L&E GLOBAL
employers' counsel worldwide

Employment Litigation: Procedures, Remedies and Best Practices

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Table of Contents

INTRODUCTION

For employers with operations in multiple jurisdictions, litigation over disputes related to employment matters is a very real concern, which applies to every sector of industry, in every region of the world.

EMPLOYMENT LITIGATION

Typical points of contention include discrimination, harassment, wage and hour violations, wrongful dismissal, breach of contract, as well as safety in the workplace violations, among others. However, while the issues that give rise to such claims are similar, the litigation process is unique to each jurisdiction. For instance, Australia, France and Sweden have designated specialized employment tribunals to oversee employment law claims. Conversely, in the United States and Canada, specialized employment courts simply do not exist. Moreover, some countries, such as Belgium and Germany, have different proceedings concerning individual claims arising out of an employment relationship and proceedings concerning the relationship between the employer and other employee representatives (e.g. the works council), referred to as 'collective disputes'. This distinction is important, as different procedural rules apply to each type of proceeding.

EUROPEAN UNION

To make things more complicated, employers with personnel inside the European Union are required to follow the laws of the Member States, EU regulations, and decisions of the Court of Justice of the European Union (CJEU), since EU law takes precedence over national laws. The litigation process for issues involving European Union directives is quite complex. Essentially, the procedure to challenge an EU directive requires a national court to question the CJEU on the interpretation or validity of the law. The reference for a preliminary ruling promotes active cooperation between the national courts and the CJEU and the uniform application of EU law throughout the EU. Here too, there is an important distinction regarding the party that may request the preliminary ruling. For example, most employers would fall under the category of private litigants or non-preferential plaintiffs (anyone other than Member States, the Commission, the European Parliament and the Council) and must demonstrate an interest in the outcome of the claim in order to request the annulment of a European act. In other words, the contested act must be addressed to the plaintiff or must concern him or her directly and individually.

ADR

Employers and employees faced with a long, drawn-out court battle, often utilize alternative dispute resolution (ADR) procedures to resolve the claim. The most popular forms of ADR include mediation, conciliation hearings and arbitration. ADR also varies greatly by region. In Norway, Romania and Switzerland, the law establishes a mandatory conciliation procedure before a claim can be filed with the courts. Following the conciliation hearings, mediation and arbitration remain available to both parties in order to resolve the issue before resorting to litigation. Over the years, mediation has become a popular alternative to resolve employment law disputes, especially in the United States, given the time, expense and potentially negative exposure of litigation. Meanwhile in Brazil, mediation is rarely used, except in conflicts related to collective bargaining.

APPEALS

Similarly, while all jurisdictions allow for some level of appellate review, the laws governing this procedure are extremely precise and detail everything from whether the decision can be appealed on points of fact or law, which party may appeal, the time frame to appeal, the required credentials for the attorney handling the appeal, as well as which decisions are indeed final and cannot be appealed.

TIPS

Defending a lawsuit can be time consuming, very expensive and can negatively impact the morale of the workforce, the company's public relations image as well as the company's financial stability. Therefore, the central pillars to avoid litigation or minimize the impact of litigation on the employer's business are: knowledge of the applicable legal sources which affect the individual employment relationship, a clear contractual basis for the individual agreements, and efficient dispute-management and documentation. The following 'best practice' policies are recommended for employers:

- draft complete and precise contracts, have them reviewed by an attorney and update them on a regular basis so they are in line with applicable legislation;
- create a proper personnel file for each employee and document shortcomings with written evidence and implement evaluation procedures;
- define work expectations and communicate with the employees and allow them - to the extent possible - to participate in decisions that affect them;
- where applicable, invest in social dialogue with the Works Council, the trade union delegation and the unions to avoid collective labor disputes or to have them settled promptly;
- seek legal advice at an early stage of a conflict or even before a problem arises;
- evaluate whether it may be preferable to settle the case out-of-court by means of a settlement agreement.

As indicated above, there are numerous scenarios, procedures and considerations involved in employment litigation and several ways an employer can minimize the risk of litigation. For these reasons, L&E Global has created this international guide in order to provide our clients, HR professionals and academics an introductory analysis of the litigation process throughout the globe.

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AUSTRALIA

I. Overview

a. Introduction

In Australia, litigation over employment or labour issues takes a variety of forms and is very common. While labour law is often seen as the "poor cousin" of areas such as commercial law, it would not be an exaggeration to say that the workplace environment is central to the Australian culture and quality of life, and that without the benefit of employment and labour law Australian society would be very different.

In order to understand the way that employment litigation in Australia takes place, it is important to note that Australia operates as a federation, with two separate but connected levels of government with their own courts and legal systems. Thus, there is a Commonwealth (federal) system of government sitting alongside systems for each State (Queensland, New South Wales, Victoria, Tasmania, South Australia and Western Australia). There are also separate legal systems and courts for the relevant Territories (the Australian Capital Territory and the Northern Territory), which, while not having full recognition of States, nevertheless have a degree of autonomy and their own legislatures. Under Australia's Constitution, there are powers that are given to the Commonwealth Government alone (for example, defence) and powers that are shared with the States. Where powers are shared, the Constitution provides for resolution of any conflict between State law and Commonwealth law by providing for the priority of the federal law. Where the Constitution is silent, the power resides exclusively in the States. The Constitution created the High Court of Australia and granted extensive powers over Constitutional issues that arise in any part of Australia, as well as acting (subject to leave in appropriate cases) as an appellate court sitting at the apex of the Australian legal system. The Constitution also allowed the Commonwealth to create federally based courts, which the Commonwealth Parliament has done. Two (the Federal Court of Australia and the Federal Circuit Court) are particularly relevant to employment matters, because they have jurisdiction to deal with certain employment related issues. The system of Courts in Australia is discussed in detail below in Section (d).

There are provisions under the Australian Constitution to allow States to refer their powers to the Commonwealth. This referral power is important, because from January 2010 the majority of States referred a large part of their industrial relations power to the Commonwealth. However, the referral was not universal nor complete: for example, States generally retained the power to regulate the employment conditions of their own Government employees, and in some cases, retained the right to regulate local government (the third tier of government in Australia).

The result is that employment litigation in Australia can be undertaken in both Federal and State jurisdictions, and can be governed by legislation made either by the Federal Parliament, or by a State Parliament, or indeed can be taken under the common law, a system of judge-made law that Australia inherited from its British beginnings. The result is at times a bewildering array of potential causes of action, in an equally bewildering choice of venues, including federally-based courts operating under the Australian Constitution, tribunals created by Federal Statutory law, common law based Supreme Courts in each of the States, District or County Courts (the title varies from State to State); Local Courts or Magistrates Courts (again, titles vary); in some States statutory-based specialist courts (such as Industrial Courts or Industrial Magistrates) as well as a variety of tribunals created under State legislation. To add to the complexity, some State Courts (Supreme Courts, for example) can exercise federal jurisdiction in some matters (federal statutes can confer federal jurisdiction on State courts, for example), and some federal courts can exercise common law jurisdiction (the Federal Court, for example, when dealing with a statutory claim under Commonwealth legislation, can also deal with a related common law claim (such as breach of contract) under what is referred to as its

accrued jurisdiction). In an attempt to reduce the incidence of related matters running under both State and federal systems, cross-vesting legislation is also available, allowing one court to refer or take up litigation commenced in another jurisdiction.

Employment or labour-related litigation not only functions under a choice of systems, but can cover a variety of topics. At the highest level, for example, the High Court of Australia can deal with fundamental issues of whether an employment statute is validly enacted under the Australian Constitution. At the other extreme, the industrial tribunals can deal with a claim by a single individual that he or she has been unfairly dismissed, or has not been paid his or her entitlements under an industrial instrument, no matter how small the claim. Types of claims available in Australia are discussed in more detail in Section (b).

b. Claims

Australian law recognises various labour and employment law claims. Note that many claims overlap and can be brought in more than one jurisdiction (see Section (d) for the Court system in Australia, as well as noting the Introduction in Section (a) above). Claims can be combined in most jurisdictions: for example, a single claim could involve allegations of breach of contract, negligence, underpayment of wages and statutory entitlements and discrimination. In appropriate circumstances, such a combined claim could be brought before a State or a Federal Court, and could be taken at a lower or intermediate court level (such as a Local or Magistrates Court Level, or a District or County Court Level) or at a Superior Court level (such as a Supreme Court of a State). The following lists the main areas where claims can be brought, but it does not purport to be a closed list.

Constitutional issues and the settlement of legal issues on ultimate appeal

While in some sense the resolution of constitutional questions, and settling legal issues (such as declaring what the common law is in Australia, and providing an ultimate decision on the interpretation of an employment statute) are not separate "claims" under Australian labour or employment law, they are listed separately because in the history of Australian industrial relations, the role of the High Court, and the role of constitutional questions in particular, has been very important. While the High Court is not the only Court capable of answering questions about the Australian Constitution, it is the ultimate Court that deals with such questions, and the ultimate court of appeal in the Australian legal system, and it has been extremely influential in the development of Australia's industrial system.

Historically, the States dealt with the bulk of employment and industrial systems, because the Australian Constitution gave to the Commonwealth Parliament the power to deal with "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State". Such an approach to the legislative power limited the Commonwealth power as any industrial or employment issue that was internal to a State was exclusively the domain of State law, and so dual State and Federal systems operated alongside each other over that time. Over the years, there has been significant litigation over whether various forms of legislation at both State and Federal levels were valid exercises of power, and jurisprudence over such an approach was shaped by the High Court for nearly a century.

Following some decisions of the High Court that suggested an alternative approach may be possible (for example, the outlawing of secondary boycotts under Australia's then *Trade Practices Act* was based on the corporations' power and had held to be valid by the High Court, as was the statutory scheme in 1996 which included provisions for enterprise flexibility agreements, certified agreements and unfair dismissal remedies)

the Commonwealth Parliament in 2005 changed the focus of the federal industrial legislation by relying, not on the conciliation and arbitration power, but on the power given to the Commonwealth in the Australian Constitution to legislate for various types of corporations (trading, financial and foreign corporations). The States and some trade unions challenged the Constitutional validity of the legislation and in late 2006 (in *State of New South Wales v Commonwealth of Australia*) the High Court held by a majority that legislation based on that power was valid, giving a very wide reading to the use of the corporations' power. This power extended to:

- the regulation of the activities, functions, relationships and the business of a corporation
- the creation of rights, and privileges belonging to a corporation
- the imposition of obligations on a corporation.

This meant the Commonwealth could:

- regulate the conduct of those through whom a corporation acts, including its employees
- regulate those whose conduct is, or is capable of, affecting its activities, functions, relationships or business (including trade unions).

Following a change of government, new federal industrial legislation (the current *Fair Work Act 2009*) was introduced. This legislation continued to be based on the corporations' power, but was amended to allow States to also refer their industrial relations powers to the Commonwealth (an invitation that was largely accepted), thus broadening the powers of the Commonwealth in the area of employment and industrial relations even further.

Nevertheless, there have been, and no doubt will be, challenges to particular provisions of the legislation on the basis that it is prohibited by the Constitution. As such, it will remain an important part of the industrial and employment landscape in Australia, even if its use is less than when industrial relations was based on the conciliation and arbitration power.

Common law based claims

Many claims in the employment and industrial relations sphere in Australia can be the subject of claims under Australia's shared common law heritage. This can be as simple as a claim for breach of contract, or a claim for damages based on wrongful dismissal. Claims can be for breach of express terms of the contract of employment, or for terms implied at law, such as the term that requires an employer to provide a safe system of work. Such claims can be founded not just in contract, but also in tort. Claims, for example, could be based on the tort of negligence. Further remedies can include specific performance, equitable damages, declaration and injunctions.

Union activity can be curtailed by reliance on the ancient tort of intimidation and nuisance, for example. Torts of deceit and injurious falsehood are occasionally pleaded in the Australian Courts, and even matters such as trespass to the person will be seen from time to time in matters such as sexual harassment cases. The "economic torts", particularly allegations of interference with contractual relations, will regularly be the subject of disputation when an employee leaves one employer and seeks to work for a competitor.

Claims based around personal injury

It is possible for employees in Australia to make a claim based on personal injury caused by the workplace. Such claims can be made under several causes of action, and can

be brought relying on either the wrongful conduct of the employer, or the wrongful conduct of another employee, where there is a sufficient connection to the employment (vicarious liability).

Firstly, as noted above, employees can take common law claims based on negligence, potentially coupled with a claim based on breach of the implied contractual term that the employer will take reasonable care of the health and safety of the worker. This may also be combined with a claim based on breach of a statutory duty of care imposed by the Work Health and Safety Acts in place in the various Australian jurisdictions. Such claims are typically heard in the civil courts (Supreme Court of a State, or a County or District Court).

Secondly, there is in each Australian jurisdiction a form of non-fault insurance for employees who are injured at work, usually referred to as Workers Compensation. These differ from jurisdiction to jurisdiction, but typically involve a form of weekly payment to injured workers and a rehabilitation system to return injured workers to their employment as soon as possible. Such claims are dealt with in various statutory tribunals or bodies. Legal involvement in such systems is highly regulated, and as such tends to be the domain of specialist firms, which do not necessarily deal with other employment related work. Note that the legislation around workers compensation will often impose conditions on employees taking common law actions in relation to a workplace injury. Amounts of compensation under such statutory schemes are modest in comparison with common law damages.

Thirdly, damages for personal injury can be claimed as part of damage flowing from other forms of statutory relief. For example, an employee who has been the subject of sexual harassment and whose health has been injured as a result (for example, they may suffer a permanent psychiatric condition as a result of the treatment to which they were subjected) may claim, as part of the compensation, damages for that personal injury.

Fourthly, there are a variety of provisions in employment and industrial statutes that relate to employees who are ill or who suffer an injury at work. For example, most workers will be covered by the Commonwealth *Fair Work Act*, which in effect prevents termination of employment for reasons relating to short-term illness or disability (that is, where the absence is less than three months). All jurisdictions provide for a form of paid leave when an employee is unfit to work. Under the *Fair Work Act* it is a civil offence, and the employee is given a statutory right to claim compensation, if the employer takes any form of adverse action because the employee claims such leave (or any other workplace right). Other jurisdictions also make additional provisions: in New South Wales, for example, there is a provision that allows an employee injured at work who has been dismissed to seek reinstatement following his or her recovery.

Where a third party wrongfully injures an employee and the employer suffers loss of the employee's services, the employer also has a cause of action against the third party for the loss of services (the ancient tort action per quod servitium amisit). A number of the States have statutory limitations on such actions.

Statutory claims involving dismissal or other action against employees

As well as common law claims for wrongful dismissal, the various jurisdictions in Australia provide for statutory claims relating to dismissal (and in some cases, other forms of adverse action) of employees.

The *Fair Work Act*, for example, contains provisions that give certain persons who have been dismissed a remedy for any dismissal from employment that is "harsh, unjust or unreasonable". There are limits on the action: it must, for example, be a case of

termination at the initiative of the employer (and so, not, for example, a resignation); there must be minimum periods of service (depending on whether the employer was a small business or not, 12 months or six months), there are monetary caps (currently $133,000 salary per year, though this is indexed each year) unless the person is also covered by a Modern Award (a form of subsidiary legislation made by the Fair Work Commission under the *Fair Work Act*) that sets out terms and conditions of employment) and the termination is not a genuine redundancy (defined in turn in the Act itself to require consultation and other steps as well as it being objectively a case of redundancy).

The *Fair Work Act* also prohibits what is referred to as "adverse action". Under these provisions, an employee is given the right to make a claim (and the employer can be prosecuted for a civil breach of the *Fair Work Act*) if they are subjected to forms of "adverse action" resulting from the exercise of any "workplace right". It applies to employees and to others with a workplace right, such as independent contractors. A workplace right is defined broadly, and will cover claiming benefits under an industrial instrument or a workplace law, having the ability to participate in industrial proceedings, being able to make a complaint or inquiry either under a workplace law or industrial instrument or under the contract of employment. It is also adverse action to take various forms of discriminatory action against an employee (see below). The adverse action provisions are based on freedom of association provisions in earlier legislation, which prohibited action against employees because of union activity, but are now much broader and are proving to be fertile ground for claims by employees. The jurisprudence around these provisions is still not settled.

Both forms of action, unfair dismissal and adverse action, have short limitation periods, 21 days from termination of employment.

A reasonably recent amendment to the *Fair Work Act* has seen the introduction of an anti-bullying jurisdiction, where an employee who claims to have been bullied at work can seek orders from the Fair Work Commission that the bullying stop. This form of claim does not allow for an award of compensation.

State jurisdictions have similar statutory rights to seek reinstatement if a dismissal is unfair (now of limited significance, as most employees will be covered by the Federal system. State systems remain of significance for State public servants, and in some jurisdictions, employees of local government). Some States have specific provisions that supplement the bullying jurisdiction of the Fair Work Commission. Victoria, for example, amended its *Crimes Act 1958* to insert section 21A, extending the definition of stalking to include bullying behaviour such as making threats, abusive language and offensive words. The *Personal Safety Intervention Orders Act 2010* (Vic) contains mechanisms for people who have suffered from behaviour which is often associated with bullying including: assault, harassment, serious threats and stalking to obtain an intervention order.

Claims based around prohibited discrimination in employment

In Australia, unlawful discrimination is prohibited by legislation at the federal, state and territory levels, with discrimination law providing employees with rights, remedies and redress for prohibited conduct arising during their employment.

Prohibited discrimination at the Federal level

At the federal level it is unlawful to discriminate against a person on the grounds of sex, race, disability and age. Legislation includes:

- Sex Discrimination Act 1984
- Racial Discrimination Act 1975

- Disability Discrimination Act 1992
- Age Discrimination Act 2004

As an example of how the legislation works, under the Disability Discrimination Act it is unlawful for an employer or person acting or purporting to act on behalf of the employer to discriminate against a person on the ground of their disability in the following circumstances:

- in the arrangements made for determining who should be offered employment
- in determining who should be offered employment; and
- in the terms or conditions in which employment is offered.

Discrimination can be "direct discrimination" or "indirect discrimination". Direct discrimination arises when a person is treated less favourably because of his or her attribute than a person without that attribute would be treated in the same circumstances. Indirect discrimination occurs where a requirement, condition or policy that appears on its face to be neutral operates in practice in a way which impacts less favourably on a particular group because they have the relevant attribute.

There is no specific prohibition on the grounds of religious belief in any of the federal acts governing discrimination law. However, protection against such discrimination is a human right explicitly guaranteed by Article 26 of the *International Covenant on Civil and Political Rights*. The Covenant is a Schedule to the *Australian Human Rights Commission Act 1986* (Cth) which enables the Australian Human Rights Commission to inquire into a complaint of discrimination on the ground of religion in some circumstances (where the conduct is committed by the Commonwealth or its agencies). The Human Rights Commission can also "inquire into any act or practice, including any systemic practice that may constitute discrimination" where discrimination has the same meaning as used in the ILO Convention Concerning Discrimination in Respect of Employment and Occupation (No 111,1958) (any distinction, exclusion or preference made on any basis, including race, colour, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation) but this power does not extend to grounds already covered by the four federal anti-discrimination Acts, and the Human Rights Commission is limited to investigating a complaint and attempting to resolve it via conciliation.

