR IN REVIEW

As mentioned in the introduction, since early 2017 there have been several changes in Mexico regarding labour and employment, primarily for the following reasons.

On 23 February 2017, the Constitution was amended, introducing a complete change to the existing labour justice system in Mexico, including stricter principles on the freedom of association and collective bargaining rights, rules for more transparent elections of union leaders, and the transition of the conciliation and arbitration boards to labour courts.

Factors in this reform include a background of criticism of the Mexican government in international forums, especially at the ILO, and the country's desire to adhere to the Trans-Pacific Partnership Agreement (now the CPTPP); there has also been pressure in relation to the renegotiation of the North America Free Trade Agreement (or NAFTA), now known as the Agreement between the United States of America, the United Mexican States, and Canada (or USMCA). Mexico has previously been accused of fostering collective bargaining agreements without union representation, whereby unions were imposed upon employees, violating their right of freedom of association. The objective of the constitutional reform was to prohibit these collective bargaining agreements, commonly known in Mexico as 'protective agreements'.

As mentioned previously, the constitutional reform also affected employment law by eliminating conciliation and arbitration boards from the executive branch of government and creating labour courts under the judicial branch of government. In addition, the constitutional reform entailed a reform of the Federal Labour Law and, as stated above, this was duly published on 1 May 2019. The enactment of the Federal Labour Law reform has introduced important changes that will guarantee much more expeditious processes. Furthermore, the Federal Labour Law reform favours conciliation over litigation by creating a mandatory pretrial conciliation stage, to be administered by the state conciliation centres, although competence for the registration of collective bargaining agreements will be reserved to the Federal Centre.

As part of the background to the Federal Labour Law reform, on 20 September 2018, the Mexican Senate ratified the 98th Convention of the ILO, regarding freedom of association and free collective bargaining rights, meaning that this international treaty became part of Mexico's national legislation, functioning at the same hierarchical level as the Constitution.

In addition, the 98th Convention obliges signatory countries to enact and maintain legislation protecting workers' right to freely join or not join a union, or resign union affiliation, without employer retaliation. This Convention will prohibit Mexico from passing any legislation permitting the signature and registration of collective bargaining agreements where employees do not know which union is party to the agreement, or are not aware of the

terms of the agreement. The changes to the Federal Labour Law are aligned and consistent with the constitutional reform of 2017 and, certainly, with the principles embodied in the CPTPP and the USMCA.

On 1 October 2018, the US Trade Representative and Canadian Foreign Affairs Minister announced that an agreement, including Mexico, had been reached to renegotiate the agreement previously known as NAFTA. However, the USMCA is still pending approval by the US Congress. The USMCA includes as part of its text a specific labour chapter for Mexico, unlike NAFTA, in which labour matters were part of an annex to the agreement. Under the USMCA, persistent violations of labour obligations with an impact on trade may result in commercial sanctions. Therefore, it is highly important for Mexico not only to have enacted the legislation for this major reform, but also to ensure it is enforceable.

In the past 12 months, important individual labour and employment law cases have been heard in Mexico and, drawing on our litigation practice experience, we present the following example of a notable labour dispute.[2]

A former chief finance officer (CFO) from a German global automotive parts manufacturer claimed a statutory profit-share payment, not from the CFO's employer but from an operating entity that benefited from the employee's services, which were provided to the operating entity by the CFO's employer. The CFO had been terminated with full severance pay and had signed a full release of obligations. However, following termination, he filed a claim for the payment of 10 per cent of the annual profit of the operating entity, which had no eligible employees, arguing that he had acted as CFO of both entities.

In this multimillion-dollar claim, the executive further argued that both legal entities, the employer and the beneficiary of the employer's services, comprised the same 'economic unit' under the Federal Labour Law, making them a single employer, which therefore had to comply with the statutory profit-sharing of all profits of both entities.

The labour lawsuit represented not only a substantial contingency for the client, but also, more importantly, a challenge to its business structure in Mexico. After five years of litigation through different levels of the Mexican judiciary system, the Supreme Court issued a resolution confirming the decision of the circuit court finding the arguments and evidence supporting the independence of the legal entities compelling. The Court also confirmed the validity of an agreement between related corporate entities to provide each other with services, thereby agreeing in writing on the elements they would have to share to comply with the purposes of their business arrangement.

Although the Federal Labour Law was substantially amended on 1 May 2019, notably the current rules for outsourcing services were not changed. Hopefully this decision will provide certainty to many businesses generating formal jobs in Mexico and, in facilitating expansion of these businesses' operations, will contribute to Mexico's productivity.

V OUTLOOK AND CONCLUSIONS

Mexico's labour law reform process represents an important opportunity for Mexico's employees and employers, but the passage of these reforms into law is just the first step. The effective enforcement of Mexico's new labour laws will be key in ensuring that the USMCA

2 Complete article by Alfredo Kupfer Domínguez and David Puente-Tostado, 'Profit-sharing litigation in Mexico: A challenge to a common corporate structure', The In-House Lawyer, Summer 2019, 119.

can actually benefit workers. For decades, unions only managed contracts to service the interests of employers that sought to avoid real collective bargaining and undermine the emergence of a democratic, independent workers' movement.

The proposed labour chapter in the USMCA includes provisions that require Mexico to end corporatist unions and their protective agreements, recognise independent unions, conduct elections for leaders and collective agreements, and establish independent labour courts. These are important reforms that must be properly funded in order to ensure that they are implemented and enforced in a timely manner.

The changes in Mexico's law likely will spur greater, and more meaningful independent unionisation than Mexican employers have experienced in the past and companies seeking to maintain the flexibility necessary to respond to a changing global marketplace should evaluate their labour relations strategies, both individual and collective.

To ensure the enforcement of the labour courts' decisions, the labour law reform requires substantial resources from Mexico's government; however, in the upcoming year, 2020, the Mexican congress is expected to approve the funding necessary for the implementation of the new legal framework and for the agencies needed to deliver these reforms.

Finally, Mexico's labour reform is expected to precipitate an important discussion regarding outsourcing. At present, under the Federal Labour Law, there is a common structure allowing employers to hire workers under this regime; however, Congress is analysing several legal proposals to change the outsourcing rules or, even worse, to have the outsourcing regime under the Federal Labour Law revoked altogether.

Chapter 12

PORTUGAL

André Pestana Nascimento and Susana Bradford Ferreira[1]

I INTRODUCTION

Employment relationships in Portugal are extensively regulated by the statutory law and regulations that constitute the Labour Code[2] and its complementary legislation on labour and employment matters.

Collective bargaining agreements also play an important part in the Portuguese labour regime. These instruments can even bind an employer that did not sign or is not a member of the employers' organisation that concluded the agreement, if the government decides to extend its provisions to a certain field of business. In addition, employment agreements remain a relevant source of labour law.

In general, employees in Portugal enjoy a comparatively high level of protection, with a special emphasis given to the constitutional principle of stability of the employment relationship. Portuguese law does not recognise the concept whereby the employer terminates the employment simply by giving notice, except in cases of the employment agreement being terminated within the trial period or the expiry of fixed-term employment agreements. Thus, dismissals without cause are forbidden and shall be deemed null and void.

There are several government agencies whose competence includes, or who are connected with the enforcement of, employment law. The two most important regulatory entities are the Directorate-General for Employment and Labour Relations and the supervisory Working Conditions Authority, with the latter having powers to conduct inspections and sanction breaches of employment and labour law.

Individual disputes between employers and employees arising from an employment agreement fall under the jurisdiction of the labour courts, incorporated in the public legal system. Alternative dispute resolution mechanisms, such as arbitration, are irrelevant and hardly enforceable. However, conciliation within judicial lawsuits, before a judge or a prosecutor from the Public Attorney's Office, is mandatory in nearly all types of employment dispute and is of paramount importance in employment litigation.

As happens in civil court litigation, employment litigation covers three levels of jurisdiction: first instance courts (often specialising in labour and employment matters), courts of appeal and the Supreme Court. Access to superior instances, however, depends on the value of the lawsuit.

Legal provisions governing dispute resolution on employment matters are mainly set out in the Labour Procedural Code (LPC), dated 9 November 1999 and amended

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2 Law No. 7/2009 of 12 February 2009.

seven times since then, the most significant reforms being in 2009 and recently in 2019. However, the LPC is not as extensive regarding procedural provisions as the Portuguese Civil Procedural Code, which is the base framework for all litigation. Where the LPC does not provide a specific rule, the civil litigation provisions will apply, meaning that any reform of civil procedural rules will have a direct effect on labour and employment litigation. The Portuguese framework for employment dispute resolution mechanisms has, for several years, faced a slight incompatibility with the default civil procedural rules, as a result of the approval of a new Civil Procedural Code in 2013. The new Civil Procedural Code introduced a few significant changes to proceedings, but the much-needed harmonisation of the LPC only occurred in 2019. We will discuss this reform further in Section IV.

The labour procedural law sets out an extensive list of 'special proceedings' (as opposed to common proceedings), which are often considered urgent procedures and consequently have a significant impact on the rules for determining procedural deadlines (particularly as they are not suspended during judicial holidays), and which benefit from shorter judicial deadlines. Bearing in mind that the main problem that arises in dispute resolution – in general – is the length of time proceedings usually take, the truth is that labour and employment procedures, as a rule, are faster than civil procedures, particularly because of the urgent nature of most of the lawsuits.

II PROCEDURE

The Portuguese framework for resolving disputes in employment matters provides for two types of procedures: the common and the specific.

The common procedure basically follows civil litigation rules, with a few minor differences. Where an employee is seeking to obtain outstanding payment from an employer or challenge the validity of the term of an employment agreement or a verbal dismissal, an initial claim must be filed with the labour court with territorial jurisdiction over the dispute – as a rule, the court of the defendant's place of residence. The counterparty will then be notified of the claim and the court will schedule a conciliatory hearing. If conciliation fails, the court will immediately notify the defendant (at the hearing) to present within 10 days its written statement of defence, in which all arguments against the claim should be laid out. Both the claim and the statement of defence must be articulated. Having analysed both the claim and the statement of defence, the court will either schedule another hearing – the preliminary hearing – with a view to the conciliation of the parties and a discussion of any procedural irregularities (e.g., the parties' capacity, legitimacy and representation, the court's jurisdiction) or, if the matter can be easily resolved and the facts are clearly and comprehensibly laid down in the claim and in the statement of defence, simply issue a preliminary order clearing the process of all irregularities and identifying the main issue of the dispute and the facts to be proven in the trial. Finally, a trial hearing will be scheduled.

The trial hearing will mainly focus on the production of evidence of the facts, notably witness hearings. When all evidence has been offered and the trial is to be concluded, the parties are invited to present their final allegations and legal conclusions.

There is also a considerable number of specific procedures that cannot be summed up in one basic set of proceedings. These specific procedures often include the intervention of the Public Attorney's Office as a mediator in the first stage of the process.

In some specific procedures, such as the procedure for challenging a written dismissal, the parties' position is actually inverted: the employee files a very simple written application

form with the court and the employer is notified to present a justification for the dismissal and explain to the court why the dismissal proceeding brought against that employee was conducted regularly and lawfully; to which, in turn, the employee will present its statement of defence. This means that although the lawsuit was filed by the employee, he or she will actually be taken as a defendant in the process.

One thing almost all labour litigation proceedings have in common is the various attempts to conciliate the parties from the point when the claim has been filed all the way to the beginning of the trial hearing. Judicial conciliation is an important part of labour and employment litigation and judges tend to be quite persistent when trying to reach that goal in the successive hearings that take place throughout the process. Some judges may prove to be more interventionist than others, offering the parties their views on the legal aspects of the claims and arguments, to make the parties reach a settlement.

III TYPES OF EMPLOYMENT DISPUTES

Employment litigation comprises all disputes that may arise, albeit not exclusively, from:

a employment relationships, or relationships initiated with a view to the conclusion of employment agreements;
b work-related accidents and occupational diseases;
c contracts that are assimilated by law into an employment agreement;
d annulment or interpretation of collective bargaining agreement provisions;
e civil disputes related to strike proceedings; and
f disputes arising from the constitution of trade unions and their relationship with unionised workers.

The most common types of disputes in Portugal include unfair dismissal, damages for outstanding payment arising from the employment relationship, breach of contract and work-related accidents.

Unfair dismissal disputes may arise not only from individual or collective redundancy procedures and dismissals with cause, but also from unlawful expiry of fixed-term employment agreements that should actually be deemed to be open-ended employment agreements.

In cases of individual or collective redundancy, or cases of dismissal with cause, if an employee wishes to challenge his or her dismissal, the LPC sets out a specific type of procedure to be followed: the special procedure for challenging the regularity and lawfulness of a dismissal. This procedure is considered urgent, which means that it is not suspended during judicial holidays[3] and is expected to be concluded within one year (although it can, and often does, take longer). The court will ascertain and rule on the validity of the dismissal (i.e., whether the proper legal proceedings were followed and whether there was an actual cause, be it objective (e.g., redundancy) or subjective (e.g., disciplinary), for the dismissal).

In cases where a fixed-term employment agreement was terminated upon expiry, the employee may claim before the court that his or her fixed-term employment agreement was invalid, and for a number of reasons (e.g., because the employer had no valid temporary need that would legally warrant a fixed-term employment agreement). Hence the employee

3 There are three periods of judicial holidays in Portugal: (1) between 22 December and 3 January (inclusive); (2) between Palm Sunday and Easter Monday (inclusive); and (3) between 16 July and 31 August (inclusive).

may claim that his or her employment agreement should be deemed an open-ended or permanent one and, as a result, should not have been terminated by expiry. For this type of dispute, the case will follow a common procedure, as described in the previous section. In these cases, the court will have a preliminary query to resolve concerning the validity of the fixed-term employment.

When an employee is claiming unfair dismissal, it is common for him or her also to petition for damages for outstanding payment arising from the employment relationship, such as working overtime, professional training hours or seniority allowances. When these payments are being claimed separately (i.e., not in connection with a claim for unfair dismissal), the case should follow the common procedure rules.

Common claims made by employers are related to breaches of contract, notably non-compete or confidentiality clauses. These disputes will also fall under the common procedure rules.

Disputes concerning work-related accidents play a leading part in labour litigation. Official data from the Ministry of Justice shows that, in 2018 alone, 39,216 of the 52,150 cases filed in first instance labour courts were work-related accident claims.[4] The reason for this substantial percentage of cases is not that employees, employers and insurance companies are particularly litigious in these matters, but simply that all serious work-related accidents, including those that result in the employee's death, must be notified to the court and will automatically give rise to a special procedure provided for in the LPC. The first phase of this type of procedure is carried out by the public prosecutor's office, with the employer, the insurance company and the injured employee, or his or her beneficiaries, being called for a conciliatory hearing, at which a detailed description of the amounts the injured employee or his or her beneficiaries are entitled to receive for the employee's incapacity or death will be laid down. The large majority of work-related accident cases shall be concluded and closed in that same conciliatory hearing, with only a few residual cases giving rise to a full judgment before a labour court (namely when the insurance company or the employer takes the view that the accident was not work-related).

IV YEAR IN REVIEW

As explained in last year's edition, the Portuguese government's programme was particularly driven by employee-friendly policies combating precarious employment and improving people's living and working conditions. While 2018 was very significant in terms of planning labour and employment law reforms – with the government presenting two long-promised reform statutes, one implementing several changes to the LPC and the other amending the Labour Code – 2019 was the year of their implementation. As 2019 was the last year of the government's term, all anticipated labour reforms were implemented, with particular emphasis on the months of September and October, when the statutes were published and entered into force. The changes to the LPC and the Labour Code are definitely the two main topics of interest from 2019.

Other legislation was also approved, obliging employers to comply with quotas for disabled employees, and a statute on gender equality for salary purposes also entered into force.

4 Data available at https://estatisticas.justica.gov.pt/sites/siej/pt-pt. Official data for the whole year 2018–2019 is not yet available for consultation. However, in the first two quarters of 2019, 25,448 out of 32,289 labour judicial disputes were occupational accident claims.

Despite a reduced level of media coverage, the battle against false self-employment was not forgotten either. In fact, a number of temporary employees in the public sector were integrated into the relevant services under open-ended employment contracts by virtue of the conclusion of part of PREVPAP,[5] the government's programme for extraordinary regularisation of precarious employment contracts in the public administration. In large part, it was the implementation of PREVPAP that led to an increase of 2.3 per cent in the public administration's employment numbers (15,690 more positions), which represents the greatest increase since 2011.[6]

i The long-awaited reform of the LPC

As explained in last year's edition, the Portuguese framework for employment dispute resolution mechanisms had faced compatibility difficulties with the default civil procedure rules as a result of the approval of a new Civil Procedural Code in 2013. The 2013 Civil Procedural Code introduced significant changes to proceedings, but these were not accompanied by the necessary harmonisation of the LPC until September 2019.

The reform of the Civil Procedural Code had led to an increased level of discussion about introducing corresponding changes to the LPC, and this resulted in the presentation of a bill to amend it in 2018. The proposed statute was finally approved by the Portuguese parliament and published as Law No. 107/2019, of 9 September.

The LPC was truly in need of deep reform, as it was considerably outdated in relation not only to civil procedural law, but also to substantive law.

In light of the incompatible nature of the pre-existing legal regime, which (for no apparent reason) had survived the previous overall revision of the LPC, the core aim of this statute was to update the LPC by carrying out the long-awaited harmonisation with the reformed Civil Procedural Code.

Furthermore, with this reform, the legislature also sought to align the LPC with the Judicial System Organisation Law[7] introduced in 2013, and to harmonise the LPC with Portugal's substantive labour law, namely the Labour Code itself and the legal regime on occupational accidents and illnesses specified by Law No. 98/2009, of 4 September.

Finally, the statute also introduced some additional modifications, perfecting aspects of labour-related proceedings that seemed to have been forgotten previously.

Among the changes introduced, and notwithstanding others provided for by Law No. 107/2019, we would highlight the following in particular.

Common procedure

The following significant changes have been made to the common labour procedure, bringing it closer to civil procedure:

a The identification of the facts to be proven in the trial now follows the same terms as the civil procedure. While previously the court had to select the facts to be proven, setting them out in the form of closed questions requiring yes-or-no answers, the facts are now

5 Programa de Regularização Extraordinária de Vínculos Precários na Administração Pública (PREVPAP).

6 Official data available at https://www.dgaep.gov.pt/.

7 Law No. 62/2013, of 26 August.

provided as evidentiary topics or themes (e.g., the rendering of overtime work by the employee). The court may, however, refrain from making topic selections, depending on the straightforwardness of the facts at issue.

b Previously, the law established that parties to a proceeding could not offer more than three witnesses for each fact to be proven. With the amendments and the introduction of the evidentiary topics mechanism, this rule was eliminated. This means that all witnesses offered may give testimony about everything brought to the proceedings by the parties.

c The limit of 10 witnesses for each party in the dispute is maintained, and for lawsuits in which the value of the claim is less than €5,000, the maximum number of witnesses is reduced by half.

d Written replies (rejoinders) to the objections raised by the defendant shall no longer be admissible; they shall be answered by the opposing party at the beginning of the preliminary hearing or, in the absence of a preliminary hearing, at the beginning of the final hearing. Rejoinders shall be admitted only in response to any counterclaim presented by the defendant.

e The recording of the final hearing is now mandatory.

f Following the evolution of the civil procedure law, the obligation to expressly and separately allege the nullity of the decision in the appeal request (made to the first instance court) is now eliminated. The nullity of the final ruling may now be claimed in the appeal itself (made to the court of appeal).

g The deadline for filing an appeal is extended from 20 to 30 days, and 15 days in urgent cases and others specifically provided for by law (mostly regarding interim rulings). If the appealing party wishes to challenge the decision regarding the proven facts, the aforementioned deadlines will be increased by 10 days (because the parties will need to hear the audio recordings of the trial sessions).

Protection of the employee's personality rights

The Protection of the Employee's Personality Rights is a special urgent procedure provided for by the LPC, and now substantially improved by Law No. 107/2019. Previously, the law only provided that defendants (i.e., employers) were summoned to answer within 10 days and that, regardless of whether or not an answer was provided, the court would decide the matter after examining the evidence produced. This type of action is now duly regulated as follows:

a Once the request has been filed by the employee who wishes to prevent the consummation of an alleged violation of his or her personality rights, or to mitigate the effects of an offence allegedly committed, the court shall immediately designate a date and time for the hearing, to be held within 20 days, unless there is reason to reject the employee's request.

b The defence shall be presented directly at the hearing.

c In the absence of any of the parties or if conciliation is not achieved, and regardless of whether or not a defence is presented by the employer, the court shall order the production of evidence and shall issue its final ruling, with a brief statement of the reasoning for the ruling.

d If the employee's claim is granted, the court shall determine the specific measures to be taken by the defendant and, where appropriate, the deadline for compliance, as well as the penalty payment for each day of non-compliance or for each infraction.

e A preliminary decision (which may not be subject to an appeal) subject to subsequent amendment or confirmation in the course of the proceedings may be given if the examination of the evidence offered reveals the possibility of imminent and irreversible damage to the physical or moral personality of the employee or if, alternatively, the court cannot firmly establish the threat or consummation of the offence, or if justifiable reasons of particular urgency require the order to be given without hearing the opposing party.

f If the defendant has not been heard before the preliminary decision has been given, he or she may answer within 20 days of the notification of the decision.

Law No. 107/2019 came into force on 9 October 2019 and, in general, its amendments were immediately applicable to the actions, proceedings and incidents pending on the date of its entry into force. There have, however, been some exceptions.

ii Changes to the Labour Code

As anticipated, the proposed changes to the Labour Code were implemented in 2019, through Law Nos. 93/2019 and 90/2019, both of 4 September 2019, realising several modifications to the Labour Code and the Code of Contributory Regimes of the Social Security Welfare System, particularly with regard to fixed-term employment agreements, temporary (agency) work, working-schedule organisation, and the protection of parenting rights. Notable among these changes are the following.

Term employment agreements

The maximum duration of fixed-term employment agreements was reduced from three to two years and the duration of non-fixed-term employment agreements from six to four years. In addition, the range of justifications for hiring fixed-term employees was limited, with prospective employees looking for their first job (i.e., individuals who have never been hired under a permanent employment agreement) and long-term unemployed candidates (i.e., individuals registered with the unemployment services for 12 months or more) no longer allowed as providing justification for fixed-term employment contracts. Moreover, the justification of fixed-term employment contracts by the launch of a new activity of an uncertain duration, or on account of the commencement of activity of a business or establishment, is now limited to companies with fewer than 250 employees (whereas before the limit was 750 employees), and can only be used within the first two years in any of these scenarios.

Trial period

To offset the limitation on the justification of fixed-term employment, employment agreements entered into with individuals looking for their first job or long-term unemployed persons now benefit from a trial period of up to 180 days. However, this measure has been called into question by several left-wing parties and a claim regarding its constitutionality is currently pending in the Portuguese Constitutional Court, notably on the grounds that it is a discriminatory provision because it does not differentiate the applicable trial period on the basis of the tasks performed but rather on the individual situation of the employees.

Temporary (agency) work

The new statute limited temporary fixed-term employment agreements through agencies to six renewals (where previously these contracts could be renewed an unlimited number of times), except in those cases where the temporary work is justified by the absence of an employee (e.g., in cases of sickness, accident, parental leave or other similar situations). Additionally, the liability arising from the failure to enter into a temporary employment agreement (between the beneficiary company and the agency) now lies with the company benefiting from the work, which is obligated to take on the temporary worker under a permanent employment agreement.

Working-schedule organisation

The statute eliminated the possibility of individual agreements between the employer and one or several employees on the implementation of a bank-of-hours regime (under which the daily working hours could be increased by up to two hours, subject to a maximum of 50 hours per week and 150 hours of additional work per year, which would be compensated either through a proportional reduction of the working hours, an increase in the holiday period, the payment of a certain amount, or a combination of these options). However, a group mechanism may be implemented regarding the employees of a given unit or department, provided that the project of the bank of hours proposed by the employer is approved by at least 65 per cent of the targeted employees in a referendum on the subject.

Other changes

Law No. 93/2019 also included other amendments, with regard to rights of employees with cancer, and in relation to vocational training and deadlines for individual redundancy procedures, among other matters. The changes highlighted above are merely those that will, in our opinion, have a substantial effect on the everyday life of employment relationships in Portugal.

Other changes were implemented with regard to parenting rights (e.g., an increase of fathers' mandatory parental leave from 15 to 20 business days, and a reduction of the subsequent voluntary period of leave from 10 to five business days, and an increase of initial parental leave for the period of the child's hospitalisation (in cases of special medical care) immediately following the postpartum hospitalisation), although some of these rules will only enter into force with the next state budget, which has yet to be approved.

iii Case law

Although they have only a limited impact on employment dispute resolution (because of the absence of a precedent rule), decisions of the higher courts often serve as guidelines in those areas where there is no relevant employment regulation or where the law is ambiguous enough to leave the ultimate interpretation to the courts.

In the past year, there have been a great number of rulings issued by the higher courts with regard to moral harassment (mobbing), although the decisions themselves did not come as a surprise.

Another hot topic in Portuguese case law throughout 2019 was, as usual, working time. For instance, the Supreme Court of Justice was called upon to decide whether the periods of availability of mobile workers should be considered working time and remunerated as such

(notably as overtime).[8] In the case at hand, the employees were subject to the Portuguese statute that applies to mobile workers employed by undertakings established in Portugal, participating in road-transport activities covered by Regulation (EC) 561/2006 or by the AETR Agreement (thus having implemented Directive 2002/15/EC, of 11 March 2001).

Much like Common Position (EC) 20/2001 adopted by the Council on 23 March 2001, the Portuguese statute specifically stated that periods of availability are not regarded as working time. Therefore, considering the definition of periods of availability in both the Portuguese statute and Directive 2002/15/EC, and on the basis of its own case law, the Supreme Court of Justice stressed that the court's common understanding was that the cornerstone in determining whether periods of availability should be considered working time was whether the employee was required to remain at the place of work. If yes, then those periods should be considered working time. If not (i.e., the employee is free to dedicate himself or herself to his or her personal life without reasonable constraints), the period of availability cannot be considered working time and, thus, is not remunerated as such.

A surprising decision came from the Court of Appeal of Porto, with regard to a special protection granted to a breastfeeding employee. Under Portuguese law, pregnant employees, new mothers and breastfeeding employees, as well as male employees on parental leave, benefit from special protection against dismissal, which includes, among other things, a requirement for an employer to submit a dismissal decision to the Portuguese Authority on Work Equality (CITE) for a preliminary opinion. A disciplinary dismissal brought against these employees is presumed to be ungrounded and thus unlawful.

The Court of Appeal of Porto ruled that because the disciplinary dismissal brought by the company was grounded in facts relating to a period in which the employee was still a breastfeeding employee, this circumstance required the dismissal decision to be submitted to CITE, and furthermore that this obligation remains even where, during the disciplinary procedure, the employee no longer has protected status as a breastfeeding employee.[9]

This decision is somewhat surprising, particularly given that a disciplinary procedure may be initiated, for instance, eight months after a certain breach has been committed by the employee, and, even then, he or she shall still be protected. It calls into question whether the lawmaker's intention was to protect the employee from dismissal on account of his or her existing (protected) status, or to grant some sort of immunity for breaches made during the period in which the employee qualifies for protected status.

Finally, another ruling worth mentioning is the one issued by the Constitutional Court on 17 December 2019 regarding a rule of the Portuguese Commercial Companies Code but with significant implications for labour relations.[10]

Under the rules set jout in the Commercial Companies Code, the members of a board of directors may not perform any duties under an employment agreement in the relevant company, or in companies in a group or domain relationship, during the term of the office to which they have been appointed.

The law states therefore that if an employee who is appointed director has concluded his or her employment agreement within the year before the appointment, it shall be immediately

8 Case No. 6590/15.6T8LSB.L1.S1; the ruling by the Supreme Court of Justice is available, in Portuguese, at www.dgsi.pt.

9 Case No. 4188/18.6T8VFR-C.P1; the ruling by the Court of Appeal of Porto is available, in Portuguese, at www.dgsi.pt.

10 Ruling No. 774/2019, which is available, in Portuguese, at www.tribunalconstitucional.pt.

terminated ('extinguished' is the actual wording used). The Constitutional Court had already ruled this legal provision to be unconstitutional three times, but because these rulings were issued in specific cases they were not yet generally binding for all cases.

However, in the decision of 17 December 2019, the Constitutional Court ruled, now with general binding effect, that this provision of the Commercial Companies Code is indeed unconstitutional.

In light of the finding of unconstitutionality, the underlying employment agreement of a recently appointed director should not be deemed terminated but suspended (as is already provided for in respect of employment agreements concluded with individuals more than one year before their appointment as directors).

V OUTLOOK AND CONCLUSIONS

The employment relationship and the legislation governing it are constantly mutating, influenced by the rotational change in government policies.

As regards dispute resolution, considering the recent reform of the LPC, no further amendments to labour and employment procedural law are expected to occur in the next 12 months. However, courts and legal practitioners will face the challenge of accommodating pending procedures under the procedural rules that have newly entered into force.

On labour and employment matters, legal practitioners and labour and employment professionals in general are keen to see what the effects of the changes made to the Labour Code will be in practice, and wide discussion is expected with regard to certain aspects of the approved statute that are still not entirely clear. The year 2020 will also be marked by changes in social security provisions regarding the protection of parenting rights and the implementation of an extraordinary tax rate to discourage the hiring of employees under fixed-term employment agreements.

In the coming months, as a result of the changes that entered into force on 20 March 2018 (and which may, by now, be reaching the higher courts), we expect to see further developments in Portuguese case law regarding the protection of employees in the event of a transfer of an undertaking. IT policies and data protection may also be a hot topic in employment and labour case law in 2020, following the entry into force of the General Data Protection Regulation and the recently approved Portuguese law on data protection.

Overall, the year 2020 is expected to produce a considerable number of developments in the area of case law, but a marked decrease in legislative activity.

Chapter 13

RUSSIA

Elena Kukushkina, Georgy Mzhavanadze and Nina Mogutova[1]

I INTRODUCTION

Russia has a broad set of laws regulating labour relations between employers and employees. The main piece of legislation is the 2002 Labour Code of the Russian Federation (the Labour Code), as amended. In addition to this core legislation, labour relations are regulated by other laws and numerous regulations, including Russian legislation on trade unions, work safety, status of foreign nationals and others. Some of these rules and regulations were adopted in the 1930s and are still effective.

Generally, Russian labour legislation is considered more favourable towards employees. It applies equally to regular employees and top managers, as well as to foreign nationals employed by Russian or foreign businesses in Russia. All employers operating in Russia must provide their employees with a set of mandatory minimum guarantees and employment-related benefits and compensations.

It is a common opinion that Russian labour legislation is more about form than substance. All employers must comply with a number of rigid and formal procedures prescribed by law and must issue a huge number of documents in hard copy to formalise hiring, promoting and demoting employees, disciplining them for violating job duties and employers' rules, and terminating their employment. However, the likelihood that courts will support scrupulous employers that comply with all required formalities, for instance in cases of employment termination, is rather high.

Moreover, the recent trend in court practice is to support conscientious employers, which often relates to big multinationals that comply with Labour Code requirements and pay salaries to employees in a timely manner (their employees' salaries are usually higher than the average salary in a particular region), as well as providing a number of other benefits that exceed the statutory minimum. This approach is becoming more and more widespread, especially in disputes with white-collar employees when it becomes evident to the court that employees are abusing their rights and that the aim of their claims is to obtain a golden handshake rather than having anything to do with violations of their employment rights. Nevertheless, each claim is resolved by the courts on a case-by-case basis. In the case of employment disputes on disciplinary dismissal, courts are required to analyse not only the formal grounds for the particular dismissal, but also the claimants' previous employment history with the employer concerned and whether they have been subject to formal disciplinary sanctions before their dismissal.

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II PROCEDURE

Russian legislation entitles employees and employers to participate in individual employment disputes and collective labour disputes and sets out special procedures to resolve them.

i Resolving individual employment disputes

There are no special employment tribunals in Russia. Employment disputes are resolved by the courts of general jurisdiction. In addition, employment disputes may be heard by commissions on employment disputes.

Resolving individual employment disputes through employment dispute commissions

Under the Labour Code, employment dispute commissions (the Commissions) are formed by equal numbers of representatives of the employees and the employer.

