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Building the Future of Work Together

Malcolm Sargeant and Michele Tiraboschi

There is common consensus that innovation in technology, large cuts in public expenditure for higher education, as well as major demographic and geopolitical changes that occurred over the last decades deeply affected the way we carry out research today. This is particularly true in the field of labour relations, due to ongoing innovation in production and work processes.

However, although resulting in many limitations and constraints, this state of affairs laid the foundations for new opportunities, as entailing the establishment of renewed relations either between the members of the international academic community, and among various actors from universities, businesses, trade unions and public institutions.

We firmly believe that there is a continuing need for ways of disseminating information and ideas and we think that a journal easily accessible on line will provide a much wider distribution network for researchers to publicise and share their work. This is the reason for the establishment of an innovative journal that will be free to all those with on line access and who have registered their interest.

As recently pointed out by the Association of American University Presses (Sustaining Scholarly Publishing: New Business Models for University Presses, March 2011) “monographs remain largely static objects, isolated from the interconnections of social computing, instead of being vibrant hubs for discussion and engagement”. The same can be said for the majority of academic journals as, notwithstanding their high level of excellence, are at risk of being self-referential, seemingly ignoring the dynamic nature of the world of work. Further, contributions in this field are often published long after changes occurred, without being able to keep up with the evolution of relevant regulatory and institutional framework, and therefore providing for outdated analyses.

In this connection, the digital format of the E-Journal of International and Comparative Labour Studies and the internet platform serving as a hub for a well established international network are intended to provide an open area where it will be possible to promote the exchange of new ideas,

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information and relevant documentation as a starting point for further cooperation between institutions of higher education, social partners, practitioners and companies.

One of the aims of this new Journal is to accelerate the progress towards a fully open access environment all over the world. As pointed out in the Report of the Working Group Expanding Access to Publish Research Findings (Finch Group in June 2012), this “will bring substantial benefits both for researchers and everyone who has an interest in the result of their work”.

Our international network of correspondents will be supported by a scientific committee and by more than 200 researchers and doctoral students of ADAPT, the non-profit organization founded in 2000 by Prof. Marco Biagi with the aim of promoting studies and research in the field of labour law and industrial relations from an international and comparative perspective. Our purpose is to encourage and implement a new approach to academic research, by establishing ongoing relationships with other universities and advanced research institutes, and by promoting academic and scientific exchange programmes with enterprises, trade unions, institutions, foundations and associations.

Generally, we are concerned with issues in employment relations, human resource management, health and safety, psychology, sociology, labour economics, politics, labour law and history. More specifically, this might include research and new developments with regard to comparative collective and individual labour issues, equality and discrimination, transitions to work, public policy and labour regulation, vulnerable workers and precarious working, employment productivity and international labour institutions; and any other material concerned with any aspect of labour studies. Such an investigation is intended to cast light on main issues flowing from the debate in these research fields, sharing a platform for interdisciplinary discussion and creative hints for research, with a view to building the future of work together.

The EJCLS is committed to rigorous scholarship and quality. All articles will be subject to independent refereeing before being accepted for publication.

Young Workers in Recessionary Times: A Caveat (to Continental Europe) to Reconstruct its Labour Law?

Michele Tiraboschi *

Introductory Remarks

Policy makers, social partners, and the public opinion monitor with interest and increasing concern the steep increase in youth unemployment, in Europe more than elsewhere.¹ Indeed, all the main international institutions²—supported by the analysis of labour market experts³—seem to uphold that young people have been hit the hardest by the “great crisis” that began in 2007 with the collapse of financial markets. It is only natural then that in a time of ongoing recession and many sacrifices demanded of workers,⁴ feelings of apprehension and hope arise

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¹ In other areas of the world, especially in developing countries, the cultural lens through which the problem of youth unemployment is explored might be different. See on the issue I. Senatori, M. Tiraboschi, *Productivity, Investment in Human Capital and the Challenge of Youth Employment in the Global Market. Comparative Developments and Global Responses in the Perspective of School-to-Work Transition*, 5th IIRA African Regional Congress, South Africa - IIRA Cape Town.

² See, by way of an example, ILO, *World of Work Report 2012. Better Jobs for a Better Economy*, International Labour Office, Geneva, 2012; ILO, *Global Employment Trends for Youth*. August 2010, International Labour Office, Geneva, 2010; J. Martin, *Unfinished Business: Investing in Youth*, in OECD Employment Outlook 2011; OECD, *Off to a Good Start? Jobs for Youth*, 2010.

³ See S. Verick, *Who Is Hit Hardest during a Financial Crisis? The Vulnerability of Young Men and Women to Unemployment in an Economic Downturn*, IZA Discussion Paper, 2009, n. 4359. For a different perspective and some valid criticisms on this shared opinion by N. O'Higgins, see *This Time It's Different? Youth Labour Market During the Great Recession*, IZA Discussion Paper, 2012, n. 6434, in particular, par. 2. Both papers are available at www.bollettinoadapt.it, A-Z index, *Lavoratori giovani*.

⁴ Particularly relevant in this respect is the study presented in the *World of Work Report 2012* of the ILO (*op. cit.*, note 2) on the measures that affected workers in terms of protection reduction.

with regard to the future, therefore involving younger generations and their employment prospects in the years ahead.

The notion of unemployment has long become less and less appropriate to frame the critical aspects of the interplay between young people and employment.⁵ Of equal importance, as well as extensively discussed and highly controversial, are those phenomenon accompanying young people in their school-to-work transitions, particularly inactivity, precarious employment and low wages.⁶

Nevertheless, unemployment still remains a main indicator, as it supplies clear and immediate evidence of the vulnerability of young people in the labour market, also for those who are not experts in the field. According to relevant data,⁷ in most countries—whether industrialised or non-industrialised ones—high levels of youth unemployment have been reported long before the onset of the recent economic and financial crisis, to the extent that many specialists made use of the term *déjà vu* to refer to the phenomenon.⁸

Accordingly, the concern resulting from high youth unemployment rates is not a novelty. What appears to be quite new here, at least within the political and institutional public debate taking place in recent years, is the emphasis placed by Europe on the future of younger generations and how this issue is “exploited” to justify—or perhaps to impose—major labour market reforms and deregulation on nation States overseen by central institutions, which will also limit their sovereignty.⁹

Put it differently, labour law rules—chiefly concerning high levels of protection against termination of employment—would explain high youth unemployment rates as well as the increasing recourse to atypical, non-standard or temporary employment arrangements.

Indeed, there is little wonder about this issue, save for the fact that—in a time of severe crisis and ongoing recession—fathers are now called to make a lot of sacrifices that are deemed to be “acceptable”, for they

⁵ On this topic, see O. Marchand, *Youth Unemployment in OECD Countries: How Can the Disparities Be Explained?* in OECD, *Preparing Youth for the 21st Century—The Transition from Education to the Labour Market*, 1999, 89.

⁶ This issue has been extensively discussed in M. Tiraboschi, *Young People and Employment in Italy: The (Difficult) Transition from Education and Training to the Labour Market*, in IJCLIR, 2006, 81 ff.

⁷ See, among others, N. O’Higgins, *op. cit.*

⁸ D.N.F. Bell, D.G. Blanchflower, *Youth Unemployment: Déjà Vu*, IZA Discussion Paper, 2010, n. 4705, at www.bollettinoadapt.it, A-Z index, *Lavoratori giovani*.

⁹ In this respect, see A. Baylos, *Crisi del diritto del lavoro o diritto del lavoro in crisi? La riforma del lavoro spagnola del 2012*, in *Diritto delle Relazioni Industriali*, 2012, n. 2.

contribute to provide their sons with better employment prospects. In this sense, the “great crisis” has acted as a catalyst¹⁰ for long-awaited labour market reforms and liberalisation processes, which however have never been fully implemented so far due to a lack of adequate political and social consensus.

Of particular significance in this respect is an interview with the President of the European Central Bank, Mr. Mario Draghi, that appeared in the *Wall Street Journal*.¹¹ In the midst of the international crisis and in the name of younger generations, Mr. Draghi questioned the future sustainability of the “European Social Model”, urging a major overhaul of national labour regulations in Europe that are currently more favourable to labour market insiders, i.e. adult workers.

This is exactly what occurred in many European countries between 2008 and 2012¹² with the introduction of a number of unpopular measures aimed at reducing workers’ protection that have been imposed on increasingly disoriented and helpless citizens, and presented as an unavoidable sacrifice required by the current macro-economic situation with a view to improving employment and retirement prospects (also) of younger generations.¹³

This trend has not been witnessed only in Europe, since 40 out of 131 countries—as are the Members of the International Labour Organization (ILO)—have reduced their standard employment protection levels.¹⁴ This

¹⁰ See OECD, *Economic Policy Reforms. Going for Growth*, 2012.

¹¹ Interview with Mario Draghi (Interview Transcripts), in B. Blackstone, M. Karnitschnig, R. Thomson, Europe’s Banker Talks Tough, in *The Wall Street Journal*, 24 February 2012, available in the *Adapt International Bulletin*, n. 7, 2012.

¹² For a review of the main actions taken by national governments in Europe, with or without the support of social partners, see M. Simms, *Helping Young Workers during the Crisis: Contributions by Social Partners and Public Authorities*, European Foundation for the Improvement of Living and Working Conditions, 2011, in particular 20 ff., at www.bollettinoadapt.it, A-Z index, *Lavoratori giovani*. See also ILO, *World of Work Report 2012. Better Jobs for a Better Economy*, cit.

¹³ As far as Italy is concerned, see Prime Minister Monti’s Inaugural Speech to Parliament on <http://www.governo.it/>. Reference to future opportunities of younger generations is a *leitmotiv* of Government discourse. See, in particular, M. Monti, *Italy’s Labor Reforms Are Serious and Will Be Effective*, in *The Wall Street Journal*, 6 April 2012, also in *Adapt International Special Bulletin*, n. 1, 2012.

¹⁴ See ILO, *World of Work Report 2012. Better Jobs for a Better Economy*, cit., 35 ff. With particular reference to the measures adopted in favour of youth employment, see B. Ha, C. McInerney, S. Tobin, R. Torres, *Youth Employment in Crisis*, International Institute of Labour Studies Discussion Paper, 2010, n. 201, at www.bollettinoadapt.it, A-Z index, *Lavoratori giovani*.

aspect is particularly apparent in industrialised countries, and chiefly in central and southern Europe, where 83% of anti-crisis reforms focused on employment protection, with particular reference to the regulation on dismissal for economic reasons.¹⁵

In view of the above, and in the context of a dramatic deterioration of the economy and lack of public resources for subsidies, this paper sets out to understand whether job-creation policies, employment incentives,¹⁶ and deregulation of labour laws in Europe—in particular in relation to unfair dismissal—could really provide a possible (if not the only) solution to cope with the issue of youth unemployment.

1. The Issue of Youth Unemployment: The New Perspective Provided to Labour Lawyers by a Comparative Study

Intuitively, it could be argued that high protection levels provided to labour market insiders may discourage or pose an obstacle to outsiders, thus including young people. Drawing on this assumption, at the end of the last century, the OECD started implementing a set of measures collected in the well-known *Jobs Study*.¹⁷ The studies that followed have questioned the role of workers' protection in terms of overall and youth unemployment.¹⁸

¹⁵ See again ILO, *World of Work Report 2012. Better Jobs for a Better Economy*, cit.

¹⁶ The relevant literature, as well as having highlighted “traps” and “risks” of public subsidies to youth unemployment and inactivity, has long discussed the limits of job creation policies, that produce limited (if not negative) effects in terms of cost-benefit analysis. On the subject, see P. Ryan, *The School-to-Work Transition: A Cross-National Perspective: Corrigendum*, in *Journal of Economic Literature*, 2001, vol. 39, n. 3, 767 ff., e J. Boone, J.C. Van Ours, *Effective Active Labor Market Policies*, IZA Discussion Paper, 2004, n. 1335. For a general overview see M. Tiraboschi, *Young People and Employment in Italy: The (Difficult) Transition from Education and Training to the Labour Market*, op. cit.

¹⁷ OECD, *The OECD Jobs Study. Facts, Analysis, Strategies*, 1994.

¹⁸ See S. Nickell, *Unemployment and Labor Market Rigidities: Europe versus North America*, in *Journal of Economic Perspectives*, 1997, vol. 11, n. 3; D. Baker, A. Glyn, D. Howell, J. Schmitt, *Labor Market Institutions and Unemployment: A Critical Assessment of the Cross-Country Evidence*, in D. Howell (ed.), *Fighting Unemployment: The Limits of Free Market Orthodoxy*, Oxford University Press, Oxford, 2004; S. Nickell, L. Nunziata, W. Ochel, *Unemployment in the OECD Since the 1960s: What Do We Know?*, in *The Economic Journal*, vol. 115, n. 500, 2005; A. Bassanini, R. Duval, *Employment Patterns in OECD Countries: Reassessing the Role of Policies and Institutions*, OECD Social, Employment and Migration Working Paper, 2006, n. 35.

Limited data actually reveal increased youth employment prospects in countries with a deregulated or flexible labour market. To the contrary, many studies show that higher workers' protection actually favoured, at least in the medium term, youth employment during the "great crisis".

Not less intuitively is that in deregulated labour markets with higher flexibility in hiring and dismissals, the youth can be discouraged or find themselves in a less favourable position compared to adults, due to a lack of work experience, no well-established connections or relations helping them in the job search, lower productivity, lack of expertise and skills, and competition with migrant workers, who are more inclined to take in jobs and stand employment arrangements deemed unacceptable by the local population.¹⁹

Labour lawyers, like the author of the present paper, have limited knowledge of technical and conceptual instruments to take part in a debate—that is also very controversial among labour economists—on the effects of the regulatory framework on the labour market organisation and regulation. Because of the thorough knowledge of the regulatory and institutional framework, labour lawyers can however present economists with a different interpretation of the potential impact of protection measures on youth unemployment rates.

This is the real challenge to take on, as pointed out also by the International Labour Organization over the last decade. According to the ILO, the currently available indicators are perfectly suitable to afford an analytical framework through which detailed information about the condition of young workers in the labour market in the different parts of the world might be given. It is still the ILO that stresses that the real difficulty is rather to identify the tools to improve employment conditions by means of existing indicators.²⁰

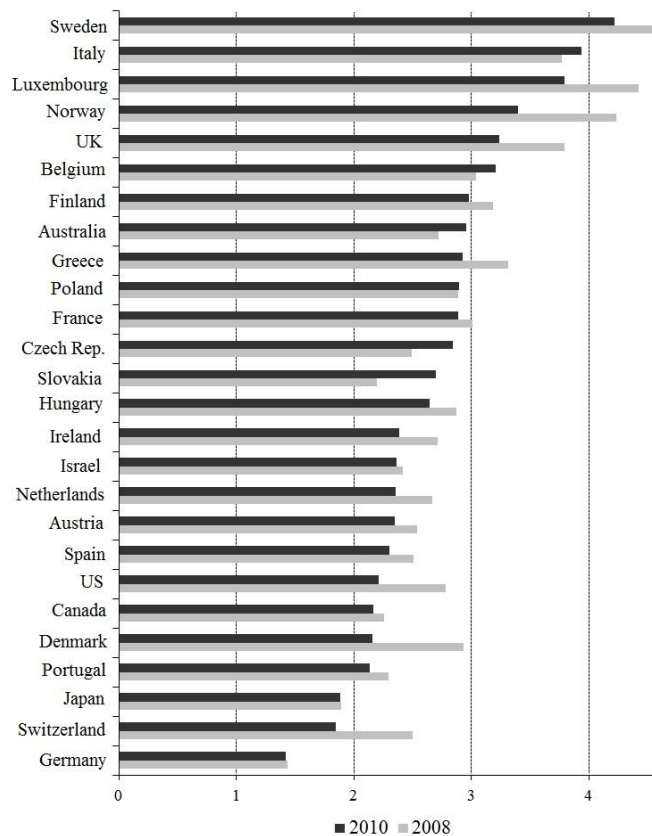
What labour economists may interpret by simple facts empirically proven—if not even the outcome of their investigation—labour law experts, especially if a comparative perspective is taken, might see as some useful insights to better assess the efficiency of labour market institutions and, in particular, the impact of protection measures on youth unemployment.

¹⁹ With reference to internal and external labour market, D.N.F. Bell, D.G. Blanchflower, *op. cit.*, 2. In the same vein, see also ILO, *Global Employment Trends for Youth. August 2010*, cit.

²⁰ ILO, *Global Employment Trends for Youth*, International Labour Office, Geneva, 2006, at www.bollettinoadapt.it, A-Z index, *Lavoratori giovani*.

From a comparative analysis of labour market indicators—before and after the “great crisis”—what emerges is the different ratio between youth and overall unemployment rates (see Figure 1). Of particular interest to a labour lawyer is that in some countries youth unemployment is broadly in line with that of adult workers (Germany, Switzerland), whereas in other countries, regardless of its level, youth unemployment is about twice (Portugal, Denmark, Spain, United States) or three times as high as that of their adult counterparts (Italy, Greece, the United Kingdom, Sweden).

Figure No. 1—Relative Youth Unemployment Rate (2008 and 2010)



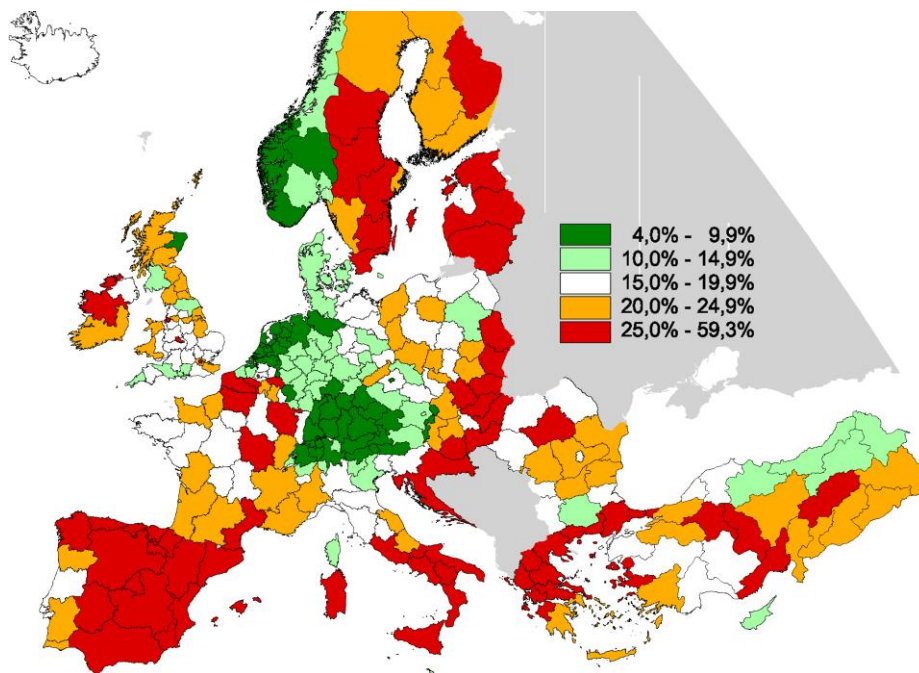
Note: The relative youth unemployment rate is the youth to adult unemployment ratio.

Source: own elaboration on OECD data.

At a first glance, a “geographical” representation of the different youth unemployment rates intuitively shows that youth unemployment is not

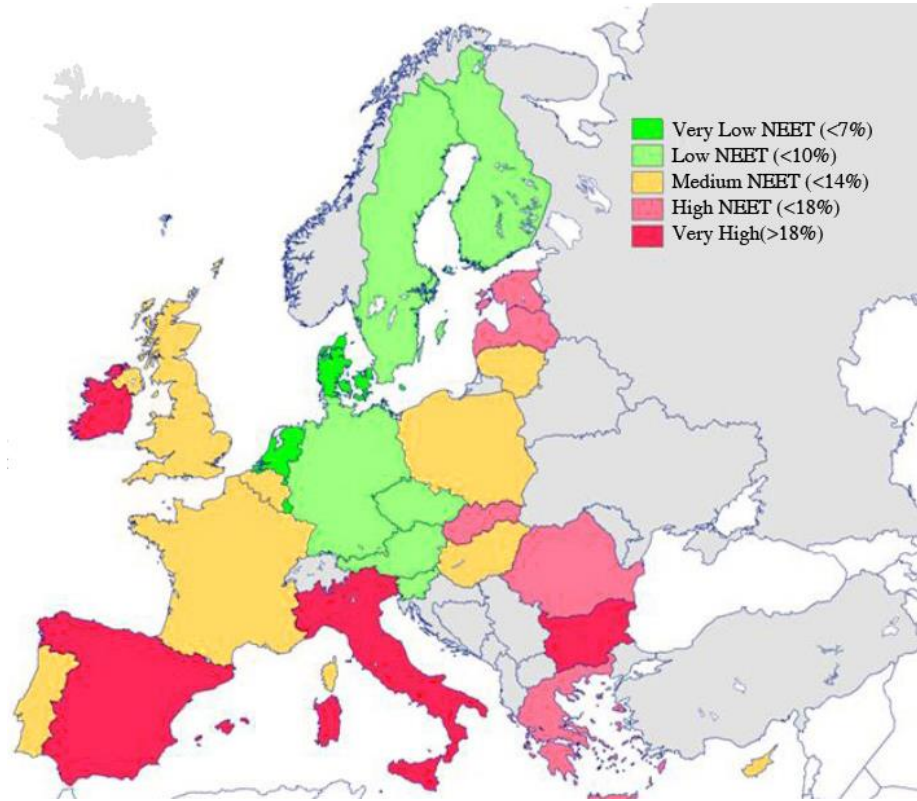
much of a problem in those countries (or in those legal systems, as a labour lawyer would put it) which make extensive use of apprenticeship, and which consider this tool not merely as a “temporary” contractual scheme, but rather as a lever for placement²¹ to achieve better integration between education and training and labour market (Figure No. 2).

Figure No. 2—Youth Unemployment Rate 2010.



Source: Eurostat Data.

²¹ See in this connection the article by P. Ryan, *Apprendistato: tra teoria e pratica, scuola e luogo di lavoro*, in *Diritto delle Relazioni Industriali*, 2011, n. 4, analysing the German “ideal” model, as opposed to the lack of transparency of market-oriented systems and to Italy and United Kingdom, where apprenticeship is a contract of employment.

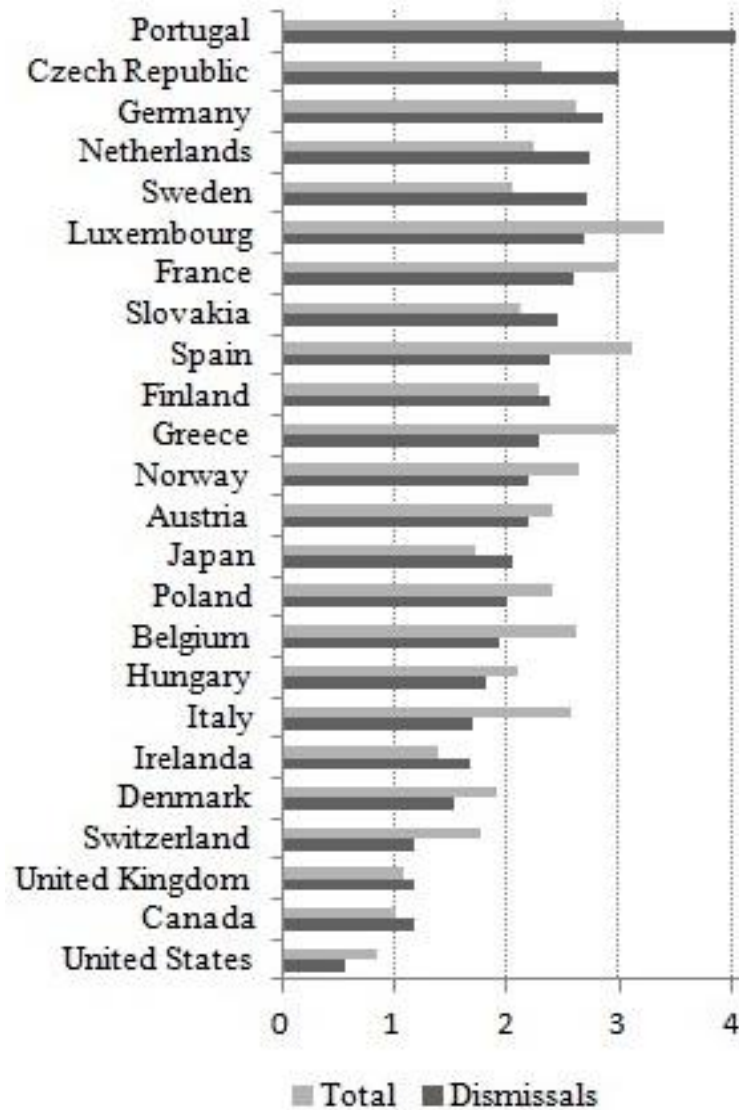
Figure No. 3—NEET Rates 2010.

Source: Eurostat data.

The same holds true for inactivity, most notably the issue of the NEETs (not in employment, nor education or training), which is less serious in countries where apprenticeship is resorted to as a means to obtain secondary education (Figure No. 3).

But, there is more. The best performing countries in terms of youth employment, such as Austria and Germany, also report high levels of workers' protection, especially against unfair dismissals (see Figure No. 4). By contrast, countries with more liberal legislation on dismissals, such as Denmark, the United Kingdom and the United States, account for high levels of youth unemployment. Evidently, they do not fare among the European countries with the worst youth employment outcomes, such as France, Italy and Spain, but youth unemployment is still twice as high as that recorded in best performing countries.

Figure No. 4—Overall Work Protection and Work Protection against Individual Dismissal (0 = less restrictive; 4 = more restrictive).



Source: Own elaboration on OECD data.

This simple and straightforward empirical observation seems therefore to uphold the assumption that major difficulties for the youth entering the labour market are not caused by inadequate regulation, but rather by

inefficient school-to-work transition processes as well as by the failure to properly match labour demand and supply. A good match between labour demand and supply is, however, not to be intended in static terms as merely dependent on more or less effective employment services—be they public and private—but rather in relation to the devising of academic careers which are consistent with current and future labour market needs in terms of training and skills acquisition.

2. Flexicurity and Apprenticeship: the Limits of the Proposal for the so-called “Single Employment Contract”

Countries embracing the *flexicurity* model as strongly recommended by European institutions²² report positive outcomes in terms of youth employment, with high employment rates and low unemployment levels (see Figure No. 5).

This led many experts to put forward the introduction of a “single employment contract” also in central and southern European countries. In some of these, including France,²³ Italy²⁴ and Spain²⁵ attempts have been made to adopt new legislative provisions favouring a “single”—or at least “prevailing”—contract for salaried workers, generally open-ended

²² See the Green Paper of the European Commission, *Modernising Labour Law to Meet the Challenges of the XXI Century* (COM(2006)708 final), and the Communication of the European Commission of 27 June 2007, *Towards Common Principles of Flexicurity: More and Better Jobs through Flexibility and Security* (COM(2007)359 final).

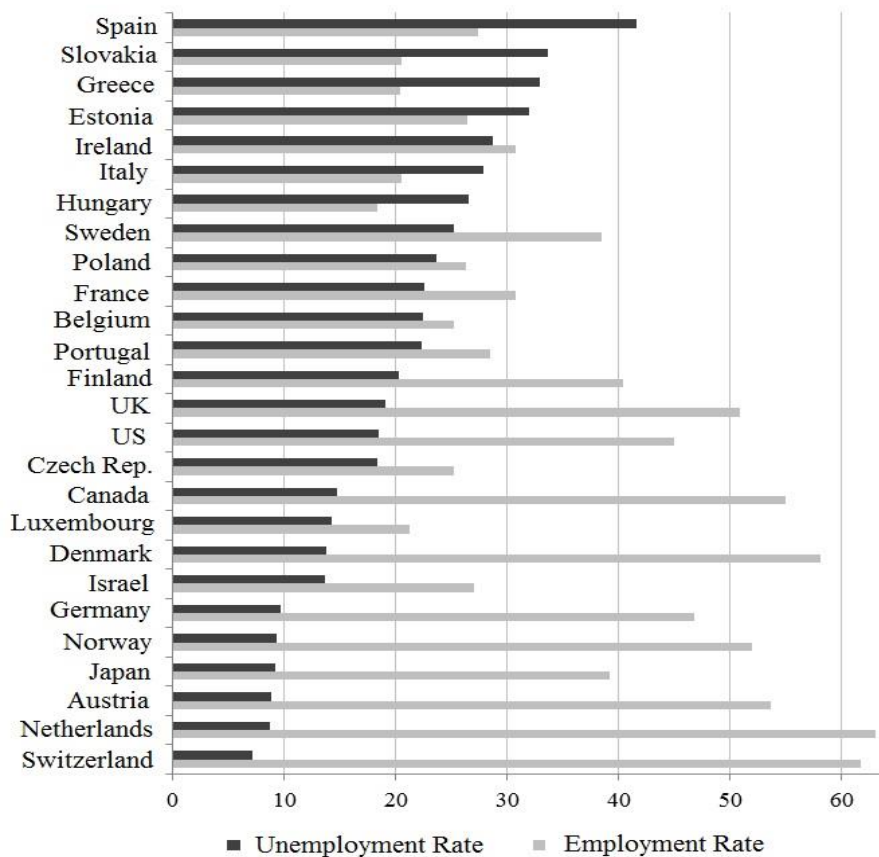
²³ O. Blanchard, J. Tirole, *Contours of Employment Protection Reform*, in K.V. Velupillai (ed.), *Macroeconomic Theory and Economic Policy. Essays in honour of Jean-Paul Fitoussi*, Routledge, New York, 2004; P. Cahuc, F. Kramarz, *De la précarité à la mobilité: vers une Sécurité sociale professionnelle*, in *La Documentation Française*, Paris, 2005.

²⁴ See in the literature T. Boeri, P. Garibaldi, *Un nuovo contratto per tutti*, Chiarelettere, Milano, 2008. Among the numerous draft laws, see Senato della Repubblica, Draft Law No. 1873 of 11 November 2009, ddl n. 1873, *Codice dei rapporti di lavoro. Modifiche al Libro V del codice civile*; Senato della Repubblica, Draft Law No. 1481 of 25 March 2009, *Disposizioni per il superamento del dualismo del mercato del lavoro, la promozione del lavoro stabile in strutture produttive flessibili e la garanzia di pari opportunità nel lavoro per le nuove generazioni*; Senato della Repubblica, Draft Law No. 2000 of 5 February 2010, *Istituzione del contratto unico di ingresso*; Camera dei Deputati, Draft Law No. 2630 of 22 July 2009, *Disposizioni per l'istituzione di un contratto unico di inserimento formativo e per il superamento del dualismo del mercato del lavoro*; Camera dei Deputati, Draft Law No. 4277 of 8 April 2011, *Deleghe al Governo per l'adozione di norme in materia di disciplina dei rapporti di lavoro, di formazione e di misure di protezione sociale per favorire l'accesso dei giovani al lavoro*.

²⁵ J. Andrés, S. Bentolila, J.J. Dolado, F. Felgueroso, *Propuesta para la reactivación laboral en España*, FEDEA, 2009.

and with significantly reduced workers' protection against unfair dismissal, to be offset by a higher degree of protection in the labour market, no longer provided by the contract itself, but rather by a more generous universal system of unemployment benefits, that can support workers during unavoidable and increasingly frequent occupational transitions.

Figure No. 5—Youth Employment and Unemployment Rates 2010.



Source: Own elaboration on OECD data.

The misleading charm and the limits of the proposal for a “single employment contract”—rest on the irrational belief, not even put forward in Fordism, with standardised production and work organisation models, that the duality of European labour markets can be overcome by reducing the multifaceted and diverse reality of modern work and production to

fixed contractual arrangements, through one single contract of employment, abolishing self-employment and coordinated and continuative collaboration (quasi-subordinate work) also in their most genuine forms. This is achieved by reducing to a limited number of cases the scope to lawfully resort to temporary work, by prohibiting it also when plausible technical, organisational and productive reasons are in place, by disregarding the educational value of access-to-work contracts directed to disadvantaged groups as well as of apprenticeship contracts for youth, with a view to favouring a pure and poorly balanced flexibility, where freedom of dismissal is easily granted upon payment of a termination indemnity.

On close inspection, a solution of this kind would damage not only employers, but also the workers themselves, most notably young people and those workers forced out of the labour market, who, in all likelihood, would bear the heaviest brunt of the reform, as they would no longer be doomed to “precarious”, but rather to “illegal” employment in the shadow economy. Not only would they have no access to internships, job-training contracts and project work, but they would also be denied protection resulting from employment stability, at least during their first years of work for the same employer or client.

This explains why the proposal for a “single employment contract” was soon dismissed in all the countries where it had been put forward, replaced—at least in France²⁶ and Italy²⁷—by a major overhaul of the apprenticeship system, as well as of those schemes (of contractual or non-contractual nature) promoting labour market access for first entrants, including internships for training and guidance. This can be seen as a reasonable trade-off based on the need to reduce the mismatch between labour demand and supply. A solution that is supported, in the author’s view, by the evidence that *apprenticeship* countries (as defined in par. 1) coped better with the crisis,²⁸ reporting a significantly lower increase in unemployment (see Figure No. 6), and in some cases, a reduction in the unemployment rates (see Figure No. 7). This aspect can be appreciated in

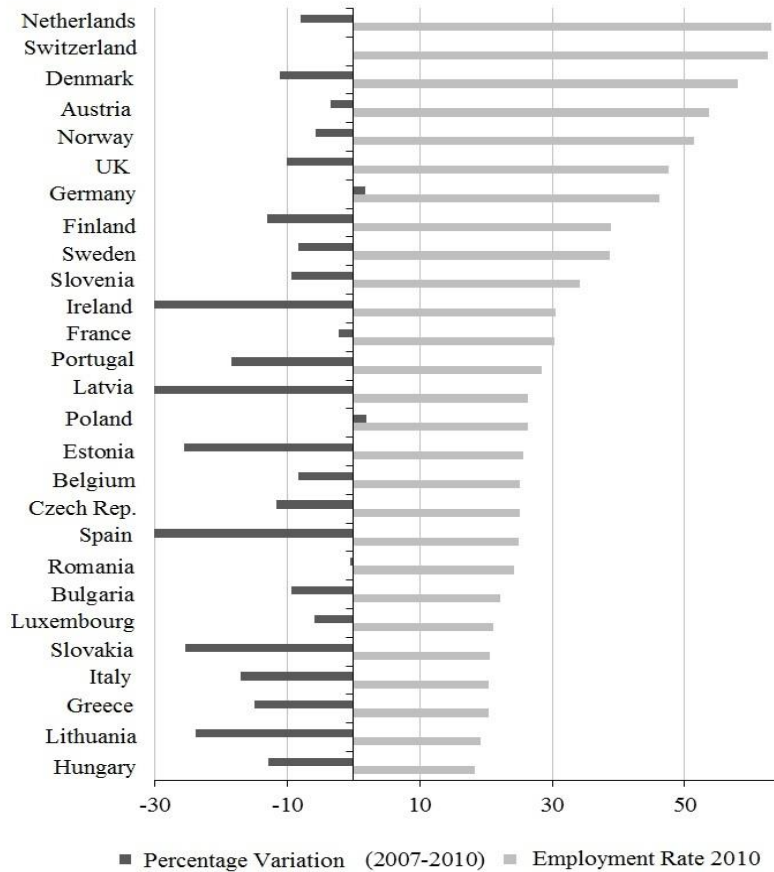
²⁶ Law No. 2011-893, so-called “Cherpion Reform”.

²⁷ Legislative Decree No. 167/2011. See in this connection M. Tiraboschi (ed.), *Il Testo Unico dell'apprendistato e le nuove regole sui tirocini. Commentario al decreto legislativo 14 settembre 2011, n. 167, e all'articolo 11 del decreto legge 13 agosto 2011, n. 138, convertito con modifiche nella legge 14 settembre 2011, n. 148*, Giuffrè, Milano, 2011.