Under the *Fair Work Act* an employer must not take an adverse action against an employee because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin. Adverse action includes dismissal, injury alteration of position and discrimination between employees.

Prohibited discrimination at the State level

The laws in the States and Territories generally prohibit discrimination on a much broader range of grounds than the Commonwealth legislation. By way of example, the *Anti-Discrimination Act 1977* (NSW) prohibits sexual harassment of employees, sex discrimination, discrimination on the grounds of marital or domestic status, discrimination on the ground of disability, discrimination on the ground of a person's responsibilities as a carer, discrimination on the ground of homosexuality and age discrimination. In relation to Queensland, the *Anti-Discrimination Act 1991* (Qld) prohibits discrimination in work and work related areas on the grounds of sex, relationship status, pregnancy, parental status, breastfeeding, age, race, impairment, religious belief or religious activity, trade union activity, lawful sexual activity, sexuality, family responsibilities, and association with a person identified on the basis of these attributes. Victoria has a similar scheme under the *Equal Opportunity Act 2010* (Vic) which prohibits discrimination in

employment for the following reasons: age, breastfeeding, employment activity, gender identity, disability, industrial activity, lawful sexual activity, marital status, parental status or status as a carer, psychical features, political belief or activity, sex, sexual orientation, personal association with a person who identifies with one or more of these attributes. Victoria also has a broad protection of human rights under its *Charter of Human Rights and Responsibilities Act 2006* (Vic). This allows for enforcement of human rights on a broader level.

Recovery of employee entitlements

Employees can claim work-related entitlements in a variety of ways. As noted above, there is a provision for a simple claim for breach of contract should an employer fail to pay employees their entitlements.

In addition, in Australia, many entitlements find their source in some form of regulated industrial instrument. Modern Awards, for example, are a form of delegated legislation made by the Fair Work Commission, and contain rates of pay and conditions for a variety of industries. Employees can also enter into collective agreements ("enterprise agreements") which are approved by the Fair Work Commission and registered under the *Fair Work Act*. Further, the *Fair Work Act* itself provides for minimum employee entitlements (the National Employment Standards), such as parental leave and related entitlements, annual leave, personal carer's leave and compassionate leave, community service leave, public holidays, notice of termination and redundancy pay. For entitlements arising under the Act or under an industrial instrument, action can be taken as a statutory claim, before either the Federal Court, the Federal Circuit Court, or an eligible State court (a District, County or Local Court, a magistrates court, the Industrial Relations Court of South Australia or the Industrial Court of New South Wales).

The legislation provides for a simplified procedure for "small claims", where the amount in question is under $20,000.

Claims around work health and safety

Where there has been a failure to take care of a worker's health and safety, the worker may have a variety of remedies. As noted above, the law in Australia implies a duty of care as a term of a contract of employment, and a failure to take care of the employee's safety can give rise to claims for breach of contract as well as in negligence.

Most Australian jurisdictions have adopted harmonised work health and safety laws (those jurisdictions which have not adopted the harmonised legislation nevertheless have similar statutes), which impose high levels of obligation on those conducting a business or undertaking to take reasonable care to ensure the health and safety of those working in the business or undertaking, as well as other people (such as visitors to the workplace). Significant penalties apply to breaches of these obligations, and the regulatory bodies in each jurisdiction are active and regularly prosecute for breaches. While the various work, health and safety statutes do not give employees a direct right of action, failure to abide by the work, health and safety legislation (in particular, failure to follow prescribed safety guidelines published from time to time under the legislation) will be available as evidence to an employee considering action, for example, in negligence.

Collective disputes and other representational action

Unions and employer bodies, and to a lesser extent, collective groups of employees, have access to the Fair Work Commission (and the courts where appropriate under

the legislation) in a variety of circumstances related to the negotiation of industrial conditions. Such circumstances include:

- making of, and review of, modern awards. The *Fair Work Act* provides for the Commission to make, and review on a regular basis, Modern Awards that govern pay and conditions within a particular industry. The Act makes provision for employers and unions to take part in such reviews by making submissions (including if necessary calling evidence). There are also provisions for regular review of superannuation provisions in awards.
- enterprise agreement making and bargaining generally. The *Fair Work Act* makes provisions for employees to make collective agreements concerning their conditions of employment. Unions (and others) can be appointed to assist as bargaining agents. As well as seeking approval of the agreement (or opposing registration, as the case may be) there are provisions for other forms of application related to the bargaining process. For example, if there is concern that the parties are not bargaining in good faith, another party can seek a bargaining order, or where there is a breach of that order, a serious breach declaration. There is a provision for an application to be made to the Commission to deal with a bargaining dispute.
- low paid employees. There is a provision for the Commission to make a declaration in relation to low paid employees, who have not historically had the benefits of collective bargaining.
- workplace determinations. These can be related to low paid workers, industrial action, or workplace bargaining.
- minimum wages and equal remuneration.
- protected industrial action. Under the *Fair Work Act*, certain industrial action is legal. Unions can make application in relation to such action, including seeking a ballot to approve such action.
- dealing with disputes. While the ability of the Federal Commission to deal with an industrial dispute is limited, the Act provides for the Commission to deal with disputes in accordance with the dispute settlement process set out in the enterprise agreement (or in default, a model clause set out under the Act).

Under State systems (now largely irrelevant to most employees in this respect), the ability to approach the State Commissions is much broader. For example, a union or an employer can under the New South Wales Act notify an industrial dispute whenever the circumstances made it likely that there could be some form of industrial action. This often took the form of a simple letter to the Industrial Registrar but could even be a phone call giving the important details. The Registry will record the necessary facts and alert the President of the Commission, who will then allocate the matter to a member of the Commission. A compulsory conference will then be convened, again by telephone. This represents a much more interventionist approach than currently adopted federally.

Intra-union and inter-union disputes

Trade unions and employer organisations in Australia that wish to participate in the industrial relations system are generally required to be registered. Most States, and the Commonwealth, provide for registration of unions and industrial associations. Some Acts, such as the Commonwealth's *Fair Work (Registered Organisations) Act 2009*, provide for incorporation of industrial bodies. While far less important than it once was, no survey of forms of action in the Australian industrial relations system would be complete without noting that disputes within unions and between unions can be taken before the industrial tribunals and courts in Australia. Many of these cases have involved significant legal issues, and have been complex and sometimes related to intractable problems within the labour movement. Examples of types of actions include:

- challenges to registration. Union registration in Australia generally discourages more than one union being formed in relation to the same area, and imposes a test (usually you cannot register a new union if the proposed members can "conveniently belong" to an existing registered union).
- demarcation disputes. When two or more unions claim coverage over the same area of work, disputes between the unions can often end in litigation. The various jurisdictions in Australia make provisions for the resolution of such disputes. This can be both at the instigation of one or more of the unions involved, or by an employer affected by the dispute.
- challenges to union elections. Legislation allows for challenges and inquiries into union elections to be conducted.
- membership issues. While membership is no longer as important as it once was, the legislation contains provisions for employees denied membership, or members whose membership is being removed, to challenge such decisions.
- State and Federal Branch disputes. Unions that are registered federally can be organised into State branches. Some States have separate systems of registration, and so a State union and the State Branch of a Federally registered organisation can claim the same members and assets. While once a common source of dispute, these have largely been resolved by provisions in the Fair Work (Registered Organisations) Act that allow for complementary registration.
- Deregistration proceedings. Where a union has become defunct, or, more importantly, has been involved in improper conduct, there may be proceedings in the nature of a show cause summons, related to deregistration of that union. These are rare applications.
- Right of entry issues. Union officials are given by statute certain limited rights to enter workplaces, for either the exercise of rights to converse with members or potential members, as well as to investigate suspected breaches of legislation (both industrial and work health and safety legislation). There are provisions that allow challenges to right of entry, for remedies for refusal to allow right of entry, and for cancellation of rights in the event of misuse or abuse of the rights.

Prosecutions

Many provisions in Australia's industrial legislation provide for penalties. For example, failure to pay prescribed wages, or taking adverse action against an employee, will not only allow the employee to recover the entitlements, but will open the employer to prosecution for breach. Often, the provisions will make it clear that the penalties are civil penalties, and though large fines may be involved, successful prosecution will not involve conviction for a criminal offence. Prosecutions can be launched by various regulatory bodies (for example, in the Federal system, the Fair Work Ombudsman (see below), but also, in some cases, by unions on behalf of their members.

As well as offences under industrial legislation, there are other relevant offences: for example, under the various Work Health and Safety Acts.

c. Administrative Agencies that Investigate or Adjudicate Claims

There are a number of administrative agencies that will investigate claims. In the Commonwealth arena, the Australian Constitution prevents an administrative body from also holding judicial functions, and so administrative agencies will not hold adjudicative powers or functions. This limitation does not exist at the State level, and so it is possible, for example, that an Industrial Relations Commission of a State could have both an administrative and a judicial role.

Commonwealth bodies include:

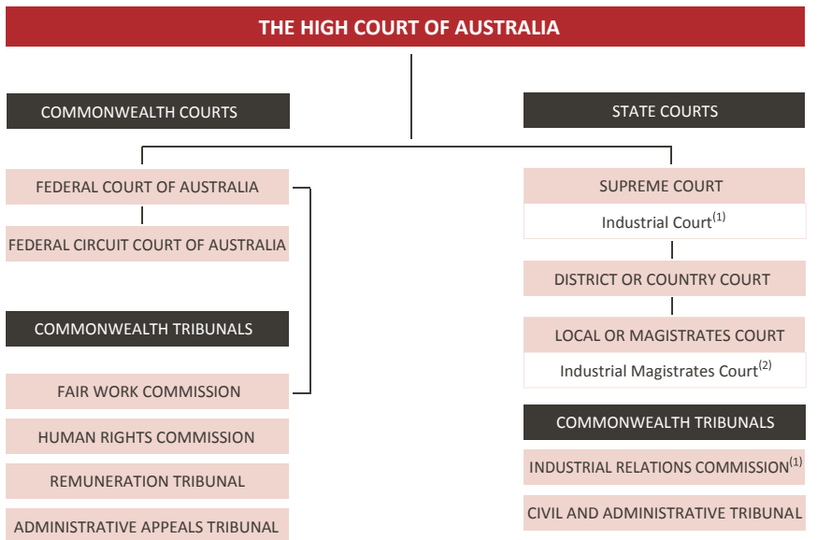
- The Fair Work Ombudsman, legally separate to the Fair Work Commission despite the similar name, is charged with promoting workplace compliance with awards, enterprise agreements and other statutory obligations. It has inspectors who investigate and if necessary prosecute workplace breaches.
- The Australian Human Rights Commission is authorised to investigate complaints of discrimination, harassment and bullying under federal laws on the grounds of: sex, disability, race and age. Further grounds are made available for employment complaints, including: sexual preference, trade union activity, criminal record, political opinion, religion or social origin. Complaints can be resolved through conciliation. If the matter cannot be resolved, the Commission issues a certificate to that effect which entitles the complainant to commence action in the Federal Court or the Federal Circuit Court.
- Fair Work Building and Construction is an Australian Government agency responsible for ensuring workplace laws are followed in the building and construction industry. It gives workers and employers information about their rights and responsibilities, investigates issues of non-compliance with workplace laws in the building and construction industry (in particular, breaches of the Building Code, and eventually, when implemented, the Fair and Lawful Building Sites Code 2014) and takes legal action when those laws are breached. It is very active in its prosecution role.

At the State level, each State has different tribunals that cover a variety of issues. For example, some States will have industrial inspectors, who carry out investigation of allegations of breaches of industrial laws, and under Work Health and Safety legislation, the States all have regulators (usually the WorkCover authority) which will investigate breaches of the work health and safety laws. Each State has a tribunal that covers issues of discrimination (see Section (d) below).

d. Court / Tribunal System

As noted above, there are concurrent court and tribunal systems in Australia, because power is shared between the Commonwealth and the States. The system is illustrated in Diagram 1:

THE AUSTRALIAN COURT SYSTEM AS RELATED TO INDUSTRIAL RELATIONS AND EMPLOYMENT



1) In some states, there is a separate Industrial Court, usually of Supreme Court Status. in some juridictions, it is combined with the Industrial Relations Commission of that State. There is sometimes a direct appeal to the State Supreme Court, other times the Supreme Court will simply exercise supervisory juridiction.
2) Some States also have a separate Industrial Magistrate Court system

The High Court of Australia sits at the apex of the system, having both original and appellate jurisdiction granted by or under the Australian Constitution. It is the court of ultimate resort for both the Commonwealth system and the State systems.

In the Commonwealth system, there are two main courts that deal with industrial relations and employment matters. The Federal Court of Australia and the Federal Circuit Court (previously the Federal Magistrates Court) deal with various issues under the *Fair Work Act*, and under human rights legislation more generally. It is not their sole area of work. Federal tribunals include the Fair Work Commission, which is the main industrial tribunal in Australia. It has members at various levels, and exercises a broad range of powers, from setting award rates and conditions of employment, approving enterprise bargaining results in the form of enterprise agreements, to adjudicating on unfair dismissal claims, conciliating adverse action claims and dealing with industrial disputation. The Human Rights Commission is charged with dealing with complaints about breaches of the various discrimination Acts, as well as having an educative role in that area. The Remuneration Tribunal sets pay rates for a variety of officials in the Federal Public Service. The Administrative Appeals Tribunal has broad jurisdiction to

review administrative acts by the Commonwealth, but also deals with claims in relation to workers' compensation in the Commonwealth area.

It should be noted that because of the Australian Constitution, it has been held that the Commonwealth Government cannot bestow both administrative and judicial power on the same body. Judicial power can only be granted to a court that complies with the requirements (express and implied) under Chapter III of the Australian Constitution. It is for that reason that some tribunals can conciliate a dispute (for example, the Human Rights Commission) but if conciliation fails, the tribunal then issues a certificate saying that conciliation is at an end, allowing the parties to file more formally in the Federal Court or the Federal Circuit Court.

In the States, there are a variety of approaches, but in essence, the States will each have a Supreme Court, of unlimited jurisdiction subject to the Australian Constitution, with both civil and criminal jurisdictions, together with a separate Division of the Court that functions as a Court of Appeal (and sometimes a separate Court of Criminal Appeal). Under that will be intermediate courts (District or County Courts), with a monetary cap on the claims that can be awarded, again exercising both civil and criminal jurisdiction. Under that are Local or Magistrates Courts, where large numbers of smaller matters are dealt with. Each of these levels can deal with some employment aspects: for example, unpaid wages or breach of contract claims could be taken at each level (though there are monetary limits to consider on a practical level).

Also, the States traditionally have had their own industrial tribunals, and often (because the separation between administrative bodies and judicial was not a requirement under State law) the functions of industrial tribunal and industrial court were combined in the one body (though only those qualified for appointment as a judge sat when the tribunal was constituted as a court). Traditionally, these State systems were very influential in the national system of industrial relations, but with the transfer of industrial power to the Commonwealth, the importance has declined. Thus, for example, in New South Wales, there is the Industrial Relations Commission of New South Wales, whose judicial members alone constitute the Industrial Court of New South Wales. In Queensland, the Queensland Industrial Relations Commission has jurisdiction under the *Industrial Relations Act 1999* (Qld) in relation to industrial matters. These matters can be heard on appeal in the Industrial Court of Queensland. The Industrial Court of Queensland also has jurisdiction to hear appeals from the Industrial Registrar or Industrial Magistrates. In Western Australia, the Western Australia Industrial Relations Commission hears matters under the Industrial relations Act 1979 (WA) by arbitration or conciliation.
The decisions from this Commission may be heard on appeal in the Western Australian Industrial Appeal Court.

The States also have tribunals that can deal, inter alia, with discrimination claims. In most cases these are along the lines of the Civil and Administrative Appeals Tribunal. In some cases, there is something like an Anti-Discrimination Board or an Equal Opportunity Commission which will deal with complaints in a similar way to the Human Rights Commission at the Federal level, with powers of referral or appeal to the Administrative Tribunal.

e. Alternative Dispute Resolution (ADR)

Alternative forms of resolution are actively encouraged in virtually all forms of employment and industrial litigation. In the Fair Work Commission, for example, conciliation is a compulsory process and often the first step (for example, an application for relief from unfair dismissal will be referred to a conciliator before the matter is listed for hearing or even directions). Under court rules that apply to most of the courts discussed above, the Court can direct parties into mediation. Typical of the provisions

is section 26 of the New South Wales *Civil Procedure Act 2005*, which provides that if it considers appropriate, a court may refer any proceedings for mediation, whether or not the parties consent. Section 27 provides that it is the duty of the parties to participate in the proceedings in good faith. Federally (under the *Civil Disputes Resolution Act 2011*, for most proceedings (but not for proceedings under the *Fair Work Act*, presumably because firstly, the limitation periods can be too short to allow such steps, and because there is already conciliation as part of the Commission's standard way of dealing with matters) it is necessary to file with the initiating documents a "genuine steps statement", which must set out "the steps that have been taken to try to resolve the issues in dispute between the applicant and the respondent in the proceedings", or if no steps have been taken, the reasons for that inaction.

The industrial tribunals in particular have a long history of resolution of industrial issues by conciliation, with a well-developed and well understood system of referral to a conciliator at an early stage of the case.

As a matter of practice, even where there are no rules mandating conciliation, courts will often steer parties towards a form of alternative dispute resolution should the court come to a view that there may be a better outcome for all through such a process. Thus, in the Federal Court, the Registrars are trained mediators and the Judges will frequently require parties to take part in what is a well-regarded, and frequently successful, mediation process.

In addition to anything that the courts may direct, it is common, and increasingly so, for parties to seek assistance from an independent mediator as an alternative to litigation.

II. The Litigation Process

a. Typical Case

Given the complexity of the systems available to parties in the industrial and employment arena, it is not possible to give a single description to the litigation process. While there may be similarities between litigation in the Supreme Court of a State and the Federal Court, for example, there will also be differences, flowing from different legislation and court rules, and different ways of approaching litigation in each court. It is possible to give a general overview, but it will be necessary to refer to specific court rules in every case if running actual litigation.
It should also be noted that the procedure for say, an application for recovery of a civil penalty will differ significantly from the process adopted in an award review matter. Prosecutions will have no discovery process. For example, there will be no mediation or conciliation, and the rules of evidence will be strictly applied.

Further, it is true, but an oversimplification, to say that the process is simplified in the industrial tribunals. An extreme example is notifying an industrial dispute under the New South Wales system, where a simple phone call to the Industrial Registrar can commence a complex series of compulsory conferences aimed at settling the dispute. Outside of that, form and procedural requirements in the Fair Work Commission will be less onerous than the requirements, for example, the Supreme Court of a State, or the High Court. Even within a single Court, the process can differ depending on the subject matter. Thus, a matter in the Commercial List of the Supreme Court of New South Wales will have different practices than say a restraint of trade injunction matter.