Importantly, not all employment disputes may be resolved by the Commissions. Thus, under the Labour Code, an employee's claim relating to reinstatement at work, a transfer to another job, unlawful actions by an employer with regard to the processing of employees' personal data and an employer's claims for compensation of damage caused by an employee, etc. may only be referred to a court. In addition, all disputes relating to compensation for moral damage may not be resolved by a Commission and should be referred to a court.[2]

The Labour Code establishes a three-month statute of limitations for claims referred to the Commissions.[3] The specific procedure and rules of consideration of labour disputes by the Commissions are established in the Labour Code. The decision of a Commission is obligatory for the employer. However, if an employee or an employer is not satisfied with the Commission's decision, that decision may be challenged in a court of general jurisdiction within 10 days of the date it was received by the employee or employer.[4]

The consideration of labour disputes by the Commissions is not an obligatory step, so the employee may refer his or her claim directly to a court, omitting the submission of a claim to a Commission.

In practice, very few organisations form Commissions and most employment disputes are considered by courts.

Resolving individual employment disputes through the courts

Employees and employers are entitled to commence a court action against each other on a number of issues when they believe the other party has violated their rights. When filing a lawsuit against an employer, employees do not have to pay a state fee.

The Labour Code establishes specific statutes of limitations for particular types of employment disputes, as follows:

a for employees' claims for non-payment or incomplete payment of a salary or other amounts due – one year from the established payment date;

b for employees' claims relating to dismissal – one month from the date an employee received a termination order or work book from an employer;

2 Article 394 of the Labour Code.

3 id., at Article 386.

4 id., at Article 390.

c for other claims by employees – three months from the date the employee learned or should have learned of the violation of his or her rights; and

d for compensation claims by employers for damage caused by an employee to the employer – one year from the day the damage was revealed.[5]

It is possible to extend the limitations period if the court is provided with justifiable reasons for why it was missed.

The procedure for consideration of employment disputes by courts is strictly regulated by the Russian Civil Procedure Code. In general, a court considers the merits of a case and if it finds a violation of the claimant's rights, the court will make a decision in favour of the claimant. The consequences of the decision will differ from case to case. In particular, the court may request the employer to pay the salary or other sums due to the employee, reinstate the employee at work, compensate for moral damage to the employee or request an employee to compensate for damage caused to the employer, among other things.

For instance, if the court finds that an employer has dismissed an employee in breach of law, the dismissal will be held to be illegal and the employee will be reinstated at work (if he or she so requests). If the dismissal is found to be illegal, the employer will be ordered to pay the employee his or her average earnings for the period from the date of dismissal until the date of reinstatement or the court's decision. In addition, the reinstated employee is entitled to moral damages (in disputes over dismissal, moral damages are normally an insignificant sum of not more than 20,000 roubles[6] as well as reasonable compensation for expenses incurred by the employee's attorneys, who are, in practice, compensated in considerably low amounts).

The decision of the court of first instance may be challenged in an appellate court within one month of the date the final decision on the case was issued. If the decision is not challenged, it comes into force upon expiry of the term of appeal. Particular decisions on labour disputes (i.e., on the employee's reinstatement at work and on payment of salary for three months) are subject to immediate execution (i.e., even prior to the date it comes into force).

Importantly, if the statute of limitations has expired by the time the lawsuit has been filed and if the other party so claims, this would serve as an independent basis for refusing to satisfy the claim unless the party manages to prove that it had valid reasons to have missed the statute of limitations. If the statute of limitations has expired, but the other party does not claim that the statute should be applied, the court cannot unilaterally apply the statute of limitations.

Importantly, the parties to an individual employment dispute may conclude a settlement agreement, in which they may specify mutually agreed terms on the settlement of the employment dispute. The settlement agreement has to be approved by a judge and entails termination of consideration of the dispute. Under the recent changes to the Russian Civil Procedure Code, which came into force on 25 October 2019,[7] the requirements for the conclusion of settlement agreements, the content of settlement agreements and the approval procedure have been clarified.

5 Article 392 of the Labour Code.

6 Roughly US$310.

7 Federal Law of 26 July 2019 No. 197-FZ 'On Amending Certain Legislative Acts of the Russian Federation' (see http://publication.pravo.gov.ru/Document/View/0001201907260004).

In addition, this amendment to the Russian Civil Procedure Code introduced a new specific section dedicated to using conciliation procedures that the parties to a dispute (including labour disputes) may use to resolve their case. Previously the law provided a conciliation procedure in the form of mediation. Now, the list of procedures has been supplemented and includes the following: (1) negotiations; (2) using an intermediary (including the mediation procedure); (3) judicial conciliation; and (4) other conciliation procedures that are consistent with the law. The parties to a dispute may choose any conciliation procedure. As a rule, the reconciliation of the parties is possible at any stage of the civil proceedings and at the stage of the execution of a judicial act. Under the law, conciliation procedures may produce the following results: (1) the execution of a settlement agreement in respect of all or part of the claim; (2) partial or complete rejection of the claim; (3) partial or full recognition of the claim; (4) partial or full waiver of the appellate claim, cassation claim or supervisory appeal; or (5) recognition of the circumstances on which the other party bases its claims or objections.

ii Resolving collective labour disputes

A collective labour dispute is a dispute between employees (their representatives) and employers (their representatives) regarding the establishment and change of working conditions (including salaries), the conclusion, modification and implementation of collective agreements and in connection with the refusal of an employer to take into account the opinion of the employees' elected representative body when adopting internal policies.[8]

The procedure for resolving collective labour disputes consists of two stages: (1) conciliation; and (2) consideration of a collective labour dispute with the involvement of an intermediary or in labour arbitration. A conciliation procedure is obligatory in the case of collective labour disputes and only if the parties did not reach an agreement within a conciliation procedure may they proceed with negotiations on resolving a collective labour dispute with the involvement of an intermediary or in labour arbitration. The Labour Code establishes specific rules for the consideration of collective labour disputes in any of the above procedures.[9] Compliance with the decisions adopted in the course of resolving collective disputes is obligatory for the employees and employers participating in these disputes.

The Russian Constitution and the Labour Code envisage employees' right to a strike as one of the means of resolving a collective labour dispute.[10]

The Labour Code provides criteria for when employees or their representatives may organise a strike, which include: (1) when conciliation procedures did not lead to the resolution of the collective labour dispute; or (2) when the employer (its representatives) either does not comply with the agreements reached by the parties to the collective labour dispute or does not comply with the decision of labour arbitration.[11] During a strike, employees may temporarily refuse to perform their job duties (fully or partially). The Labour Code provides rather strict rules on conducting a strike (which include obligatory notification to an employer of a forthcoming strike and the obligation of the parties to conduct negotiations during a strike to resolve a collective labour dispute). Importantly, employees are not allowed to conduct a strike in some situations (e.g., during periods of military or emergency regimes

8 Article 398 of the Labour Code.

9 id., at Articles 399 to 404.

10 Article 37 of the Russian Constitution; Article 409 of the Labour Code.

11 Article 409 of the Labour Code.

or when conducting a strike would create a threat to the security of the state and to the life or health of other people). If a strike is conducted in violation of any of the rules and procedures, it may be considered illegal by a court.

In addition, during the consideration and resolution of a collective labour dispute, employees have the right to hold meetings and demonstrations and picket in support of their claims. Importantly, these collective actions may only be conducted in accordance with the procedures established by Russian legislation and entail, in particular, preliminary registration with local state authorities and, inter alia, the obligation to maintain public order during such actions. Any collective action conducted in violation of established requirements may be cancelled by authorised state bodies.

III TYPES OF EMPLOYMENT DISPUTES

There are various types of employment disputes that may arise in Russia.

Disputes that can be initiated by employees cover a vast range of aspects of employment relations and may be grouped as follows:

a unfair dismissal and reinstatement at work;

b disputes over the non-payment or incomplete payment of salaries or other amounts due to employees (including non-payment or incomplete payment of salaries and other amounts due to an employee upon termination of employment); and

c all other disputes, including:
- disputes over recognition of labour relations;
- disputes challenging disciplinary penalties;
- disputes over breaches of policies and contracts (not relating to non-payment of salaries or other monetary amounts);
- disputes over discrimination; and
- disputes over protection of employees' personal data.

Disputes over the non-payment or incomplete payment of salaries or other amounts due to employees have been the most common in past years. For instance, in 2018 and in the first half of 2019, this type of dispute accounted for about 90 per cent of all employment disputes in Russia.

Employers initiate disputes significantly less frequently. Disputes that can be initiated by employers may be grouped as follows:

a disputes over compensation for damage caused by employees during the performance of employment duties;

b disputes challenging orders and fines imposed by the state Labour Inspectorate and other state bodies in the context of employment relations;

c disputes over recognition of strikes as illegal and compensation for the damage caused by them; and

d disputes over contesting the actions of a trade union (e.g., refusal to consent to the dismissal of a trade union leader in certain instances).

IV YEAR IN REVIEW

The past year produced quite a number of significant cases with a direct effect on law enforcement practice and procedures. During 2019, the Supreme Court addressed a number of important employment law issues.

One of the most important decisions of the Supreme Court related to the rules of salary indexation.

Under the Russian Labour Code, companies should arrange for salary indexation in accordance with the procedure prescribed in an applicable collective bargaining agreement, in accords or in local policies. Indexing of salaries should reflect increases in consumer prices for goods and services.

In accordance with the previous position of the Supreme Court, the Russian Labour Code does not stipulate any requirements for the indexation mechanism. Therefore employers have the right to choose how to establish the conditions of the indexation and how to conduct it (including its frequency, the procedure for determining the value of the indexation and the list of payments subject to indexation) according to the specific circumstances of their activities and level of solvency. To calculate salary indexation accurately, it is necessary to take into account other factors that increase employee income (e.g., bonuses, merit increases and medical insurance),[12] but previously it did not matter whether such other factors were specifically included in a company's policy on salary indexation.

However, in April 2019, the Supreme Court clarified that other factors or benefits that increase employee income (e.g., bonuses, merit increases and medical insurance) must be specifically included in a company's internal policy on the calculation of salary indexation.[13] Otherwise, the company cannot be regarded as having implemented salary indexation and, accordingly, the employer can be required to increase salary even irrespective of having provided its employees with such additional benefits.

In another Resolution,[14] the Supreme Court found that the Labour Inspectorate cannot impose a fine on an employer for violation of a procedure for imposing disciplinary sanctions on its employees. The Labour Inspectorate fined a company for violations made in the procedure of a disciplinary dismissal of an employee for absenteeism. The employer appealed the fine. The courts of the first and second instances supported the Labour Inspectorate and ruled that the fine was imposed correctly, but the Supreme Court upheld the company's appeal, ruling that the dispute over the employee's liability for disciplinary dismissal related to individual labour disputes, and could therefore be resolved only by labour dispute commissions or courts; the Court found that the Labour Inspectorate cannot impose administrative liability on an employer for the misapplication of a disciplinary sanction.

The Supreme Court also took this position in one of its later cases.[15]

The Supreme Court also addressed the issue of recovering damages from employees. An employer revealed that an employee had performed services for several former clients of the company, during the employee's working hours and using company software. The employee performed these services unofficially, for her own benefit and not for the benefit of her employer. As the company was not paid for the services, it went to court and tried to recover the money paid to the employee for these services. The first and second court

12 Resolution of the Supreme Court of the Russian Federation No. 18-KG17-10 of 24 April 2017.

13 Resolution of the Supreme Court of the Russian Federation No. 89-KG18-14 of 8 April 2019.

14 Resolution of the Supreme Court of the Russian Federation No. 19-AD18-32 of 18 January 2019.

15 Resolution of the Supreme Court of the Russian Federation No. 19-AD19-6 of 13 September 2019.

instances supported the company, but the Supreme Court did not agree with their position. An employee can be held liable only if he or she has caused direct actual damage. Amounts that the employer did not receive from potential customers constitute lost profits. They cannot be recovered from the employee.[16]

In another case, the Supreme Court ruled that it is not permitted to recover damages from an employee if the terms of a financial liability agreement with an employee are not legally compliant.[17]

In another resolution, the Supreme Court found that an employee's childcare leave can be considered a due reason for missing a statute of limitations deadline. In 2014, an employee failed to receive a bonus but only went to court in 2017, after the expiry of the statute of limitations for this type of dispute (one year). The employee justified bringing the action after the expiry of the limit by the fact that she had been on maternity and childcare leave, and she filed relevant claims against the employer with the Labour Inspectorate and the Prosecutor's office. The lower courts did not accept this explanation and found that those circumstances could not serve as a due reason for missing the statute of limitations deadline. The employee had been aware of the violation of her rights for several years. Maternity and childcare leave did not prevent her from going to court, including through a representative. The Supreme Court did not support this approach and restored the statute of limitations. The employee's main responsibilities during maternity and childcare leave were to protect her health during pregnancy and to take care of her children. Furthermore, the Supreme Court did not agree that the employee could simply have sent a representative to court. The employee can choose whether to participate in the process in person or through a representative. It is not possible for this choice to be limited.[18]

The Supreme Court also extended the statute of limitations in a situation where an employee missed the deadline because he had applied to the Labour Inspectorate in a timely manner, expecting that the dispute would be settled out of court.[19]

As we noted in last year's edition, according to previous court practice, these circumstances were not usually accepted by the courts as grounds for extending the statute of limitations. This situation changed when the Supreme Court issued its Resolution No. 15 of 29 May 2018 'on the application by courts of legislation regulating the work of employees working for individual entrepreneurs and for small-sized enterprises that are classified as micro-enterprises'. Although the above clarifications were issued in relation to individual entrepreneurs and micro-enterprises, they have affected court practice in relation to all types of employers.

Finally, the Supreme Court also addressed a widespread practice of reducing employees' salaries while they are on a probationary period. An employee's employment agreement established that during the probation period, the employee received 60 per cent of the base salary. The employee filed a lawsuit against the company. The lower courts did not support the employee and held that if an employee has signed an employment agreement, the employee has agreed to its terms. The Supreme Court ruled that the employer must ensure equal pay

16 Resolution of the Supreme Court of the Russian Federation No. 18-KG18-225 of 28 January 2019.

17 Resolution of the Supreme Court of the Russian Federation No. 69-KG18-23 of 25 March 2019.

18 Resolution of the Supreme Court of the Russian Federation No. 78-KG18-74 of 28 January 2019.

19 Para. 10 of 'Review of court practice of the Supreme Court of the Russian Federation No. 2 (2019)' (approved by the Presidium of the Supreme Court of the Russian Federation on 17 July 2019).

to all employees for work of equal value, including those who are on probation. A condition that decreases the base salary during a probation period diminishes the employee's rights therefore it cannot be applied.[20]

V OUTLOOK AND CONCLUSIONS

i Developments to the procedure of consideration of employment disputes

In 2019, a couple of new laws[21] came into force that introduced substantial changes to the judicial system and the consideration of labour disputes.

Under these laws, which were adopted back in 2018 but came into force last year, new independent cassation and appellate courts were created. As a result, the consideration of cases (including employment disputes) in appellate and cassation instances has changed.

Regarding complaints at the appellate level (i.e., complaints about court decisions that have not entered into force), under the new law, first instance decisions rendered by regional courts are now considered by the newly established appellate courts. The decisions of all other courts are considered at appellate level by the same courts as they were previously. The appellate instance reform is not significant for employment disputes as they are rarely considered by first instance regional courts (particularly decisions to render a strike illegal).

Regarding complaints at the cassation level (i.e., complaints about court decisions that have entered into force), this reform has affected employment disputes. Under the new law, all cases at the cassation level are now considered by the newly established cassation courts. The new law also sets out changes to the procedure for filing cassation claims. For example, a complaint to a cassation court needs to be filed within three months of the date of entry into force of the contested court judgment (this was previously a six-month term). The complaint must now be submitted to the cassation court through the court of first instance, whereas previously the complaint was submitted directly to the court considering the cassation claim.

With regard to both the appellate and cassation instances, all Russian regions have been divided into relevant court districts, so that each court is assigned to a particular district, and the decisions of that court should be considered by the relevant appellate and cassation courts of that district, subject to the above rules. In most cases, the appellate and cassation courts are not located in the same city as the court that rendered the contested decision. The aim of this is to ensure the impartiality of judicial decisions in appellate and cassation instances. Again, the division into court districts will not apply to the reconsideration of the majority of employment disputes in the appellate instance, except for cases considering strikes, etc. (see above). The majority of cases will be reconsidered in the same manner as they are now. However, reconsideration of employment cases in the cassation instance will follow the new procedure.

20 Resolution of the Supreme Court of the Russian Federation No. 18-KG19-77 of 19 August 2019.

21 Federal Law of 28 November 2018 No. 451-FZ 'On Amendments to Certain Legislative Acts of the Russian Federation' (see http://publication.pravo.gov.ru/Document/View/0001201811280063); Federal Constitutional Law of 29 July 2018 No. 1-FZ 'On Changes to the Federal Constitutional Law on the Judicial System of the Russian Federation and Separate Federal Constitutional Laws in Connection with the Creation of Cassation Courts of General Jurisdiction and Appellate Courts of General Jurisdiction' (see http://publication.pravo.gov.ru/Document/View/0001201807300021).

Pursuant to Resolution No. 30[22] of the Supreme Court, the appellate and cassation courts commenced operation on 1 October 2019.

Pursuant to another federal law,[23] which came into force on 1 October 2019, companies and individuals are now entitled to submit collective lawsuits to the courts to defend the rights and legitimate interests of a group of persons or companies, and this also applies to labour disputes.

A collective lawsuit may be submitted subject to the following conditions:

a there is a common defendant in relation to each member of the group;

b the subject of the dispute is the common or uniform rights and legitimate interests of members of a group;

c similar factual circumstances form the basis of the rights of the members of the group and the obligations of the defendant; and

d all members of a group use the same way of protecting their rights.

The collective lawsuit may be filed if the group consists of a minimum of 20 members. The new law regulates the peculiarities of the consideration of collective lawsuits as compared to lawsuits submitted by individual employees.

ii Foreseeable developments in resolving employment disputes

The current practice of considering employment disputes shows particular tendencies, some of which are favourable to employers and some to employees.

First, employees in Russia are currently actively applying recent legislative changes on resolving employment disputes that are more favourable to them (in particular, those related to the venue for hearing employment disputes and extension of the statute of limitations). We believe that the number of disputes regarding payment of salary and other sums due to employees might increase further because of the increased limitations period in cases of this kind. In addition, employees have already been using their right to submit lawsuits at the place of their residence and will continue doing so, which might in turn increase the expenses incurred by employers for representation in courts (e.g., if an employee lives in a different, remote region).

Russian courts currently have a unified approach with regard to protection of employees in the 'protected categories', especially pregnant women. Following a ruling by the Russian Supreme Court in 2014,[24] the courts of general jurisdiction often reinstate pregnant women at work even if they were dismissed by mutual consent or voluntary resignation.

There are also some positive tendencies for employers. Increasingly, the courts are not content merely to adopt a formal approach when resolving disputes, but are deeply analysing the circumstances. This is particularly evident in disputes involving white-collar employees,

22 Resolution of the Supreme Court of the Russian Federation No. 30 of 12 September 2019 'On the Day the Cassation and Appeal Courts of General Jurisdiction and the Central District Military Court Begin to Operate'.

23 Federal Law No. 191-FZ of 18 July 2019 'On Amendments to Certain Legislative Acts of the Russian Federation' (see http://publication.pravo.gov.ru/Document/View/0001201907180055?index=0&rangeSize=1).

24 Clause 25 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 1 of 28 January 2014 'On the Application of Legislation Governing the Work of Women, Persons with Family Responsibilities and Minors'.

whose salaries are usually quite high, so claims that their labour rights have been violated by an employer (e.g., with regard to the provision of an additional, usually non-guaranteed, benefit or bonus) are most likely to be considered unfounded by courts. In the same way, courts are increasingly tending to take the employer's side when employees abuse their labour rights; for example, when employees try to use (and sometimes artificially create) a 'protected' status to impede a termination procedure against them (e.g., create trade unions when the dismissal procedure against them has been already launched, or take long-term sick leave).

We believe these tendencies will develop further in the near future.

Finally, Russia is in the process of implementing an 'electronic justice' system in courts of general jurisdiction, which is intended to reduce paperwork in overburdened courts by enabling court documents to be exchanged online. The system has not yet been fully implemented and we expect it might be several years before it becomes standard practice.

Chapter 14

SLOVENIA

Ljuba Zupančič Čokert[1]

I INTRODUCTION

Labour and employment disputes in Slovenia that cannot be resolved amicably or, in certain cases, through alternative dispute resolution (ADR), fall under the exclusive jurisdiction of specialised labour and social courts, which are organised within the district and higher court system and judged at first and second instance in both individual and collective disputes. The primary legislation regulating procedure in labour and employment disputes is the Civil Procedure Act and the Labour and Social Courts Act. The legislative framework in labour and employment disputes is mainly composed of the Employment Relationship Act, the Labour Market Regulation Act and, in cases where a certain branch is bound by a collective agreement, the relevant collective agreements in force.

Until September 2017, a third-instance judicial ruling on extraordinary legal remedies by the Supreme Court was also accessible, specifically in cases of disputes relating to the termination of employment relationships, under more favourable conditions than in civil procedures and was often used in employment disputes in accordance with the Labour and Social Courts Act. In this regard, a significant amount of good case law was generated. However, with the amendment of the Civil Procedure Act (effective since September 2017), access to this third instance has been limited to cases of the most evident breaches of procedural provisions and is now allowed only if the conditions under the Civil Procedure Act are met, and there is no consideration for the special nature of employment law.

In September 2017, a new Class Action Act was adopted, which came into force in April 2018. Among other things, the Class Action Act introduced the option for employees to combine their individual employment claims in a form of class action against the employer; however, this only applies in cases where conditions for filing a class action are met. As the new Class Action Act has introduced a completely new way of resolving joint employment lawsuits, it is yet to be seen how these changes will be implemented in practice.

Employment disputes in the public sector, however, are subject to specific provisions and procedural steps under the Civil Servants Act and the Administrative Disputes Act, which must be taken before the employee (i.e., a civil servant) files a lawsuit against the state or local government (i.e., the employer).

In general, Slovenian legislation provides sufficient protection to employees and their rights, and adequated flexibility for employers to adjust the content of individual employment contracts to the employer's specific needs and work structure if the employer has sufficient knowledge of Slovenian labour law to follow its provisions correctly.

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II PROCEDURE

The procedure in both individual and collective employment disputes is subject to the Civil Procedure Act; one also has to take into account the specific provisions of the Employment Relationship Act, the Labour and Social Courts Act, the Collective Agreements Act and, as of April 2018, the Class Action Act.

Specialised labour and social courts have exclusive jurisdiction over labour (both individual and collective) and social disputes. Labour courts of first instance have the status of district courts and their judges the status of a district court judge. There is only one labour court of second instance, the Higher Labour and Social Court, which is the only specialised court of second instance in Slovenia and has jurisdiction over all second instance labour and social disputes in the territory of the Republic of Slovenia.

The labour courts give priority to resolving labour disputes, therefore labour and employment disputes are among the fastest procedures in Slovenia. As such, a first instance court decision may be delivered within a year of filing a lawsuit.

i Individual employment disputes

If, while an employment relationship is current, the employer breaches the employee's rights or fails to fulfil its obligations in accordance with that relationship, the employee has the right to demand, by way of a written claim, that the employer remedies the breach or fulfils its obligations towards the employee. If the employer does not remedy the breach or fulfil its obligations within eight working days of receiving the employee's written claim, the employee has the right to demand judicial protection of his or her rights by filing a lawsuit with the competent labour court within a preclusive period of 30 days of the expiry of the aforementioned employer's deadline for the voluntary fulfilment of the obligations or remedy of the breach.

If an employment relationship has been terminated and the employee wishes to dispute either the termination, another form of cancellation of his or her employment agreement or a disciplinary measure, the employee must file a lawsuit with the competent labour court within 30 days of being served with the termination or after being informed of the breach.

The above-stated deadlines for filing a lawsuit are extended if the parties agree to an ADR method.

Notwithstanding the above-mentioned deadlines, all monetary claims arising out of an employment relationship (e.g., payment of salary, severance pay and damages) can be filed directly with the competent labour court. The statute of limitations for these monetary claims is five years.

After a lawsuit has been filed, the procedure follows the general rules of the Civil Procedure Act, with some specifics addressed under the Labour and Social Courts Act to take into account the specific nature of employment disputes and the notion that the employee is the weaker party in an employment dispute (e.g., a speedy resolution of labour and employment disputes whereby deadlines for procedural acts are in most cases explicitly set and shorter than in civil procedures; the duty of the court to obtain and assess additional evidence if the existing evidence does not provide an adequate basis for a decision; and the option for the court to impose on the employer the payment of all expenses relating to the production of evidence). In disputes regarding the existence or termination of an employment relationship, the employer bears its own expenses regardless of the outcome of the judicial dispute.

Either party may file an appeal with the Higher Labour and Social Court in Ljubljana against the decision of the labour court of first instance. One noteworthy amendment in

this respect was the extension of the deadline for filing an appeal from 15 to 30 days, which came into effect with the amendments to the Civil Procedure Act in September 2017. The same amendment package significantly reduced the access to the third instance ruling of the Supreme Court, which is now accessible only in exceptional cases under the Civil Procedure Act and contingent on prior success with a motion to allow this extraordinary remedy by the Supreme Court.

With regard to ADR, each judicial proceeding governed by the Civil Procedure Act – therefore including judicial proceedings in employment disputes – entails an invitation to join a mediation procedure prior to opening the main court hearing. If both parties agree to a mediation procedure, the court procedure is halted for three months during which the parties try to reach an agreement through a mediation centre. There are mediation centres adjoining the courts; however, the parties may agree to choose other mediation institutes to resolve the dispute. If the mediation procedure is successful and a settlement is reached and sent to the court, the settlement shall be signed as a court settlement, thus having the immediate and same effect as a final court decision. However, if the parties are unable to reach an agreement, the dispute is returned to the court to be resolved. The parties may also settle at any time during the court proceedings in the form of either a court settlement or an out-of-court settlement; the latter has the nature of a regular agreement without the status of an immediately effective and enforceable agreement, unless it is signed as such before a notary. As in many cases, an amicable resolution of an employment dispute is a preferred method of resolving employment disputes, and many courts actively pursue and promote amicable resolution of such disputes.

If the option is provided by a collective agreement, the parties of an individual employment agreement may agree to resolve the dispute through arbitration, but this type of case is not very common under Slovenian law.

As in other types of disputes, a constitutional appeal to the Constitutional Court of the Republic of Slovenia is possible in employment disputes if there has been a violation of fundamental human rights or freedoms, as guaranteed by the Constitution. As a rule, a constitutional appeal may be filed only against a court decision after the parties have exhausted all (ordinary and extraordinary) legal remedies provided by the law.

ii Collective employment disputes

Under the Labour and Social Courts Act, a collective employment dispute may arise in the following circumstances:

a between the parties to a collective agreement, or between the parties to a collective agreement and third parties on the validity of a collective agreement and the execution thereof;

b on competency for collective bargaining;

c on compliance of collective agreements with relevant legislation, compliance among collective agreements and compliance of an employer's general acts with the law and binding collective agreements;

d on the legality of strikes and other industrial action;

e on workers' participation;

f on the competence of a union in relation to employment relationships;

g on the status of a representative union; and

h in other cases provided by law.

There are procedures specific to each of the above-mentioned types of collective dispute; however, in general, the Collective Agreements Act prescribes a peaceful manner of dispute resolution as the preferred method, and lists the possible methods of negotiation, intervention and arbitration. If ADR methods are not successful, collective employment disputes also fall under the jurisdiction of the labour and social courts and the rules of civil procedure are applied with some specific changes (i.e., the judicial procedure begins with the filing of a motion as opposed to filing a lawsuit, and the parties to the judicial proceeding are called participants, and, pursuant to the Labour and Social Courts Act, inclusion as one of these participants is extended to all persons, bodies and associations that are holders of rights and obligations in the relationship at issue). A court decision in a collective employment dispute has a general effect, meaning that any person who gains a certain right through the court decision can enforce it, even if that person was not a participant in the court proceeding. To this end, a court decision that affects a collective agreement or a general act of an employer must be published in a public or other relevant gazette.

III TYPES OF EMPLOYMENT DISPUTES

The Labour and Social Courts Act distinguishes between employment disputes in the following respects:

a the conclusion, existence, term and termination of the employment relationship;
b the rights, obligations and responsibilities arising from the employment relationship between the employee and employer or their legal successors;
c the rights and obligations arising from the relationship between the employee and the user for whom the employee was sent to work under an agreement between the employer and the user of the employer's workforce;
d the employment procedure for candidates;
e the rights and obligations arising out of industrial property created in employment relationships;
f company scholarships undertaken between an employer and a student; and
g voluntary internships.

However, the most commonly encountered types of employment disputes are those relating to unlawful termination, discrimination in the workplace, violations of non-compete clauses and different types of monetary claims (payment of salary, severance pay and damages, etc.) as described in more detail below.

i Existence of employment relationship

If the elements of an employment relationship exist in a relationship that is otherwise not formally concluded by way of a written agreement or using a different type of agreement (e.g., a civil law contract), the employee may demand to be offered an employment agreement by the employer. If the employer fails to provide the employee with the employment agreement within eight days of receiving a written request from the employee, the latter may file a lawsuit on the establishment of an employment relationship within 30 days of the expiry of the eight-day deadline. Elements of an employment relationship include voluntary involvement of the employee in the organised work process of the employer, work for payment, continuous performance of work and performing work according to the instructions and under the supervision of the employer.

ii Unlawful termination

Among the most common types of employment disputes are those that arise from unlawful termination. In this regard, many terminations are proclaimed unlawful because of breaches of the procedural provisions that need to be strictly observed by an employer when terminating an employment agreement. The correct procedure for terminating an employment agreement depends on the type of termination (i.e., ordinary or extraordinary). An extraordinary termination of an employment agreement by an employer can be carried out because of serious breaches of an employment agreement by an employee; for example, if an employee is absent from work for five or more consecutive days and fails to notify the employer of the reason for the absence. An ordinary termination of an employment contract can be carried out for business reasons or because of fault or incompetence. The Employment Relationship Act specifies the exact procedure that needs to be followed to lawfully terminate an employment agreement for each termination reason.

As an example, the Employment Relationship Act explicitly provides that, in cases of termination for reasons of fault or incompetence, an employer must provide an employee with the opportunity to defend himself or herself at a meeting between the two parties. The termination must also be carried out according to legally prescribed deadlines (e.g., in cases of termination due to incompetence, the termination notice must be served to the employee within six months of the first occurrence of the valid reason for termination). If an employer fails to comply with the procedural provisions of the Employment Relationship Act, the termination of an employment agreement shall be deemed as unlawful if challenged by the employee in a judicial proceeding.

iii Discrimination claims

A special type of employment dispute arises from an act of discrimination against an employee in the workplace. The Employment Relationship Act defines discrimination as the unequal treatment of individuals based on their personal circumstances, such as racial or ethnic origin, nationality, religious affiliation, physical or mental disability, health status, gender, sexual orientation, age, socioeconomic status, parenthood, external appearance, union membership, political convictions and world view. Discrimination can occur on different occasions; for example, in the process of selecting candidates for a post, the payment of salary, or in the process of terminating an employment relationship. In the event of discrimination, an employee can file a lawsuit against an employer with the competent labour court, where the employee can also claim damages in relation to discrimination under the general provisions of civil law. When assessing the amount of damages to be awarded to an employee, the court shall take into account that the damages must be effective and proportionate to the damage suffered by the employee and must discourage the employer from repeating the infringements.

iv Monetary claims

Other common types of employment disputes relate to monetary claims, such as payment of wages and other benefits and payments to which an employee is entitled under statutory provisions and employment agreements. The legal basis for monetary claims is provided by the Employment Relationship Act, binding collective agreements, general acts of the employee and the employment agreement, in relation to which the amount of certain payments that an employer is obliged to pay to an employee is provided by specific legislation or government

regulations. While an employee must observe certain procedural steps before being entitled to judicial protection, monetary claims can be filed directly with the labour court. The statute of limitations is five years after the due date.

v Claims relating to non-compete clauses

In cases where technical, production or business knowledge or business connections are acquired in the course of an employee's work or in connection with work, the employee and the employer may, in the employment contract, agree upon a non-compete clause, prohibiting the employee from pursuing and performing competitive activity after the termination of the employment contract by taking advantage of the knowledge and business connections acquired during the employment relationship with the current employer. Non-compete clauses can be agreed for a maximum of two years. The validity of non-compete clauses is conditional upon agreement on remuneration for respecting the non-compete clause, which must be concluded in writing and is usually included in the provisions of the employment agreement. If an employer considers that an employee is in breach of the non-compete clause, the employer can file a lawsuit against the employee for remuneration in the form of damages. In cases of this kind, the burden of proof is on the employer, who has to prove that the employee caused damage to the employer by exploiting the knowledge and business connections acquired during the employment relationship.