²⁸ See M. Simms, *op. cit.*, in particular 24 ff.

comparison with *flexicurity* countries, which, by contrast, proved to be more vulnerable in the recession.²⁹

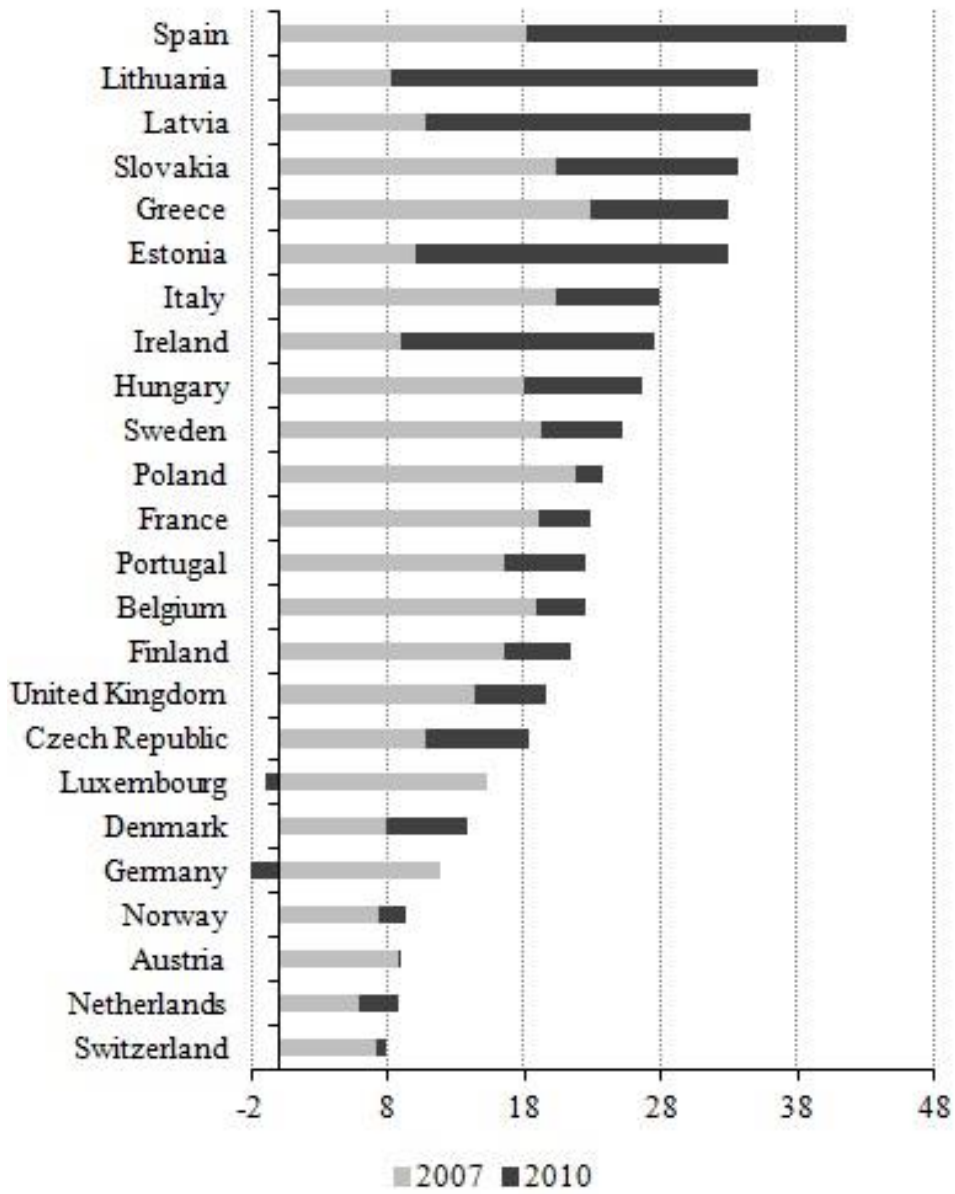
Figure No. 6—Youth Employment Rate in 2010 and Percentage Variation between 2007 and 2010.



Source: Own elaboration on Eurostat data.

²⁹ See T. M. Andersen, *A Flexicurity Labour Market in the Great Recession: The Case of Denmark*, IZA Discussion Paper, 2011, n. 5710. For a comparative evaluation, see S. Spattini, M. Tiraboschi, *Labor Market Measures in the Crisis and the Convergence of Social Models*, in W. E. Upjohn Institute for Employment Research, 2012, forthcoming.

Figure No. 7- Youth Unemployment Rate 2007 e 2010.



Source: Own elaboration on Eurostat data.

3. The (Main) Determinants of Youth Unemployment: Education Systems, School-to-work Transition, Labour Market Institutions, Industrial Relations Systems

The existence of a sound dual system of apprenticeship cannot be the only reason for low levels of youth unemployment in countries such as Germany, Switzerland, and Austria, and in more general terms, nor the cause of what has been defined as the “German labour market miracle during the great recession”.³⁰

Without assuming a direct causal relationship between labour market institutions and the policies in place in the different countries, it seems however possible to identify a number of specific determinants of youth unemployment that show how limited and partial an intervention of a purely regulatory nature would be in tackling the problem of youth employment, all the more so if an institutional approach would probably be more effective.

According to several comparative analyses, youth unemployment trends are not only—or not much—affected by labour market rules with regard to hiring and dismissing, but rather by a series of factors including the quality of the education system, an effective school-to-work transition, the integration between school and work-based training, the quality of the industrial relations system, and the functioning of labour market institutions.

The table that follows classifies some European countries and the United States considering the unemployment rate for youth aged 15-24 years old, providing an overview of the determinants of positive or negative youth employment outcomes on the basis of three factors: education and training, industrial relations and employment protection legislation (see par. 4). The comparative overview supplied in the following table is based on a series of indicators collected from authoritative research and international studies and shows in particular that different priority issues must be taken into account to effectively tackle youth employment and that labour market reform is not enough.

³⁰ See on the issue M. C. Burda, J. Hunt, *What Explains the German Labor Market Miracle in the Great Recession?*, IZA Discussion Paper, 2011, n. 5800.

Table No. 1—Characteristics of Labour Market Institutions and Youth Unemployment in Europe and in the United States.

Youth Unemployment Rate 2010	Training and School-to-work Transition						Industrial Relations System		Employment Protection Legislation	
	Quality of education	Apprenticeship			School-to-work Transition		Cooperative Ind. Rel.	Wage Flexibility	Flexibility in Hiring	Flexibility in Firing
		As flexible employment	As a form of training	Low pay, more training	School Placement	Efficient employment services				
Austria 9%	x	x	x	x	x	x		x		
Netherlands 9%	x		x	x	x		x	x		
Germany 10%	x	x	x	x	x	x	x	x		
Denmark 14%	x			x	x	x		x	x	
USA 18%	x			x	x		x	x	x	
UK 19%	x	x		x	x	x	x	x	x	
France 23%			x					x		
Italy 28%		x						x		
Spain 42%		x						x		

Note: the X indicates that the country ranks within the top 30 in the rankings.

Sources: benchmarking was created with reference to 1) The Global Competitiveness Report 2011-2012, World Economic Forum, Geneva, 2011; 2) Eurostat, Methods used for seeking work, 2011; 3) World Bank, Doing Business Report, 2011.

Source: Own Elaboration.

At the time of addressing interventions, priority should be given to the education system, focusing on the shift from school to work. Indeed, education policies are not only applied during crises, but also as structural measures, and it is no coincidence that countries with good youth employment outcomes have high quality education and training systems. As pointed out in the Table No. 1, the higher quality of education is related to lower youth unemployment rates. For reasons of simplicity, the table presents a general indicator describing the “quality of the education system” taken from the *Competitiveness Report* of the World Economic Forum³¹ where in an executive opinion survey it was asked “How well does the educational system in your country meet the needs of a competitive economy?” [1 = not well at all; 7 = very well].

Countries with low youth unemployment rates (light and medium grey in the table) are those where the quality of education perceived by corporate executives is high. Although this indicator is probably subjectively biased, it can be particularly useful in that it gives the standpoint of labour market operators, not merely focusing on education *per se*, but taking into account the extent to which education and training meet the skill and vocational requirements of the competitive economy.

In the context of education and the school-to-work transition, apprenticeship plays a substantial role also in cultural terms, providing effective training and work-based learning and being acknowledged in the literature as one of the most valuable means for an effective school-to-work transition.³² However, not all apprenticeships are equal in terms of investment in training, which is the fundamental feature of a true apprenticeship.³³ Moreover, not all apprenticeships carry the same value in

³¹ K. Schwab, *The Global Competitiveness Report 2011-2012*, World Economic Forum, Geneva, 2011. The X indicates that the country ranks among the first 30 out of 140 countries in relation to the *Quality of education* index.

³² See the review on school-to-work transition systems, with particular reference to the superiority of the dual apprenticeship model in G. Quintini, T. Manfredi, *Going Separate Ways? School-to-Work Transitions in the United States and Europe*, OECD Social, Employment and Migration Working Papers, 2009, n. 90, and in G. Quintini, J. P. Martin, S. Martin, *The Changing Nature of the School-to-Work Transition Process in OECD Countries*, IZA Discussion Paper, 2007, n. 2582. In the Italian literature, see G. Bertagna, *Apprendistato e formazione in impresa*, in M. Tiraboschi (ed.), *op. cit.*

³³ According to Ryan (in *Apprendistato: tra teoria e pratica, scuola e luogo di lavoro, op. cit.*), “ideal” apprenticeship is not only a work-based learning opportunity, but should rather provide part-time vocational training as well as work experience, leading to the acquisition of a formal vocational qualification.

terms of youth employability, and if there is no investment in “genuine” training on the part of the company, what remains is the mere use of cheap labour. For this reason, in the table below, apprenticeship schemes are divided according to the (effective, and not just theoretical as required by law) provision of training. Although a number of legal provisions establish compulsory training during apprenticeship, reality is often very distant from the ideal apprenticeship model, and this tool becomes a mere instrument of exploitation of a flexible and cheaper labour force. Apprenticeship schemes in Germany and Austria include part-time formal schooling, whereas in Italy and in the United Kingdom, apprenticeship is not only a “flexible” or “subsidised” employment contract, but is also often devoid of real learning contents, if we consider that the share of apprentices receiving formal training is lower than 40%.³⁴

This is also the reason why the third indicator, i.e. pay levels of apprentices with respect to skilled employees, was included in the table. By analysing the level of pay granted to apprentices, one might quantify the exchange value of training, and it follows that the higher the investment in training, the lower the apprentice’s remuneration defined in collected agreements; whereas, apprentices are paid almost the same as skilled workers when training is neglected. It is significant, as the following table clearly shows, that German and Austrian apprentices receive a lower pay and learn more. The dual system distinguishes itself from how the apprentices’ pay is defined, since it is considered an allowance (*Vergütung*) rather than wage in a strict sense, as is generally referred to in the United Kingdom and in Italy. In Austria and Germany, as well as in the Netherlands and France, apprentices receive less than the half of the wage of a skilled employee, whereas in Italy the apprentices’ pay can reach up to 80% of the full wage of a skilled worker.

³⁴ P. Ryan, K. Wagner, S. Teuber, U. Backes-Gellner, *Trainee Pay in Britain, Germany and Switzerland: Markets and Institutions*, SKOPE Research Paper, 2010, n. 96. See also M. Tiraboschi, *Ragioni e impianto di una riforma*, in M. Tiraboschi (ed.), *op. cit.*

Table No. 2—*Apprentices' Pay as a Percentage of the Wage of a Skilled Worker.*

		Manufacturing	Services	Other Sectors	
United Kingdom	2005	46%	70%	Da 45% (hair-dressers) a 60% (trade)	
Germany	2007	29%	34%	27%	
Switzerland	2004	14%	17,5%	18%	
Ireland	2009	30% (I year), 45% (II year), 65% (III year), 80% (IV year)			
France (% minimum wage)	2010	25% (under 19 years old), 42% (20-23 years), 78% (over 24 years old)			
Italy	2010	72% (2 levels below the final employment grade)	from 70% to 80% (2 levels below the final employment grade)	Craftsmanship: from 55% to 90%	Construction: from 60% to 85% (over 3 years, + 10% per year)

Source: ADAPT, *Giovani e lavoro: ripartiamo dall'apprendistato, in fareApprendistato.it, 10 May 2011.*

Besides the proper use of contractual (and non-contractual) arrangements, an efficient school-to-work transition should rely on a placement system able to develop a synergy between “knowledge” and “know-how”—i.e. schools and businesses—by fostering a systematic collaboration based on an ongoing information exchange that builds a bridge between labour demand and supply, as well as in light of future prospects, exploring training and skill needs required by the market and providing training centres with the relevant information.³⁵

³⁵ M. Tiraboschi, *Il problema della occupazione giovanile nella prospettiva della (difficile) transizione dai percorsi educativi e formativi al mercato del lavoro*, in P. Reggiani Gelmini, M. Tiraboschi (eds.), *Scuola, Università e Mercato del lavoro dopo la Riforma Biagi. Le politiche per la transizione dai percorsi educativi e formativi al mercato del lavoro*, Giuffrè, Milano, 2006; S.

In countries where there is a well-established school and university placement system, the relationship between training centres and businesses is—in their mutual interest—of a cooperative nature. Students' CVs, as well as job posts are freely available on the universities websites and in placement offices, and schools are actively involved in job matching process and are aware of the skills required by the market.

In countries such as the United Kingdom and the United States, this synergy results in a smoother youth labour market entry and lower youth unemployment rates. Inefficient placement offices and insufficient placement employment services—both public and private—make job search for young people even more difficult. So much so that, as shown in Table No. 1, in countries where employment services are efficient, young people tend to rely more on them during their job search, increasing the chances to find employment. By contrast, EUROSTAT figures show that in countries with higher unemployment levels, the youth rely less on employment services, and resort to informal methods (such as friends and connections) acquiring less information and thus adding to the traditional difficulties in labour market entry further barriers due to asymmetric information.

Not only does this first proposal represent an alternative to Labour Law reform as the only solution to youth unemployment. It can also contribute to preventing the increase in youth unemployment, by setting the stage for the acquisition of marketable skills for the job market, bringing young people closer to the labour market by means of apprenticeship and other relevant tools, and creating a network among the institutions involved.

The idea that Labour Law reform is not the only way to reduce youth unemployment is reinforced by the awareness that new policies and regulations are adopted only when problems have already arisen and they cannot fully solve the difficulties that youth face in the labour market.

The second important area of intervention to focus on is the quality of the industrial relations system. As provided in Table No. 1, two factors falling under the rubric of industrial relations could particularly contribute to promoting youth employment and to creating a more inclusive labour market.

In countries where industrial relations are more cooperative, where collective bargaining is decentralised and wage determination is flexible,

Spattini, M. Tiraboschi, *La revisione dei regimi di autorizzazione e il rilancio del placement universitario*, in M. Tiraboschi, G. Proia (eds.), *La riforma dei rapporti e delle controversie di lavoro. Commentario alla legge 4 novembre 2010, n. 183 (cd. Collegato lavoro)*, Giuffrè, Milano, 2011; S. Spattini, *Riforma dell'apprendistato e nuovo placement*, in M. Tiraboschi (ed.), *op. cit.*

the production system is efficient and new opportunities for youth can easily arise. By contrast, in countries where social partners do not act cooperatively and where the bargaining system is highly centralised, the voice of labour market insiders, i.e. adult workers with stable employment, prevails over the voice of outsiders and of the unemployed or inactive.

Among industrial relations indicators, particularly relevant is the extent to which industrial relations can be considered cooperative, and wage determination flexible. Both indicators are drawn from the *Competitiveness Report*³⁶ with a view, once again, to looking at reality rather than providing a theoretical perspective based on laws and contracts. The World Economic Forum classification and the analysis of youth unemployment rates seem to be in line with the idea that cooperative industrial relations and flexible wage determination mechanisms can contribute to building a more inclusive productive system.

The debate at a European level is, however, moving away from the notion of “concertation”, with employment protection legislation that is considered almost unanimously the main cause of youth unemployment.³⁷

As previously noted, labour economics literature has not universally established the effects of employment protection systems on unemployment, while there is overwhelming agreement only on the fact that these effects are ambiguous. In this connection, Table No. 1 shows that higher flexibility in dismissals perceived by labour market operators is not related to lower youth unemployment levels, since, as noted, in Austria, the Netherlands and Germany it is not as easy to dismiss workers as in *flexicurity* countries or in those countries with a free market economy, despite reporting lower youth unemployment rates.

4. Future Prospects for Interdisciplinary Research

The main economic studies on the subject agree that a central role in terms of youth employment promotion policies is played by aggregate

³⁶ K. Schwab, *op. cit.* The X indicates that the country is ranking among the first 30 out of 140 countries with reference to the *Cooperation in labour-employer relations* and *Flexibility of Wage Determination* indexes.

³⁷ M. Tiraboschi, *I paradossi di una riforma sbagliata (e che si farà, anche se non piace a nessuno)*, and P. Tomassetti, *Riforma del lavoro: una sconfitta della concertazione o delle relazioni industriali?*, in P. Rausei, M. Tiraboschi (eds.), *Lavoro: una riforma a metà del guado. Prime osservazioni sul DDL n. 3249/2012. Disposizioni in materia di riforma del mercato del lavoro in una prospettiva di crescita*, Adapt University Press, 2012, at www.bollettinoadapt.it.

demand. It remains crucial, therefore, in the fight against unemployment in general, and youth unemployment in particular, to adopt sound (tax and monetary) macro-economic and sectoral policies.³⁸ Particularly relevant, today and more so in the future, is the role of demography, both for the sustainability of retirement and welfare systems and for the effects on the labour market and business organisation models.

The present article has aimed to point out the marginal role played by labour market liberalisation reforms, showing instead that institutional factors are of fundamental importance when concerning youth employment. These factors include the quality of the education system, apprenticeship as a work-based training opportunity, efficiency and quality of the industrial relations system and more generally, of labour market institutions. There is therefore scope for a new strand of research based on a cross-sectoral approach intended to verify the assumption presented in the previous paragraphs and focusing on the determinants of youth employment and related problems in an interdisciplinary fashion. To those who are aware of the complexity of the subject, these issues cannot be addressed and solved with legislative intervention alone.

³⁸ ILO, *World of Work Report 2012. Better Jobs for a Better Economy*, cit.

Factors Contributing to the Effectiveness of the European Works Council: An Explorative Study

Theodore Koutroukis *

Introduction

Acknowledging the role carried out by employees in MNCs has been the major concern of the most relevant EU bodies from the beginning of the 1970s until 22 September 1994, when the EWCD giving them the right to information and consultation was finally adopted. The main purpose of the European Works Council (EWC) is to bring together employee representatives (ERs) from various European sites where MNCs operate.¹ To date, EWCs have been set up considering two main schemes. The first scheme consists of ERs on an exclusive basis who enter into consultation with management when necessary. The second is of a mixed composition, that is representatives of both sides.² So far, the contribution of EWCs to the industrial relations system at both European and national level has been poorly explored. In this sense, very little scholarly work has dealt with this issue, such as the classic by Lamers on the added value of EWCs³ and some other books.⁴ The effectiveness of EWCs as a tool to

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¹ P. Kerckhofs, *Evaluating the Development of European Works Councils: An Analysis of Case Study Evidence*, (PhD thesis), Manchester Business School, Manchester, 2007.

² T. Koutroukis, *Employee Relations in Multinational Enterprises: The experience of European Works Councils* [Ph.D. thesis, in Greek], Panteion University, Athens, 2004.

³ J. Lamers, *The Added Value of European Works Councils*, AWWN, Haarlem, 1998.

⁴ M. Hall, M. Carley, M. Gold, P. Marginson, and K. Sisson, *European Works Councils: Planning for the Directive*, IRS- IRRU, London, 1995. T. Bain, and K. Hester, *European Works Council Directive and HR/LR Strategies of Multinational Companies*, paper presented at

enhance employment relations and strengthening employee voice within MNCs has only been investigated in pertinent studies.⁵ At the onset, it might be worth pointing out the notion of Europeanisation as a fundamental aspect among social partners in Europe. Europeanisation can be conceptualised as “the development of this complimentary layer of actors, structures and processes at the European level, which interact with national institutions and actors”.⁶ More specifically, the Europeanisation of industrial relations has been described as a quite complex process.⁷ As far as Greece is concerned, EI schemes are rare, since only 5% of the companies have actually established them pursuant to Works Council Law. This is due to the strong presence of small- and medium-sized enterprises, where union action is very weak or does not exist at all. Thus, the implementation of the EWCD could promote and disseminate the concept of employee involvement in the Greek IR system as a whole.⁸ In the context of this paper, the major factors that influence the effective functioning of international EI in MNCs which operate in Greece are surveyed. It is widely accepted that a MNC is a group of companies performing in many countries, sharing common resources and adopting a common strategy. MNCs may also include one or more (parent) companies which expand abroad—either with the same or a different nationality—and set up subsidiaries overseas, with local shareholders having a minority or a majority stake in them. In practice, and according to the typologies put forward by Perlmutter, Bartlett and Ghoshal, MNCs can assume various forms.⁹ Typically, the management of MNCs can be decentralised or centralised. Decentralisation is mainly found in the

the 6th European IIRA Congress, Oslo, Norway, June 2001. T. Weber, P. Foster, and K. L. Egriboz, *Cost and Benefits of the European Works Councils Directive*, UK Department of Trade and Industry, in Employment Relations Research Series n. 9, DTI, Birmingham, 2000.

⁵ M. Bailey, *Can You Hear Us?: The Effectiveness of European Works Councils as a Mechanism of Employee Voice for Hungarian Workers of PrintCo*, in *Employee Relations*, 2009, vol. 31, n. 2, 197-218.

⁶ P. Kerckhofs, *op. cit.*

⁷ W. Lecher, H-W. Platzer, S. Rüb, and K-P. Weiner, *European Works Councils: Negotiated Europeanisation*, Ashgate, Aldershot, 2002. T. Müller, and A. Hoffman, *EWCD Research: A Review of the Literature*, Warwick Papers in Industrial Relations, n. 65, IRRU, Warwick, 2001.

⁸ C. Jecchinis, *Recent Developments in Greek Industrial Relations: Statutory and Attitudinal Changes towards Participation and Cooperation*, in *Labour* 1994, vol. 8, n. 3, 547-566. T. Koutroukis, *op. cit.*

⁹ M. Leat, and J. Wooley, *Multinationals and Employment Relations*, in G. Hollinshead, P. Nicholls, and S Tailby, (eds.), *Employee Relations*, Financial times-Prentice Hall, Essex, 1999, 93-131.

management of the subsidiaries when dealing with administrative matters, such as daily productive activities of the single economic unit, the investigation of the local market and the short-term corporate policy to be applied locally. Centralised management mainly concerns top executives who make strategic decisions as regards investment and financial issues.¹⁰ There are various effects of MNCs on employment relations. The scope of the phenomenon has contributed to a growing international awareness of labour-related issues and has led to the emerging need to find new solutions to these issues. The multinational dimension of IR has two main aspects:¹¹

- differences in the structures of employment relations in the various countries where the MNCs operate;
- differences in the approach of both national trade union and labour institutions concerning matters such as wage and working conditions.

Certain peculiarities of the MNCs have influenced employment relations significantly,¹² in particular:

- (a) the two-tier nature of decision-making, with management of parent companies who deal with financial matters and those at a decentralised level, namely subsidiaries, who are in charge of solving issues concerning industrial relations;
- (b) the high level of flexibility of the corporate group in terms of manufacturing; and
- (c) the relative opacity which characterises the economic activity of the MNCs.¹³

The decision to increase or reduce the productive base in MNCs is made by their headquarters, which means that the parent company also has a say

¹⁰ T. Koutroukis, *op. cit.*

¹¹ D. Kujawa, *Labor Relations of U.S. Multinationals Abroad*, in *Labor Relations in Advanced Industrial Societies: Issues and Problems*, in B. Martin, and E. Kassalow, (eds.), Carnegie Endowment for International Peace: Washington D.C., 14-42, 1980.

¹² G. Spiropoulos, *Employee Relations in Greece, Europe and Internationally* [in Greek], A. Sakkoulas, Athens-Komotini, 1998.

¹³ B. Liebhaberg, 1980, *Industrial Relations and Multinational Corporations in Europe*, Gower-ECSIM, Brussels.

with regard to personnel in each subsidiary. MNCs usually prefer to invest in countries with higher labour flexibility,¹⁴ where they can transfer production activities from one undertaking where industrial conflict takes place to another one, and stop the operations in a factory at any time.¹⁵ However, there is no universally accepted view on the impact on employment relations formed in the subsidiaries by the MNCs.¹⁶ Referring to them, Martinez Lucio and Weston note that some tend to adjust to the national IR traditions, while others act as a catalyst for change with the spread of new forms of work organisation and IR practices.¹⁷ Coller and Marginson¹⁸ maintain that employment relations seem to be dependent, to a great degree, on local factors and are not very sensitive to the effects of parent company management. At the same time, the impact that the various influence channels might have on employment and work organisation should not be overlooked, particularly that occurring through transnational management practices within the group.

Other scholars insist that in most MNCs there are two counter-balancing trends which combine the increasing decentralisation in each production unit and centralisation taking place at the European level. This is the result not only of exogenous pressures for adjustment, but also of internal needs for coordination and control.¹⁹ Part of the literature argues that employee relations within the MNCs are decentralised, irrespective of the

¹⁴ P. Marginson, and K. Sisson, *The Structure of Transnational Capital in Europe: The Emerging Euro-Company and its Implications for Industrial Relations*, in *New Frontiers in European Industrial Relations*, R. Hyman, and A. Ferner, (eds.), Blackwell, Oxford, 1994, 15-51.

¹⁵ M. Steuer, and J. Gennard, *Industrial Relations, Labour Disputes and Labour Utilization in Foreign-owned Firms in the United Kingdom*, in J. Dunning, (ed.), *The Multinational Enterprise*, G. Allen and Unwin, London, 1971, 89-167.

¹⁶ H. Günter, *Multinational Corporations and Labour: A Selected and Annotated Bibliography*, International Institute for Labour Studies, Geneva, 1993. A. Ferner, and P. Edwards, *Power and the Diffusion of Organizational Change within Multinational Enterprises*, in *European Journal of Industrial Relations*, 1995, n. 1, 229-257.

¹⁷ M. Martinez Lucio, and S. Weston, *New Management Practices in a Multinational Corporation: The Restructuring of Worker Representation and Rights?*, *Industrial Relations Journal* 1994, 25: 110-121.

¹⁸ X. Coller, and P. Marginson, *Transnational Management Influence over Changing Employment Practice: a Case from the Food Industry*, in *Industrial Relations Journal*, 1998, n. 29, 4-17.

¹⁹ T. Edwards, *Multinationals, International Integration and Employment Practice in Domestic Plants*, in *Industrial Relations Journal*, 2000, n. 31, 115-129. P. Marginson, and K. Sisson, *Multinational Companies and the Future of Collective Bargaining: A Review of the Research Issues*, *op. cit.* T. Turner, D. D'Art, and P. Gunnigle, *US Multinationals: Changing the Framework of Irish Industrial Relations?*, in *Industrial Relations Journal*, 1997, n. 28: 92-102.

involvement of parent company management in cases of serious crises,²⁰ whereas another claim is that MNCs standardise some aspects of IR and disseminate them within the national IR system, rather than adjusting fully to the local practices of employee relations.²¹

Finally, some other scholarly work has described the following influencing factors as significant in evaluating the extent to which parent companies play a part in employment relations within a subsidiary:²²

- the extent of inter-subsiary integration of production activities, since evidence has shown that a great deal of inter-subsiary integration of production activities leads to the centralisation of employment relations;
- the nationality of the MNC, because US-owned MNCs are characterised by higher levels of centralisation as regards the decision-making process concerning employment relations in comparison to European-owned ones;
- the way a subsidiary is established, given that MNC Brownfield sites tend to enjoy greater autonomy than Greenfield ones;
- the financial performance of subsidiaries, particularly for those with inadequate financial turnover when that performance negatively affects employment relations. In this case, MNCs usually implement national employment relations practices in order to reduce industrial conflict

²⁰ H. Günter, *op. cit.*

²¹ A. Ferner, J. Quintanilla, and M. Varul, *Country of Origin Effects and the Management of HR/IR in Multinationals: German Companies in Britain and Spain*, paper presented at the 12th World Congress of IIRA, Tokyo, Japan, 2000. M. Muller Camen, P. Almond, P. Gunnigle, J. Quintanilla, and A. Tempel, *Between Home and Host Country: Multinationals and Employment Relations in Europe*, in *Industrial Relations Journal*, 2001, n. 32, 435-448.

²² H. Knudsen, *European Works Councils-Potential and Obstacles on the Road to Employee Influence in Multinational Companies*, in *Industrielle Beziehungen*, 2004, vol. 111, n. 3: 203-220. European Foundation for the Improvement of Living and Working Conditions. *European Works Councils in Practice*, Luxembourg, 2004. M. Leat, and J. Wooley, *op. cit.*. P. Marginson, J. Lavelle, J. Quintanilla, and R. Sanchez Mangas, *Transnational Employee Voice in Multinational Companies: Variable Dialogue in European Works Councils*, paper presented at the MNCs symposium, IIRA World Congress, Sydney, Australia. 2009. V. Pulignano, *Connecting Employee Representatives Response Across Borders: A Comparative Study of American-based Multinational Subsidiaries in Europe in two Sectors*, paper presented to the 7th IIRA European Congress, Lisbon, Portugal, September 2004. V. Pulignano. *EWCs' Cross-National Employee Representative Coordination: A Case of Trade Union Cooperation?* in *Economic and Industrial Democracy* 2005, vol. 26, n. 3, 383-412.

and/or increase productivity. By contrast, in subsidiaries with satisfactory performance and efficiency, MNCs tend to adopt local employment relations practices which are routinely applied in those production units;

- the amount of investment allocated to the subsidiary by MNCs, when the parent company is required to invest considerable capital, the tendency is to increase its intervention in the latter's employment relations. Equally important, is the undermining influence of MNCs on EI schemes.²³ Thus, in MNC subsidiaries, the employees' rights of participation are weakened because the decision-making power is not in the hands of national participation bodies. It has been found, however, that the framework and practice of employee participation in the MNC subsidiaries depend only to a minor extent on direct regulation of the headquarters. By making reference to a survey of several case studies, Lumley and Misra indicate that parent companies were concerned with the performance of their subsidiaries in terms of production and profits, whereas they show no interest whatsoever in EI issues and, if that happens, it is overt only when participation practices are obviously opposed to financial goals.²⁴ In a similar vein, Hann has pointed out that EWCs provide limited contribution to regulate MNCs allowing ERs to influence decision-making.²⁵ Finally, it seems that the MNC subsidiaries make use of many cultural elements of IR practice of the host country, without, however, ruling out the transfer of certain practices implemented in the home country. Consequently, it is interesting to examine the policy of the MNC subsidiaries that operate in Greece, and especially those in which EWCs have been established pursuant to European Directive No. 94/45/EC.

1. Methodology

The purpose of the survey was to examine the influencing factors in the effective functioning of EWCs in MNC subsidiaries in Greece. Two

²³ J. K. Looise, and M. Drucker, *Employee Participation in Multinational Enterprises: The Effect of Globalisation on Dutch Works Councils*, in *Employee Relations*, 2002, vol. 24, n. 1, 29-52.

²⁴ R. Lumley, and S. Misra, *Employee Participation in the Subsidiaries of Multinational Enterprises: Two Anglo-Indian Case Studies*, in *Economic and Industrial Democracy*, 1994, 15: 631-649.

²⁵ D. Hann, *European Works Councils: the Cornerstone to a European System of Industrial Relations?* Paper presented to the Conference "Industrial Relations in Europe", CIRN, Athens, July 2007.

sectors were singled out and a qualitative approach was deemed necessary as combining investigative and interpretative criteria.²⁶ The issue arising from an over-generalisation of the findings was sidelined by investigating the function carried out by EWC in all the MNC subsidiaries of both sectors.²⁷ The problem of transparency was coped with through an analytical description of the methodology. The choice of the case studies and the interviews that were selected comprised an empirical investigation of a certain phenomenon within its actual framework, as it is particularly recommended when the boundaries between the phenomenon and the framework are blurred.²⁸

The food and drink sector (FD) and oil lubricants industry (OL) were singled out because:

- a) they are representative of the industrial activity in Greece and abroad, and are characterised by a variety of ownership, corporate culture, managerial methods, EI and IR traditions;
- b) they have similar unionisation rates. In addition, to control for differences at a sectoral level, all cases were chosen from both sectors.

Further, all the enterprises with EWCs in these two sectors were investigated. The characteristics of the businesses per sector are illustrated in Table No. 1:

²⁶ N. Kiriazi, *Sociological Research* [in Greek], Ellinika Grammata, Athens, 1999.

²⁷ R. Gomm, M. Hammersley, and P. Foster, *Case Study and Generalization*, in R. Gomm, M. Hammersley, and P. Foster (eds.), *Case Study Method: Key Issues, Key Texts*, Sage, London, 2000, 98-115.

²⁸ R. Stake, *Case Studies*, in N. Yenzin, and Y. Lincoln, (eds.), *Handbook of Qualitative Research*, Sage, Thousand Oaks, 1994, 236-247. R. Yin, *Case Study Research; Design and Methods*, Sage, Thousand Oaks 1994.

Table No. 1—Characteristics of the Businesses Surveyed (per sector).

Characteristics of the Businesses Surveyed (per sector)		
Sector	Food Drinks (FD)	Oil Lubricants (OL)
Average number of employees	604	317
Union activity in the sector	Through company unions	Through branch unions
Types of enterprises	Traditional Greek industrial enterprises taken over by MNCs during the past 15 years (Brownfield sites)	They were established from the beginning as MNC subsidiaries (Greenfield sites)
Type of employee representation in the workplace	Company Union	Works Council

Source: Interview Data Processing.

Accordingly, eleven in-depth interviews with ERs and nine interviews with HR managers were carried out. This number provides for complete coverage of Greek employee delegation in MNCs surveyed in both sectors. The content of the interviews was recorded upon consent of the participants, and they were also given the opportunity to check the first draft of the interview transcript, which was standardized. The questionnaire was an adapted and enriched version of the research tools employed in similar studies all over Europe.²⁹

Systematic and methodical recording of all the procedures of the survey ensured its repetition in the future, with a high probability that the same results would be produced.³⁰

²⁹ P. Kerckhofs, *op. cit.*

³⁰ E. Wallis, *Industrial Relations in the Privatised Coal Industry: Continuity, Change and Contradictions*, Ashgate, Aldershot, 2000.

2. Findings

Drawing on collected evidence, it was found that EWCs enhance the promotion of a European HR policy on the part of MNCs, and that they act as a communication channel of the interested parties at the European level, also contributing to a convergence of employment relations within MNCs. The main findings which arose from the interviews of the HR Managers are provided in Table No. 2.

Table No. 2—Interviews with HR Managers: Main Findings.

Interviews with HR Managers: Main Findings
Described employment relations in their company as “co-operative” (9/9)
Have a positive opinion of EI schemes. In regular and extraordinary EWC meetings, representatives of subsidiary and local management take part in almost all the FD companies, but in no OL companies (8/9)
Believe that the EWC is useful for the company, but only few wish for the reinforcement of its role (8/9)
Believe that EWCs increase the chances to implement a European HR policy in their companies (the majority of)
Believe that the EWC function improves their company’s performance (the majority of)
Believe that the EWC function improved labour-management relations at the local level (6/9)
Believe that the role of ERs is successful (9/9), and no one thinks that ERs might cause problems of any kind
Stated that the relation of subsidiary/ local management with the Greek EW Councillor is very positive (9/9)
Believe that EWCs create (positive) added value in labour-management relations of the MNC as a whole and at the local level as well (9/9)
Think that the most significant cost for the company is high employee expectations concerning the future of employee involvement in the company (7/9)
Think that the travel cost of ERs is the most important real cost item from the EWC function (the large majority)

Agree that EWCs promote a transnational co-operation of social partners' organisations, widen the promotion of a European HR policy by the MNCs, become a part of an emerging European IR system, offer a channel of communication of the interested parties at the European level and contribute to a convergence of employment relations within MNCs (a large majority)

Source: Interview Data Processing.

Furthermore, it was found that in several sectors EWCs provide access to upper-management, promote consultation and common visions/values with foreign colleagues as well as international cross-pollination, develop a European dimension of the group and IR, facilitate steering and checking through social dialogue, contribute to business-like cooperation and positively influence IR within the parent company and the subsidiaries as well.

As far as interviews of the ERs are concerned, the main findings are given in Table No. 3.

Table No. 3—Interviewing Employee Representatives (ERs): Main Findings.

Interviewing Employee Representatives (ERs): Main Findings
Describe employment relations in their company as “co-operative” (10/11)
Positively view EI schemes (10/11)
Believe that EWCs could widen the scope for cooperation and development of strong links among trade unions all over Europe (10/11)
Believe that EWCs could be a stepping stone towards the creation of a European collective bargaining framework (9/11)
Believe that EWCs will contribute to the convergence of IR at the supra-national level (9/11)
Believe that EWCs positively influence national/local EI schemes (9/11)
Believe that EWCs add value in labour-management relations within MNC (10/11)
Believe that they have positively influenced labour-management relations at the local level (many from the FD sector but, none from the OL sector)

Source: Interview Data Processing.

To sum up, ERs have reported more and stronger positive influences of EWCs in the OL companies than the ones of FD sector. The main differences that the survey identified between the two sectors that were surveyed are shown in Table No. 4:

Table No. 4—Characteristics of the Investigated Enterprises per Sector.

Table 4: Characteristics of the Investigated Enterprises per Sector		
Sector	Food Drinks (FD)	Oil Lubricants (OL)
Average number of employees	604	317
Average “life cycle” of EWCs	4 years	7 years
Union activity in the sector	Through company unions	Through sectoral unions
Types of enterprises	Traditional Greek industrial enterprises taken over by MNCs (Brownfield sites)	Enterprises were established as MNC subsidiaries (Greenfield sites)
Collective Labour Agreements	Concluded between the subsidiary/ local management and the company union	No written agreements between the subsidiary/local management and works council
Type of worker representation in the workplace	Company Union (works council in 3/6 enterprises)	Works council (works council in 3/3 enterprises)
Subsidiary/Local management is:	Represented at the EWC- parent company management meetings	Never represented at the EWC- parent company management meetings
ERs have had previous experience in EI schemes:	In some cases (4/8)	Always (3/3)
Union involvement in the appointment/selection of	Exists in about half of the cases	Never

ERs		
ERs union membership	All ERs	Only one ERs (1/3)
ERs transfer information that obtained in EWC meetings, mainly to	The company union	The works council
ERs believe that they have influenced subsidiary/local management decisions in employee relations issues	The majority of ERs	The minority of ERs
There is a European division of the group	In several cases	In few cases
The ERs were trained with the initiative of the management:	Only in one subsidiary(1/6)	In most of the subsidiaries (2/3)

Source: Interview Data Processing.

Moreover, several factors have emerged from the survey which hamper the effective functioning of the EWCs in the MNC subsidiaries in Greece. These factors can be classified into two groups. The first one concerns the nature and features of the businesses, including:

- the origin of the company (Brownfield or Greenfield investment);
- the managerial approach (degree of decentralisation and centralisation of corporate decision making, especially with regard to employment relations issues);
- the company structure and the inter-corporate decision-making levels (whether a European department exists or not);
- the degree of internationalisation of corporate operations (national-oriented or supra-national approach of human resources and employment relations);
- the role of subsidiary/local management (the level of representation at the EWC's meetings).