For those reasons, the description that follows will be general in nature and an oversimplification of what happens in practice.

i. Steps in the Process

- **Attempts to settle:** see Section (e) above. For jurisdictions that mandate attempts "to try to resolve the issues in dispute", the first step would be for the legal practitioner to make the client aware of the client's obligations under the law to attempt to reach a settlement and require that the client take the necessary steps to do so.
- **Assessment of prospects of success**. Before litigation can be commenced, Australian legal practitioners must be able to certify that the proceedings have a reasonable prospect of success, based on available evidence.
- **Drafting and filing initiating process.** Process will vary from Court to Court, and from Tribunal to Tribunal. It could be a formal set of pleadings, with the cause of action, and the facts on which the applicant relies (but not the evidence) set out in a strict and formal way. It could be a simple form to complete. Some Court rules require both an Application and a Statement of Claim, and some require the documentation to be verified under oath (so by affidavit or statutory declaration).
- **Filing initiating process in the appropriate Court or Tribunal Registry.** There is usually a filing fee (some collective actions in the Fair Work Commission are an exception) unless waived on the grounds of hardship. Many actions have time limits: as short as 21 days in the case of an action for a remedy in relation to unfair dismissal, up to six years for contractual breach. Many courts and tribunals now allow for electronic filing.
- **Service of the initiating process.** This is usually the responsibility of the applicant party, but some tribunals will serve the application (again, usually restricted to industrial tribunals and then for certain matters only).
- **Filing of a Defence or Reply.** Some jurisdictions require a formal response from the other side. Similar to the application, this can be a formal document or a simple form, depending on the jurisdiction.
- **Initial directions hearing.** Practice here differs markedly from court to court. Some courts, such as the Federal Court, will have a "Docket Judge", to whom the matter is allocated at an early stage, with directions being given as to the steps to be taken to prepare the matter for hearing, including in some cases an early indication of hearing dates. In other jurisdictions, there will be a series of directions hearings, often before a Court Registrar, who will oversee the matter as it comes closer to hearing, with a final allocation to a judge with fixed hearing dates.
- **Interlocutory steps.** These also differ, depending on the Court and the type of matter. Typical steps include discovery (where each side discloses relevant documents to the other); issue of subpoenas to produce documents or notices to produce documents, arguments about pleadings, requests for further and better particulars, or steps to reduce or clarify the issues between the parties.
- **Preparation of evidence.** Some matters proceed by way of affidavit evidence, and the court will set a timetable for the filing and service of affidavits by all parties. If evidence is to be given in person, then all that is likely to be seen is the necessary subpoenas to give evidence or produce documents. However, ordinarily there will be discussions between the parties about who will be required to be available for cross-examination.
- **Preparation of expert evidence.** Where evidence will be required from experts, most jurisdictions will have special rules about how that is to be prepared and presented. Experts need to be shown Court Guidelines that in effect, require them to be independent and not advocates for their side. Rules may require experts on both sides to meet and to present a joint report indicating areas of agreement and disagreement, or to give evidence concurrently with the experts called by the other side.

- **Preparation of documentation, etc.** Depending on the jurisdiction, it may be necessary to prepare evidence in documentary form ahead of time, with the parties required to co-operate on what documents are relevant. These may be required to be in volumes numbered and organised in chronological order, or by witness.
- **Matter is listed for hearing.**
- **Hearing before the court or tribunal.** Typically, the applicant would commence by an introductory address, followed by the defendant's address, the applicant's witnesses, with cross-examination, then the defendant's witnesses followed by cross examination, the applicant's submission (written and oral) and the defendant's submissions and the applicant's submissions in reply.
- **Judgment rendered.**
- **Final formal orders made.**
- **Potential appeal.**

ii. Pretrial Proceedings

The various court rules make provision for various procedures, which have been briefly set out above. They include a number of steps designed to ensure evidence is ready and available, that all issues are identified and the parties are ready to proceed. As set out above, these include matters such as discovery, subpoenas, notices to produce, and the like. In other cases, other procedures may be relevant: for example, orders preserving assets if it seems likely that assets may be stripped or taken out of the jurisdiction, or orders in the nature of an injunction where delay would be fatal to the cause of action (for example, an injunction to prevent an employee misusing confidential information, or working for a competitor in the face of a restraint).

Where a party does not have sufficient knowledge of the identity of the party or cause of action, some jurisdictions provide for a form of preliminary discovery, limited to those issues.

iii. Role of Witnesses, Counsel and Court / Tribunal

Australia's court system is largely an adversarial one, that is, it is the function of the parties to present evidence and legal arguments to the Court, which acts as decision maker and not as not as an inquirer or investigator into the facts. In this system, the participants have the following roles:

- the parties: to put their respective cases forward, including evidence and arguments.
- Solicitors (see point vi below) prepare the process and paperwork, and instruct the advocates.
- The advocates (usually barristers, though there is no prohibition on solicitors acting as advocates (see point vi, below) present the evidence, whether documentary or oral, question the other parties' evidence, and make submissions about the evidence and the law.
- Judge or member (variously described): makes a decision based on the evidence and the law presented to him or her. It is not permissible in most Australian tribunals for the Judge to gather evidence on his or her own initiative. There are some exceptions, for example, the industry panel members in industrial tribunals can make inquiries and rely on their own knowledge of the industry.

iv. The Appeal Process

Following the making of a final decision at first instance, parties usually have a right of appeal (though not always). Some appeals will require leave, sometimes of the tribunal at first instance, but more usually of the appeal tribunal. Some appeals are open in the sense that they can challenge findings of both fact and law; others are restricted to appeals on questions of law only.

Appeals can take two essential forms: it can take the form of a rehearing, or it can be an appeal in the strict sense, with the appeal court limited to the matters before the tribunal at first instance. Some legislation allows additional evidence on appeal where it can be shown the evidence was not available at first instance, or on other special grounds only.

Appeals are commenced in a similar way to matters at first instance: there is appeal documentation (formal pleadings or a prescribed Form); filing of the documentation, service of the application, interlocutory steps to prepare the matter for hearing, the preparation of formal documentation (often quite detailed, with separate volumes being required for transcript, affidavits, submissions, documents and exhibits, etc.), with the matter then being set down for appeal.

Appeals can be internal within the court (so to a bench of typically three or more members of the same body) or can be to a separate court (for example, an appeal from the Fair Work Commission to the Federal Court). Some matters have multiple levels of appeal (single member to full bench of the same tribunal, to superior tribunal, and then to the High Court (usually only with special leave).

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

Costs

Legal costs in litigation in Australia are generally classified in two different ways. Firstly, there are costs between the lawyer and her or his client (so called solicitor client costs, though similar rules apply to costs levied by counsel). The level of these will be governed by the costs agreement between the lawyer and the client (or the other lawyer in the case of counsel instructed by solicitors) and by legislation. These costs are typically time based, or are based on particular tasks.

Secondly, where litigation has concluded, the courts will typically make an order for costs on what is referred to as a party/party basis. While costs are a matter of discretion by the court, the usual order is that a successful party will be awarded costs on a party/party basis. That basis sees the Court (but more frequently, an officer of the court or an independent assessor) award costs on the basis of what is reasonable for one side to pay to the other. This results in an order that usually ranges from approximately 60 to 85% of the solicitor client costs (for example, as between the lawyer and the client, the client may have wished to retain additional assistance, but the costs assessor may consider an additional lawyer not the responsibility of the losing party).
Where the losing party is in some sense "at fault" (for example, they did not accept a settlement offer and the result is the same or better than the offer, or was the cause of unnecessary costs in the proceedings), courts can award costs on an indemnity basis, that is, the successful party obtains all reasonable costs (so almost all costs, unless they are unreasonable, such as insisting on expensive copies of documents when photocopies were sufficient). This will usually give a successful party something in the range of 90 to 95% of actual costs.

There are three limits on being able to recover costs: (a) costs are an indemnity and so if the lawyer did not charge (for example, was acting pro bono) then costs cannot be recovered. This does not prevent deferred fees or conditional costs being recovered; (b) some courts have strict scales of costs (for example, $X for preparing an application) and where this applies, then that is the extent of costs that can be recovered from the other side; and (c) the *Fair Work Act* contains provisions that mean that a party cannot recover costs from the other side, unless the action (or defence) was unreasonable or frivolous or vexatious. This applies, for example, in relation to unfair dismissal cases. Thus, in such matters each party must pay their own costs, but do not face paying the other side's costs unless they are relevantly at fault.

Actual costs can vary enormously: a few thousand dollars for something like unfair dismissal conciliation, or well in excess of $1 million for a significant common law action extending over a number of days. Large cases can result in costs in the multiples of millions of dollars.

Remedies

Given the breadth of the causes of action, actual remedies will differ. They include damages, account of profit, injunction, declaration, reinstatement, compensation (limited to six months in the case of unfair dismissal actions) or orders in relation to industrial action or enterprise bargaining.

Time frames

It is difficult to narrow down considering the variety of matters. An unfair dismissal application can be listed for conciliation within a week of filing, but a Supreme Court breach of contract claim may take years to reach hearing. All courts and tribunals make a provision for urgency (so an application for an urgent injunction before the Supreme Court can be listed within a day or two of filing, though final hearing can be months away. Courts are conscious of delays and make efforts to reduce delays, though resources sometimes prevent this.

c. Trade Unions, Work Councils and Other Employee Representative Bodies

The process described above will also be applied in some sense to disputes with unions. Litigation is still seen primarily adversarial, though industrial tribunals have relaxed rules as to reception of evidence and can also inform themselves as they deem fit. Often members of industrial tribunals will have experience in their industry areas, and can draw on their own knowledge in coming to a decision. In general, for industrial litigation involving unions or workplace representatives there will be simplified forms to complete and simplified procedures adopted.

d. Specialized Litigation Bar

Typically in Australia, lawyers are admitted as "legal practitioners" and not to a specialised litigation bar. However, traditionally, lawyers choose to practice either as solicitors (responsible for all aspects of acting for their clients, including necessary documentation) or as barristers (specialising in advocacy and court work). However, there is nothing to prevent solicitors also practicing as advocates and solicitors have a general right of appearance (note though that in certain proceedings before the Fair Work Commission, a legal practitioner (barrister or solicitor) will need leave of the Commission to appear). Barristers have two levels of seniority. The bar recognises some members as having particular expertise and awards them the title of Senior Counsel (all others are known as Junior Counsel, whatever their length of practice). Senior Counsel will normally appear assisted by Junior Counsel. Barristers are no longer prevented from seeing clients directly, but the majority will still insist on being instructed by a solicitor.

Within the bar, there are a number of barristers who are known for practicing particularly in the employment and industrial areas, though they will accept other instructions within their areas of competence, and barristers who do not normally accept instructions in employment and industrial relations are free to work on industrial and employment matters. This can be advantageous at times: for example, if an employment matter involves issues of intellectual property, it can be useful to brief a barrister with expertise in that field.

III. Tips to Avoid Litigation

There are a number of "best practice" approaches that can either reduce the incidence of litigation or minimise its impact on an employer. Some are listed here.

Unfair dismissal and adverse action litigation

- implement proper recruitment practices. Carry out checks with previous employers, ensure contracts are well drafted and signed, record answers given at interviews.
- Have proper policies and induct employees into those policies, recording their attendance at training.
- Have a probationary period in the contract of employment and regularly review suitability.
- Regularly review the contract of employment, and document any changes to the role, ensuring that notice periods are still valid.
- Bear in mind the Small Business Unfair Dismissal Code: even if the business is not a small business the steps outlined give an indication of what the Commission expects.
- Do not mix up performance and conduct: performance issues need a different approach to improper conduct by employees.
- Speak to employees about both performance and conduct and keep a record of what was said. Set deadlines for improvement of performance and review at regular intervals to ensure there is improvement.
- Ensure fair and consistent treatment of all staff.
- Keep records of all decisions that affect staff and the reasons for those decisions.

Sexual or other harassment or bullying

- Have proper policies and induct employees into those policies, recording their attendance at training.
- Have mechanisms for employees to report improper activity without fear of retribution.
- Lead from the top: senior management needs to demonstrate that harassment and bullying will not be tolerated and will have no place in the organisation. For example, management at whatever level should not let incidents of bullying pass as harmless jokes. In particular, management must not reward such behaviour simply because the person earns the business too much income or attracts too much business.
- Do whatever is necessary to change a culture that accepts such conduct as normal.

Breach of contract

- Have proper contracts in place and regularly review them.
- Be aware of other potential terms, particularly any that may flow from industrial instruments and because of implied terms (reasonable notice terms are often overlooked, so contracts should be reviewed whenever there is a change of role to ensure that there remain proper notice periods).
- Communicate with employees about their performance or conduct regularly, and communicate reasons for any decisions about their employment.
- Seek legal advice before any major termination.

Restraints of trade

- Have contracts drawn up with restraints for employees only when needed to protect the business. General restraints pose a substantial risk of being struck down as unreasonable.
- Consider restraints based on protection of confidential information rather than simple protection from competition.

- Make restraints as narrow as possible and for as short a period as possible, consistent with protection of the business. Where an employee poses a significant risk, ideally there should be a separate Deed drawn up.
- Act quickly. Courts will not grant injunctions where the moving party has sat on its rights.

Industrial issues

- Ensure compliance with all contractual and statutory terms, and any industrial instrument. Undertake an audit of those obligations for each employee.
- Ensure ongoing communication with staff, and if relevant, with unions.
- Ensure consultation obligations are maintained and met. This is particularly important where there is a need for change management (for example, because of structural change or technological change, where there are obligations under the Fair Work Act.
- Have a documented change management strategy.
- Seek early advice if there are signs of unrest or union activity.

IV. Trends and Specific Cases

a. New or Expected Developments

The current Commonwealth Government has indicated that it wished to pass legislation allowing employers, among other things, greater flexibility in the management of employee working conditions. At present, the current government does not have control of the upper house (the Senate) and so is dependent on the support of some minor parties to pass legislation.

b. Recent Amendments to the Law

On 1 January 2014 the *Fair Work Act* was amended when a new Part 6.4B introduced anti-bullying provisions (see sections 789FC, 789FD, 789FF). Under these provisions, a worker who reasonably believes that he or she has been bullied at work can apply to the Commission for an order to stop the bullying. The Commission is not able to award financial compensation to the applicant or impose any further penalties.

Section 789FD(1) provides that workplace bullying occurs when an individual or group of individuals repeatedly behaves unreasonably towards a worker or a group of workers at work. This unreasonable behaviour must create a risk to health and safety. Examples of bullying may include aggressive and intimidating conduct, belittling or humiliating comments, victimisation, spreading malicious rumours, practical jokes or initiated, exclusion from work-related events; pressure to behave in an inappropriate manner, and unreasonable work expectations.

A "worker" under section 789FC will include an employee, a contractor or subcontractor and their employees, an employee of a labour hire company, an outworker, an apprentice or trainee, a work experience student, a volunteer, Australian Federal Police members, and Commonwealth statutory office holders. However, unlike some other provisions the anti-bullying provisions only apply to those employed by a constitutional corporation.

If reasonable management action is carried out in a reasonable manner, the conduct will not constitute bullying.

Recent cases

***Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82:** The Federal Court of Australia held on appeal that the amount of $18,000 in damages for sexual harassment was manifestly inadequate having regard to the amount of damage suffered and with reference to the community standards. The Court substituted the sum of $130,000. This was significant because it recognised that the law should apply the same measure of damages to harassment cases as applied to other areas of the law.

***Commonwealth Bank of Australia v Barker* [2014] HCA 32:** In this case, the High Court of Australia held that there is no implied duty of trust and confidence in employment contracts although it did not rule against the implied duty of good faith. This is a major department from the law in other non-Australian jurisdictions.

***Ms SB* [2014] FWC 2014:** The Fair Work Commission handed down the first decision to consider the meaning of the anti-bullying provisions in the *Fair Work Act*. *Reasonable management* action is to include every management action directing and controlling the way that work is carried out. It therefore has a wide meaning under the anti-bullying laws. Management action need not be perfect or ideal but *reasonable*. The test is not whether the action could have been completed in a more reasonable manner, but whether there was a significant departure from established policies. Making deliberately false or misleading allegations against another worker may be regarded as unreasonable conduct constituting bullying. In terms of reasonable management action, Human Resources had not been unreasonable in not insisting that support be taken at that time because the applicant was unwell. However, it was also held that with the betterment of hindsight, training and mentoring would have been beneficial when originally proposed.

***Vergara v Ewin* [2014] FCAFC 100:** The Federal Court upheld that a "workplace" can include a pub across the road under section 28B(7) of the *Sex Discrimination Act 1984* (Cth).

***Justin Corfield* [2014] FWC 4887:** This case held that mere embarrassment, distress or damage by publicity would not be a sufficient basis to grant an order for de-identification of the parties in the matter which accords with the principle of *"open justice"*.

***Mr Tao Sun* [2014] FWC 3839:** The applicant was not able to establish workplace bullying as the conduct was considered to be management action, and not bullying or unreasonable. Unless a discretionary bonus payment has been applied in a punitive manner it will not establish workplace bullying.

***Arnold Balthazaar v Department of Human Services* [2014] FWC 2076:** It was held by the Fair Work Commission that the receipt of carer payments from the Commonwealth Department of Human Services did not amount to performing work for the Department. Although the scope of the anti-bullying jurisdiction is very broad and extends well beyond the classes of employees covered by the other provisions of the Act, a carer would not constitute a worker for the purposes of the Act.

V. Conclusion

The Australian industrial and employment system can be complex, and only an outline can be provided in a short publication. Employers are advised to obtain advice at any early stage whenever any issue is potentially heading towards litigation. Once a matter reaches the stage of litigation, it is likely that substantial costs will be involved.