IV YEAR IN REVIEW

Labour and employment dispute case law in Slovenia develops at a slow but steady pace. Some notable cases have contributed to the development of case law in this area.

With regard to claims for the establishment of an employment relationship, the Supreme Court issued a decision[2] in which it revised the precedent set by existing case law with regard to the procedural preconditions for filing a claim to establish an employment relationship and for challenging an unlawful termination of the employment relationship, which according to previous case law had to be claimed simultaneously. The Supreme Court ruled that imposing this demand on the employee was too severe and was unreasonable given that an employment relationship that had yet to be established could not be terminated, and particularly since these preconditions did not derive from law but were based on previous case law.

Regarding termination of an employment relationship due to a fault by the employee, the Supreme Court issued a decision[3] in which it ruled that a termination letter must specify the termination reason and the type of fault must be defined (i.e., intent or negligence). Therefore, the fact that an employee has breached contractual or other obligations arising from the employment relationship does not, in itself, present a valid reason to terminate the employment agreement for fault if the fault is not substantiated in the termination letter.

Regarding claims for reintegration and the related question of broken trust between employee and employer, the Higher Labour and Social Court issued a decision[4] in which it ruled that the court must assess whether the continuation of an employment relationship is still possible, depending on the specific circumstances of the case and the interests of the

2 No. VIII Ips 258/2015 dated 5 April 2016.

3 No. VIII Ips 217/2016 dated 4 April 2017.

4 No. Pdp 78/2016 dated 1 December 2016.

contracting parties. In this regard, the Higher Labour and Social Court pointed out that the reasons for the termination of the employment agreement should not be confused with the circumstances and interests of the disputing parties in relation to the possibility of continuing the employment relationship. In this particular case, the employer claimed that it had lost confidence in the employee because of alleged violations of the employment contract with elements of a criminal offence, even though the state prosecutor found that the employee did not commit the alleged violations and the charges against him were withdrawn. The Court therefore held that the mere fact that a criminal proceeding was in progress against the employee is in itself not a circumstance that would prevent the continuation of the employment relationship. For this reason, the Court granted the employee's reintegration claim. The employer filed for an extraordinary legal remedy against this decision with the Supreme Court, stating that, as the employee worked in the field of childcare in a kindergarten, there was a possibility of negative media coverage and protests by the parents of children, even though the employee did not commit the alleged violations or criminal offences, and therefore it was not in the interests of the employer to continue the employment relationship with the employee as it could severely affect the future work process. The employee responded by raising the point that a criminal proceeding against an employee cannot in itself constitute an admissible reason for the termination of an employment relationship by a court ruling, especially in this case as the criminal proceeding against the employee was based on allegations made by the employer (and which later turned out to be unfounded); otherwise this could lead to a situation in which an employment relationship could be terminated regardless of whether criminal allegations subsequently proved to be unfounded.

This trial is still ongoing and the outcome will produce important case law on the aforementioned issues.

Regarding employment disputes arising from discrimination, the Supreme Court issued two important decisions[5] in which it ruled that even though the burden of proof with regard to discrimination claims is on the employer, the employee is not relieved of the procedural duty to substantiate the claim by providing proof of the claim. The employee must therefore precisely define the circumstances that outline the existence of discrimination. Loose statements alone, to the effect that the employer discriminated against the employee, are not enough to transfer the burden of proof to the employer.

In disputes relating to non-compete clauses, the most common issue is the legal nature of the payment for damages to which an employer is entitled because of a breach of the non-compete clause by an employee. The question arises whether the legal nature of a contractually agreed payment for damages is a contractual penalty or a claim for damages under the provisions of the Obligations Code on business liability for damages. The essential difference between a contractual penalty and a damages claim lies in the burden of proof of the existence and the amount of damage sustained by an employer. In the first case, the employer does not need to prove it sustained any actual damage to be entitled to the full amount of the contractually agreed monetary penalty, while in the second case the employer has to prove the existence and amount of actual damage sustained. A decision of the Supreme Court[6] provided an interpretation that is favourable to employers, in that the parties to the

5 No. VIII Ips 24/2016 dated 30 August 2016 and No. VIII Ips 46/2016 dated 21 June 2016.

6 No. VDSS Pdp 767/2016 dated 5 February 2018.

employment contract may agree on a contractual penalty, meaning that neither the existence nor the amount of damages needs to be proved by the employer if the employee breaches the non-compete clause.

In March 2016, the Supreme Court issued a decision on this matter,[7] ruling that a contractually agreed payment for the breach of a non-compete clause is by nature a contractual penalty and therefore the employer does not need to prove the existence and the amount of actual damage. In December 2016, the Higher Labour and Social Court issued a ruling[8] in which it disregarded the previous case law and ruled that the provisions of the Obligations Code on contractual penalties are less favourable to the employee than the provisions on non-compete clauses provided by the Employment Relationship Act; therefore, the employer is required to prove all the elements of business liability for damages, which includes the existence and amount of actual damage sustained. The Higher Labour and Social Court explained that using the contractual penalty as provided under the Obligations Code represents a simplification, to the detriment of the employee, and which is contrary to the main narrative of the Employment Relationship Act. Contractual penalties agreed in an employment agreement for breach of a non-compete clause should therefore be deemed null and void.

V OUTLOOK AND CONCLUSIONS

After the newly elected government was finally formed following an extended period of negotiations, it made an important decision to amend the minimum wage and, on 24 December 2018, the Parliament passed an amendment, effective as of 1 January 2020, which not only introduced a rise in the amount, but also changed the definition of the minimum wage. Under the new definition, only the basic salary, without any bonuses or expenses, constitutes the legally prescribed level of the minimum wage, thereby significantly increasing the amount of the minimum wage. The government's adoption of this decision is a response to the fact that employers had begun to intensively change their internal policies and rules determining their pay systems, all with the intention of reducing the effects of the expected salary increase.

In addition, the newly elected government began a tax reform with the purpose of reducing labour costs. From 2019 onwards, the payment of the annual leave allowance up to the amount of the average gross salary in Slovenia is not subject to tax (whereas previously it was tax-free only up to the amount of the minimum legally prescribed salary). The government's plan also includes a change to the income tax scale, with an increase in the number of tax classes and an increase in general tax relief, although the government has yet to confirm these legislative amendments.

In the framework of the pension reforms that have been adopted, effective as of 1 January 2020, pensions of retirees gradually increase through the vesting percentage of pensions for men and women. The reforms also entitle all persons meeting the conditions for retirement on age grounds to 'dual status', which means they may continue to work while also receiving part of the applicable pension.

With regard to the general tenor of labour and employment dispute resolution, Slovenian law has tended, and will continue, to prefer mediation and other forms of amicable dispute

7 No. VIII Ips 320/2015.

8 No. Pdp 767/2016.

resolution. Employment disputes arising from the existence of employment relationships or from their unlawful termination remain the most common types of disputes, largely because of employers' failure to adhere to the strict procedural steps required in terminating employment agreements, although these can be easily prevented by obtaining professional help and guidance. It is of paramount importance to obtain such guidance as early as possible in the dismissal process (i.e., as soon as an employer has made a decision to terminate an employment agreement), because by the time an employee has filed a lawsuit, procedural errors cannot be remedied. Procedural provisions under Slovenian law are strict; however, with professional help, adherence to even the strictest provisions may be achieved and many unlawful termination rulings prevented.

Chapter 15

SOUTH AFRICA

Ross Alcock and Peter le Roux[1]

I INTRODUCTION

During the period of transition to democracy between 1990 and 1998, a series of statutes regulating labour relations and employment were enacted. The most important of these were the Labour Relations Act 66 of 1995 (LRA) the Basic Conditions of Employment Act 75 of 1997 (BCEA) and the Employment Equity Act 55 of 1998 (EEA). Taken together, these statutes, as amended, formed a detailed legal framework for the regulation of labour relations and employment law.

The LRA regulates aspects of both collective labour law and individual labour law. In respect of collective labour law, it makes provision for the establishment of collective bargaining institutions at sectoral level, the most important of these being bargaining councils. These bodies also provide dispute resolution mechanisms in the sectors over which they have jurisdiction. The LRA also regulates recourse to strikes and lockouts by employees and employers, respectively. At the level of individual labour law, the LRA provides protection for employees against unfair dismissal, and against a range of defined unfair labour practices that can be committed by employers.

The BCEA provides a floor of minimum terms and conditions of employment, including the regulation of working time and various forms of leave. It does not provide for a minimum wage. This is dealt with in the National Minimum Wage Act.

The EEA prohibits unfair direct and indirect discrimination by employers against employees on a wide range of grounds, the most important being race, sex, gender, sexual orientation, age, pregnancy and marital status. It also requires employers to implement affirmative action measures.

II PROCEDURE

One of the objectives of the LRA is to attempt to ensure that all types of labour disputes will be addressed and, if possible, resolved expeditiously. It prescribes that by far the majority of disputes that fall within its ambit must first be referred to conciliation. The idea is that the conciliator will seek to assist the parties to resolve the dispute. If there is a bargaining council with jurisdiction over the dispute, the conciliation will usually be undertaken by an official of that council. If there is no bargaining council, the conciliation will be undertaken by an official of the Commission for Conciliation, Mediation and Arbitration (CCMA).

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If conciliation fails to resolve the dispute, three possibilities arise. The first is that, for certain types of disputes, employees may acquire the right to strike and employers may acquire the right to lock out employees, provided that certain further requirements are met. If employees comply with these requirements, the strike will be regarded as a protected strike. The result will be that employees may not be dismissed for participation in the strike and that trade unions and their members cannot be held civilly liable for any losses suffered by employers arising from the protected strike. The second is that employees may acquire the right to refer certain types of disputes to arbitration to be conducted by an official of a bargaining council or the CCMA. The third is that employees may acquire the right to refer certain types of disputes to the Labour Court. In some cases, employees may have a choice of routes to follow.

The Labour Court has an original jurisdiction to consider certain types of disputes; for example, those concerning the dismissal of strikers, as well as contractual disputes. It also exercises a supervisory jurisdiction in the sense that it can review and set aside arbitration awards issued by the CCMA or a bargaining council. It can also hear appeals against CCMA awards dealing with discrimination claims.

The ordinary civil courts retain their right to consider contractual disputes between employer and employee.

III TYPES OF EMPLOYMENT DISPUTES

The LRA draws a distinction between disputes that can be the subject of a strike or a lockout and those that may be resolved through arbitration by officials appointed by a bargaining council or the CCMA, or that may be adjudicated by the Labour Court.

For the purposes of this chapter, disputes that can be arbitrated or adjudicated are the most important. By far the majority of disputes that are arbitrated or adjudicated concern an allegation that an employee has been unfairly dismissed or that an employee has been the subject of an unfair labour practice. The grounds on which an employer can justify the fairness of a dismissal are the misconduct of an employee, poor work performance on the part of an employee, an employee's incapacity or the employer's operational requirements. A fair procedure must also be followed prior to the dismissal. In certain cases, dismissals are regarded as being automatically unfair (e.g., if the reason for the dismissal is membership of or participation in the affairs of a trade union, or participation in a protected strike). Unfair labour practice disputes can involve a range of alleged employer actions, including unfair suspensions, the unfair failure to promote an employee and unfair employer conduct relating to training or the provision of benefits.

The jurisdiction to consider disputes relating to benefits is a particularly important one because of the wide interpretation given to the term 'benefit'. In *Apollo Tyres South Africa (Pty) Ltd v. CCMA & Others*,[2] the Labour Appeal Court held that the definition of a benefit, as contemplated in Section 186(2)(a) of the LRA, was not confined to rights arising from the contract of employment but included rights judicially created, and advantages or privileges employees have been offered or granted in terms of a policy or practice, subject to the employer's discretion.

The LRA grants valuable rights to employees of temporary employment services, part-time employees and people employed in terms of fixed-term contracts. A significant

2 [2013] 34 ILJ 1120 (LAC).

number of disputes involving the enforcement of these rights are being referred to the CCMA. Other types of disputes that may be the subject of arbitration or adjudication are those that deal with the interpretation of collective agreements, those that concern the granting of organisational rights and those that relate to whether or not a strike is protected. The latter type of dispute usually occurs when an employer approaches the Labour Court as a matter of urgency to interdict a strike from taking place.

The resolution of the above-mentioned type of dispute is regulated in terms of the LRA. In addition, arbitrators and the Labour Court are being called upon to deal with an increasing number of disputes dealing with allegations that an employer has unfairly discriminated against an employee or a group of employees. Most of these disputes deal with allegations that the employer breached the equal pay provisions of the EEA. These are dealt with in terms of the provisions of the EEA. Finally, a steady stream of disputes is referred to the Labour Court or the ordinary civil courts in which an employee or an employer seeks to enforce contractual rights.

IV YEAR IN REVIEW

i Liability for employer's obligations

One of the important amendments to the LRA that came into effect on 1 January 2015 was the insertion of Section 200B, which reads as follows:

> *(1) For the purposes of this Act and any other employment law, 'employer' includes one or more persons who carry on associated or related activity or business by or through an employer if the intent or effect of their doing so is or has been to directly or indirectly defeat the purposes of this Act or any other employment law.*
> *(2) If more than one person is held to be the employer of an employee in terms of subsection (1), those persons are jointly and severally liable for any failure to comply with the obligations of an employer in terms of this Act or any other employment law.*

Until recently, this Section has not been subject to judicial interpretation.

The rationale for Section 200B is set out in the memorandum of objects that accompanied the 2014 LRA Amendment Bill. The purpose of the Section is said to be to prevent simulated arrangements or corporate structures that are intended to defeat the purposes of the LRA or any other employment law, and to provide for joint and several liability on the part of persons found to be employers under this Section for any failure to comply with employer obligations in terms of the LRA or any other employment law. This is particularly important in the context of subcontracting and outsourcing arrangements if these arrangements are subterfuges to disguise the identity of the true employer.

In the recent decision of *Masoga and Another v. Pick n Pay Retailers (Pty) Ltd and Others*, the Labour Appeal Court had the opportunity to express its view as to the scope and effect of this Section.

The facts of the case concern a contractual arrangement between a South African retail chain, Pick n Pay Retailers (Pty) Ltd (PNP) and a self-standing bakery business, Assist Bakery 115 CC (AB), a separate legal entity. PNP utilised AB as part of an economic empowerment initiative whereby PNP would empower the business with all the skills required to run a self-standing bakery.

The appellants in the Labour Appeal Court litigation were two employees of AB. They were employed as bakery assistants on 12-month fixed-term contracts. Their job functions included picking ingredients from PNP stores and delivering them to AB's workplace where AB's other employees would mix the ingredients for the purposes of baking bread for sale in PNP's stores.

Prior to the effluxion of the fixed-term contracts, the appellants referred a dispute to the CCMA in which they claimed that AB was a temporary employment service (labour broker) and that they had been placed by AB to work in a PNP store. They then claimed that they had become permanent employees of PNP because their employment with PNP was not a genuine temporary employment service (as defined in the LRA) and therefore they were deemed, in terms of Section 198(3)(b), to be the employees of PNP.

The CCMA commissioner concluded that the facts established a close association between the businesses of PNP and AB. The commissioner went on to find that Section 200B applied and that PNP and AB were joint or co-employers of the appellants.

On appeal, the Labour Appeal Court noted that it is clear that, when read as a whole, Section 200B cannot be utilised to determine whether a particular person or entity is the true employer of a particular employee. It deals with the question of whether an employer can be held to be jointly liable with another employer.

The Labour Appeal Court found that the effect of Section 200B is merely to fix or extend the liability that would ordinarily be that of the employer to another or others who carry on an associated or related activity or business by or through an employer. They are regarded as employers for the purposes of liability. However, they would only be treated as the employer if they are in an associated or related business with the employer that is intended to defeat, or has the effect of defeating, the purposes of the LRA or any other employment law, either directly or indirectly.

When one or more persons are held to be employers in terms of Section 200B, they are held jointly and severally liable for a failure to comply with the obligations of an employer in terms of the LRA or any other employment law. Importantly, the Labour Appeal Court held that the Section cannot be utilised generally for making persons or entities the employers of others.

On the facts of this case, the Labour Appeal Court concluded that there was no evidence that PNP and AB engaged in a subterfuge by utilising an empowerment scheme for deceitful purposes or, more particularly, that PNP was using the scheme and AB as a sham to avoid its legal obligations toward its employees, or that the scheme had such an effect.

This case highlights the fact that Section 200B cannot be used to determine who is an employer of an employee. However, it can be used to scrutinise the relationship or arrangement between two or more entities and to attribute liability to any person or entity found to be a co-employer for the purposes of liability in terms of the LRA or other employment laws. The far-reaching consequences of Section 200B are particularly important for employers that engage in subcontracting or outsourcing arrangements.

ii Derivative misconduct

For the first time in employment law jurisprudence, the South African Constitutional Court has considered the nature and scope of the duty of good faith within the context of the contract of employment. This occurred in its recent decision in *NUMSA obo Nganezi & Others v. Dunlop Mixing and Technical Services (Pty) Ltd & Others*.

During August 2012, Dunlop's employees embarked on a protected strike. As is all too common with strikes in South Africa, violence between strikers and non-strikers occurred. Dunlop obtained an urgent interdict from the Labour Court to stop the violence, but the violence continued and escalated.

Dunlop attempted to identify the individuals who took part in the violence, and sought the assistance of the union that called the strike, the National Union of Metalworkers of South Africa (NUMSA). Dunlop experienced difficulty in doing so and decided to dismiss all striking employees, not for participating in the strike but because of their alleged involvement in acts of violence committed during the course of the strike. NUMSA challenged the fairness of the dismissals. In coming to his decision, the CCMA arbitrator distinguished between three categories of employees. The first were employees who had been identified as committing acts of misconduct. The second were employees who had been identified as being present when violence was committed. The third were employees who had not been identified as being present when violence was being committed. He found that the dismissal of employees in the first two categories of employees had been fair, but that the dismissal of those in the third category had been unfair. It appears that the finding that the dismissal of the first two groups of employees had been fair was based on the view that they had either been the perpetrators of the misconduct (often referred to as the 'primary misconduct') or knew who the perpetrators were and failed to disclose this information to the employer (i.e., they were guilty of derivative misconduct).

On review, the Labour Court and the Labour Appeal Court found that the dismissal of all three categories of employees had been fair and set aside the decision of the CCMA. These courts found the dismissal of the second and third categories of employees had been fair on the basis of a finding that they had been guilty of derivative misconduct, which breached the duty of good faith that employees owed to their employer.

NUMSA sought, and was granted, leave to appeal to the Constitutional Court against the finding of the Labour Appeal Court that the dismissal of the third category of employees had been fair. The Constitutional Court held that the duty of good faith is a reciprocal duty that an employer and employee owe to each other. However, in the strike context, the Court considered that the right to strike is underpinned by the power play between employer and employees and that employees only have the power to strike if there is solidarity among the employees. Imposing an obligation to report the misconduct of other employees would undermine that solidarity. In the context of a strike, therefore, an employee would only be under the obligation to report the misconduct of his or her fellow employees if the employer has complied with its duty of good faith by guaranteeing the employee's safety and protection before, at the time of and after the disclosure.

Given this reciprocal duty of good faith, before they can rely on derivative misconduct, employers are required to prove that they guaranteed their employees' safety and protection before, when and after the employees disclosed the identity of the perpetrators of strike violence (or other misconduct). On this basis, the Constitutional Court upheld the decision of the CCMA that the dismissal of the third category of employees had been unfair.

iii Automatically unfair dismissals

Section 187(1)(c) of the LRA, which was amended in 2015, provides that a dismissal will be automatically unfair if the reason for the dismissal is a refusal by an employee to accept a demand in respect of any matter of mutual interest between the employer and employee.

Prior to the amendment of Section 187(1)(c) of the LRA, an employer who wished to implement changes to terms and conditions of employment could, if its proposed changes were rejected by employees, justify dismissing these employees on the basis of its operational requirements, so that it could employ new employees who were prepared to accept the changed conditions of employment. This was the case, provided that the dismissals were final and irrevocable and the requirements of the LRA dealing with operational requirement dismissals had been met (see the decision in *National Union of Metalworkers of SA & Others v. Fry's Metals (Pty) Ltd*).

Whether an employer was entitled to adopt this course of action after the amendment to Section 187(1)(c) was considered by the Labour Appeal Court in *National Union of Metalworkers of South Africa & others v. Aveng Trident Steel (a division of Aveng Africa Proprietary Ltd) & Another*.

When confronted with a decrease in sales and increased costs, the employer in this matter gave notice of possible retrenchments in terms of Section 189(3) of the LRA. One of the proposals made by the employer as a retrenchment avoidance measure during the consultation process prescribed by Section 189 was that its workforce be restructured. It proposed that the scope of existing jobs be redefined so as to increase the duties associated with these jobs. Extensive negotiations took place on this issue, but the union representing the employees refused to agree to this proposal.

After reaching an impasse, the employer informed the union that it would be implementing the redesigned job descriptions and presented all the affected employees with new contracts of permanent employment, together with redesigned job descriptions, without altering their rate of pay. The employer informed the employees that if the contracts of employment were rejected, the employees would be dismissed. When the contracts were rejected by the employees, the employer gave notice of termination of their contracts of employment.

The union challenged the fairness of these dismissals and argued that the dismissals had been automatically unfair by virtue of the provisions of the amended Section 187(1)(c). The union argued that the dismissals were automatically unfair because the reason for the dismissals was the refusal by the employees to accept the employer's demands in respect of the redesigned job descriptions, which was a matter of mutual interest.

The Labour Appeal Court found that the dismissals were not automatically unfair. Its reasoning was, inter alia, that if employers are not permitted to dismiss employees who refuse to accept a change to terms and conditions of employment, and to employ others who are willing to accept the altered terms and conditions of employment that are operationally required, the only way to satisfy an employer's operational requirements would be 'through collective bargaining and ultimately power play'. The Court found that this would be self-defeating by adding to the economic pressure put on an employer that was already struggling financially.

The fact that a proposed change is refused and followed by a dismissal does not mean that the reason for the dismissal is necessarily the refusal to accept the proposed change. The question of whether Section 187(1)(c) of the LRA is contravened does not depend on whether the dismissal is conditional or final, but rather on the true reason for the dismissal of the employees. The actual or proximate reason for the dismissal needs to be determined and there is no reason for excluding an employer's operational requirements from consideration as a possible reason for dismissal.

After considering the facts, the Court found that the purpose of Aveng making the proposal was not to gain any advantage in wage bargaining but rather to restructure for operational reasons to ensure the company's long-term survival. The employees' rejection of the proposal necessitated their dismissal because of operational requirements. The dominant or proximate cause for the dismissals therefore was Aveng's operational requirements.

iv Vicarious liability

Section 60 of the EEA provides that an employee who has been sexually harassed by a co-employee can hold the employer liable for this harassment in the circumstances set out in that Section. However, our courts have accepted that an employer may also be held vicariously liable in terms of South African common law principles of delict (tort). This will be the case where there is a 'sufficiently close link' between the wrongful actions of the employee committing the harassment and the purposes and business of the employer.

The application of this principle is illustrated by the recent decision in *LP v. Minister of Correctional Services*. In this case, the harassed employee sought to hold her employer vicariously liable for her harassment by a fellow employee who was not her direct supervisor, but who was in a position to exercise authority over her because they were employed in a small office where they were often in contact with each other. The employer was held vicariously liable. This was on the basis that, irrespective of any official policy, official job descriptions or line management functions, the harasser was in a position of authority over the harassed employee. This was a situation created by the employer and endorsed or, at the very least, condoned by it. The unequal balance of power between the two employees was beyond question. The closeness of the working relationship between the two employees rendered the harassed employee vulnerable to the harassment. The employer created the opportunity for an abuse of power by the harasser even though technically he was not the harassed employee's direct supervisor.

v Disciplinary charges

Although the LRA requires that a dismissal for misconduct must be preceded by a fair procedure in terms of which the employee concerned is given an opportunity to state a case, it does not envisage a lengthy and formal hearing. The LRA contemplates an informal, expeditious disciplinary process requiring, in essence, nothing more than a dialogue and an opportunity for reflection before a decision is taken to dismiss an employee.

The recent decision in *EOH Abantu (Pty) Ltd v. Commission for Conciliation, Mediation and Arbitration* demonstrates that disciplinary processes should not adopt an overly formalistic or legalistic character.

The employee in this matter was employed in a position that gave him access to certain 'licence keys', which enabled him to activate software installed on the employer's computers. He provided one of these keys to his girlfriend so that she could assist her mother with the installation of Microsoft Office on her mother's personal computer.

When the employer discovered that this had occurred, the employee was charged with the disciplinary offences of dishonesty and a breach of confidentiality agreements. The chairperson of the disciplinary enquiry found that the employer had been unable to prove dishonesty but found that the employee had been grossly negligent. He was dismissed on this basis.

When the employee challenged the fairness of his dismissal, the arbitrator found the dismissal had been unfair because the employee had been found guilty and dismissed for gross negligence – a disciplinary offence he had not been charged with. On review, the Labour Court agreed with the arbitrator.

On appeal, the Labour Appeal Court held that disciplinary charges need not be drafted with the precision of a criminal charge sheet, and added that courts and arbitrators should not adopt an approach that is too formalistic or technical. The inaccurate description of the alleged disciplinary offence would only lead to unfairness if the employee was prejudiced by it. The test for prejudice is whether the employee would have conducted his or her defence differently had he or she known of the possibility of a 'competent verdict' to the charges. In other words, would the employee have conducted his or her defence differently had he or she known that, even if the employer could not prove dishonesty, the employee could still be dismissed for gross negligence?

On the facts, the Labour Appeal Court found that the employee had failed to exercise the required standard of care, and this had the potential to cause reputational harm to the employer. The employee's denial of negligence, his seniority and the potential damage that his conduct could have caused all contributed to a finding that the employer was justified in finding that it had lost trust both in the employee and in the continuation of the employment relationship. The dismissal was accordingly found to be fair.

vi Suspension

Employees who are alleged to have committed serious disciplinary offences are often suspended on full pay as a 'precautionary measure' while the allegations against them are being investigated. The courts have consistently held that, in certain circumstances, a precautionary suspension may constitute an unfair labour practice as defined in the LRA. A suspension will be regarded as unfair if there was no good reason for the suspension, or if it endured for too lengthy a period. The courts have also accepted that a suspension must be procedurally fair in the sense that the employee must be afforded some form of opportunity to be heard (albeit in an attenuated form) prior to the decision to suspend being taken. The employee in *South African Breweries (Pty) Ltd v. Long and Others* had been subjected to a precautionary suspension. He argued that his suspension had been unfair because it had endured for too long and because he had not been provided with an opportunity to make representations before a decision to suspend was taken. The CCMA commissioner accepted that the employer had committed an unfair labour practice by not affording the employee an opportunity to make representations.

The Labour Court reviewed and set aside the CCMA decision and held that there is no requirement for an employee to be provided with the opportunity to make representations before being placed on precautionary suspension. However, a suspension imposed as a disciplinary sanction (usually without pay and as an alternative to dismissal) must be preceded by a fairly conducted disciplinary proceeding.

On appeal, the Constitutional Court held that the finding of the Labour Court regarding the issue of an opportunity to make representations could not be faulted.

vii Legislative changes

Wage disparity remains a contentious issue in South Africa. Of equal significance is the violence and other unlawful actions that have accompanied strikes in recent years. This problem has been exacerbated when strikes have endured for lengthy periods. These issues were addressed during the course of 2016 and 2017 by representatives of government, business and labour on the National Economic Development and Labour Council.

Agreement was reached on the introduction of a national minimum wage. This has now been implemented though the enactment, in January 2019, of the National Minimum Wage Act. It is envisaged that the national minimum wage will be reassessed annually by the National Minimum Wage Commission, which will make recommendations to the Minister of Employment and Labour in this regard. This review will be conducted for the first time in 2020.

Agreement was also reached on a process to assist with the resolution of disputes that are the subject of lengthy strikes or that are the subject of strikes accompanied by violence and intimidation. This agreement is reflected in the newly enacted Sections 150A to 150D of the LRA. They provide that, in certain defined situations, an advisory arbitration panel can be established to issue an advisory award that would include recommendations on how the dispute that is the subject of the strike can be resolved.

The Labour Laws Amendment Act 10 of 2018 (LLAA), which came into force on 1 January 2020, amends the BCEA to provide for parental, adoption and commissioning parental leave to employees. It provides that an employee who is a parent of a child is entitled to at least 10 consecutive days parental leave. An adoptive parent will be entitled to adoption leave of at least 10 consecutive weeks. If there are two adoptive parents, one will be entitled to parental leave and the other to adoption leave. A commissioning parent in a surrogate motherhood agreement will be entitled to at least 10 weeks commissioning parental leave. If there are two commissioning parents, one will be entitled to commissioning parental leave and the other to parental leave. Parents who take parental, adoption or commissioning leave can claim unemployment insurance benefits from the Unemployment Insurance Fund.

V OUTLOOK AND CONCLUSIONS

One of the important objectives of the LRA is to provide institutions and procedures that will encourage the effective resolution of labour disputes. A major concern in this regard is the backlog of cases to be decided by the Labour Court. The cause of this backlog is a combination of the sheer number of employment disputes that are referred to the Court and a lack of resources to appoint more judges to adjudicate matters. Two recent interventions may have a positive impact on this issue. First, the BCEA has been amended to give the CCMA jurisdiction in relation to certain contractual claims that would ordinarily be adjudicated at the Labour Court. Second, it is expected that new Rules of the Labour Court will be introduced to curtail certain proceedings, particularly review proceedings.

Thus far, the advisory arbitration process envisaged in Sections 150A to 150D of the LRA has not been invoked and the ability of this process to resolve lengthy and violence-prone strikes will probably be critically assessed in the next year.

Chapter 16

SOUTH KOREA

Chang Young Kwon, Marc Kyuha Baek and Jane Young Sohn[1]

I INTRODUCTION

i Statutory framework

Korean labour law is sourced from both domestic and international laws. Positive domestic laws include the Constitution, legislation, enforcement decrees and rules, while self-regulation law includes collective agreements and rules of employment. International laws include treaties such as the International Labour Organization Conventions that Korea has ratified and customary international law.

Legislation on individual labour relations

The following primary domestic legislation governs individual labour relations:

a the Labour Standards Act regulates labour conditions of general workers;
b the Act on the Protection, etc. of Fixed-Term and Part-Time Employees regulates employment contracts;
c the Act on the Guarantee of Employees' Retirement Benefits regulates retirement allowance systems;
d the Minimum Wage Act regulates the minimum wage; and
e the Wage Claim Guarantee Act regulates wage claim guarantees in the event that wages are overdue and unpaid for reasons such as the employer's insolvency.

Other key legislation includes:

a the Industrial Accident Compensation Insurance Act, which regulates workers' compensation for occupational accidents;
b the Occupational Safety and Health Act, which regulates occupational safety and health;
c the Employment Insurance Act, which regulates employment insurance;
d the Employment Security Act, which regulates employment security;
e the Act on the Protection, etc. of Temporary Agency Workers, which regulates the temporary placement of workers; and
f the Act on the Employment, etc. of Foreign Workers, which regulates the status of foreign workers.

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Legislation on collective labour relations

Legislation on collective labour relations includes the Trade Union and Labour Relations Adjustment Act; the Act on the Promotion of Workers' Participation and Cooperation; the Act on the Establishment, Operation, etc. of Public Officials; and the Act on the Establishment, Operation, etc. of Teachers' Unions.

ii Types of labour and employment disputes

Civil actions

Labour disputes in Korea can largely be divided into disputes relating to individual labour relations and those relating to collective labour relations.