The second group of factors includes the field of employment relations, such as:

- the nature and structure of trade union organisation (at both company and sectoral level);
- the tradition of labour-management relations, be it of a cooperative or competitive nature);
- the degree of formalism (written or formal agreements, no agreements concluded for determining the employment terms) and the level of IR regulation (at a national and transnational level);
- the previous experience of ERs in EI schemes (whether national works councils were in place or not);
- the relations between trade unions and works councils (degree of trade union involvement in the selection/appointment of the ERs, the union membership or not of the ERs and so forth.

Food and Drink Industry

Thus, in the FD sector, the overwhelming majority of businesses were Greek indigenous firms, which were taken over by MNCs. The subsidiary and local management of companies investing in Brownfield sites continue to maintain to a great extent the managerial approach already adopted by the previous owners. Most companies operating in the FD sector have established a special European department, while HR issues are approached in a way that is more nationally-oriented. Furthermore, subsidiary local management of these companies are usually also represented at EWC meetings convened by parent company management. In all likelihood, the parent company management of MNCs in the FD industry has promoted their participation in such meetings as a means to enhance business integration and effectively promote a diverging managerial approach in all the MNC subsidiaries. As for employee relations, company unions are usually the majority in the FD sector, while labour-management relations, if co-operative, are marked by a sense of cautiousness and mutual suspicion. The procedures for the regulation of employment relations are more formal—collective agreements in written form—and follow national criteria and customs that are typical of the Greek IR system. The same can be said of the relationships between company unions and works council—if they exist and are not in competition with one another—which are characterised by certain amount of formality and a relative underestimation of the latter on the part of the former. It should be noted, however, that the company unions play a major role at the time of appointing the ERs. HR Management seem to agree that the presence and the role of the ERs did not produce

an improvement with regard to labour-management relations, apparently because they are unable to be involved in decision-making at a local level. It is therefore obvious that within businesses operating in the FD sector, which draw on the national IR system, managers are willing to engage into more traditional forms of employee representation, mainly for unions concerning unions at a sectoral level. To sum up, there is little wonder about employers in the FD sector adopting a more nationally-oriented model of employment relations. In this framework, EWCs—which on average have a shorter “life cycle”—now represent a novelty at a supra-national level, since they are perceived as an element of Europeanisation.

Oil Lubricant Sector (OL)

By way of contrast, all the companies surveyed in the Oil Lubricant Sector (OL) were Greenfield subsidiaries of MNCs. Their subsidiary and local management maintain, by-and-large, the management approach which is used in all MNC undertakings worldwide. There is a European department only in a few of them, while HR issues are dealt with from a transnational perspective. Also, the subsidiary and local management of these companies are not represented at the meetings of EWC set up by the management from the parent company. This state of affairs points to an integrated HR management approach.

Furthermore, it has been found that the union at sectoral level here is prevalent, and labour-management relations have a long tradition of co-operation. The procedures for IR regulation are more informal—no written form is required to conclude labour-management agreements—they usually comply with transnational criteria and try to escape the formal character of the Greek IR system. In addition, unions at sectoral level and works councils seem to be in good terms and their relationship is cooperative, as their role is well-defined, with unions that provide support to works councils.

Essentially, works councils—which are particularly well-established in the OL sector—are included in a pyramidal form of EI, at the top of which there is the union federation of the OL sector. The trade union branches stand at the intermediate level, while the base consists of the works council, with each role carried out at each level being well defined. Works councils are given priority in employee representation at the company level. In contrast, this form of employment relations is more widespread in the OL sector and has a more international ring to it. EWCs are mainly an extension of existing EI bodies at the national level and are not regarded as an innovation in employment relations. At the same time, the

longer “life cycle” of the EWCs which reflects a pertinent familiarity of the interested parties, partly explains their more effective functioning. EWCs embody the characteristics of the OL sector in a more complete fashion than those of the FD sector. Thus, in the OL sector, HR managers confirm that the presence and the role of the ERs did not improve labour-management relations at the local level, apparently due to their institutional weakness to intervene in local decision-making. From the above we see that EWCs operate more effectively in the OL enterprises than in the FD sector. The reasons for this state of play are the structure and the origin of the company, the degree of internationalisation, the type of the employee representation, sector/corporate trade-unionism, the existence of works councils, and the character of IRs which have been established in each sector (employee relations structured at a transnational or a national scale).

3. Discussion

The adoption of EWCs in certain national IR systems has brought about a concern regarding the possible impact of the EWCs on employee relations, which are formed in the MNC subsidiaries. On the management side, it seems that EWCs produce a number of beneficial and, for that reason, desirable effects—e.g. an increase in mutual trust between management and workers, improvement of the employee “commitment” towards the company—yet some very important benefits for the MNCs have also been reported, especially in a time of increasing internationalisation of the capital pressures for productive reorganisation and reorientation of corporate operations within MNCs. Accordingly, the benefits arising from the function of EWC—such as a better management decisions regarding employees and the contribution to organisational changes in the company—can support the critical decisions made by the management of the parent company when necessary (e.g. extensive reorganisation of production). There are also somewhat backwards, as they are limited by the sense of uncertainty which can originate from an increase in employees’ expectations concerning the EWCs and their competence, which in no case, for the time being has produced risks to MNCs. In addition, some costs - chiefly travel expenses - that result from participating in the EWCs’ meetings exist, yet they are insignificant for large companies.

From an employee’s perspective, EWCs produce a number of beneficial and, for that reason, desirable effects—e.g. access to central management,

and a positive influence on labour relations. Nonetheless, the benefits enjoyed by them are not those claimed by the European Trade Unions in the 1970s, such as worker control within MNCs. Besides, such benefits are closer to the model of “pseudo-participation”,³¹ as employees have to accept the decisions made by central management after brief consultation. Particularly important are also the characteristics at a sectoral level, which influence the effective functioning of EWCs in MNC subsidiaries in Greece. In view of the above, it could be argued that EWCs operate with greater effectiveness in a number of international MNCs’ subsidiaries which already have some national EI bodies, while trade unionism at the sectoral level (outside the enterprise) carries out an advisory role concerning the EWCs. In other words, EWCs—as supra-national/European bodies are fitting for international companies and to a certain structure of employee representation, which corresponds to that of the European trade union movement, in the framework of which the roles of the unions and the participation bodies are very clear, at least where there is a dual employee representation at the workplace.

The comparative analysis provided in this paper confirms that in a significant number of MNCs a trend towards decentralisation exists along with a need for internal co-ordination and control, which are achieved through a centralisation process (glocalisation) at the European and international level.³² Also, the findings uphold the view that the subsidiary and local management in the MNC Brownfield sites enjoy greater autonomy in relation to the subsidiary/local management of the MNC Greenfield sites.³³ It was also found that the management of certain MNCs (mainly in the OL sector) have tried—via effective training—to incorporate the ERs in the international structure of the group of companies more effectively.

Presumably, EWCs can be regarded as multinational bodies which are more suited to international companies, to their integrated operations and the trend towards the centralisation of employee relations at the transnational level of the Euro-companies. In those companies, EWC effectiveness is increased as regards their contribution to the creation of added value for the employees, but also with reference to their beneficial impact to the Europeanisation of the national IR systems in which the

³¹ A. Timming, 2007, *European Works Councils and the Dark Side of Managing Worker Voice*, in *Human Resource Management Journal*, 2007, vol. 17, n. 3, 248-264.

³² P. Marginson, and K. Sisson, *Multinational Companies and the Future of Collective Bargaining: A Review of the Research Issues*, in *European Journal of Industrial Relations*, cit.

³³ M. Leat, and J. Wooley, M. Leat, and J. Wooley, *op. cit.*

MNCs operate. Thus, the hypothesis that various factors concerning local subsidiaries of MNCs are determined *inter alia* by company and trade union structure aspects seems to be validated.³⁴ However, it is very likely that in the MNC subsidiaries, which adopt sectoral unionism in combination with the function of works councils, EWCs function more effectively. It is possible that EI pre-existing experience in those enterprises in combination with a clarified and distinctive role of each EI body in both the company and supra-company level, are elements which influence the relatively more successful function of the EWCs. By way of contrast, in companies that are less international, with more autonomous managerial operations and with decentralised and diverging employee relations practices, EWCs have a reduced effectiveness as regards their addition of value for the employee side, but also with respect to the beneficial impact of Europeanisation on the national IR systems. Moreover, it appears that in the MNC subsidiaries which adopt the form of unionism implemented in the company, the EWC function is less effective. It is likely that the lack of previous EI experience in those enterprises, alongside the possible confusion of the roles of the EI bodies (unions and works councils), are elements which influence less successful EWCs.

It therefore seems valid that EWCs are more appropriate for MNC subsidiaries with higher levels of integration, where national EI schemes already exist, though unions act mainly at the sectoral level and play a consulting role to the EWCs. Therefore this also confirms Hann's claim that ongoing Europeanisation of IR which has been taking place during the last few years, seems to more adequately meet the needs of MNCs' to integrate and internationalise some of their operations more than their employee needs.³⁵ By way of conclusion, one might note that while the establishment and functioning of the EWCs were a perennial demand of the European trade unions, the latter seem to be more cautious on the future development of EWCs, as for the time being they merely benefit

³⁴ European Foundation for the Improvement of Living and Working Conditions. *European Works Councils in Practice*, 2004, Luxembourg. V. Pulignano, *Connecting Employee Representatives Response Across Borders: A Comparative Study of American-based Multinational Subsidiaries in Europe in two Sectors*, cit. V. Pulignano. *EWCs' Cross-National Employee Representative Coordination: A Case of Trade Union Cooperation?* in *Economic and Industrial Democracy*, cit. H. Knudsen, *op. cit.* P. Marginson, J. Lavelle, J. Quintanilla, and R. Sanchez Mangas, *op. cit.*

³⁵ D. Hann, *European Works Councils: the Cornerstone to a European System of Industrial Relations?* Paper presented to the Industrial Relations in Europe Conference, CIRN, Athens, July 2007.

from EWCs. Thus, the EWC Directive has already been re-orientated towards the service mainly of corporate and managerial purposes (i.e. group integration) than the democratic and humanitarian ones (develop a European IR dimension in the long run). In other words, MNCs tend to hold the perception that EWCs play a positive role in terms of employee representatives.

Equality Bodies and Individual Victims: An Example of Good Practice from the Netherlands

Erica Howard *

Introduction

This article¹ discusses the individual complaints procedure used by the Dutch Equal Treatment Commission² and whether this procedure could act as an example of good practice for equality bodies in other countries. The focus on the individual complaints procedure at the Commission was chosen because of the quasi-judicial role—quasi-judicial, because its opinions are not binding as we shall see later—and because it appears to provide a simple, quick and cost-free or low-cost procedure which a victim of discrimination can follow without expensive legal advice. A person who feels that they have been discriminated against can request a formal opinion from the Commission on whether what has happened is indeed a breach of the equal treatment legislation. This can be done via a simple letter or by filling in a form on the Commission's website. Employers and other organisations can also ask the Commission's opinion about their practices or proposed practices and actions. And, if an individual is not sure whether they want to make a formal complaint, they can also telephone, email or write to the Commission and check before they proceed. The Commission aims to deal with a formal complaint

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¹ This paper is based on research done during a period of eight days spent at the Dutch Equal Treatment Commission in 2011 and on the information gathered there and at the University of Utrecht library. This visit was made possible through a grant received from the Research Activities Fund of the Society of Legal Scholars. I would like to thank the Commission for their generous hospitality and cooperation during that time. I also thank the SLS for providing me with this opportunity.

² *Commissie Gelijke Behandeling*, hereafter referred to as the Commission.

within six months. The Commission was specifically set up to have a very low threshold and to be accessible for victims of discrimination. But is this always the way it works in practice?

Jacobsen and Rosenberg Khawaja write that “experience has shown that few individuals who feel they have been discriminated against take their claims to court themselves—presumably because legal action is too strenuous, expensive and time-consuming a process to embark on”.³ This article attempts to answer the question whether the procedure at the Dutch Equal Treatment Commission is an easier, less stressful, less expensive and less time-consuming way of getting satisfaction for a victim of discrimination than going to court. Before this question is addressed, part 1 gives information about the Commission’s history, composition and mandate, to create a background for the individual procedure. Part 2 describes the individual procedure itself, while the concluding part will contain an assessment of this individual procedure and of the question whether this is a satisfactory way of dealing with individual discrimination complaints which can be seen as an example of good practice for other countries.

1. Background

1.1. History

The Commission was established by Art. 11 of the Equal Treatment Act 1994 (ETA 1994).⁴ Art. 12 par. 1 determines that the Commission may, after a written request or on its own initiative, investigate whether discrimination has taken place. The Commission deals with discrimination on the grounds of gender, race, religion, belief, political opinion,

³ B. D. Jacobsen, and E. O. Rosenberg Khawaja, *Legal Assistance to Individuals Powers and Procedures of Effective and Strategic Individual Enforcement*, in S. Obura, and F. Palmer, (eds.), *Strategic Enforcement Powers and Competencies of Equality Bodies*, Brussels, Equinet, 2006, 10.

⁴ *Wet Gelijke Behandeling*. The legal instruments governing equal treatment, the Regulation on the Procedures and Operation of the Commission and the Regulation on the Legal Position of the Members of the Commission can all be found on the Commission’s website: www.cgb.nl (accessed 5 April 2012). Where these instruments are not available in English, the Dutch text is used and translated by the author. For a booklet on the Commission in English, see Commissie Gelijke Behandeling, *Equality Law and the Work of the Dutch Equal Treatment Commission*, (undated): <http://www.cgb.nl/english/about> (accessed 5 April 2012).

nationality, sexual orientation, civil status, disability, chronic illness, age, full and part-time work and the permanent or temporary nature of the labour relationship.⁵

Art. 12 par. 2 ETA 1994 states that a request for an opinion can be made by, among others, a person who believes that they are a victim of discrimination and by anti-discrimination organisations. The latter means that group or class actions are possible. Goldschmidt points out:

The importance of this kind of action should not be underestimated. Commencing proceedings is often a very cumbersome and emotional act for individuals, organisations do not have this burden. Moreover, many discrimination cases affect groups of individuals, because they are related to collective agreements or regulations or company practices and it is more effective to challenge the total body of regulations or practices.⁶

After conducting an investigation, the Commission brings out a reasoned opinion as to its findings and can make recommendations (Art. 13). This opinion is not binding on the parties and they can still take their discrimination complaint to court.

An opinion can also be requested by persons or organisations who want to know whether their conduct, practices, policies or regulations are compatible with the equal treatment legislation. The latter includes trade unions, works councils and anybody who is responsible for taking decisions on matters of discrimination. It also includes judges who can ask the Commission for an expert opinion, though this has never been done to date. In its second five-year evaluation report, the Commission suggests that it will point out the possibility to judges because it can not only give expert opinions in the case itself, it can also advise on the necessity of referring cases and the formulation of questions to the Court of Justice of

⁵ Not all of these grounds are covered by the ETA 1994 itself, some are covered by other legislation. But the different pieces of legislation governing these grounds all provide for the competence of the Commission and it is thus not necessary to sum up the different pieces of legislation here.

⁶ J. Goldschmidt, *Anti-discrimination Law in the Netherlands: A Specific Legal Patchwork, Normative System and Institutional Structure*, in Y. Wen Li, and J. Goldschmidt, *Taking Employment Discrimination Seriously: Chinese and European Perspectives*, Leiden, Brill, 2009, 255. Goldschmidt was chair of the Commission from its establishment in 1994 until September 2003.

the EU (CJEU).⁷ The Explanatory Memorandum to the proposal for the ETA 1994⁸ explains the usefulness of having a Commission overseeing the observance of anti-discrimination legislation. Specifically, it states that the act aimed to establish an *easily accessible*, independent commission [my italics].⁹ It also explains that it is very important that people who think they have been discriminated against, can, *in a simple manner*, contact a body tasked with monitoring and supervising the laws [my italics].¹⁰ To provide optimal clarity for victims, the proposed Commission is going to incorporate the existing Commission for Equal Treatment between Men and Women. This means that there is only one single equality commission and that victims can contact this body for discrimination on all the discrimination grounds covered by the law.¹¹ In the organisation of the Commission, attention will be given to a “*low threshold access*”, as is explicitly stated in the Memorandum [my italics].¹² Therefore, the Commission was, from its inception, set up to be easily accessible for victims of discrimination who can, in a simple way, complain when they feel discriminated against.

The Memorandum explains that the opinions of the Commission do not have binding legal effects and that the primary aim of the procedure is to bring the parties together through authoritative and expert advice.¹³ The authority and the expertise of the Commission is thus emphasised. Goldschmidt explains that “the fact that the opinions of the ETC [Equal Treatment Commission] are not binding can be justified as a logical consequence of its restricted scope for review. Given that the Commission is only competent to consider compliance with the relevant equality legislation, it is not possible to judge cases on all their merits”.¹⁴ Instead of binding opinions, the Commission is given the power to bring

⁷ Commissie Gelijke Behandeling, *Second Evaluation 1999-2004* [*Het Verschil Gemaakt Evaluatie AWGB en Werkzaamheden CGB 1999-2004*], 2004 98. All evaluation reports are available in Dutch from the Commission’s website.

⁸ *Memorie van Toelichting, Tweede Kamer 1990-1991*, 22014, n. 3 [*Explanatory Memorandum, Second Chamber*], http://ressourcesgd.kb.nl/SGD/19901991/PDF/SGD_19901991_0006831.pdf (accessed 5 April 2012).

⁹ *Ibid.*, 1.3.

¹⁰ *Ibid.*, 6.1.

¹¹ *Ibid.*, 6.2.

¹² *Ibid.*, 6.4.

¹³ *Ibid.*, 6.3.

¹⁴ J. Goldschmidt, *Implementation of Equality Law: A Task for Specialists or for Human Rights Experts? Experiences and Development in the Supervision of Equality Law in the Netherlands*, in *Maastricht Journal of European and Comparative Law*, 2006, vol. 36, n. 3, 329.

legal action with a view of obtaining a ruling that the conduct is contrary to the Equal Treatment Acts (Art. 15). The Memorandum states that, therefore, the Commission offers an extra—*simpler and cheaper* [my italics]—possibility to improve observance of the act.¹⁵

According to Art. 13 par. 3 ETA 1994, the Commission can, if it believes this is appropriate, forward its findings to Ministers, organisations of employers, employees, professionals or public servants, consumers of goods and services and relevant consultative bodies. The opinions are public and can be found on the Commission's website. Art. 20 ETA 1994 determines that the Commission publishes an annual report and five-yearly evaluation reports. In addition, every year an annotated collection of the most important opinions given that year, edited and written by independent experts, is published. Since March 2011, the respondent is named in the opinion and, although it is too early to see the results of this, the impression at the Commission is that this works as a deterrent for respondents.

1.1. Composition and Independence¹⁶

Art. 16 ETA 1994 determines that the Commission has nine Commissioners, including a chair and two deputy chairs. In addition, there are at least nine deputy commissioners, who sometimes have more specialised expertise in a specific field. The selection of Commissioners is public and open to all. The Commission itself can make proposals for nominations. All members are appointed for six years by the Minister of Justice in consultation with four other ministers. The independence of the Commission is established through a regulation providing for the Commissioners salary and working conditions. Neither the Government nor any Ministry have the power to give instructions to the Commission and the Commissioners can only be dismissed after a procedure that is similar to that followed for members of the judiciary: only by the Supreme Court and only on specific grounds prescribed by law. The chair and the vice-chairs must have the qualifications required of district judges.

In 2012, the Commission will become part of the Netherlands Institute for Human Rights [*College voor de Rechten van de Mens*].¹⁷ All tasks of the

¹⁵ *Memorie van Toelichting, Tweede Kamer 1990-1991, 22014, n. 3 [Explanatory Memorandum, Second Chamber]*, cit., 6.3.

¹⁶ Commissie Gelijke Behandeling, *Equality Law and the Work of the Dutch Equal Treatment Commission*, cit.

present Commission will be transferred in full to the new Institute. The mandate of the new Institute will be the same in relation to equality and non-discrimination and the individual complaint procedure will stay as it is for this area. However, there will not be a similar procedure in relation to human rights and the new Institute will not have the competence to deal with individual complaints of violations of human rights as there is a National Ombudsman who does this.¹⁸ The appointment of the chair and the Commissioners for the new Institute will change to make the Institute even more independent. According to Art. 16 par. 1 of the NHRI Act 2011, they will be appointed by Royal Decree on recommendation of the Minister of Justice.

Art. 17 ETA 1994 provides for an office to be set up to assist the Commission in its work. The staff includes legal experts and research assistants. At present the office has a staff of approximately 62 full-time people. Art. 17 of the NHRI Act 2011 contains the same provision.

1.2. Mandate

The most important task of the Commission is the investigation of complaints that discrimination has taken place, on request or on its own initiative. The Commission takes an active role in investigating a complaint and can ask questions, request information and conduct a site visit to perform an investigation. The Commission also provides advice, for example, to ministers and government departments, the legislator and other organisations which play a role in society. Further, it gives information through lectures, training sessions and campaigns.

¹⁷ See for the history of this Institute and the incorporation of the Commission within it: J. Goldschmidt, *Protecting Equality as a Human Right in the Netherlands. From Specialised Equality Body to Human Rights Institute*, in *The Equal Rights Review*, 2012, vol. 8, 32-49.

¹⁸ See Art. 9-13, Chapter 2, *Investigations and Findings Relating to Equal Treatment*, Wet College Rechten van de Mens [*National Human Rights Institute Act (NHRI Act 2011)*] 24 November 2011, Staatsblad 2011, 573, at <http://www.naarenmensenrechteninstituut.nl/ul/cms/fckuploaded/Gewijzigvoorstelw-etEersteKamerd.d.19april2011.pdf> (accessed 5 April 2012) and the *Memorie van Toelichting* [*Explanatory Memorandum*], 14, at <http://www.naarenmensenrechteninstituut.nl/ul/cms/fck-uploaded/documents/MvT-crm-na-mrd.d.28aug2010.pdf> (accessed 5 April 2012). For more information on the change to a National Human Rights Institute, see also: <http://www.naarenmensenrechteninstituut.nl/10/home/> (accessed 5 April 2012); and, J. Goldschmidt, *Protecting Equality as a Human Right in the Netherlands. From Specialised Equality Body to Human Rights Institute*, in *The Equal Rights Review*, cit.

As mentioned, under Art. 15 ETA 1994, the Commission can bring legal action in its own name with a view of obtaining a ruling that the conduct contrary to one of the equality acts is unlawful and request the court to prohibit such conduct or to give an order that the consequences of such conduct will be rectified. However, the person affected by the unlawful conduct needs to agree to this. The Commission has never made use of this power to date, as it sees this as conflicting with its role as an impartial decision-making body: it would be a combination of the role of investigator and judge (in its opinions) and prosecutor (in its actions in court).¹⁹

Since 2005, the Commission can refer parties in an individual procedure to an external mediator to find a solution, if they both agree to this. The procedure will be suspended during the mediation. It is aimed at keeping the relationship between the parties and finding a way forward which both parties can agree to. If the mediation is unsuccessful, the procedure will continue. Individuals can also request a referral to a mediator, but, again, the other party needs to agree to this. If mediation in this case is not successful, a complaint to the Commission can be made in the normal way. The Commission only refers to qualified and registered mediators.

2. Individual Complaints Procedure

If a person who thinks they have been discriminated against is not sure whether their problem falls within the ambit of the Commission or whether they want to request an opinion, they can contact the Commission via letter, email or telephone. There is, for example, a daily telephone surgery. They will be told whether their problem is covered and if so, what will happen if they file a complaint—for example, it is made clear that the employer/other party will be asked to give their reply to the complaint—and what the Commission can and cannot do. The procedure or the fact that the other party will be informed sometimes discourages people from making a complaint.

¹⁹ See on this Equinet *Influencing the Law through Legal Proceedings The Powers and Practices of Equality Bodies*, Brussels, Equinet, 2010, 17; J. Goldschmidt, *Implementation of Equality Law: A Task for Specialists or for Human Rights Experts? Experiences and Development in the Supervision of Equality Law in the Netherlands*, in *Maastricht Journal of European and Comparative Law*, cit., 333; and, the booklet, Commissie Gelijke Behandeling, *Equality Law and the Work of the Dutch Equal Treatment Commission*, cit., under *Legal Action by the Commission*.

When an official complaint is filed,²⁰ both parties will receive a letter with an explanation of the procedure and a request for the necessary information, with a specified time within which they need to reply. According to Art. 19 ETA 1994, the Commission can demand any information from either party or from third parties²¹ and non-compliance with this demand within the time specified constitutes a criminal offence. If necessary, the Commission can also take a person who is reluctant to provide the required information to court and the court can then order the defendant to give the relevant information under penalty of a fine.

Both parties can request witnesses and experts to be heard and the Commission can also visit the parties or ask them to visit the Commission. All information from one party is sent to the other party, while information from third parties is sent to both. Both can react to all information received.

Subsequently, a formal Commission session takes place which is open to the public, with three Commissioners, one of which is the case manager, and a legal secretary. Parties can bring a solicitor or other representative/adviser or friend to the meeting, but the costs of these fall on the party bringing them. I sat in on three cases and in two of these the claimant had a legal adviser, while in all three the respondent party was accompanied by an adviser. This is, however, not the norm although the numbers of both parties bringing legal representatives has gone up in 2010. In that year, 22% of claimants had a legal adviser as compared to 14% in 2009 and 16% in 2008. This could be a solicitor, a representative of a legal assistance insurance company, a union representative, or someone from an anti-discrimination bureau or an advocacy organisation.²² 29% of respondents had a legal adviser with them in 2010 compared to 22% in 2009 and 13% in 2008, mainly solicitors or lawyers from employer organisations.²³ One of the Commissioners mentioned that sometimes the involvement of a legal adviser can be more of a hindrance because the case is made more judicial.

As already referred to, the Commission was set up to have a very low threshold, to be very accessible for victims of discrimination and it thus

²⁰ The procedural rules are laid down in the Regulation on the Procedures and Operation of the Commission [*Besluit Werkwijze Commissie Gelijke Behandeling*], 29 July 1994.

²¹ With the exception of issues covered by professional confidentiality or where a person would implicate themselves or their immediate family, spouse or partner.

²² Commissie Gelijke Behandeling, *Jaarverslag 2010 [Annual Report 2010]*, 31. All Annual Reports are available on the Commission's website.

²³ *Ibid.*, 33.

devotes a lot of attention at the session to the facts of the case, with both parties getting ample time to bring forward their side of the story. As Rorive writes, “the hearings are staged in a fairly informal setting and a large place is dedicated to informing the parties on the law and its implications”.²⁴ When the respondent has a legal adviser and the claimant has not, the Commission spends more time explaining to the claimant the legal rules and why certain questions are asked and this extra attention together with the easy accessibility sometimes gives the respondent the impression that the Commission is on the side of the claimant. This is borne out by the second five-yearly evaluation report, where it is stated that one of the main criticisms is that the sympathy of the Commission is from the start with the claimant, that there is a bias towards him or her.²⁵ Respondents feel that they are accused and need to defend themselves and that they are not always heard. One commissioner did mention that the procedure is, in the end, somewhat judicial and that, despite the extensive explanations given at the session, claimants (and also respondents) might still not always understand the legal aspects and issues. The explanations also lengthen the duration of the sessions. This is confirmed by Goldschmidt where she writes “although the ETC’s proceedings are informal compared to those in court, people without any legal background still consider them rather formal”.²⁶ It is also mentioned in the second five-yearly evaluation report where a point of criticism is that the language used is too difficult and judicial.²⁷ Unless mediation takes place, in which case the procedure is suspended, both parties receive, within 8 weeks, the Commission’s written opinion as to whether discrimination has taken place and, if so, on what ground. This prescribed period is not often breached and if there is a delay, the parties will be informed. Art. 4 of the Regulation allows the Commission to extend the prescribed periods as long as a request is dealt with within a reasonable time period.

²⁴ I. Rorive, *A Comparative and European Examination of National Institutions in the Field of Racism and Discrimination*, in K. Boyle, (ed.), *New Institutions for Human Rights Protection*, Oxford, Oxford University Press, 2009, 164.

²⁵ Commissie Gelijke Behandeling, *Second Evaluation 1999-2004* [Het Verschil Gemaakt Evaluatie AWGB en Werkzaamheden CGB 1999-2004], cit., 88-89.

²⁶ J. Goldschmidt, *Implementation of Equality Law: A Task for Specialists or for Human Rights Experts? Experiences and Development in the Supervision of Equality Law in the Netherlands*, in *Maastricht Journal of European and Comparative Law*, cit., 329.

²⁷ Commissie Gelijke Behandeling, *Second Evaluation 1999-2004* [Het Verschil Gemaakt Evaluatie AWGB en Werkzaamheden CGB 1999-2004], cit., 89.

The Commission's opinion contains a finding whether discrimination has taken place and can include recommendations for individual or structural measures which the respondent should take. These recommendations can be made whether discrimination has been found or not. However, as mentioned, the opinion is not binding on the parties and they can still go to court to complain. About 74% of respondents follow the recommendations and this number has been fairly constant over the last five years (74% in 2010 and 2009, 79% in 2008 and 75% in 2007)²⁸. The Commission cannot, however, award any compensation and parties would need to go to court to get compensation. According to one of the Commissioners, of the 200 or so cases dealt with each year, about 8 go on to the courts which sometimes come to another conclusion than the Commission. This might not always be because the court disagrees with the opinion. It could be because the courts can deal with much wider issues: for example, the Commission can make a finding that discrimination has taken place when an employee was dismissed, but they cannot say anything about the fairness or unfairness of the dismissal. The latter can only be done by a court.

If the Commission has brought out an opinion and one of the parties then goes to court, the court must take account of the opinion and, if it does not follow this, must give its reasons for not doing so, as is clear from a Supreme Court [*Hoge Raad*] decision in 1987.²⁹ This case concerned the Commission for Equal Treatment of Men and Women, the predecessor of the present Commission. It was held that, because of the specific expertise of the Commission, sound and compelling reasons must be given for disagreeing with the opinion of the Commission.

That 74% of its recommendations are followed might be connected to the fact that the Commission has an active follow-up procedure in which it monitors the implementation of its opinion. When discrimination has been found and the Commission has made recommendations, the respondent will, within one month of being informed of the opinion, receive a letter asking what has been done to avoid unlawful discrimination in future. If no reaction is received, another letter or a phone call follows. Sometimes, more information is given or an explanation as to how the recommendation could be dealt with or was

²⁸ For this information, see the Annual Reports for these years.

²⁹ *St Bavo-Gielen, Hoge Raad*, 13 November 1987, NJ 1989, 698. See G. Moon, *Enforcement Bodies*, in D. Schiek, L. Waddington and M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Oxford/Portland, Oregon, Hart Publishing, 2007, 919.

dealt with by others. The Commission tries to involve the claimant in this, but this can only be done with permission of the respondent.

The Commission aims to deal with every case within six months, although a number of Commissioners said that this was not always done and that some cases took a little longer, about 8 to 9 months.

3. Assessment of the Individual Procedure

The individual procedure has now been running for more than 15 years and appears to work well. The Commission has the impression that most people who file a complaint with them are satisfied with the procedure. For example, in the second five-yearly evaluation report we can read that external research, done on the request of the Commission, shows that parties are, generally, positive about the way it has dealt with their case.³⁰ The third five-yearly evaluation report contains information on external research into victimisation, questioning 132 former claimants to the Commission. Despite many of these claimants experiencing victimisation after making their claim, 80% were positive about the procedure, 89% felt that they had done the right thing by going to the Commission and 86% had found it useful to make a complaint. It appears that the fact that the procedure at the Commission satisfies a need for justice, recognition and attention was especially influential in this.³¹ The latter is confirmed by quite a few of the Commissioners and legal secretaries I spoke to, who mentioned that claimants usually want to be heard, that they want to have the feeling that someone is listening to them and taking them seriously. Or, as the Commission writes, “an element of the hearing that should not be underestimated is the effect of ‘the day in court’: it is very important to the plaintiff as well as to the defending party to finally be heard”.³² And, Ammer *et al.*, writing about the impact of equality bodies on individual victims of discrimination, mention that “it is clear that there is a broader and equally important psychological impact. This is recognised in the Netherlands country fiche where the evaluation of the work of the Equal

³⁰ Commissie Gelijke Behandeling, *Second Evaluation 1999-2004* [*Het Verschil Gemaakt Evaluatie AWGB en Werkzaamheden CGB 1999-2004*], cit., 93.

³¹ Commissie Gelijke Behandeling, *Third Evaluation* [*Derde Evaluatie AWGB, WGB m/v en Artikel 7:646 BW*], 2009, 37-38.

³² Commissie Gelijke Behandeling, *Equality Law and the Work of the Dutch Equal Treatment Commission*, cit., 5.

Treatment Commission highlighted the fact that complainants felt supported by the recognition of their legal position”³³.

Through its opinions and other work, the Commission has built up expertise in the application of equal treatment legislation. It has become an authoritative body which has influence in the debate in this area. Ammer *et al.* write that: “the success of the Commission is attributed to its image as an authority on the enforcement and monitoring of equality and non-discrimination legislation”.³⁴ According to Rorive, “the *Dutch model* of a quasi-judicial body focuses on the need of the alleged victims of discrimination to have access to law. To a large extent, it has recourse to the moral weight of non-binding rulings [...]” [her italics].³⁵

But, naturally, the Commission has also come in for criticism. According to one of the Commissioners, some people see the Commission as too woolly, too focused on promoting multiculturalism and too expensive. Some people also accuse it of dealing with silly or unimportant cases instead of with important equality issues³⁶ or state that it is a “one-issue” organisation dealing with equal treatment only, although it is recognised that its mandate is limited to this.³⁷ Some politicians and others have called for the abolition of the Commission.³⁸ A number of issues specifically concerned with the individual complaints procedure are discussed in the following analysis.

³³ M. Ammer, N. Crowley, B. Liegl, E. Holzleithner, K. Wladasch and K. Yesilkagit, *Synthesis Report Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC*, Utrecht, Human Rights Consultancy and Vienna, Ludwig Boltzmann Institut für Menschenrechte, 2010, 287.

³⁴ *Ibid.*, 172.

³⁵ I. Rorive, *op. cit.*, 145.

³⁶ R. Holtmaat, *Een Agenda voor Wetgeving, Beleid en Onderzoek op het Gebied van de Discriminatie Bestrijding en Gelijke Behandeling* [*An Agenda for Legislation, Policy and Research concerning the Fight Against Discrimination and Equal Treatment*], in R. Holtmaat, (ed.) *De Toekomst van Gelijkeheid* [*The Future of Equality*], Deventer, Kluwer, 2000, 264.

³⁷ *Ibid.*, 266-267; M. Loth, *Synergy of Roleblurring? De Commissie Gelijke Behandeling als Motor van het Gelijkeheidsdiscours* [*Synergy or Blurring of Roles? The Equal Treatment Commission as Engine of Equality Discourse*], in R. Holtmaat, (ed.) *Gelijkeheid en (Andere) Grondrechten* [*Equality and (Other) Human Rights*], Deventer, Kluwer, 2004, 230.

³⁸ See on this I. Rorive *op. cit.*, 170; A. Terlouw, *Draagt Wetgeving bij aan Gelijkeheid?* [*Does Legislation Contribute to Equality?*] in M. Hertogh, and H. Weijers (eds.), *Recht van Onderop* [*Law from the Bottom Up*], Nijmegen, Ars Aequi Libri, 2011, 362.

3.1. A Cost-free, Easy and Quick Procedure

First of all, is the procedure as simple, easy and cost-free as it is said to be? The procedure is certainly less costly when compared with civil court proceedings, because there are no court fees and legal representation is not necessary. There is also no risk of costs being awarded against a party. However, if people want representation they have to bear the costs themselves. They also have to pay travel costs to the Commission's offices when they attend the hearing. They may be invited or ordered to do so. If parties are ordered to attend, they have to do so and if they do not it can be used in evidence against them. In addition, claimants have to invest time in the process and there are often emotional costs involved as well. But the whole procedure is certainly much less costly than a civil court procedure.

Is the procedure simple and easy to do? Again, compared to a civil court procedure, it is simple and easy, but then, in civil proceedings, parties have legal representation. It has already been mentioned that people find the process rather formal and judicial. One of the Commissioners commented that the burden of proof rules are, for example, quite difficult to understand for the parties. The fact that more parties bring (legal) representation could also indicate that the procedure is not that simple, although there could be many other reasons for this as well. In the end, the Commission deals with equal treatment legislation and thus a certain amount of legal issues are part of the procedures. This is why the Commission spends so much time at the hearing explaining such issues and making sure that parties understand what these are. It also provides information and leaflets on the procedure and what the claimant/respondent can expect.

Is the procedure quick? The Commission aims to deal with all cases within 6 months of receiving the claim, but, even if this is not achieved, the case is still generally dealt with within 8 or 9 months. The Commission is also working towards shortening this period. Equal pay claims especially tend to take more time than other cases.

3.2. Low Threshold/Easy Accessibility

What about the low threshold, the easy accessibility of the Commission? This can be seen as covering two overlapping issues: whether people know about the Commission and what it does; and, whether complaints of discrimination actually reach them.