AUSTRIA

I. Overview

a. Introduction

According to recent labor market statistics, in 2013, the number of employed persons (ILO definition) in Austria amounted to 4.175.200. Nearly nine out of ten people (86.7 % of the employed persons) worked as employees. The meaning of employment law and thus, the mechanism of law enforcement are of significant importance in Austria. According to the official yearbook 2015 of Statistics Austria the labor and social courts of first instance handled around 18.900 cases in 2013.

b. Claims

The most relevant employment law matters dealt with by the labor and social courts are:

- **Any disputes arising between employers and employees in connection with the employment relationship and termination thereof - matters of individual labor law, e.g.**
  - Pecuniary claims regarding all kinds of remuneration, benefits or damages
  - (e.g. in connection with an occupational accident or discrimination)
  - Action against unfair dismissal on various grounds including discrimination (targeted on the reinstatement of the employment)
  - Action to obtain judicial approval to terminate an employment with special protected employees (e.g. pregnant employees, employees working parental part-time, etc.)
- **Disputes between employees in connection with their work together**
- **Disputes between works council and employer regarding collective rights, e.g.**
  - Disputes on co-determination rights
  - Disputes on the election of employee representatives including European Works Council issues, SE Works Council, employee participation in the event of cross-border mergers
- **Collective Action**
  - As a peculiarity of employment law litigation, the law provides the possibility for employee representatives (on workplace but also on supra-company level) to initiate “collective action”. However, as decisions in such proceedings basically only have binding character for the participating parties the practical relevance remained quite moderate. Such proceedings may be initiated under the following circumstances:
  - A works council may bring legal action regarding a matter of individual labor law if the disputes concern at least two employees. *Vice versa* the employer can litigate against the staff body. However, the court can only rule on whether a right exists or not (declaratory judgment). Only matters of individual labor law may be the subject of such proceedings. It has to be noted that this decision is not binding for subsequent claims between employer and employees.
  - Any employee or employers association capable of being a party to a collective bargaining agreement can file an application with the Supreme Court to seek a declaratory judgment on the existence or non-existence of rights or legal relationships concerning facts independent of specifically named persons. The application must concern a point of substantive labor law (individual as well as collective labor law), which is significant for at least three employers or employees. The decision is not binding for subsequent cases.
- **Aside from collective action**: If a works council has expressly objected to a dismissal, primarily the works council is entitled to take legal action if the dismissal is socially unfair or had been issued on unlawful motives (this does not apply to discrimination cases - discrimination claims can only be initiated by the individual employees themselves). However, usually the works council transfers the right to take legal action to the individual employee.

c. Administrative Agencies that Investigate or Adjudicate Claims

In various areas of individual and collective labor law there are responsibilities of administrative agencies. In this regard it has to be mentioned that employee protection (statutes on the safety and health of employees) is a matter of public law and generally falls under the competence of administrative authorities. Regarding matters of civil law, some of the most important administrative agencies are detailed below.

Conciliation Boards (*Schlichtungsstelle*)

A conciliation board has to be set up on application of works council or employer to decide on any dispute concerning the conclusion, amendment or cancellation of a shop agreement (*Betriebsvereinbarung*, i.e. agreement between works council and employer on company level). However, this only applies to some shop agreements, not every topic which can be dealt with by a shop agreement can be subject to a proceeding before a conciliation board. The conciliation board's responsibility is to mediate between the parties, propose settlements and procure that an agreement can be reached between the parties. In case no settlement can be reached the conciliation board has to make a binding decision on the disputed shop agreement. Most frequently, the conciliation board is handling applications regarding the establishment of a social plan (this is a shop agreement on measures regarding the prevention, elimination, or alleviation of adverse effects in connection with the closure/or alteration of an establishment). The decision of the conciliation board has the legal quality of a shop agreement. The decision is not subject to legal remedy.

Equal Treatment Commission (*Gleichbehandlungskommission*)

The Equal Treatment Commission, which now consists of three senates, was set up to scrutinise matters relating to discrimination under the Equal Treatment Act. It is a special institution designed to support labor, social and civil courts. The Equal Treatment Commission consists of three senates. Each senate has ten to twelve members and a chairman. They comprise representatives of ministries as well as employers' and employees' associations. The Equal Treatment Commission reviews cases and issues an opinion, whether discrimination occurred in a specific case or not. An employee may initiate proceedings before the Equal Treatment Commission on his/her own or with the support of the Ombuds Office for Equal Treatment or another institution. The Equal Treatment Commission issues a written decision on the results of the examination, which is not legally binding, but can be presented in court proceedings. The Equal Treatment Commission is not authorised to award damages. The decision is not subject to legal remedy.

Social Welfare Office (*Sozialministeriumsservice*)

Another important institution with regard to employment is the Social Welfare Office, which has nine regional offices (one in each of Austria's nine federal states – *Bundesländer*). This administrative agency is (inter alia) the competent body where employers apply to obtain approval to terminate the employment of a disabled employee, if this employee has a status of special protection. Moreover, the Social Welfare Office serves as a conciliation board for discrimination cases concerning discrimination due to a disability. Before a complaint can be filed with the labor and social court, an application for conciliation has to be made. If an agreement cannot be reached within a certain time-frame, the case can brought before the competent labor and social court (cf also below).

Competence Center against "Wage Dumping" (*Kompetenzzentrum für Lohndumping*)

In May 2011, anti-wage-dumping laws (*Lohn- und Sozialdumping-Bekämpfungsgesetz – LSDBG*) entered into force. The LSDBG was implemented to prevent employers from agreeing on wages which are below the minimum standards of the applicable Collective Bargaining Agreement (CBA) or applicable statutory minimum salaries. Basically, this law makes it an administrative offence to infringe the minimum remuneration standards of a CBA and provides quite considerable administrative penalties for employers who agree and pay wages which are below the minimum remuneration standards of an applicable CBA or statutory provisions on minimum salaries. The penalties range from € 1.000 – 10.000 per employee. As of 2015, not only the base salary, but also other parts of remuneration which are subject to the regulations of a CBA fall within the scope of these controls, which are carried out by the Competence Center against "Wage Dumping", which is part of the regional health insurance institution. As a result, the consequences of non-compliance with an applicable CBA are not limited to (typically manageable) potential lawsuits with individual employees anymore. They can also lead to severe administrative fines.

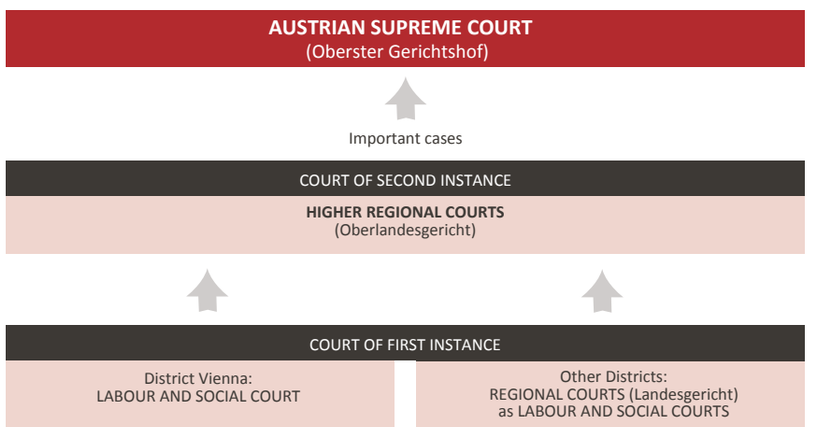
d. Court / Tribunal System

Austria's labor court system and procedural rules were subject to a major reform in 1986, implemented via the Act on Labor and Social Courts (*Arbeits- und Sozialgerichtsgesetz*), which entered into force in 1987. The labor and social courts became the main competent bodies to decide about disputes arising from labor law and social security. Prior to this reform, a number of different judicial and administrative authorities were competent for such disputes.

In general, employment law litigation follows the rules of Austrian civil procedural law. However, the Act on Labor and Social Courts provides for special rules and exemptions reflecting the special nature and needs of employment litigation.

Labor Courts rule in panels consisting of a professional judge as chairman and two lay judges. The lay judges are appointed upon recommendation of statutory representative bodies of employers and employees. So both spheres are represented in the courtroom and also in the decision-making process.

THE AUSTRIAN COURT SYSTEM FOR EMPLOYMENT LAW



e. Alternative Dispute Resolution (ADR)

Compared to the established judicial mechanisms, alternative dispute resolution methods do not play an important role in the practice of individual dispute resolution in employment law matters.

Employment law matters are quite rarely subject to **arbitration** (i.e. the settlement of a dispute by referring the case to an arbitrator for a decision instead of judicial proceedings). The reasons can be found in the statutory restrictions on arbitration with regard to employment law. Arbitration is only available for an existing conflict between employer and employee (low practical relevance). Agreements to refer future disputes to an arbitrator are void.

Mediation shall create a possibility for the disputing parties to reach a solution via a neutral third person (mediator). Mediation conducted by a qualified external mediator is a tool mainly used by employers to resolve and settle conflicts at the work place (e.g. harassment) between employees. The employer is not obliged to offer mediation. Also the participation of employees is voluntary.

However, statutory law provides **formalized procedures of alternative dispute resolution** in the following cases:

- In the event of discrimination of employees on the ground of disability - the law provides for conciliation proceedings which have to be complied with in order to be authorised to initiate judicial proceedings. The employee has to file an application for conciliation with the Federal Social Welfare Office (*Sozialministeriumsservice*). The conciliation procedure is conducted by a special trained employee of this institution. Alternatively, the parties can suggest a private mediator. Only if a settlement cannot be reached within a certain time frame (depends on the occasion of discrimination), can the case be brought before the competent labor court.
- If an employer aims to terminate an existing apprenticeship (unilaterally), the employer is obliged to initiate a mediation procedure. The employment may only be terminated if at least one meeting took place and a settlement could not be reached.

II. The Litigation Process

a. Typical Case

Austria has a system of lower courts (district courts) and subsequent appellate courts. For matters of general civil law, in principle, the district courts are the courts of first instance. However, in **employment law matters**, the **regional courts (*Landesgerichte*)** are the courts of first instance. In Vienna only, a separate, freestanding labor and social court is established. Outside Vienna, the regional courts serve as labor and social courts when they rule in employment law and social security matters (with specialised chambers). The **Higher Regional Courts (*Oberlandesgerichte*)** are the **Courts of Second Instance. There are 20 regional courts and four higher regional courts in Austria.** The **Supreme Court (*Oberster Gerichtshof*) rules in civil law matters (including labor law) as final instance.** The courts reach their decisions in panels consisting of professional judges and lay judges (upon recommendation of employers and employees association).

i. Steps in the Process

Lawsuits are commenced by the filing of a statement of claim with the court. Since, for employment law matters, a person does not have to be represented by a lawyer for filing

a statement of claim, a claimant may also initiate proceedings by way of oral submission put on record by the court. Attorneys, however, have to use a special electronic system provided by the government.

In general, the **statement of claim** should include the relevant facts on which the claim is based and should be supported by respective offers of proof. Legal arguments are recommended, but are not a mandatory part of a statement of claim. The claim is considered to be properly presented if it does not give grounds for immediate rejection or for correction by the court. The court (basically) verifies the competence of the court and the conclusiveness of the facts provided (on a very rough basis) and then submits the statement of claim to the defendant and sets a date for a first (preparatory) hearing.

A **simplified procedure** is in order for **pecuniary claims up to € 75,000.00**: Upon application by the claimant, the court takes a decision on the claim at issue *ex parte*, i.e. without any prior possibility for the defendant to participate. This decision is served on the defendant with an instruction to follow the order or to contest the claim within four weeks by raising an objection. In case no objection is raised, the payment order becomes effective. If an objection is raised within the given time frame ordinary proceedings are initiated.

Until one week before the first preparatory hearing the parties may submit and **exchange written statements (briefs)** presenting all facts and offer evidence. As a principle, the claimant has to assert (and subsequently prove) any facts which justify his claim, while the defendant must provide any facts which justify his objections.

The **first hearing** is only of a preparatory nature and usually does not last longer than an hour. The judge discusses the different positions with the parties and determines a hearing schedule. Also, the judge evaluates and discusses possible **settlement options** with the parties. Usually, the parties discuss this option with their legal representative before the hearing and are prepared to make concrete suggestions. The role of the penal system in this proceeding is rather to mediate than to suggest concrete settlement options and “numbers”. It became common before the labor and social court that the defendant (consequently, in most cases the employer) starts the negotiations with a first offer. A settlement does not have to be found in the first preparatory hearing, this option remains open until the effective ending of the proceedings. Even during the appellate process a settlement can be agreed upon. However, if the parties are willing to settle, typically an agreement is reached during the early stages of a trial.

In the subsequent hearings, the court conducts the **taking of evidence**. The court hears the parties and witnesses, sometimes experts, and evaluates the other evidence provided (documents, etc.). When the taking of evidence is completed the panel formally closes the proceedings.

In almost every case the **decision is provided in writing** and is submitted to the parties usually within two to five months after the last hearing. Generally, the duration of proceedings strongly varies depending on the evidence that has to be taken, the working mode of the judge, the involvement of experts, etc. The average duration of first instance proceedings until the court’s decision is submitted to the parties is around one year from filing of the statement of claim.

ii. Pretrial Proceedings

Austrian civil procedural law does not provide for specific mandatory pre-action procedures. Of course, a claimant usually takes legal action only after having tried to assert the claims out of court. Frequently, the Chamber of Labor intervenes on behalf of its members.

Also, Austrian civil procedural law does not provide for specific pretrial proceedings (e.g. pretrial-discovery). The pretrial stage (i.e. before first preparatory oral hearing) is limited to the exchange of written submissions (briefs).

iii. Role of Witnesses, Counsel and Court / Tribunal

As a peculiarity of employment litigation the parties can represent themselves in first instance procedures – regardless of the value in dispute. The parties are also free to be represented by an attorney or be represented by any other so called "qualified person", e.g. a staff member of statutory employers' or employees' associations (e.g. Labor Law Chamber) or voluntary professional associations (e.g. trade unions). A qualified person (not necessarily an attorney) may also represent a party before an appellate court. Before the Supreme Court, however, parties need to be represented by a qualified attorney.

In most of the cases, both sides are represented by **qualified attorneys** (even before first instance courts). In Austria, attorneys admitted to one of the nine federal bar associations (*Rechtsanwaltskammern*) are authorized to represent parties before all courts in Austria, including the Supreme Court. There is no special litigation bar.

An important institution for all employees with regard to employment litigation is the **Chamber of Labor** (*Arbeiterkammer*), which is the statutory representative body of employees. The membership is compulsory for all employees. There are separate chambers in each of the nine federal states of Austria (*Bundesländer*). The Chambers of Labor provide information and cost-free advice on different issues, including but not limited to, labor and social law. In employment law disputes between employees and employers, in many cases, the Chambers of Labor serve as the first-line of assistance for any queries regarding rights and duties in an employment relationship. The Chambers offer legal assistance, intervene with employers, and often provide cost-free representation of employees before the labor and social court. As outlined above, before the courts of first and second instance, the experts employed with the chamber of labor are authorised to represent employees. However, it is also very common that the Chamber of Labor "outsources" representation and engages an attorney. If representation is granted to the full extent, the pursuing of a lawsuit is basically riskless for the employees.

Also, **trade unions** in their function as voluntary representative bodies provide legal assistance to their members, including written and oral interventions or free representation before the courts. However, the role of the Chamber of Labor dominates in this regard.

The Austrian Code of Civil Procedure explicitly mentions five types of evidence: (1) documents (2) witnesses (3) the hearing of the parties, (4) experts, and (5) visual inspection. They all have the same probative value. Under Austrian civil procedural law, the principle of the free assessment of evidence (*freie Beweiswürdigung*) applies. The court freely evaluates the evidence provided by the parties. However, admissible evidence does not necessarily have to fit into these categories. The court may reject offers of proof if the court is of the opinion that the offered proof is not relevant to the case. Also, the right to question witnesses is of course limited to the relevant facts of a case.

Witnesses have to appear and testify before the court. Consequently, witness statements or affidavits are not accepted from Austrian courts. However, for the past few years, the questioning of a witness may be conducted via video conference (under certain circumstances). This is especially helpful and important if witnesses from abroad have to testify. Usually, the professional judge questions the witness first, then the lay judges may ask additional question. Finally, the parties have the right to ask questions. False testimony is a criminal offense.

iv. The Appeal Process

First instance judgments may be appealed on points of fact and law. In contrast to other civil proceedings fewer, restrictions apply regarding the grounds of the appeal in employment law cases. An appeal of fact and law may be lodged on the grounds of invalidity or mistaken legal judgment, on the grounds of procedural errors or establishment of incorrect facts.

The **courts of second instance** are only called upon to **review the first instance judgment**. In employment law matters these are the higher regional courts (*Oberlandesgerichte*). The courts of second Instance can decide the case themselves and confirm or amend the judgement. Also, the courts of second instance may overturn the decision and order the court of first instance to retry the matter. However, as a fundamental principle, the decision of the court cannot be to the detriment of the party who filed the appeal. In approximately 99% of the cases the appellate proceedings are limited to the exchange of written submissions (statement of appeal – response). The average duration of employment law matters before the court of second instance is roughly four to eight months.

Second-instance judgments may be challenged by means of an **appeal on points of law**. However, access to the Supreme Court is limited. In principle, the Supreme Court decides only on **legal issues of considerable importance**. If a disputed legal issue fulfils this requirement, it is decided by the Supreme Court as a preliminary question. In contrast to other civil proceedings, appeals on points of law to the Supreme Court in employment law matters are always permissible, regardless of the value in dispute (provided a legal issue of considerable importance is concerned). The **Supreme Court** is bound in its judgment by the facts previously established. The Supreme Court only decides on the legal questions of a case and to a limited extent, may take up procedural errors. The facts previously established, however, cannot be subject to legal review. The Supreme Court may decide on the matter itself (confirm or amend the judgment) or overturn the previous decisions and instruct the courts of first instance to retry the matter.

Also, before the courts of second instance and before the Supreme Courts special chambers consisting of professional judges and lay judges are competent for labor law matters.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

Basically there are two types of procedural costs: court fees and legal fees. The Austrian civil procedural law follows a system of cost reimbursement. This means the losing party has to reimburse the costs (court fees and legal fees) of the proceedings to the prevailing party. If a party prevails only to a certain extent, the costs to reimburse are correspondingly lower.

Court fees: Court fees have to be paid by the claimant before the proceedings. They are due once the statement of claim has been filed. They are subject to the Court Fees Act and their amount depends on the value in dispute. The Austrian court fees are frequently criticized for being too high and impeding access to court. E.g.: A pecuniary claim with a value in dispute of € 70,000,00 causes the following court fees: 1st instance: € 1,389.00; 2nd instance: € 2,043.00; 3rd instance: € 2,724.00. Value in dispute: 210.000,00: 1st instance: € 4.170,00; 2nd instance: € 6.131,00; 3rd instance: € 8.175,00

Legal fees: In principle, the costs of representation by an attorney are subject to agreement. Restrictions apply due to the Austrian Civil Code according to which contingency/conditional fees are *contra bonos mores* and therefore inadmissible. Conditional fees/contingency fees are calculated on the basis of a percentage share of the amount to be awarded by the court in a lawsuit. Attorneys regularly calculate their

fees on the basis of the Autonomous Criteria for Legal Fees issued by the Austrian Bar Association. It is also very common to calculate fees on (flat) hourly rates independent from the value in dispute. However, the costs which have to be reimbursed by the losing party are limited to necessary costs. With regard to attorneys' fees, the court is bound to the rates provided in the Austrian Attorneys' Fees Act. This Act defines fixed rates for different steps and actions in the proceeding, depended on the value in dispute. Preparatory work (e.g. research for written submission, correspondence with the client etc.) are covered by the fixed rates and are not reimbursed separately.