Disputes related to individual labour relations include suits: (1) to contest the validity of unfavourable measures against employees, such as dismissals, suspensions, transfers and disciplinary actions; (2) to confirm employee status; (3) to claim payment of wages and other allowances; (4) to claim retirement benefits; (5) to claim damages for violations of labour conditions; and (6) to claim damages for employment-related injury caused by the employer's unlawful acts.

Disputes related to collective labour relations include suits: (1) filed by employers to claim damages in respect of unlawful industrial actions of labour unions; (2) to compel the performance of collective bargaining agreements; and (3) to confirm the representative status of a trade union regarding the simplification of bargaining windows.

Administrative litigation

An employee may claim relief for unfair dismissal or unfair labour practices at the applicable Regional Labour Relations Commission.

Administrative actions may be initiated to revoke: (1) the establishment of labour unions; (2) an order to modify labour union agreements; (3) corrective judgments regarding the breach of duty of fair representation; (4) decisions dividing bargaining units; (5) corrective orders regarding collective bargaining agreements; and (6) decisions to retry arbitral awards.

iii Labour policies and judicial trends

In matters involving individual labour relations (such as status of workers in special types of employment and the applicability of ordinary wages to various types of allowance), a number of judgments have been passed in favour of the employee. On the basis of a number of recent cases, the courts appear to be a little more favourable to employers in matters involving collective labour relations; in these cases, the court (1) affirmed the criminal liability of a labour union for using the term 'labour union' in its name before filing its establishment report;[2] (2) affirmed the constitutionality of the simplification of a bargaining windows system;[3] and (3) imposed criminal liability and awarded extensive damages after denying the legitimacy of industrial action.[4]

2 Supreme Court Decision 2019Do8505, 31 October 2019.

3 Constitutional Court Decision 2011HeonMa338, 24 April 2012.

4 Supreme Court Decision 2016Da11226, 29 November 2018.

II PROCEDURE

i Civil action

Litigation on the merits

Both employer and employee can bring a claim in the civil courts to protect their rights. Claims exceeding 200 million Korean won in value and claims that cannot be valued because of their proprietary nature (for example, suits to confirm the invalidity of dismissals) are heard by a panel of judges in the district court (first instance), then the high court (appellate) and finally the Supreme Court. Claims under 200 million won in value are heard by a single judge. There is no limitation period for filing an action to confirm the invalidity of a dismissal, but courts have applied the principles of trust and good faith to dismiss claims.[5] The limitation period for bringing a claim for wages is three years.[6]

Provisional dispositions during labour disputes

Parties often use the process of 'provisional disposition to fix a temporary position' to resolve labour disputes as this can be cost-effective. The most common types of provisional dispositions include dispositions of wage status, of worker status preservation, of collective bargaining and of prohibitions of industrial action. Either the court having jurisdiction over the merits of the case or the district court having jurisdiction over the location of the objects of the dispute has jurisdiction over labour-related provisional dispositions.[7] The court decides on a request for a provisional disposition through a hearing process in which the debtor may participate.

ii Administrative disputes

Administrative adjudication by the Labour Relations Commission

An employee claiming unfair dismissal has three months from the date of the dismissal to file a claim with the applicable Regional Labour Relations Commission.[8] An employee or labour union seeking relief for unfair labour practices must file a claim with the applicable Regional Labour Relations Commission within three months of the date of the unfair practice (if the practice in question is continuous in nature, then within three months of the end of the practice).[9] The Labour Relations Commission must conduct a hearing. A party disagreeing with the decision of the Regional Labour Relations Commission has 10 days to apply for review by the National Labour Relations Commission. The National Labour Relations Commission must also conduct a hearing.

Appeal litigation

A party disagreeing with the decision of the National Labour Relations Commission has 15 days to appeal to the Administrative Court. Before the Administrative Court, the head of the National Labour Relations Commission becomes the defendant and the party who succeeded before the National Labour Relations Commission becomes a participant in the

5 Supreme Court Decision 99Du4662, 25 June 1999.

6 Labour Standards Act, Article 49.

7 Civil Execution Act, Article 303.

8 Labour Standards Act, Article 28(2).

9 Trade Union and Labour Relations Adjustment Act, Article 82(2).

Administrative Court proceedings to support the National Labour Relations Commission. The decision of the Administrative Court may be appealed in the high court (appellate) and thereafter, in the Supreme Court.

Party process

Lawsuits filed by the Government Workers' Union against the government constitute a party process. Likewise, a claim for overtime payment by a regional firefighting official against the local government with which he or she is affiliated also constitutes a party process, as a matter of public law.[10]

iii Autonomous settlement of disputes

Parties to a labour dispute may seek resolution through mediation and arbitration, but this is relatively uncommon.

III TYPES OF EMPLOYMENT DISPUTES

i Employee status

This is an action whereby the claimant seeks to confirm his or her employee status, claim retirement allowance or confirm the invalidity of his or her dismissal. The majority of cases involve verifying the status of employees in special types of employment or confirming whether an employee, in an illegal dispatch scenario, is, in fact, an employee under the Labour Standards Act.

ii Wages and other allowances

The majority of wage-related lawsuits are claims for retirement and other statutory allowances, such as overtime, and night and holiday allowances. Claims for retirement allowance often centre on whether certain wage categories should be included in the calculation of the average wage, which in turn forms the basis of retirement allowance calculations. The question of whether bonuses and welfare points should be included in the calculation of ordinary wages that forms the basis of statutory allowance calculations is a recent key issue.

iii Compensation for injury or harm

These actions often involve claims by employees for injury or harm caused by occupational accidents or employers' violations of labour conditions. Actions are also filed by employers against labour unions and workers for harm caused by illegal industrial actions.

iv Unfair dismissal

These actions involve an employee seeking (1) the invalidation of a dismissal, and the payment of wages on the basis that he or she was dismissed unfairly; or (2) the invalidation of a suspension or other disciplinary action on the basis that it is unfair. Applications for relief for unfair dismissal and other unfair action may also be made to the Regional Labour Relations Commission.

10 Supreme Court Decision 2012Da102629, 28 March 2013.

v Transfer orders

This is where an employee seeks the invalidation of an employer's transfer order on the basis that it is unfair.

vi Unfair labour practices

This is where a labour union or the employee seeks, in the civil courts, the invalidation and forbearance of the employer's unfair labour practices, such as unfair treatment, anti-union agreements, refusal of collective bargaining, domination and intervention. The labour union and employee can also file an application for relief at the applicable Regional Labour Relations Commission.

vii Criminal litigation

An employer may be subject to criminal punishment if it delays the payment of wages or otherwise violates labour relations legislation. An employee may be subject to criminal punishment if he or she participates in illegal industrial action, thereby causing obstruction to business.

IV YEAR IN REVIEW

i Verification of employee status

The Labour Standards Act is the core labour legislation in Korea. If a worker is not acknowledged to be an employee under this Act, he or she will not benefit from other labour laws and labour-related laws such as the Industrial Accident Compensation Insurance Act and the Employment Insurance Act, which only apply to those regarded as employees under the Labour Standards Act. Therefore, verifying the status of a worker is extremely important, as otherwise the worker will have only minimal protection under the Civil Act.

Establishing employee status – criteria

The Supreme Court has stated[11] that the question of whether or not a worker is an employee under the Labour Standards Act should be decided on the basis of whether the substance of the employer–employee relationship (and not the form of contract) is such that the worker has been engaged on a subordinate basis to provide labour to the business or at the place of business in exchange for remuneration. The question of whether a subordinate relationship exists must be further determined by comprehensively considering various economic and social factors, such as whether:

a the employer:

- decides on the content of work to be undertaken;
- is subject to rules of employment and human resources regulations;
- exercises significant command and supervision over the work process; and
- designates the working hours and place of work and whether the worker is bound by them;

11 Supreme Court Decision 2004Da29736, 7 December 2006.

b the worker:
- can operate a business on his or her own account by, for example, possessing supplies, raw materials or equipment or hiring a third party to perform the work on his or her behalf; and
- personally bears the risk of generating profits and incurring losses from the provision of labour;

c the nature of remuneration is the object of the work itself;
d the basic or fixed salary has been set;
e income tax is withheld;
f the employment relationship is continuous and exclusive; and
g the worker is recognised as an employee under the social security regime.

However, as a number of the above criteria (for example, whether a basic or fixed salary has been set, whether income tax is withheld, whether the worker is recognised as an employee under the social security regime) can be decided arbitrarily by employers using (or misusing) their economically superior position, the absence of these factors will not necessarily mean the worker is denied employee status.

Judicial decisions recognising employee status

In recent years, the following have been confirmed as having employee status: a TV station VJ,[12] a caregiver working at a long-term care facility for the elderly (a private institution) established under the Long-Term Care Insurance Act,[13] a lawyer working in a law firm,[14] a debt collector,[15] a driver engaged by a transportation company to deliver using his own private registered vehicle,[16] a part-time university lecturer,[17] a home-consigned mail carrier,[18] a community centre volunteer,[19] a lecturer in English at a foreign language institute,[20] and a service technician at a satellite broadcaster.[21]

12 Supreme Court Decision 2010Du10754, 24 March 2011.
13 Supreme Court Decision 2011Do9077, 15 November 2012.
14 Supreme Court Decision 2012Da77006, 13 December 2012.
15 Supreme Court Decision 2012Da20550, 9 July 2015.
16 Supreme Court Decision 2015Du51460, 25 October 2018.
17 Supreme Court Decision 2015Du46321, 14 March 2019.
18 Supreme Court Decision 2016Da277538, 23 April 2019.
19 Supreme Court Decision 2017Du62235, 30 May 2019.
20 Supreme Court Decision 2018Da239110, 18 October 2018.
21 Supreme Court Decision 2019Du50168, 28 November 2019.

Judicial decisions denying employee status

On the other hand, the following have been denied employee status: a manager who recruited, trained and managed digital sellers (product sales persons) and received commission from the hiring company based on the sales volume of the digital sellers,[22] an insurance manager who executed an entrustment contract with a post office,[23] and a deliveryman affiliated with a delivery agency company.[24]

ii Dispatched workers and labour relations

The Act on the Protection, etc. of Temporary Agency Workers (the Temporary Agency Workers Act) sets out exceptional circumstances where the temporary placement ('dispatch') of workers is allowed. There are many ways a worker may be engaged in the workplace (for example, subcontracts, delegation, dispatch), but the form will depend on whether the engaging party is a dispatch agency or an employer. The question of whether temporary placements are legally permitted under the Temporary Agency Workers Act is an often-disputed issue in Korea.

Recognition of direct employment relationships

Where an employee is dispatched by an employer on temporary placement to a third-party company, the employee may nevertheless be deemed to be employed by the third-party company and not by the employer if the relationship of the parties is such that an employment contract may be implied between the dispatched employee and the third-party company. In one particular case,[25] the Supreme Court found the third-party company to which the employee had been dispatched to be the actual employer on the basis that the purported employer lacked its own identity and independence as a business proprietor; the purported employer's existence was only nominal in nature; the dispatched employee was in fact in a subordinated relationship with the third-party company, which also paid the dispatched employee's wages; and the only beneficiary of the employee's work was the third-party company.

Establishment of lawful temporary placements

When an employer dispatches its employee to a third-party, a question arises as to whether that dispatch is in fact subcontractual in nature or a temporary placement. If the latter, then the relationship is governed by the Temporary Agency Workers Act. This determination is key because if the relationship is deemed to be subcontractual (i.e., a service), there is no time limit on the relationship, whereas the maximum term for a temporary placement contract is two years, after which the third party must treat the dispatched worker as its own employee (if it decides to continue the labour relationship). In making this determination, the Supreme Court will look beyond the form of the relationship to the substance and will look for factors such as whether (1) the third party directly or indirectly gives binding instructions regarding the performance of the tasks; (2) the worker can be seen as having been substantially

22 Supreme Court Decision 2009Da37923, 14 July 2011.

23 Supreme Court Decision 2011Da46371, 12 July 2013.

24 Supreme Court judgment 2016Du49372, 26 April 2018, although the Court in this case found that the worker could be deemed to have 'special employee' status under Article 125(1) of the Industrial Accident Compensation Insurance Act.

25 Supreme Court Decision 2012Da96922, 26 February 2015.

incorporated into the third party's business such that the worker and the employees affiliated with the third party constitute one working group; (3) the original employer exercises its decision-making power independently regarding the selection, number, education and training, work and rest hours, holidays and inspection of the work attitude of the workers to be deployed; (4) the purpose of the contract is clearly defined and its scope is limited to a specific task that is distinct from that of the third-party's employees; (5) the worker being dispatched has the relevant professional or technical skills; and (6) the original employer has the necessary independent corporate organisation or facilities to achieve the purpose of the contract.[26]

The Hyundai Motors case

In this case,[27] the claimant workers, who had been engaged by in-house partner companies within Hyundai Motors' Ulsan plant and subsequently dispatched to Hyundai Motors' worksite (pursuant to a subcontract between the partner companies and Hyundai Motors), were found to be in a temporary agency relationship (and not a subcontractual relationship) with Hyundai Motors on the following grounds: (1) most of Hyundai Motors' automobile assembly and production work was carried out by an automatic workflow method that used conveyor belts and the claimants were engaged in the design process that used these conveyer belts; (2) the claimants worked with Hyundai Motors' regular employees on both sides of the conveyer belts, used Hyundai Motors' production-related facilities, parts and consumables and followed various job orders (regarding identification methods and simple and repetitive tasks) in which the in-house partner companies had no input; (3) Hyundai Motors had general rights of designation in respect of the claimants and could decide matters such as their workload, methodology and work sequence (just as with employees under their direct control); (4) Hyundai Motors either directly instructed the claimants or, via site managers, delivered specific work directions to them that were decided and controlled by Hyundai Motors; (5) Hyundai Motors decided matters such as time of commencement and cessation of work, breaks, extended and overtime work, and the operation of shift systems and the speed of work in respect of both the claimants and the employees under its direct control, and the claimants were asked to fill in for its regular employees in the event of their absence due to industrial accidents and leave; and (6) Hyundai Motors identified and managed the attendance and personnel status of the workers (including the claimants) engaged by the in-house partner companies.

Duty to protect temporary agency workers

Taking into consideration the nature of temporary placements, the Supreme Court has held[28] that an employer that receives at its workplace a temporary agency worker for its benefit and instructs that worker to engage in continuous labour must protect and ensure the safety of the temporary agency worker; and that it would be reasonable for the temporary agency dispatching the worker to enter into a dispatch agreement with the employer a condition of which would be that the employer would agree to comply with the obligation to protect the worker, and whereby the temporary agency would agree to dispatch the worker on the basis

26 Supreme Court Decision 2010Da106436, 26 February 2015.

27 Supreme Court Decision 2008Du4367, 22 July 2010.

28 Supreme Court Decision 2011Da60247, 28 November 2013.

of that condition being satisfied. Therefore, even if the employer has not directly employed the temporary agency worker or executed an employment contract with him or her, the temporary agency worker may rely on an implied agreement to claim compensation for harm or injury against the employer that fails to comply with its duty to protect.

iii Succession of employment relationships

Business transfers

In a business transfer, in principle, employees and their employment relationships are also transferred to the acquirer of the business.[29] An employee of the transferor may refuse to transfer with the business and remain an employee of the transferor company; however, in cases such as these, if the business transfer results in layoffs being required, the employer may dismiss the employee who refused to transfer, as long as the proper procedures are followed.[30]

Division of companies

According to Article 530-10 of the Commercial Act, a company newly established (the Newco) as a result of a division assumes the rights and obligations of the divided company as prescribed by the division plan or agreement; thus, the employment relationships of the dividing company are also likely to be transferred to the Newco. The transfer of employment relationships in a division scenario can only be permitted when the proper process of seeking the employees' consent and cooperation has been undertaken and the transfer must be denied should the purpose be to bypass legal protection afforded to employees.

Therefore, a company seeking to transfer its employment relationships as part of a business transfer to a Newco following a division, should, prior to obtaining the necessary shareholder resolutions, meet with the labour union and employees to explain the reasons for, purpose and timing of the division, the scope and details of the employment relationships proposed to be transferred and the purpose of the Newco, and obtain their consent to this transfer. As long as this process has been undertaken, the transfer of the relevant employment relationships is, in principle, deemed to be reasonable, even if the consent of a particular individual employee was not obtained. However, where the purpose of the division is to evade the restrictive provisions relating to dismissals under the Labour Standards Act and dismiss employees, an employee may refuse to transfer and may stay with the dividing company.[31]

iv Retirement systems

Article 19(1) of the Act on Prohibition of Age Discrimination in Employment and Elderly Employment Promotion (the Elderly Employment Law)[32] provides that '[a]n employer shall set the retirement age of workers at 60 years of age or older' and Article 19(2) further provides that 'in cases where any employer sets the retirement age of workers below 60 years of age notwithstanding [Article 19(1)], the retirement age shall be deemed set at 60.' Pursuant to the Elderly Employment Law, the Supreme Court has held that any employment contract,

29 Supreme Court Decision 2002Da70822, 9 June 2005.

30 Supreme Court Decision 2010Da41089, 30 September 2010.

31 Supreme Court Decision 2011Du4282, 12 December 2013.

32 Amended on 22 May 2013.

rules of employment or collective bargaining agreements that set the retirement age below 60 are null and void to the extent that they violate Article 19. The relevant retirement age is to be calculated based on the person's actual birthdate.[33]

v Payment in lieu

Where an employer intending to dismiss an employee fails to give the employee at least 30 days' prior notice, it must pay the employee an amount in lieu equal to 30 days' ordinary wage,[34] regardless of whether the dismissal is effective. Even if the dismissal is deemed ineffective (because it is regarded as unfair), the employee still has the right to the payment in lieu of notice.[35]

vi Ordinary wage

The term 'ordinary wage' means 'hourly wage, daily wage, weekly wage, monthly wage or contract amount to be paid to an employee for specifically agreed work or an entire job of work on a regular and flat basis'.[36] The ordinary wage is a concept needed for calculating miscellaneous additional wages, and numerous lawsuits are initiated over which payments fall within the scope of the ordinary wage concept.

Scope of the ordinary wage

According to the Supreme Court,[37] the question of which payments fall within the scope of the ordinary wage should be determined on the basis of whether the payment is monetary (or in kind) and is made regularly, uniformly and on a fixed basis as remuneration for prescribed work. 'Remuneration for prescribed work' refers to monetary payment (or payment in kind) that the employer has agreed to pay the employee for work undertaken during normal prescribed work hours. Additional wages paid by the employer for working overtime or for performing duties outside his or her scope of employment are deemed to be payments not related to work conducted during normal prescribed work hours and therefore are not considered to be ordinary wages.

Payments will be regular if they are made continuously and at regular intervals. Therefore, even if a payment is made not every month but, for example, quarterly, the payment will be deemed to be a regular payment and will fall within the scope of the ordinary wage.

Payments will be uniform if they are made to all employees who have achieved certain conditions or standards. Since the aim of the concept of the ordinary wage is to create a fixed and standard pay, these conditions or standards should also be fixed. Also, because the ordinary wage is used to establish the value of prescribed work, the conditions or standards used to determine whether payments made to all employees are uniform must necessarily be related to the content and nature of the work prescribed, the skills and experience required for that work and other conditions that determine the value of the prescribed work.

33 Supreme Court Decision 2018Du41082, 29 November 2018.

34 Labour Standards Act, Article 26

35 Supreme Court Decision 2017Da16778, 13 September 2018.

36 Enforcement Decree of the Labour Standards Act, Article 6(1).

37 Supreme Court Decision 2012Da89399, 18 December 2013.

Payments will be fixed if they are paid regardless of the employee's performance and other labour conditions. A fixed wage may be defined as the minimum basic remuneration payable to a worker in consideration for his or her day's work, even if the worker has only worked for one day.

Since the ordinary wage is a fundamental tool prescribed by law to establish the basic standards of labour conditions, its meaning or scope cannot be agreed separately by the employer and employee (for example, through a collective agreement). Thus, any labour-management agreement that purports to exclude payments that fall within the scope of the ordinary wage under the Labour Standards Act will be ineffective.

Condition of incumbency

Regardless of whether or not an employee has worked his or her prescribed hours, where wages are set to be paid on a payment date (or other point in time) only to employees in service, an employee will only be eligible to receive remuneration if he or she is incumbent at that specific time. Wages that are paid under these conditions cannot be seen to be remuneration for prescribed work or work of a fixed nature since the employee will not receive any payment for work undertaken (whether during normal work hours, overtime, at night or on a holiday) if he or she retires prior to the relevant point in time.[38]

Welfare points based on a selective welfare system

In a case before the Supreme Court,[39] welfare points awarded to employees on a continuous and regular basis pursuant to a collective agreement or rules of employment, for use in an employee-only online store as part of a flexible welfare programme were deemed to fall outside the scope of ordinary wages because this award was not in consideration for labour provided.

vii Additional payments

In a matter where an employer had paid holiday wages without factoring in overtime pay for an employee that had worked more than 40 hours a week, the Supreme Court held that holiday work hours fall outside the standard weekly work hours and weekly overtime work hours, so the employee could not be entitled to additional wages in respect of both holiday work hours and overtime.[40] The amended (and current) Labour Standards Act clearly reflects this intention. Under Article 56(2), an employer must pay an additional 50 per cent of the ordinary wage to employees who work less than eight hours on a holiday, and an additional 100 per cent of the ordinary wage to those who work more than eight hours on a holiday.

viii Fixed-term labour

Expectation of renewal

An employee who has concluded a fixed-term employment contract will lose his or her employee status upon the expiration of the fixed term and will be deemed to have resigned automatically unless he or she renews the employment contract. However, if the rules of employment, employment contract or collective bargaining agreement stipulates that the

38 Supreme Court Decision 2013Da60807, 12 July 2018.

39 Supreme Court Decision en banc 2016Da48785, 22 August 2019.

40 Supreme Court en banc Decision 2011Da112391, 21 June 2018; note, this case was decided under the former Labour Standards Act.

employment contract will be renewed upon satisfaction of certain conditions or, even if no such provisions exist but the employee's expectation for renewal can be justified on the grounds that a relationship of trust and understanding between the parties has been established (based on a totality of circumstances, including the contents of the contract, the motives and particulars surrounding the formation of the contract, the existence of renewal standards such as renewal procedures and requirements, and the nature of the employee's work), then the employer's refusal to renew the contract may be deemed to be unfair and therefore null and void.[41]

In the case of fixed-term employment contracts entered into after the retirement age, the Supreme Court has further held that, in addition to the above factors, the employee's ability to undertake the work required by the job, the employee's competence, any decrease in work efficiency and increase of danger due to age, and other precedent cases of employees working beyond the retirement age should be taken into consideration when determining whether the employee's expectation of renewal is justified.[42]

Repeating fixed-term employment contracts

Under Article 4(1) of the Act on Protection, etc. of Fixed-Term and Part-Time Employees, an employer may hire a fixed-term worker for a period not exceeding two years (where his or her fixed-term employment contract is repetitively renewed, the total period of his or her continuous employment shall not exceed two years). Nonetheless, the employer may hire a fixed-term worker for more than two years provided that any of the following circumstances apply: (1) the period required to complete a project or particular task is specified; (2) a fixed-term worker is needed to fill a vacancy arising from a worker's temporary suspension from duty or dispatch until the absent worker returns to work; (3) the period required for a worker to complete his or her schoolwork or vocational training is specified; (4) an employer enters into an employment contract with a senior citizen; (5) the job requires professional knowledge and skills or is offered as part of the government's welfare or unemployment measures; or (6) where any other reasonable grounds exist (collectively the Article 4(1) exceptions). However, the Supreme Court has held that even where an Article 4(1) exception applies to a fixed-term contract that is entered into on a repeated basis, if – based on the context of the employment contract, the parties' intentions, the existence of breaks between contract periods, job description and similarity of working conditions – the periods prior to and following the exception periods have continued without any hiatus, they will be added up to calculate the total period of contract under Article 4 of the Act on Protection, etc. of Fixed-Term and Part-Time Employees.[43]

Discriminatory treatment

Should a fixed-term employee claim that he or she is being discriminated against because of the nature of his or her contract, the claim of discriminatory treatment in respect of remuneration must be verified by comparing each category of wage in detail.

41 Supreme Court Decision 2007Du1729, 14 April 2011.

42 Supreme Court Decision 2016Du50563, 3 February 2017.

43 Supreme Court Decision 2017Du54975, 19 June 2018.

ix Minimum wage

Where an employer (a taxi company) attempted to fix the standard working hours of its employees (taxi drivers) regardless of the actual number of hours worked, in order to calculate the fixed amount of salary due to each employee (which is based on the minimum wage multiplied by the number of hours worked) on the basis that it was difficult to fix the working hours of taxi drivers, the Supreme Court held these actions to be unreasonable, particularly when their real purpose was to circumvent the Minimum Wage Act. In this case, the employer and the taxi drivers' labour union had agreed simply to reduce the number of contractual work hours (without actually modifying the working environment or actual work hours) to make it seem as though the fixed hourly wages were greater than they were in reality, but this in fact had the effect of causing the minimum wage paid to fall beneath the legislative standard. The Court found that the agreement between the employer company and the labour union was invalid because its purpose had been to circumvent the application of Article 6(5) of the Minimum Wage Act, which is mandatory law.[44]

x Personnel orders

Transfer measures

Transfer measures can be disadvantageous for employees because they entail changes in the type, content and place of work, but they are not null or void unless special circumstances exist. In principle, the employer has significant discretion to transfer personnel for the purposes of its business and, as long as it does not abuse or misuse this discretion, a transfer measure will not necessarily be deemed to violate the Labour Standards Act.

Suspensions

Although disciplinary actions such as suspensions result in disbenefits to employees, if disciplinary measures of this kind are available to the employer under the rules of employment or other employment policies, the employer is, in principle, afforded a wide discretion to use such measures, as long as this discretion is not misused or abused in violation of the Labour Standards Act.[45]

xi Rules of employment

Rules of employment that have been amended unfavourably in respect of employees will not be deemed to supersede individual employment contracts that have more favourable terms and conditions, even if the amendment to the rules of employment were agreed collectively. In this context, the Supreme Court held in a relevant case[46] that the more favourable provisions of individual employment contracts take priority over the rules of employment unless the employer obtains each individual employee's consent.

44 Supreme Court en banc Decision 2016Da2451, 18 April 2019.

45 Supreme Court Decision 2007Du22498, 10 July 2008.

46 Supreme Court Decision 2018Da200709, 14 November 2019.

V OUTLOOK AND CONCLUSIONS

We are seeing a lot of new case law precedents being established in relation to issues that traditionally constituted labour disputes. In the case of ordinary-wage lawsuits, there is an increased tendency in the lower courts to find that certain categories of payment (which have traditionally been found by the Supreme Court to fall outside the scope of ordinary wages) now fall within the scope of ordinary wages and this is causing intense controversy in the industry.

It is also anticipated that workers in special types of labour who have traditionally not been protected under the Labour Standards Act will increasingly be considered 'employees' under the Act, and actions that were previously deemed to be subcontracting and therefore valid may increasingly be held to be illegal worker dispatch. Furthermore, with the entry into effect as of 16 January 2020 of the newly amended Occupational Safety and Health Act, cases involving employers' violations of their responsibility for workplace safety and employees' exercise of the right to suspend work are expected to increase and to result in the setting of new precedents.

Chapter 17

SPAIN

Jorge Aranaz Benito, Ana Campos Rodríguez de Tembleque and Lucas Peiro de la Rocha[1]

I INTRODUCTION

Laws and regulations governing employer–employee relationships and working conditions in Spain are set out in the Workers' Statute, and in all national employment and social security laws and regulations, and collective bargaining agreements, which have to comply with European Union regulations and directives of direct application, the Spanish Constitution, international treaties and the international labour standards of the International Labour Organization (ILO).

Spain is organised at the level of towns, provinces, autonomous communities and central government. The state is divided into 17 autonomous communities, which are geographical regions with political autonomy over many aspects of governance. In relation to employment, the state has exclusive competence for labour and employment legislation. However, most autonomous communities have assumed responsibility for the implementation and execution of labour legislation, as allowed for by the Constitution.

The main piece of legislation is the Workers' Statute, which regulates individual employment relationships, including types of employment contracts, working time, termination and suspension of the employment contract, collective representation rights, collective bargaining and labour infractions.

As well as the Workers' Statute, there is a wide array of laws and regulations that govern employment relationships. The most important of these govern social security, prevention of occupational hazards, gender equality, temporary employment agencies, infringements and penalties related to employment and social security obligations, the jurisdiction of the social courts (labour disputes), legal freedoms in relation to trade unions, strike law, and special regulations applicable to specific employment relationships, such as senior management relationships.

Under the Spanish legal regime for labour and employment, collective bargaining agreements are those contracts negotiated between workers' representatives and employers or employers' representatives to regulate working conditions in certain sectors or in companies operating nationally or at regional levels. These agreements can only stipulate employment conditions that improve on those established in the Workers' Statute and they usually regulate working time and the work system (i.e., whether it is a rotational system); remuneration,

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including yearly increases and benefits; job descriptions for each professional group; vacation time; disciplinary procedures; requirements for the hiring of new employees; and certain obligations regarding temporary employment contracts.

Employment contracts at the level of the individual also constitute a source of regulation of employment relationships. Individual employment contracts must necessarily respect all conditions established both in laws and regulations and in applicable collective bargaining agreements.

Finally, the social security system provides coverage for a number of contingencies, including unemployment, temporary or permanent disability, retirement and death, salary guarantee funds in case of company insolvencies, and for widows and orphans. To pay for this coverage, every employer and employee must make contributions to the social security system. Contribution amounts are proportionate to the salary each employee receives. The social security system also provides universal healthcare coverage.

II PROCEDURE

Under Spanish employment law, disputes between employers and employees may be resolved through individual or collective procedures, mainly depending on the specific nature of the dispute and the number of employees involved.

i Individual procedures

Individual procedures are the most common type of litigation procedure in Spain. They are usually initiated by employees, although employers may also initiate them under certain circumstances (usually to claim amounts from employees, such as back pay compensation or damages arising from a breach by the employee of a post-contractual non-compete covenant)

To initiate an individual procedure, the employee must first file an administrative claim before the relevant regional conciliation service requesting a conciliation hearing with the company. (Note that exceptions to this process are made in the case of certain specific procedures, such as annual leave procedures or procedures for the modification of working conditions.) The filing of a claim prior to the start of the formal procedure before the employment courts is mandatory. The administrative claim shall include the main terms of the lawsuit that will be pursued in court and will result in a conciliation hearing, with both parties summoned to try to settle the case. In practice, a significant number of disputes are resolved by means of agreements reached through the conciliation services, which helps reduce the number of court procedures.

If no agreement is reached through the conciliation service, the claimant is entitled to file his or her lawsuit with the employment court. The employee must include in the written claim the arguments that will be used at the trial in court, so that the defendant is apprised of them prior to the court hearing and is therefore able to defend the case.

The parties can reach an agreement and settle the case at any time before the court hearing takes place, otherwise they shall appear before the court on the date of the hearing. On that date, prior to the hearing, the parties will again be asked to hold a mandatory conciliation hearing before the judge to try to settle the case. Should there not be a conciliation between the parties, the hearing will take place subsequently.

During the court hearing, the claimant must explain his or her position and the defendant will answer the claimant's arguments orally (no written reply to the claimant's lawsuit is allowed in employment procedures). Moreover, both parties will submit their

evidence before the court, which includes not only documents but also witnesses' testimony or experts' reports. Finally, the parties will explain their conclusions to the judge and the trial will finish.

The court will then deliver its judgment, deciding whether to accept the claimant's arguments, totally or partially, or reject them. Exceptions are made for certain specific procedures, but most court decisions are subject to appeal before the superior courts (either the high court of justice of the appropriate autonomous community or the Supreme Court) by any of the parties involved. Appeals are made in written form and not orally.

ii Collective procedures

From a procedural standpoint, collective procedures basically follow the same rules as those set out for individual procedures. The main difference from individual procedures lies in the subject matter of the dispute or in the nature of the claimant. In this connection, collective procedures are raised in relation to the following:

a lawsuits that have an impact on the general interests of a group of employees (e.g., interpretation or application of a specific law, a collective bargaining agreement or a company policy);

b claims against company decisions of a collective nature (e.g., significant modifications of working conditions that have a collective impact); and

c challenges to collective bargaining agreements.