On the first issue, Holtmaat reported in 2000 that there was a quite considerable lack of familiarity with the work of the Commission and that there was only a limited “elite” group of mainly higher educated people who did or could appeal to them.³⁹ Elsewhere, Holtmaat reports that the barriers to complaining to the Commission are especially high among people from ethnic minorities.⁴⁰ Goldschmidt, writing in 2006, also remarks on the relative ignorance of the general public about the Equal Treatment Act and the role of the Commission in relation to this, “although the familiarity with the law and the Commission has improved since the first five years’ evaluation in 1999”.⁴¹ And, Hertogh and Zoontjes, who did an external evaluation in 2006, report that about 57% of the respondents in their research had heard or read something about the Commission, but that only a few people knew about their tasks and competences.⁴² The latter authors come to the conclusion that the equal treatment legislation does not provide sufficient opportunity for people to know about and to pursue their rights and duties.⁴³ And, Ammer *et al.* report that “in the Netherlands stakeholders feel that the Equal Treatment Commission needs to be more visible [...]”.⁴⁴

On the second issue, whether complaints of discrimination actually reach the Commission, in the second evaluation report it is stated that the Commission presumes that the number of incidences of discrimination is much bigger than the number of complaints that reaches them⁴⁵ and that external research showed that only about 3% of the people who said they have experienced discrimination approach them.⁴⁶

Terlouw writes that it is difficult for victims to improve their position through anti-discrimination legislation for three reasons. Firstly, there are

³⁹ R. Holtmaat *op. cit.*, 264. Complaints of discrimination on the grounds of race form an exception to this.

⁴⁰ R. Holtmaat, *Catalyst for Change? Equality Bodies According to Directive 2000/43/EC*, Luxembourg, OOPEC, 2007, 54.

⁴¹ J. Goldschmidt, *Implementation of Equality Law: A Task for Specialists or for Human Rights Experts? Experiences and Development in the Supervision of Equality Law in the Netherlands*, in *Maastricht Journal of European and Comparative Law*, *cit.*, 329.

⁴² M. Hertogh, and P. Zoontjes (eds.), *Gelijke Behandeling Principes and Praktijken Evaluatie Onderzoek AWGB [Equal Treatment Principles and Practices Evaluation Project General Equal Treatment Law]*, Nijmegen: Wolf Legal Publishers, 361.

⁴³ *Ibid.*, 362.

⁴⁴ M. Ammer, N. Crowley, B. Liegl, E. Holzleithner, K. Wladasch and K. Yesilkagit, *op. cit.*, 351.

⁴⁵ Commissie Gelijke Behandeling, *Second Evaluation 1999-2004 [Het Verschil Gemaakt Evaluatie AWGB en Werkzaamheden CGB 1999-2004]*, *cit.*, 70.

⁴⁶ *Ibid.*, 76.

still a number of thresholds to proceeding, including that victims of discrimination often do not complain until the issue escalates beyond what is tolerable; that complaining involves a complicated process of “naming” (the victim must define him/herself as a victim), “blaming” (the victim must address who is responsible for the discrimination) and “claiming” (the victim must start proceedings); and, that victims are afraid of being victimised.⁴⁷ A second reason is that despite the requirement of equality of arms, the complainant is not always in an equal position to the respondent. This is because the procedure often involves an individual against an organisation with more knowledge and money to employ legal counsel or to propose a financial settlement; and, because of problems with proving discrimination.⁴⁸ And, a third reason why it is not always easy for victims is that, even if discrimination is found, this does not always guarantee an improvement in the victim’s situation.⁴⁹

One Commissioner I spoke to also pointed out that only a few of the total number of victims of discrimination go to the Commission but that there are other organisations like anti-discrimination bureaus which play a role in the assistance of victims of discrimination and which deal with many cases as well. This will be looked at next.

3.3. Assistance to Victims of Discrimination

EU Directives prescribe that Member States designate a body or bodies for the promotion of equal treatment on the grounds of racial and ethnic origin⁵⁰ and gender.⁵¹ The competences of these bodies should include providing independent assistance to victims in pursuing their complaints about discrimination. The Commission does not do so because “this was considered to be incompatible with its role as a formal decision-making

⁴⁷ A. Terlouw, *op. cit.*, 352-358.

⁴⁸ *Ibid.*, 358-362.

⁴⁹ *Ibid.*, 362.

⁵⁰ Council Directive of 29 June 2000 Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin, 2000/43/EC [2000] OJ L 180/22.

⁵¹ Council Directive of 13 December 2004 Implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services, 2004/113/EC [2004] OJ L 373/3 and Council Directive of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast), 2006/54/EC [2006] OJ L 204/23.

body”.⁵² Or, as Cormack and Niessen write, “doubts of a body’s independence may be raised if, for example, it is acting as investigator of allegations of discrimination one minute, defending victims the next and adjudicating breaches of legislation after that. [...] It is with these concerns in mind that the Dutch Equal Treatment Commission chooses not to exercise its powers of supporting parties in court [...]”.⁵³ As mentioned, this is also the reason why the Commission has not made use of its competence under Art. 15 ETA 1994 to bring legal action.⁵⁴

Therefore, the Commission does not perform all tasks prescribed by the EU Directives for equality bodies. However, this does not mean that the Netherlands is in breach of the Directives and that no assistance is provided for victims of discrimination. Compliance with the Directives is ensured by other bodies. There are a number of anti-discrimination agencies⁵⁵ and, since 2009, every local authority must have an “*Antidiscrimatievoorziening*” [anti-discrimination facility], which provides independent advice and assistance to persons in pursuing their complaints about discrimination, including assistance in procedures at the Commission or in court.⁵⁶ It was found that in 2010, one year after this became law, 97% of local authorities had fulfilled this duty.⁵⁷

3.4. Labour Intensive

One of the disadvantages of the system of individual complaints as used in the Netherlands is that it is extremely labour intensive. One

⁵² M. Ammer, N. Crowley, B. Liegl, E. Holzleithner, K. Wladasch and K. Yesilkagit, *op. cit.*, 263. See on this also: J. Goldschmidt, *Implementation of Equality Law: A Task for Specialists or for Human Rights Experts? Experiences and Development in the Supervision of Equality Law in the Netherlands*, in *Maastricht Journal of European and Comparative Law*, *cit.*, 324, and G. Moon, *op. cit.*, 373.

⁵³ J. Cormack, and J. Niessen, *The Independence of Equality Bodies*, in *European Anti-Discrimination Law Review*, 2001, vol. 1, n. 27. See also: I. Rorive, *op. cit.* 171-172.

⁵⁴ Loth discusses the tensions between the different functions of the Commission in more detail; *op. cit.*, 221-237.

⁵⁵ On anti-discrimination agencies, see: www.discriminatie.nl (accessed 5 April 2012).

⁵⁶ Wet Gemeentelijke Antidiscrimatievoorzieningen [Local Authority Anti-Discrimination Facilities Act] of 25 June 2009, *Staatsblad*, 2000, 313, Art. 2, at www.wetten.overheid.nl (accessed 5 April 2012). See also M. Ammer, N. Crowley, B. Liegl, E. Holzleithner, K. Wladasch and K. Yesilkagit, *op. cit.*, 263 and 378.

⁵⁷ Kamerstukken II 2010/11, 31439 n. 18. See *Nederlands Tijdschrift voor de Mensenrechten/NCJM Bulletin [Journal of the Dutch Human Rights Committee]*, 2011, vol. 36, n. 2, 241-242.

commissioner is assigned the case and does an investigation before the case gets to the session with parties. The session is preceded and followed by case conferences of the 3 commissioners involved and the legal secretary. The legal secretary then writes a draft opinion, which will be sent for comment to each Commissioner involved. On average, a case where only one single ground of discrimination is at issue takes just over 14 hours of Commissioner's time and 43 hours from the legal secretary. When more grounds are involved, this amount is higher.

The Commission has recently started a "front-office" pilot project which investigates alternative ways of dealing with a case. This involves the requests for an opinion being scrutinised before the formal investigation begins. In those cases which are outside the ambit of the Commission, the claimant gets a phone call to explain this and is then asked whether a short note to confirm is sufficient. Claimants with complaints falling within the ambit are also phoned and then given information and an explanation of the procedure in detail. Often, people are satisfied with this. Sometimes, claimants only want to air their grievance and are happy when they are given the opportunity to do so. Claimants can also be offered mediation. But in all cases, except where the issue falls outside the ambit of the Commission, the claimant is told that they have a right to get a formal opinion if they want to receive one.

Goldschmidt writes that

The fact that more and more issues have been the subject of an investigation and that the law has been interpreted in thousands of opinions of the ETC means that the body of case law provides an answer to many questions for citizens who want to know whether a certain situation is in accordance with the law: these questions can thus be answered by telephone or email.⁵⁸

This is not only used for the telephone helpline and to deal with general email inquiries, but also in the front-office pilot project. Goldschmidt does point out that this means that the number of opinions decreases.⁵⁹

However, the question can be raised whether spending so much time on individual cases does promote equality in society on a wider scale. As Jacobsen and Rosenberg Khawaja write "it has been the experience of equality bodies that handling individual complaints is a resource-intensive

⁵⁸ J. Goldschmidt, *Anti-discrimination Law in the Netherlands: A Specific Legal Patchwork, Normative System and Institutional Structure*, cit. 256.

⁵⁹ Ibid.

process that is not always in proportion to the results achieved on a larger scale”. These authors continue that “some types of discrimination, e.g. systemic discrimination, cannot be combated effectively solely by individual enforcement”.⁶⁰

In relation to the individual procedure, it is true that litigation in an individual case depends on an individual complainant and that solutions are sought which are best for this individual, which could include mediation and settlement. In that case, even if a principled issue of interpretation of the anti-discrimination legislation is at stake, no opinion of the Commission results and there is no wider implication of the case.

On the other hand, it can be argued, firstly, that the individual cases do contribute to the promotion of equality. As mentioned, the Commission has built up an extensive body of case law interpreting and explaining the legislation. This can assist victims in deciding whether to file a case and provide guidelines for employers and goods and services providers.

Secondly, the Commission, whether it finds discrimination or not, can make recommendations in its opinions that certain measures are taken and these include both individual and structural measures. The latter can include that the respondent changes policies, e.g. on access, recruitment and selection, informs employees of existing equality regulations, adjusts the text of job adverts or introduces an equality policy or a complaints procedure.⁶¹ The Annual Reports of the last three years show that many more structural measures are recommended than individual ones—about 40% structural to 8% individual—and that in 27-30% of cases both are recommended.⁶²

Thirdly, group or class actions are possible and organisations can ask for opinions. Fourthly, opinions of the Commission are published and, since March 2011, they also mention the name of the respondent, which could have a wider deterrent effect. And, finally, the annual reports contain a section on developments and the annual annotated collection of the most important opinions includes cases that are strategically important because they interpret a key issue of the anti-discrimination legislation.

Furthermore, the Commission also contributes to the promotion of equality on a larger scale via its other tasks, for example, by bringing out advice to civil society organisations, the social partners or to the government. According to Ammer *et al.*, “both the ETC and stakeholders are convinced that advisory opinions contribute greatly to awareness-

⁶⁰ B. D. Jacobsen, and E. O. Rosenberg Khawaja, *op. cit.*, 10.

⁶¹ See Annual Report 2010, 42, on the type of structural measures.

⁶² See Annual Reports 2008, 40, 2009, 29 and 2010, 39.

raising and have proven to be an effective tool to improve application of equal treatment standards and legislation”.⁶³

Another important task in this respect is the ‘own initiative investigations’ the Commission can do when there is a suspicion that systematic discrimination takes place in a certain organisation or industry.⁶⁴ Ammer *et al.* write that “these powers assist in making structural discrimination visible and in developing strategies to fight it”.⁶⁵ Apart from these tasks, the Commission also provides information and clarification through training, lectures and campaigns.

Support that the work of the Commission contributes to the promotion of equality can be found in Goldschmidt who writes that “individual cases have resulted in, e.g. amendment of discriminatory regulations, and thus the broader active follow-up policies seem to have a deeper structural impact than mere compliance by individual parties”.⁶⁶ She also points out that, without the individual complaints to the Commission, cases of discrimination might never come to light as most claimants would never take their case to a court.⁶⁷ And, Ammer *et al.* report that “in the Netherlands 44% of respondents believed that the work of the Equal Treatment Commission has led to a decrease in unequal treatment”.⁶⁸

3.5. Non-binding Opinions

The opinions of the Commission are not binding and it cannot impose sanctions for non-compliance. Parties can thus ignore these opinions if they wish to do so. However, the active follow-up policy to monitor compliance which the Commission pursues does mitigate the

⁶³ M. Ammer, N. Crowley, B. Liegl, E. Holzleithner, K. Wladasch and K. Yesilkagit, *op. cit.*, 389.

⁶⁴ An example is the investigation into equal pay in hospitals: Commissie Gelijke Behandeling, *Onderzoek en Oordeel: Gelijke Beloning van Mannen en Vrouwen bij de Algemene Ziekenhuizen in Nederland [Investigation and Opinion: Equal Pay of Men and Women in the General Hospitals in the Netherlands]*, 2011.

⁶⁵ M. Ammer, N. Crowley, B. Liegl, E. Holzleithner, K. Wladasch and K. Yesilkagit, *op. cit.*, 387.

⁶⁶ J. Goldschmidt, *Implementation of Equality Law: A Task for Specialists or for Human Rights Experts? Experiences and Development in the Supervision of Equality Law in the Netherlands*, in *Maastricht Journal of European and Comparative Law*, *cit.*, 327.

⁶⁷ *Ibid.*, 330.

⁶⁸ M. Ammer, N. Crowley, B. Liegl, E. Holzleithner, K. Wladasch and K. Yesilkagit, *op. cit.*, 314.

disadvantage of the non-binding character and the impossibility to impose sanctions to a certain extent.

Parties can also, at the same time as filing a complaint at the Commission or after having received an opinion, make a claim to court for a finding of discrimination or to enforce the opinion. As mentioned, the Dutch Supreme Court has established that the courts must take account of the opinion of the Commission and, if it does not follow this, must give its reasons for not doing so.⁶⁹ This is not laid down in law, as Loth points out,⁷⁰ and courts do not always follow this.⁷¹ However, in the second evaluation, it was found that in 81% of cases decided in court following an opinion of the Commission, the courts paid serious attention to the opinion and in 61% of cases they followed the opinion. This report also mentions that the number of cases where the judge follows the Commission's opinion is on the increase.⁷² Goldschmidt comes to the conclusion that "bearing in mind that less than about 10% of the cases heard by the Commission are taken to court, it can validly be argued that the Commission's procedures avoid court proceedings and that the courts benefit from the investigations made by the Commission".⁷³

However, there is a drawback to the fact that the Commission does not give binding judgments: it means that it cannot make a preliminary reference to the CJEU for interpretation or explanation of EU anti-discrimination law and this can be seen as a serious lacuna, especially because very few discrimination cases ever reach the civil courts.⁷⁴ This is compounded by the fact that the Commission has, to date, not made use of the competence given in Art. 15 ETA 1994 to take cases to court.

The Commission cannot impose any sanctions so it cannot, for example, award compensation, and it can be questioned whether this is in line with

⁶⁹ *St Bavo-Gielen, Hoge Raad*, 13 November 1987, NJ 1989, 698.

⁷⁰ M. Loth, *op. cit.*, 225.

⁷¹ See on this J. Goldschmidt, *Implementation of Equality Law: A Task for Specialists or for Human Rights Experts? Experiences and Development in the Supervision of Equality Law in the Netherlands*, in *Maastricht Journal of European and Comparative Law*, *cit.*, 330; G. Moon, *op. cit.*, 920; I. Rorive *op. cit.*, 164.

⁷² Commissie Gelijke Behandeling, *Second Evaluation 1999-2004 [Het Verschil Gemaakt Evaluatie AWGB en Werkzaamheden CGB 1999-2004]*, *cit.*, 95.

⁷³ J. Goldschmidt, *Anti-discrimination Law in the Netherlands: A Specific Legal Patchwork, Normative System and Institutional Structure*, *cit.*, 256.

⁷⁴ J. Goldschmidt, *Implementation of Equality Law: A Task for Specialists or for Human Rights Experts? Experiences and Development in the Supervision of Equality Law in the Netherlands*, in *Maastricht Journal of European and Comparative Law*, *cit.*, 333; G. Moon, *op. cit.*, 921. See on the question whether equality bodies which have been given the power to issue legally binding decisions can refer questions to the CJEU: Equinet, *op. cit.*, 27-28.

the EU Equality Directives which prescribe that sanctions for breaches of anti-discrimination legislation must be effective, proportionate and dissuasive.⁷⁵ One of the Commissioners I spoke to thought that a simple opinion that discrimination has taken place is not enough of a deterrent for employers and that an order to pay compensation would work better in that respect. On the other hand, another Commissioner said that, if they are able to give compensation, this would make the situation difficult: they could then not investigate the cases themselves as that would combine the role of investigator/prosecutor and judge. However, the lack of binding opinions and sanctions does not appear to be a problem in practice. Ammer *et al.* conclude that the “soft sanctions in addition to the ETC’s high degree of acceptance as the expert institution for any questions relating to discrimination have proved highly effective and mean that the ordinary civil courts, which can issue binding sanctions, are rarely chosen as a means of redress”.⁷⁶

3.6. Questions in Relation to the Future

With the establishment of the Netherlands Institute for Human Rights imminent, are there likely to be any changes in the above? The Commission in its entirety is absorbed into the new Institute and all its tasks will be transferred. It is important to state that, as De Witte points out, this “amalgamation operation was not inspired by dissatisfaction with the Equal Treatment Commission, which is generally considered to be an active and effective institution”.⁷⁷ Within the Institute, there will be a separate department for equal treatment and the mandate in relation to equal treatment will not change.⁷⁸ The Institute will still deal with individual complaints about violations of anti-discrimination legislation but it will not be given the competence to deal with individual complaints about human rights violations. Whether this means that the limited mandate of the Commission, where it can only review the equal treatment

⁷⁵ See Art. 15 Directive 2000/43/EC, *op. cit.*; Art. 17 Council Directive of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation 2000/78/EC [2000] OJ L 303/16; and Art. 14 Directive 2004/113/EC and Art. 25 Directive 2006/54/EC.

⁷⁶ M. Ammer, N. Crowley, B. Liegl, E. Holzleithner, K. Wladasch and K. Yesilkagit, *op. cit.*, 387.

⁷⁷ B. De Witte, *National Equality Institutions and the Domestication of EU Non-Discrimination Law*, in *Maastricht Journal of European and Comparative Law* 2011, vol. 18, n. 1-2, 171.

⁷⁸ See, Art. 9-13 NHRI Act 2011.

aspects of an individual case, which has been criticised for being too narrow in the past,⁷⁹ will be extended so that the Institute can review or take account of the human rights aspects of the case as well, is not quite clear. The Commission has recently held that it can review whether the ETA 1994 is in accordance with international human rights treaties.⁸⁰ So the Commission appears to hold itself competent to consider international human rights. As part of the Human Rights Institute, this might become even easier to do.⁸¹

In relation to the issues analysed here, the cost-free, quick and easy procedure remains the same and thus will still be labour-intensive. There will be no change in relation to assistance to victims of discrimination, as the Commission does not provide this at the moment. The new Human Rights Institute is not tasked to assist victims of violations of human rights either. The opinions on whether discrimination has taken place remain non-binding and the Commission will not be able to impose sanctions. In relation to the easy accessibility of the Commission, there do not appear to be any plans to change this but there could be a danger that, as part of the Institute, the equality work of the Commission will become less visible and, also, that victims of discrimination might get confused as to what the Institute does. Discussions have taken place as to whether the new Institute should have human rights as well as equal treatment in its name but, after consultation, the Government has decided against this.⁸² A number of questions will only be answered once the Institute is up and running, like whether it will be able to deal with wider issues; whether the equal treatment focus will be the main one or will be watered down; how the Institute will develop and how its equal treatment department will function in the wider context of human rights.

One more point should be raised here. Ammer *et al.* write that “stakeholders criticised the Equal Treatment Commission in the

⁷⁹ See R. Holtmaat, *Een Agenda voor Wetgeving, Beleid en Onderzoek op het Gebied van de Discriminatie Bestrijding en Gelijke Behandeling*, 266-267; M. Loth, 224; and J. Goldschmidt, *Implementation of Equality Law: A Task for Specialists or for Human Rights Experts? Experiences and Development in the Supervision of Equality Law in the Netherlands*, in *Maastricht Journal of European and Comparative Law*, cit., 332.

⁸⁰ Opinion 2011-69.

⁸¹ For more information see A. Terlouw, *De CGB en de Algemene Mensenrechttoets, The Equal Treatment Commission and General Human Rights Review*, in *Nederlands Tijdschrift voor de Mensenrechten/NCJM Bulletin [Journal of the Dutch Human Rights Committee]*, 2011, vol. 36, n. 6/7, 656-671; and, J. Goldschmidt, *Protecting Equality as a Human Right in the Netherlands. From Specialised Equality Body to Human Rights Institute*, in *The Equal Rights Review*, cit., 45.

⁸² See *Explanatory Memorandum, NHRI Act 2011, op. cit.*, 12.

Netherlands on the grounds that so many of its staff have a legal background; some stakeholders believed that a more multi-disciplinary staff composition would improve its functioning”.⁸³ The new Institute might have to address this issue. And, not only a more multi-disciplinary but also a more diverse and representative staff composition will need to be considered, especially if the Institute wants to comply with international obligations and to attain the A-status granted by the UN to national bodies which fully comply with the Paris Principles.⁸⁴ There appears to be a lack of representation from groups like disabled people, ethnic and religious minorities, and so forth.

4. Conclusion

The focus of this article has been on the Dutch Equal Treatment Commission and especially its individual complaints procedure. Part 1 painted a background picture by examining the Commission’s history, composition and mandate, while Part 2 described the individual procedure itself and Part 3 contained an assessment of this procedure and an analysis of the question whether this is a satisfactory way of dealing with individual discrimination complaints and whether this procedure can be seen as an example of good practice for other countries.

The first issue examined was whether the individual complaints procedure was, as is claimed, a cost-free, simple and quick way for victims of discrimination to get satisfaction and the conclusion was that, certainly compared to a civil court action, this is indeed the case. Some costs are involved, especially when parties want representation. The procedure is also fairly easy to use, but parties still find the whole process rather judicial, despite the fact that the Commission spends time at the hearing to explain everything in detail. The procedure is also reasonably quick, and cases are generally dealt with within six months.

⁸³ M. Ammer, N. Crowley, B. Liegl, E. Holzleithner, K. Wladasch and K. Yesilkagit, *op. cit.*, 344.

⁸⁴ *Principles relating to the Status of National Institutions (The Paris Principles)*, Adopted by General Assembly Resolution 48/134 of 20 December 1993, available at <http://www2.ohchr.org/english/law/parisprinciples.htm> (accessed 5 April 2012). See on this also the Explanatory Memorandum, NHRI Act 2011, 13-14; and, J. Goldschmidt, *Protecting Equality as a Human Right in the Netherlands. From Specialised Equality Body to Human Rights Institute*, in *The Equal Rights Review*, cit., 37 and 39. At present, the Commission has B-status.

Is the Commission easily accessible? It was found that just over half of the general public had heard about the Commission, but that most do not know what it does. There is thus scope for improvement on its visibility and its tasks. There is also evidence that only a small number of discrimination complaints actually reach the Commission. The Commission does not provide assistance to victims in pursuing a claim of discrimination, but there are other organisations, like anti-discrimination bureaus and municipal anti-discrimination facilities, which advise and assist victims.

The individual procedure is labour intensive, but the Commission has been working towards dealing with cases in a more efficient way, via telephone and email enquiries and a front-office pilot project. The individual procedure does, in a number of ways, promote equality on a wider scale. Opinions are published and now name the respondent party, group actions are possible and an extensive body of case law has been built up which provides guidance for victims, but also for employers and goods and services providers. Furthermore, in its opinions, the Commission often recommends that parties take structural measures as well as or instead of only individual measures. Other tasks performed by the Commission also contribute to the promotion of equality on a larger scale.

The opinions of the Commission are not binding and it cannot impose sanctions for non-compliance. However, it has an active follow-up policy to enhance compliance and the opinions are followed up in about 75% of the cases. When a party takes a case to court after the Commission has brought out an opinion, the Supreme Court has held that the court must take account of the opinion and must give reasons if it does not follow this.

When the Institute for Human Rights is set up—this is expected to happen in the latter part of 2012—the Commission will, in its entirety, become part of the new Institute but the individual procedure for victims of discrimination will remain as it is. This is to be welcomed. It is suggested that the individual procedure has, by-and-large, succeeded in what it was set up for: to create an easy accessible, simple, quick and cost-free or low-cost way for victims to complain about discrimination. And, together with the other tasks of the Commission, it has contributed to the promotion of equality in the Netherlands. Or, as Goldschmidt writes, “in its almost 15 years of existence, the ETC has developed into an

authoritative institution in the implementation of equality laws”.⁸⁵ The Commission will have to make sure that its visibility and the general public’s knowledge about its existence and what it does is maintained and even increased and that this does not suffer from the incorporation into the new Institute for Human Rights. The establishment of this Institute provides a good occasion to raise awareness.

It is submitted that the way in which the Dutch Equal Treatment Commission deals with individual complaints of discrimination can represent a clear example of good practice for other countries as it provides victims of discrimination with an easier, less stressful, less expensive and quicker way to get a finding of discrimination than taking a case to a court. The Dutch Government set up the Commission to provide this and has, thus, succeeded in its goal. And, although the national political and legal circumstances for an equality body must be taken into account⁸⁶ and thus the procedure might not be suitable to be transplanted in its entirety, many aspects like, for example, the information the Commission provides on the telephone, by email, on its website and in leaflets, the way the Commissioners spend time at a hearing to explain (legal) issues, the recommendation of structural as well as individual measures and the active follow-up policy, can be seen as very useful tools for other equality bodies as well. The Commission’s individual procedure can thus definitely be seen as an example of good practice for equality bodies in Europe and beyond.

⁸⁵ J. Goldschmidt, *Anti-discrimination Law in the Netherlands: A Specific Legal Patchwork, Normative System and Institutional Structure*, cit. 259.

⁸⁶ See, G. Moon, *op. cit.*, 874.

The Transposition of Council Directive 99/70/EC of 28 June 1999 on Fixed-term Work into Spanish Labour Law: Some Critical Aspects following the 2011 and 2012 Reforms

Lourdes Mella Méndez *

Introduction

In this introductory section, an outline is provided on the manner in which employment contracts are governed within Spanish labour legislation. In this respect, one should note that:

- the most widespread contractual schemes in Spain are open-ended and fixed-term contracts, which are regulated by Art. 15.1, par. 1 of the Workers' Statute (hereafter simply as ET). The legislator shows a preference for permanent contracts, as the employment relationship is established upon intention of the parties on an exclusive basis. The same cannot be said of fixed-term work, as here it is the fulfilment of one of the objective reasons stated in the contract that justifies its temporary nature. This usually concerns workers in standard employment relationships that are regulated by the ET, yet some exceptions can be observed concerning workers in special working arrangements that, since 1985, have been governed by specific provisions (e.g. Royal Decrees). This is the case, for instance, of temporary employment contracts concluded by professional sportsmen;

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- such preference for fixed-term work arrangements on the part of the Spanish legislator is also apparent if one takes account of several aspects, such as:

- a) the countless provisions laid down to allow the conversion of a fixed-term contract into a permanent one, which is usually accompanied by economic incentives, pursuant to Art. 8, 11.3, 15.7, and 17.3 of the ET. One should note that this conversion would be null and void once a waiver of a right is assumed which is unavailable to the worker, that acts as stability of employment (Art. 3.5 of the ET);
- b) the *iuris tantum* presumption—that is the rebuttable presumption—that the employment contract has been performed for an indefinite period. This is the case of contracts not concluded in a written form (Art. 8.2 of the ET), or those that do not envisage enrolment to social security upon completion of the probationary period (Art. 15.2 of the ET);
- c) in the event of an illicit takeover of the business, workers have the right to gain the status of permanent workers (Art. 43.4 of the ET);
- d) the scope for agency workers to be hired permanently by the user company they work for, provided that they continue to work also after expiration of the contract between the user company and the temporary work agency;
- e) the rules contained in par. 3 and 5 of Art. 15 of the ET, which will be discussed below;

- with regard to the employment relationship for an indefinite period, until February 2012, there were two types of contracts that could be implemented: the traditional open-ended contract, and the one aimed at the promotion of permanent employment. The former, which is regulated by the ET, refers to the standard relationship between a worker who provides a service and an employer who receives and remunerates these services. The other contractual scheme was implemented in 1997 to help certain categories of workers to find stable employment, also by means of some incentives granted to the employers. Among others, these incentives included a reduction of workers' social contributions to be paid by the employer, the amount of which depended on the professional category the workers belong to. In addition, monetary compensation should be paid to employees in the event of a dismissal for objective reasons or in an unfair dismissal. Such compensation benefitting workers was usually higher in the event of the former. Accordingly, the employer had to pay a sum of money corresponding to 33 days of wages for each year during which workers have provided services to the employer of up to a maximum of 24 months. This type of contract, which should be

concluded in writing, was regulated by the first Additional Provision of Act No. 12 of 9 July 2001 on urgent measures to reform the labour market and improve the quality of employment, subsequently amended by Art. 10 of Act No. 43 of 29 December 2006 for higher growth and employment. Royal Decree Law No. 3 of 10 February 2012 now in force provides some urgent measures to reform the labour market and replaces the foregoing open-ended contract with a “permanent employment contract to support entrepreneurs” (Art. 4), granting certain benefits to entrepreneurs and small businesses that hire a worker with an open-ended contract;

- since services can be provided either on business days or only intermittently, Art. 12.3 and 15.8 of the ET make provision for two additional contractual schemes which are regarded as being of a permanent nature, viz. “stable and regular” contracts and “fixed-discontinuous” contracts. In the first case, workers need to perform their tasks according to a fixed schedule. In the other, if a fixed-discontinuous contract is concluded, work is carried out intermittently;

- Spanish labour legislation provides a wide range of fixed-term contracts, among which are the training and apprenticeship contracts regulated by Art. 11.1 and 2 of the ET. Training contracts cater for theoretical and practical learning which is necessary to carry out a task properly, thus affording the worker the opportunity to gain adequate work-related qualifications. Those in apprenticeship contracts already have sufficient theoretical learning, thus they only need vocational training in line with their educational attainment. There are also some other work arrangements which are regulated by par. a, b, and c of Art. 15.1. of the ET, namely project contracts—that is employment contracts for a specific project or service—casual contracts—due to production overload or backlog—and substitution contracts, that are traditionally used for temporary hiring. More specifically, project contracts are concluded for specific tasks that, although limited in time, might be of uncertain duration. As for casual contracts, they might be used to hire workers in the event of increasing and unexpected business activity, whereas the substitution contracts might be performed if a need arises to replace another worker who is temporarily absent but whose right to return to work is laid down in national legislation, collective agreements, or his/her individual employment contract.

- Art. 15.3 of the ET leaves no doubts whatsoever about the unlawful nature of fixed-term contracts for an indefinite period, that is those

concluded for a specific period of time within a longer reference period. The Decisions on the 20 and 21 February of 1997¹ of the Supreme Court (hereafter simply as TS) ruled that the repetitive use of fixed-term work arrangements would result in this contract to becoming open-ended, and so will the recourse to temporary contracts in cases in which a violation of relevant legislation is reported (e.g. lack of a reason justifying the time limit or a misuse in terms of duration and contents). Thus, according to the TS, a contract for a definite term will be transformed into a contract for an indefinite term once the unlawful nature of the former has been certified, yet fixed-term employment is permitted provided it will not result in a “chain” of fixed-term contracts. Therefore, the permanent character of the contract represents an inalienable right for the workers (Art. 3.5 ET), and this is also safeguarded in cases of an alternation of permanent and temporary contracts, or when some other circumstances have occurred: severance payment in a settlement, compensation for termination of a fixed-term contract, and unemployment benefits, to name a few. Accordingly, at the time of looking at the chain of contracts and understanding at which point one has acquired the status of “permanent” worker, one should take into account possible breaks in the string. If there has been no break of continuity in the series of contracts, all of them should be examined. Conversely, when a period of inactivity has elapsed between two contracts which amounts to more than 20 working days—including the dismissal procedures—the previous contracts are not taken into consideration, since it is assumed that the employee has had enough time to challenge the expiration of the last one or, alternatively, he/she has given his/her consent to the termination of the employment relationship, irrespective of the fact that a new contract might have been concluded with the same employer. Consequently, one should consider whether the interruption mentioned above has been the result of employers’ misconduct acting *contra legem* or of the particular nature of the employment relationship (e.g. the number and type of contracts, the duration of the contractual chain, and activities carried out). In this connection, it seems worth pointing out the peculiar case of illegal recruitment in the Public Sector. Before 1996, the misuse of fixed-term contracts had the same legal effects in both the private and the public sector, viz. conversion into permanent employment contracts. However,

¹ Art. 1457 and 1572, respectively, as well as some subsequent rulings of the same Court of April 22, 2002 (Art. 7796), November 7 and December 5, 2005 (Art. 1691 and 1316).

the TS ruling of 7 October 1996² drew a distinction between the notion of “permanent” and “definite” employment relationships. This wording should be examined with some qualifications. More specifically, the service provided under a fixed-term contract the conclusion of which does not comply with the law may be transformed into a contract of an indefinite period. This means that this is the way the contract would be considered until its expiration, even though the worker would not be entitled to permanently work in the company. Clearly, if the latter were the case, especially in the Public Sector, this would make the contract null and void, as a merit-based selection procedure needs to take place to gain such a position, in accordance with the principles of equality, merit, ability and advertising laid down by Art. 23.2 and 103.3 of the 1978 Spanish Constitution. In the private sector the terms “permanent” and “definite” may be regarded as equivalent, which cannot be said of the Public Sector. Here, even though fixed-term contracts illegally concluded will be transformed into open-ended contracts, their holders will not be regarded as holding a permanent position. Evidently, the fact that a post in the Public Service is subject to statutory procedures suggests that the position in question is for a definite term and subject to termination. Recently, Act No. 7 of 12 April 2007—Basic Statute of Public Employee—has made express provision for this type of contract, stating that, depending on its duration, this contract might be regarded as a temporary or a permanent one (Art. 11.1).

- Aside from these fraudulent practices, the repetition of fixed-term contracts with the same employers used to be the norm in Spain, as it was neither prohibited by the legislator nor questioned by doctrine. In this sense, the prerequisite to conclude permanent contracts was an objective reason justifying their use, as well their conformity with relevant legislation in terms of duration and content. However, the scope for repeating fixed-term contracts has changed significantly since 2006, mostly because the influence of Community law.

² Art. 7492 and subsequent judgements, namely the TS rulings of January 20 and January 21, 1998 (Art. 1000 and 1138), January 19 and January 26, 1999 (Art. 810 and 1105), February 3 and October 13, 1999 (Art. 1152 and 7493).

1. Council Directive 99/70/EC of 28 June 1999 Concerning the Framework Agreement on Fixed-Term Work

1.1. Contents

Council Directive 99/70/CE intends to implement the Framework Agreement on working conditions for fixed-term employees, passed on 18 March 1999 by the Union of Industry and Employers of Europe (UNICE), the European Centre for Public Enterprises (CEEP), and the European Trade Union Confederation (ETUC). The Preamble of the Agreement states that, although the contract of indefinite duration is the most widespread form of employment relationship between employers and workers, it should be acknowledged that the fixed-term contract also responds to certain real needs of the labour market. Thus, the framework agreement sets out general principles and minimum requirements relating to fixed-term work, taking into account specific national, regional, professional, and seasonal conditions. The main idea is to establish a reference framework to ensure equal treatment and non-discrimination of fixed-term workers with regard to permanent workers. In doing so, the directive intends to improve the quality of employment for fixed-term workers and to stem the increasing practice of successive contracts or fixed-term employment (Clause 1 of the Agreement). The Framework Agreement also defines “the worker with fixed-term work” as one “who has an employment contract or employment relationship consented directly between an employer and a worker where the termination of the contract of employment or the relationship is determined by objective conditions, such as a specific date, the completion of work or service or the occurrence of a specific fact or event”. Non-discrimination of workers and the establishment of measures to prevent the abuse of fixed-term contracts in relation to permanent workers represent two main points of the agreement. Concerning the first aspect, fixed-term workers are expected to have less favourable working conditions than permanent workers within the company. A fixed-term relationship does not justify any type of discrimination, as workers in these employment contracts can only be treated differently on objective grounds (Clause 4). Moreover, the principle of equal treatment also covers aspects such as access to vacancies in the company and adequate training to improve their professional qualifications, for which fixed-term workers should be provided with necessary information. As for limitations to the use of fixed-term contracts to prevent the abuse of this contractual

scheme, Clause 5 of the Agreement provides that the Member States should introduce one of the following measures, after consultation with the parties concerned (social partners, lawmakers, actors of collective bargaining and so forth) and taking account of the specific needs of workers and sectors:

- a) objective reasons justifying the renewal of such contracts or fixed-term employment relationships;
- b) the maximum total duration of successive fixed-term employment contracts or relationships;
- c) the number of renewals.

National legislation and social partners are left with the responsibility of determining whether the fixed-term employment relationship might be renewed or converted into a contract of indefinite duration.

1.2. The Transposition of Council Directive 99/70/CE into Spanish Labour Law

Art. 2 of Directive 99/70/CE provides that the Member States should act in keeping with the Directive “no later than July 10, 2001” or—when justified on objective grounds—within a year. In Spain, the directive was transposed into national law through Act No. 12 of 9 July 2001, which however did not make any special provision for succession of fixed-term contracts, an aspect that was subsequently dealt with in the 2006 Labour Reform (Royal Decree-Law 5/2006).