Example: In case claimant prevails (100%) the following legal fees have to be reimbursed by defendant:

Value in dispute € 70.000,00

Statement of claim	1518,00
Further submission (brief)	1139,25
1st preparatory hearing	1139,25
2nd hearing (two hours)	1708,80
3rd hearing (two hours)	1708,80
total incl VAT (20%)	**8656,92**

There are **special rules** with regard to costs and fees on lawsuits before the **labor and social courts**. These exemptions shall facilitate an easier access to court for employees. An important exemption applies to the most common kind of unfair dismissal lawsuits – on the grounds of a dismissal being socially unfair or on unlawful motives (both are based on the sec 105 of the Labor Constitution Act). In these proceedings (except before the Supreme Court) both parties have to bear their own costs – regardless of the outcome of the proceedings. Moreover, for these proceedings court fees do not apply. In general, non-pecuniary claims (e.g. reinstatement of employment, ineffectiveness of a transfer, right to work parental part-time, etc.) are also not subject to court fees – even before the Supreme Court.

III. Tips to Avoid Litigation

The central pillars to avoid litigation or minimise the impact of litigation on the employer's business are: knowledge of the applicable legal sources which affect the individual employment relationship, a clear contractual basis for the individual agreements, efficient dispute-management and documentation. The following aspects seem to be especially crucial in this regard:

Determination of the applicable Collective Bargaining Agreement (CBA)

More than 90% of the employment relationships in Austria are covered by a Collective Bargaining Agreement. These agreements regulate (mandatory) working conditions between employers and employees; they contain industry-wide minimum salaries, rules on the remuneration of overtime, statutes on working time, regulations on termination of employment, etc. For the individual agreement, the legal standards provided in CBAs may neither be revoked nor restricted by an individual employment agreement and apply automatically. Especially if an employer has memberships in different employers' associations or in the event an employer changes the field of business, the determination of the applicable CBA can be a complicated task and requires a thorough legal review. As the application of the wrong CBA affects the entire workforce, the consequences of errors in this regard, however, are severe.

Proper Contract Drafting

The most important step to avoid litigation or minimise the impact of litigation has to be taken before the employment relationship commences: It is the task of providing a clear and secure written basis for the employment relationship. Sometimes employers, instead of setting up an employment contract, only provide a written statement of terms of the employment (*Dienstzettel*). Such a document is usually not signed by the employees and thus is only of declarative nature. This approach is not recommendable – because it means that perhaps important provisions of the "contract" are not enforceable.

Some of the most frequent, but avoidable mistakes that can be found in employment contracts and which can trigger expensive consequences are the following:

Term: Sometimes contracts on a fixed term basis or an initial fixed term basis do not provide sufficient clauses allowing the employer to give ordinary notice of termination during the fixed period. In case the employer terminates the contract, although the contract does not provide for this right, the employee may claim damages reflecting the entire remaining duration of the term.

Collective Bargaining Agreements: Employment contracts have to refer to the applicable Collective Bargaining Agreements. However, the language should clearly indicate that this reference is only of declarative nature and does not mean that the parties *agree* on a special CBA. Otherwise, the employer has the risk – in case the applicable and the "agreed" CBA differ (e.g. because of a change of field of operation) the rules of two CBAs have to be considered (according to the principle of most favourable conditions (*Günstigkeitsprinzip*) for each issue covered by the CBAs). Sometimes CBAs exclude certain groups of employees from their scope of application. This is frequently the case for managing directors and sometimes even for senior executive employees. Their contracts should not refer to the CBA.

Shop agreements: (i.e. agreements on plant level between employer and works council) do not have to be mentioned in an employment agreement. However, the relevant provisions have to be taken into account when drafting the employment contract (this task is particularly important in large enterprises where different shop agreements apply to different groups of employees).

Working Time: A great number of employment lawsuits are dealing with working time issues. Very often these time and cost-intensive disputes are caused by unclear and insufficient provisions on working time in the employment contract. E.g.: In Austria, so called *all-in-agreements* (all overtime is covered by the agreed salary) are admissible if firstly, they do not result in an infringement of minimum salary standards of a CBA (or statutory minimum salaries) and secondly, only insofar as the employee can assess from the contract which part of the remuneration covers the normal working hours. An all-in agreement may not be enforceable if these conditions are not met. Also, in some enterprises, employers operate flexible working time schemes but ignore, however, the fact that implementing flexible working time requires the conclusion of a shop agreement (if a works council is established) or a written individual agreement. The lack of sufficient agreements may result in a huge amount of overtime which is subject to surcharges.

Variable remuneration: With regard to variable remuneration, like bonus or stock options, contracts frequently refer to annual side-letters containing the details of such payments, including targets, etc. Sometimes, however, employers forget to provide such agreements for each period. This creates a very difficult position for the employer when he thinks the employee did not perform well enough for the bonus.

Post-contractual non-compete: These clauses, which shall restrict competitive activities of an employee, in practice seem to be more easily enforceable if competing companies are explicitly mentioned in the contract (this of course only applies if the situation of competing companies is sufficiently clear and predictable). Also, employers have to consider that if a penalty (liquidated damages) had been agreed upon, it is not possible to bring an action for injunction or claim further damages. On the other hand, if non-compliance with the non-compete clause is subject to a penalty, the employer does not have to furnish proof as to the amount of the actual damage. Therefore, employers need to consider carefully how their non-compete clauses are safeguarded instead of using the same model-clause for all employees.

Forfeiture/Limitation clause: These clauses oblige the employees to make any claims arising from the employment relationship, regardless of their legal basis, within a certain period after they arise in writing (three months is considered to be the minimum), otherwise the claims forfeit. Generally, such clauses are enforceable (and extremely helpful) if and so far as statutory law or CBAs do not provide for more favourable standards (e.g. longer periods for certain claims). These clauses essentially help to minimise the impact of potential claims for past periods.

Dispute management during and after employment

The majority of employment law disputes are brought before the court after the employment has been terminated. However, many of them have already appeared before the end of the employment and some of them could have been prevented with a timely and sufficient intervention/reaction. An important factor concerns the **employer's duty to take care** of the employees' interests and provide safe and healthy working conditions. If an employee complains about discrimination or harassment in the workplace or reports other instances which negatively affect the working conditions, the employer is obliged to investigate and take all necessary and reasonable steps to restore a discrimination and harassment free, healthy and safe work-environment. The employer is free to choose the measures he finds reasonable for the situation at hand. However, his duty is not limited to initiate such proceedings (usually starting with personal meetings with the persons involved, up to engaging an external mediator. If no other measure seems to be appropriate, the employer has to consider removing the discriminating and harassing superiors or colleagues from their workplace). The employer has to make sure that the measures taken have the desired effect. Pre-defined policies and strategies to tackle such problems have proven to be helpful in order to be able to react in an appropriate and timely manner. The employer needs to document his efforts carefully to be able to show in a potential lawsuit that he fully complied with his duties (cf below).

Another aspect of dispute management concerns the handling of **out of court interventions** of employees or employee representative bodies (e.g. The Chamber of Labor). Such written or oral demands are the customary pre-trial process before an employee files a claim with the court. In this regard, it has to be taken into account that even lawsuits which can be successfully completed for the employer tie up resources of the employer/HR department, etc. In order to avoid litigation, employers should take even unjustified demands seriously and explain their point of view and provide clarifying information, if necessary.

A major part of employment litigation concerns **unfair dismissal claims**. In general, under Austrian law, termination is not restricted to specific reasons (if the employee is not specially protected from termination, e.g. works-council members, disabled employees with a special status). However, employees may challenge a termination before the court on different grounds (for being socially unfair, for being discriminatory, etc.). Before terminating an employment unilaterally, the employer should evaluate the risks of a potential lawsuit and consider **offering an agreement** on the mutual termination of the employment, because this form of termination is usually not challenged before a court. A mutual termination agreement is also available after notice of termination has already been issued and even after an employment had been terminated with immediate effect for cause. Especially in the latter case, a mutual termination agreement can avoid lengthy proceedings with an unpredictable outcome.

Documentation

Written documentation is a crucial factor in successful employment litigation. Below are examples where written documentation is especially important.

As previously outlined above - employees may challenge a dismissal before the labor courts on the grounds of social unfairness. The majority of unfair dismissal cases are based on these grounds. The employer may defend the termination if he can prove that there are either business requirements (e.g. restructuring) or special facts connected to the respective employee (e.g. breach of duties, incapacity to fulfil the duties at the workplace, etc.) that may justify the intention to terminate the employment. In practice, it appears that courts tend to be more easily convinced to follow the position of the employer if factors like breach of duties and subsequent warnings have been documented in writing.

Written Documentation is also especially important to avoid that claims arise from so called **"company practice"**: If an employer decides to render voluntary benefits to the employee without being obliged to do so, it is important to expressly declare these payments or benefits in kind as voluntary benefits, which cannot establish a right on future benefits. Many lawsuits are based on claims arising from company practice, because the necessary reservations have not been made or cannot be proven.

Moreover, a frequent contentious issue is remuneration of over-time. In general, the employer is obliged to keep a record of the actual daily working time and breaks. Failure to do so can result on the one hand in administrative penalties. Even more important, it is likely that the court relies on any records provided by the employee in case of disputes, the employer's means to invalidate this evidence are low. Also, lack of sufficient working time records negatively affect forfeiture clauses.

IV. Trends and Specific Cases

In **2014**, a ground-breaking **reform of administrative jurisdiction** entered into force, changing major principles of administrative jurisdiction.

Prior to this reform, the legal review on decisions and acts of authorities fell within the competence of - higher level - authorities. Only after exhaustion of all stages of appeal, administrative decisions could be challenged before a court, the Constitutional Court (*Verfassungsgerichtshof*) or the Supreme Administrative Court (*Verwaltungsgerichtshof*). The existing appeal system was subject to criticism as it did not comply with the requirements of Art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, according to which in the determination of civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by

an independent and impartial tribunal established by law. The higher-level authorities, which were competent for the legal review prior to the reform, did not comply with the requirement of an "independent and impartial tribunal". Since this reform in 2014, complaints against a decision by an administrative authority have to be brought before an administrative court. Rulings of administrative courts may be challenged by an appeal to the Supreme Administrative Court. The Administrative Court can now also rule on the merits of the case. This reform also affects the legal review of decisions of administrative authorities in employment law matters (subject to administrative jurisdiction, cf above). E.g.: Since 1 January 2014 decisions of the Federal Social Welfare Office (Sozialministeriumsservice) may be appealed before an Administrative Court.

V. Conclusion

In general, employment law litigation follows the rules of Austrian civil procedural law. However, the law provides for special rules and exemptions reflecting the special nature and needs of employment litigation. E.g.: Elements of the simplified proceedings provided for district court level apply (regardless of the value in dispute). Parties can be represented before the labor courts not only by attorneys, but also by other so called qualified persons (e.g. members of representative bodies). Some lawsuits do not trigger court fees and are also cost-neutral with regard to attorneys' fees (each party has to bear their own costs). In special matters, some decisions become provisionally enforceable even if the losing party files an appeal (claims on outstanding salary payments). Another important feature of employment litigation is that fewer restrictions apply on the review of decisions by appellate courts: Regardless of the value in dispute, decisions of first instance courts may be appealed to second instance courts, and those decisions can be appealed to the Supreme Court. Employment law cases are heard by special labor courts, which consist of professional judges and lay judges.

One of the most important players on the employees' side with regard to employment law litigation is the Chamber of Labor, the statutory representative body for employees. In many cases, the Chamber of Labor covers the costs of the proceedings and thus facilitates easy and risk free access to the courts for their members. Employers usually bear the full risk of litigation. Therefore, employers tend to try to avoid employment litigation.

Efficient ways to avoid litigation or at least minimise the impact of litigation on the employer's business have been proven to be, first of all, awareness of the applicable legal sources which affect the individual employment relationships (e.g. determination of the applicable collective agreements, like collective bargaining agreements or shop agreements). Moreover, a clear contractual basis for all individual agreements and efficient dispute-management (already during the employment) can help to prevent expensive and time consuming proceedings before the labor courts. However, in case litigation cannot be avoided, the employer should be prepared and have sufficient written documentation to have a strong basis of evidence supporting the employer's position.

BELGIUM

I. Overview

a. Introduction

Belgium has a specialized jurisdiction for labor conflicts, namely the labor tribunals ("Tribunal du Travail/Arbeidsrechtbank"), sentencing in first instance, and the labor courts of appeals ("Cour du Travail/Arbeidshof"), sentencing in the degree of appeal, hereafter jointly referred to as "the labor courts".

Procedures before the labor courts are regulated by the Judicial Code, as is the case for all civil and commercial procedures in Belgium. There are only a few rules that are specific to the labor courts, namely:

- the possibility for a trade union representative to represent the employee in court;
- the unlimited possibility of appeal (a judgment of a labor tribunal can always be appealed, irrespective of the value of the claim);
- the presence of a specific public prosecutor in certain social matters ("the labor prosecutor").

Belgian employment litigation is based on a system of civil law. In principle, case law precedents have no legally binding force. Yet, in practice, decisions of the highest courts have strong persuasive authority, especially when confirmed repeatedly.

It should be noted that employment law and employment litigation do not cover civil servants who are not bound to their employer by a contract, but by statute. Disputes arising from the latter working relationship are, in principle, brought before the Council of State, which is the Belgian administrative court. However, certain disputes including subjective rights (e.g. salary, legal responsibility, …) can be brought before the civil courts (the court of first instance and in case of appeal, the court of appeal). The procedure before the Council of State exceeds the scope of this contribution and will therefore not be addressed.

b. Claims

Individual labor disputes

The labor courts have jurisdiction with regard to all individual labor disputes, i.e. disputes arising from the individual relationship between the employer and the employee. The Belgian labor courts often treat the following subjects:

- Termination of the employment contract, wrongful dismissal, constructive dismissal, …
- Salary, fringe benefits
- Equal treatment, equal pay and discrimination
- Violence, moral and sexual harassment
- Unfair competition, non-compete clauses, confidentiality, …
- Re-characterization of a contract on a self-employed basis into an employment contract
- Working time, overtime hours and overtime pay, …
- Extra-legal pension plans
- Well-being at work
- Allowances payable in the event of industrial accidents or occupational illnesses

*The above list is of course not exhaustive.

Collective labor law conflicts

In principle, the labor courts have no jurisdiction with regard to collective labor law

conflicts – i.e. conflicts that go beyond the individual employer-employee relationship - such as a strike or lock-out.

Also, collective disputes that arise between the employer and the employees as a result of conflicting interests when renegotiating a collective bargaining agreement (CBA), e.g. disagreement over the determination of the employment conditions, cannot be brought before the labor courts, as they constitute a "conflict of interest" and no "dispute of rights".

The Belgian legislator preferred that these disputes would be solved by means of negotiations (the 'social dialogue' between employers and unions), and if that fails, by means of conciliation and mediation, which takes place within the conciliation committee of the joint committee[1], competent for the concerned undertaking or within the office of mediators created by the Social Dialogue Department of the Federal Public Service for Employment to assist with solving collective labor disputes (see the section *Collective labor law* hereunder).

However, when subjective rights are violated, courts may be asked to intervene in collective conflicts to end certain activist behavior, for instance, with regard to acts of violence committed by employees during a strike. The right to strike is a fundamental social right, which cannot be infringed. Courts are more and more reluctant to accept claims against strikes based on the subjective rights of others, such as, for instance, the right to work (affected when non-strikers are denied access to the company) or the freedom to conduct business and the property right of the employer (affected when the employer is denied access to his company). However, when picketing is accompanied by acts of violence against individuals or property, it becomes illegal. In that case, the employer can refer to the president of the court of first instance (civil court and not the labor tribunal) in order to obtain an injunction against these acts of violence. This procedure will be conducted as an interim procedure.

Yet, the labor courts do have jurisdiction to sentence in the following situations of a "collective nature" where "disputes of rights" are concerned:

- In case of an individual dispute that arises in the context of a collective dispute (e.g. was the dismissal of an employee who participated in the strike legitimate?);
- In case of claims with regard to the installing and functioning of the Works Council and the Committee for Prevention and Protection at Work (e.g. claims with regard to the social elections of these bodies and the termination of its members and candidates who are protected against dismissal);
- In case the competence of the joint committee chosen by the employer, is disputed;
- Disputes with regard to collective lay-offs and closing;
- All claims initiated by the employee(s) or the unions (see the section *Representation* hereunder) with regard to disputes relating to the rights set out within collective bargaining agreements (e.g. if the employer does not respect his obligation under a CBA to pay a certain premium or ensure certain working conditions).

Social security issues

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

[1]A joint committee is a body established per sector of industry in which the social partners (the unions) and the employers' organizations are represented. In these joint committees, collective bargaining agreements including wages and working conditions per sector of industry are entered into.

Social penal law

As numerous employment laws include criminal sanctions in case of non-compliance, employment law litigation can also be conducted before a criminal court. This is the so-called social penal law.

An employee who is the victim of a penal act committed by the employer who violated an employment law that is criminally sanctioned (e.g. the non-payment of salary), can either bring a civil action (claim for damages) in penal proceedings or initiate a proceeding before the labor courts.

Miscellaneous

A stranger in this midst is the jurisdiction regarding consumer over-indebtedness cases. This competence shifted in 2006 from the courts of first instance (judge of seizure) to the labor courts. The assignment of this specific competence to the labor courts is an arbitrary shift of caseload.

c. Administrative Agencies that Investigate or Adjudicate Claims

Both in the framework of "civil" labor law, as in the framework of social penal law, there are a number of administrative agencies that either investigate a claim or pronounce a ruling. We list the most important ones.

"Civil" labor law

The joint committee needs to recognize an economical or technical reason in order for an employee representative to be dismissed

Employee representatives within the Works Council and the Committee for Prevention and Protection at Work and non-elected candidates are protected against dismissal.

If the employer wants to dismiss such protected employees, he can only do so for serious cause (prior approval of the president of the labor tribunal is necessary) or for an economical or technical reason.

Such economical or technical reason needs to be recognized by the competent joint committee. Therefore, the employer needs to comply with a specific procedure before this administrative body, installed within each sector of industry and composed of representatives of the unions and of employers' organizations.

A Social Ruling Commission can classify the nature of a working relationship

If parties qualify their working relationship as a self-employed collaboration, but in practice a link of subordination exists between the principal and the self-employed worker, this situation is qualified as 'false self-employment' and the service contract can be re-characterized as an employment contract with important financial consequences.

The question whether or not a link of subordination exists, is sometimes difficult to assess. Therefore, parties in a self-employed relationship who wish to obtain legal certainty with respect to the exact nature of their relationship can request a social ruling from an administrative commission, namely the "Social Ruling Commission", either before or at the latest within one year as of the start of the collaboration. This Commission is presided over by a magistrate and is composed of personnel from the different social security authorities. It became operational as of mid-2013.

Social penal law

Investigation by the social inspectorate

The social inspectorate is responsible for the surveillance of employment and social security legislation. There are inspection services within the Federal Public Service for Employment (one for the supervision of labor legislation and one for the supervision of well-being at work) and inspection services, which come under the Federal Public Service for Social Security.

The social inspectors may proceed with an investigation to make sure that the employment and social security legislation is complied with.