The parties entitled to initiate collective procedures are workers' representatives, trade unions, companies, company associations or the national or regional labour authorities. Collective procedures are subject to the same rules as individual procedures, with minor specificities due to the collective nature of the dispute. This means that the initial phase will be oral, with any subsequent appeal made in written form.

III TYPES OF EMPLOYMENT DISPUTES

There are several types of procedures to be followed in employment-related disputes under Spanish law. The specific type of procedure depends on the nature of the dispute, and the following are the most notable of these:

a Ordinary procedure: this is the general procedure covering all areas not included in other types of procedure. Ordinary procedures cover claims for pending amounts (e.g., salaries, bonuses and overtime) or requests for specific conditions.

b Termination procedure: this procedure involves claims against any kind of termination of employment (e.g., redundancy, disciplinary dismissal or collective redundancy).

c Protection of fundamental rights: this procedure aims to protect employees from any violation of their fundamental rights by their employer (e.g., retaliation, breach of trade union freedom or discrimination at work).

d Social security: certain procedures regarding social security matters that were previously held before administrative courts are now held before the employment courts. These include certain social security benefits of employees, claims for amounts (social security contributions), or social security fines imposed on companies by the public administration.

e Other procedures: procedures regarding challenges to disciplinary measures imposed on the employee by the employer, annual leave, professional classification, relocation, changes to working conditions, or reconciliation of family and professional life.

On top of the above-mentioned types of procedures, the existence of collective procedures, as explained in the previous section, must also be considered.

Finally, most significant contentious issues with regard to employment matters in Spain are those regarding termination of employment, particularly where an employee claims that a dismissal is unfair or null and void, with the aim of being reinstated or receiving the statutory severance payments set out under applicable law.

In this regard, termination in Spain can be implemented through a disciplinary dismissal based on the employee's misconduct or through redundancy based on economic, technical, organisational or productive reasons. In cases of disciplinary dismissal, there is no implied duty for the employer to pay any severance on the termination date, whereas redundancy entails the right of the employee to statutory severance pay, equal to 20 days of salary (salary includes base salary plus commissions plus some benefits paid either in cash or in kind, such as a company car or stock options) for each year of service (capped at 12 months' pay) together with the delivery of the termination letter.

However, if the employee does not agree with the reasons for termination (regardless of the type of termination undertaken by the employer), he or she can challenge the decision through the termination procedure before the employment courts. As a consequence of the employee's claim, the court shall decide whether the termination is:

a justified (i.e., the grounds justifying the termination are deemed to be valid and the legal procedure has been followed);

b unjustified (i.e., the grounds justifying the termination are not well founded, which in turn would imply an obligation for the employer to pay the employee severance pay of 45 days' salary per year of service until 12 February 2012 and 33 days' salary per year of service after 12 February 2012, with any amount already paid in the event of redundancy to be deducted from the overall severance payment); or

c null and void (which would entail the obligation for the employer to reinstate the employee with back pay); this finding of lack of justification would occur in the case of certain employees who are specially protected against termination, such as workers' representatives, pregnant women, employees who have taken maternity or paternity leave, or where the termination is due to retaliation.

IV YEAR IN REVIEW

i Overview

During 2019, there were some significant legislative changes in relation to equality and the obligation to record working time.

On 8 March 2019, Royal Decree-Law 6/2019 on equality[2] came into force, with the following key elements:

a The obligation to prepare equality plans is to be gradually extended to companies with 50 or more employees.

b Every company must compile a register of disaggregated salary information by gender and professional classification. This register is to be accessible to employees through their legal representatives, and all employees carrying out equal-value jobs must receive the same salary.

c Companies with 50 or more employees that identify a pay gap of 25 per cent or more between employees of either gender must provide an objective and reasonable justification for this disparity.

d Objective dismissal in specially protected cases requires proof of the specific need to terminate the employee's contract.

e The suspension of the employment contract due to paternal leave is to be gradually extended to 16 weeks for each parent in 2021.

f The right to adjust and rearrange working hours and the way of working to achieve a work–life balance, without having to reduce working hours and salary, is strengthened. This aspect is proving to be controversial and has given rise to a substantial number of judicial conflicts in the lesser courts.

Furthermore, on 12 May 2019, Royal Decree-Law 8/2019[3] came into force. This Decree-Law expressly introduces the obligation for all companies to keep a daily register of all employees' standard working day, with their start and finish times. According to the ruling of the European Court of Justice (ECJ) of 12 May 2019,[4] this obligation extends to all Member States and requires employers to set up an objective, reliable and accessible system registering the effective daily working time for each employee.

In accordance with this new ordinance, companies must negotiate with employees' representatives on how to organise and maintain that register, which must be kept for four years. Employees, their representatives and the labour inspectorate are entitled to access these registers.

Directive 2019/1937 on the protection of persons who report breaches of union law was published in November 2019 and entered into force on 17 December 2019, and it requires that Member States implement the following:

a the obligation for companies with 50 or more workers to establish internal reporting channels; and

2 Royal Decree-Law 6/2019 of 1 March on urgent measures to guarantee equal treatment and opportunities for men and women in employment and occupation.

3 Royal Decree-Law 8/2019, of 8 March on urgent measures for social protection and to combat job insecurity in the workplace.

4 Case C-55/18.

b protection for persons who report breaches of European Union law who have obtained their information in the context of their work-related activities, and provide a series of safeguards against possible retaliation.

ii Case law

As regards case law, there have been significant rulings issued by both national and international courts and affecting the following areas: video surveillance; discrimination against sick employees; termination for objective reasons based on justified absenteeism; consideration of working time; severance compensation for temporary employment contracts; tax exemption of severance compensation of senior management relationships; digital platforms and the gig economy; and compensation and benefits. These topics are discussed further below.

Video surveillance

Regarding video surveillance, the Grand Chamber of the European Court of Human Rights (ECHR) issued a ruling on 17 October 2019[5] revoking its prior ruling of 9 January 2018. The case concerned the disciplinary termination of several employees (supermarket cashiers) who by means of temporary security camera coverage had been recorded helping customers and other co-workers to steal items and stealing items themselves. The ECHR ruling of 2018 declared that the employees' privacy rights had been violated by the filming, which was done with temporary covert security cameras.

In its second ruling, however, the ECHR declared that the employees did not suffer a violation of their privacy rights. The ECHR relied heavily on the fact that the surveillance was temporary and carried out in response to suspicions of misdemeanours (irregularities in the shop's stock and its sales, and losses over several months), and that notification of the surveillance would have rendered it useless. This decision reinforces previous rulings and case law from the Spanish Supreme Court.

However, the facts of this case happened before the General Data Protection Regulation[6] and Spain's Organic Law 3/2018 on Data Protection and Guarantee of Digital Rights came into force, so it remains to be seen whether the answer would be identical under the current regime.

Discrimination against sick employees

An employee assigned to the processes of assembly and shaping of plastic pipes suffered from epicondylitis, a condition considered an 'occupational disease', and accordingly the employee was categorised as being among 'employees particularly susceptible to occupational risks'. The employee attended the company's medical centre on several occasions complaining of pain and sent various letters to the medical centre and to the employer requesting that her workplace be adapted to her physical condition. At each medical assessment, the employee was declared 'fit with limitations'. The company dismissed the employee and nine other employees on objective grounds, citing economic, technical, production and organisational reasons.

5 Case *López Ribalda II*, applications 1874/13 and 8567/13.

6 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

The employee sued the company over the termination, and the social court requested a preliminary ruling by the ECJ on several questions arising from the matter.

On 11 September 2010, the ECJ ruled on the case[7] that the termination for objective reasons of an employee particularly susceptible to occupational risks within the meaning of national law (as was the case) on the basis of criteria of productivity, multi-skilling in the undertaking's posts and absenteeism may be discriminatory because the worker's condition was considered to be disabled. The ECJ ruled that the concept of 'disability' must be understood as referring to a limitation of capacity resulting in particular from long-term physical, mental or psychological impairments that, in interaction with various barriers, may hinder the full and effective participation of the person concerned in professional life on an equal basis with other employees.

Termination for objective reasons based on justified absenteeism

Spain's Constitutional Court has declared the recurring absences of an employee to be valid cause for termination (even when the absences are justified, as stipulated in Section 52(d) of the Workers' Statute). In its ruling of 16 October 2019, the Court declared that even where absences are due to temporary sickness, the Court's interpretation of the Workers' Statute does not violate either the constitutional right to life and physical integrity nor the right to health and the right to employment. In consequence, employers may terminate employment relationships when the number of absences from work reach a certain threshold within a time frame. In this case, the affected workers were entitled to severance compensation of 20 days' salary per year worked.

Consideration of working time

The Supreme Court declared on 19 March 2019 that time spent with clients at events outside regular working hours (such as accompanying clients to sporting competitions or presentations by journals or magazines) to strengthen the relationship with them constitutes 'effective working time', even where attendance at such events is voluntary for the employees.

Regarding individually mobile workers, such as technicians, on 31 October 2019 the National High Court also declared that the time spent on the journey from the worker's home to the first client and back home from the last client at the end of the day was 'effective working' time. The Court applied the ECJ's doctrine from the *Tyco* case[8] of 10 September 2015. The *Tyco* criteria were applicable in this case because (1) the worker's activity was carried out exclusively on clients' premises, so the journey to and from those premises was unavoidable; and (2) during the journey, which was controlled by GPS systems, the workers were subject to the employer's instructions and directions, and could not use the time for other purposes.

Severance compensation in temporary employment contracts

On 13 March 2019, the Supreme Court declared that interim workers are not entitled to severance compensation upon regular termination of the interim relationship – thereby closing the *De Diego Porras* dispute.[9] In contrast to its position in previous procedures, which was not clear, the Supreme Court currently considers that Spanish regulation of interim

7 Case C-397/18, *Nobel Plastiques*.

8 Case C-266/14, *Tyco*.

9 ECJ 14 September 2016, C-596/14, *De Diego Porras*.

contracts and, according to the ECJ decision in *De Diego Porras II*,[10] their termination does not contravene Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

Tax exemption of severance compensation in senior management relationships

On 5 November 2019, another notable ruling from the Supreme Court dealt with the tax treatment of severance compensation for at-will termination of a senior management relationship.

In cases of termination of an ordinary employment relationship, the Workers' Statute stipulates the level of severance compensation, which is tax exempt, while in the case of senior management relationships, the level of severance compensation is agreed between the parties. If there is no agreement between the parties, severance compensation is set pursuant to Royal Decree 1382/1985, which regulates senior management relationships, at seven days' cash salary per year worked, which is the amount the Supreme Court has declared to be tax exempt.

Digital platforms and the gig economy

Rulings on the employment status of 'riders' (i.e., delivery workers who work for digital platforms, including home-delivery apps such as Deliveroo and Uber Eats) continue to generate debate. The latest chapter is the decision of the High Court of Justice of Madrid of 27 November 2019 declaring that workers providing delivery services for a technological platform must be classified as employees and subject to the Workers' Statute. This ruling is significant as it has been issued by the full High Court of Justice of Madrid, assembled specifically for this purpose in view of the contradictory rulings that have been handed down by social courts and other high courts. In agreement with this ruling is the one by the High Court of Justice of Asturias of 25 July 2019, which also declared the relationship between the riders and the company to be in the nature of employment. However, on 19 September 2019, the High Court of Justice of Madrid (not assembled in full, but a section of the Court)declared that there was no employment relationship between riders and digital platform companies.

This issue is expected to reach the Supreme Court, which will have to decide the matter and provide unifying legal doctrine, which will have to be followed by the lower courts.

Compensation and benefits

The National High Court has declared in its ruling of 24 May 2019 that compensation for paid leave must include all salary concepts, regardless of whether they have their basis in personal circumstances (academic titles, languages) or functional circumstances (night work, multitasking, etc.). The Court also declared that when the paid leave was due for reasons of work–life balance not doing so would constitute discrimination (both direct and indirect).

10 ECJ 21 November 2018, C-619/17, *De Diego Porras II*.

V OUTLOOK AND CONCLUSIONS

Looking at developments on the horizon for the next 12 months, it is almost certain there will be significant events.

From a legislative viewpoint, after a year with hardly any developments (and following previous years with little legislative work) and two general elections, the government newly elected in November 2019 has announced its intention of reformulating certain aspects of the labour reform implemented in 2012, namely (1) repealing the preferential application of company bargaining agreements over sector bargaining agreements, and (2) modifying the rules regarding the temporary non-application of collective bargaining agreements and their enforceability even when their temporary validity has lapsed.

Moreover, it is presumed that the new government may continue its proposed outsourcing and subcontracting reform (a reform initiated in 2016 and yet to be concluded) aiming at equal salaries and essential conditions of employment in contractor and contracting companies. It also intends to fight gender inequality in the workplace and tackle fraudulent temporary employment. The control and reduction of overtime is also one of the government's objectives.

The government and the trade unions have also announced the need to review current legislation and assess whether it should be adjusted to accommodate the new ways of working brought about by digital platform companies and the gig economy. There is a division of opinions on this issue, because, as seen in the rulings issued so far, some believe these new ways of working are covered perfectly well by the current legislation, while others believe it is not adequate and should be reformed accordingly.

Regarding union whistle-blowing, Directive 2019/1937[11] affords Member States broad discretion in transposing the Directive into national law, so it is possible that the protection it grants may be extended. The deadline for transposing the Directive is 17 December 2021.

As to case law developments, the ECJ has yet to rule on when paid leave commences – either on the first working day after the event triggering the leave takes place or on the day after the event.

It is also foreseeable that more rulings on the consideration of 'effective working time' may be issued, as this topic has regained pre-eminence as a source of conflict in employment relations because of recent legal reform and recent rulings.

Considering the economic prospects for 2020, there will possibly be an increase in the number of the types of collective procedures that tend to lead to judicial disputes, such as downsizings and modifications of employment conditions. Rulings in these disputes will help settle some controversial issues, such as how to manage those procedures in complex companies, including in groups of companies.

Furthermore, as previously mentioned, the Supreme Court seems certain to rule on the nature of the relationships between digital platforms and gig economy workers, as there have been contradictory rulings on this issue. A ruling by the Supreme Court would surely be significant, and may affect any subsequent new regulation of these relationships.

Finally, regarding the reform on gender equality introduced by Royal Decree-Law 6/2019,[12] it is expected that rulings will continue to be handed down and a body

11 Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law.

12 Royal Decree-Law 6/2019 on urgent measures to guarantee equal treatment and opportunities for men and women in employment and occupation.

of doctrine formed on the more controversial issues raised by the Decree-Law, such as the right to adjust and rearrange working hours, and ways of working to achieve a work–life balance without having to reduce working hours and salary. It is expected that some of these shall reach the Supreme Court and consequently it will ultimately issue unified doctrine on these topics.

Chapter 18

SWEDEN

Jessica Stålhammar[1]

I INTRODUCTION

Swedish labour law is regulated in different legislative acts and by collective agreements. There are approximately 680 collective agreements in the Swedish labour market. The key statutes concerning disputes are the Employment Protection Act, the Co-Determination in the Workplace Act and the Labour Disputes Act.

The purpose of the Co-Determination in the Workplace Act is that differences of opinion between employers and employees should be resolved through negotiations. If a party fails to do this, it risks having to pay damages. Therefore, disputes are resolved in the first instance through negotiation, of which there are three types: co-determination negotiation, dispute negotiation and agreement negotiation. Should the parties be unable to settle a dispute, the issue will be handled in court.

In the main, Swedish labour laws are more favourable towards the employee.

II PROCEDURE

i Objective grounds for termination of employment

According to the Act on Security of Employment, dismissal of an employee must be based on objective grounds, which can either consist of personal reasons or be the result of redundancy. Objective grounds for terminating an employment contract do not exist if it would be considered reasonable for the employer to relocate the employee to other work.

When an employment contract is terminated, the burden of justification rests with the employer.

ii Claim procedure – unfair dismissal

A dismissal is the termination of a contract based on grounds relating to an individual employee. The dismissal may be with or without a notice period. A dismissal without a notice period may be justified only if the employee has grossly neglected his or her obligations to the employer. Even then, it may not be based on circumstances known solely to the employer for more than two months before the obligatory information is given to the employee and the local union regarding the planned dismissal.

An employer who wishes to dismiss an employee because of circumstances that relate to the employee personally shall notify the employee to this effect in advance. In cases of

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dismissal without notice, notice shall be given at least one week in advance and for dismissal with notice, two weeks. If the employee is a member of a union, the employer shall also give notice to the local organisation of employees to which the employee belongs.

The employee and the local organisation of employees to which he or she belongs shall enjoy a right to have discussions with the employer about the measure to which the notification and notice to the union relate. Damages may be awarded for procedural faults, both to the employee and the union. Dismissals, like other terminations, cannot be implemented while negotiations with employee representatives are taking place.

If the employment contract is terminated because of personal reasons, the employee can declare the termination invalid, to have the objective grounds tried in court. The declaration will have the effect that the employment contract is not terminated prior to the final result of the dispute. The contract will continue and the notice period might be longer than originally stated. This rule does not apply in the case of dismissal without notice.

An employee seeking to have his or her dismissal declared invalid must inform the employer within two weeks and must file for court proceedings within two weeks of the end of the notice period or the end of any negotiations between a union and the employer.

In some cases, the employee may not wish to keep or regain his or her contract but only claim damages. If an annulment is not sought but damages are, the employer must be told no later than four months after the events for which damages are claimed – a period extended to four months from the end of the employment contract if the employee has not been properly informed of his or her rights. The actual court proceedings must be initiated within four months of the end of the notice period or the end of the negotiations.

Damages may be payable not only for lost income (i.e., economic damages, which, as a general rule, are linked to length of service) but also for the offence that the violation may have caused (i.e., general damages). The union can also be awarded damages for any violation of its rights.

Even if the court rules that the termination is invalid, the employer may refuse to reinstate the employee. If so, the employer will have to pay compensation according to the fixed sums stated in the Employment Protection Act, which vary according to the duration of the employment (from 16 months' pay for less than five years to 32 months' pay for at least 10 years of employment).

iii Claim procedure – redundancies

In general, it is accepted as redundancy when an employer decides to restrict its operation. The employer therefore normally decides alone when redundancy exists since the employer freely decides over its own organisation. When there is a redundancy situation, the employer must negotiate with the union – if the employer has a collective agreement or there are affected employees who are members of a union – before deciding what to do and carrying out the notices of termination.

Prior to any redundancy dismissal, the employer must first try to transfer the employee to another post. Other free posts within the company shall be offered to the employee.

The Swedish general rule states that the person who has worked the longest within the company may keep his or her employment. Therefore, the negotiations concern, inter alia, the order of priority of the employees and the necessary qualifications for remaining work tasks. If the two parties cannot reach a mutual understanding, the matter can be referred to discussions on a national level. Only after that is the employer entitled to make a final decision.

An employee who has left an employer because of shortage of work has the right of precedence, within his or her unit and collective agreement area, for nine months from the end of the employment. This right of precedence presupposes that the employment has lasted for at least 12 months, that the employee has informed the employer about his or her interest and that he or she is sufficiently qualified for the new job.

If the employer claims shortage of work as the objective grounds, but the employee believes that other reasons have been taken into consideration instead, the employee can claim that the termination should be declared void. The employee must do so within 14 days of the notice, as is the case with dismissal. An employer who breaches the rules shall be liable to pay not only salary and other employment benefits to which the employee may be entitled (i.e., economic damages) but also general damages. An employee who believes that the employer is in breach of the rules concerning the order of priority can only claim damages.

The union will be awarded substantial damages if the employer fails to consult the union in the prescribed manner.

iv Labour court, district court and arbitration tribunal

If local and central negotiations between the employee, or union, and the employer, or relevant employers' organisation, do not result in an agreement, the case is usually pursued in the Swedish Labour Court in Stockholm as the court of first and final instance. The Labour Court's procedure does not differ much from that of district courts.

If the employee is acting on his or her own, or is not a union member, or the employee is not bound by a collective bargaining agreement, the case is pursued in the district court. An appeal may be lodged with the Labour Court against a judgment by a district court. However, there are certain rules regarding leave to appeal.

Under some agreements, there are provisions for arbitration proceedings instead. Agreements on arbitration are normally permitted in employment agreements but, in some cases, may be modified by the courts on the grounds that they are unreasonable.

III TYPES OF EMPLOYMENT DISPUTES

Typically, all labour law disputes deal with issues concerning dismissal, redundancy, salary and benefits, vacations, relocation, discrimination, work environment, damages, protection of trade secrets and such.

A labour dispute can also relate to the interpretation or application of collective agreements or the right to take industrial action (such as strike, lockout or blockade).

IV YEAR IN REVIEW

There follows a short summary and assessment of the most significant cases during 2019.

i Employment

Case AD 2019 No. 17

Three employees had carried out work for a painting company. A dispute occurred over whether the painting company or a staffing company was their employer. In that specific case, the workers had carried out the job on the painting company's premises, under the supervision of the painting company and using the painting company's tools. Therefore, the

court ruled that the employees had been directly employed by the painting company and not by the staffing company. In addition, no one had informed the employees that the staffing company would enter into the employment relationship.

ii Dismissal

Case AD 2019 No. 2

An employee with a long length of service, and working at a distance, had repeatedly failed to report to the office and communicate with his manager. He was instructed to show up at the office more often. The employer had – both orally and in writing – informed the employee that he risked losing his employment if he did not improve his conduct.

Case AD 2019 No. 12

A CEO had terminated his employment without notice. No notice period was agreed between the CEO and the employer. The court stated that a reasonable mutual notice period for a CEO is six months.

Case AD 2019 No. 35

A company within the construction industry had dismissed its employee without notice because of allegations concerning the theft of tools. The court agreed with the company that, because of personal reasons, there were objective grounds for terminating the employment without notice, since the employer had met the burden of proof and shown that theft had taken place.

Case AD 2019 No. 38

An employee at the Swedish Migration Board was dismissed without notice for misuse of a database. The court found that there were no objective grounds for dismissal without notice, since the employee did not act for his own interests or to disrupt operations; neither did he breach any secrecy clauses or break the law.

iii Redundancy

Case AD 2019 No. 9

A redundancy situation had occurred at a workplace. A manager had informed five employees that a previous period of employment would be credited to the employees. The manager had no mandate to make a decision on this matter. Also, the claim of reliance on this by the employees was not justified since they had contented themselves with merely oral representations on the matter, without their having to provide information regarding their period of employment and without ensuring that the arrangement was checked higher up in the organisation. The case shows the importance of having detailed routines to establish which decisions may be taken by managers at various levels in the workplace.

iv Collective agreements

Case AD 2019 No. 34

A trade union had repeatedly summoned an employer to negotiate a collective bargain agreement. The employer had neither replied or appeared at the negotiations. The court ruled that the employer had to pay damages of 50,000 kronor to the trade union.

v Discrimination

Case AD 2018 No. 74

A woman had been employed for a probationary period of six months from 14 December 2015. Before starting work, the woman had told the employer that she was pregnant. From 4 April 2016, she was on sick leave and then on maternity leave. On 10 May 2016, the employer told her that her probationary period was to be discontinued. The woman thereafter argued that she had been the subject of discrimination.

The Labour Court stated that discontinuing employment was a disadvantage for the woman. However, since the woman could not prove that the pregnancy itself had been a factor in the decision to end her employment, the court concluded that there had been no discrimination against the woman.

V OUTLOOK AND CONCLUSIONS

Sweden held national elections in September 2018. As a result of the outcome, Sweden was initially unable to form a new permanent government, although the crisis was finally resolved in January 2019, following coalition negotiations that saw Social Democrat leader Stefan Löfven returned for a second term in office.

Disputes concerning discrimination issues will still be of significant interest in the future and the number of court cases will probably increase. The 'handshaking' judgment in Case AD 2018 No. 74, concerning a prospective employee's refusal to shake hands, on religious grounds, produced lively discussion in Sweden. Many people argue that a company should be able to decide how its employees should greet each other in the workplace. We feel sure there will be other similar cases in the near future.

During 2018, there was one verdict concerning non-solicitation clauses. As this type of clause, and others concerning customer protection, are becoming a more common feature of employment contracts, we are very likely to see additional disputes within this area.

With the increase in awareness resulting from the #MeToo movement, there have also been a fair number of sexual harassment cases arising in workplace environments. Swedish authorities and companies will continue to work on suitable policies and strategies to provide ways to handle and minimise this global issue.

Chapter 19

SWITZERLAND

Davide Jermini and Alex Domeniconi[1]

I INTRODUCTION

The way in which a labour and employment dispute is resolved in Switzerland depends essentially on whether (1) the employment relationship is governed by private law or public law, and (2) the dispute arises from an individual employment relationship (individual dispute) or from a collective labour agreement between employers or employer organisations and trade unions (collective dispute).

This chapter focuses mainly on individual disputes with private employers, which are governed by federal laws to a large extent and, therefore, harmonised at country level. On the other hand, disputes concerning public sector employment relationships are governed by a variety of communal, cantonal and federal laws, depending on the public body involved. Although the two kinds of employment relationships were treated in a very different manner by the courts in the past, nowadays we are witnessing a growing rapprochement between the two statutory systems, which is reflected in the similarity of the disputes and in the procedures used to resolve them. More specifically, the freedom of contract that characterises Swiss private employment law has been increasingly eroded for social protection reasons (e.g., by the introduction of minimum wages in certain regions and for certain professions professions and through an increased protection against abusive termination for older employees), while at the same time the public employment relationships tend to be more flexible and less protective for the employee (e.g., by abolishing the status of civil servant and through the introduction of terminable employment agreements). Also, with respect to the resolution of the related disputes, the two types of employment relationships are becoming more similar, for instance through the increasing use (including in the public sector) of consensual termination agreements.

The Swiss Code of Obligations (CO), the Federal Labour Act and the Swiss Code of Civil Procedure constitute the main sources of legislation for private labour and employment disputes. The Federal Act Governing the General Applicability of Collective Labour Agreements, the Federal Data Protection Act, the Federal Act on Gender Equality, and the Federal Act on Information and Consultation of Employees represent additional significant sources. Depending on the specific circumstances of the individual case, a number of other laws, ordinances or regulatory provisions may play an important part in labour and employment disputes, such as the Federal Act on Private International Law, the Federal Merger Act and the Federal Act on Foreigners.

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The fairly liberal character of Swiss private employment law is reflected in the CO, which contains – in addition to certain mandatory provisions and other semi-mandatory provisions that may not be waived to the detriment of the employee – a variety of discretionary provisions, thus providing enough scope for tailor-made solutions. The CO regulates individual employment contracts, collective employment contracts and those known as standard employment contracts, which are federal or cantonal enactments regulating working conditions for certain specific professions. The Federal Labour Act, on the other hand, lays down rules on health protection, working hours and rest periods.

In general, Swiss law appears to be well balanced in terms of the rights and duties of employers and employees; when compared with other jurisdictions, however, the system is fairly liberal, for example with respect to the possibility of terminating an employment relationship. It is not a coincidence that, unlike some of its neighbouring countries, strikes are very rare in Switzerland, although the right to strike is expressly provided for in the Federal Constitution. The 'peace at work' that we are still experiencing is concomitant with the long tradition of avoiding industrial conflicts through negotiation.

II PROCEDURE

In 2011, a unified civil procedural code (CPC) was introduced in Switzerland with the aim of ensuring a uniform application of substantive civil law throughout the country.

As a general rule, a civil litigation has to be preceded by a conciliation attempt before a conciliation authority. Although the parties may, with mutual consent, waive the conciliation proceedings in favour of disputes with a litigious value of at least 100,000 Swiss francs, this is seldom the case, especially in employment law litigation, which generally appears to be well suited to conciliation, both because of the personal involvement of the parties (as well as on an emotional level) and because of the fact that evidence is often based on documents (without the need for expert opinions or a long discovery phase). An application for conciliation triggers pendency. The conciliation hearing, at which the parties (with few exceptions) have to appear in person, must take place within two months of the date on which the application was received by the conciliation authority. If the parties fail to reach an agreement during the conciliation proceedings, the conciliation authority grants an 'authorisation to proceed', allowing the claimant to file the action in court within three months. Conciliation proceedings usually last between a few weeks and a few months.

As regards substantive proceedings, the CPC provides for simplified proceedings in disputes with a litigious value of up to 30,000 Swiss francs. Other than ordinary proceedings, which apply when the litigious value is higher, the court shall establish the facts *ex officio* and no court costs are charged to the parties, unless a party has proceeded in bad faith or wantonly. Compared to ordinary proceedings, simplified proceedings are more oral-oriented, faster and provide for a certain ease of pleading given a more active role of the court. First instance proceedings typically last from one to three years depending on the circumstances of the case and the type of proceeding (simplified or ordinary) applying to it.

The organisation of the conciliation authorities and of the civil courts is not governed by federal law and differs from canton to canton; it is also subject to local needs and resources. Claims arising from an employment relationship must be filed with a district court, except in certain cantons that have established specialised employment courts. Appeals against

first instance decisions are normally brought to the ordinary cantonal courts of appeal and afterwards to the Swiss Federal Supreme Court. The claim must be written in the official language (German, French, Italian or Romansh) of the canton in which the claim is filed.

Class actions are not permitted under Swiss civil law and, consequently, claims must be filed by individuals, although there are some particular situations in which multiple parties are allowed to act jointly. Disputes between the parties of collective labour agreements are typically resolved by conciliation offices – usually at cantonal level or occasionally at federal level, if the dispute extends beyond the territory of a canton – or by arbitral bodies.

III TYPES OF EMPLOYMENT DISPUTES

Employment disputes may arise for a number of reasons. Typical disputes in this context mainly involve termination (e.g., abusive termination, unjustified immediate termination, termination agreements and settlement agreements), salaries and rewards, certificates of employment, discrimination and protection of the employee's personality.

A termination may be considered abusive if a party imposes it:

a because of a quality inherent in the personality of another party (unless that quality relates to the employment relationship between the parties or significantly impairs cooperation within the enterprise);

b because the other party exercises a constitutional right (unless the exercise of that right violates a duty of the employment relationship or significantly impairs cooperation within the enterprise);

c to solely frustrate the forming of claims by another party arising out of an employment relationship;

d because another party asserts, in good faith, claims arising out of the employment relationship (also known as 'dismissal for revenge'); or

e because the other party performs compulsory Swiss military, civil defence or a legal duty that is not voluntarily assumed.

Moreover, the notice of termination of an employment relationship by the employer is deemed abusive if it is given (1) because the employee belongs or does not belong to an employees' organisation, or lawfully exercises a union activity, (2) during the period the employee is an elected employee representative in a company institution, and the employer cannot prove a justified motive for the termination, or (3) in connection with a mass dismissal without prior consultation of the employees.[2] The notice of termination remains valid even if it is deemed abusive by a court. However, the employer who abusively terminates an employment relationship is required to pay an indemnity to the employee. This indemnity may not exceed the employee's salary for six months and is determined by the court.

A termination with immediate effect without good cause entitles the employee to a claim for damages in the amount he or she would have earned if the employment relationship had been terminated observing the notice period or on expiry of its agreed fixed duration. In addition, the employer may be ordered to pay the employee an indemnity determined at the discretion of the court, taking into account all circumstances of the case. However, the indemnity may not exceed the equivalent of the employee's salary for six months. On the other hand, if the employee, without a valid reason, does not appear at the workplace or

2 See Art. 336 CO.

leaves it without notice, the employer shall be entitled to a claim for compensation equal to one quarter of the employee's wage for one month; moreover, the employer shall be entitled to compensation for additional damages.

Disputes about remuneration aspects of an employment relationship are quite frequent, in particular in connection with bonuses. On this specific subject there is a rich and constantly evolving case law, as the bonus is a fairly common form of remuneration that is not expressly regulated in the CO. Remuneration disputes often concern a number of other particular situations, such as on-call work, or arise in connection with other claims by the employee, such as the right to refuse to work owing to inaction or omission by the employer.

The issuance of certificates of employment often gives rise to legal disputes. The employee may request from the employer – at any time – a certificate concerning the nature and the duration of the employment relationship, his or her performance and his or her conduct (known as a qualified work certificate). In principle, the certificate of employment should promote the employee's professional career and should therefore be written in a benevolent manner. However, benevolence finds a limit in the duty of completeness and of telling the truth. These two principles do not always coincide, giving rise to disputes between employees and employers.