More specifically, Art. 12.2 of the provision—which was later converted into Act No. 43 of 29 December 2006—provides a new reading of paragraph 5 of Art. 15 of the ET: “Notwithstanding what is set forth in paragraphs 2 and 3 of this article, the workers who, within a time-period of thirty months, have been contracted for more than twenty-four months for the same job and by the same employer by means of two or more fixed-term contracts with the same or different contractual schemes of a specific duration, with or without resolved continuity, either directly or through the temporary work agency, shall acquire the status of permanent workers. In consideration of the peculiar nature of each activity and the characteristics of the post, it is up to collective bargaining to lay down measures aimed at preventing the abuse of contracts of a specific duration to employ different workers to fill the same position for which short-term contracts have been used, with or without resolved continuity, including those concluded with temporary work agencies. What is provided for in this section shall not be applicable to the training, replacement or substitution contracts”. The purpose of this reform is therefore to prevent

the excessive use of successive fixed-term contracts, that is, to stem precarious employment resulting from high rotation in the Spanish labour market, and promote stable employment of high quality. At present, the statutory limit on successive fixed-term contracts somehow hinders the fraudulent nature of this contractual relationship imposed by employers for regular working activities. In so doing, the shift from precarious to stable employment is achieved without amending the rules of the contractual relationship. Employers still have scope for resorting to (precarious) fixed-term employment, yet limited in time. As a result, the transposition of the EU Directive 1999/70 has made it possible to amend national legislation, which however makes little to no reference to restrictions in the abuse of successive short-term contracts.

Act No. 35 of 17 September 2010 containing urgent measures to reform the labour market makes some major amendments to the original text of paragraph 5 of Art. 15 of the ET.

1.2.1. Statutory Restrictions on Successive Fixed-Term Contracts

The use of successive fixed-term contracts with the same worker is subject to a temporal limit imposed by law, at the end of which the employment contract is converted into an open-ended one, provided that certain requirements are met. The conversion results in a contractual *novatio ex lege*, in the sense that the last fixed-term contract becomes open-ended and the parties cannot decide otherwise. Pursuant to Art. 15.5 of the ET, a short-time working arrangement is not presumed, but it is imposed by law. This aspect is relevant as providing that, under certain conditions, fixed-term employment has to be limited in time to safeguard employment stability. Therefore, the employer cannot justify the unlimited use of fixed-term contracts with the fact that the assignment is of a temporary nature. It might also be the case that the employer anticipates the automatic conversion of the employment relationship, and he/she can choose to do so through a “permanent employment contract to support entrepreneurs” (Art. 4 of Royal Decree Law No. 3 of 10 February 2012). The employer might opt for this solution as being more beneficial in monetary terms, especially with regard to reductions in social security contributions, also considering that it does not oblige him/her to compensate the worker in the event of dismissals taking place during the probationary periods (12 months). If the conversion takes place automatically, that is upon expiration of the last fixed-term contract, none of these benefits are entitled to the employer. In the event of a temporary

contract concluded with an employment agency, the agency worker will be hired by the user company on a permanent basis whereas its renewal exceeds the statutory time-limit of two years. Consequently, there is no contractual innovation, because no contractual relationship existed between the worker and the user company, and a new open-ended contract is concluded by law. When the employer does not comply with the new rules and proceeds to the termination of the last fixed-term contract, the worker can claim an unfair dismissal or null and void dismissal if he/she has worked for the same employer for at least two years. In this sense, some reservation might arise as to the type of dismissal. Indeed, the dismissal may be regarded as null and void as an infringement of Art. 15.5 of the ET. On the other hand, in going through case law and courts decisions, it appears that non-compliance with Art. 15.3 of the ET takes place, with the dismissal that would be declared unfair. Evidently, the legal limit is not intended to encourage fraudulent practices on the part of employers, but to reduce the widespread use of successive fixed-term contracts, even though this is permitted by law. Accordingly, and as also evidenced by the courts, Art. 15.5 is by all means in line with Art. 15.3, because it does not pursue the fraudulency of the contractual relationship, but the direct transformation of fixed-term contracts into permanent ones when the statutory requirements are fulfilled.³ In this respect, the following requirements need to be met in order to be legally authorised to transform a short-term contract into an open-ended one:

a) identity of the holder: the contracts are to be concluded with the same worker. If different workers are employed to carry out the same job, the conventional limit will apply, but not the statutory one. We shall return to this point later.

b) Use of two or more fixed-term contracts. Only the employment contracts of fixed duration concluded subsequent to the enforcement of Art. 15.5 of the ET would be subject to the statutory limit imposed on the first of successive fixed-time contracts. The time-limit does not apply for a single contract of a given duration, even in cases where they exceed the time-limit laid down in Art. 15.5 of the ET. In the name of job stability, however, workers would also welcome the extension of this time requirement to individual employment contracts.

Fixed-term contracts may be concluded for a definite or an indefinite period, thus it has been regarded as superfluous to include a clause that

³ Cantabria STSJ July 13, 2007 (Prov. 307/310).

interrupts the chain of contracts. This also means that the employment relationship might be characterised by interruptions and periods of inactivity, yet within set time-limits. By way of example, the periods of inactivity can last far more than twenty days—with this limit that in some cases has been taken into account by courts to argue that there was a string of fixed-term contracts.⁴ The period of inactivity can reach up to 6 months, during which the worker is entitled to unemployment benefits or to work for another employer. Periods of inactivity are not counted as being part of the employment contract, but they can be added up. The judicial review of the contractual chain extends from first to last fixed-term contract in the company, regardless of whether they were intended as linked or not. Successive fixed-term contracts may be directly concluded between employers and employees, or through temporary work agencies. In this latter case, the employment contract finalised is counted as being part of the string of fixed-term contracts, that might consist of varied fixed-term contractual arrangements.

Training contracts, replacement contracts and substitution contracts, however, do not count in the string of fixed-term contracts, and if concluded, their duration should be deducted, because of the lower incidence of abuses that occurs in this form of contracts. The legislator has attempted to strike a balance between the measures preventing a rise in precarious employment and the freedom on the part of employers to job creation. So, employers are unwilling to create jobs that result from substitutions which have been already covered, replacement posts related to existing jobs or training jobs which can have continuity within the company. However, this behaviour has also been criticized, as young workers are those who suffer the most from the precarious situation ensuing from the use of these contractual relationships. After the introduction of Act No. 35 of 17 September 2010, the contracts concluded within the framework of state-run job-training programmes, as well as temporary contracts promoted by certain agencies to help workers re-enter the labour market do not count as fixed-term contracts. Casual contracts and project contracts—also those concluded through the employment agency—are computed as being within the string of fixed-term contracts.

⁴STJCE of 4 July 2006 (Case C-212/04; ILJ 1135): Clause 5 of the Framework Agreement prohibits that national legislation defines as “successive” those “fixed-term contracts that are not separated by an interval exceeding 20 labour days”. See STSJ Andalusia November 12, 2007 (ILJ 2315).

It is doubtful whether the statutory limit of fixed-term contracts can be applied to those contracts that do not fall within the scope of the ET. This is the case, for instance, of fixed-term contracts regulating special employment relations as laid down in Art. 2 of the ET, or those contracts addressing some special categories of workers, viz. Religious teachers operating in public bodies that are employed on an annual basis, researchers who have been diagnosed with some form of disability, and researchers who are engaged in contracts of promotion of permanent employment. With regard to contractual schemes entered into in the event of special employment relations, they are governed by special labour laws that are however viewed as subsidiary provisions in that they deal with possible legal loopholes arising from national legislation.

Taking into consideration the string of fixed-term contracts, the Royal Decrees mentioned above do not include any relevant provisions, therefore Art. 15.5 of the ET applies as a subsidiary rule, unless this is incompatible with the work performed. In addition, while Art. 15.5 of the ET also applies to domestic workers and commercial mediators, it is more complex to implement it with regard to artists and ex-offenders, due to their special status. The same can be said of professional athletes, who are only employed under fixed-term contracts, and senior managers, because the ET is not seen as a subsidiary rule in this case. Art. 15.5 of the ET also applies to training contracts such as those entered into by assistant professors, physicians operating locally, and so forth.

c) Recruitment in the same company and in the same job. The fact that, in the light of Art. 15.5 of the ET, recruitment must be performed in the same company and in the same job has produced a problem of interpretation with regard to whether the transformation of fixed-term contracts into permanent ones is also applicable to public servants. Initially, Art. 15.5 of the ET was not applicable for this category of workers, due to the difficulty of transforming fixed-term contracts into open-ended ones in the Public Sector, where recruitment for permanent positions is based on objectively measured competence and merit. To address the issue, Art. 15 was reworded, so that its implementation “shall not preclude the obligation to cover positions through normal procedures, in accordance with applicable laws”. Accordingly, fixed-term workers employed in the Public Sector for more than 24 months gain the status of “permanent employees” until it is decided that their situation should be regulated as per law, along the lines of what happens in the event of fixed-term contracts concluded illegally. The different treatment in the private and public sector is consistent with Spanish and EU law. More specifically, it conforms to Directive 1999/70/EC and its Framework

Agreement, as has been also shown by the two decisions handed down by the European Court of Justice (ECJ) of 7 September 2006 (*Marrosu-Sardino Affairs* and *Vasallo*),⁵ according to which “clause 5 of the Framework Agreement does not entail, as such, that the abuse of successive contracts of fixed-term employment relationships has a different treatment in the Member States, regardless of whether the contractual relationships take place in the private or public sector”. In broad terms, the ECJ considers that the Framework Agreement does not preclude Member States from legislating on the issue. Indeed, in cases of abuses of successive contracts or fixed-term employment relationships in Public Sector, temporary employment contracts may not be converted into open-ended ones, provided that national legislation contains alternative measures to prevent wrongdoings. This is not the case of Spain, which also allows for the conversion in the Public Sector.⁶ On the other hand, Act No. 35 of 17 September 2010 amends the fifteenth Additional Provision of the ET and specifies that the time-limit provided in Art. 15.5 of the ET only applies “to contracts concluded by the Public Administration on an exclusive basis, without the involvement of other legal entities”. Further, Art. 15.5 of the ET does not apply to certain employment contracts for the university staff which are regulated by Act No. 6 of 21 November 2001. Another issue that is worth mentioning is that the Royal Decree Law 5/2006 has not adopted provisions with regard to groups of companies or subsidiaries controlled by a contractor, and special regulation was necessary to avoid any possible fraud resulting from non-compliance with Art. 15.5 of the ET. A worker might be transferred to another company within the same group or to a subsidiary by concluding short-term contracts with each of them and without reaching the duration set out in Art. 15.5 of the ET. If this was the case, the TS opted for “piercing the corporate veil”, that was disclosing its legal personality, so that the “chain of fixed-term contracts” concluded afterwards was disclosed too. In these cases, a number of criteria are evaluated to demonstrate that a company belongs to a group of companies or is a subsidiary (examples include: the same management, the same staff, and so forth). Art. 15.5 of the ET also applies in the event a new employer takes over or succeeds in the business. Act No. 35 of 17 September 2010 modifies the foregoing article and deals with both issues to prevent any possible violation. Of relevance is the fact that the succession of fixed-term contracts can also take place

⁵ ECJ 2006, 229 and 224.

⁶ See STJCE of April 15, 2008 (ECJ 2008, 82).

within the “same occupation”, with this concept that might convey different nuances of meanings. In this case, occupation refers to tasks that:

- a) are performed in the same workplace;
- b) consist of the same working activity, regardless of the workplace; and
- c) are performed in a systematic and teleological sense, pursuant to Art. 22 and 39 of the ET. In this case, the characteristics of the job are shared by those in a category or profession.

This broad interpretation of the notion of job intends to prevent fraud at the time of circulating between jobs, concluding different fixed-term contracts within the same group of companies, or to access equivalent positions. Although this might be a question to be solved in courts, the number of successive fixed-term work arrangements within the same group of companies and in the same job/position must not exceed the statutory limit set in Art. 15.5 of the ET. Whereas “post/job” and “professional category/position” are regarded as being equivalent, workers cannot be transferred among different occupational levels or positions as a way to elude the application of the law with regard to the conversion. The employee may also bring the case before the courts to ascertain the existence of a permanent employment relationship. In order to have a clear interpretation of the law, Act No. 35 of 17 September 2010 modifies the foregoing article, specifying that temporary employment contracts can be converted into open-ended contracts regardless they refer to the same or a “different” position.

- d) Statutory limit of successive fixed-term contracts.

Pursuant to Art. 15.5 of the ET, the statutory limit for successive fixed-term contracts applies when employees have provided their services to the same employer for 24 months out of a 30-month period. Upon completion of this time-period, the position covered by the employee is automatically regarded as “permanent”, although some causes of seasonality may still be present. If successive fixed-term contracts are entered into for 24 months for a period longer than 30 months, no conversion to permanent contracts would take place. The key issue in this case is to narrow the timeframe of 30 months of uninterrupted employment in the same company to ascertain whether or not there is a string of fixed-term contracts for a period of 24 months from the conclusion of the first employment contract. Art. 15.5 of the ET also applies to existing contracts, not only to new ones. Arguably, a problem might arise when the length of service has not been calculated from the first day of work, thus setting the *dies a quo* of the string of fixed-term contracts which becomes difficult. It is also important to assess whether

the periods of inactivity—temporary sick leave, temporary disability—should be included or not. The legislator does not make any reference to the matter and, because it is complex to understand when recruitment has taken place, there is scope for agreement between the parties. In the event of dismissals without just cause *before* the expiration of a 24-month period, general rules for these contractual arrangements apply, so courts will rule in favour of the employment relationship and the termination as an unfair dismissal.

1.2.2. Conventional Limits and the Role of Collective Agreements

The recourse to successive fixed-term contracts in the same job is subject to a newly-set conventional limit, as collective bargaining lays down “the necessary requirements to prevent the abuse of fixed-term contracts to perform the same job” (Art. 15.5, par. 2 of the ET), on the basis of the content of the working activity. The previous version of Art. 15.5 of the ET stated that “by means of collective agreements concluded at a national or sectoral level—strikingly enough, company-level agreements were excluded—further requirements could be set out to prevent the abuse of successive fixed-term contracts”. It is also significant that, in the language of the provision, the use of collective bargaining as an instrument to deal with the issue is only viewed as a remote possibility (*may* provide). In some respects, Art. 15.5 imposes these conventions, and this hints at the importance lawmakers give to this issue. Thus, one might expect a more decisive response by actors of collective bargaining, regardless of the scope of the accord, with collective agreements that, unlike what was provided in the previous wording of Art. 15.5—should include relevant clauses. Yet the existence of the obligation to bargain on such clauses remains to be seen. Likewise doubtful is to understand if their absence entails that the agreement is null and void. Express mention of the “obligation to bargain” would have probably been more useful, as well as the statutory imposition to include such clauses among the minimum terms of the collective agreements (Art. 85.3 ET). Accordingly, many scholars are of the opinion that there is no real obligation in this connection and in some other provisions, the legislator has decided not to include such a requirement. This is the case, for instance, of Art. 36.2 of the ET concerning night work stating that “it is up to collective bargaining to determine a special hourly wage rate”.

More generally, these clauses can serve different purposes:

- a) determining the maximum number of fixed-term contracts in a given post that can be concluded for a certain period, or from a specific date, to limit the subsequent use of these contractual arrangements;
- b) fixing the maximum number of contracts that can be concluded for a given period in a given post in order to limit their use; and
- c) defining the position within the company that must be occupied by permanent workers.

There are, then, different formulae. The only statutory requirement is that they have to include those contracts concluded with a temporary employment agency. In a similar vein, it is compulsory that interruptions of “chain of contracts” do not hinder the overall assessment of the string of fixed-term contracts. Although not made explicit in Art. 15.5 of the ET, precarious employment should be dealt with by offering permanent jobs. By means of conventional agreements, the broad and flexible set of temporal causes to hire workers for a definite period tends to be narrowed, even without questioning their relevance. There is nothing wrong in reducing the use of fixed-term contracts through collective bargaining. However, the conventional limits imposed on collective bargaining may also serve to avoid fraud in successive fixed-term illegal contracts. In line with this, Art. 15.3 of the ET states that: “fixed-term contracts concluded illegally should be converted into open-ended employment contracts”.

1.3. Art. 15.5 of the ET and the Current Economic Crisis

Art. 5 of Royal Decree Law No. 10 of 26 August 2011 on urgent measures for the promotion of youth employment makes provisions for job stability as well as for vocational retraining for those who are no longer entitled to unemployment benefits. It suspended the application of Art. 15.5 of the ET in the two years following the introduction of the Royal Decree Law, that is, until 31 August 2013. The rule providing for the conversion of fixed-term contracts into open-ended ones was established in 2006 in a time of economic expansion to promote employment stability.

However, due to the current financial situation, this rule, rather than encouraging the recourse to permanent contracts, may have negative effects, leading to the expiration of temporary contracts, thus reducing employment opportunities. For this reason, lawmakers decided for its suspension or “non-implementation”.

Art. 17 of the Royal Decree Law No. 3 of 10 February 2012 now in force concerns urgent measures to reform the labour market and reduces the period of suspension laid down by Art. 15.5 of the ET to 31 December 2012. It also introduces significant changes to that, thus limiting workers' rights in some respects (for instance, in terms of internal flexibility, termination of the employment contract, collective bargaining). It is therefore even more surprising that a provision aimed at improving employees' working conditions has been introduced. In its Preamble, the lawmaker sets forth that the aim of the reform is that of "reducing labour market duality as soon as possible". It remains to be seen whether this attempt will be successful or not.

Family-supportive Organisational Perception: A Prediction of Life Satisfaction among Lagos State Employees

Olabimitan Benjamin Adegboyega *

Introduction

The quest for productivity is a major concern of modern economies, particularly in the light of the challenges brought about by the financial crisis. In this sense, employers who overlook the role of employees in dealing with this all-important aspect risk losing out in terms of competitiveness, since only satisfied workers can be productive. Over the years, extensive changes have occurred in employees' work and family domains, such as an increasing share of families supported by dual incomes, multiple family care responsibilities, a growing number of single parents in the workplace, and greater gender integration into organisations.¹ This situation has made it necessary to investigate the interplay between work and family and how this could be positively affected by the relationship between family-supportive organisational perceptions and employees life satisfaction. Worldwide, recent issues stemming mainly from demographic changes in the workforce have led to the adoption of organisational policies for work and family—e.g. flexible work schedules and childcare assistance—in an increasing number of

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¹ E. E. Kossek, and S. L. Lambert, *Work-family Scholarship: Voice and Context.*, in E. E. Kossek and S. Lambert (Eds.), *Work and life integration: Organizational, cultural, and individual perspectives.* Mahwah, NJ, Lawrence Erlbaum Associates, 2005. M. B. Neal, and L. B. Hammer, *Working couples caring for children and aging parents: Effects on work and well-being.* Mahwah, NJ: Lawrence Erlbaum Associates, Inc, 2007.

organisations. This has been done in light of a growing commitment of employees to their family responsibilities, and in response by employers to help employees balance work and family demands.² Support for these policies has produced higher levels of retention of qualified staff, higher life satisfaction, and increased commitment and reduced turnover intention.³ Life satisfaction, by and large, refers to the overall assessment—be it positive or negative—of feelings and attitudes about one's life at a particular point in time. It is one of three major indicators of well-being, together with positive effect, and negative effect.⁴ Although satisfaction with current life circumstances is often assessed in research studies, Diener, Suh, Lucas, and Smith⁵ also include the following under the rubric of life satisfaction: desire to change one's life; satisfaction with past; satisfaction with future; and the views of others about one's life. Related terms in the literature include happiness—sometimes used interchangeably with life satisfaction—quality of life, and subjective or psychological well-being, a broader term than life satisfaction. Life satisfaction is frequently regarded as an outcome or consequence variable in work-family research.⁶ Further, it is often classified as a non-work variable, yet having major implications in organisational behaviour and human resource management. Apart from the inherent desirability of life satisfaction, relevant studies have pointed out a close link with work and family variables. The connection between work-family conflict and life satisfaction suggests that organisational interventions aimed at reducing the former—e.g. work-family benefits, flexible scheduling, and supervisory support—may enhance employees life satisfaction. Increased levels of satisfaction may, in turn, cause absenteeism and turnover intention to decrease, while raising work motivation and productivity. Relevant studies have also shown that work-family conflict is one of the

² J. D. Goodstein, *Institutional pressures and strategic responsiveness: Employer involvement in work family issues* in *Academy of Management Journal*, 1994, vol. 37 n. 2, 350-382. P. Osterman, *Work-family Programs and the Employment Relationship*, in *Administrative Science Quarterly*, 1995, n. 40: 681-700.

³ J. Haar, and C. Spell, *Examining Work-family Conflict within A New Zealand Local Government Organisation* in *The New Zealand Journal of Human Resources Management*, 2001, n. 1, 1-21, 2001.

⁴ E. Diener, *Subjective Well-being*, in *Psychological Bulletin*, 1984, n. 95, 542-575.

⁵ E. Diener, E. M. Suh, R. E. Lucas, H. L. Smith. H.L., *Subjective Well-Being: Three Decades of Progress* in *Psychological Bulletin*, 1999, n. 125, 276-302.

⁶ T. D. Allen, D. E. L. Herst, C. S. Bruck, and M. Sutton, *Consequences Associated with Work-to-family Conflict: A Review and Agenda for Future Research*, in *Journal of Occupational Health Psychology*, 2000, n. 5, 278-308.

main causes of life dissatisfaction experienced by employees. In the UK, a national survey carried out with over 1,540 managers has identified work-family conflict as the second highest stressor affecting physical and mental well-being—thereby having the potential for lower life satisfaction—while longer hours are leading to increased absenteeism, sickness, lower life satisfaction and staff turnover.⁷ The reciprocal and likely causal relationship between job satisfaction and life satisfaction points to the need on the part of organisations to take cognisance of the factors that affect them. In effect, a happy worker is a productive worker not only because of job satisfaction⁸ but also because he is satisfied with life in general.⁹ There is, however, a growing body of literature that questions whether family supportive policies alone facilitate the balancing of work and family commitments.¹⁰ Consequently, critics have argued that devising formal work-family policy is an inadequate condition on which to alleviate work-family conflict.¹¹ For example, Kossek *et al.*¹² maintain that there is a difference between the stated policy aim and employee beliefs regarding actual work-family support. Kossek *et al.*¹³ have referred to this as the “underlying message”, considering this of relevance in employees’ perception of organisational support. Similarly, Haar and Spell¹⁴ and Lambert¹⁵ have focussed on their perception of work-family practices and found these to be useful indicators of job attitudes and experiences with

⁷ L. Worrall, and C. L. Cooper, Quality of Work Life Survey: Managers’ Health, Motivation and Productivity. *Chartered Management Survey: London* 2007.

⁸ T. A. Judge, C. T. Thoresen, J. E. Bono, G. K. Patton, *The Job Satisfaction-job Performance Relationship: A Qualitative and Quantitative Review Psychological Bulletin*, 2001, n. 127, 376-407.

⁹ T. A. Wright, and R. Cropanzano, *Psychological Well-being and Job Satisfaction as Predictors of Job Performance*, in *Journal of Occupational Health Psychology*, 2000, vol. 5 n. 1, 84-94.

¹⁰ E. E. Kossek, and C. Ozeki, *Bridging the Work-family Policy and Productivity Gap*, in *International Journal of Community, Work, and Family*, 1999, n. 2, 7-32. E. E. Kossek, and C. Ozeki, *Work—family Conflict, Policies, and the Job-life Satisfaction Relationship: A Review and Directions for Organizational Behavior*, Human Resources Research, in *Journal of Applied Psychology*, 1998, n. 83, 139-149. C. A. Thompson, L. L. Beauvais, and K. S. Lyness, *When Work-family Benefits are not Enough: The Influence of Work-family Culture on Benefit Utilization Perceptions, Organizational Attachment, and Work-family Conflict*, in *Journal of Vocational Behavior*, 1999, n. 58, 414-435.

¹¹ E. E. Kossek, B. A. Lautsch, S. C. Eaton, *Telecommuting, Control and Boundary Management: Correlates of Policy Use and Practice, Job Control, and Work-family Effectiveness*, in *Journal of Vocational Behavior*, 2006, n. 68, 347-367.

¹² E. E. Kossek, B. A. Lautsch, S. C. Eaton, *op. cit.*

¹³ *Ibid.*

¹⁴ J. Haar and C. Spell, *op. cit.*

¹⁵ S. Lambert, *op. cit.*

regard to life satisfaction. Allen¹⁶ has found that family perception of organisational support benefitted availability alone—while having a limited effect on job attitudes—with the global perception employees formed with regard to the workplace environment that was strongly related to employee commitment. Therefore, what may be crucial in balancing work and family conflict and life satisfaction are employees' beliefs as to the perceived organisational climate or “underlying message”, regardless of the stated aim of the work-family practice. This aspect is an important one, with Behson¹⁷ that has recently argued that only organisations that spend time and resources to create cultures and management skills that are truly supportive of formal work-family practices would benefit from positive outcomes. Relatively few studies have specifically addressed work-family and gender, and this represents a critical gap in work-family research. Many studies have either been conducted with exclusively female samples¹⁸ or have ignored gender in the analyses.¹⁹ However, a significant number of studies show that significant differences do exist. Duxbury and Higgins²⁰ have found significant differences between fathers and mothers in predicting the strength of numerous paths under a comprehensive work-family pattern. Ayree²¹ has also found relevant differences, maintaining that the role ambiguity seems to intrude more severely from work to family life for men than for women. Scott²² has reported that men had less difficulty in combining work and family commitments than women. Furthermore, Hammer,

¹⁶ T. Allen, *Family-supportive Work Environments: The Role of Organizational Perceptions*, in *Journal of Vocational Behavior*, 2001, n. 58, 414-435.

¹⁷ S. J. Behson, *Which dominates? The Relative Importance of Work-family Organisational Support and General Organizational Contest in Employee Outcomes*, in *Journal of Vocational Behaviour*, 2002, n. 61, 53-72.

¹⁸ E.g. K. H. Bernas, and D. Major, *Contributors to Stress Resistance: Testing a Model of Women's Work-family Conflict*, in *Psychology of Women Quarterly*, 2000, vol. 24 n. 2, 170-178.

¹⁹ R. C. Barnett, *Toward a Review and Reconceptualization of the Work/Family Literature*, in *Genetic, Social, and General Psychology Monographs*, 1998, n. 124, 125-182.

²⁰ L. E., Duxbury, and C. A. Higgins, *Gender Differences in Work-family Conflict*, in *Journal of Applied Psychology*, 1991, n. 76, 60-73.

²¹ S. Aryee, *Antecedents and Outcomes of Work-family Conflict among Married Professional Women: Evidence from Singapore*, in *Human Relations*, 1992, n. 45, 813-837.

²² D. B. Scott, *The Costs and Benefits of Women's Family Ties in Occupational Context: Women in Corporate-government Affair Management*, in *Community, Work and Family*, 2001, vol. 4 n. 1, 5-27.

Allen, and Grigsby²³ have argued that men report lower levels of work-family conflict—but higher degrees of family involvement—than women. In a similar vein, Hill, Jacob, Shannon, Brennan, Blanchard, and Martinengo²⁴ have signalled that working fathers are engaged in lower levels of family-work conflict than their female counterparts.

1. Theoretical Background

The Ecological Systems Theory put forward by Bronfenbrenner²⁵ posits that the work Microsystem and family Microsystem interact and influence one another through permeable boundaries to create the work-family Mesosystem. This relationship is seen as bidirectional; that is, work affects family and family affects work. The ecological perspective theorises that work, family, and individual characteristics interact in a way that may be facilitative and conflictual at the same time. It also recognises that each pertinent work, family, or individual characteristic may have additive or interactive effects on the work-family Mesosystem. Consistently with Voydanoff's²⁶ application of the Ecological Systems Theory, work, family, and individual characteristics are seen to have direct effects on the perception of family supportive organisational culture and facilitation of work outcomes, such as life satisfaction. This is the case of social categories such as gender, age, educational qualification, and marital status. Proponents of the *Role Expansion Theory* insist that occupying multiple roles enhances engagement in both work and family life, with some studies that have evidenced a positive impact of multiple roles on self-esteem and life satisfaction among multiple role occupants.²⁷ An empirical test between the role stress and role expansion theories has

²³ L. B. Hammer, E. Allen, and T. D. Grigsby, *Work-family Conflict in Dual-earner Couples: Within-individual and Crossover Effects of Work and Family*, in *Journal of Vocational Behavior*, 1997, vol. 50, n. 2, 185-203.

²⁴ J. E. Hill, J. I. Jacob, L. L. Shannon, R. T. Brennan, V. L. Blanchard, and G. Martinengo, *Exploring the Relationship of Workplace Flexibility, Gender, and Life Stage to Family-to-work Conflict, and Stress and Burnout*, in *Community, Work, and Family*, 2003, vol. 11, n. 2, 165-181.

²⁵ U. Bronfenbrenner, *Ecology of the Family as a Context for Human Development: Research Perspectives*, in *Developmental Psychology*, 1986, n. 22, 723-742.

²⁶ P. Voydanoff's, *Linkages between the Work-family Interface and Work, Family, and Women's Work-family Conflict*. *Psychology of Women Quarterly*, 2002, vol. 24, n. 2, 170-178

²⁷ R. C. Barnett, and J. S. Hyde, *Women, Men, Work, and Family. An Expansionist Theory*, *American Psychologist*, 2001, n. 56: 781-96.

found greater support for the latter, in such a way that the number of social roles an individual occupies is negatively associated with insomnia and lingering illness.²⁸ The authors insist that multiple roles may expand individual access to resources, thereby increasing the support in important respects and reducing life dissatisfaction. However, the benefits accrued from multiple roles may be limited, as long as they are not felt as *demands*. Some studies have suggested that the positive effects of multiple roles are greatest when the workload, measured by the number of hours of paid work²⁹ and responsibility for small children³⁰ is not excessive. Thus, while multiple roles may be beneficial, if those roles begin to impinge upon each other, then role *overload* and/or role *conflict* are cause of distress, and reduce life satisfaction. In an attempt to verify the relationship between family support perception and life satisfaction, the *Role Stress Theory*, that draws from the classical role theory,³¹ states that the experience of ambiguity in role will result in an undesirable state. A central assumption of the role stress theory is that high demand leads to stress, and the stress generated by demand from a number of multiple roles increases the stress with each demanding role one occupies. A variant of the *Role Stress Theory* is the *Scarcity Perspective*, which assumes a finite amount of psychological and physiological resources available to an individual to respond to their role obligations. Multiple roles increase the demand on resources and on individual risks depletion and/or exhaustion of resources. As such, individuals must make trade-offs to reduce *role strain*.³² Underlying the trading-off of finite resources, particularly in the work-life context, is the notion that work and family roles have distinct responsibilities and obligations in which the satisfaction of those associated with one role entails the sacrifice of another.³³ This leads to a *role conflict*, due to

²⁸ M. Nordenmark, *Balancing Work and Family Demands: Do Increasing Demands Increase Stress?* in *Scandinavian Journal of Public Health*, 2004, vol. 32, n. 6, 450-455.

²⁹ S. Aryee, *op. cit.* and A. Scharlach, *Role Strain among Working Parents: Implications for Workplace and Community*, in *Community*, 2001, vol. 4, n. 2, 215-230.

³⁰ P. Moen, and Y. Yu, *Effective Work/Life Strategies: Working Couples, Work Conditions, Gender, and Life Quality*, in *Social Problems*, 2000, vol. 47, n. 3, 291-326. A. Scharlach, *op. cit.*

³¹ R. L. Kahn, D. M. Wolfe, R. P. Quinn, J. D. Snoek, and R. A. Rosenthal, *Organizational stress: Studies in role conflict and ambiguity*, Wiley, New York, 1964.

³² S. Aryee, E. S. Srinivas, and H. H. Tan, *Rhythms of life: Antecedents and Outcomes of Work-family Balance in Employed Parents*, in *Journal of Applied Psychology*, 2005, n. 90, 132-146.

³³ S. Zedeck, and K. L. Mosier, *Work in the Family and Employing Organization*, in *American Psychologist*, 1990, n. 45, 240-251.

incompatibility between roles,³⁴ which has been the main subject of much of the *work-life/work-family* literature. Despite acknowledging the fact that the work environment is critical for balancing work and personal life,³⁵ and because life in Lagos—the commercial nerve centre of Nigeria—is full of stress resulting from long hours spent on the road going and coming from work, with the population density leading to scarcity of limited resources needed for a fulfilled and satisfied life—little empirical research has been directed towards examining employee perceptions regarding the extent to which the work environment is family-supportive in this culture and programmes aimed at reducing work-family induced stress and subsequent life dissatisfaction. It is this observed gap that motivated an interest in this study, which intends to provide answers to some identified employees' problems arising from inter-role conflicts which are a major source of low life satisfaction. In this connection, the following questions are addressed: Why is productivity low in our organisations, particularly public organisations despite awareness of work-family conflict? Why are employees of these organisations experiencing low life satisfaction due to inter-roles conflict? Are there any differences in the perception of organisational social supports in terms of gender?

2. Research Hypothesis

1. There will be a significant positive relationship between family supportive organisational perception and life satisfaction.
2. Gender will significantly influence family-supportive organisational perception.

³⁴ J. H. Greenhaus and N. J. Beutell, *Sources of Conflict between Work and Family Roles*, in *Academy of Management Review*, 1985, n. 10, 76-88. R. L. Kahn, D. M. Wolfe, R. P. Quinn, J. D. Snoek, and R. A. Rosenthal, *op. cit.*

³⁵ D. E. Friedman, and A. A. Johnson, *Moving from Programs to Culture Change: The Next Stage for the Corporate Work-family Agenda*, in S. Parasuraman and J. H. Greenhaus (Eds.), *Integrating Work and Family: Challenges and Choices for a Changing World* Quorum Books, Westport, CT, 1997. 192-208.

3. Methodology

3.1. Research Design

This study is of a quantitative nature, and involves collecting information in numeric form. In this respect, the study made use of survey research methods to gather the necessary data. The independent variable adopted is family supportive organisational perception, while life satisfaction functions as a dependent variable. Also, variables such as age, sex, educational qualification, tribe, organisational tenure, and status serve as control variables.

3.2. Population / Study Sample and Sample Technique

The target population for this study was mainly composed of public servants at the time in office at the Lagos State Government. Participants consisted of 200 civil servants randomly drawn from ten ministries³⁶ which are all based in the Alausa Secretariat of the Lagos State Government. The stratified sampling technique was adopted so that all strata of workers would be represented in the study. Alausa was chosen because this is where all ministries are based and employees here cut across the different cadres.

3.3. Measuring Criteria

Family supportive organisation perceptions is measured with 14 items drawing on Allen's³⁷ family supportive organisational perception, ranging from 1=strongly disagree, to 5=strongly agree. Respondents were asked to reflect on the extent to which each item represented the beliefs or assumptions held by their organisation. Most of the items were worded negatively (e.g. "It is considered taboo to talk about life outside of work"); these negative items were reverse-scored so that a higher score indicated a

³⁶ The ministries involved in the study are those of Women Affairs and Poverty Alleviation; Youth, Sport and Social Development; Agriculture and Cooperative; Land and Housing; Budget and Economic Planning; Water Resources; Finance; Local government and Chieftaincy affairs; Environment; and Education.

³⁷ T. Allen, *op. cit.*

perception of the organisation as being more family-supportive. This measure has a Cronbach's alpha of .67. Life satisfaction was measured using the 5-item measure by Diener, Emmons, Larsen, and Griffin,³⁸ also resorting to a 5-point Likert scale. This scale has a Cronbach's alpha of .84 and has been used in a number of organisational work-family studies.³⁹ Sex, age, ethnicity, religion, education, marital status, organisational tenure, and organisational position were included as control variables because of their potential relationship with the dependent variables.

3.4. Statistics

Hypotheses 1 and 2 were tested using Pearson Product Moment Correlation T-Test for independent groups.

4. Findings

Hypothesis 1 states that there will be a significant positive relationship between the family supportive organisational perception and life satisfaction was tested using Pearson r.

Table No. 1: Summary table of Pearson Product Moment Correlation showing the relationship between the family supportive organisational perception and life satisfaction.

Variable	N	X	SD	R	DF	P
FSOP	200	79.2	6.14	0.18	199	<.05
Life Satisfaction	200	68.7	17.41			

Source: 2011's research data on FSOP and life satisfaction, Alausa-Lagos.

Table No.1 shows that there is a significant positive relationship between

³⁸ E. Diener, R. A. Emmons, R. J. Larsen, and S. Griffin, *The Satisfaction with Life Scale*, in *Journal of Personality Assessment*, 1985, n. 49, 71-75.

³⁹ T. A. Judge, J. W. Boudreau, and R. D. Bretz, *Job and Life Attitudes of Male Executives*, in *Journal of Applied Psychology*, 1994, n. 79, 767-782.

the family supportive organisation perception and life satisfaction among Lagos State civil servants, $r = 0.18$, $df = 199$, $P < .05$. Thus our hypothesis which stated that there would be a significant positive relationship between family supportive organisational perception and life satisfaction was supported by the result.

Hypothesis 2 states that gender will significantly influence family supportive organisational perception was tested using the t-test for independent group. The result is presented in Table No. 2.

Table No. 2—T-test summary table showing the difference between female and male participants on family supportive organisational perception among Lagos state civil servants.

Variable	N	X	SD	DF	DF	P
Male	126	47.84	12.15	199	-13.28	<.05
Female	74	34.67	7.87			

Source: 2011's research data on FSOP and life satisfaction, Alausa-Lagos.

The result in Table No. 2 shows that there is a significant difference between male and female on family supportive organisational perception, $t = -13.28$, $df = 199$, $P > .05$.

Accordingly, our hypothesis which stated that gender would significantly influence family supportive organisational perception is upheld by an analysis of the results that is provided in Table No. 2.