An employee or any third party may lodge a complaint with the social inspectorate if he is of the opinion that a labor or social security law that is criminally sanctioned has been violated by the employer (e.g. the failure to respect wage scales, maximum working time, …). An investigation can also take place at the initiative of the social inspectorate.

If the social inspector encounters infringements, he may issue a warning to the employer and propose a deadline by which a regularization should take place. If the employer does not regularize the situation, or in case of a serious and/or repeated violation of the law, the inspector will draw up a formal report that will be transmitted to the public prosecutor (the labor prosecutor).

This may lead to judicial prosecution (before the criminal court) for the (more) serious violations or to administrative fines for the least serious violations.

Administrative prosecution by the Administrative Fines Office within the Federal Public Service for Employment

The least serious violations of employment and social security laws cannot be subject to criminal prosecution. For these violations, it will be an administrative body, namely the Administrative Fines Office within the Federal Public Service for Employment that will decide whether a procedure for the issuing of an administrative fine will be initiated, or the infringement will be left without further action.

For the (more) serious violations, the labor prosecutor holds the initiative to bring the case before a criminal court or not. If not, the Administrative Fines Office can then decide whether or not to apply an administrative fine.

d. Court / Tribunal System

Jurisdiction

Belgium has a specialized jurisdiction for labor conflicts, namely the labor tribunals (*"Tribunal du Travail/Arbeidsrechtbank"*) and labor courts of appeals (*"Cour du Travail/ Arbeidshof"*).

Until mid-2014, there were 27 judicial districts, each having a labor tribunal sentencing in first instance.

Appeals go to a labor court of appeals of which there are five, each covering a judicial area. These include one in Brussels, Antwerp, Ghent, Liège and Mons.

However, in 2014 the Belgian judiciary was reformed.

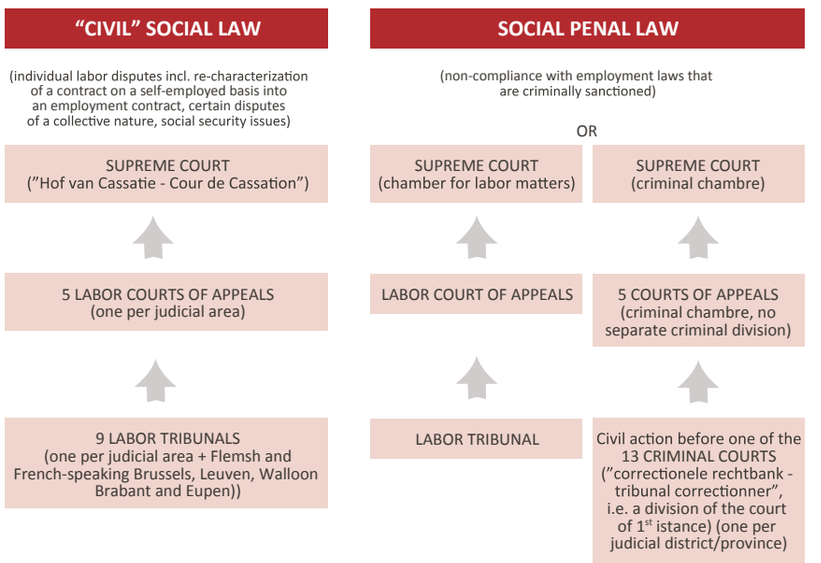
The labor tribunals, sentencing in first instance, are not organized on district level anymore, but on the level of a judicial area, just like the labor courts of appeals, albeit there is an exception for Brussels (which has a Flemish and a French-speaking labor tribunal), Leuven, Walloon Brabant and Eupen.

Yet, the former seats of the labor tribunals are maintained as local divisions, so that for parties seeking justice nothing changes in practice. They can still go to the same courthouse.

The core idea of the reform is that all court divisions offer basic judicial services and that specialized cases can be assigned exclusively to one division for the whole area.

Moreover, the new reform introduces the concept of judicial mobility, meaning for instance, that a judge who is appointed in a specific labor tribunal can be asked to work in another labor tribunal or even in the labor court of appeals.

THE BELGIAN COURT SYSTEM WITH REGARD TO EMPLOYMENT LITIGATION



Language

Proceedings conducted in the Flemish region take place in Dutch, whereas proceedings in the Walloon region are conducted in French and proceedings in the German-speaking region (Eupen) in German. In the Brussels region, the claimant may choose to initiate proceedings either in Dutch or in French, but the defendant may ask – under certain conditions - to have the proceedings transferred to the court of another language.

Chair

In principle, the labor tribunals and labor courts of appeals are presided over by a professional judge assisted by two so-called lay judges (*"juges sociaux/rechters in sociale*

zaken"), one of whom is an employer representative and the other a union representative or a representative of the self-employed. The latter are non-professional judges, nominated by their representative organizations. The social partners thus participate in employment justice in order to complete the legal knowledge of the professional judge with practical experience.

Moreover, both the labor tribunals and labor courts of appeals include a labor prosecutor (*"auditeur du travail/arbeidsauditeur"*), who represents the public interest. His role is to give oral or written opinions. For some cases brought before the labor courts, especially for social security matters and discrimination and mobbing cases, he is obliged to do so by law, while for others, no such obligation exists.

The highest court is the Supreme Court (*"Cour de Cassation / Hof van Cassatie"*), which is composed of three chambers, including a chamber for labor matters and one for criminal matters.

The Supreme Court does not reconsider the facts of the case, but only reviews the legality of the decision rendered by the labor court of appeals. If it upholds an appeal, this renders the original decision null and void, and the case is referred back to another labor court of appeals for retrial.

Representation

The parties may appear in person before the labor tribunals and labor courts of appeals and present their own written pleadings and arguments. If not, they can be represented by an attorney, but also by a spouse or parent, or by a delegate of a representative employee organization (a union), the latter being a particularity for Belgian employment litigation.

Before the Supreme Court, a party in a civil (employment) case needs to be represented by one of the attorneys appointed to the Supreme Court. In criminal cases, each attorney is allowed to represent his client before the Supreme Court.

e. Alternative Dispute Resolution (ADR)

Contrary to the Anglo-Saxon *"all to the judge"*-model, in Belgium, collective labor disputes are resolved through mediation and conciliation (see *Collective labor law conflicts* above), which is aimed at defusing a conflict before the decision to take collective action is made.

Alternative dispute resolution procedures were not often used in the past to resolve individual labor disputes. However, the interest for these procedures has increased over the past few years.

Collective labor law

With regard to collective disputes, conciliation is provided for at different levels: first of all within the undertaking, and if no solution can be reached, within the joint committee.

The trade union delegation[2] within the company has the right to be heard by the employer in relation to each actual or potential collective conflict. Moreover, every employee has the right to be assisted by a trade union delegate if he has an individual grievance.
If the employer and the trade union delegation cannot settle the dispute, they may call upon the secretary of the unions.

[2]A trade union delegation must be established, at the request of the unions, in companies employing a minimum number of workers.

If there is still no solution, the matter can be referred to the so-called conciliation committee of the joint committee. This conciliation committee is composed of the chairman of the joint committee (which is a civil servant) and members appointed on an equal basis between employers' organizations and trade unions.

Yet, conciliation before the joint committee will always be on a voluntary basis. Parties cannot be forced to reconcile.

The purpose of the conciliation procedure is to bring the parties together to reach an agreement. The conciliator does not make a judgment nor suggest a solution, but works with the parties to find an acceptable outcome.

When there is unanimity within the conciliation committee, the latter will work out a recommendation. This recommendation does not bind the disputing parties, but has strong moral value, so that in practice, it is often executed by the parties.

When no unanimity can be reached, the procedure is brought to an end with a record of "non conciliation". In that case, the parties regain full liberty of action (e.g. the notification of a strike).

Another option is to invoke the aid of the Social Dialogue Department of the Federal Public Service for Employment, which has created an office of mediators to help resolve collective labor disputes. The mediator goes a step further and makes suggestions to the parties on a possible solution.

The above-indicated conciliation and mediation procedures, organized by the Belgian State, are free of cost for the parties involved.

There is no arbitration procedure for collective labor disputes.

Individual labor law

For a long time and although incorporated in the Judicial Code, alternative dispute resolution procedures were not used in Belgium to resolve individual labor conflicts. However, in 2005, a new law reorganized alternative ways to resolve these conflicts, namely conciliation and mediation.

Arbitration is another alternative to litigation through the courts.

Details of all three variants of ADR (conciliation, mediation and arbitration) are set out below.

Conciliation

Conciliation is organized by the court. Either party can ask the court to start a conciliation procedure and this before the procedure in court has started or at any time during this procedure and at the latest during the oral pleadings. Also, the judge can propose conciliation to the parties rather than a trial. It is then up to the parties to agree or not. Conciliation is free of cost. However, it is rarely used.

Mediation

This is where an impartial third party, the mediator, helps two or more people in dispute attempt to reach an agreement.

There are two types of mediation, namely (i) a voluntary mediation, which is not linked to existing legal proceedings, or (ii) a court-instigated mediation, which takes place within the framework of existing legal proceedings, but only with the parties' consent.

The mediator will be jointly chosen by the parties. Mediators are accredited by the Federal Public Service for Justice and most of the time they are lawyers.

The successful outcome of a mediation results in a settlement agreement that is binding on the parties.

However, unlike an arbitral award, this agreement is not enforceable, nor is it appealable. If enforcement of the agreement becomes necessary, the party needs to go to court to seek judicial ratification.

All documents or communications used in a mediation procedure have to remain confidential and may not be used in labor court. The mediator has a duty of secrecy.

A mediation procedure has the advantage of avoiding an antagonistic confrontation, which is particularly useful, as the employer and the employee have to maintain their working relationship. The procedure is more rapid than a "normal" judicial proceeding before court, which means that the problem will be settled in a short period of time.

Moreover, if mediation is successful, it is generally more time-effective and therefore cheaper than a trial. The costs linked to mediation correspond to the fees and expenses of the mediator.

Over the past few years, there has been an increase in utilizing mediation in individual labor disputes.

In the region of Brussels, the courts and the social partners reached an agreement that encourages the use of mediation. The Brussels labor courts now systematically propose mediation to the parties by sending them a letter explaining this possibility. Also, other labor courts began following this initiative.

The new Belgian government Michel I, has inserted in its coalition agreement, the possibility of a mediator intervening during the negotiations in the frame of a collective lay-off or closing-down of an undertaking.

Arbitration

As a general rule, any dispute, which can be terminated by a settlement agreement (and thus no dispute with regard to public order provisions), may be submitted to arbitration.

In principle, the employer and the employee can only decide to resort to arbitration after the dispute has arisen. In other words, it is not possible to enter into an arbitration clause beforehand (e.g. within the employment contract) indicating that in case of conflict, the matter will be presented to an arbitrator instead of the labor court.

There is one exception to this rule: an arbitral clause can be inserted within the employment contract for employees earning at least 66.406€ gross a year (inclusive benefits; figure in 2015, yearly indexed) and entrusted with high management responsibilities.
An arbitral award is final and binding on the parties and it is not possible to appeal an arbitral award before a court.

The most important arbitration institute in Belgium is the CEPANI-CEPINA (Belgian Center for National and International Arbitration) based in Brussels. Its administration

is efficient and its rules are modern and effective. Also ad hoc arbitrations may be conducted in Belgium.

Arbitration is rather expensive, as the fees of a specialized (panel of) arbitrator(s) are elevated. However, in Belgium, few employment law cases are presented to arbitrators.

II. The Litigation Process

a. Typical Case

i. Steps in the Process

Contrary to most other proceedings, which must be initiated by a writ of summons (served by a bailiff), most litigation before the labor courts can be initiated by a petition (*"verzoekschrift/requête"*), which does not entail any costs.

The petition (or the writ of summons if the more expensive option is chosen) must be entered into the register of cases, which is kept at the court registry and which is a public document.

The petition or the writ of summons must set out the claimant's case and the date and location of an introductory court hearing. This introductory hearing will take place in a short time (at least 8 days and in general a maximum of a few weeks following the delivery of the writ or petition) at a date appointed by the court's clerk.

Cases that only require limited debate (i.e. simple cases) may be decided upon at this introductory hearing or at a hearing fixed shortly thereafter.

In cases that require a more extensive exchange of arguments, which is the vast majority of the cases, a calendar will be agreed upon between parties or set by the court, including the dates on which the written pleadings with each party's arguments and pieces of evidence must be submitted.

If the written pleadings or the documentary evidence is submitted after the expiration of the fixed time limit, the court can refuse to take these into account.

The claimant must first send his documentary evidence to the defendant.

Parties must provide the other party with all documents on which they rely.

After the exchange of briefs and documentary evidence, the parties will plead their case during the oral hearings, which will take place at a date fixed by the court.

The timing of the hearing date will depend on the court's caseload and the time required to plead the case. In general, it takes several months after the filing of the last brief before the case can be heard by the court.

Parties may plead in person or can be represented by an attorney or a representative of the unions.

In theory, before starting the oral pleadings, the court must try to conciliate the parties. In practice however, this is just a formality and no real attempt to reach a settlement is made at that stage. The judge just asks if settlement is possible and the clerk records that the answer is negative, which is mentioned in the judgment.
It is the professional magistrate that will conduct the hearing. Although they can ask

questions, the lay judges often stay passive during the hearing and rely on the professional magistrate.

After the oral pleadings, the court will deliberate and will render a decision in the form of a written judgment. It will be the professional magistrate that will write the judgment; the lay judges only take part in the deliberation.

Normally, the judgment must be rendered within one month and no later than 3 months following the oral pleadings. However, in practice, it sometimes takes longer.

First, the court will check compliance with formal requirements for proceedings (e.g. has the claim been filed in time, did the party have the capacity to sue, ….). Only if the action met the formal procedural requirements, will the court consider the merits of the case.

If, in his preparation of the judgment, the judge finds that he has insufficient information, he can invite the parties to give additional explanation or to express their opinion on a specific matter in the frame of additional briefs. He will than render an interim judgment ordering the re-opening of the debates and inviting the parties to submit the additional information.

ii. Pretrial Proceedings

No compulsory pretrial proceedings exist in Belgium.

iii. Role of Witnesses, Counsel and Court / Tribunal

As in most civil law countries, documentary evidence is the most important type of evidence in employment matters in Belgium.

Documentary evidence can include all written documents, plans, pictures, objects, … A party can choose the documentary evidence it wants to submit to the court and has no obligation to disclose harmful documents. However, when a party is shown to hold a document, which could prove or disprove a fact that is relevant to the case, the court can order that party to submit the document.

Contrary to other civil proceedings in Belgium (besides commercial cases), in labor cases, the court can always allow witnesses to testify (irrespective of the amount at stake and even if there is also written evidence to support a claim).

Although allowed, oral testimonies are not often used as (i) most of the time written evidence will be sufficient, and (ii) a specific procedure needs to be complied with.

In order to avoid having to revert to time-consuming oral testimonies, in 2012, the legislator introduced new rules relating to written testimonies, meaning that witnesses are allowed to submit their testimonies in writing to the court, provided that a number of formalities, guaranteeing their authenticity, are complied with. The evidentiary force attributed to such testimonies is limited to a presumption that can be rebutted by proof to the contrary.

In technically complex cases, the court can order an expert survey upon the request of one of the parties or at its own initiative. The expert can only advise on technical matters. (e.g. if the dispute concerns the question whether the employee has become permanently physically incapable to do his job, the court can assign a medical doctor to examine the employee, in case of evaluation of the value of stock options, …).

iv. The Appeal Process

When a decision has been reached by default (i.e. the defendant failed to appear), the case may be brought back to the court and a new decision may be asked for. This is called “opposition”.

If both parties appeared and a decision is rendered in first instance, the losing party can lodge an appeal before the labor court of appeals.

Unlike decisions with regard to some other civil claims below a certain amount, decisions of the labor tribunal are always appealable.[3]

The appeal must be lodged within a period of one month following the notification of the decision by the winning party’s bailiff, with the exception of social security cases in which the term to lodge an appeal already starts running as of the sending of the judgment by the court’s clerk. Appeals that are filed late will be dismissed by the labor court of appeals.

The procedure before the labor court of appeals is similar to the procedure in first instance. In fact, the case is tried again and is left to the appreciation of a higher court.

A party can decide to bring a decision of the labor court of appeals before the Supreme Court. The time to file such a petition is three months from the notification of the appeal decision. However, the Supreme Court will not re-examine the merits of the case, but will only pronounce a decision on the questions of law.

b. Costs, Attorney’s Fees, Remedies / Damages, Timing, …

The “compensation for legal proceedings” (*“rechtsplegingsvergoeding/indemnité de procédure”*)

The party winning the case is awarded a so-called “compensation for legal proceedings” (*“rechtsplegingsvergoeding”/”indemnité de procédure”*), which is - as of 2007 - a lump sum allowance for attorney’s costs and fees. Before 2007, this compensation only covered the expenses of the judicial procedure, but not the attorney’s fees.

This lump sum amount means that the actual fees are not recoverable, but are limited to a fixed amount related to the amount of the claim. The higher the amount of the claim, the higher the compensation.

The Royal Decree determining these lump sum amounts distinguishes between a basic amount, a maximum and a minimum amount for each range of claims.

In principle, it will be the basic amount that will be attributed. However, at the request of a party, the judge can decide to only grant the minimum amount in case of a precarious financial situation of the losing party. If, amongst others, the case was very complex, the judge can decide to grant the maximum amount.

The basic amount ranges between 165€ (for claims up to 250€) and 16.500€ (for claims which exceed 1.000.000€). For claims related to industrial accidents and professional diseases, the basic amounts are much lower (they range between 40,11€ and 320,65€).

This compensation for legal proceedings is only paid to the party assisted and/or represented by an attorney. Hence, a party which defends its own legal interest during

[3] With the exception of some judgments of the labor tribunal in the frame of social elections.

a trial, or which is assisted by another person (e.g. a trade union representative), is not entitled to this compensation.

If both parties are considered as "partly losing parties", the judge can divide the compensation for legal proceedings.

A major exception applies to judicial proceedings with regard to social security, initiated by or against a citizen receiving social security benefits. In those proceedings, independent of who is the claimant or the defendant and independent of the result, the compensation for legal proceedings (as well as other court charges) is lower and taken at charge by the Social Security Institutions (the Belgian State).

Finally, the compensation for legal proceedings is awarded per instance, meaning that if a judgment of the first instance is being reformed or annulled in the degree of appeal, the 'loosing' party will be sentenced to compensation for legal proceedings of both instances.

Attorney's fees

No party can be obliged to pay additional compensation for the attorney's intervention of the other (winning) party above the amount of the compensation for legal proceedings. If the attorney's fees are higher, the difference will have to be borne by the winning party itself.

The losing party always pays its own attorney's fees.

Attorney's fees are not regulated in Belgium. Attorneys set them freely and they may be negotiated between client and attorney, with the understanding that attorneys must still set them within suitably restrained limits.