The courts are also frequently faced with disputes concerning the protection of the employee's personality. The employer shall respect and protect the employee's personality, having due regard to the employee's health and care for the preservation of morality. In particular, the employer shall ensure that the employee is not sexually harassed and that victims of sexual harassment are not further disadvantaged.

IV YEAR IN REVIEW

i Termination in cases of sickness

The Federal Supreme Court was recently asked to decide whether a termination of a sick employee at the end of the protection period stipulated in Article 336c CO may represent an abusive termination.

An employment relationship of indefinite duration can be terminated by either party subject to the statutory or contractual period of notice.[3] In principle, no special reasons are required to give notice of termination. However, the freedom of termination is limited by the prohibition of abuse. A sickness that leads to incapacity to work and thus affects the employment relationship constitutes in most cases legitimate grounds for termination, at least to the extent that the protection period pursuant to Article 336c CO has expired. On the other hand, the termination could be deemed abusive if the sickness-related impairment was due to the breach of a duty of care incumbent on the employer. To be abusive, the termination requires a causal link between the banned motive for termination and the termination itself. In other words, the reason for termination that has been challenged as abusive must have played a decisive role in the employer's decision to terminate the employment relationship.

In the case at hand, the employee did not prove that his sickness was the result of a breach of the employer's duty of care. The termination was therefore considered not to be abusive.

3 Art. 335 Para. 1 CO.

ii Termination in cases of conflict between employees

The Federal Supreme Court was recently faced with a case of a termination given for alleged sexual harassment. An employee, after having had a consensual sexual relationship with a work colleague, was accused by the latter of having sexually harassed her. The employer heard separately both employees twice, whereby the male employee denied the sexual harassment on the occasion of the hearing and, giving privacy as his reason, did not provide any further information on the relationship between him and the female employee. The employer duly terminated the employment relationship with the male employee (a manager) reproaching him for a breach of the duty of loyalty because he did not actively contribute to the clarification of the facts.

Abuse of a termination can also result from the manner in which the right of termination is exercised. In conflict situations, particularly in the case of unilateral accusations, a termination can be abusive if the employer does not sufficiently investigate the accusations. However, the burden of proof shall lie with the employee claiming the abuse.

A breach of the duty of loyalty by an employee who refuses, on the grounds of privacy, to collaborate in the clarification of accusations of sexual harassment brought against him by another employee is sufficient to exclude any abuse in the termination.

iii Non-competition clauses

Employment agreements often provide for post-contractual non-competition clauses. However, whether and under which conditions these can actually prevent competition from former employees is subject to a number of uncertainties.

In a case brought before the Federal Supreme Court an employer asked an employee to pay a penalty for an asserted violation of a contractual non-competition clause. The controversial issue was the extent of the scope of this clause. The employee worked as marketing assistant and according to the employment agreement was responsible for 'creation of sales concepts, preparation and implementation of trade fairs or events, advertising, sales promotion activities, sales and product documentation, organisation, and home page and internet'. The non-competition clause was worded as follows: 'The marketing assistant undertakes to refrain from any competing activity after termination of the employment relationship – i.e., not to engage in any business that competes with the company for his own account, nor to be active or participate in any such business. The prohibition of competition applies to the territory of Switzerland, for a period of three years. In the event of a breach of the non-competition clause, a contractual penalty of 30,000 Swiss francs will be charged. Payment of the contractual penalty does not cancel the non-compete obligation.'

A non-competition clause may not prohibit any activity except a competing activity; it may not, therefore, extend beyond the scope of the employer's activity. The prohibition on performing 'any competing activity' fulfils the requirement of Article 340a CO, at least to the extent that the competing activity is determined or determinable by general methods of interpretation.

A marketing position, even if it is related to the planning, implementation and monitoring of the company's activities, is not per se sufficient reason to prohibit all activity in a competing company on the basis of knowledge of technical, organisational or financial information that the employer would like to keep secret.

In this decision the Federal Supreme Court has eliminated at least one of the uncertainties related to non-competition clauses by making unmistakably clear that the parties to an employment agreement can also validly agree to a prohibition of 'any competing

activity'. Although such non-competition clauses in employment agreements are valid, they can still be limited by a court as before. This means that the court can limit the extent of the non-competition clause.

iv Overtime

An employee who, after having received notice of the termination of his or her employment agreement, modifies his or her time sheet by entering overtime does not necessarily commit fraud, as long as the overtime hours subsequently entered in the working-time registration system were actually performed by the employee.

v Bonuses

In 2019, the Federal Supreme Court was once again asked to rule on the legal qualification of bonuses and in particular on the distinction between salary and gratuities.

Where an amount (no matter the designation, whether bonus or gratuity) is determined or objectively determinable (i.e., it has been contractually promised in principle and its amount is determined or must be determined on the basis of predefined objective criteria such as profit, turnover or a share in the operating result and is not dependent on the employer's assessment), it must be considered a (variable) component of the (variable) salary, which the employer is obliged to pay to the employee. On the other hand, if the bonus is indeterminate or objectively indeterminable (i.e., its payment depends on the employer's goodwill and its amount depends essentially on the employer's latitude in that it is not fixed in advance and depends on the subjective assessment of the employee's performance by the employer), it must be qualified as a gratuity.

In the present case, although the parties had agreed on the principle of payment of a bonus and they intended to set the amount of the remuneration according to a predefined objective criterion (a percentage of the 'profit before tax'), they never had the opportunity to set this percentage during subsequent discussions. The cantonal judges found that the parties had understood each other, but their actual preferences did not coincide as to the quantum in dispute (further discussions were necessary for an agreement to be reached). Accordingly, the cantonal judges established the existence of a clear disagreement. The appellant himself acknowledged this in his pleading, which dealt with the issue of subjective interpretation, but he did not draw the necessary conclusions from this. He was of the opinion that the cantonal court was bound not to stop at the actual intention of the parties but should have applied the principle of mutual trust and confidence, which would have led it to hold that the variable part of the salary was well determined. According to the Federal Supreme Court, since the cantonal court had established the existence of a clear disagreement, it was up to the appellant to question the result of the subjective interpretation reached by the cantonal court, which he did not do. It followed that the remuneration provided for in the employment contract, and agreed in principle, was not determinable and could not be regarded as a component of the salary.

vi Home office

In another case judged by the Federal Supreme Court, among other things it was disputed whether an employee can claim compensation for using a room in his or her private home for work purposes.

The employer in the case argued to no avail that the employment agreement did not provide for an obligation to pay compensation because no 'office or archive rent' had been agreed.

An employer is obliged to provide its employees with a suitable workplace. Irrespective of the absence of agreements, if the employer does not provide such a suitable workplace, it has to bear the costs of establishing the necessary work infrastructure at home in accordance with Article 327a CO. Pursuant to this rule, the employer has to reimburse the employee for all expenses necessarily incurred in the performance of the work. In the case in question, the Federal Supreme Court confirmed an obligation to pay compensation.

V OUTLOOK AND CONCLUSIONS

No significant changes to procedure that may affect employment disputes and their resolution are foreseen or expected to be announced during the next 12 months.

Topical themes that are likely to come to the attention of the courts in the coming years are those related to new forms of work performance (also called atypical work) that are not specifically codified, such as job-sharing, on-call work, freelance work, and home-office and part-time work. Certain atypical forms of work are becoming increasingly common, hence an increasing number of disputes in this area is to be expected.

In more general terms, the performance of work not directly rooted within an employer organisation (as in the Uber model) is still a focus of attention for the general public on an international scale, not only in Switzerland. Among the currently known forms of the gig economy are 'crowd work' and 'work-on-demand via app', in which the demand and supply for work activities are brought together online or through the use of apps. According to various media reports, a Lausanne court of first instance ruled in May 2019 that Uber drivers are to be considered employees, at least in connection with an Uber subsidiary's termination without notice of the cooperation of an Uber driver.

All the parties affected (authorities, social insurers and interest representatives) are trying to cope with the opportunities offered by atypical forms of work and new technologies. For the labour market to continue to operate fairly, references to the new forms of work or new means of making work available need to be incorporated within the existing legal framework in a proper way, without hindering the inexorable march of change. The greatest advantage of the atypical forms of work is the flexibility offered to both employer and employee, which reduces personnel costs for employers and gives employees more freedom. The main risks are the loss of legal protection for the worker and increasing social costs for the community. We expect major changes during the next few years to the way employment relationships are managed and, as a consequence, significant changes in the way employment disputes are resolved. In particular, we believe that the (already very thin) line between work-related and non-work-related activities will finally vanish.

Chapter 20

UNITED KINGDOM

Nicholas Robertson[1]

I INTRODUCTION

In the United Kingdom, employment tribunals are the principal forum for resolving employment disputes. The Employment Tribunals Act 1996 sets out the claims over which tribunals have jurisdiction. However, typically, many employment-related contractual disputes are dealt with in the civil courts; for example, disputes relating to restrictive covenants and high-value bonus disputes.

As employment law is heavily influenced by EU law, it will be interesting to see what the impact of Brexit will be on UK employment law.

II PROCEDURE

i Employment tribunals

Acas

From 6 May 2014, a mandatory early conciliation (EC) procedure with the Advisory, Conciliation and Arbitration Service (Acas) came into force to provide the opportunity for disputes to be resolved without resorting to a tribunal. As a result, a claimant must contact Acas prior to presenting a claim to a tribunal. Conciliation is intended to be confidential, impartial, independent and free. Acas takes a fairly light-touch approach to EC and the parties are not compelled to engage in the process. The Acas conciliation officer has one month to attempt to resolve the dispute, which may be extended by up to two weeks by agreement.

If EC is refused by one of the parties, or attempts at a resolution are unsuccessful within the established time frame, an EC certificate is issued confirming that Acas conciliation has been complied with. The claimant can then proceed to issue a claim.

Data subject access requests

Individuals have a right to make a data subject access request (DSAR) to access personal data that is held about them. In light of the General Data Protection Regulation (GDPR), which came into force on 25 May 2018, there has been a rise in the number of DSARs being made by employees to employers. Increasingly, the requests are in the context of ongoing disputes or a tribunal claim by employees as a means of obtaining advance disclosure of documents or using it as leverage to achieve settlement in view of the time and expense that a company can

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incur by responding to a DSAR. We have seen a corresponding increase in the investigations undertaken by the Information Commission Officer. DSARs are often complex, involving careful consideration of what constitutes personal data and who the data subject is.

Employment tribunal proceedings

All tribunal proceedings are regulated by the Employment Tribunals Rules of Procedure 2013 (the Tribunal Rules). In accordance with the Tribunal Rules, to commence proceedings, a claimant must present a completed ET1 claim form, to the tribunal. With effect from 26 July 2017, there is no fee for bringing or defending a tribunal claim.

One of the key factors an individual must consider before presenting a claim to a tribunal is the time limit applicable. Generally, a claimant has three months, starting from the date of the relevant event, to bring a claim. However, during the EC period, the time limit is paused and resumes the day after the parties have received the EC certificate. In addition, in limited circumstances, a claimant may apply for an extension of time to submit a claim. There are different statutory tests that must be met to extend the time limit, depending on the type of claim.

On receipt of the ET1, the tribunal will review it to ensure that it meets the minimum requirements for a valid claim. Once the claim has been accepted, it will be sent to the party defending the claim, known as the respondent. If the respondent wishes to defend the claim, an ET3 response form must be completed within 28 days of the date on which the respondent received a copy of the ET1 from the tribunal. As there is limited discretion to extend this deadline, a respondent may put in a holding defence until a more substantive defence can be drafted if necessary.

If no response is filed within the established time limit, an employment judge can determine the substance of the claim without a hearing, if it is considered to be appropriate in the circumstances. Otherwise, a date will be fixed for a hearing before an employment judge, sitting alone, to determine the claim. The respondent will be notified of the hearing and any decision, but will only be entitled to participate in the hearing to the extent permitted by the employment judge.

The Tribunal Rules permit the tribunal to make case management orders at any stage of the proceedings, whether on its own initiative or on application by the parties. Case management orders typically provide for disclosure, the preparation of the hearing bundle and simultaneous exchange of witness statements. Tribunals also have the power to list a case management hearing or hold a preliminary hearing to deal with any preliminary issues that may arise.

The main hearing may be heard by a panel of three individuals, made up of an employment judge and two lay members chosen from a panel of lay members. One lay member will come from an employer background (e.g., a human resources professional) and the other from an employee background (e.g., a trade union official). However, it is increasingly common for the main hearing to be heard before an employment judge sitting alone. Unlike other courts, and in accordance with the Tribunal Rules, the tribunal seeks to avoid undue formality and may itself question the parties or a witness, so far as is appropriate, to clarify an issue or elicit evidence. As with the civil courts, hearings are open to the public.

At the end of the hearing, if it was heard by a panel, the tribunal will try to reach a unanimous decision on the issues and will give a judgment. In some instances, judgments

can be reached by a majority of the panel. The judgment can either be announced orally or reserved to be given in writing as soon as practicable. In either case, the tribunal must give reasons for its decision.

A successful party does not automatically obtain an order for payment of its costs. In tribunals, unlike the civil courts, costs do not 'follow the event'. Tribunals do have the power to make a costs order, a preparation time order or a wasted costs order against a party's representative. However, these are awarded to the successful party in relatively limited circumstances. During the past few years, the number of costs awards by the tribunals has fallen, with only 209 being awarded in 2018–2019 out of the 121,111 claims that were accepted by the tribunals. The maximum cost award was £329,386.

A tribunal judgment can be challenged by a party either seeking a reconsideration or making an appeal to the Employment Appeal Tribunal (EAT). However, an appeal to the EAT can only be made on a question of law. Further appeals from the EAT are then heard by the Court of Appeal of England and Wales. The basis of an appeal to the Court of Appeal has to be either on a question of law or on the grounds that the judgment was one that no reasonable tribunal could have reached. It is necessary to obtain leave to appeal from the EAT or the Court of Appeal if one of the parties wishes to pursue an appeal. A further appeal from the Court of Appeal can be made to the Supreme Court, but leave to appeal must be obtained from the Court of Appeal or the Supreme Court. Only a handful of cases each year are appealed to the Supreme Court.

ii Civil court

A claim that arises from a breach of an employment contract can be brought in either a tribunal or a civil court. However, as a claimant can only claim up to £25,000 for a breach of contract claim in a tribunal, such claims are often brought in the civil courts.

A claimant has six years from the date on which the cause of action occurred to bring a claim in a civil court. However, in relation to a claim for an injunction (e.g., breach of restrictive covenants), any delay can seriously damage the claimant's prospects of success.

Before commencing proceedings in a civil court, a claimant must be aware of the cost involved in doing so. There is a fee for bringing a claim in a civil court, unlike in a tribunal, and the unsuccessful party is usually liable for a proportion of the other side's costs.

The civil courts are governed by the Civil Procedural Rules, which are far more formal than the Tribunal Rules.

iii Settlement

A dispute in a tribunal can be settled at any point, whether before or after proceedings have been instigated, up until the tribunal determines the claim. This can be achieved through Acas or private negotiations. If an agreement is reached through Acas, agreements do not have to be in writing to be legally binding. However, the terms of the agreement will generally be recorded on a standard form,[2] which contains all the agreed terms and is signed by the parties as proof of the agreement. If settlement is reached via private negotiations, this will be recorded by way of a settlement agreement that must satisfy certain statutory requirements. The key requirement is that the claimant must be advised by a relevant independent adviser of the terms and effect of the settlement.

2 Acas settlement form, known as a COT3.

Mediation also forms part of the employment landscape for all types of disputes; however, it is not commonplace. Settlement can be reached by way of private mediation or judicial mediation. Cases suitable for judicial mediation are generally identified by the employment judge at the first case management hearing.

In a civil court, if the parties wish for the terms of the settlement to be kept confidential, a *Tomlin* order may be used. This is an order that stays all further proceedings on agreed terms and enables the parties to apply to the court to enforce the agreed terms, but the terms of the agreement itself are not contained within the order.

III TYPES OF EMPLOYMENT DISPUTES

i Unfair dismissal

Under the Employment Rights Act 1996 (the ERA 1996), employees who have the requisite two-year qualifying period of service have a right not to be unfairly dismissed. However, if the dismissal is for an automatically unfair reason, the qualifying period does not apply in most cases.

A dismissal will be deemed unfair unless the employer can show that it was for one of the five potentially fair reasons, which are lack of capability or qualifications, misconduct of the employee, redundancy, statutory requirement or some other substantial reason to justify dismissal. The employer will also need to show that the dismissal was reasonable and that it was carried out using fair procedures.

Unfair dismissal awards usually consist of a basic award and a compensatory award.

As at 1 January 2020, a basic award is capped at £15,750 and a compensatory award is capped at £86,444. Individuals can be awarded an amount up to the compensatory award cap or 52 weeks' gross salary, whichever is lower. The caps are increased on 6 April each year.

ii Whistle-blowing

The ERA 1996 protects employees or workers from being dismissed or suffering any detriment at work if they have made a 'protected disclosure'. To qualify as a protected disclosure, an individual must have disclosed information that they reasonably believe relates to one of the six categories set out in the ERA 1996 (e.g., breach of a legal obligation or a criminal offence). The individual must also have a reasonable belief at the time the disclosure is made that the disclosure is in the public interest. The disclosure must also be made internally within the employer's organisation or externally to one of the 'prescribed persons' set out in Section 43d to 43h of the ERA 1996 (e.g., an industry regulator). There are additional requirements that must be complied with if the disclosure is being made to a prescribed person.

The dismissal of an employee will be automatically unfair if the reason, or the principal reason, is the qualifying disclosure. It is not necessary to have a minimum period of service to bring such a claim. A 'detriment' claim can be brought by a 'worker', a term that is defined more widely than the term 'employee' and includes, among others, agency workers, freelance workers and trainees, as well as employees. A detriment can include unfair treatment, threats of or pursuance of disciplinary action, or performance management as a result of an individual having blown the whistle.

There is no cap on compensation for whistle-blowing, whether an unfair dismissal or a detriment claim.

iii Discrimination

Under the Equality Act 2010 (the EqA 2010), there are four forms of discrimination claim that an employee or a worker can bring, namely direct discrimination, indirect discrimination, harassment and victimisation.

Direct discrimination is when an individual is treated less favourably because of a protected characteristic. The protected characteristics are age, disability, gender reassignment, marital or civil partnership status, pregnancy and maternity, nationality, race or colour, religion and belief, gender and sexual orientation. Generally, direct discrimination is not justifiable; however, direct age discrimination can potentially be justified if it is a proportionate means of achieving a legitimate aim.

An employer has a duty to make reasonable adjustments for an employee who qualifies as disabled. Failure to do so can result in an employee bringing a claim for failure to make reasonable adjustments under the EqA 2010.

Indirect discrimination relates to a provision, criterion or practice (PCP) that is not intended to treat anyone less favourably but has the effect of unlawfully putting an individual with a protected characteristic at a disproportionate disadvantage for a reason connected to that characteristic. A PCP will amount to indirect discrimination unless it can be objectively justified by the employer.

Harassment is any unwanted conduct relating to a protected characteristic (excluding marriage and civil partnership, and pregnancy and maternity) that has the purpose or is reasonably viewed as having the effect of violating an individual's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for an individual. For example, making racial or ageist remarks or making unwanted advances of a sexual nature in the workplace would be classified as harassment. An individual need not have the protected characteristic that is the subject of the abuse; for example, it can be based on the perception that they have the protected characteristic.

Victimisation occurs when an individual is subjected to a detriment because either the individual has carried out a protected act or it is believed that the individual has carried out or may carry out a protected act. Section 27(2) of the EqA 2010 sets out what may qualify as a protected act. The most obvious form of victimisation is when an individual is penalised by an employer for bringing discrimination proceedings against that employer; for example, if an employer gives an adverse reference as a result of the proceedings having been instituted.

Compensation for all forms of discrimination claims is not capped. In 2018–2019, the highest discrimination award made by a tribunal was in relation to a disability discrimination claim in the amount of £416,015. However, most cases are settled privately.

iv Employment status

Whether an individual is an employee, worker or self-employed is of key importance in relation to any employment benefits or rights he or she may have. For example, certain rights are available to employees and workers, such as the right to the national minimum wage and paid annual leave, but only employees benefit from certain other rights, such as the right not to be unfairly dismissed. In addition, the tax treatment of an individual will depend on his or her employment status.

In general terms, an employee is someone who has entered into or works under a contract of employment. An individual is self-employed if she or he is in business on his own or her own account. In contrast, a worker is an individual who has entered into or works under a contract of employment, or any other contract whereby the individual performs the work

personally for another party to the contract, but the individual is not carrying out business on his or her own behalf. In determining employment status, the courts, tribunals and Her Majesty's Revenue and Customs will look at a number of factors governing the arrangement between the parties. There is no single conclusive test for an individual's employment status. Under tax rules,[3] an individual who would have been an employee if engaged directly by the end user (instead of being provided via an intermediate company such as a personal service company) may be deemed to be an employee for tax purposes (see See Section IV for further detail).

v Other disputes

Other common disputes heard in a tribunal are those relating to holidays and wages. Holiday disputes usually involve employees or workers claiming they have been underpaid or prevented from taking annual leave, whereas wage disputes usually arise from an employer making an unauthorised deduction from a worker's wages.

vi High Court disputes

Employment claims issued in the High Court are typically either high-value breach of contract claims (e.g., in relation to notice periods or bonus issues) or claims relating to restrictive covenants (e.g., when an employer seeks to restrain an employee from acting in breach of a covenant). Breach of contract claims valued at more than £25,000 must be issued in the High Court or County Court as the tribunals do not have jurisdiction to hear such claims.

When a dispute relates to post-termination restrictions, an employer may seek to enforce the restrictions by asking the High Court to grant an injunction. It is possible to apply for an interim injunction or a final injunction, or both. An injunction is an equitable remedy, granted at the discretion of the court, and the court will consider the competing interests of the parties when exercising its discretion.

At the interim or interlocutory injunction stage, before a final determination of rights has taken place, the High Court must take whichever course of action is likely to 'hold the ring' until trial. The factors that the High Court should take into account when exercising its discretion in a claim for injunctive relief were set out in *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396. Broadly, the High Court is required to consider whether there is a serious issue to be tried, whether damages would be an adequate remedy and which party would be most prejudiced by its decision to grant or decline the interim injunction.

Once the trial has taken place, a final injunction may be granted in respect of the successful party's rights. As an alternative to seeking an injunction (or if the injunction is refused), an employer can consider other types of High Court claims; for example, a claim for damages for breach of covenant against an employee and, where relevant, any new employer who has facilitated or procured a breach.

3 Off-payroll working rules, known as IR35; see Section IV.

IV YEAR IN REVIEW

i Key themes

Sexual harassment

Sexual harassment has been a topic of concern throughout 2019, spurred on by the #MeToo movement, which gathered momentum in the wake of high-profile sexual harassment scandals in both the United Kingdom and the United States. In the United Kingdom, a parliamentary select committee, the Women and Equalities Committee (WEC), launched an inquiry into workplace sexual harassment and published its report in July 2018, outlining a five-point plan with recommendations for the government to implement to address the issue. The UK government responded to this report in December 2018, setting out the recommendations it had accepted and would begin to implement, and those on which it would consult. Subsequently, in June 2019, the WEC published its report on the use of non-disclosure agreements (NDAs) and, more importantly, the misuse of confidentiality clauses in circumstances of workplace harassment or discrimination, and called upon the government to 'reset the parameters' around the use of these, and made a series of 45 recommendations. In July 2019, the UK government published its own consultation and, while acknowledging that NDAs were important, it agreed that using NDAs as a tool to keep victims of harassment and discrimination suppressed and silenced was unacceptable. As such, the government committed to introduce new legislation in this area. Until then, employers do still need to ensure that clauses are properly drafted and permit legitimate disclosure of wrongdoing by employees. Employers need to be aware that it is increasingly difficult to ensure that settlements can be kept private, as there have been a number of private settlements that have seen the light of day.

Data privacy

Employers often wish to monitor their workplace, for example, through CCTV or monitoring of emails and devices. Although the Data Protection Act 2018 does not prevent workers from being monitored, there is a balance to be struck, with respect for a worker's statutory right to privacy and appropriate processing of personal data. Monitoring has been a contentious issue, with a few cases having been heard in 2019 relating to covert monitoring, each of which has had a significant yet differing outcome. As the United Kingdom awaits Brexit, it seems inevitable that this area of law will continue to develop.

Whistle-blowing

Whistle-blowing continues to be a complex area in employment law. The past year saw the European Parliament formally adopt Directive (EU) 2019/1937, designed to improve on and harmonise the current whistle-blowing protections within the European Union, and which will be implemented across 28 countries by May 2021. The new Directive will build on the existing legislation in the United Kingdom, including the requirement for organisations with 50 or more employees to establish internal channels and procedures to respond effectively to reported concerns within a set time frame. Case law has also continued to develop in this area, with recent Supreme Court case decisions also widening the scope of whistle-blowing protections. It, therefore, seems inevitable that this area of law is likely to develop dramatically over the coming year.

IR35

IR35 is the collective name given to two sets of tax legislation; the first set has been in force since 2000, and the second (the 'off-payroll reforms' (OPRs), applicable to public companies) has been in force since 2017. Introduced to resolve the issue of 'deemed employment', where workers are engaged on a self-employed basis, usually through an intermediary (i.e., a personal service company), IR35 is now being significantly amended. This set-up is beneficial to the engaging company, as it removes the company's obligation to pay employers' National Insurance contributions and apprenticeship levies, or offer employment benefits to these self-employed workers, such as holiday and pension benefits. It makes it much more difficult for an individual to claim they are an employee. Employer concerns throughout 2019 have centred around the forthcoming rollout of OPRs to private sector businesses, which are currently expected to come into force in April 2020. This means that these private sector businesses, in their new role as the end client, will be responsible for determining the employment status of hired contractors, rather than the contractors themselves being considered the end client. Determination of whether a contractor is caught by IR35 has been considered in several cases; however, this area of law will undoubtedly see further developments in the coming year.

Good Work Plan

The Good Work Plan is a programme designed by the government to ensure that the labour market works favourably for everyone and provides adequate protections for workers and their rights. Under this new Plan, the government has proposed several important changes, such as the reform of family-related leave and pay, proposals for neonatal leave and pay and the creation of a new single enforcement body (SEB). The aim of the SEB is to ensure that vulnerable workers are protected from exploitative practices and that they are aware of and can exercise their rights, and also to create a level playing field for businesses that do comply with the law.

ii Significant cases

Whistle-blowing

Reported cases on whistle-blowing have continued, and 2019 has seen significant Supreme Court decisions. These cases continue to be of importance to employers because of the possibility of uncapped damages, personal liability for managers involved in penalising whistle-blowers and reputational damage due to the public nature of hearings and easy access to judgments online.

The EAT, in *Elysium Healthcare No 2 Ltd v. Ogunlami* UKEAT/0116/18, considered the tribunal's approach to whether a worker had a belief in the breach of a legal obligation disclosed and the public-interest nature of the disclosure. The EAT held that the question of whether a claimant held a particular belief that a disclosure was in the public interest was ultimately a matter of inference for the tribunal. In addition, it is not necessary for an individual to explicitly refer to a breach of a legal obligation when making a disclosure, it is sufficient to establish a belief that the information disclosed showed a breach of a legal obligation. It, therefore, highlights that anything that is capable of amounting to a breach of contract that also has a public-interest element may amount to a qualifying disclosure.

Royal Mail Ltd v. Jhuti [2019] UKSC 55 is an important case that was recently decided by the Supreme Court, which considered the question of whether, in identifying the reason

for a dismissal, it is only the motivation of the ultimate decision-maker that matters. The Supreme Court overturned the Court of Appeal's decision and found that the fairness of a dismissal can be influenced by events that the dismissing manager was not aware of at the time. In this case, the claimant had complained of regulatory breaches to her line manager, who subsequently subjected her to a series of detrimental acts. A different manager later genuinely took the decision to dismiss the claimant on account of poor performance. The dismissing manager did not have the claimant's complaints to her line manager in mind when she made the decision to dismiss, as the line manager had misled the dismissing manager over the existence of the complaints. The court held that where an individual who is in the 'hierarchy of responsibility above the employee', such as a line manager, conceals the real reason for dismissal from the dismissing manager behind an invented reason, it is necessary for the court to 'penetrate through the invention' to look at the real underlying reason for the dismissal.

Although the facts of this case are rare as it involves the fabrication of grounds for dismissal, in instances where there are whistle-blowing disclosures and any other form of human resources process (e.g., a disciplinary or grievance process), the two processes should be separated, with different decision-makers being appointed for each.

Harassment

Reported cases on workplace harassment, specifically sexual harassment in the workplace, have increased within the UK employment law landscape this year, and there have been a number of interesting issues.

In *Raj v. Capita Business Services Ltd & another* UKEAT/0074/19/LA, the claimant's employment was terminated on account of performance issues and the claimant then brought a tribunal claim regarding, among other things, allegations of sexual harassment relating to an incident where his female manager massaged his shoulders while at his desk. The tribunal found that although the claimant had been subjected to unwanted physical contact by his manager, there was no evidence that the conduct was related to sex. The tribunal held that the behaviour was gender-neutral as the actions were the result of a misguided attempt at encouragement, and it dismissed the claim. The claimant appealed on the grounds that the tribunal erred in law by failing to apply the shifting burden-of-proof provisions, which would result in the burden of proof being placed on the respondent rather than the claimant, to determine whether unlawful harassment relating to sex had occurred. However, the EAT upheld the tribunal's finding and held that not all of the elements necessary to shift the burden of proof had been proven by the claimant. This case highlights the need to establish all the necessary elements in a claim for sexual harassment and in particular that a gender element is necessary for it to amount to unlawful harassment. It also demonstrates the need for employers to set clear policies and deliver training sessions to establish what is acceptable conduct in the workplace.

Discrimination

The themes arising from discrimination cases continued to be varied in 2019. In the ongoing saga of *Ali v. Capita Customer Management Ltd* and *Hextall v. Chief Constable of Leicestershire Police* [2019] EWCA Civ 900, both cases were appealed to the Court of Appeal on the question of whether it was unlawful sex discrimination, as prohibited by the EqA 2010, for men to be paid less on shared parental leave than women on maternity leave. In *Ali*, the company did not offer voluntary enhanced shared parental leave pay and as a result

the employer faced a claim for direct sex discrimination for pay at the higher voluntarily enhanced maternity rate that his wife was entitled to. In *Hextall*, the individual brought a claim for indirect sex discrimination on the basis that shared parental leave would be taken by a higher proportion of men, whereas maternity leave would predominantly be taken by women. The Court of Appeal held in both cases that it did not amount to either direct or indirect discrimination, nor a breach of the equal pay sex quality clause. This was due to the fact that the purpose of shared parental leave was considered different from that of maternity leave, which was designed to enable the mother to prepare for and cope with the latter stages of pregnancy and then to recover. These cases, therefore, demonstrate that it is not necessary for employers to ensure that individuals receive the same level of payment on shared parental leave and maternity leave and it remains at the discretion of the employer whether to do so. Both cases have been appealed to the Supreme Court.

Disability discrimination also remained highly topical in 2019. In *A Ltd v. Z* UKEAT/0273/18/BA, the EAT allowed an appeal against a tribunal decision that the claimant's complaint of discrimination under the EqA 2010 was correctly founded. The claimant had an extensive history of severe mental health problems, including depression, schizophrenia and low moods, and was considered a disabled person for the purposes of EqA 2010. However, she suppressed this information from her employer and was therefore dismissed in view of her poor timekeeping. The tribunal found that the employer had constructive knowledge of the claimant's disability prior to her dismissal by way of the GP certificates and hospital certificate provided by the claimant to the employer. However, the EAT reversed this decision and confirmed that the tribunal erred in focusing only on what the employer ought reasonably to have done and failing to also consider what it should reasonably have known in order to reach its conclusion. In this instance, the EAT held that even if further enquiries had been made, the employer would not have reasonably been expected to know more because it was likely that the claimant would have continued to hide her mental health problems.

Base Childrenswear Ltd v. Otshudi [2019] EWCA Civ 1648 concerned an allegation of race discrimination. In this case, the claimant was summarily dismissed on the grounds of redundancy after only three months of employment and therefore commenced proceedings for race discrimination. Shortly before the tribunal hearing, the employer amended its defence to change the reason for dismissal to her conduct, namely suspected theft, rather than by reason of redundancy. The employer appealed on the grounds that there was no evidential basis for the tribunal and the EAT's finding that the claimant had proved that race was a factor in her dismissal. The Court of Appeal dismissed the appeal and found that the manager's persistence in lying about the reason for the dismissal formed a prima facie case of race discrimination and therefore shifted the burden of proof onto the employer to show that race played no part in the dismissal, which it failed to do. This cases demonstrates the importance of being honest to employees about the real reason for dismissal.