5. Discussion

This study was conducted to assess the influence of family supportive organisational perception on life satisfaction among Lagos State employees. The results obtained at the end of the study supported the hypotheses put forward. The first hypothesis that there will be a significant positive relationship between the family supportive organisational perception and life satisfaction was upheld by the results. This means that family supportive organisational perception has a significant statistical influence on employees life satisfaction. The results

are consistent with the previous findings. In their investigation, Haar and Spell⁴⁰ and Lambert⁴¹ have focussed on the employees' perception of work-family practices and found these to be a useful predictor of job attitudes which are strongly influenced by employees life satisfaction. Allen⁴² has found that global perception employees formed had a greater effect on job attitude and employees life satisfaction than benefit availability alone. Worrall and Cooper's⁴³ studies have identified work family conflict as the major cause of life dissatisfaction among employees. Therefore, what may be crucial in striking a balance between work and family conflicts and life satisfaction are employee beliefs as to the perceived family supportive organisational climate, regardless of the stated aim of the work-family practice. This belief was supported by Behson's⁴⁴ assertion that only organisations that spend time and resources to create cultures and management skills that are truly supportive of formal work-family practices would benefit from positive outcomes of family supportive organisational culture. The second hypothesis that gender will significantly influence family supportive organisational perception was also statistically relevant. This means that males and females differ in how they understand organisational family supportive policy. These results are supported by Duxbury and Higgins,⁴⁵ Aryee,⁴⁶ Scott,⁴⁷ Hammer, Allen, and Grigsby,⁴⁸ and Hill *et al.*⁴⁹ Duxbury and Higgins⁵⁰ have found a significant difference between fathers and mothers in predicting the strength of numerous paths in a comprehensive work-family model, while, Aryee⁵¹ has reported differences between women and men, suggesting that role ambiguity seems to intrude more severely from work to family life for men than for women. Scott⁵² has further revealed that men have less difficulty in combining work and family commitments than

⁴⁰ J. Haar and C. Spell, *op. cit.*

⁴¹ S. Lambert, *op. cit.*

⁴² T. Allen, *op. cit.*

⁴³ L. Worrall, and C. L. Cooper, *op. cit.*

⁴⁴ S. J. Behson, *op. cit.*

⁴⁵ L. E. Duxbury and C. A. Higgins, *op. cit.*

⁴⁶ S. Aryee, *op. cit.*

⁴⁷ D. B. Scott, *op. cit.*

⁴⁸ L. B. Hammer, E. Allen, and T. D. Grigsby, *op. cit.*

⁴⁹ J. E. Hill, J. I. Jacob, L. L. Shannon, R. T. Brennan, V. L. Blanchard, and G. Martinengo, *op. cit.*

⁵⁰ L. E. Duxbury and C. A. Higgins, *op. cit.*

⁵¹ S. Aryee, *op. cit.*

⁵² D. B. Scott, *op. cit.*

women. Furthermore, Hammer, Allen, and Grigsby⁵³ have pointed out that men report lower levels of work-family conflict but higher degrees of family involvement than women. Similarly, Hill *et al.*⁵⁴ have demonstrated that working fathers reported lower levels of work-family conflict than working mothers. This finding is also consistent with Voydanoff's⁵⁵ application of the Ecological Systems Theory, according to which family—along with individual characteristics—have direct effects on the perception of family supportive organisation culture and facilitation of work outcomes. Even studies that report positive effects of multiple roles on self-esteem and life satisfaction emphasised that such effects are greater when the workload, as measured by the number of hours of paid work⁵⁶ and responsibility for small children⁵⁷ is not excessive. Reasons why women may be reporting higher levels of conflict may not be far from the traditional role of combining work, housekeeping, taking care of the children and the elderly, which working men do only rarely.

6. Implications and Recommendations

This study will help management (job analysts) in the redesign of work in such a way that it will be perceived by employees as being family supportive. In doing so, workers can experience higher life satisfaction and a fulfilling career which, in turn, will lead to increased productivity, committed employees with low willingness to turnover, among other positive job attitudes. In organisational terms, findings will also educate supervisors and managers that introducing work-family supportive policies alone might not be enough. However, education of employees on the purposes and ways to make effective use of such policies will contribute in shaping employees perception of such policies and their impact on life satisfaction and work attitudes in general. Although men and women's perception of work-family supportive programmes influences employees life satisfaction, women should be given special consideration at the time of devising work-family policies. This is because working women are on the receiving end of work-family conflict. Indeed,

⁵³ L. B. Hammer, E. Allen, and T. D. Grigsby, *op. cit.*

⁵⁴ Hill J. E. Hill, J. I. Jacob, L. L. Shannon, R. T. Brennan, V. L. Blanchard, and G. Martinengo, *op. cit.*

⁵⁵ P. Voydanoff's, *op. cit.*

⁵⁶ S. Aryee, *op. cit.* and A. Scharlach, *op. cit.*

⁵⁷ P. Moen, and Y. Yu, *op. cit.* and A. Scharlach, *op. cit.*

responsibilities such as child-care, home-help for the elderly, and other domestic works are mainly seen as being the task of women. For this reason, work-family policies such as company crèches and flexible work arrangements will be more appreciated by this category of workers than some other instruments that may not directly impact on their activities, that they perform in addition to their normal work. In conclusion, some recommendations for future research could be made from this study. First, the use of larger samples across the country, within and outside public organisations would allow for generalisations of the findings. Further, some other organisational factors that influence employees life satisfaction might be taken into consideration, such as age, tenure, position, political views, and income.

Working Time Regulation in Georgia

Zakaria Shvelidze *

Introduction

In 2006, the Parliament of Georgia passed the new Labour Code. Before that, employment relations in the country were governed by the Soviet Labour Code, in force since 1 October 1973. However, and notwithstanding the amendments made in 1997, existing labour legislation faced serious difficulty in keeping up with recent developments within employment relationships. Starting from the period 2003-2004, a series of sweeping political changes led to the rise of the liberal economy, with trade liberalisation that significantly marked national labour laws. The newly-adopted Labour Code is mainly oriented towards favouring employers' interests, as it waters down regulatory restrictions and standardises labour law provisions. In passing employer-friendly laws, the Georgian government aims at creating a more attractive and liberal economic environment, which, in turn, should encourage job creation and employment. In this connection, this paper discusses the new patterns of working time regulation introduced by the Georgian Labour Code. A comparative analysis between the working time regulation now in place, the Soviet Labour Code previously in force, and the European Union Directive 2003/88/EC concerning certain aspects of the organisation of working time will be carried out. This is done to assess the harmonisation of the new Labour Code with the EU Working Time Directive, also as an instrument to facilitate European integration. On 1 July 1999, the Partnership and Cooperation Agreement (PCA) between Georgia, the European Communities, and their Member States entered into force. Parties to the PCA viewed the approximation of Georgian legislation with

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the European Union (EU) regulations as an important condition for strengthening the economic links between Georgia and the EU. The PCA listed the fields of integration among which employment relationships are to be included. Additionally, pursuant to the 1997 Parliament Resolution, all normative acts issued from 1 September 1998 shall comply with EU norms and standards. In the context of this paper, the conformity of Georgian Labour Code with the EU standards and the European Social Charter, and rules on working time therein, will also be investigated. To some extent, this work will contribute to enhance international awareness of labour laws enforced in this post-Soviet country, even more so because of the peculiar nature of the working time arrangements implemented nationally. This might be regarded as one of the first attempts to provide an analysis of the liberal stance on working time regulation which emerges from the investigation of the Georgian Labour Code.

1. The Duration of the Working Week in Georgia

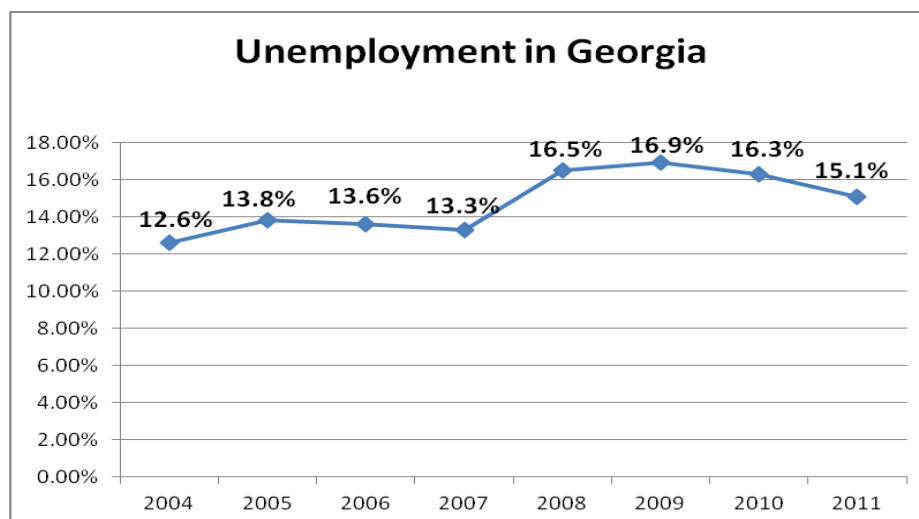
The way working time is regulated varies across countries, and the setting of a maximum number of working hours should, among other things, safeguard workers' health and safety. According to the traditional doctrine, the origins of Labour Law in modern society are to be found in the need of protection towards working people. In an attempt to balance the two parties to the contract, the legislator has deemed it necessary to intervene by envisaging provisions of public law which oblige the employer to abide by certain rules—e.g. standardized maximum working time.¹ The limit set on working hours is regarded as an important restraint mechanism against employers, and the Preamble of the Working Time Directive specifies that all workers should be entitled to adequate rest periods. The concept of “rest” must be expressed in units of time. Workers must be granted minimum daily, weekly and annual periods of rest and adequate breaks. It is also necessary to place a maximum limit on weekly working hours.² One of the main characteristics of labour law is its reliance on different economic, political, and ideological aspects, which evidently influence the devising of relevant provisions, this being the result of different factors. The question at issue here cannot be dealt with at an abstract level and without taking into account the current economic

¹ A. Berenstein, and P. Mahon, *Switzerland*, in *International Encyclopaedia for Labour Law and Industrial Relations*, ed. R. Blanpain, 2001, Vol.13, 30.

² N. Foster, *Blackstone's Statutes EC Legislation*, 17th Edition, 2006/2007, 382.

scenario.³ Since 2006—that is when labour law reform took place—the high unemployment rates facing Georgia have been an enormous problem.

Table No. 1—Unemployment Rate in Georgia for 2004-2011.



Source: official information of National Statistics Office of Georgia.

According to Table No. 1⁴, starting from 2005, the unemployment rate in the country faced a significant decrease, particularly as a result of the dynamic nature of the economy in the period 2005-2007. However, the Russian invasion and the financial crisis had a detrimental effect on the Georgian economy and in 2008 and 2009, the percentage of unemployed recorded a 3 percent increase. In 2010, the rate fell by 0.6 percent and stood at 16.3 percent.⁵ In 2011, the positive trend continued and the rate decreased by 1.2 percent, now corresponding to 15.1 percent. In October 2011, that is at the time the National Democratic Institute Survey was conducted, 62 percent of the interviewees considered the issue of unemployment as being more serious than the national territorial integrity

³ M. Despax, and J. Rojot, copy-editing assistance F. Millard, *France*, in *International Encyclopedia for Labour Law and Industrial Relations*, ed. R. Blanpain, 1987, Vol. 6, 39.

⁴ Author's own elaboration based on the data of National Statistics Office of Georgia, www.geostat.ge.

⁵ Georgia reported the highest unemployment rates of the region. In Armenia, Azerbaijan and Turkey, the share of the unemployed was 6.9, 6, and 12.5, respectively.

or Euro-Atlantic integration.⁶ As noted in the introductory section, the new Labour Code was passed as an instrument to enhance job creation and reduce unemployment. To this end, and for the first time in the history of Georgian labour legislation—the Labour Code laid down a number of novelties, such as the employment contract to be concluded orally, at-will employment relationship that can be terminated for any reason or for no reason, and the deregulation of working time. In Europe, and for a long time now, the trend has been towards a progressive regulation and a shortening of the full-time working week. At the end of the 20th century, the emphasis has shifted in favour of more flexible and individualized working hours. In this sense, legislation has focused on allowing tailor-made solutions within the boundaries of a commonly agreed-upon framework.⁷ The Georgian Labour Code is in line with this tendency, however failing to set the maximum limit of working time. Pursuant to Article 14.1 of the provision “the regular working hours are up to 41 hours a week, however the parties are free to set different regular working hours under the employment contract”. The Labour Code has maintained the 41-hour threshold already envisaged by Soviet labour legislation, yet an article has been introduced that entitles parties to the employment relationship to increase the 41-hour threshold in the employment contract. It is therefore important to determine the scope of an agreement of this kind. In other words, it is decisive to understand the extent to which parties are free to bargain on the duration of statutory working time exceeding 41 hours. In considering the subordinate position of the employees, scholars in the field regard labour law to have a “mandatory”⁸ nature for employers, as the main idea is to safeguard the weaker party to the contract. In general terms, labour regulations set minimum standards that can be improved through private agreements.⁹ This means that parties cannot deviate from the law, neither by individual

⁶ L. Navarro, and I. Woodwar. 2011. *Public Attitude in Georgia: Results of a September 2011 Survey Carried out for NDI by CRRC*, (accessed February 27, 2012).

⁷ J. Plantenga, and C. Remery, *Flexible Working Time Arrangements and Gender Equality*, in *Comparative Review of 30 European Countries*, 2009, 7, <http://ec.europa.eu/social/BlobServlet?docId=6473&langId=en> (accessed February 27, 2012).

⁸ On some occasions, Labour law is referred to as a set of rules carrying out a protective function, as it sets minimum standards to safeguard employees. S. Gimpu, and A. Ticlea, *Romania*, in *International Encyclopaedia for Labour Law and Industrial Relations*, ed. R. Blanpain, 1988, Vol.12, 22.

⁹ T. Treu, *Italy*, in *International Encyclopaedia for Labour Law and Industrial Relations*, ed. R. Blanpain, 1998, Vol.8, 20.

nor collective agreement, save for when the law sets minimum standards which can be amended *in melius*.¹⁰ Amendments to these standards shall be acceptable only if benefitting the employee.¹¹ The parties to the employment contract are free to regulate their own relationship, as long as this is done within the limits of what is permitted by the law. This theoretical assumption implies that the statutory weekly 41-hour limit should only be modified in such a way to favour the employee (e.g. working time equal to 38 hours per week). Yet this approach is poorly supported in practical terms, for the reason that labour laws are often employer-oriented—that is that the rights were vested only upon employers—and there are no legal grounds to allow such an interpretation. In effect, the Labour Code does not envisage any mandatory rule laying down restrictions on labour standards as a result of an individual agreement.¹²

A different stance was taken by the Soviet Labour Code, pursuant to which clauses that worsen the conditions already set in employment contracts—the so-called *reformatio in peius*—were deemed null and void. Accordingly, and “unless otherwise addressed by the employment contract”, the freedom on the signatories to agree upon a higher number of hours is left unrestricted. Employers can establish less favourable conditions for the employees, but such deviations from the contract will be considered illegal. Given this situation, one might question the existence of the 41-hour statutory requirement. It could be said that such a maximum provides the general framework in arranging the working hours, which becomes compulsory if parties fail to agree on matters of working time. As a result of this state of affairs, even though the mandatory upper limit for working time is set at 41 hours per week, parties are free to bargain and extend working time beyond this statutory limit. It follows that the Labour Code contravenes the EU Working Time Directive. Article 6 of the Working Time Directive requires that the

¹⁰ R. Blanpain, *Belgium*, in *International Encyclopaedia for Labour Law and Industrial Relations*, ed. R. Blanpain, 2001, Vol.3, 39.

¹¹ L. Adeishvili, and D. Kereselidze, *Draft Labour Code of Georgia and Some Basic Principles of Labour Law in Continental European Countries*, in *Georgian Law Review*, 2003, vol. 6, No1, 11.

¹² The only exception in this connection is the regulation of minimum annual paid leave. Under the Labour Code “an employee is entitled to fully paid leave of not less than 24 working days and unpaid leave of not less than 15 calendar days per year. An employment contract may define terms and conditions differently from those addressed in the present article, which shall not worsen the employee’s conditions”. This special provision automatically excludes modification of minimum paid leave term whereas worsening previously agreed terms of employment.

period of weekly working time shall be limited by means of laws or by any other admissible legal instrument. Further on in the same article, it is stated that working time for each seven-day period, including overtime, should not exceed 48 hours on average.¹³ The report produced by the Civil Society Institute (CSI) on the Georgian Labour Code has confirmed that this legislative approach legitimates actors in the labour market to conclude employment contracts which exceed statutory upper limits concerning working time. The survey found that employees who have concluded employment contracts on an oral basis work more than 41 hours a week. Some of those who have been interviewed explained that, because of the higher levels of unemployment reported in Georgia, employers take advantage of their rights and, by a “take it or leave it” approach, force employees to work for more than 60 hours per week in return of low pay. Consequently, employees believe that the statutory limits of 41-hour week could put a break on this situation.¹⁴

2. Indirect Working Week Limits

Apparently, the Labour Code provides the parties with a certain degree of autonomy at the time of negotiating their contractual arrangements, however indirectly imposing the maximum working week. Pursuant to Article 14.2, “the length of rest time between the working days (shifts) shall not be less than 12 consecutive hours”.¹⁵ This provision is a mandatory one and the signatory parties are not in a position to deviate from the law—unless derogation from the employment contract is *in melius*, in the sense that it favours employees. It is noteworthy that, by establishing minimum daily rest periods at 12 hours, the Labour Code provides higher standards than those laid down by the Working Time

¹³ N. Foster, *op. cit.*, 384.

¹⁴ The Civil Society Institute (CSI) Monitoring Report on Georgian Labour Code, 16, <http://www.civilin.org/pdf/r2.pdf> (accessed February 27, 2012). The report is available only in Georgian.

¹⁵ The old Soviet Labour Code laid down a convoluted set of rules on minimum daily rest period: for 5-day working weeks, daily working hours were defined in accordance with a set of guidelines which was agreed upon between the employers and the trade unions. For 6-day working weeks: (i) when the working week was limited to 41 hours, daily working hours were reduced to 7 hours; (ii) when the working week was 36 hours long, the daily working hours were capped at 6 hours; (iii) when the working week was limited to 24 hours, daily working hours were restricted at 4 hours. In addition, the hours worked on the day before the rest day and official holiday were shortened by one hour.

Directive, according to which a daily rest period consists of at least 11 consecutive hours over a 24-hour period.¹⁶ The Labour Code does not regulate the right to rest breaks during the working day,¹⁷ with employees that are not guaranteed minimum rest breaks under Georgian labour law. On the contrary, Article 4 of the Working Time Directive specifies that every worker is entitled to a rest break, whereas the working day is longer than six hours. Additionally, and unlike the Labour Code previously in force,¹⁸ current legislation does not ensure minimum rest periods for a working week. The Working Time Directive provides that per each seven-day period, every worker is entitled to a minimum uninterrupted rest period of 24 hours, plus the 11 hours' daily rest.¹⁹ As it appears, the determination of all those essential components of the employment relationship is subject to the will of the parties. The sole restriction observed here is the statutory maximum for a working day that derives from the regulation on minimum daily rest periods. Since employees have the right to at least 12 consecutive rest hours over a 24-hour period, the daily limit for working time is thus set at 12 hours. As the law does not regulate statutory daily rest break and minimum rest periods for the working week, hypothetically one is allowed to work 7 days a week with 12-hour working days, which add up to 84 hours of the maximum statutory weekly working hours allowed by the Labour Code (see Table No. 2). Yet indirectly, the Labour Code caps the maximum weekly working time at 84 hours.

¹⁶ N. Foster, *op. cit.*, 384.

¹⁷ The old Labour Code did not fix the exact duration of daily rest breaks, while the maximum period for rest break was limited at four hours.

¹⁸ According to the Soviet Labour Code, employees usually worked 5 days per week (and rested for two rest days as per required). However, in establishments where 5-day working week was not regarded as feasible, another working day was added. Employees were not allowed to work on Sundays.

¹⁹ N. Foster, *op. cit.*, 384.

Table No. 2—Proposed Method of Calculation of Maximum Weekly Working Time.

max. daily limit 12	-	min. rest break 0	=	Permitted hours during work day 12	12 X =	Max. weekly working time 84 Hours
7 max. workda y per week	-	0 min. rest day(s)	=	7 permitted workdays during work week	7	

Source: Author's own elaboration.

In contrasting what has been discussed so far with the Japanese practices of *Karoshi*—death by overwork—and *Karojisatsu*—suicide by overwork—a working week of a maximum of 84 hours might potentially produce a risk of fatal injuries. *Karoshi* refers to fatigue accumulated by excessive workloads, which might cause the workers to die. The primary cause of *Karoshi* and *Karojisatsu* was extremely long working hours,²⁰ and, in this regard, a survey of grievances filed in the past showed that the victims worked 3,000 hours a year or more.²¹ In Georgia, a worker might work for 84-hour working weeks—excluding 17 public holidays and 24 working days (*circa* 31 calendar days) of annual paid leave as defined by the Labour Code. This means that annual working hours for employee working 84 hours per week might amount to more than 3,200 hours (see Table 3).

²⁰ M. Ishida, *Death and Suicide from Overwork: The Japanese Workplace and Labour Law*, in *Labour Law in an Era of Globalization, Transformative Practices and Possibilities*, ed. J. Conaghan, M.F. Richard, and K. Klare, 2002, 223.

²¹ Article 32 of the Japanese Labour Standards Act limits working time to forty hours a week, yet with one exception. Article 36 of the same law sets forth that whereas the representative of a trade union composed of over half of the workers, or the representative of over half the workers enters into an agreement with the employer, and the employer pays a 25 percent overtime premium, then working hours may be lengthened over the legal limit of forty hours per week and employees may have to work on holidays too. As a result, overtime work is performed upon an agreement between employers and representatives of trade unions or of over half the workers, thus not necessarily with the consent of workers on an individual basis. *Ibid.* 219-225.

Table No. 3—Proposed Method of Calculation of Annual Working Time.

84 hour s	X	52 week s	-	(17days x 24hours) Public holidays	-	(31days x 24hours) annual paid leave	=	3216 hours annual working hours
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Source: Author's own elaboration.

Evidently, the upper limit of 84 hours of weekly working time envisaged by the Labour Code contravenes the EU Working Time Directive. The trend towards diversification and individualization of working time are evident in most European Member States. The same cannot be said of Georgia, where much still needs to be done in this connection.²² Existing working time regulation also fails to conform to Article 2.1 of the European Social Charter, especially taking account that “with a view to ensuring the effective exercise of the right to just conditions of work, the parties undertake to provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit”. The Conclusions of European Committee of Social Rights (ECSR) underlined how the Labour Code provides the parties with maximum freedom in determining both the duration and conditions of working time.

The ECSR recalls that the aim of providing for reasonable daily and weekly hours in Article 2.1 is to protect the health and safety of workers. Under all circumstances, it should be ensured that no employee works more than 60 hours in a week. Given that Article 14 of the Labour Code permits employers and employees to agree on working time without fixing a maximum limit on weekly working hours, the ECSR is of the opinion that this is not in conformity with Article 2.1 of the Revised Charter.²³

²² J. Plantenga, and C. Remery, *op. cit.*

²³ European Committee of Social Rights, Conclusions 2010, (Georgia), 5, (accessed February 27, 2012).

3. The Employer's Right to Extend Working Hours

According to an agreed upon definition, employees are obliged to work under the command, authority and supervision of the employer. They are at the employer's disposal, to comply with and follow his instructions concerning the way the work should be done. Simply put, employees shall perform their duties at the time agreed upon, in the place agreed upon, and in the manner and conditions agreed upon.²⁴ Pursuant to the Labour Code, and within the framework of his right to "instruct", the employer is allowed to increase mutually agreed working hours. In this sense, the control of working hours on the part of employer refers to the possibility to change established maximum hours. From where the employee stands, this total lack of control refers to a situation in which the employer can unilaterally change the day-hour combination.²⁵ Employees in Georgia are not allowed to reduce scheduled working time. For their part, employers can increase the working day hours unilaterally, by virtue of the Labour Code and because of the foregoing right to "instruct". In this respect, Article 11 specifies that "the employer is permitted to instruct the employee with reference to special conditions of the work to be performed that however shall not amend the terms of an agreement substantially. Insubstantial amendments to the employment contract are those that modify the working day for not more than 90 minutes". Following this line of reasoning, the set of instruction provided by the employer also contemplates the right to increase the working day up to a maximum of 90 minutes. The length of the weekly working time is an important element of the employment contract and is one of the aspects the parties negotiate on, yet the employer has the last say on the matter.

3.1 Overtime Work

There are two main aspects to consider at the time of examining the regulatory framework governing overtime. First off, the law should set the maximum length of normal working hours in order to clarify when overtime begins. Second, thresholds on overtime should also be statutorily established. As for the first point, the maximum weekly

²⁴ R. Blanpain, *op. cit.*, 142.

²⁵ P. Berg, E. Appelbaum, T. Bailey and A. Kalleberg, *Contesting Time: International Comparisons of Employee Control of Working Time*, in *Industrial and Labor Relations Review*, 2004, vol.6, n.1, 333-334.

working time is 41 hours, unless differently specified in the employment contract. According to Article 17.1 of the Labour Code: “The carrying out of work on the part of an employee during a period of time that exceeds the number of working hours provided under the employment contract is regarded as overtime work. If the employment contract does not specify the maximum number of hours to be worked, then work exceeding 41 hours a week shall be considered as overtime work”. As for the second point, the Labour Code does not set a limit to the maximum number of overtime hours,²⁶ yet in certain situations the daily limit of 12 hours apply. As a result, the Labour Code provides some restrictions upon overtime work only on a daily basis. Overtime hours are those worked above a certain threshold of working time, for which workers must be remunerated either by extra pay or time off.²⁷ As a rule, employees consider working overtime as a valuable source of additional income, although the Georgian Labour Code does not provide solid legal basis for an arrangement of this kind. Indeed, Article 17.4 only sets forth that “the terms and conditions of overtime work should be agreed between the parties to the employment contract”, with overtime that is therefore a matter of bargaining that is left entirely to the parties’ discretion, and with employers bearing the obligation to remunerate overtime work if agreed so. If this is not the case, workers are not entitled to remuneration nor compensation for performing overtime work. In this sense overtime work is not regulated, but it is up to workers to negotiate overtime pay. It should be noted, however, that Article 4.2 of the European Social Charter specifies that “with a view to ensuring the effective exercise of the right to a fair remuneration, the Georgian Republic has undertaken to recognize the right of workers to an increased rate of remuneration for overtime work”. This implies that employers have now the obligation not only to pay workers for overtime labour, but to do so at a higher remuneration rate. ECSR refers to its conclusion on Article 2.1 of the same document, where it was argued that the freedom given to the parties in determining both working hours and conditions for overtime work does not provide employees working excessively long hours sufficient safeguards. In the

²⁶ In general terms, the Soviet Labour Code prohibited overtime labour. The employer could resort to it only under special circumstances and upon the consent of the trade unions. Pregnant workers, breast-feeding females, female taking care of an infant under twelve months, individual up to eighteen years, people who had been diagnosed with active tuberculosis, and employees in education while working were not allowed to perform overtime work. The overtime limit for consecutive working hours was set at four. Annual limit for overtime work was defined at being at 120 hours.

²⁷ J. Plantenga, and C. Remery, *op. cit.*

context of Article 4.2, overtime should only refer to maximum weekly working hours, which is not the case under overtime regulation of the Labour Code, since the parties are free to arrange working hours and overtime practically without any limitations. Further, the ECSR recalls that, within the meaning of Article 4.2 of the Revised Charter, workers are entitled to remuneration for overtime work, which is higher than the regular wage rate. Remuneration for overtime may be also granted in the form of time-off, provided that this time is longer than the additional hours worked. The right to a higher remuneration rate for overtime work should apply to jobs, although exceptions may be allowed for certain positions, namely senior state officials or senior managers. The ECSR also pointed out that the Georgian Labour Code does not regulate any of the foregoing matters, leaving the parties free to define terms and conditions of overtime. As a result, since there is no guarantee that employees performing overtime work will be paid at higher remuneration rates or granted compensatory leave, the ECSR found that this state of play is not in conformity with Article 4.2 of the Revised Charter.²⁸ In the context of this paper, it might be worth mentioning that the Soviet Labour Code previously in force provided the following remuneration scheme for overtime work: the first two hours of overtime work were compensated with one half of the hourly rate, while remuneration for the following hours was doubled. Overtime remuneration could be also provided in the form of periods of leave. Pursuant to the CSI Report, most of the employees interviewed worked overtime, and none of them had ever requested remuneration for overtime work. In addition, only 1 percent of interviewees were granted time off in lieu of monetary overtime compensation.²⁹

3.2 Special Regulation of Working Time

The Labour Code does not regulate and allow for reduced working hours for special categories of workers, such as women and young workers. By way of example, one is not allowed to work less than the statutory working time for delivering or adopting children. However, according to the Labour Code, female employees who are in need of breast-feeding an infant up to twelve months of age, are entitled to break hours not less

²⁸ The European Committee of Social Rights, *op. cit.*

²⁹ The Civil Society Institute (CSI) Monitoring Report on Georgian Labour Code, *op. cit.* 15.

than one hour per day. Breast-feeding breaks are counted as regular working hours and are therefore subject to remuneration.³⁰ The Labour Code does not provide alternative working time arrangements for young workers either. More specifically, whereas the Soviet Labour Code laid down special working time schemes for young workers,³¹ labour legislation currently in place only prohibits night work—that is from 22.00 pm to 6.00 pm—in the case of minors, pregnant women, breast-feeding females or employees taking care of newly-born children. In 2009, at the time of assessing Labour Code compliance with the Convention No. 138 on Minimum Age, the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), issued a report considering allegations made by the Georgian Trade Union Confederation (GTUC) that extended working hours also applied to young workers. The government made reference to Article 18 of the Labour Code which prohibits night work for young persons and Article 4.2 which lays down the conditions of employment of children between 14 and 16 years. The latter sets forth that “children below 16 years shall only be allowed to work upon consent of their legal representative, tutor or guardian, if it is not against their interests, does not affect their moral, physical or mental development and does not limit their right and ability to obtain elementary and basic education”. In this regard, the CEACR observes that the Labour Code does not contain provisions setting a limit to the number of working hours during which young persons have to perform their work. The Committee also recalls that—according to section 7.3 of the Convention—the competent authority shall determine the activities in which employment or work may be permitted and shall prescribe the number of hours during which such employment or work may be undertaken. The CEACR thus urged the government to take the necessary steps with regard to the hours during which light work may be performed by young persons of 14 years of age and above, in conformity with the ILO Convention No. 138.³² In the CEACR 2011 Report, the GTUC also made a proposal to reduce the working hours of young

³⁰ By force of the Soviet Labour Code, employers were under the obligation to provide part-time working day or working week for pregnant and female workers who were taking care to kids up to 12 years or disabled family members.

³¹ Working time for 16 to 18 year-olds did not exceed 36 hours, while those in the 15 to 16 age group were allowed to work up to a maximum of 24 hours a week. Additionally, working weeks of 36 hours were established for employees in hazardous jobs.

³² International Labour Conference, 98th Session, 2009, Report of the Committee of Experts on the Application of Conventions and Recommendations, 335, (accessed March 1, 2012).

persons and to make provision for rest periods, breaks and holidays. In this sense, the CEACR noted that Article 18 read in conjunction with Article 4.2 of the Labour Code implies that children may work for about eight hours per day, excluding school hours and night work. In this context, the CEACR refers to par. 13.1.b of Recommendation No. 146 Minimum Age, according to which a strict limitation should be put upon the hours spent by children at work in daytime and over a week, and overtime work should be also prohibited, so as to allow children to dedicate enough time to education and training (e.g. homework), for rest, and for leisure activities.³³

The Labour Code does not regulate different forms of flexible work that are well established in Europe, such as telework, staggered working hours, job-sharing, and working time accounts. This omission can be explained by the fact that more flexible working time arrangements are not widespread within the national labour market. However, parties are free to negotiate working conditions, be it reduced work hours for young people and pregnant women or any other form of flexible working time. The general principle of Georgian Civil law shall apply here, whereby people can take any action which is not prohibited by law, including those which are not expressly mentioned.

4. Conclusion

The Labour Code limits weekly working time at 41 hours, but parties are free to agree and increase this threshold up to 84 hours. This maximum is the result of the minimum daily rest period, that is at least 12 consecutive hours. The Labour Code does not make provision for rest breaks in the working day or rest periods over the week. The daily limit of working hours is the only restriction within working time regulation, wherefrom the 84-hour limit emerged, causing the annual working time to exceed 3,200 hours. Furthermore, employers are allowed to extend agreed-upon hours of a working day by a further 90 minutes, without the employees' consent. The Labour Code does not set a limit for overtime work, with a 12-hour daily limit that is thus the only statutory restriction. As far as overtime work is concerned, no mandatory provisions are laid down, so the employer is not obliged to remunerate workers if they perform extra

³³ International Labour Conference, 100th Session, 2011, *op. cit.*, 332, (accessed March 1, 2012).

work. Nor does the Labour Code include special regulation for women and young workers concerning their working time arrangements—save for night work prohibition and an additional break hour for breast-feeding employees of infants up to twelve months. Accordingly, the Georgian Labour Code does not comply with both the EU Working Time Directive and the European Social Charter. Hence, EU Commission Progress Report on “Implementation of the European Neighbourhood Policy in 2007” stated that the 2006 labour legislation is not in line with EU standards, nor with the European Social Charter that Georgia ratified in July 2005.³⁴ The principle of “freedom of labour” allows an individual to enter into bargaining and willingly accept employment conditions established by the employer. Taking into consideration the specifics of the domestic labour market and the position of employers therein, it is mostly the employer who sets the employment conditions at the time of negotiating the terms of the contract. The majority of jobseekers do not possess enough legal knowledge or economic ability to impact the formulation of the proposed conditions and—since they are often put forward on a take-or-leave-it basis—and they are obliged to accept this state of affairs. In this sense, the role played by the labour standards becomes crucial. It should be also noted that setting a statutory maximum for working time has some negative aspects too—e.g. institutional constraints for the parties’ discretion. Further, and as stated in the Communication “Towards common principles of flexicurity: More and better jobs through flexibility and security”, issued by the Commission in 2007, there is evidence that that stringent employment protection legislation reduces the number of dismissals, however decreasing the entry rates into the labour market. Relevant studies suggests that although the impact of strict employment protection legislation on total unemployment is limited, it can negatively impact on those groups that are most likely to face problems at the time of accessing the labour market, such as young people, women, older workers and the long-term unemployed.³⁵ On the other hand, opposite vector of working time regulation promotes higher levels of freedom for working time allocation. Such policy is put

³⁴ EU Commission Staff Working Document Accompanying the Communication from the Commission to the Council and the European Parliament, Implementation of the European Neighbourhood Policy in 2007, Progress Report Georgia, Brussels, 3 April 2008, (accessed March 1, 2012).

³⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards common principles of flexicurity: More and better jobs through flexibility and security, Brussels, 27 June 2007; (accessed March 1, 2012).

forward by countries where the regulated and centralized labour market has come into disfavour, particularly in ideological terms. From where the employees stand, deregulation of working time may negatively affect their working conditions. Additionally, and drawing on the Japanese experience, excessive freedom in working time arrangements might also lead to new and serious labour issues, such as *Karoshi* (death from overwork) and *Karojisatsu* (suicide from overwork). Ideally, the amendments made to working time arrangements shall be oriented towards balancing the objective interests of both parties. On the one hand, it shall enable employers to laid down flexible working time regulation that will be easily adaptable to the new economic trends. On the other hand, the regulatory framework shall improve employees' labour conditions, conferring the ability to reconcile work and family commitments. The ultimate goal of labour legislation in this area is to combine flexible arrangements with some form of shared control that serves the interests of both sides, or that at least promote the interests of one without harming those of the other.³⁶ Decision-making at the national level should ensure the adoption of legislation that rationally benefits all those involved, and which definitely comply with the economic reality of particular society at a particular time. As for unemployment rates, it is not easy to scrutinize the practical effects of current working time regulation on unemployment trends. Although in the period 2005-2007 the rate of unemployment was reported to decrease, the effectiveness of the new Labour Code in respect to job creation deserves a closer economic analysis, even more so in consideration of the negative events that took place in the period 2008-2010. It can be concluded that, in terms of benefits, the Labour Code further encourages an imbalance of interests in the employment relationship rather than a win-win situation. It seems that Georgian labour legislation tips a balance in favour of the employer. The policy adopted towards deregulation is a move towards the free market, and minimizing the state interference in private relationships seems to be the main goal. From the employees standpoint, existing regulation of working time is in need of substantial amendments, particularly as regards overtime remuneration. On the other side, granting employers higher degrees of autonomy it will definitely promote their interests, which to some extent may positively affect employees well being, and labour market in general.

³⁶ P. Berg, E. Appelbaum, T. Bailey, and A. Kalleberg, *op. cit.* 333.

The aim of Georgia is to join the EU. In this sense, harmonisation of national labour standards with the EU Directives would accelerate the long process of integration. At this point, it seems appropriate to demonstrate that all efforts in legal and economic terms are aimed at striking a balance between the legitimate interests of both the employers and the employees. The European Union decided to find mutually beneficial solutions, by introducing flexible and individualized forms of working hours. This is something Georgia is attempting to achieve, although national labour legislation fails to adjust the reasonable maximum limit of working time. By setting the limit of the working week at 84 hours, there might be the risk of bearing an identifiable label, admitting that such a liberal approach negatively affects employees. The signs of transition from soviet to progressive labour law are already quite evident, and likewise evident is the fact that this irreversible process was successfully completed in 2006. It is now time to conform to the European context of flexibility. Until that, the ongoing debate on the adequacy of present labour legislation remains outstanding, as both sides have sufficient grounds for legal arguments supporting their interests.