The lawyers' association may check that attorneys do not exceed these limits.

Several calculation methods are possible: an hourly fee; a fee for each service provided; a fee according to the value of the case (percentage of the amount involved in the proceedings); etc. However, a fees pact solely linked to the outcome of the action is prohibited in Belgium.

Since 2014, attorneys' fees are subject to VAT in Belgium (21%).

Registration duties

Each condemnation with regard to money debts will be subject to tax charges. These tax charges are up to 3% of the amount of the money debt, which is declared by the court. However, if the amount of the condemnation does not exceed 12.500€, no tax charges will be levied.

Bailiff costs

A petition can initiate most litigation before the labor courts, which is free of costs. Should a party opt to initiate the proceedings by a writ of summons, this writ will have to be served by a bailiff and will entail bailiff costs. Also, the notification of the judgment to the losing party (necessary to have the term to lodge an appeal begin) must be done by a bailiff and will entail bailiff costs. In general, these bailiff costs will have to be borne by the losing party.

Legal aid

Persons who do not dispose of sufficient income can be fully or partially discharged of judicial expenses (e.g. costs of bailiff). They can also be represented by a so-called *pro bono*-attorney (partly) free of charge.

The *pro bono*-attorney receives compensation from the State. There is a list of attorneys who present themselves in order to act as a pro bono-attorney. All trainees (i.e. attorneys during their first three years of professional experience) are obliged to accept *pro bono*-cases.

Damages

In labor cases, the losing party will, in principle, be sentenced to pay compensatory damages.

The amount of damages will generally be determined by law. However, in some limited cases, the employer and the employee can agree upon the scope of indemnification within the employment contract (e.g. a non-competition indemnity must at least equal half of the gross remuneration corresponding to the duration of the non-competition clause, but the duration of the clause can – within certain limits – be agreed upon by the parties).

A penalty clause where a party promises to pay a fixed sum if he fails to perform the contract or breaches a specific obligation, is rather exceptional in employment contracts and subject to article 18 of the Act of 3 July 1978 on Employment Contracts, which stipulates that an employee can only be held liable for acts of fraud, a serious fault or a frequently occurring minor fault. An example is a penalty clause in case of breach of a confidentiality obligation after termination of the employment contract. However, if the amount to be paid by the breaching party is manifestly higher than the potential damages which the parties could foresee at the time of entering into the contract, this clause will be null and void.

Other judicial remedies besides damages

Interim measures before the president of the court – summary proceedings

An urgent matter may require interim measures, which can be granted in the frame of summary proceedings that are conducted in a very brief time period.

An application for interim measures is made to the president of the labor tribunal.

The request must be urgent and the claimant must face a threat of imminent damages if no measures are taken. The president of the court may only declare a temporary provisional decision and may not decide on the merits of the case.

The decision of the president is immediately enforceable. However, it is not binding for the judge who will hear the case on the merits and issue a final judgment.

In extremely urgent cases, one party petitioning the court can initiate proceedings.

Examples of measures in employment cases that can be ordered in summary proceedings:

- prohibiting an employee to use or to disclose confidential documents from his ex-employer;

- suspending the unilateral modification of an essential element of an employee's employment conditions (like the function, place of work or salary) decided by the employer;
- prohibiting an employee from violating a non-competition clause; etc.

Cessation order

The president of the labor tribunal can also grant a cessation order to prevent a party from carrying on an illegitimate practice.

There is no requirement for urgency.

Formally, these proceedings are conducted as summary proceedings, but the president of the court will decide on the merits of the case.

The president may also impose a fine on a defendant for any violation of a cessation order.

The typical example of a cessation order in employment matters involves the cessation order in the frame of discrimination cases.

Indeed, the Belgian Anti-discrimination laws provide for actions for injunction to stop discriminatory acts, e.g. discriminatory employment conditions. These actions can be introduced by the employee-victim, but also by the representative employers' and employees' organizations, the labor prosecutor or the governmental Centre for the Equality of Chances and Opposition to Racism, which assists victims of discrimination through advice, legal support, mediation or legal action.

Also, in mobbing cases, a cessation order to stop acts of violence, moral or sexual harassment can be ordered.

Timeframe

The average duration of a case before the labor tribunal (from the filing of the petition to the judgment) varies between 12 and 18 months, depending on the complexity of the matter, the number of written pleadings that have been exchanged and the caseload of the court.

The appeal procedure often takes a bit longer than the procedure in first instance, although employment cases in the degree of appeal are handled in a relatively short time compared to other civil proceedings (which can even take a few years).

c. Trade Unions, Work Councils and Other Employee Representative Bodies

The Works Council, the Committee for Prevention and Protection at Work (CPPW) and the Trade Union Delegation

Enterprises employing at least 100 employees on average, must install a Works Council. The Works Council has mainly information and consultation rights on economic and social issues.

A Committee for Prevention and Protection at Work (CPPW) must be set up in enterprises normally employing at least 50 employees on average. It is competent for health and safety matters.

The employee representatives within both the Works Council and the CPPW are union members, nominated by their union and elected within the frame of social elections, which must be held every four years.

A Trade Union Delegation must be established at the request of the unions in enterprises employing a minimum number of workers determined by CBA. The Trade Union Delegation can present and discuss individual and collective grievances and supervises the observing of employment legislation and of the CBA's within the undertaking.

The trade union delegates are employees of the enterprise who are either appointed by the unions or elected by the other (unionized) employees (although not in the frame of social elections).

If disputes arise with regard to (the installation of) the Trade Union Delegation or the (election of) the Works Council or the CPPW, the unions that have nominated the employee representatives, not these bodies, will be engaged in litigation proceedings against the employer (see the section on *Individual labor law*).

The unions

Belgian trade unions have no formal legal status or corporate capacity. This implies that:

- except in the cases explicitly provided for by law (see hereunder), they cannot stand in justice;
- they cannot be sued to pay damages, nor for violation of the so-called "social peace obligation" (see the section below on *Trade unions can in principle not be sued to pay damages, nor for violation of the "social peace obligation"*).

The standing in justice of the unions

Belgian law only grants the representative trade unions the right to stand in justice regarding the circumstances noted below.

Disputes regarding the legislation on collective bargaining agreements

- In Belgium, employment regulations are not only embedded in laws, but also, amongst others, in collective bargaining agreements (CBA's).
- CBA's are entered into either on an industry level between unions and employer organizations or on a company level between the unions and an individual employer.
- CBA's include provisions with regard to wages and working conditions that need to be respected by the employer and provisions with regard to the relations between the unions and the employer.
- The unions have the capacity to sue an employer not respecting these obligations in order to defend their members' rights arising from these provisions within the CBA's.

Disputes regarding the legislation on Works Councils and CPPW's (mainly disputes with regard to social elections)

- If disputes arise in the frame of the social election process, unions have the capacity to sue and be sued.
- Possible disputes between the employer and the unions can relate to:
  - the determination of what is considered by the employer to be the technical operation unit, i.e. the level on which the Works Council and the CPPW must be established. The technical operation unit is defined on the basis of so-called economic and social criteria and does not necessarily coincide with the legal entity.

- the defining of the functions of high management staff (employees pertaining to the category of high management staff cannot stand as a candidate for the social elections).
- the list of candidates established by the unions.

The procedure with regard to the dismissal of elected employee representatives and candidates to the elections

- Employee representatives within the Works Council and the CPPW, as well as non-elected candidates are protected against dismissal.
- If the employer wants to dismiss such protected employees, he can only do so for serious cause and with the prior approval of the president of the labor tribunal (or for an economical or technical reason that needs to be recognized by the competent joint committee: see the section on *"Civil" labor law* above).
- The unions will be party to the judicial proceedings initiated by the employer to obtain this prior approval from the court.

Other disputes

- the maximum age of workers in case of selection and hiring;
- the European Works Councils;
- equal treatment of men and woman;
- the protection for violence, moral and sexual harassment;
- discrimination.

Trade unions can in principle not be sued to pay damages, nor for violation of the "social peace obligation"

Another consequence of the lack of legal status of the unions is that they cannot be sentenced to pay damages, nor can they be sued for violation of the so-called "social peace obligation".

The "social peace obligation" is a commitment from the unions, included within most CBA's, to refrain from all claims during the lifetime of the CBA, not to strike and not to undertake any action which conflicts with the agreed CBA.

As it cannot be enforced, the social peace obligation is more of a moral engagement.

III. Tips to Avoid Litigation

Defending a lawsuit can be time consuming and expensive.

Therefore, it is crucial to avoid litigation or to minimize its impact on the business.

The following "best practices" are recommended in this respect to the employer:

- keep open lines of communication with the employees and let them - to an extent possible - participate in decisions that affect them;
- invest in the social dialogue with the Works Council, the CPPT, the trade union delegation and the unions to avoid collective labor disputes or to have them settled promptly;
- draw-up accurate and detailed employment policies, have them reviewed by an attorney and update them on a regular basis to be in line with applicable legislation;
- draft complete and precise contracts;

- document shortcomings, build up a file with written evidence and implement evaluation procedures;
- seek legal advice in an early stage of a conflict or even before a problem arises;
- keep apprised of applicable employment laws;
- evaluate whether or not it may be preferable to settle the case out-of-court by means of a settlement agreement (in this respect all negotiations between the attorneys of both parties are confidential); etc.

IV. Trends and Specific Cases

a. New or Expected Developments

Up until 2014, the notice periods for white-collar workers earning more than 32.254€ (figure in 2013, yearly indexed), were not fixed by law, but needed to be negotiated between parties or decided upon by a judge. Therefore, many disputes with regard to the duration of the notice period (or the amount of the indemnity in lieu of notice) were brought before the labor courts.

As part of the recent Belgian labor law reform, this rule no longer exists.

As from January 1, 2014, the labor law determines all notice periods.

Therefore, we expect that this part of litigation will disappear.

On the other hand, we also expect that a new type of litigation will become more important.

Indeed, also as part of the labor law reform, a collective bargaining agreement (CBA) on the motivation of dismissal was entered into on national level. This CBA entered into force on April 1, 2014 and applies to dismissals implemented or notified as from that date.

All workers now have the right to ask for the specific reasons that have led to dismissal.

Moreover, workers hired for an indefinite period may seek damages if it appears that they have been dismissed on "manifestly unreasonable grounds", i.e. for reasons which do not relate to their capability or conduct or to the operational requirements of the company, and which would never have been decided by a 'normal and reasonable' employer.

If the court admits the manifestly unreasonable character of the dismissal, the employer owes damages for an amount ranging between 3 and 17 weeks of salary (benefits are inclusive).

It will be up to the labor courts to evaluate whether or not a dismissal was manifestly unreasonable, without assessing the opportunity of the employer's decision to dismiss.

As the legal framework on the motivation of a dismissal is relatively new, to date, there is little case law interpreting and defining this notion of a "manifestly unreasonable dismissal".

It is expected that such case law will take form in the months and years to come.

b. Recent Amendments to the Law

Two recent amendments can be highlighted:

- As of January 1, 2014 services provided by attorneys are subject to VAT (21%).
- Also in 2014, the Belgian judiciary was reformed.

The labor tribunals, sentencing in first instance, are not organized on district level anymore, but on the level of a larger judicial area, although in practice little changes as the former seats of the labor tribunals are maintained as local divisions.

Moreover, the new reform introduces the concept of judicial mobility, meaning for instance that a judge who is appointed in a specific labor tribunal can be asked to work in another labor tribunal or even in the labor court of appeals.

V. Conclusion

The Belgian legislator has established efforts to make the labor tribunals and labor courts of appeals as accessible as possible for the parties:

- a trade union representative can represent an employee in court;
- there is an unlimited possibility of appeal, irrespective of the value of the claim;
- cases are handled in a relatively short period
- a labor prosecutor will be present in social security matters, discrimination and mobbing cases to give an oral or written opinion.

The overall position with regard to the handling of employment litigation cases is rather positive.

Over the past few years, there seems to be a tendency towards a decrease in the number of cases that are brought before the labor courts. A possible explanation could be the increase of the 'compensation for legal proceedings' (*"rechtsplegingsvergoeding"/"indemnité de procédure"*).

BRAZIL

I. Overview

a. Introduction

In Brazil, labor relations are a matter of Federal law, so the States and Municipalities have no power to legislate over labor matters. Therefore, labor rights are nationally standardized, and the same labor costs and consequences will apply regardless of an employer's place of business or place of incorporation.

The basic principles concerning labor relations in Brazil are contained in the Labor Code, the so-called "CLT" (Consolidação das Leis do Trabalho), enacted on May 1st, 1943. Although it has been complemented, altered and amended over the years by scattered statutes and also by the Federal Constitution of 1988, the Labor Code is outdated in several points as it was enacted under a very different social and economic reality. From time to time, the idea of a major review of the Labor Code is raised at a political level, but a concrete step toward such review is still pending. Although there are other laws regulating labor rights, the main concepts and limits are stated in "CLT".

Given that, in essence, no significant changes have been made to the original Labor Code, its application has been strongly influenced by the interpretation developed over the years by Brazilian Labor Courts. There are courts specialized in labor matters and they are competent to judge any dispute related to work relationships.

b. Claims

The most relevant labor rights are briefly described below. They are applicable solely for individuals hired as employees, and may be complemented by the applicable collective bargaining agreement.

Compensation

Compensation, with the exception of commissions, must be paid at least monthly and in Brazilian currency (Reais). Employees are entitled to receive a Christmas bonus corresponding to one monthly salary, paid by the end of each year.

In Brazil, the employees' monthly salary is used as a base for the calculation of all applicable labor and social security charges. However, such charges apply not only over the salary, but also on the overall compensation which comprises any other amount or benefit granted to the employee such as commissions, bonuses, fringe benefits such as personal or family benefits and living expenses, among others. The only exceptions are some benefits expressly exempted by law from labor and social security charges, such as payments connected with Profit and/or Results Sharing Plans (see item 9.2 below), transportation vouchers, meal vouchers, health care and education among others, provided that some specific requirements applicable to each situation are complied with.

Collective bargaining agreements often set forth mandatory rates for annual salary increases, which shall be applied for all employees - including managers, directors and executives hired as employees. Such rates are generally defined based on the accumulated inflation rates of the preceding 12-month period.

Profits and/or result sharing

In addition to regular compensation, workers are guaranteed a share in the profits or results of the employer's activities.

Although profit/result sharing rules are extremely flexible and do not establish any kind of limit, such payments must be governed by a plan, which is previously discussed with an elected committee of employees, with the participation of the relevant Union, or directly with Union representatives.

Certain requirements that must be observed in the profit/result sharing plan include the indication of clear and objective rules/targets/goals, and the prohibition of more than two payments per year.

Provided that the applicable rules are complied with, profit/result sharing payments are exempted from labor and social security contributions and indeed are an important tool used by Brazilian companies to compose the employees' global compensation.

Working hours

All companies with more than 10 employees shall control the work shifts of their employees. Certain exceptions include employees holding managerial positions and employees working outside of the company's facilities, who are not subject to have their work hours controlled and are not entitled to overtime payment.

Ordinary working hours shall not exceed 8 hours per day and/or 44 hours per week.

Any overtime worked must be remunerated with an additional fifty percent (50%) of the hourly rate, and hours worked on Sundays or holidays must be remunerated with an additional one hundred (100%) percent. Collective bargaining agreements may establish higher rates for overtime payments. Provided that there is Union authorization, overtime worked on a day may be offset by a reduction in those worked on another day, without the additional overtime payment.

Vacation

After each 12-month working period, an employee is entitled to a 30-day vacation, which must be taken within the subsequent period of 12 months. The remuneration paid with respect to the vacation month must be added by one-third of the employees' regular monthly compensation.

Severance pay fund (FGTS)

Employers must deposit, on a monthly basis, eight percent (8%) of each employee's salary in an account opened on their behalf and administered by an official federal financial institution. Funds deposited in such accounts may be withdrawn in events of dismissal without cause, retirement, purchase of real estate and death, among others.

Termination of employment

In Brazil, both the employer and the employee are allowed to terminate the employment at any time, without cause. Under some specific and exceptional circumstances, employees may be entitled to temporary job stability, which may prevent the employer from terminating the relationship for a given period.

As a general rule, the termination of an employment contract with an indefinite term requires a 30 to 90-day prior notice, which, however, may be converted into a payment in lieu of notice. In either case, mandatory severance applies.

The severance entitlement in case of termination without cause is directly connected with the terminated employee's length of service.

In the event of employee misconduct, the employment may be terminated with cause, with no need for prior notice and with a significant reduction of the mandatory severance.

Health and safety measures

Health and Safety is a sensitive matter in Brazil. There are several regulations providing for strict rules concerning mandatory periodical medical examinations, medical examinations upon admission and termination, medical records, environmental risks prevention, creation and maintenance of an Internal Commission for Accident Prevention (CIPA), health-hazard and dangerous activities and the corresponding allowances and ergonomics, among others.

c. Administrative Agencies that Investigate or Adjudicate Claims

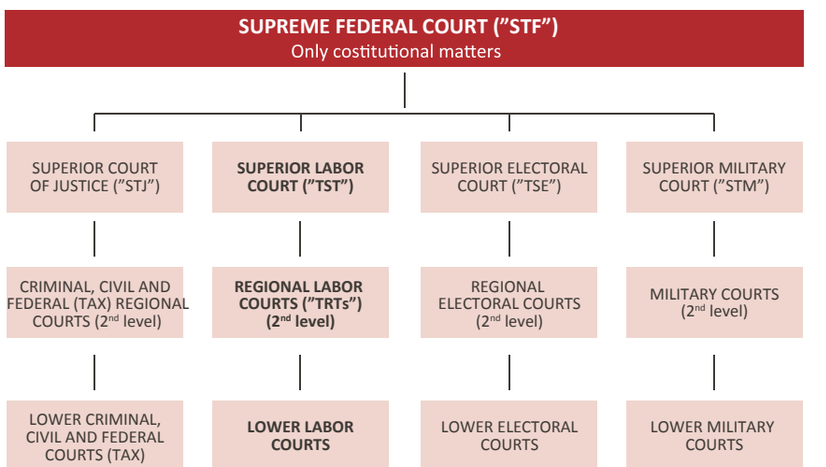
The Ministry of Labor is part of the Federal Government and it is the main labor authority in Brazil. The Ministry issues administrative regulations and proceeds with labor inspections.

The Labor Public Prosecutor's Office - "MPT" - is part of the Federal Public Prosecutor's office and its main activity is the protection of Brazilian labor law and its fulfillment by the employers. The "MPT" investigates the compliance with labor regulations and has full autonomy to investigate companies in order to guarantee compliance with labor regulations. Whenever the Public Prosecutor is unable to reach an amicable solution in the investigation, the outcome of their conclusions is the filing of a public civil action to protect the collective interests of the workers.

d. Court / Tribunal System

Brazil is a Federal Republic governed by 3 powers, Executive, Legislative and Judiciary; the Federal Constitution establishes their powers and duties.