Data privacy

A topical theme coming out of data privacy law has specifically related to the interplay between employee monitoring and surveillance and individuals' fundamental right to privacy under Article 8 of the European Convention of Human Rights.

In *Garamukanwa v. United Kingdom* (70573/17) [2019] 6 WLUK 109, the European Court of Human Rights (ECHR) considered whether an employee's right to privacy was breached when the employer relied on material found on the employee's mobile phone. The

claimant had been involved in a personal relationship with a female colleague, which then ended. Subsequently, the claimant emailed her and other colleagues about his concern that she had formed a personal relationship with another colleague. Complaints were raised and the claimant was warned about the inappropriateness of his behaviour and later suspended and arrested by the police, who were investigating claims of harassment and stalking against the claimant. During the police investigation some material was passed to the employer by the police and the employer then used it to dismiss the claimant for gross misconduct. The tribunal and the EAT held that there was a sufficient connection to work in the communications for it not to be a matter purely of his private life, which the ECHR upheld. Further, he had voluntarily provided the disciplinary panel with some private communications.

In *López Ribalda and others v. Spain (applications Nos. 1874/13 and 8567/13)*, the Grand Chamber of the ECHR overturned its previous judgment and found that the right to privacy had not been violated. In this case, because of suspicions by employees, a Spanish supermarket installed both visible and hidden cameras and covertly monitored employees. The footage revealed five employees stealing from the supermarket and helping customers to do the same, and resulted in the employees' dismissal. The employees later brought unfair dismissal claims. The initial hearing held that the covert surveillance had been obtained unlawfully and thus violated their right to privacy under Article 8 of the European Convention of Human Rights. However, at the appeal stage, it was held that the installation of covert surveillance was justified by legitimate reasons and that it was necessary to distinguish, when considering the proportionality of covert video surveillance, the places in which the monitoring was being carried out. While the Grand Chamber observed the importance of informing monitored individuals clearly before the implementation of covert surveillance, on the case-specific facts, it could be said that there was an overriding requirement relating to the protection of significant public or private interests to justify a failure to notify the employees of the covert recording.

In contrast, the EAT in *Phoenix House Ltd v. Mrs Tatiana Stockman* UKEAT/0058/18/OO considered the issue of whether an individual's covert recording of a meeting with human resources personnel following an incident amounted to misconduct and, if so, whether the compensation awarded by the tribunal in relation to the individual's successful unfair dismissal claim should be reduced to nil. On appeal, the company argued that if it had known about the covert recording, it would have dismissed the claimant for gross misconduct and therefore her award should be reduced to zero. The EAT dismissed the appeal and held that the decision about whether any compensation should be reduced on account of an individual's behaviour will vary based on the importance attached by the particular employer to the conduct under consideration. In this instance, the tribunal had correctly placed importance on the fact that covert recordings were not listed as amounting to gross misconduct in the company's disciplinary policy nor had it been updated in light of the proceedings. Importantly, the EAT considered the purpose of covert recording as highly relevant and pointed out that because many individuals own devices readily capable of recording conversations, this reduced the likelihood that a covert recording would be done with the intention of entrapment. The fact that the claimant had only recorded the one meeting and not relied on it at any point during the internal grievance or disciplinary proceedings assisted in demonstrating that her intention had not been one of dishonesty.

For employers who believe that covert recording is not in line with company practice, this decision is an important demonstration that they must ensure it is conveyed clearly to employees this practice constitutes gross misconduct, preferably in writing or via the company handbook.

Employment contracts

Cases on restrictive covenants are often limited in number; however, several cases have been heard in 2019 that offer employers guidance on the enforceability of restrictive covenants and the importance of reviewing and drafting them with sufficient clarity. A particularly important case in 2019 was the Supreme Court decision in the matter of *Tillman v. Egon Zehnder Limited* [2019] UKSC 32. The Supreme Court considered whether a non-compete restriction was valid, because it would preclude the employee from holding any shares whatsoever for the purpose of investment only in a competitor and, if it was, whether the provisions could be severed. The Supreme Court unanimously allowed an appeal against the Court of Appeal's refusal to sever certain words from the non-compete restriction, which had meant that the covenant was void as an unreasonable restraint of trade. The Supreme Court held that the covenant could be severed to remove the offending words 'or interested in' from the restriction, which employed the following wording: 'directly or indirectly engage or be concerned or interested in any business carried on in competition with any of the businesses of [the Appellant]' without changing the meaning or effect of the covenant.

This decision makes the enforcement of restrictive covenants easier as drafting errors are less likely to cause the entire covenant to collapse. However, it is advised that drafting should always be clear and unambiguous – and challenges to covenants are likely to be fact-based rather than legally based.

IR35

In *Christa Ackroyd Media Limited v. HMRC* [2019] UKUT 0326 (TCC), the Upper Tribunal rejected an appeal against a decision that IR35 applied to the provision of Christa Ackroyd's services as a presenter to the BBC through a personal services company (PSC). When considering the hypothetical contract between the parties, the Upper Tribunal determined that, despite there not being an express term regarding control in the contract with the BBC, it did have sufficient control over her. Further, Ms Ackroyd did not have a right to provide a substitute to perform her work. On this basis, the first-tier tribunal was satisfied the BBC did have sufficient control over what work Ms Ackroyd did, and how she did it, for her to qualify as a hypothetical employee. This case indicates that the legislation is likely to give HMRC and, therefore, the tax tier tribunals, quite some leeway to determine whether something would or would not be an employment contract in a hypothetical world.

In *Canal Street Productions Limited v. HMRC* [2019] UKFTT 647 (TC), however, the first-tier tribunal allowed the appeal of the television presenter's PSC against HMRC's determination that IR35 applied. The tribunal found that several factors, such as the lack of ongoing work-related obligations, were inconsistent with the hypothetical contract of employment, and that the individual was to be regarded as a self-employed person. In this case, the tribunal looked at the overall arrangements that were in place, such as the individual actively seeking other work throughout the time she was engaged with the network, rather than just focusing on the hypothetical arrangements with the television network. This case

does highlight that individuals who are tied in to one particular client are going to be more at risk of IR35 applying and, therefore, there will be an increased risk for the end client that they will need to pay income tax and National Insurance contributions post-April 2020.

Legal advice privilege

In *Curless v. Shell International Ltd* [2019] EWCA Civ 1710 CA, the Court of Appeal considered whether legal advice privilege applied to a leaked email concerning a redundancy exercise relating to the possible dismissal of the claimant. The claimant was a long-standing senior legal counsel and suffered from diabetes and sleep apnoea. The employer had ongoing concerns about the claimant's work dating from 2011, and the claimant was dismissed by reason of redundancy in 2017. Subsequently, the claimant issued tribunal proceedings for victimisation, disability discrimination and unfair dismissal, and relied on a copy of an email, marked 'Legally Privileged and Confidential', between an in-house lawyer and an external lawyer, which had been sent to the claimant anonymously. He used it as a basis to argue that his redundancy was a sham. The Court of Appeal agreed with the employment tribunal's view that the email did not fall foul of the 'iniquity principle' (which states that iniquitous behaviour cannot be hidden by cloaking the communication in a legally privileged communication) and was, therefore, legally privileged as it contained the sort of advice that employment lawyers give from day to day. The Court held that the advice was relevant for the employer to decide whether, and, if so, how, the claimant might be offered either voluntary severance or dismissed on the grounds of redundancy in the course of the ongoing reorganisation 'with appropriate safeguards and in the right circumstances'. This decision is positive for employers and their advisers, demonstrating that legal advice privilege cannot be easily undermined. However, it does also highlight the care with which private communication should be disclosed to the other side.

V OUTLOOK AND CONCLUSIONS

There have been significant developments in employment law during 2019. With certain legislation due to take effect in 2020 and more cases due to be heard, specifically within the realms of whistle-blowing, IR35 and sexual harassment, we are likely to witness further developments in UK employment law next year.

Chapter 21

UNITED STATES

Andrew S Rosenman and Elaine Liu[1]

I INTRODUCTION

Employers in the United States face a number of constantly evolving challenges to comply with the wide variety of laws that govern their employment arrangements. These challenges are magnified by the fact that employment relationships are not governed by a single statutory framework. Unlike many other countries, the United States has no general laws requiring an employer to have good cause for dismissal or to pay severance pay at the time of dismissal. The general principle is 'employment at will'. However, in place of a general obligation, the United States maintains many disparate laws that regulate employers and the employment relationship. The legal relationships between employers and their employees are governed simultaneously by federal, state and local laws, as well as common law principles. Depending on the issue, employers also must remain attuned to conflicting judicial decisions and interpretations across the country, which may further complicate their efforts to comply with applicable employment laws. While the remedies available to employees under these different employment laws frequently vary from one state or locality to another, a national or international employer generally applies uniform policies in a single country wherever possible.

Determining which federal laws govern an employer's workplace typically requires, at minimum, an analysis of the employer's size and the locations where its employees work. For example, one of the most commonly invoked federal employment laws – Title VII of the Civil Rights Act of 1964[2] (Title VII) – prohibits employment discrimination based on race, colour, religion, sex or national origin, and typically applies nationwide to all employers with 15 or more employees. Similarly, the Americans with Disabilities Act[3] (ADA) – which includes provisions generally prohibiting employment discrimination on the basis of physical or mental disabilities – also applies to employers with 15 or more employees. The federal Age Discrimination in Employment Act[4] (ADEA), however, generally applies to employers with 20 or more employees.

There also are many federal statutes that require other types of analyses to determine their application to the workplace.[5] For example, the federal Family and Medical Leave

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2 42 U.S.C. §§ 2000e et seq.

3 42 U.S.C. §§ 12101 et seq.

4 29 U.S.C. §§ 621 et seq.

5 It would be impracticable to try to address, in a single chapter, all applicable federal employment laws in the United States, so we have limited the discussion here to some of the most commonly analysed and frequently litigated statutes.

Act,[6] which generally provides up to 12 weeks of unpaid leave for qualified family and medical reasons for oneself or for a family member, applies only if the employer has at least 50 employees within a 75-mile radius of the location where the employee works. The Fair Labor Standards Act (FLSA), which generally establishes a federal minimum wage along with record-keeping requirements, child labour restrictions and certain eligibility standards and exemptions regarding payment for working overtime, does not depend on a specified number of employees. Instead, an employer is subject to the FLSA if its annual gross volume of sales made or business done is at least US$500,000.[7] As a practical matter, the FLSA applies to the overwhelming majority of employers in the United States.

In addition to these and many other federal employment laws and administrative regulations, states and cities also have the power to enact their own employment laws. The overwhelming majority of the 50 states have done just that, in many instances expanding the obligations on employers above and beyond the scope of federal employment laws. To make matters even more complex for employers, cities and counties are passing, with increasing frequency, ordinances and regulations that impose further obligations on employers in the United States. One illustrative example of this trend is minimum wage laws. Although the FLSA has, for many years, imposed a general federal minimum wage of US$7.25 per hour,[8] more than half of the states have historically established higher minimum wage requirements that apply to employees working in that state. In recent years, an increasing number of the largest cities and the most expensive cities have raised the bar even further with higher minimum wages of their own, with variations sometimes dependent upon the size of the employer's local workforce.

In sum, employers with employees who are located in the United States, particularly larger employers with workplaces located across the country, must be especially vigilant to ensure that they have both a national perspective and a good understanding of the numerous state and municipal employment laws that govern their workplaces.

II PROCEDURE

Much like the many employment laws that govern the workplace, there also are a variety of procedures available for resolution of employment-related disputes. Of course, many disputes are resolved by the parties through compromise agreements without the need for litigation. The United States does not maintain separate labour courts. When a dispute is not resolved by compromise, the employee typically files a complaint in a federal or state court. In many cases, a jury trial is available. For certain types of matters, the dispute between an employer and employee must be presented to a federal, state or local agency tasked with administering specific employment laws. Parties to employment disputes also frequently resolve them through arbitration tribunals when the parties have agreed to arbitrate, which most typically occurs in employment agreements requiring arbitration or through collective bargaining agreements.

The Equal Employment Opportunity Commission (EEOC) is the federal agency tasked with administering and enforcing federal civil rights laws prohibiting workplace discrimination. Certain federal statutes, such as Title VII, the ADA and the ADEA, include

6 29 U.S.C. §§ 2601 et seq.

7 29 U.S.C. §§ 201 et seq.

8 29 U.S.C. § 203.

mandatory procedures that require employees to exhaust certain administrative procedures at the EEOC or, where applicable, parallel state agencies before proceeding with lawsuits in federal court.

In contrast, many state laws that prohibit employment discrimination do not require exhaustion of administrative procedures as a condition of filing a lawsuit. Therefore, employees in those states can file a lawsuit in court almost immediately after an adverse employment action, such as the termination of their employment. The statutes of limitations under state employment laws are also, in many instances, far more favourable for employees than under federal law and allow plaintiffs to seek substantially greater damages than may be available under federal law.

In addition to pursuing their own individual claims, employees can seek to proceed with mass, class or collective action cases on behalf of one or more classes of similarly situated employees. Depending on the specific claims that are made and the type of relief that a plaintiff seeks, such actions typically proceed as opt-out or opt-in class actions in those cases where the court determines that the requirements for class certification have been satisfied. In an opt-out employment case, all similarly affected employees who are included as part of the court-certified class are bound by the court's final judgment unless they have specifically opted out by the court-ordered deadline. An opt-in employment case, on the other hand, requires each employee who may be interested in joining the lawsuit to file a consent form expressing an intention to do so. In some circumstances, such as wage and hour lawsuits brought concurrently under federal and state law, a case may include both opt-out and opt-in classes.

III TYPES OF EMPLOYMENT DISPUTES

There are many types of employment-related claims that individuals can bring under federal, state and local employment laws in the United States. Claims can arise out of all aspects of the employment relationship, including hiring, firing, promotions, disciplinary actions, pay-related claims and employment contracts. While this chapter cannot cover every available theory of employment-related disputes, three types of lawsuits that are commonly filed are cases alleging discrimination or harassment, unlawful retaliation or wage and hour violations.

Allegations of discrimination or harassment under federal law are typically based on one or more of the following protected categories: age, race, colour, religion, sex, national origin and physical or mental disability. There are many other protected categories under federal or state (or both federal and state) anti-discrimination laws, such as sexual orientation, pregnancy, ancestry, gender identity, citizenship status, genetic information, marital status, military or veteran status and immigration status. In addition to allegations involving discrimination, employment claims often include allegations of sexual harassment or harassment based on any of the protected categories.

Retaliation claims also are a frequent subject of litigation in the United States. Many federal, state and local statutes that proscribe discrimination also have provisions explicitly prohibiting retaliation against employees for exercising their rights under those statutes (or associating with others). A number of federal and state statutes also provide protection from retaliation by employees who act as corporate whistle-blowers. There are several other types of retaliation claims that employees routinely pursue. For example, most states permit claims of wrongful discharge for public policy reasons (such as retaliation for refusing to commit an illegal act or for exercising a legal right).

Wage and hour claims, whether filed individually or as class or collective actions, are another frequently litigated subject in US courts. Wage and hour lawsuits under the FLSA or state law often include claims by employees for overtime pay, missed or interrupted meal and rest periods, and for the alleged misclassification of employees as exempt from federal and state overtime requirements. Here, too, wage and hour requirements and statutes vary widely. In addition to different minimum wage laws from one state or city to another, some states and cities impose other requirements in favour of employees who work there. The state of California, for example, generally requires employers to pay different rates of overtime to eligible employees who work more than eight or 12 hours in a day, regardless of how many hours they may work in a week.[9] The federal FLSA, in contrast, only requires overtime pay for eligible employees who work in excess of 40 hours in a workweek.[10]

IV YEAR IN REVIEW

We discuss below four of the most significant employment law developments in 2019. First, states have continued to introduce new requirements in an attempt to address sexual harassment concerns in the wake of the #MeToo movement. Second, the US Supreme Court resolved a split among federal appellate courts concerning the jurisdictional nature of Title VII's charge-filing requirement. Third, the National Labor Relations Board (NLRB) has issued a series of employer-friendly decisions that have restricted union activity. Finally, the US Department of Labor (DOL) has finalised its long-awaited overtime pay regulations.

i Mandatory sexual harassment training requirements

Employers in the United States have continued to feel the impacts of the #MeToo movement. In particular, six states recently enacted legislation establishing or expanding sexual harassment training requirements in the workplace.[11] Generally, employers meeting a certain minimum threshold of employees are required to promptly provide training upon hiring or promoting an employee, and are subject to civil penalties if they fail to do so.

In California,[12] the passage of Senate Bill 1343 requires employers with at least five employees to provide two hours of sexual harassment prevention training to supervisory employees and one hour of training to non-supervisory employees within six months of hire or promotion, and every two years thereafter.[13] Seasonal, temporary, and other short-term employees must also be trained within 30 days of hire or 100 hours worked, whichever comes first.[14] Previously, only employers with at least 50 employees were required to provide two hours of sexual harassment prevention training, and only to supervisors. Moreover, Senate Bill 1343 requires the California Department of Fair Employment and Housing to make

9 Cal. Labor Code § 510(a).

10 29 U.S.C. § 207(a).

11 Maine is another state that long has had specific training requirements. Most recently, in 2017, Maine's legislature amended its law to add penalties for violating its requirement that employers with 15 or more employees in the workplace conduct an education and training programme on sexual harassment for all new employees within one year of commencement of employment. 26 M.R.S.A. § 807(3), (6)(B).

12 Cal. Gov. Code § 12950.

13 id. § 12950.1(a)(1).

14 id. § 12950.1(f).

available to employers online interactive training courses.[15] In October 2019, after employers experienced some confusion over the law's requirements, California Governor Gavin Newsom signed Senate Bill 778[16] to clarify the law's new anti-harassment training requirements and extend the deadline for complying with them from 1 January 2020 to 1 January 2021.[17]

In Connecticut,[18] the Time's Up Act mandates that all employers with at least three employees provide two hours of sexual harassment training to all employees within six months of hire or promotion.[19] Employers with fewer than three employees are required to provide training only to supervisory employees.[20] Connecticut also mandates providing supplemental training once every 10 years.[21] Previously, the state required that only employers with at least 50 employees must provide training, and that training be provided only to supervisors. In addition, the Connecticut Commission on Human Rights and Opportunities may deem any employer failing to comply with training requirements to be engaging in a 'discriminatory practice'.[22] These expanded requirements for mandatory sexual harassment prevention training took effect on 1 October 2019.

In Delaware,[23] the state amended its Discrimination in Employment Act to introduce sexual harassment training requirements effective as of 1 January 2019. Employers with at least 50 employees (not including applicants or independent contractors) in the state must provide training to employees within one year of their hiring and every two years thereafter.[24] New supervisors must receive additional interactive training within one year of their hiring or promotion.[25] While the length of the training is not specified, the law requires certain topics to be covered, including the definition and examples of sexual harassment, legal remedies available to an employee, guidance on how to contact the Delaware Department of Labor, and the illegality of sexual harassment and retaliation.[26]

In Illinois,[27] beginning on 1 January 2020, all employers must provide sexual harassment prevention training at least once a year to employees.[28] Under the Illinois Workplace Transparency Act, which amended the Illinois Human Rights Act, employers must use either the online model programme developed by the Illinois Department of Human Rights, or one that meets the minimum standards provided by the model.[29] While the law does not specify the length of the training, it does require the training to explain what constitutes sexual harassment, provide examples of conduct of this kind, summarise state and federal laws

15 id. § 12950.1(k).
16 https://www.gov.ca.gov/2019/08/30/governor-newsom-signs-legislation-8-30-19/.
17 Cal. Gov. Code § 12950.1(a)(1).
18 Conn. Gen. Stat. § 46a-54(15)(C).
19 id. § 46a-54(15)(C)(i).
20 id. § 46a-54(15)(C)(ii).
21 id. § 46a-54(15)(C).
22 id. § 46a-51(8).
23 19 Del. Code § 711A.
24 id. § 711A(g)(1)–(2), (6)(a).
25 id. § 711A(g)(4).
26 id. § 711A(g)(3).
27 775 Ill. Comp. Stat. § 5/2-109.
28 id. § 5/2-109(C).
29 id.

concerning sexual harassment and explain employer duties and responsibilities pertaining to the investigation and prevention of sexual harassment.[30] Illinois also imposes additional requirements on hotels, casinos, bars and restaurants.[31]

In New York,[32] the state enacted measures in 2018 mandating that all employers provide annual, interactive sexual harassment prevention training to all employees (including part-time, seasonal and temporary workers).[33] Initially subject to a deadline of 9 October 2019, the measures required New York employers to provide an employee with sexual harassment policies and training materials in English and the employee's primary language[34] at the time of hiring and during each annual training programme.[35] They also must use the model sexual harassment prevention training programme provided by the New York State Division of Human Rights and the New York Department of Labor, or establish a programme that equals or exceeds the minimum standards of the programme, covering topics such as the definition of harassment and the legal rights of employees.[36] Notably, New York City recently enacted the Stop Sexual Harassment in NYC Act[37] to impose training requirements on employers with 15 or more employees as well, and on 11 January 2020, expanded them to apply to not only employees and interns, but also independent contractors and freelancers.[38]

Finally, in Washington,[39] the state enacted Senate Bill 5258 on 13 May 2019 to establish annual anti-harassment training requirements but only in certain industries – specifically, retail, hotel, motel, security and property services contractors (i.e., persons or entities that employ workers that provide commercial janitorial services, with some exceptions). The definition of 'employees' for whom training is required is limited to those who are employed as janitors, security guards, hotel or motel housekeepers, or room service attendants, and who spend a majority of working hours alone, or whose primary responsibilities involve working without another employee present.[40] Hotels and motels with 60 or more rooms were required to comply by 1 January 2020, while all other employers must comply by 1 January 2021.[41]

While training requirements have been a major focus of state legislation, employers have also had to take steps to comply with other new state requirements relating to sexual harassment. For example, Connecticut introduced notice requirements and granted the state human rights commission the authority to inspect workplaces to ensure compliance

30 id. § 5/2-109(B).

31 See, e.g., id. § 5/2-110(D) (requiring, for example, the provision of supplemental training on activities related to the restaurant or bar industry, as well as English and Spanish language options); 820 Ill. Comp. Stat. 325/5-10 (requiring, for example, hotels and casinos to provide employees with copies of the anti-sexual harassment policy in both English and Spanish).

32 N.Y. Lab. Law § 201-g.

33 id. § 201-g(2).

34 If the primary language is Spanish, Chinese, Korean, Polish, Russian, Haitian-Creole, Bengali, or Italian. https://www.ny.gov/combating-sexual-harassment-workplace/employers.

35 N.Y. Lab. Law § 201-g(2-a)(a).

36 id. § 201-g(2)(c).

37 N.Y.C. Admin. Code § 8-107(30).

38 id. § 8-107(23).

39 Wash. Rev. Code Ann. § 49.60.515.

40 id. § 49.60.515(3)(b).

41 id. § 49.60.515(4).

with them.[42] Furthermore, Illinois has prohibited the use of mandatory arbitration or non-disclosure or non-disparagement provisions that cover harassment or discrimination claims unless certain conditions are met.[43] With effect from 1 July 2020, and by 1 July each year thereafter, Illinois also requires employers to disclose to the Illinois Department of Human Rights (IDHR) any adverse judgments or administrative rulings from the preceding calendar year in which there was an allegation of sexual harassment or unlawful discrimination.[44] The IDHR also may require employers responding to charges of discrimination to submit the total number of settlements entered into during the preceding five years that relate to alleged acts of sexual harassment or unlawful discrimination.[45] Employers can expect states to continue to enact significant new measures seeking to combat harassment in the workplace.

ii Non-jurisdictional nature of Title VII's charge-filing requirement

In June 2019, the United States Supreme Court issued its decision in *Fort Bend County, Texas v. Davis*.[46] The Court unanimously held that the requirement in Title VII of the Civil Rights Act that an employee file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) prior to commencing an action in court[47] is not 'jurisdictional', but rather is a claims-processing rule that may be forfeited if not raised in a timely manner.[48]

Prior to filing a lawsuit, the plaintiff, Lois Davis, submitted an EEOC charge against her employer, Fort Bend County, alleging sexual harassment and retaliation for reporting the harassment in violation of Title VII, which prohibits discrimination in employment on the basis of race, colour, religion, sex, and national origin.[49] Davis subsequently sought to supplement the allegations of her charge by handwriting 'religion' on the 'Employment Harms or Actions' part of her intake questionnaire but did not make any changes to the formal charge document.[50] After receiving a notice from the Department of Justice of her right to sue, Davis brought her action, alleging both religious discrimination and retaliation for reporting sexual harassment.[51] However, following years of litigation, only the religion-based claim had remained in the case, at which time Fort Bend raised a new argument that the district court lacked jurisdiction to adjudicate the claim on the ground that Davis did not make such a claim in her EEOC charge.[52]

42 Conn. Gen. Stat. §§ 46a-54, 46a-97(d) (granting authority for the commission to enter an employer's place of business during normal business hours in the 12 months following the filing of a complaint by an employee against the employer, or if the executive director of the commission 'reasonably believes that an employer is in violation' of the sexual harassment posting and training requirements in id. § 46-54).

43 820 Ill. Comp. Stat. § 96/1-25(a)–(b) (providing that agreements with unilateral conditions barring disclosure or requiring arbitration of alleged unlawful employment practices are 'against public policy' and 'void' to the extent they prevent statements or deny a 'substantive or procedural right or remedy' relating to the practices); id. § 96/1-25(c) (providing conditions under which contractual provisions 'against public policy' are permissible).

44 775 Ill. Comp. Stat. § 5/2-108(B).

45 id. § 5/2-108(C).

46 139 S. Ct. 1843 (2019).

47 42 U.S.C. § 2000e–5(e)(1), (f)(1).

48 *Fort Bend County, Texas*, 139 S. Ct. at 1846.

49 id. at 1847.

50 id.

51 id.

52 id. at 1848.

In an opinion authored by Justice Ruth Bader Ginsburg, the Supreme Court rejected Fort Bend's argument. Because the charge-filing requirement has no link to Title VII's statutory jurisdictional language giving federal courts the power to hear Title VII claims, and instead is in a part of Title VII that speaks only to a party's procedural obligations when bringing such claims, the Court held that it was a claim-processing rule.[53] Moreover, the Court concluded that an objection based on such a rule may be 'forfeited if the party asserting the rule waits too long to raise the point'.[54] Accordingly, the Court found that Fort Bend had waived its objection to Davis' failure to raise her religious discrimination claim in her EEOC charge.

The Supreme Court's ruling resolved a circuit split, rejecting contrary decisions issued by the Fourth and Tenth Circuits. In doing so, however, the Court did not define what is considered 'too long' to wait to object to a plaintiff's failure to file a charge and exhaust administrative remedies before bringing an action. To avoid losing this key defence, employers may need to raise it at the time the employer answers or responds to the complaint. In addition, beyond its consequences for Title VII actions, *Fort Bend County* may have similar implications for litigation of employment discrimination and retaliation claims under comparable state law provisions, given that state courts often find federal courts' interpretations of Title VII to be persuasive, even though they are not binding.

iii NLRB decisions disfavouring union activity

The NLRB continued its recent trend of issuing significant decisions tending to favour employers over union activity allegedly protected under Section 7 of the National Labor Relations Act (NLRA). In so doing, the NLRB has overturned a number of important precedents. The following discussion focuses on a few key examples from 2019.

In *Kroger Limited Partnership I Mid-Atlantic*,[55] the NLRB scaled back a prior NLRB expansion of employee union access to an employer's property. Pursuant to the US Supreme Court decision in *NLRB v. Babcock & Wilcox, Inc*,[56] one exception to the general rule that an employer cannot be compelled to provide access to its property is that, when an employer has provided this access to other non-employees, an employer cannot discriminate against non-employee union organisers, but rather must provide them similar access.[57] The NLRB found that its previous standard 'improperly stretched the concept of discrimination well beyond its accepted meaning'.[58] It concluded that, for a union to establish its right to access, the union's activity must be of the same nature as that involved in the prior access provided to other non-employees. As a result, the NLRB held that the employer in *Kroger* did not improperly discriminate in barring union representatives from soliciting its customers to sign a petition protesting against the employer, because the employer had not permitted groups such as fraternal societies and religious organisations access for similar organising activity, and because this organising activity was different from the charitable, civic, or commercial solicitations that the employer may have permitted.[59]

53 id. at 1849.
54 id. (internal quotations omitted).
55 368 NLRB No. 64 (Sep. 6, 2019).
56 351 U.S. 105 (1956).
57 *Kroger*, 368 NLRB No. 64, slip. op. at 1.
58 id.
59 id., slip. op. at 2, 11.

In *Caesars Entertainment d/b/a Rio All-Suites Hotel & Casino*,[60] the NLRB reinstated the standard from its 2007 decision in *Guard Publishing Co. d/b/a Register Guard*[61] that permits an employer to prohibit employees from using the employer's information technology equipment for union activity protected by Section 7.[62] As such, the NLRB found that hotel rules barring the use of computers to, for example, '[s]olicit for personal gain or advancement of personal views' or '[s]end chain letters or other forms of non-business information' are permissible.[63] Nonetheless, the NLRB observed that in 'rare' circumstances, employees may have the right to use an employer's information technology equipment for activity protected by Section 7 if it is the only reasonable means for communication, and a facially neutral restriction may be deemed unlawful if it is applied in a discriminatory manner.[64]

Yet another notable NLRB reversal of Obama-era decisions concerns confidentiality rules pertaining to investigations conducted by employers. According to the majority in *Apogee Retail LLC d/b/a Unique Thrift Store*,[65] the NLRB's 2015 *Banner Estrella Medical Center* decision[66] did not properly weigh employer interests when it permitted an employer to bar discussion of investigations 'only where the employer shows that it has a legitimate and substantial business justification that outweighs employees' Section 7 rights' to discuss discipline or ongoing disciplinary investigations.[67] Instead, applying the tripartite framework established in *Boeing Co*,[68] the NLRB held in *Apogee Retail* that because 'the justifications associated with investigative confidentiality rules applicable to open investigations will predictably outweigh the comparatively slight potential of such rules to interfere with the exercise of Section 7 rights', such rules are properly considered under *Boeing* 'Category 1', and are therefore presumptively lawful.[69] And while the rules at issue in *Apogee Retail* were not limited to open investigations and thus were 'Category 2' rules that warranted individual scrutiny, the NLRB also found those rules to be permissible because they 'do not broadly prohibit employees from discussing either discipline or incidents that could result in discipline', and as a result, had a 'relatively slight' impact on Section 7 rights.[70]

60 368 NLRB No. 143 (Dec. 16, 2019).

61 351 NLRB No. 1110 (2007). In *Caesars*, the NLRB overruled its 2014 decision in *Purple Communications, Inc.*, 361 NLRB No. 1050 (2014), which held that an employee with access to an employer's email system must be permitted to use it for Section 7 activity during non-working time, unless the employer could show special circumstances.

62 *Caesars*, 368 NLRB No. 143, slip. op. at 1.

63 id., slip. op. at 12.

64 id., slip. op. at 1.

65 368 NLRB No. 144 (Dec. 17, 2019).

66 362 NLRB No. 1108 (2015).

67 *Apogee Retail*, 368 NLRB No. 144, slip. op. at 3–5.

68 365 NLRB No. 154 (2017) (setting out three categories of rules: (1) rules that the NLRB designates as lawful to maintain, either because the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or the potential adverse impact on protected rights is outweighed by justifications associated with the rule; (2) rules that warrant individualised scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications; and (3) rules that the NLRB will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule).

69 *Apogee Retail*, 368 NLRB No. 144, slip. op. at 8.