The Regulation of Economically Dependent Self-employed Work in Spain: A Critical Analysis and a Comparison with Italy

Carmen Agut García and Cayetano Núñez González *

Introduction

On 29 April 2012, the Plenary Session of the European Economic and Social Committee (EESC) passed an own-initiative opinion on “New trends in self-employed work: the case of financially dependent self-employed work”.¹ This opinion recognises for the first time the existence of the financially dependent self-employed workers” (*TRADEs* in Spanish, used hereafter) and provides the opportunity to establish a set of rights for all European workers, be they salaried or self-employed. For this reason, it was considered that there should be future communication from the European Commission on the matter in a more detailed fashion. To date, the EU countries have maintained different positions with regard to this category of workers and, according to the foregoing opinion, only a few national governments have regulated or acknowledged their status, namely Austria, Germany, Italy, Portugal, the United Kingdom, and, starting from 2007, Spain. Act No. 20 of 11 July 2007 (hereafter simply as *LETA*)² introduced the concept of financially dependent self-employed workers within the Spanish legal system (Art. 11 to 18). This notion

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¹ SOC/344—CESE 639/2010. The opinion was put forward by the Spanish committee member José María Zufiaur Narvaiza.

² BOE 12-7-2007. The *LETA* passed on 12 October 2007 and entered into force by means of Royal Decree No. 197 of 23 February 2009.

presents some similarities with that regulated in the Italian legal system by Legislative Decree No. 276 of 10 September 2003, which draws on the proposals put forward by labour law scholar Marco Biagi. Legislative Decree No. 276/2003—the so-called Biagi Law—redesigned some already existing employment contracts—such as coordinated and continuous collaboration (quasi-subordinate work)—while making provisions for new contractual arrangements, e.g. a contract for the completion of a certain project (project work).³ There are, however, a number of distinctions that can be observed between the two legislative measures implemented in Italy and Spain.⁴ In Spain, *TRADEs* are defined as “[...] those who, in return for remuneration, carry out an economic activity or a profession, personally, directly and predominantly for an individual or an organisation—known as the client—on whom they are financially dependent, as granting them at least 75 percent of their income” (Art. 11 of LETA). In conceptual terms, and as it happens for instance in Germany,⁵ it is the quantitative criterion that plays a role at the time of identifying the contractual scheme adopted.⁶ In a similar vein, pursuant to Art. No. 61 of Legislative Decree 276/2003, an Italian worker employed to carry out a project is also considered to be self-employed. In Italy, the activity must be undertaken on an individual basis, without any kind of relationship of subordination. A project or work plan must be provided, and the worker must be able to perform it autonomously, that is without being subject to the close supervision of the employer and regardless of the time needed to carry out the task. Further, workers must operate considering the business production cycle and even coordinate their activities with the client’s working schedule and requirements (Circular 1/2004 of the Ministry of Labour).⁷ It is submitted that the

³ See T. Treu, *Uno Statuto per un lavoro autonomo* in *Diritto delle relazioni industriali*, 2010, vol. 20, n. 3, 2010, 603, a text that provides a major contribution to the new reform. See also F. Martelloni, *La zona grigia tra subordinazione e autonomia e il dilemma del lavoro coordinato nel diritto vivente*, in *Diritto delle relazioni industriali*, 2010, vol. 20, n. 3, 635-636.

⁴ On the different regulation techniques, see A. Perulli, *Per uno Statuto del lavoro autonomo*, in *Diritto delle Relazioni Industriali*, 2010, vol. 20, n. 3, 635-636.

⁵ In Germany they are called *arbeitnehmerähnliche Person*. See Opinion CESE 639/2010, *op. cit.*, 9.

⁶ A critical reflection on the identification criteria can be seen in T. Treu, *op. cit.*, 615.

⁷ For more information on this contractual scheme, see, among others, IRPET, *Il lavoro flessibile: opportunità o vincolo?*, Franco Angeli, Milano, 2005; M. Lai, *Flessibilità e sicurezza del lavoro*, Giappichelli, Torino, 2006; P. Olivelli and M. Tiraboschi, *Il diritto del mercato del lavoro dopo la riforma Biagi*, Giuffrè, Milano, 2005; M. Tiraboschi, *Il lavoro a progetto: profili teorico ricostruttivi*, in *Studi in onore di Mattia Persiani*, Cedam, Padova 2005; *Diritto delle relazioni industriali*, n. 3/2010.

“exclusivity” of the task is not associated with the individual nature of the work,⁸ and workers under these contractual schemes might work for more than one client, pursuant to Art. 64 of Legislative Decree 276/2003. The reason for this was to stem the increasing fraudulent practice of “pseudo self-employment” (Art. 61 to 69),⁹ and to make a clear distinction between salaried employment and self-employment. The same occurs in Spain¹⁰ through Royal Decree No. 1 of 24 March 1995, that reformed the Workers’ Statute (ET). The LETA was the result of an ongoing process that began in the mid-2004s, when the Ministry of Employment and Social Affairs commissioned a pool of experts to draft a report on the matter.¹¹ Meanwhile, a great deal of dialogue took place involving representatives from the government, employers’ associations and trade union representatives, as well as associations of self-employed workers. At last, at the time of being presented before the Parliament, the LETA was accompanied by increasing support on the part of political parties.

1. An Overview on Statistics

Consistent with the information provided by the Ministry of Employment and Immigration, and in considering the rate of affiliation to social security, statistics on self-employed workers¹² reveal the importance of

⁸ On the concept of “exclusivity” in Italy, A Valdés Alonso, *La regulación del trabajo autónomo económicamente dependiente en la Ley 20/2007: apuntes para un debate*, in *REVESCO* 2008, n. 97, 141-142.

⁹ See M. Barturen Martínez, *Nuevo Estatuto del Trabajo Autónomo. Comentarios a la Ley 20/2007, de 11 de julio*, Quantor, Madrid, 2007, 8; J. García Murcia, *Estatuto del trabajo autónomo: algunos puntos críticos*, in *Actualidad Laboral*, 2007, n. 18, 3; F. Trillo Párraga, *Derechos colectivos del trabajador autónomo dependiente económicamente*, in *Documentación Laboral*, 2009, n. 85, 92.

¹⁰ See G. Barrios Baudor, and A. V. Sempere Navarro, *Régimen profesional del trabajador autónomo económicamente dependiente*, in *Tratado del Trabajo Autónomo*, Thomson-Aranzadi, Navarra, 2009, 191; M. García Jiménez and C. Molina Navarrete, *El estatuto profesional del trabajador autónomo: diferenciando lo verdadero de lo falso*, TECNOS, Madrid, 2008, 45; J. L. Monereo Pérez, *El trabajo autónomo, entre autonomía y subordinación*, in *Aranzadi Social*, 2009, n. 5, 15; L. E. De La Villa De La Serna, *Algunas consideraciones críticas sobre la Ley 20/2007, de Estatuto del Trabajo Autónomo*, in *RGDTSS*, 2007, n. 15, www.iustel.com, 3; M. J. Rodríguez Ramos, *El Estatuto del Trabajador Autónomo: aplausos y críticas*, in *RGDTSS*, 2008, n. 18, www.iustel.com, 21.

¹¹ This Ministry is now called “Ministry of Employment and Immigration”.

¹² See www.mtin.es. Sub-directorate General of Social Economics, Self-Employed Work and Corporate Social Responsibility.

this contractual arrangement in Spain, as well as across the European Union,¹³ although it is difficult to compare figures due to a lack of a universally-accepted definition.¹⁴

In June 2007, when the LETA was approved, there were 2,236,522 “true” self-employed workers¹⁵ enrolled in different social security schemes for self-employed workers. 79.4% of the self-employed—amounting to 1,775,510—did not hire employees. Of the remaining 20.6%, 461,012 had paid employees, and 232,404 of them had a worker under their supervision. Further, 87% of the self-employed were paying only minimum contributions. On 30 September 2010, because of the economic crisis, there were only 1,989,917 “genuine” self-employed workers who were affiliated to the social security system. 79.9% of them—that is 1,590,507—had no paid employees. Of the remainder, 20.1% of self-employed workers—that is 399,410—had paid employees and, of these, 210,253 were responsible for the work of another worker. 83.7% of the self-employed workers paid minimum contributions.

Collecting data on *TRADES* is far more difficult, and this problem was also addressed by the European Union through the CESE opinion mentioned above. In Spain, *TRADES* are included in the statistics on self-employed workers and, so far, a breakdown has not been reported. In fact, the record of *TRADE* contracts kept by the State Public Employment Service (SPEE) is merely informative and is not publicly disclosed (Art. 12 LETA and Art. 6 of Royal Decree 197/2009)¹⁶. Despite this, some associations of self-employed workers, such as ATA,¹⁷ provided figures revealing an increase in the number of *TRADES*, from 208,414 in 2000 to 394,742 in 2005. In October 2009, a fall was reported and the number of workers in this contractual scheme decreased to

¹³ Here, there are 23 million self-employed workers, according to Opinion CESE 639/2010, *op. cit.*, 6.

¹⁴ See J. M. Zufiaur and S. Reyna, Trabajo autónomo dependiente en la UE in *El País Negocios* 25-4-2010.

¹⁵ “True” self-employed workers are workers affiliated to one of the social security systems for in place for the self-employed, and not forming part of companies, cooperatives or other business organisations. Workers in family-run businesses and those belonging to special categories are also excluded.

¹⁶ Art. 6 of Royal Decree 197/2009 only specifies that the SPEE will inform the Self-Employed Work Council on the statistical details resulting from the *TRADE* contracts that have been registered. So far, this Council has not been set up yet.

¹⁷ National Federation of Associations of Self-Employed Workers, *Dependent Self-Employed Worker Report*, 2005.

300,000.¹⁸ Accordingly, one might say that today, there are around 200,000 and 300,000 TRADEs.

What is controversial about these figures is that they are not even close to those recorded at SPEE in July 2009, that is around 3,240.¹⁹ Equally low is the number of Agreements of Professional Interest (AIP)²⁰ that had been concluded as of the same month.²¹ These figures call into question the positive assumption accompanying the establishment and regulation of TRADEs in the LETA:²² if the effectiveness of a regulation depends on the acceptance of their beneficiaries, the way these new contractual arrangements have been disregarded is arguably worrying.²³ Evidently, the client may attempt to disrupt recognition of the new type of employment relationship because it carries some additional obligations, but this type of conflict has not yet been raised before tribunals dealing with aspects of social security.

2. The (Hypothetical) Independence of Self-employed Workers

Despite the current difficulties, the right to work continues to provide a legal framework that puts salaried workers in a position of advantage with respect to self-employed workers. This calls for equality of treatment: self-

¹⁸ ATA figures given in the financial newspaper *Cinco Días*.

¹⁹ See <http://www.mtin.es/es/empleo/economia-soc/autonomos/noticias.html> and <http://www.mtin.es/es/empleo/economia-soc/cuerpo.html>

²⁰ AIPs are regarded a legal source at the time of making provision for the for TRADEs (Art. 3 LETA). These are agreements concluded under the Civil Code (CC) between associations of self-employed workers or trade unions representing TRADEs and the companies for which they perform their tasks to establish conditions on the way, the duration and the place this activity is carried out and other general terms (Art. 13 LETA).

²¹ It is particularly significant that the first AIP was concluded in April 2009 between the PANRICO S.L.U.—a company operating in the biscuit market - and its self-employed lorry drivers. It must be pointed out that the lorry drivers gained the status of self-employed workers in 1994 (Art. 1.3.g of the ET). Consequently, by signing the AIP, lorry drivers working at PANRICO S.L.U. were regarded as TRADEs, and their rights were consequently clarified, See AIP PANRICO, S.L.U. at <http://www.ugt.es/actualidad/2009/abril/PANRICO.pdf>.

²² See S. Del Rey Guanter, *Introducción: Trascendencia, función y características esenciales de la Ley del Estatuto del Trabajo Autónomo*, in *Comentarios al Estatuto del Trabajo Autónomo*, ed. S. Del Rey Guanter, Lex Nova, Valladolid, 2007, 26.

²³ ASNEPA specifically maintains that: “The National Association of Self-Employed Workers (ASNEPA) considers that there is reason to celebrate on the second anniversary of the Statute. Two years have passed by and there have been no significant developments. Self-employed workers remain at the back of the queue with regard to workers’ rights”. (14 October 2009), see: <http://autonomos-asnepa.com/index.php?incluir=noticias/muestranoticia.php&modo=normal&id=481>

employed workers want to have the same rights as employees,²⁴ and it does not matter how they are classified,²⁵ as long as they are safeguarded. This claim for equal treatment, which is also present in Italian labour legislation,²⁶ has in no case been dealt with by the LETA in terms of “identity” between the two categories of workers. And also in Spain, the trend of the legislator is towards a statutory distinction that considers TRADEs as a form of self-employment.

This aspect seems to be undisputed. In the Preamble of the LETA, it is clearly stated that: “the intention of the legislator is to eliminate the blurring of boundaries between these three categories. Accordingly, Art. 11 of the LETA is very restrictive in defining the financially dependent self-employed worker, limiting, in accordance with objective criteria, the circumstances under which the activity is carried out outside the sphere of the organisation and management of the client that contracts the self-employed workers”. It is also clarified that the “financial dependence statutorily recognised to this category of workers must not be the cause of misinterpretations: this is a self-employed worker and such financial dependence must, under no circumstances, involve organisational dependence or direct employment”.²⁷ This is why Art. 2.d of the LETA states that TRADEs are “expressly included in the sphere of application of this law” regulating self-employed work.²⁸ On the basis of these considerations, one might wonder which improvements have been introduced into the individual TRADE-client relationships by the LETA.²⁹ An assessment of this kind must be made considering the

²⁴ See J. M. Goerlich Peset, *La noción de trabajo autónomo económicamente dependiente: puntos críticos*, in *Justicia laboral*, 2008, n. 33, 15.

²⁵ As Prof. Marco Biagi notes: “[...] a major overhaul of the right to work is required to recognise minimum levels of supervision whenever services are provided [...]”, see M. Biagi, C. Agut García and M. Tiraboschi, *Italia: un Derecho en evolución (El Libro Blanco del Gobierno sobre el mercado de trabajo. El Proyecto de Ley de Delegación para la reforma del mercado de Trabajo)*, in *Justicia Laboral*, 2003, n. 2003, 59.

²⁶ According to A. Perulli, *op. cit.*, 630-631, it must be understood from the legal system that these workers are not in pseudo self-employment, even when there are some “hybrid features” that make them difficult to classify.

²⁷ See A. Montoya Melgar, and R. Martín Jiménez, *Estatuto del Trabajo Autónomo. Comentario a la ley 20/2007, de 11 de julio*, Thomson-Civitas, Navarra, 2007, 103.

²⁸ See, in this sense, V. García Alarcón, *Trabajo asalariado, trabajo autónomo y trabajo autónomo económicamente dependiente*, in *Trabajadores Autónomos, Estudios de Derecho Judicial*, 2007, n. 146 (CGPJ), page 55; J. M. Goerlich Peset, *op. cit.*, 20; M. L. Segoviano Astaburuaga, *Trabajadores autónomos económicamente dependientes*, in *Documentación Laboral*, 2008, n. 81, 33.

²⁹ In the context of this paper, we are not going to treat social security (the self-employed workers have access to unemployment benefits—according to Law No. 32 of 5 August

conditions on which TRADEs provide their services, which are governed by the LETA and can be imposed, whereas an individual employment contract contravenes them.³⁰

Said conditions relate to working time and breaks in working activity (Art. 14 of the LETA), expiration of the contract (Art. 15 of the LETA), justified interruptions of working activity (Art. 16 of LETA), and scope of competence (Art. 17 LETA). According to the Preamble of the LETA, all of these aspects constitute “regulations which safeguard the financially dependent autonomous worker.

3. Aspects Concerning Remuneration

Before going into details with regard to the foregoing issues, it must be pointed out that Art. 11 of the LETA concerning the concept of TRADE requires that they should receive “financial remuneration depending on the result of their activities, and in line with what has been set in the contract with the client, bearing responsibilities arising from its non-compliance” (Art. 11.2.e of the LETA). Something similar occurs in Italy, where remuneration must be provided on the basis of the quantity and quality of the work performed, regardless of the statutory minimum wage (Art. 63 of Legislative Decree 276/2003). The meaning of this regulation is clear; in terms of “remuneration” (a broader concept than “wage”),³¹ the LETA by no means favours the TRADEs. This is despite the fact that the Group of Experts who drafted the report pointed out the need to oversee the remuneration system of the self-employed workers. This request was justified by “[...] a simple reality: the income of self-employed workers generally constitutes their basic means of economic subsistence”.³² However, this benevolent concern is not translated into a guarantee of minimum remuneration along the lines of the minimum

2010 which was drafted considering Royal Decree 1541 of 31 October 2011—in the form of a special system of protection for termination of activity of the self-employed), health and safety at work and employment policy regulations.

³⁰ See J. L. Monero Pérez, *El trabajo autónomo, entre autonomía y subordinación*, in *Aranzadi Social*, 2009, n. 5, 28.

³¹ Ruling RJ/546 of 19 February 2010 of the Asturias High Court of Justice covering Administrative Disputes held that TRADE’s remuneration cannot be considered as wage in a strict sense.

³² See J. Cruz Villalón, S. Del Rey Guanter, J. A. Maroto Acín, C. Saez Lara, and F. Valdes Dal Ré, *Un Estatuto para la Promoción y Tutela del Trabajador Autónomo*, Madrid (MTAS), 2006, 162.

wage for salaried workers, or the application to this minimum of that 75% that implies the presence of a client and, hence of the *TRADES*.³³ The survey also indicated the need to widen access to credit facilities for the self-employed, which should not be limited merely to situations of bankruptcy. In case of insolvency, a set of rules should be envisaged which would exclude personal goods from financial liability for debts (e.g. non-luxury movable and immovable goods used for domestic needs of the self-employed workers and their family).³⁴ However, concerning the right to be remunerated for their work, the LETA simply refers to existing provisions of Civil and Commercial Law concerning privileges and preferences, and to the Bankruptcy Act No. 22 of 9 July 2003. This means that self-employed workers are covered under Art. 91.3 of the Act, which provides “credits for non-dependent personal work [...] accruing during six months prior to the declaration of bankruptcy” (Art. 10.3 of the LETA). The reverse occurs in the event of autonomous workers facing insolvency (the LETA recalls that self-employed workers will be answerable for their obligations with all their present and future assets, without prejudice to the protection of some goods from seizure generally established in Art. 605, 606 and 607 of the Civil Proceedings Act No. 1 of 7 January 2000 (Art. 10.4 of LETA). Thus, the only improvement provided by the LETA on this issue is a more benevolent-than-usual treatment concerning seizures, which is limited to administrative seizure of self-employed worker’s habitual residence for the payment of debts involving taxes and social security contributions (Art. 10.5 of the LETA). As for the *TRADES*, whose main defining element is their financial reliance on a single client, the LETA does not include guarantees or special forms of protection in cases of financial difficulties, insolvency on the part of the client, or the self-employed workers. Nor is there any legal measure safeguarding their income which can be compared to the Wage Guarantee Fund for employees established in Italy.

4. Working Time and Rest Periods

Art. 14 of the LETA sets forth that *TRADES* are entitled to “an interruption of their working activity of 18 working days per year”, which is much shorter than the 30-day rest period granted to salaried workers by

³³ See M. García Jiménez and C. Molina Navarrete *op. cit.*, 151 and ff.

³⁴ See J. Cruz Villalón, S. Del Rey Guanter, J. A. Maroto Acín, C. Saez Lara, and F. Valdes Dal Ré, *op. cit.*, 164 and ff.

the ET,³⁵ yet an increase in this connection can be envisaged in the individual employment contract or the AIP. Significantly, “interruption” has been interpreted as “holiday”,³⁶ despite the fact that the LETA never makes use of this term. Indeed, most of the debate concerning its denomination concerns its content. Aside from the wording adopted, another important question should be raised. Art. 16 of the LETA—to which we will later refer—makes provision for “justified interruptions of working activity”, somehow questioning the right to a rest period. Clearly, the enjoyment of this right would be significantly reduced if it was understood that this interruption of 18 days referred to the specific causes laid down in Art. 16. Apparently, a limited meaning of the combination of these two precepts would not be welcome. Further, as increasing difficulties resulting from the effectiveness of this right arise, it must be recalled that it is the TRADEs who bear the full risk of the activity performed (Art. 11.2.e of the LETA). In this sense, the LETA does not make any reference to remuneration for these days on which the working activity is interrupted. However, TRADEs perform and organise their tasks using their own judgment. The LETA insists that, although they may receive technical instructions from their client (Art. 11.2.d of the LETA), “under no circumstances does financial dependence imply dependence in ‘organizational terms’” (Preamble of the LETA).

Accordingly, since the TRADE who is in charge of successfully fulfilling the task assigned by the client, the opportunity to enjoy time off is significantly reduced in practice. As far as remuneration is concerned, there is no regulation concerning the TRADE’s maximum working day, minimum rest periods between working days or weekly time off. As a consequence, minimum and maximum conditions with regard to remuneration are usually set out in the individual employment contract or the AIP (Art. 14.2 LETA). Indeed, the LETA lays down two provisions concerning the reconciliation of work and family life for TRADEs,

³⁵ The Confederation of Workers’ Commissions (CC.OO). “(...) disagrees with the insufficient protection and safeguards for TRADEs concerning the right to holidays—18 unpaid days is unfair compared to that provided to other workers—see <http://www.ccoo.es/cscceo/menu.do?Areas:Empleo:Actualidad:6493>.

³⁶ See CC.OO. statements providing the same arguments in the aftermath of the approval of the LETA, see <http://www.ccoo.es/cscceo/menu.do?Areas:Empleo:Actualidad:6493>.

See also M. Luque Parra, and D. Martínez Fons, *Régimen profesional del trabajador autónomo económicamente dependiente*, in S. Del Rey Guanter, op. cit., 189; V. A. Martínez Abascal, *El Estatuto del Trabajo Autónomo: alcance protector y límites del Derecho del Trabajo*, in *Aranzadi Social*, 2008, n. 2, 28; A. Montoya Melgar, and R. Martín Jiménez, op. cit., 159.

particularly to prevent mistreatment of working women. Concerning the first aspect, the law provides that working hours should be adapted to better balance personal and professional life. As for female workers who are vulnerable to abuse, they will have the right to adapt their working hours in order to receive adequate protection and full assistance (Art. 14.4 and 5 of LETA). Once again, it is difficult to assess who the real right-holder is. If TRADEs plan their activities according to working and personal needs, they need not justify themselves to clients. This will be the only interpretation that can be given to their lack of “organisational” dependence or direct employment. Apparently, this is not a right in a strict sense. It is more like asking TRADEs to find a way to ease work-life balance and prevent gender discrimination, with this aspect that is further evidence of the problematic nature of the LETA. Despite the narrow scope³⁷ of the foregoing provisions, Art. 14 of the LETA sets certain limits on overtime work. More specifically, it states that it is up to the TRADE to perform a task for longer hours than what agreed upon in the employment contract. Overtime should not exceed the maximum envisaged in the AIP or—whereas not applicable—30% of normal working hours agreed upon in the employment contract (Art. 14.3 of LETA). As it is, it seems difficult to implement this provision.

5. Termination of the Employment Contract

In Italy, the contract for the completion of a certain project must necessarily be a temporary one, as its duration depends on the time needed to carry out the task assigned, although its renewal is allowed in order to perform the same job (Circular of the Ministry of Employment No. 1/2004). In the Spanish legal system, these conditions are not expressly mentioned and issues relating to their duration depend entirely on the will of the signatories, being the employment contracts for TRADEs governed by the Civil Code. Moreover, the provisions contained in the LETA concerning the expiration of the employment contract seem to be oriented in the opposite direction of what is laid down for open-ended contracts. According to Art. 15 of the LETA, the system envisaged that to terminate a contract involving the TRADEs

³⁷ Concerning the narrow scope of the rights recognised for TRADEs in terms of working hours see M. García Jiménez and C. Molina Navarrete, *op. cit.*, 145 and ff. See on this matter J. I. García Ninet, ed., *Comentarios a la Ley del Estatuto del Trabajo Autónomo, Artículo. 14*, CISS, Bilbao, 2007, 300 and ff.

confirms that they are self-employed workers. Consequently, notwithstanding the great deal of criticism that this system has attracted with regard to the many technical issues that ensue,³⁸ the thread running through is that the extinction of the labour relationship is governed by the principle of freedom of the contracting parties as though they were contracts concluded under Civil Law, thus putting TRADEs and clients on equal footing. The same occurs in Italy, where the contract may be terminated before it expires only if there is good cause or under the circumstances established by the parties in the contract, even though breach of this provision entitles to compensation only in cases of damages and loss (Art. 67 of Legislative Decree No. 276/2003).

Leaving aside any other form of compensation that may be envisaged in the individual employment contracts and the AIPs, the point around which the termination of the employment relationship for TRADEs revolve is the freedom of the two parties to practically terminate the contract at any time. This right also includes compensation for damages facing the worker, which is awarded only if the loss is proven. In particular, “those who, in complying with their obligations, show malice, negligence or provide late payment, and those who contravene the terms of the obligations in any way, will be subject to compensation for the damages and losses caused” (Art. 1101 CC).³⁹ In this respect, it is important to highlight that, following the AIP concluded at PANRICO S.L.U., the consequences of the termination of the employment contract of the self-employed lorry drivers are substantially different for the clients and the TRADEs. So, if the lorry driver ends the contract, he/she has no right to compensation and will be subject to compensation for any damages or losses caused to the employer, which in the case of failure to execute a transport order for a considerable amount of perishable goods can be particularly high. On the other hand, if it is the employer who terminates the contract, the TRADE will be entitled to fixed compensation, along the lines of what is laid down by the ET for salaried workers⁴⁰. In Italy, Art. 66 of Legislative Decree No. 276/2003 lists

³⁸ See I. Beltrán de Heredia Ruiz, *La extinción del contrato del autónomo dependiente: análisis (crítico) de su regulación jurídica (y propuestas de reforma)*, in *Aranzadi Social*, 2008, N. 4.

³⁹ In this sense, Decision RJ/546 of 19 February of 2010 of the Asturias High Court of Justice concerning Administrative Disputes, expressly indicates that compensation for unfair dismissal established by the ET does not apply by analogy.

⁴⁰ Cf. AIP PANRICO, S.L.U., “18. Consequences of the termination of the contract:
1.- If the contract is terminated for the reasons established in the previous article, the self-employed lorry driver shall have no right to any compensation, and, in such a case,

pregnancy, illness and injury among the reasons for suspending the contact, for which no remuneration is granted. In a similar vein, Art. 16 of Spanish LETA includes various circumstances considered as justified reasons for interrupting the TRADEs activity without providing any form of remuneration. In general, termination of the contract on the part of the client cannot be grounded on these reasons, yet this is not the case. Pursuant to the LETA, and without prejudicing what is laid down in the individual contract of employment or the AIP, the following are justified reasons for terminating the employment relationship:

- a) mutual agreement between the parties;
- b) the need to attend to sudden, urgent and unforeseeable family responsibilities;
- c) a serious and incumbent risk to the self-employed worker's life and health, as set forth in section 7 of 8 of the LETA;
- d) temporary incapacity, maternity, or paternity.
- e) A situation of violence against women employed under this contractual arrangement, so she can receive protection and full assistance.
- f) Force majeure.

In principle, the existence of a reason justifying the interruption of the employment relationship prevents the termination of the contract if agreed upon by clients (Art. 15.1 par. f of the LETA). However, the following exception leaves the good intentions of the client devoid of content. Whereas the causes of the interruption are those established in sections d) and f) and produce “a considerable loss to the client , affecting the activities routinely performed”—which, one would expect, happens in most cases—then the termination is justified. Assessing the feasibility of this exception is beyond the scope of this paper. What is relevant here is that an issue is raised concerning their incompatibility with the task the self-employed perform, as well as with family responsibilities or protection of their health and safety. In this sense, interruptions of the

the employer shall have the right to claim any damages and losses that may have affected him as a result of the breach of the contract.

2.- If the self-employed lorry driver decides to challenge the Company's decision before a competent legal body and, as a result of this, a judgment is given demonstrating the absence of a justified reason for terminating the contract, the employer is obliged to pay the lorry driver compensation that will be calculated under the following terms:

- the amount of compensation established by law applicable at the time for the unjustified dismissal of employees under the common system. [...]"

employment relationships are usually very limited, as they refer to urgent family commitments or a serious and incumbent risk to the TRADEs' life or health, while it might be extended in cases of women workers who have been victims of abuse.

6. The Juridical Competence of the Social Security System

As occurs in Italy for coordinated and continuous collaboration (quasi-subordinate work), some special bodies operating in the field of social security have jurisdiction over all the claims arising from the employment contract concluded between the TRADE and the client, as laid down by Art. 17 of the LETA. This move has been hailed with enthusiasm, as it is believed that the traditional protective stance towards workers would also be extended to TRADEs,⁴¹ although it seems that its implementation fell into oblivion.⁴² To date, there has been little time to assess the impact of this measure and, if anything, the favourable expectations have been dashed by ruling RJ/6391 of 11 July 2011 of the Supreme Court.⁴³ Indeed, this judgment upholds what has been pointed out so far in the resolutions issued by High Courts of Justice of Autonomous Communities. They refer to the nature and the type of formal requirements to be met in order to conclude a contract between the TRADEs and their clients, e.g. its written form.⁴⁴

⁴¹ In this respect, the CC.OO argued that “We value the fact that some of the claims maintained by CO.OO for TRADEs have been upheld, including the guarantee that their employment disputes will fall under the remit of the social system”. See <http://www.ccoo.es/cscoco/menu.do?Areas:Empleo:Actualidad:6493>.

⁴² See, in this respect, C. Chacartegui Jávega, *Tutela judicial y extrajudicial de los autónomos. Asunción por la Jurisdicción Social de los litigios entre autónomos económicamente dependientes y sus clientes*, in *Trabajadores Autónomos, Estudios de Derecho Judicial* 2007, n. 146 (CGPJ), 239 and ff.; J. M. Goerlich Peset, A. Moreno and T. Sala Franco, *Trabajo autónomo: nueva regulación*, Tirant lo Blanch, Valencia, 2007, 119 and ff.

⁴³ Doctrine in the rulings of 12 July 2011 (RJ 2011/6397) and 24 November 2011 (RJ 2012/544).

⁴⁴ See judgments from the Valencian Community of 27 January 2009 (JUR 2009\226017); Asturias of 20 February 2009 (JUR 2009\322984); Andalusia of 4 March 2009 (JUR 2009\285307) and Andalusia dated 25 March 2009 (JUR 2009\1593). Along these lines, there is also the pronouncement of A. Martín Valverde, *La Ley y el Reglamento del Estatuto del Trabajo Autónomo: puntos críticos*, in *Actualidad Laboral*, 2009, n. 11. In the opposite direction, there are the decisions of the High Courts of Justice, Administrative Disputes sections, of Castilla and León-Valladolid of 29 October 2008 (AS 2008\2799); Aragon of 4 February 2009 (AS 2009\943); Cantabria of 26 June 2009 (JUR 2009\308480).

In this respect, the Supreme Court has ruled that the written form is an essential prerequisite to conclude an employment contract concerning TRADEs. This means overlooking that, pursuant to Art. 8.1. of the ET, the form of the contract is not a form *ad solemnitatem*—that is a condition of validity—an aspect that is also recalled by Art. 12 of the LETA. In a similar vein, the fact that according to Art. 1258, 1278, and 1279 of the Civil Code the observance of written form is not required seems to be neglected: “contracts come into force through mere consent and, from then on, they are binding, not only in terms of compliance with what is expressly agreed but also with all consequences which, depending on their nature, follow in accordance with good faith, custom and the law” (Art. 1258 CC). Nonetheless, the arguments put forward by the Supreme Court have convinced the legislator to reform Art. 11bis and 12 of LETA, with the written form of the employment contract that is now a mandatory requirement.⁴⁵ In Italy, where the law also specifies that contracts for the completion of a certain projects must be concluded in writing, the form is by no means *ad solemnitatem* (Art. 62 of Legislative Decree 276/2003). Whereas finalised orally, a *iuris tantum* presumption is assumed and that the contract is open-ended and refers to salaried workers. As a result, what should be demonstrated in Italy’s case is the condition of subordination, which becomes the determining factor of the employment relationship (Circular No. 1/2004 of the Ministry of Employment).

7. Supporting Self-employed Workers

On the basis of what has been argued so far, the attempt to safeguard the rights of TRADEs on the part of the LETA and to regard them as individual workers has not been as effective as it might have appeared initially.⁴⁶ However, the recognition of rights of collective bodies representing the interests of self-employed workers, and hence TRADEs, deserves special mention. In this concluding section, the reasons why the LETA was usually favourably received by these bodies will be clarified. Title III of the provision protects the collective rights of all self-employed

⁴⁵ In this respect, J. López Gandía, *La difícil existencia de la figura del TRADE tras la jurisprudencia del Tribunal Supremo y la nueva Ley de Jurisdicción Social*, in *Revista de Derecho Social*, 2012, n. 56, 171, ff.

⁴⁶ See M. L. Martín Hernández, *La tutela de los trabajadores autónomos en el ordenamiento jurídico español: análisis crítico de la Ley 20/2007, de 11 de julio, del Estatuto del Trabajo Autónomo*, in *RGDTSS*, 2008, n. 17, www.iustel.com, 56 and ff.

workers, while Art. 13 concerning TRADEs lays down rules for the conclusion of the AIPs for this category of workers on an exclusive basis. On close inspection, Title III of the LETA recalls already existing collective rights, while extending some others to self-employed workers and their professional organisations, as well as trade unions the members of which are self-employed.

In this manner, more strictly technical considerations are pushed into the background, particularly those concerning the way legislation is developed, and the scope that should be given to the fundamental right of trade union freedom, as well as the fact that the LETA remained silent on the issue of recognition of the right to adopt a system of collective dispute.⁴⁷ One might note that in this connection, by law, professional associations of self-employed workers are eligible. These associations will be established according to Act No. 1 of 22 March 2002 concerning the right of association. They must register and keep their articles of association in an official list held in public offices and purposely set by the Ministry of Employment or a corresponding Autonomous Community where the association carries out its own activity. Trade unions, businesses, and other organisations will be enrolled in a separate register within the same public office.⁴⁸

These professional associations are entitled:

- a) to form federations, confederations or unions and to make connections with trade union organisations and business associations;
- b) to give their consent on the conclusion of AIPs for TRADEs;⁴⁹

⁴⁷ On this matter, see A. Ojeda Avilés, *La sinéresis de lo colectivo como rasgo sustancial del Estatuto del Autónomo*, in *Aranzadi Social*, 2009, n. 4; F. Lousada Arochena, *Los derechos colectivos del trabajador autónomo*, in *Aranzadi Social* 2007, n. 21; V. A. Martínez Abascal, *op. cit.*, 21 and ff.; N. Mendoza Navas, *Los derechos colectivos de los trabajadores autónomos: derecho de asociación y libertad sindical, negociación de Acuerdos de Interés Profesional y adopción de medidas de conflicto para la defensa de los intereses profesionales*, in *Trabajadores Autónomos, Estudios de Derecho Judicial*, 2007, n. 146 (CGPJ), 167 and ff.; F. Trillo Párraga, *op. cit.*, 89 and ff.

⁴⁸ RD 197/2009 makes reference to the creation of a state registry of professional associations of self-employed workers (Art. 20 LETA).

⁴⁹ On this matter, see C. Bermúdez Rodríguez, *Los acuerdos de interés profesional de los trabajadores autónomos económicamente dependientes*, in *Actualidad Laboral* 2008 n. 22; J. A. Fernández Avilés, *La regulación colectiva de las condiciones de trabajo de los trabajadores autónomos económicamente dependientes*, in *Actualidad Laboral*, 2009, n. 3; N. Sirvent Hernández, *Los Acuerdos de Interés Profesional como fuente reguladora de la relación profesional de los trabajadores autónomos económicamente dependientes*, in *RGDTSS*, 2007, n. 15, www.iustel.com.

- c) to collectively protect and oversee the professional interests of self-employed workers;
- d) to join non-judicial systems for resolving collective disputes involving self-employed workers when this is done in agreement with their professional interests (Art. 19 LETA).

Art. 21 LETA makes provision for associations representing self-employed workers. In addition, pursuant to Art. 6 and 7 of Act No. 11 of 2 August 1985 on Trade Union Freedom, these associations and most representative trade unions are assigned certain powers concerning:

- a) the representation of self-employed workers before public bodies and other State or Autonomous institutions or organisations;⁵⁰
- b) their consultation when questions arise regarding public policies that might affect this category of workers;
- c) the management of public programmes addressing self-employed workers, in accordance with statutory requirements (Art. 21 LETA);
- d) any other function to be carried out in accordance with existing laws or regulations (Art. 21 of LETA).

Taking account of this institutional participation, and considering associations of self-employed workers as valid interlocutors to conclude social agreements, the council of self-employed work is instituted, pursuant to Art. 22 of the LETA.

Set up by the government, this is a consultative body on socio-economic and professional matters concerning self-employed work, which issues various reports on several issues—among others the regulation of this form of work— which might become binding whereas amending the LETA. These are measures that strengthen the role of associations of the self-employed. They are given new rights as interlocutors with public authorities, thus take on a leading role. Perhaps this is the reason why the passing of the LETA was hailed with enthusiasm by them, yet the powers assigned to this council should be used to benefit the TRADEs. This category of workers faces high levels of vulnerability in the labour market. This is particularly true if one considers that they are caught in the middle, in the sense that they face the risks of their status without being given the opportunity to compete in the market, *de facto* regarded as salaried

⁵⁰ On this matter, see H. Ysàs Molinero, *El derecho de participación institucional en el Estatuto del Trabajo Autónomo: especial referencia al Consejo Estatal del Trabajo Autónomo*, in *Relaciones Laborales*, 2008, n. 18.

workers—at least in financial terms—and lacking the necessary protection. As result, it would be desirable that the EU's future action be addressed in this direction.

