Fourth Study Commission
Public and Social Law

Meeting in Tunis, 11-14 September 1995

Conclusions

DISMISSAL FOR ECONOMIC REASONS

The Fourth Study Commission, which was created at the Athens Congress in October 1994 and had its first meeting in Tunis in September 1995, received 23 reports from members coming from the following countries: Australia, Austria, Belgium, Brazil, Canada, Denmark, Finland, France, Greece, Ireland, Israel, Japan, Luxembourg, Morocco, Norway, Republic of China (Taiwan), Romania, Senegal, Slovenia, Spain, Switzerland, Tunisia, United Kingdom.
The subject discussed was "Dismissal for economic reasons".
A questionnaire was previously distributed to the members of the Commission.
From the different reports it emerged that although dismissal for economic reasons is taken into account by the majority of national legislations, in certain countries this type of dismissal is part of the general regulations dealing with legal grounds for dismissal, while in a small number of countries this kind of dismissal is unknown.
Unanimity was reached on the solutions adopted for the following three points:
- The burden of proof rests on the employer;
- The existence of a pre-judicial obligatory or facultative procedure for dismissal because of economics reasons;
- Indemnity for the dismissal.
Due to the considerable differences in the solutions to the problems posed in the questionnaire, the Commission decided to follow the points of the questionnaire in order to give objective information on the different experiences.

1) Does your industrial relation law contemplate such kind of dismissal?
This kind of dismissal exists in some countries: as is the case in Spain, France, Ireland, United Kingdom, Slovenia, Tunisia, Italy and Romania.
It exists in Belgium, as well as in Brazil and Austria, but only for protected workers.
In contrast, although it exists in Switzerland, Japan, Canada and Israel, it does not differ in any form from other kinds of dismissal.

2) What courts are entitled to adjudicate such cases?
In Australia, the question is very complex, because each state has its own system for solving work conflicts. However, generally the conflicting parties have to undergo reconciliation attempts in front of the commission of industrial relations before trying the conflicts in the court of industrial relations.
In Japan, ordinary courts are competent while in Canada the federal commission for arbitration is the only institution expected to solve such conflicts.
In general, there exist two levels of jurisdictions (1st Instance, and Appeal) and Cassation. Some countries have courts specially composed at various levels (from the first instance until the appeal for certain courts and until cassation for others) where less formal rules apply. Those countries include Switzerland, Slovenia, Belgium, France, Brazil, Senegal, Ireland, Tunisia, Luxembourg, Israel, United Kingdom, Australia and Austria.

3) Does your law provide for any mandatory or optional non-contentious proceeding to be resorted to prior to undertaking a legal action before a Court?
This exists in every country.

4) Is such a dismissal admissible prior to any ruling by a Court? If so, what authority is able to decide?
For a considerable number of countries this possibility is provided by the law. Example: Senegal, France, Canada, Belgium, United Kingdom, Luxembourg, Ireland, Australia, Switzerland, Brazil, Denmark, Japan, Finland, Slovenia, Israel and Tunisia.
In Spain, in the case of individual dismissal, the legislation is identical to the above-mentioned countries: they exclude this possibility for collective dismissals.

5) In such instances, what are the possible consequences to a decision that goes contrary to the one taken by the court? (Reintegration of the illegally dismissed employee and compensation for damages suffered, as well as the payment of overdue salaries or simply compensation without reintegration?)
In some countries reintegrating an employee after a court decision contrary to that previously taken by the employer is not possible. Only compensation for damages is provided: Israel, Senegal, Switzerland, Finland, Canada.
In France, Luxembourg, Belgium, Australia, United Kingdom reintegration is optional, and if there is no reintegration, compensation must be given for the damage suffered as a consequence of breach.
In Spain, Brazil, Italy, Austria, Ireland and Slovenia reintegration can be obligatory when ordered by the judge.
In Japan, it is the court that imposes the solution to the parties.

6) What kind of evidence (e.g., expert witnesses, court rulings, or any other evidence offered by the employer) is admissible to prove the existence of economic reasons for the dismissal?
In most of the countries freedom of proof is the rule and the burden of proof rests on the employer.

7) Once that dismissal for economic reasons has been proven to a judge, could the judge consider the dismissal illegal because a rule of procedure was violated either by the employer or during the pretrial proceeding?
A breach in a rule of procedure makes the dismissal illegal and irregular and leads to the payment for the breach in most countries, for example: France, Luxembourg, Spain, Belgium, Ireland, Australia, Canada, Tunisia, United Kingdom, Romania and Israel.
In Italy, Spain, Austria and Slovenia, when a law of procedure is breached, the reintegration is obligatory.
In Brazil and Japan, this law is not applicable because all dismissal leads to reparation.

8) Do any specific norms apply in case of dismissal, for economic reasons, of the representative (delegate) of the employees?
In all the countries an obligatory procedure must be observed (Senegal, France, Japan, Belgium, Switzerland, Finland, Luxembourg, Austria, Slovenia, Tunisia and Italy).
In Luxembourg the dismissal of the workers delegate is impossible during the mandate.
In the following countries the workers delegate has no special protection: Ireland, United Kingdom, Israel and Brazil.
In Canada, the workers delegate cannot be dismissed because of an economic motive, only in the case of collective dismissals.

9) When the judge pronounces favorably for the dismissal because of economic motives, does the law give the possibility to supply the dismissed employee with indemnities? What is their foundation?
The response is positive in all the countries which have this system, only the details differ.
In Japan, no indemnity is provided, only the salaries due are paid and no reintegration is possible.
In Senegal and in France, there are indemnities for breach as well as those provided by the collective conventions.

In countries like Spain, Israel, Belgium, United Kingdom, Slovenia, Luxembourg, Finland, Australia and Canada, a fixed indemnity is provided taking into account the length of service.
Concerning Austria, an allocation of departure is obligatory in all cases.
Ireland presents originality. In effect, the employee has the right to fix an indemnity which varies according to length of service:
a) If the employee is solvable he pays 60% and the State the remaining.
b) If the employee is insolvable, the state pays the total indemnity.
The United Kingdom has a similar system.
As for Brazil, a guarantee fund created in 1966 permits the indemnisation with a participation of 8% of the monthly salary, obligatorily given by the employer.

10) What is the proportion that the dismissal for economic motives occupies in the jurisdictional conflicts of your national jurisdiction? Are they decreasing in comparison to previous years or not?
There are no statistics in the great majority of countries.
Neverthless, redundancy is on the increase, certain reporters note, in France, Spain, United Kingdom.
It is decreasing in Finland and Ireland. In Slovenia the statistics are 2.3% of the cases in the courts.

11) In case of redressing the enterprise what destiny is reserved to the former employees victims of the dismissal?
The priority of employment is provided by the law in Senegal, Tunisia, Finland and France.
In Italy the enterprise which re-employs the dismissed employee who is in a particular situation benefits from an economic advantage.
It exists in Spain, Canada, Luxembourg, Austria and Belgium only when the collective convention, the agreements of the establishment or the social plan of collective dismissal provide for it.
It does not exist in Ireland, Australia, Israel, Brazil and in Switzerland.
It is optional in the United Kingdom, in Japan and in Slovenia.