70 id.

iv US DOL regulations on overtime pay

An issue of keen interest to most employers in the United States is overtime pay regulations, and this matter has engendered significant debate, lawsuits and uncertainty for employers in recent years. To be exempt from overtime pay requirements under the FLSA, employees must be paid a salary of at least the threshold amount and meet certain duties tests. If the employees are paid less than the threshold or do not meet the duties tests, the FLSA requires that they be paid 1.5 times their regular hourly rate for all time worked in excess of 40 hours in a workweek. In September 2019, the DOL finalised its updated rules on the minimum salary threshold employees must be paid to be properly classified as exempt.[71] Taking effect on 1 January 2020, the salary threshold for executive, administrative, and professional exemptions under the FLSA increased from $23,660 per year (equating to $455 per week) to $35,568 per year (equating to $684 per week).[72] In addition, the 'highly compensated employee' exemption threshold increased from $100,000 to $107,432 per year.[73] The duties tests remain the same.

Furthermore, the DOL now permits employers to use non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10 per cent of the salary threshold for the executive, administrative, and professional exemptions.[74] However, discretionary bonuses cannot be counted towards satisfying the salary threshold.[75] In addition, the DOL is allowing employers to make catch-up payments to employees who do not earn enough in non-discretionary bonuses or incentive payments in a given 52-week period to retain exempt status, provided that the catch-up payment is made within one pay period of the end of the year.[76]

Notably, these new rules are not as ambitious as the 2016 rules that the Obama administration had proposed but that a federal district court subsequently enjoined from taking effect.[77] For example, the DOL rules effective in 2020 raise the minimum salary thresholds to lower amounts than the DOL had proposed in 2016 ($35,568 instead of $47,892 per year for most employees, and $107,432 instead of $134,004 for highly compensated employees). The 2020 rules also do not implement automatic increases in the salary thresholds every three years, as the DOL had proposed in 2016.[78] This is a victory for employers concerned about having to reclassify additional exempt employees as non-exempt, or to incur additional overtime pay obligations for certain newly hired employees, or both.

V OUTLOOK AND CONCLUSIONS

Employers in the United States should expect additional changes in administrative agency decisions and interpretations in 2020, particularly as Trump administration appointees at the NLRB, DOL and other federal agencies revisit Obama-era initiatives. We anticipate a continuation of more employer-friendly rulings and policy changes in the lead-up to

71 29 C.F.R. § 541.
72 id. § 541.600(a).
73 id. § 541.601(a)(1).
74 id. § 541.602(a)(3).
75 id.
76 id. § 541.602(a)(3)(i).
77 *Nevada v. United States Dep't of Labor*, 218 F. Supp. 3d 520 (E.D. Tex. 2016).
78 id. at 525.

the November 2020 presidential election. For example, the NLRB is expected to move forward with its amendments to union election procedures after having finalised its first set of regulations of this kind on 13 December 2019.[79] And the DOL is likely to implement additional changes to overtime pay requirements under the FLSA. On 5 November 2019, the DOL published a proposed rule that, if adopted, would include bonuses, 'premium' payments (e.g., higher pay for working a night shift), and other additional pay in an employee's regular rate of pay for purposes of calculating any overtime pay for that week.[80]

The US Supreme Court also is poised to decide a number of highly watched discrimination-related issues for employers. On 22 April 2019, it granted certiorari in three cases raising the question of whether Title VII's prohibition of harassment on the basis of sex extends to discrimination on the basis of sexual orientation or gender identity.[81] Having heard oral arguments on 8 October 2019, it is expected to issue a decision in 2020.[82] Furthermore, the Supreme Court is expected to hear arguments in a pair of cases that will decide the scope of the ministerial exception to claims of discrimination under federal law for religious employers.[83]

79 29 C.F.R. § 102.

80 84 Fed. Reg. 59590 (Nov. 5, 2019).

81 https://www.supremecourt.gov/orders/courtorders/042219zor_9olb.pdf.

82 https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalOctober2019.pdf.

83 https://www.supremecourt.gov/orders/courtorders/121819zr_kjfm.pdf.

Appendix 1

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Ross Alcock is a director at ENSafrica in the employment law department, where he specialises in integrated employment solutions and global mobility.

He has acted for private and public sector clients with regard to executive issues in the workplace, including drafting executive agreements (with a focus on, inter alia, restraints of trade (restrictive covenants), share incentives, performance bonus structures, protection of personal information, and intellectual property and copyright protections). He has also handled senior executive exits by way of negotiation or formal disciplinary or performance enquiries.

Ross' experience includes drafting, enforcing and defending restraint of trade agreements in the High Court and Labour Court, providing advice with regard to the employment aspects of mergers and acquisitions, insolvency, and outsourcing and secondary outsourcing. He has extensive experience providing advice in respect of large-scale and small-scale restructuring exercises (retrenchments) and drafting opinions on all facets of employment law, as well as all employment-related litigation and due diligence and employment law compliance audits.

Ross is recognised as a leading or a recommended lawyer by *Chambers Global Practice Guide: Employment 2015–2018*, *The Legal 500: EMEA* for labour and employment (South Africa, 2016–2018), *Who's Who Legal: Labour, Employment & Benefits 2016* (South Africa), and by *Best Lawyers* for employee benefits law (South Africa, 2017–2019) and for labour and employment law (South Africa, 2011–2019).

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Anna Charalambous-Katsaros graduated from the law school of Aristotle University of Thessaloniki in 2009 and has been a member of the Cyprus Bar Association and the Nicosia Bar Association since 2010. She is a manager–advocate in the law firm A & E C Emilianides, C Katsaros & Associates LLC. Her main areas of expertise and practice relate to labour and employment law, commercial and corporate law, banking and finance, real estate law and dispute resolution. During her years of practice, Mrs Anna Charalambous-Katsaros has represented employers and employees in various employment litigation cases. In addition, she has extensively advised clients on the full spectrum of employment law matters. Mrs Anna Charalambous-Katsaros is fluent in Greek, English and French.

AMULYA CHINMAYE

Trilegal

Amulya Chinmaye is an associate in the Bangalore office of Trilegal in the firm's employment practice. Amulya started her career with Trilegal and during her tenure at the firm she has been involved in advising clients on various employment law issues relating to business closures, business transfers and related employee transfer scenarios, employee compensation and benefits, disciplinary inquiries, immigration, social security benefits, working conditions of employees in the IT sector, overtime payments and employment conciliation and litigation. Further, she has advised various companies in relation to disciplinary proceedings and senior management terminations.

Amulya has a keen interest in the law on workplace sexual harassment. She has experience in assisting clients and their internal committee members with effectively handling inquiries on complex sexual harassment complaints. She has conducted training for internal committee members and employee-sensitisation sessions on prevention of sexual harassment for clients in the IT and manufacturing sectors.

Amulya is an alumnus of National Law University, Jodhpur (India).

FRANCESCO D'AMORA

Quorum Studio Legale e Tributario Associato

Francesco d'Amora is a partner and co-head of the employment team based in the firm's Milan office. He advises industrial, commercial and financial entities on a broad range of legal matters relating to human resources management, employment, self-employment, agency relationships and social security. This advice covers corporate restructuring, management buyouts, mergers, stock option plans, industrial relations, agency and senior managers. He has also authored more than 50 publications.

Francesco d'Amora is a member of the International Bar Association (IBA), the European Employment Lawyers Association (EELA), the Italian Employment Lawyers Association (AGI), the Spanish Employment Lawyers Association (ASNALA) and the English Employment Lawyers Association (ELA). He is the author of numerous articles and a speaker at seminars and conventions in Italy and abroad, and he teaches employment law at postgraduate master's degree level at 24ORE Business School and LUISS Guido Carli University.

ALEX DOMENICONI

Walder Wyss Ltd

Alex Domeniconi is a senior associate at Walder Wyss in Lugano. He was born in 1979 and educated at the University of Zurich (*lic iur* 2005, *Dr iur* 2013). He has worked as an associate in law firms in Zurich and Lugano, and as a research assistant and lecturer at the University of Zurich. Alex Domeniconi mainly focuses on employment, corporate and commercial law matters, as well as industry and commerce. He advises on dispute resolution and represents parties before state courts and in enforcement proceedings. Alex Domeniconi regularly publishes and lectures in his fields of expertise.

SUSANA BRADFORD FERREIRA

Uría Menéndez – Proença de Carvalho

Susana Bradford Ferreira joined Uría Menéndez – Proença de Carvalho's labour practice group in 2017. Her practice is focused on matters relating to employment law and employment litigation.

Susana ensures daily monitoring and the provision of advice to companies on all aspects of employment-related matters of a general and strategic nature, particularly in the drafting of relevant documentation in labour issues, the elaboration of legal opinions, the provision of follow-up advice and instruction regarding disciplinary procedures, and advice on labour misconduct matters and judicial proceedings related to employment and labour disputes.

Susana holds a master's degree in forensic law from the Catholic University of Portugal in Lisbon. Before joining the firm, she collaborated as a research assistant in the publication of books and other academic papers in the field of tax litigation and arbitration.

JEAN GÉRARD

Chassany Watrelot & Associés

Jean Gérard began his legal practice as a judge. In 1987, he became an attorney at Gérard Vernet and then at Aguerra, both law firms in Lyon. Jean Gérard joined Chassany Watrelot & Associés in 1992 as a partner and now manages the litigation department.

Jean Gérard assists and represents French and international companies before all French courts having jurisdiction in social law, be they civil, criminal, administrative or specialised. His expertise is much sought after in the framework of emergency procedures.

CHRISTINA IOANNOU

A & E C Emilianides, C Katsaros & Associates LLC

Dr Christina Ioannou is associate dean of the school of law of the University of Nicosia and associate professor of European politics and labour law. She acts as a consultant on labour and employment law issues with the law firm A & E C Emilianides, C Katsaros & Associates LLC. She holds a PhD and an MA from the University of Manchester and a BSc from the University of Warwick. She is the editor-in-chief of *The Cyprus Review*. She is also the coordinator of the University of Nicosia MA programme in law and politics in the European Union, and a member of the board of directors of the Centre for Scientific Dialogue and Research.

Her areas of specialisation include labour law, European integration, Europeanisation and social policy. She has participated in a number of EU-funded projects, as well as a number of conferences, colloquia and discussion networks. Her latest publications include articles in international peer-reviewed journals, book chapters and the book monograph *Labour Law in Cyprus*, which is published as part of the International Encyclopaedia of Laws series (Kluwer Law International: Hague, 2016).

DAVIDE JERMINI

Walder Wyss Ltd

Davide Jermini is a partner at Walder Wyss in Lugano. He is mainly active in the fields of corporate and commercial law and mergers and acquisitions (in particular real estate

transactions). He regularly advises on employment law issues and corporate succession planning. Davide Jermini was born in 1968 and studied economics at the University of St Gallen (*lic oec* HSG, 1992) and law at the University of Basle (*lic iur*, 1995; *magna cum laude*). He was admitted to the Ticino bar in 1999 and to the Ticino notary society in 2000. Since June 2016, he has been a member of the Royal Institution of Chartered Surveyors. He joined Walder Wyss in 2013 after having worked for five years for a major international business law firm in Zurich and having been a partner in law firms based in Zurich and Lugano for eight years.

Davide Jermini is mentioned by *Chambers* as a recognised real estate practitioner. According to *The Legal 500*, he is recommended for corporate and real estate matters. He is fluent in Italian, German, English and French.

ELENA KUKUSHKINA

Baker McKenzie CIS, Limited

Elena Kukushkina is of counsel and coordinator of the labour and migration practice in the Moscow office of Baker McKenzie. Elena specialises in employment and immigration law issues and advises clients on complex employment and immigration cases, including restructurings, pretrial resolution of disputes with employees, negotiations with trade unions and compliance investigations. She has wide experience in successfully representing major Russian and international companies in courts of different instances in labour disputes (including claims for reinstatement, challenging disciplinary sanctions, payment of regional premium rates and breach of trade union members' rights). She also advises on personal data-related issues, including data protection, processing and international data transfer.

ALFREDO KUPFER

Sánchez Devanny

Alfredo Kupfer is co-head of the firm's labour, social security and immigration practice group. He advises local and foreign clients in complex labour and employment matters, including union negotiations, planning for new and existing investments in efficient labour structures, executive transfers and terminations, social security and data privacy matters, formation and implementation of pension plans, equity compensation programmes, and flexible benefit plans. Alfredo also advises clients on labour matters in mergers, acquisitions, restructurings and privatisations. He has assisted clients in the preparation of all kinds of contracts and documents in labour matters. Alfredo has more than 17 years' experience in practising law. From 2013 to 2018, Alfredo was the managing partner in Sánchez Devanny's Mexico City office and, before joining the firm, he was partner at another international law firm. He is fluent in English and Spanish.

PAUL KWAN

Deacons

Paul Kwan is a very experienced litigator, with a wide range of experience. He regularly handles employment matters (both contentious and non-contentious), including matters relating to enforcement of restrictive covenants, discrimination, disciplinary proceedings, redundancy and termination. His areas of practice also include disputes relating to property, building

management, landlord and tenant, land resumption, probate, trust and family estates, and he also handles a wide range of commercial litigation, including shareholder disputes, company insolvency and winding up, contractual disputes, and debt recovery and asset tracing.

Paul is the co-author of various legal publications, including: *Company Secretarial Manual*; *Hong Kong Employment Law – A Comprehensive Guide*; *Employment Termination Report*; *Guide to Hong Kong Law* (first to fourth editions); *The Hong Kong Encyclopedia of Forms and Precedents* ('Business Organisations: Partnership'); *The New Companies Ordinance (Cap. 622) Volume II: Company Financing – Equity & Debt*; and *The New Companies Ordinance (Cap. 622) Volume IV: Directors, Company Secretaries & Shareholder Remedies*. He is the sole author of the legal publications *Hong Kong Corporate Law* (2006, hardback) and *Hong Kong Corporate Law* (2010 to present, loose-leaf).

CHANG YOUNG KWON

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Mr Chang Young Kwon is a partner in Jipyong LLC's labour and employment practice group and represents clients in diverse areas of general corporate, labour relations, construction and real estate, shipping and aviation, civil and criminal law, public administration, trade disputes and medical disputes.

Before joining Jipyong LLC in March 2017, Mr Kwon served as a judge in numerous courts. When he resigned, he was the Chief Justice of Uijeongbu District Court. During his 18-year service as a judge, Mr Kwon handled many complex cases in various fields of law, including civil, commercial, criminal and administrative, preservation, tax, medical, religious, family and insolvency cases.

Mr Kwon contributed to the publication of the Annotations to the Labour Standards Act and the Annotations to the Trade Union and Labour Relations Adjustment Act while serving as an editorial committee member at the Labour Law Practice Research Institute of the Supreme Court of Korea. Mr Kwon has also lectured on labour dispute-related injunctions at the Judicial Research and Training Institute of the Supreme Court of Korea since 2003.

In addition, Mr Kwon is the author of *Civil Preservation Law*, which draws on his many years of trial experience regarding civil execution and applications (provisional seizures and injunctions) and is regarded as the best academic book on the subject. Mr Kwon also authored the *Commentary to the Civil Execution Act Vol 7*.

Mr Kwon is a member of the Korean Bar and has a PhD in law from Seoul National University.

PETER LE ROUX

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Peter le Roux is an executive consultant at ENSafrica in the employment department.

Peter has expertise in administrative law and labour law. He has represented and advised prominent mining houses, and local and international corporate clients, in matters pertaining to employment, pension funds, medical aid schemes and health and safety.

He is the co-author of *Essential Labour Law* and *The Law of Unfair Dismissal* and he co-edits *Contemporary Labour Law*.

Peter was a professor and head of the department of mercantile law at the University of South Africa.

He is a member of the South African Society for Labour Law.

Peter is recognised as a leading or recommended lawyer by *Chambers Global Practice Guide: Employment 2017*, *The Legal 500: EMEA* for labour and employment (South Africa, 2015–2018), *Who's Who Legal: Labour, Employment & Benefits 2016* (South Africa), *Best Lawyers* for labour and employment law (South Africa, 2017, 2018), as a Senior Statesperson for employment (South Africa) by *Chambers Global* (2015, 2016) and as Labour and Employment Lawyer of the Year (South Africa) by *Best Lawyers* in 2016.

MICHELLE LI

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Michelle Li is an associate in the litigation and dispute resolution practice group. Her current practice focuses on general commercial litigation. She has assisted clients on a variety of matters and proceedings, including employment (both contentious and non-contentious), discrimination, contractual disputes, winding-up proceedings, building management, landlord and tenant, defamation and debt recovery.

ELAINE LIU

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Elaine Liu is an associate at Mayer Brown LLP in its Chicago office. Elaine's practice has covered a number of areas, with a primary focus on labour and employment matters. Her experience has encompassed all stages of litigation in federal and state courts, as well as arbitration proceedings. She has successfully defended clients in disputes involving a variety of labour and employment-related claims, such as discrimination, harassment, wrongful termination, and employee benefits. She also provides counselling to clients seeking to ensure compliance with federal, state and local laws. In addition, Elaine serves on the Women in Law Empowerment Forum's Young Lawyers Committee and Legal Aid Chicago's Ambassadors Board. She received her JD from Columbia Law School and her AB from Harvard University.

ZHENGHE LIU

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Zhenghe Liu is the head of the employment practice at AnJie Law Firm. He has extensive experience in labour law, social security law and labour union law. He provides comprehensive employment legal services, including labour dispute resolution, human resource legal risk assessment and compliance risk management, employment planning and management, employee placement and dismissal, and other non-contentious matters. His clients are from a wide range of industries, such as communications, electronics, banking and insurance, aviation logistics, energy, real estate, education, pharmaceuticals and chemicals. Prior to joining AnJie Law Firm, he was with the Beijing Federation of Trade Unions as a public lawyer focusing on union legal affairs management, grassroots labour union legal services and labour rights protection, among other things. He has been deeply involved in the lawmaking process for employment legislation, collective wage consultation and union legal affairs management.

KAITIAN (KAI) LUO

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Kaitian (Kai) Luo is a partner at AnJie Law Firm. He has extensive experience in advising clients on contentious and non-contentious employment matters, such as employment and labour relations, internal policies and procedures, pensions, benefits, bonuses and social security, non-compete protection, and compliance investigations. Kai Luo has represented many reputable clients in labour disputes before labour arbitration committees and courts. He is an expert in addressing issues in bankruptcies, M&A, liquidations, closing, restructurings, workforce reductions and outsourcing projects.

Kai Luo has also provided services in relation to general corporate and compliance matters for clients from a wide range of industries. Before joining AnJie, he was a senior associate in King & Wood Mallesons' Beijing office.

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Baker McKenzie CIS, Limited

Nina Mogutova specialises in employment and immigration law issues. Nina provides advice on hiring, terminating employment, staff redundancies, employment benefits, disciplinary enforcement, labour safety and other employment-related issues. Nina is involved in litigation and pretrial resolution of disputes with employees and also advises on personal data-related issues, including data protection, processing and international data transfer.

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Georgy Mzhavanadze is an associate in the Moscow office of Baker McKenzie. Georgy is involved in litigation and pretrial resolution of disputes with employees and provides advice on hiring, terminating employment, corporate restructuring, staff redundancies, disciplinary enforcement, cooperation with trade unions and other employment-related issues, including compliance investigations. Georgy also provides advice on personal data protection and other matters.

ANDRÉ PESTANA NASCIMENTO

Uría Menéndez – Proença de Carvalho

André Pestana Nascimento joined Uría Menéndez in 2003 and has been a member of the firm's labour practice group since 2005. He focuses his practice on all matters relating to employment law, employment litigation, collective bargaining agreements, data protection and pensions and social security law.

André has vast experience in restructuring procedures and has been called on to lead several downsizing procedures (namely collective dismissals and individual terminations), and to advise clients in relation to transactions aimed at the acquisition of undertakings or businesses (e.g., transfers of going concerns, mergers and spin-offs). He regularly advises and represents clients in disciplinary and administrative procedures and all other legal proceedings of an employment nature, as well as on all day-to-day labour-related matters.

André holds a postgraduate degree in employment and social security law from the University of Lisbon and a postgraduate degree in sports law from the Catholic University of Portugal in Lisbon.

ROGÉRIO PODKOLINSKI PASQUA

Pessoa Advogados

Rogério Podkolinski Pasqua was formerly a partner at Pessoa Advogados. He is a labour lawyer with more than 20 years of practice in litigation and consulting, as well as acting in collective labour rights matters. He obtained his diploma in law from the University of São Paulo in 1994 and was a substitute consular coordinator of contracts and procurement at the legal department of the Ministry of Justice. Rogério Podkolinski Pasqua is also a former professor of civil procedural practice on the postgraduate programme at the Getúlio Vargas Foundation São Paulo Law School.

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Andrea Patrizi is a partner and co-head of the employment team based in the firm's Rome office. He is an expert in labour and employment law, social security matters, industrial relations and individual and collective dismissals and regulations. He has assisted several multinational companies with personnel restructuring, workplace health-and-safety regulations, outsourcing contracts, freelance and consultant contracts, sales representative-related matters, executive work contracts and dismissals, stock option and management buyout plans, and litigation.

Andrea Patrizi is the author of several juridical books and articles and is a speaker at seminars and conventions in Italy and abroad. He is a member of the European Employment Lawyers Association and the Italian Employment Lawyers Association (AGI); he has been a speaker at seminars and conventions in Italy and abroad and he teaches employment law at postgraduate master's degree level at 24ORE Business School and LUISS Guido Carli University.

LUCAS PEIRO DE LA ROCHA

Cuatrecasas

Lucas Peiro received his law degree from the Autonomous University of Barcelona in 2011, which also presented him with the University's special award for his degree course. Lucas also completed a full academic year at the University of Strasbourg (2009–2010). He has been an associate in the Cuatrecasas labour and employment practice since 2011. He has specialised in litigation procedures, transfers of undertakings, employment-related aspects of insolvency procedures and the provision of advice to multinational companies operating in Spain.

DAVID PUENTE-TOSTADO

Sánchez Devanny

David Puente-Tostado co-heads the labour, social security, and immigration practice group. He has experience in advising domestic and foreign clients on labour, immigration and social security matters deriving from investments. He also has extensive experience in collective negotiations, with a special emphasis on the automotive and energy sectors. David is

recognised for handling complex individual and collective litigation, and litigation involving credits issued by social security institutions. David is currently the President of the Canadian Chamber of Commerce in Mexico (CANCHAM) in Monterrey. Before joining Sánchez Devanny, David practised law at an international law firm in Monterrey. He is fluent in English and Spanish.

NICHOLAS ROBERTSON

Mayer Brown International LLP

Nick Robertson is head of Mayer Brown's London employment group, which has been described as 'an authority in employment' and 'a first stop for City clients', for providing 'real authority and nous' and 'fit-for-purpose advice'. Leading the practice, he 'puts his neck on the line for clients' (*The Legal 500*, 2016). He is regarded as a leading light in employment law and has been rated as either a 'Star' lawyer or a 'Band 1' lawyer for advice to employers in *Chambers*.

Clients like his personable, down-to-earth approach and how he quickly gets to grips with their needs. He has an ability to cut through complex areas of law, communicating them clearly and simply. Nick advises on a full range of employment matters for employers, both on a collective basis and in relation to individual employees. He regularly advises on the recruitment and termination of senior executives, the conduct of consultation meetings with trade unions and employee representatives, and large-scale corporate reorganisations and outsourcing matters.

His experience includes representing employers in legal proceedings in employment tribunals, the Employment Appeal Tribunal, the High Court and the Court of Appeal. He has represented clients at the Central Arbitration Committee and in mediation.

SEBASTIÁN ROSALES-ORTEGA

Sánchez Devanny

Sebastián Rosales-Ortega joined Sánchez Devanny in 2015 as part of the labour, social security and immigration practice area. Before joining Sánchez Devanny, he worked as a law clerk at a law firm specialising in labour law. He also worked previously as an associate in the labour practice area for another firm, where he coordinated matters for the Querétaro State Roads Commission, as well as handling individual and collective disputes for the firm's clients.

ANDREW S ROSENMAN

Mayer Brown LLP

Andrew Rosenman is a partner at Mayer Brown LLP in the firm's Chicago office and co-leader of the firm's US employment litigation and counselling practice. His practice particularly emphasises labour and employment litigation and counselling on behalf of employers. In the course of his employment law and litigation practice, Andrew has advised clients on all aspects of the employment relationship, from drafting employment policies, contracts and handbooks to hiring, discipline and termination issues. He further counsels employers and litigates on behalf of employers regarding claims involving discrimination, harassment, non-competition, non-solicitation and other restrictive covenants, trade secrets, employment contracts, employee benefits, defamation and a variety of other contract and tort claims. Andrew's practice also includes frequent litigation and advice to employers in individual,

class and collective action lawsuits involving overtime, meal and rest breaks, paid and unpaid leave and other wage-and-hour issues. Andrew has won several jury and bench trials for companies in state and federal courts and in arbitration proceedings, and has successfully represented employers in appeals in state and federal appellate courts. Andrew is an active member of the state bars of Illinois, California and Michigan. He also is a member of the American Employment Law Council, an invitation-only entity that is the nation's premier organisation of high-level labour and employment attorneys practising on behalf of employers and management.

NOBUHITO SAWASAKI

Anderson Mōri & Tomotsune

Nobuhito Sawasaki has been engaged in a wide range of practice areas since he joined the firm in 2001. He has advised domestic and foreign clients on labour law, pension law, mergers and acquisitions and the Personal Information Protection Act. Recently, Mr Sawasaki has been advising domestic and foreign clients on compliance with labour and employment laws, and the Personal Information Protection Act. He has also assisted domestic and foreign clients with numerous labour and employment disputes and other labour-related matters, such as the redundancy process, formulation of working rules and reformation of employee benefits schemes. Further, Mr Sawasaki contributes practical advice to domestic and foreign clients who handle employees' personal information and proprietary information in the course of their business. Mr Sawasaki has been selected as a 'Recognised Practitioner' in the 'Employment: *Bengoshi*' category of *Chambers Asia-Pacific* 2018, 2019 and 2020.

PHILIPPE SCHMIT

Arendt & Medernach

Philippe Schmit is a partner in the employment law, pensions and benefits practice at Arendt & Medernach.

Philippe advises employers in the financial and industrial sectors on all aspects of the employment relationship (including its termination). He also specialises in all matters relating to restructuring and reorganisation, negotiation in the context of collective dismissals and collective bargaining procedures, as well as any other HR aspects triggered by corporate restructuring, including mergers and acquisitions (e.g., transfers of undertakings).

His practice encompasses advice on compensation and benefits schemes, equity schemes, share option plans and pension schemes.

Philippe also has extensive knowledge of expatriation matters and provides legal advice with respect to business immigration and all its related aspects.

He has been a member of the Luxembourg Bar since 2006.

He is a member of several associations focusing on employment law, including the Employment Law Alliance.

Philippe Schmit holds a master's degree in law from the Robert Schuman University, Strasbourg, France, and an advanced master's degree (DEA) in private international law from the same university. Philippe speaks English, French, German and Luxembourgish.

NICOLAS SIMON

Van Olmen & Wynant

Nicolas Simon is a partner at Van Olmen & Wynant, specialising in employment law, with a focus on psychosocial risks (i.e., harassment and violence), discrimination and privacy issues relating to the use of new technologies in the workplace. He is fluent in French, Dutch and English.

Nicolas also has extensive experience as a litigator before the courts. He covers the various aspects of individual employment law, such as employment contracts, service agreements, individual dismissals and self-employment issues, as well as collective labour law, including collective actions and strikes, social security and transfers of undertakings.

Furthermore, through secondments with large corporate clients, Nicolas has acquired expertise in matters requiring day-to-day advice, from the perspective of both law firm and client.

Nicolas Simon has been a speaker at numerous conferences for the International Bar Association and the Belgian Institute of Company Lawyers on various topics, such as strikes and lockouts, collective bargaining and social dialogue, well-being at work and privacy in the workplace. He is also a regular speaker at in-house client seminars.

JANE YOUNG SOHN

Jipyong LLC

Ms Jane Young Sohn is a foreign attorney in Jipyong LLC's M&A/corporate practice group and in the energy, resources and infrastructure practice group.

Trained and qualified in the United Kingdom, Ms Sohn has diverse international experience across many jurisdictions, including the United Kingdom, the Middle East, Europe and North America. Representing clients from a variety of industries, including oil and gas, energy, healthcare, media and technology, construction, infrastructure, retail, aircraft and financial services, Ms Sohn advises on private equity and venture capital matters, complex cross-border mergers and acquisitions, takeovers, divestitures, joint ventures, corporate/project finance transactions and international dispute resolution.

Prior to joining Jipyong LLC, Ms Sohn was an associate in the corporate and finance practice at Morgan Lewis & Bockius LLP's Dubai office.

Ms Sohn is qualified as a solicitor in England and Wales and has a BA in archaeology and anthropology from the University of Cambridge, United Kingdom.

JESSICA STÅLHAMMAR

WSA Law (Wesslau Söderqvist Advokatbyrå)

Jessica Stålhammar heads the firm's labour and employment law expert group and is also a member of the dispute resolution expert group.

Jessica works closely with company HR departments, providing advice both on day-to-day operational and strategic issues and on labour and employment law negotiations and legal proceedings. As part of the day-to-day operating activities, she also assists many foreign clients with cross-border relationships. Jessica is also much in demand as a public speaker and columnist in the field of labour and employment law.

Jessica started out on a judiciary career path, but in 2000 she began working in employment law as a legal associate at law firm MAQS Advokatbyrå. In 2009, she became a joint owner of WSA Law. Jessica now has almost 20 years' experience of providing advice on every aspect of labour and employment law.

SWARNIMA

Trilegal

Swarnima is a partner at Trilegal in the firm's employment practice. She has worked with both domestic and multinational clients on a wide range of employment matters. These include structuring senior management contracts and remuneration policies, advising on effective management of resignations and terminations, and strategising senior management exits.

Swarnima is considered one of the leading experts in the new sexual harassment law in India. She has advised and guided several multinational clients not only in managing such complaints, but also in assisting in the review and creation of sexual harassment policies and comprehensive guidelines for committee members. Swarnima represents Trilegal at the National Association of Software and Services Companies (NASSCOM), one of India's largest IT associations, and regularly conducts training on the new law. She was also invited by the Indo-American Chamber of Commerce and Bangalore Political Action Committee to speak on the challenges of implementing the new sexual harassment law, and the best practices that companies could adopt.

Swarnima was recognised as a 'next generation lawyer' in *The Legal 500* for 2017 and 2018. She has also been recognised by *Chambers and Partners* as an 'Up-and-Coming' lawyer in the area of employment law. Swarnima was the winner of the 'Young Achiever Under 35' award at the 2019 IDEX Legal Awards. In 2019, she was named by *Asian Legal Business* as one of the top 10 lawyers under the age of 40 in India.

HONGQUAN (SAMUEL) YANG

AnJie Law Firm

Hongquan (Samuel) Yang is a partner at AnJie Law Firm. He has extensive experience in advising clients on contentious and non-contentious employment matters, such as employee investigations, employment and labour relations, strategic guidance on policies and procedures, pensions, benefits, rewards, bonuses and social security, non-compete protection of confidential information, restrictive covenants and enforceability, restructurings, workforce reductions and outsourcing, mergers and acquisitions and workforce integration, senior employee and boardroom issues, union and employee relations, arbitration and litigation.

Samuel Yang also has broad experience in the areas of technology, media and telecommunications (TMT) and is regarded as an expert on data protection and cybersecurity matters in China.

Before he joined AnJie, he worked for British Telecom, CMS Cameron McKenna and DLA Piper successively.

LJUBA ZUPANČIČ ČOKERT

Law Firm Miro Senica and Attorneys, Ltd

Ljuba Zupančič Čokert has more than 30 years of professional experience in corporate and civil law advisory matters, from both a business and a legal perspective, and she handles

the most difficult and complex cases with a high success ratio. She started her career in the corporate environment, as the director of human resources and the legal/general affairs department in one of the largest publishing houses in Slovenia, Mladinska knjiga Založba d.d. in Ljubljana.

She has presided over and been an expert member of the supervisory boards of a number of joint-stock companies and acted as a volunteer president of the Labour Court Senate in Ljubljana. Currently, she regularly lectures at the professional meetings organised by the Bar Association of Slovenia and to students at the Faculty of Law of the University of Ljubljana and the Faculty of Law of the University of Maribor. She also acts as a member of the examining board of the Slovenian state Bar Commission and as a certified mediator.

Ljuba Zupančič Čokert joined Law Firm Miro Senica and Attorneys, Ltd in 2005 and became a partner in 2009. She currently heads the labour and administrative law department.

Appendix 2

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