The Right to Strike in Canada: Comment on a Recent Saskatchewan Court Decision

Roy J. Adams *

In the past decade the Supreme Court of Canada (SCC) has handed down a series of labour decisions that have amazed many and have infuriated some.¹ Those decisions have attracted praise in some quarters but much criticism in others. Perhaps the most prevalent condition that they have elicited is confusion or as one SCC judge characterized it: bewilderment.² In his recent decision regarding the Saskatchewan Public Service Essential Service Act, Justice Dennis Ball has done the community a huge service by addressing many of the issues contributing to this turmoil.³ Although Freedom of Association is considered globally to be a human right that, in the context of work, includes the right to organize without interference, the right to bargain collectively and the right to strike, in Canada the latter two rights had no constitutional protection until 2007, when the Supreme Court overturned 20 years of jurisprudence by “constitutionalising” collective bargaining.⁴ However by refusing to accept the common Canadian notion that the term collective bargaining is a process inextricably bound to the Wagner-Act model of labour legislation that prevails across Canada, it left many perplexed. The Supreme Court’s Fraser decision, which split the court in several directions, muddied the

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¹ *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94; *Health Services and Support—Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 and *Ontario (Attorney General) v. Fraser*, 2011 SCC 20.

² In her opinion in *Fraser v. Ontario*, Deschamps, J. declared that the BC Health Services decision “caused some bewilderment” (par. 297).

³ *Saskatchewan Federation of Labour v. Saskatchewan* 2012 SKQB 62.

⁴ R. J. Adams, *From Statutory Right to Human Right: The Evolution and Current Status of Collective Bargaining*, in *Just Labour*, 2008, Vol. 12, 48-67.

water even more. Particularly frustrating to many was the refusal by the SCC to clarify the status of “the right to strike.”

A major device used by Justice Ball to cut through the confusion was to closely tie dissenting opinions issued by then Chief Justice Dickson in the 1980s, to the reasoning of the majority of the present court. In essence Justice Ball treated the Dickson dissents (in the trilogy of cases that addressed the right to strike, of which the most often referred to is the dissent in the Alberta Reference) as if they had become an integral part of the rationale of the present court.⁵ Since the current SCC majority has relied heavily on those dissenting opinions and has, in fact, either used directly or paraphrased many of Justice Dickson’s notions, that is not an unreasonable approach. Had the SCC majority (as constituted during recent cases) squarely addressed the right to strike it most likely, it seems to me, would have reasoned much like Justice Ball.

From the perspective he adopted, Judge Ball was easily able to show us that the right to strike is essential to meaningful collective bargaining. In his Alberta Reference dissent, after an extensive review of the importance of collective bargaining as an essential element of democratic society (using language later paraphrased by the current SCC majority) Dickson CJ said “[...] effective constitutional protection of the associational interests of employees in the collective bargaining process requires concomitant protection of their freedom to withdraw collectively their services, subject to s. 1 of the Charter.”⁶ That statement is crystal clear and free of all ambiguity.

Justice Ball also addresses directly arguments put forth by counsel for the Saskatchewan government in defence of its legislation. Those arguments reflect criticism that has been put forth by various pundits subsequent to the Health Services and Fraser cases.⁷ Justice Ball considers those arguments and effectively refutes them.

Adopting a spin that has been promoted by some government and management-side lawyers, the Saskatchewan Government argued that the Fraser case “represented a substantial retreat” from Health Services and

⁵ The most widely quoted minority opinion of Dickson C.J. was made in Reference to the Public Service Employee Relations Act (Alberta) [1987] 1 S.C.R., 313, 38 D.L.R. (4th) 161. Referred to as Alberta Reference. The other two decisions were Saskatchewan v. R.W.D.S.U., Locals 544, 496, 635 and 955 [1987] 1 S.C.R. 460, 38 D.L.R. (4th) 277 and PSAC v. Canada [1987] 1 S.C.R. 424, 38 D.L.R. (4th) 249.

⁶ Alberta Reference par. 98.

⁷ For an extensive consideration and critique of those positions see A. Bogg and K. Ewing, *A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada*, in Comparative Labor Law and Policy Journal, 2012, forthcoming.

that it replaced “bargaining” in “collective bargaining” with something akin to “listening” or perhaps “consulting.” The government also asserted that “applicants claiming that laws violate s. 2(d)” must demonstrate that the impugned laws make their ability to associate “substantially impossible” rather than meeting the less onerous “substantial interference” standard established in *Health Services*. And finally the government notes that the SCC has never “explicitly recognized a constitutional right to strike” and thus the Saskatchewan court should not do that.⁸

Justice Ball firmly rejected that position. The “Government of Saskatchewan’s interpretation of what was decided in *Fraser*,” he says, “cannot be correct.” If it were “it would mean that the SCC said one thing in *Health Services* and something different in *Fraser*. It would mean that s. 2(d) protections for collective action to achieve work place goals amount to nothing more than meaningless paper rights...” (par. 90)

He goes on unequivocally to state: “I do not accept that in *Fraser* the SCC resiled from its position in *Health Services*, nor do I accept that the decision in *Fraser* is in any way incompatible with recognition of a right to strike as a fundamental freedom under s. 2(d) of the Charter”. He accepts at face value the statement by the SCC majority in *Fraser* that:

Health Services is grounded in precedent, consistent with Canadian values, consistent with Canada’s international commitments and consistent with this Court’s purposive and generous interpretation of other Charter guarantees. (par. 91)

The SCC did not refrain from addressing the right to strike because there was any doubt that it deserved constitutional protection, but rather because it was not at issue in the cases put before it. In both *Health Services* and *Fraser* “the court explicitly states that it was not dealing with the issue of the right to strike” (par. 92).

In effect Justice Ball firmly rejects the minority opinion of Supreme Court Justice Rothstein (supported by Justice Charron) in *Fraser* asserting that *Health Services* was wrongly decided and that the pre-*Health Services* status quo should be reinstated. Without directly confronting the Rothstein opinion, Justice Ball in effect considers the points made in that decision and rejects them.⁹ The Ball decision is thus a setback to those

⁸ SFL v. Saskatchewan 2012 SKQB 62, par. 87.

⁹ The extensive Rothstein dissent in *Fraser v. Ontario (Attorney General)* is presented at paras 119-296.

seeing a ray of hope in Rothstein's opinion that this annoying "human rights" aberration from settled labour policy might go away.

In short, this decision goes a long way in clearing up the "bewilderment" of the Canadian labour community around the implications of recent Supreme Court decisions. If it withstands appeal, the three key aspects of the universal human right to freedom of association at work (the right to organize, the right to bargain collectively and the right to strike) will have become firmly embedded as constitutional rights of all Canadians.¹⁰

Despite its many positives, the Ball decision does not get us all the way down the road to where we need to be. Drawing heavily on Justice Dickson, Judge Ball firmly concluded that the full range of international labour law is applicable to Canada (see par. 100-114). That was the correct conclusion, I believe. The problem is that too few Canadian lawyers, professors, trade unionists or government officials understand international labour law and its implications. Indeed, Justice Ball reveals his own inadequate understanding of that body of law when arriving at his opinion on the constitutional status of the Saskatchewan Trade Union Act.

In rejecting the view that Health Services requires legislatures to enact an "elaborate legislative superstructure" he says "what is required is a rudimentary structure that protects the essential components of collective bargaining". No problem, so far, but he then goes on to say that among the "basic elements" of such legislation would "likely" be "an assessment of the freely expressed wishes of the majority concerning a bargaining representative" and "a requirement that the employer bargain exclusively with that representative". Although Justice Ball weakly says that "these are not necessarily elements derived from a Wagner Act model," he seems to be unaware of the relevant international law (par. 263). That law clearly says that governments may not make majoritarian exclusivity a minimum condition for collective bargaining recognition.¹¹

What this implies, it seems to me, is that a great deal of learning still needs to take place in Canada. Much work needs to be done before we begin to approach a legal environment (as well as an on-the-ground reality) that fully respects the universal human rights of Canadian workers.

¹⁰ The Saskatchewan government appealed the decision on 5 March 2012.

¹¹ See Freedom of Association, Digest of Decision and Principles of the Freedom of Association, Committee of the Governing Body of the ILO, 5th revised edition, International Labour Office, Geneva, 2006, par. 974-980 regarding the Rights of Minority Unions.

Shades of Grey

Malcolm Sargeant *

read the **abstract**

Introduction¹

Is age discrimination different to discrimination in relation to the other grounds of discrimination, now to be found in the Equality Act 2010? The answer is yes, according to the Supreme Court in the case of *Seldon v Clarkson Wright and Jakes* [2012] UKSC 16. Lady Hale somewhat contentiously stated that age is a continuum, rather than binary in nature (man or woman, black or white, gay or straight) and, as a result, one can say that “younger people will eventually benefit from a provision which favours older employees, such as an incremental pay scale; but older employees will have already benefitted from a provision which favours younger people, such as the mandatory retirement age”.

The case concerned Mr Seldon who was a senior partner in a law firm where the partnership deed contained a mandatory retirement clause. There was a requirement to retire from the partnership at the end of the year when the age of 65 was reached. When the time for retirement approached Mr Seldon put forward a number of proposals to the partners that would enable him to continue working for another three years. The partners rejected this and offered him an ex gratia payment in recognition of his services. He told the firm that he was taking legal advice on a claim for age discrimination after which the offer of the ex gratia payment was withdrawn. He began proceedings in March 2007 alleging direct age

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discrimination and victimisation (because of the withdrawal of the ex gratia payment offer). Five years later the case arrived at the Supreme Court.

The argument centres on the possibility of justifying both direct and indirect age discrimination if the act is a “proportionate means of achieving a legitimate aim”. Art. 6 par. 1 of Directive 2000/78/EC provides that differences in treatment on the grounds of age will not constitute age discrimination if they are “reasonably and objectively justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary”. Regulation 3 of the Employment Equality (Age) Regulations 2006 (SI 2006/1031) (now incorporated into the Equality Act 2010) then provided that direct and indirect age discrimination could be justified if the treatment could be shown to be “a proportionate means of achieving a legitimate aim”. Mr Seldon claimed that regulation 3 was inconsistent with Directive 2000/78/EC. This was firstly because regulation 3 did not take into account the distinction between direct and indirect discrimination and, secondly, because Art. 6 of the Directive contemplated that justification for direct age discrimination should be based upon the broad social and economic policy objectives of the state and not the individual needs of employers and partnerships.

1. Legitimate Aims

The firm had put forward a number of what it claimed were legitimate aims to the Employment Tribunal which accepted that compulsory retirement was an appropriate means of achieving the “firm’s legitimate aims of staff retention, workforce planning and allowing an older and less capable partner to leave without the need to justify the departure and damage dignity”. After a review of the case law at the Court of Justice of the EU, Lady Hale concluded that two kinds of legitimate aims had been identified. These were inter-generational fairness and dignity. The first of these, which was stated as being “comparatively uncontroversial” meant a various things depending upon the particular circumstances of the employment, but could include facilitating access to employment for young people, but it could also mean enabling older people to remain in the workforce. It can also mean sharing limited opportunities to work in a particular profession fairly between the generations. It is interesting how a number of the references on retirement to the CJEU have concerned the

professions (case C-341/08 *Petersen* concerning dentists; cases C-250/09 and C-268/09 *Georgiev* concerning university professors and cases C-159/10 and 160/10 *Fuchs* concerning public prosecutors) where, arguably, it might be possible to show that there are a finite number of jobs and progression demands that older members of the profession retire to make way for younger ones.

The second general type of legitimate aim is dignity, which was an argument put forward by employers wanting the default retirement age established by the 2006 Age Regulations. It is concerned with avoiding the need to go through lengthy disciplinary and competence procedures when some older workers decline in performance and capacity. Retirement is seen as a way for older workers to exit the workforce with dignity rather than being dismissed for other reasons. There is an underlying issue here concerning the stereotyping of older workers, however.

In *Age UK* (Case C-388/07), according to the Court, the social policy aim of the government had been identified as the need to preserve the confidence and integrity of the labour market. This is not an open ended justification for employers because “the Secretary of State accepts that there is a distinction between aims such as cost reduction and improving competitiveness, which would not be legitimate, and aims relating to employment policy, the labour market and vocational training, which would”. Lady Hale summed up the position in Para 55 of the judgment as “that the United Kingdom has chosen to give employers and partnerships the flexibility to choose which objectives to pursue, provided always that (i) these objectives can count as legitimate objectives of a public interest nature within the meaning of the Directive and (ii) are consistent with the social policy aims of the state and (iii) the means used are proportionate, that is both appropriate to the aim and (reasonably) necessary to achieve it”.

Having found that a legitimate aim can be justified under the Directive in social policy terms there are still further steps to be undertaken. Firstly it has to be shown that the legitimate aim is actually the one being pursued, although there is the possibility of post facto rationalisation of the aims. It is also necessary to then ask whether the aim is legitimate in the particular circumstances of the employment concerned, e.g. a wish to recruit young people to establish an age diverse age force might be a legitimate aim in social policy terms, but if the employer already has many young employees and does not have a problem recruiting them, then the aim may not be “legitimate” for that employer. Similarly if there is an established and sophisticated performance management system in place then avoiding the

need for a performance management system for older workers would not constitute a legitimate aim for that enterprise.

2. Limited Usefulness

The Supreme Court concluded that there was a difference in the treatment of justification for direct and indirect discrimination with regard to age and that the two should not be treated in the same way. The Court accepted that three of the legitimate aims put forward by the partnership were legitimate both in social policy terms and also in the partnership's individual circumstances. Two of them were, firstly, the need to ensure that associates had the opportunity of a partnership after a reasonable period of time as an associate, thus aiding retention; and, secondly, ensuring that there is a turnover of partners such that any partner can expect to become senior partner eventually, thus aiding workforce planning. Both of these aims were related to the legitimate social policy aim of "sharing out professional employment opportunities between the generations". The third justification accepted was limiting the need to expel partners by way of performance management and this fell under the legitimate social policy heading of "dignity". The Court accepted that these were legitimate social policy aims and that they also applied to the type of business concerned.

In the event the case was referred back to the Employment Tribunal to consider whether the age of 65 was an appropriate choice of age for achieving these legitimate aims, particularly the first two, which, according to the Court, might be taken to justify any retirement age, not just this particular one. On this issue Lord Hope intervened to state that the fact that a default retirement age of 65 was in existence at the time of Mr Seldon's dismissal may be helpful in deciding this issue.

3. Conclusion

Many employers were hoping for a clear lead from this judgment on what were the conditions required to adopt an employer justified mandatory retirement age. Lady Hale's judgment is clear and concise, although it can be criticised for appearing to accept the lump of labour fallacy that removing older workers through retirement actually encourages the employment of young people (for which there is little or no evidence). It is doubtful whether the judgment will, however, make it any easier for the

justification of mandatory retirement by employers. The approach to justifying direct age discrimination is different to that justifying indirect discrimination (for comment on this see *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, published on the same day). This must be a correct approach. Age is the only one of the nine protected characteristics, contained in the Equality Act 2010, for which direct age discrimination can be justified. There is the need to ensure that the aim is legitimate in both social policy terms and in the application of that social policy to the individual circumstances of the employer concerned. Nevertheless a mandatory retirement age is possible where an employer can justify it as being so. The hurdles to be overcome are high, but this must be justifiable in terms of the potential impact of the justified discrimination upon the individual.

The UK Employment Law Review and Changes to Unfair Dismissal

Lisa Rodgers *

Introduction

This short article discusses the changes being brought in by the UK government as part of its Parliament-long Employment Law Review (running 2010-2015). The context of this Review is two-fold. Firstly, these changes arise in the context of the global economic crisis of 2008 and the need to promote economic recovery and “growth”. Secondly, these changes reflect the particular political aims and aspirations of the Conservative/Liberal coalition. In this Coalition, the Conservative party is in the majority, and so arguably has the opportunity to promote its favoured political goals of economic freedom and efficiency over other considerations (rights). Certainly, the promotion of economic efficiency and freedom is evident from the first two of the stated aims of the Employment Law Review. These are: to create a flexible labour market to support the UK economy which encourages job creation, and to ensure that the labour market is “effective” which will enable “employers to manage their staff effectively”.¹ The final aim of the Review, to create a “fair” labour market, does include providing a “strong foundation of employment protections”² and suggests that some consideration is to be given to rights, although the priority given to rights in practice will be examined in this article. This article will also discuss the balance and conflicts between all three aims, and the structure of the resulting

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¹ BIS, *Employment Law Review: Annual Update 2012*, 2012, 5.

² *Ibid.*, 5.

compromise in (selected elements of) the Employment Law Review. The content of the Employment Law Review is very wide ranging, but can be broadly separated into three (overlapping) areas. The first of these areas is reform of unfair dismissal law. This includes the extension of the qualification period for unfair dismissal from 1 to 2 years (already in force), the exemption from unfair dismissal legislation for small businesses and the reform of unfair dismissal procedures. The second area of reform involves the introduction of alternative dispute resolution mechanisms to ensure that, where possible, workplace disputes are resolved without recourse to the Tribunal system. The government plans to introduce a comprehensive system of mediation for the resolution of employment disputes, as well as facilitating the use of compromise agreements. It also intends to allow “protected conversations” between employers and workers (which cannot be used in any litigation between the parties) as well as introducing Tribunal fees and streamlining the Tribunal process. The third area of reform stems from the “Red Tape Challenge” to reduce the amount of statutory legislation which creates “onerous and unnecessary demands on businesses”³. As part of this element of reform, the government plans to review the obligations under the Agency Worker Regulations 2010 and the Transfer of Undertakings (Protection of Employment) Regulations 2006, and to consider reducing statutory consultation periods for redundancy.

The very wide ranging nature of the employment reforms means that it is impossible to deal with them all in the format of a short article. I thus intend to deal only with the reforms to the system of unfair dismissal. All three elements of the reform to the unfair dismissal system will be considered, although the second and third elements are connected (the introduction of compensated no-fault dismissal and the reform of discipline and grievance procedures) and will be considered together. It is hoped that an analysis of these (actual and proposed) reforms will provide an insight into the ethos and direction of the UK government and the possible impact that this will have on employment relationships in the UK.

³ V. Cable, *Speech to the Engineering Employers Federation* 23 November 2011 <http://www.bis.gov.uk/news/speeches/vince-cable-reforming-employment-relations> (accessed 9 May 2012).

1. Extending the Qualification Period

In its Response to the Resolving Workplace Disputes consultation (the Response),⁴ the government states that the major benefit of the extension of the unfair dismissal qualification period from one to two years from April 2012 would be the increase in business confidence to “recruit and retain staff”.⁵ This corresponds with the government’s aim to create a more flexible labour market which allows the “creation of jobs by making it easy to get people into work and stay in work”.⁶ However, it is difficult to see how in practice, greater flexibility for employers to hire and fire without fear of Tribunal claims will lead to job creation and retention. Indeed, one commentator has suggested that although deregulation and less job protection “encourages increased hiring during economic recoveries, it also results in increased firing during downturns”.⁷ Therefore the overall effect of such a measure is to make “employment less stable over the economic cycle, with little significant impact one way or the other on structural rates of unemployment”.⁸ Furthermore, if such a measure simply encourages a “hire and fire culture”, that might also decrease the willingness of employers to invest in staff, and manage them “productively”. Thus, there could be a conflict between the first aim stated by the government of achieving a “flexible” labour market whilst at the same time achieving the second stated aim: an “effective” labour market which allows productive workforce planning.

It is interesting to note that in the Response the government mentions the concerns raised by the majority of consultation respondents that the increase in the qualification period for unfair dismissal would reduce employee rights and have a disparate impact on particular groups.⁹ However, in relation to the first of these concerns, the government hardly deals with the issue at all, despite a “strong foundation of employment protections” being part of one of the government’s stated aims in relation to the reform. Rather, the government focuses on the “benefit for employees recruited into roles with a high training requirement”.¹⁰ The

⁴ BIS, *Resolving Workplace Disputes: Government Response to the Consultation*, November 2011.

⁵ *Ibid.*, 34.

⁶ *Ibid.*, 34.

⁷ J. Philpott, CIPD’s Chief Economic Advisor, quoted in *Coalition Employment Law Plans*, in *Employment Law Bulletin*, 2011, n. 105, 7.

⁸ *Ibid.*, 7.

⁹ BIS, *op. cit.*, 33.

¹⁰ *Ibid.*, 33.

government contends that if these employees are falling below the required standard then firms are likely to dismiss them before their qualification for unfair dismissal to avoid the costs associated with these claims. Thus, if the qualification period were extended, then workers would have a greater opportunity to meet the required standard and would be more likely to retain their job. This is a strange comment, and in fact suggests problems with business culture rather than employment law (i.e. businesses are more prone to “hire and fire” than invest in staff). It also suggests that the problem lies more with business understanding of the effect and implications of unfair dismissal law, rather than the length of the qualification period. The current law on unfair dismissal is supposed to act to protect an employer who dismisses an employee for genuine reasons of capability and who has followed the correct procedures in this regard. If employers feel that this option is not available to them, then this implies that the unfair dismissal laws are not working effectively and need to be amended, or that “business confidence” could be furthered without changing the law, by simply making employers aware of what they are and are not entitled to do.¹¹

In relation to the disparate impact that the increase in the qualification period might have on different groups, the government does deal with this in the Response. This is perhaps a reflection of the legal challenge to the two-year qualification period which was brought against the previous Conservative government on the grounds of disparate impact (indirect discrimination), and which reached the European Court of Justice.¹² In the Response, it is stated that according to the (Equality) Impact Assessment, the extension of the unfair dismissal qualifying period would not cause *considerable* disparity of impact on any particular group (and so the measure could not be indirectly discriminatory). In any event, the government states that (even if the measure were indirectly discriminatory) increasing the qualification period for unfair dismissal could be objectively justified on the grounds that it is a proportionate means of achieving the legitimate aim of improving business confidence to recruit and retain staff.¹³ Certainly, such an aim is likely to be considered “legitimate” as a similar aim was considered legitimate by the Court in the previous *Seymour Smith* case, but the proportionality of such a

¹¹ In fact the government has already attempted this in the creation of an Employers Charter. This is available at <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/E/employerscharter.pdf> (accessed 16 May 2012).

¹² *R v Secretary of State for Employment ex p Seymour-Smith* C-167/97 [1999] ECR I-623 ECJ.

¹³ BIS, *op. cit.*, 34.

measure was not tested in that case. Furthermore, whether there is “considerable” disparity of impact would depend on the statistical evidence at the time, and the government should be mindful of the findings of its Impact Assessment which suggest that young people and ethnic minority groups will be particularly affected by these new rules. Finally, the government claims that the changes to the unfair dismissal qualification period will mean a 4-7% reduction in Tribunal claims and a considerable cost saving for employers.¹⁴ However, it has been suggested that such cost savings have been exaggerated, and that in any event, they have not been properly balanced against the clear social costs to workers losing their right to unfair dismissal. Ewing and Hendy estimate that the increase in the qualification period for unfair dismissal will remove dismissal protection for 3 million workers.¹⁵ By contrast, the cost savings will be very modest, because unfair dismissal cases have a very low success rate in Tribunal, and the level of compensation awarded is modest.¹⁶ Therefore the social costs – including the disproportionate effect of such proposals on certain groups – outweigh the modest administrative cost savings.¹⁷

2. No-fault Dismissals and Procedural Reform

As part of the government’s overall review of unfair dismissal procedures, it suggests a system of “compensated no-fault dismissal” for businesses with fewer than 10 employees. Essentially this system would allow small businesses to dismiss an employee who was not “at fault” (i.e. had not been guilty of misconduct) without going through formal disciplinary processes, as long as that employee receives a set amount of compensation. Employees dismissed in this way would not be entitled to claim unfair dismissal at Tribunal, but could still claim other employment law rights. The government hopes that this will not only increase efficiency by reducing the number of unfair dismissal claims reaching the

¹⁴ BIS, *op. cit.*, 33.

¹⁵ K. D. Ewing, and J. Hendy, *Unfair dismissal law changes – unfair?* in *Industrial Law Journal*, 2012, vol. 41 n. 1, 115.

¹⁶ The average level of compensation for unfair dismissal last year was £4591. Ministry of Justice, Employment Tribunal and EAT Statistics 2010-11, available at <http://www.justice.gov.uk/downloads/statistics/mojstats/employment-trib-stats-april-march-2010-11.pdf>, 10.

¹⁷ K. D. Ewing, and J. Hendy, *op. cit.*, 117.

courts, but will address the particular problems that small businesses have in complying with unfair dismissal procedures.¹⁸ The government contends that these proposals will benefit both employees and workers, by striking “a sensible balance between the need to give workers enough support and clarity about what is expected of them” and the need of (small) employers to dismiss workers without “unnecessary red tape and bureaucracy”.¹⁹

There are a number of elements of these proposals which are perplexing. Firstly, the notion of “no-fault” seems very odd in this context, where clearly some culpability is suggested on the part of the employee. Secondly, it is strange that the government seeks to argue that this will strike a fair balance between the needs of employers and employees. It is hard to see this as anything other than a deregulatory measure and an erosion of employees’ rights. Thirdly, the “efficiency” basis of this measure can certainly be questioned. Evidently, it is possible to argue that this measure will give greater flexibility for (small) employers, but it appears that these changes have great potential to undermine job stability and will have a negative impact on productivity (through a much reduced investment in people).²⁰ Furthermore, it could certainly reduce the attractiveness to potential employees of working for small employers, if they realise that in doing so they will be entitled to far fewer employment rights. This can only act to undermine the productivity of these small employers, and mean that they fail to attract the best (and perhaps most innovative) people.²¹

In relation to these observations, the no-fault system of compensation is of course used (effectively) in order to provide compensation for medical accidents. This system therefore provides an interesting comparison with

¹⁸ The government cites two elements of the current ACAS Code on Discipline and Grievance, which are particularly onerous for small business in this regard. The first of these is the requirement for different personnel to run different meetings in the disciplinary process, and particularly that a manager not previously involved in the case should chair any appeal. The second onerous element is the requirement for a series of warnings before dismissal. The government suggests that this represents too much of a burden on small businesses, presumably because this takes up considerable management time (and there are a restricted number of managers and often no HR to deal with these). BIS, *Dealing with Dismissal and “Compensated No-fault dismissal” for micro businesses*, 2012, 8.

¹⁹ *Ibid.*, 4.

²⁰ *Ibid.*, 36.

²¹ M. Bradshaw, “Compensated no-fault dismissal: the case for and against.” 12 April 2012, available at <http://www.personneltoday.com/articles/2012/04/12/58472/compensated-no-fault-dismissals-the-case-for-and-against.html> (accessed 16 May 2012).

the system of compensated no-fault dismissals suggested in the Response. In the context of medical accidents, it has been argued that the success of the no-fault system is based on the fact that it more effectively meets the aims of tort than negligence litigation. This is because a greater number of people receive compensation than under negligence (receiving compensation does not rely on proving fault), and also the no-fault system prevents accidents by creating a “culture where doctors and other medical professionals are not afraid to admit where they have made mistakes”.²² However, it could be argued that the no-fault system will not be as effective in the context of employment law, because the aims and operation of employment and tort law are different. Employment law, in the context of unfair dismissal with which we are concerned here, seeks to remove the arbitrariness of dismissal through the imposition (on business) of legal standards. This is not only to boost the bargaining power of the weaker party, but also to maintain employment relationships where possible, in recognition of the social and economic value of employment. Under tort law, the (on-going) relationship between the parties is not so important, and so no-fault systems can successfully be introduced which distance the “victim” and “perpetrator” and remove the stigma of fault (compensation is paid through general taxation).²³ However, in the employment law context, the no-fault system is not depersonalised, and so the stigma of fault is not removed. Furthermore, such a system is unjust because it is no longer the employer who is judged by the required (and now non legal) standards, but the employee, so the system penalises rather than aids the weaker party.

In the Response, the government also suggests that small businesses (and businesses in general) would benefit from reform of unfair dismissal procedures as a whole. It therefore asks for stakeholder opinion on the current unfair dismissal procedures under the ACAS Code of Practice for Discipline and Grievance 2009. It also introduces the model of the Australian Small Business Fair Dismissal Code (SBDC) and asks for views on whether this model could be successfully applied in the UK. The SBDC sets out the basic principles that small businesses should take into account when considering “summary” or “other” dismissal. “Summary” dismissal is permitted where the employer believes on reasonable grounds that the employee’s conduct is sufficiently serious to warrant immediate dismissal. For “other” dismissals, the employer must give the employee a

²² M. A. Jones, *Medical Negligence*, Sweet and Maxwell, 2003, 36.

²³ T. Douglas, *Medical Injury Compensation: Beyond No-fault*, in *Medical Law Review*, 2009, vol. 17, n. 1, 30, 45.

reason why he or she is at risk of being dismissed. This must be a valid reason based on capability or conduct. The employee must be warned either verbally or in writing and given the chance to respond to the warning and a chance to improve. This might include providing training or making clear the employer's expectations. The employee has the right to be accompanied in any discussions which may lead to dismissal.

The SBDC certainly represents a watering down of the ACAS Code. For instance, the ACAS Code requires that notification of disciplinary issues must be in writing, an employee must have the opportunity of a meeting to discuss the problem, and every employee must be given the right to appeal disciplinary action. It also suggests a series of warnings for lesser conduct or capability issues rather than just the one warning in the SBDC. However, the introduction of the SBDC does have great advantages over the compensated no-fault dismissal system in which employees can be dismissed for "poor" performance without any warning or any chance to improve. It therefore perhaps provides a better compromise for small businesses and their workers than the compensated no-fault dismissal system.

3. Conclusions

It appears from the above discussion that the UK government has made and intends further wide ranging changes to employment law in the name of "efficiency". However, how far these aims consider "efficiency" beyond the cost savings of deregulation must be brought into question. It must also be questioned whether the government can sensibly maintain the argument that these changes will not affect the employment protections currently enjoyed by UK workers, given that in all of the elements of unfair dismissal reform considered in this article, the employment rights of workers have been, or potentially will be, seriously curtailed.

International Employment and Labour Law **by Jean-Michel Servais. A Review**

Christopher Leggett *

The International Labour Organisation (ILO) was the only agency of the League of Nations, formed in 1919 after the First World War, to continue as an agency of the United Nations, after the Second World War. The ILO's webpage *How the ILO works* specifies its purposes and maps the formal organisation through which it works: it is "responsible for drawing up and overseeing international labour standards" which are set by the annual International Labour Conference, and its main aims are "to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues"¹, but offers little about *how* it works.

The ILO is distinguished by its tripartite structure, to reflect the views of what today are called "the social partners", its executive is the Governing Body and its administrative headquarters is the International Labour Office in Geneva, and to some extent this structure is iterated at the regional level. Whether ratified or not, it is the ILO's conventions that are the main (but not the only) source of international labour law, the subject of Servais' 2011 monograph, *International Employment and Labour Law* which offers an informed insight into the role of the ILO in the generation, implementation and supervision of international labour standards and its attempts today to balance economic progress with social justice.

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¹ ILO, *How the ILO Works*, online, 2012.

In his account, Servais excludes indirect sources of international standards that are explicitly concerned with social justice, such as the International Covenants on Human Rights from *International Employment and Labour Law*, as beyond its scope, in order to focus on the ILO as the main source of international labour standards. As befits the bibliographical format of a ‘monograph’ *International Employment and Labour Law* is confined to a single topic, the ILO as a source of international labour law. Servais’ three reasons for becoming acquainted with international labour law (he does not specify by whom other than, tautologically, those researchers and practitioners already familiar with it) are the relationship with the legal instruments in force and with the scope of states’ obligations, the influence of the conventions and recommendations on the conduct and regulation of industrial relations, and its function as a benchmark for comparative labour law.

In keeping with the orderliness of an international bureaucracy and its manner of legal documentation the monograph is highly structured: paragraphs (1141 in all) are enumerated in one sequence throughout the text, and the chapters of each of the parts are divided into numbered sections, making it easy for those who might want to use *International Employment and Labour Law* as an encyclopaedic reference. Although Servais, who was an official in various roles in the International Labour Organisation (ILO) and the International Institute of Labour Studies (IILS) from 1972 to 2005, roles he has combined with a scholarly orientation, claims to have pitched *International Employment and Labour Law* at those already familiar with employment and labour law, it is quite understandable, but not easily read, by those of us for whom labour law is but one dimension of a broader framework of industrial and employment relations usually published in more of a narrative format. Its overall purpose appears to be to justify international labour regulation— noting the inequalities and conflicts generated by social and economic structural and technological change and acknowledging the difficulties of interpretation of the regulations. Servais argues that the need for international labour regulations is as valid now as it was when the ILO was founded.

Servais divides his monograph into three parts, four if you count the extensive “General Introduction” that is part historical, part contemporary and part the ILO’s constitutional framework, and which is followed by a “Select [but extensive] Bibliography”. Prophetically, a “Forward”—by Kari Tapiola, Executive Director, Standards and Fundamental Principles and Rights at Work, International Labour Office—is “to the First Edition” so presumably the publishers anticipate

future updates. Part I examines the ILO—its constitution and conventions—as the main of source of international labour standards, but also examines other sources, and analyses the clashes between them. Part II focuses on the substance of international labour law—freedom of association and social dialogue, labour and employment, and social security. The concern of Part III is with their supervision and promotion and with the difficulties of their implementation.

International Employment and Labour Law is exhaustive in detail, especially of the content of international labour standards and as such would serve as a vital reference for those for whom their practice and research of labour matters is focused on international labour standards, and includes the range of employment relations issues, from forced labour and foreign workers to the terms and conditions of employment.

Although it is an encyclopaedic source of ILO made international labour law *International Employment and Labour Law* is mindful of the economic and social dimensions of that law, and acknowledges the social clause dilemma that “straddles the borderline between law and economics”, as manifested for example in the 1998 Declaration of Fundamental Principles and Rights at Work that seeks to associate social justice with economic growth.

Servais acknowledges that the institutional economic and employment shift from international to global has lessened the control that the state and the national “social partners” have over the “social game” and wrestles with the consequent difficulty of the implementation of ILO labour standards. The interactions of the players have become more “transnational”, including regional, with the increase in multi-national employers and other transnational entities. This overarching source of difficulty in implementing ILO sourced international labour law is compounded by the difficulties of supervision (of implementation), and of evaluating the impact of labour laws. From this acknowledgement Servais proceeds to “new solutions” that include the aegis of the concept of decent work. “Decent work”, he writes, “as used by the ILO, seeks to group under one umbrella all the elements of harmonious economic and social development, of which protective labour rules are an essential component”. He quotes the retiring Director General of the ILO who as the visible proponent of the decent work campaign explained:

The goal is not just the creation of jobs, but the creation of jobs of acceptable quality. The quantity of employment cannot be divorced from its quality. All societies have a notion of decent work, but the quality

of employment can mean many things. It could relate to different forms of work, and also to different conditions of work, as well as feelings of value and satisfaction. The need today is to devise social and economic systems which ensure basic security and employment while remaining capable of adaptation to rapidly changing circumstances in a highly competitive global market.²

Finally, Servais suggests a new role for the ILO arising out of the increase in the insertion of minimum labour standards in legislation as well as in trade agreements. The expertise of the ILO and its “first-hand knowledge of development in less industrialized countries” make the ILO “an ideal neutral third party charged with examining the social provisions introduced in non-universal treaties”.

International Employment and Labour Law is not an easy work to read but it offers a wealth of detail and some interesting analyses that may serve the information requirements of researchers in the field of labour studies, regardless of their specialist foci, and provide a ready reference for labour lawyers, academic and practicing.

² J. Somavia, *Decent Work*. Report of the Director-General to the 87th session of the ILO, ILO, Geneva, 1999.

Online Resources

All issues of the *E-Journal of International and Comparative Labour Studies* comprise an online resources section, set up for documentary purposes and with the aim to implement and update the content of our publications on a regular basis.

The documents provided below are available in our international bulletins (www.adaptbulletin.eu) and in our A-Z Index (www.bollettinoadapt.it) and include:

- a) sources of law,
- b) relevant EU and international documentation,
- c) agreements and collective agreements,
- d) monographic works,
- e) studies and research reports.

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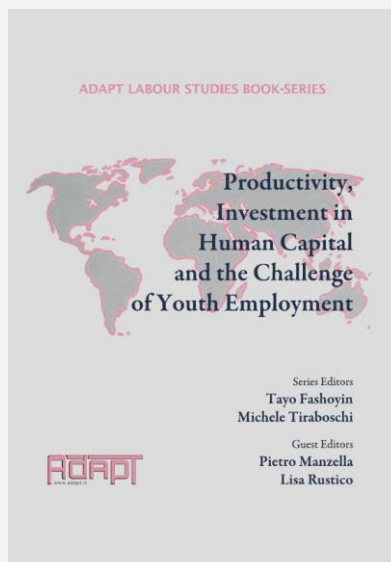
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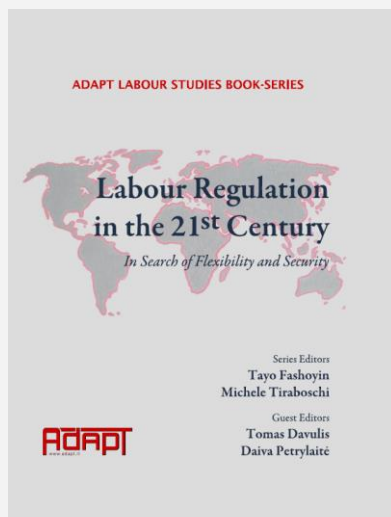
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III edition

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