BRAZILIAN JUDICIAL SYSTEM



The Federal Constitution grants the Labor Court jurisdiction to decide all matters arising from labor relationships, including material and moral damage indemnifications.

The Superior Labor Court is the highest instance of the Labor Courts. However, some relevant labor disputes involving constitutional matters may be decided by the Supreme Federal Court.

There are 24 Regional Labor Courts spread throughout the country. The Regional Courts are the courts of second instance. There are hundreds of lower labor courts (first instance) throughout the cities. Some cities in the metropolitan areas (*e.g. São Paulo and Rio de Janeiro*) have dozens of lower labor courts.

e. Alternative Dispute Resolution (ADR)

Except for the collective negotiation between the Employees' Union and Employers' Unions, arbitration is still not valid in Brazil. Case law still invalidates decisions rendered in arbitrations involving the discussion of individual labor agreements.

Mediation is also not a common practice in Brazil, except for situations in which the Ministry of Labor is involved in collective discussions involving Unions or negotiations between Employers and Unions.

In general, extrajudicial settlements are not binding and do not prevent employees from filing a labor claim. However, if the labor claim leads to a negative outcome for the defendant, the amounts paid under the same subject in the settlement can be set off.

The only binding extrajudicial settlement is the one conducted before a chamber created by the Union and employers, a "conciliation committee" and the majority case law holds that a release given by the employee is full and broad, except if the employee includes a disclaimer regarding specific monies he/she may be entitled to request later.

II. The Litigation Process

a. Typical Case

A labor lawsuit in Brazil is basically comprised of 3 phases: (i) evidentiary phase, (ii) appeal/revision phase, and (iii) foreclosure phase.

The first (evidentiary) phase takes place when the lower judge analyzes the requests of the plaintiff, the arguments of the defendant and the evidence brought by the parties in view of the law governing the subjects involved in the labor claim. In this, phase the hearings with the parties and witnesses are held and all the evidence is presented; such phase ends when the Lower Labor Court judge renders a decision and then the parties are able to appeal. Although there are different sequences of procedural acts, most of the cases are filed under ordinary sequence, in which parties are able to obtain the depositions of up to three witnesses.

Although the attorneys can interview the witnesses before the hearing, they can never interfere in the content of their testimonies. During the hearings, the attorney does not ask the questions directly to the witnesses. The questions are first made to the judge and if the judge considers the question relevant then the witness will be inquired about it.

Documents must be presented with the complaint and with the defense. Although some judges allow the presentation of documents until the closing of the evidentiary phase, the majority case law holds that documents not filed with the case records along with

the complaint/defense will not be considered. Of course, new documents - documents that did not exist before - can be attached at any time.

After the first instance decision is rendered, the case may be submitted for revision of the Regional/Superior Courts, initiating the second (appeal/revision) phase. The first (evidentiary phase) takes approximately 6 to 12 months.

In case any party appeals the Lower Court's decision, the second (appeal/revision) phase begins. The Regional Labor Court takes, approximately, an additional 6 to 12 months to conclude judgment. Should the Regional Court's decision not be favorable, the parties may file another appeal, this time before the Superior Labor Court. However, this second appeal may only be filed if the Regional Court's decision violates the provisions of Federal Constitution or of any Federal Law, or diverges from the consolidated case law. Therefore, often such appeal is not applicable. The Superior Labor Court currently takes approximately 12 to 24 months to judge its appeals. In very few situations another type of appeal, filed before the Brazilian Supreme Court, shall be used.

After the final and non-appealable decision is rendered by the Regional Labor Court, or, when applicable, by the Superior Labor Court or by the Supreme Court, the foreclosure phase begins.

At this stage, the parties, and sometimes a court appointed accounting expert, have to ascertain the entitlements and amounts granted to the plaintiff by the final decision. In this phase, only criteria of calculation may be discussed. From the ascertainment of the amount involved to the payment of the debit, it may take from 6 to 12 months, approximately, depending on the discussions regarding the calculations presented by both parties. After the debt is ascertained, the Social Security Authorities can question some criteria used for the calculation of the Social Security Contributions, which may also occur in case of settlement, thus possibly delaying the foreclosure phase by several more months.

Note that once the first Lower Court judgment is rendered (first phase), the plaintiff may immediately initiate the ascertainment of the entitlements and amounts granted in such stage, even when a final decision is pending in view of appeals filed before the Regional or Superior Courts. In these cases, considering that the foreclosed decision is not final yet, this foreclosure is provisory and it will end with the escrow of the debit, until the final decision is rendered and the foreclosure becomes definitive.

At any time the parties may settle an agreement, thus immediately closing the case[1].

Finally, in recent years the Labor Court has implemented the Digital Electronic Lawsuit, in which the parties and the Court submit digital files. Although we are still in a transition period, the electronic lawsuits tend to expedite the labor claims reducing the time from the filing date until the closing of the case.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, ...

It is free for employees to file labor claims. The only requirement to be granted with the benefit of free judicial costs is to present a letter declaring that the employee cannot afford litigation costs.

[1] Although in some cases, it may take months for the Court to adopt all bureaucratic procedures and definitively archive the claim after the settlement is agreed, paid and the Social Contributions Authority has not contest the amounts.

Most of the attorneys that assist plaintiffs are remunerated through success fees. Protective labor law, no judicial costs and no attorney's fees stimulate employees to file labor claims in Brazil. Usually, the attorneys receive 30% of the amount awarded.

In case of an unfavorable ruling for the defendant, there will be judicial costs to be paid in the amount of 2% over the value awarded by the decision rendered.

c. Trade Unions, Work Councils and Other Employee Representative Bodies

Trade unions in Brazil

All companies and employees are mandatorily represented by a Union, regardless of voluntary unionization/affiliation.

Union classification is made on a territorial basis, based on the preponderant activity/core business of the company and territorial scope of authority of the respective Union.

Collective bargaining agreements are those executed between the unions representing employers and employees, or between the employees' union and a specific company, for purposes of establishing general and normative rules which govern the relationship of a given category of employers and employees. Collective bargaining agreements are of mandatory observation for all their parties and/or the companies/employees of the respective category and based on the territory where the Unions have authority.

Collective lawsuits in Brazil

Public civil action is a type of lawsuit established by the Brazilian Federal Constitution and it is the judicial remedy for the protection of collective interests, such as environmental, social and labor issues.

Labor Public Civil Actions can be filed not only by the Prosecutors, but also by several other governmental entities (for instance: Federal, State and Municipal Governments; Unions; Bar Association; etc.).

In the last fifteen to twenty years, Labor Public Civil Actions have become very common and are frequently filed whenever one of the entities mentioned above becomes aware of employers that do not comply with labor regulations. Additionally, the Federal Government has made huge investments in the last years improving the structure of the Labor Ministry Prosecutor's Office, that lead to a more active performance of such entity.

Labor Prosecutors have been requesting million dollar moral damages indemnifications aiming to push the companies to accept signing a conduct adjustment agreement. Two main relevant elements are used in the calculation of a moral damages indemnification: (i) how grave and intense were the labor violations by the defendant; and (ii) the wealth of the company being sued.

So far, the courts have been ruling in a balanced way. The majority of labor public civil actions lead to condemnations of a few hundred thousand Reais instead of the millions requested by Labor Prosecutors. When a case involves severe violations the condemnations reach millions of Brazilian Reais.

d. Specialized Litigation Bar

There is no specialized litigation bar. However, proceedings and the sequence of acts are significantly different when comparing a labor lawsuit with a civil or a tax claim. Therefore, it is very common to have attorneys specialized in labor, civil or tax litigation.

III. Tips to Avoid Litigation

As described above, the number of labor claims in Brazil is significantly high. Therefore, being proactive and preventive is always the best alternative to create a good working environment.

Having an efficient and technical HR Department is a solution aiming to mitigate litigation levels. HR people must be close to the workforce and to the leaders and managers. Interviews and conversations during the employment relationship and at the termination are useful to be aware of the employee's expectations and complaints.

Compliance with the law is not enough to avoid litigation. Demonstrating to the employees that the company is concerned about having a safe and healthy working environment and that compliance with labor law is an important value to the company is also important to reduce the litigation.

Demonstrating concern with the employees' needs and concerns during the relationship and in the termination interview can make the employee uncomfortable with suing the company.

IV. Trends and Specific Cases

The latest and most relevant discussion that arose at the Labor Court involves the possibility of outsourcing activities related to the company's core business.

Although there are no specific legal provisions governing outsourcing in Brazil, such practice is commonly accepted by Brazilian Labor Courts, provided that some requirements are complied with.

For an outsourcing arrangement to be considered regular: the outsourced services cannot constitute the core business of the contracting company; the contracting party cannot directly supervise/control the outsourced workers; and the outsourced services cannot be rendered on a personal basis. Also, the contracting company will always be the liable subsidiary in case the outsourced company fails to comply with any applicable law or regulation.

In 2014, the Supreme Federal Court declared the necessity of discussing the constitutionality of Precedent 331, from the Superior Labor Court, which regulates outsourcing.

The case in which this discussion will take place at the Supreme Federal Court can significantly change outsourcing in Brazil and the entire market is waiting for the decision to be rendered about the possibility of outsourcing core business activities.

CANADA

"Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect."[1]

- Dickson, C.J., the Supreme Court of Canada

I. Overview

a. Introduction

Over the past decades Canadian workplaces have become increasingly complex with increased regulations of the workplace by the Government and the Courts.

The stakes for parties involved in workplace litigation have grown significantly, in terms of cost, potential damage awards, fines and other remedies, and reputational risks. There have been a number of employment cases in Canada in recent years that have attracted significant media attention.

As the quote above illustrates, Canadian courts are protective of employees. Legislation that regulates the workplace is remedial and the normal canon of interpretation is that a remedial statute receives liberal construction while a penal statute, such as the *Criminal Code*, calls for strict construction. In the case of remedial statutes, if there is any doubt, the same is resolved in favour of the class of persons for whose benefit the statute is enacted.

b. Claims

Wrongful dismissal cases are typical employment claims that employers face following the termination of employment of non-union employees. Although they are predominantly founded on the common law concerning employment contracts, they may also arise out of violations of various statutory schemes designed to protect the rights of workers or Canadians generally.

Provincial and federal governments provide mandatory protections to employees under various employment statutes. Workplace parties cannot contract out of these minimum standards. Consequently, contravention of these minimum standards, regardless of any contrary contractual provisions or settlements, could provide the foundation for a cause of action for wrongful dismissal. In addition to court actions for wrongful dismissal and related claims, there are statutory complaint procedures available to disgruntled employees. In some cases, an employee need not even initiate a complaint: a government agency may initiate enforcement procedures of its own volition. Alternatively, and sometimes as well, employees could follow one of various statutory complaint procedures. It is important for employers to understand how these different facets of the law relate to wrongful dismissal so they can effectively avoid problems when terminating employment or at least limit their exposure to liability.

Most workplaces are regulated by provincial legislation in regard to workplace law. Each province and territory (to some extent) has its own laws dealing with five major areas of employment, and employees can make claims in any of these areas:

[1] *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] S.C.J. No. 10, [1987] 1 S.C.R. 313 at para. 91 – this was actually part of a dissent.

Employment standards: The standards set out in the Employment Standards Acts establish minimum statutory standards that must be met by employers who do business in Canada.

Labour relations or trade union law: This legislation lays out the process of trade union organizing and certification, which permits unions to act as the sole and exclusive bargaining agents for groups of employees. Furthermore, the legislation sets out the framework that governs the relationship and obligations that exist between the employer and the certified union and employees.

Human rights: This area of workplace law prohibits discrimination of employees based on certain characteristics such as race, gender and disability in regard to hiring and throughout the employment relationship. It also protects employees from workplace harassment based on protected grounds. Some jurisdictions also have pay equity legislation and employment equity legislation. Human rights cases are an area of frequent litigation and so this is a developing area of the law. Further, new protected grounds have been added in some jurisdictions.[2]

Occupational health and safety: There is a system in Canada that places a duty on various players in the workplace to cooperate to maintain a safe and healthy work environment. This duty is fulfilled by employers through the authorization of worker representatives and health and safety committees who investigate and bring unsafe or unhealthy working conditions to the attention of the employer.

Workers compensation: This is an insurance system run by various provincial governments that supplies a complex array of benefits to workers who become ill or injured due to workplace accidents. In return, workers are denied the right to sue their employers for creating an unsafe or unhealthy work environment or for allowing such an environment to persist.

Despite the primacy of provincial jurisdiction in employment and labour law, there are some workplaces that are not covered by provincial employment legislation because under the Canadian constitution they are federally regulated. Persons employed by the federal government and federal Crown corporations are covered by federal legislation. Federal employment legislation also applies to employers in the areas of banking, international or inter-provincial transportation, broadcasting, and telecommunications to name a few. Claims by federally regulated employees can be made under any of the five major areas of employment law described above.

c. Administrative Agencies that Investigate or Adjudicate Claims

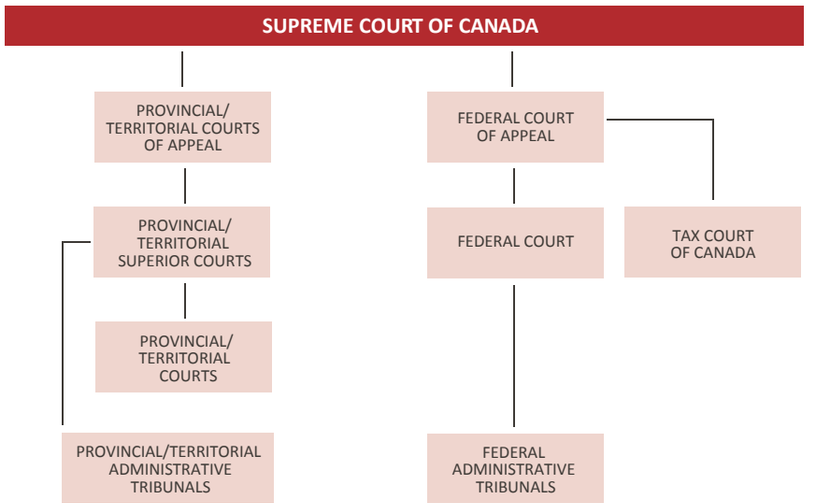
While an exhaustive review of the administrative agencies that investigate and/or adjudicate each of the various types of employment claims in each province and territory of Canada is beyond the scope of this paper, it is generally the case that each of the areas of employment law described above has a specialized agency that administers that area of the law and investigates and/or adjudicates claims made under the relevant legislation. Attached as Appendix 'A' is a general overview of the legislation in each of the five areas of employment law identified above and the agencies responsible for administering and overseeing the legislation in each province and territory.

[2]On June 13, 2012, the Ontario Human Rights Code was amended to add both gender expression and gender identity as prohibited grounds of discrimination. One day later, the Manitoba Human Rights Code was also amended to add gender identity as a prohibited ground. At the Federal level, 2012, Bill C-279 passed second reading in Parliament and in June 2014 was referred to the Standing Senate Committee on Legal and Constitutional Affairs. The Bill amends the Canadian Human Rights Act to add "gender identity" to its list of prohibited grounds of discrimination. It also would alter the Criminal Code, adding gender expression and identity as distinguishing characteristics protected under hate propaganda laws, and making discrimination against transsexuals an aggravating factor in sentencing.

As a practical matter, what this means is that, for an area of employment law such as occupational health and safety, there are fourteen jurisdictions (one federal, ten provincial and three territories[3]) all of which have their own agencies that are responsible for investigating and/or adjudicating claims made under the relevant legislation.

d. Court / Tribunal System

CANADA'S COURT SYSTEM



Overview

There are basically four levels of court in Canada. First, there are provincial/territorial courts. Second are the provincial/territorial superior courts. On the same level, but responsible for different issues, is the Federal Court. At the next level are the provincial/territorial courts of appeal and the Federal Court of Appeal, while the highest level is occupied by the Supreme Court of Canada.

Provincial/Territorial Courts

Each province and territory, with the exception of Nunavut, has a provincial/territorial court, and these courts hear cases involving either federal or provincial/territorial laws. (In Nunavut, there is no territorial court – matters that would normally be heard at that level are heard by the Nunavut Court of Justice, which is a superior court.) The names and divisions of these courts may vary from place to place, but their role is the same. Besides certain criminal and family law matters, provincial/territorial courts deal with provincial/territorial regulatory offences (such as prosecutions under occupational health and safety legislation), and claims involving money, up to a certain amount (set by the jurisdiction in question). Private disputes involving limited sums of money may also be dealt with at this level in Small Claims courts.

[3]Although they are separate territories, Nunavut and the Northwest Territory share administrative agencies.

Provincial/Territorial Superior Courts
Each province and territory has superior courts. These courts are known by various names, including Superior Court of Justice, Supreme Court (not to be confused with the Supreme Court of Canada), and Court of Queen's Bench. While the names may differ, the court system is essentially the same across the country, with the exception, again, of Nunavut, where the Nunavut Court of Justice deals with both territorial and superior court matters.

The superior courts have "inherent jurisdiction," which means that they can hear cases in any area except those that are specifically limited to another level of court. In the employment law context, superior courts try cases over a set monetary limit, which varies across the country.

Although superior courts are administered by the provinces and territories, the judges are appointed and paid by the federal government.

Courts of Appeal

Each province and territory has a court of appeal or appellate division that hears appeals from decisions of the superior courts and provincial/territorial courts. The number of judges on these courts may vary from one jurisdiction to another, but a court of appeal usually sits as a panel of three. The courts of appeal also hear constitutional questions that may be raised in appeals involving individuals, governments, or governmental agencies.

The Federal Courts

The Federal Court and Federal Court of Appeal are essentially superior courts with civil jurisdiction. However, since the Courts were created by an Act of Parliament, they can only deal with matters specified in federal statutes. In contrast, provincial and territorial superior courts have jurisdiction in all matters except those specifically excluded by a statute.

The Federal Court is the trial-level court; appeals from it are heard by the Federal Court of Appeal. While based in Ottawa, the judges of both Courts conduct hearings across the country. The Courts' jurisdiction includes interprovincial and federal-provincial disputes, intellectual property proceedings (e.g. copyright), citizenship appeals, Competition Act cases, and cases involving Crown corporations or departments of the Government of Canada. Only these Courts have jurisdiction to review decisions, orders and other administrative actions of federal boards, commissions and tribunals. These bodies may refer any question of law, jurisdiction or practice to one of the Courts at any stage of a proceeding.

The Supreme Court of Canada

The Supreme Court of Canada is the final court of appeal from all other Canadian courts. The Supreme Court has jurisdiction over disputes in all areas of the law, including constitutional law, administrative law, criminal law and civil law.

The Court consists of a Chief Justice and eight other judges, all appointed by the federal government. The Supreme Court Act requires that at least three judges must come from Quebec. Traditionally, of the other six judges, three come from Ontario, two from western Canada, and one from the Atlantic provinces. The Supreme Court sits in Ottawa for three sessions a year – winter, spring and fall.

Before a case can reach the Supreme Court of Canada, it must have used up all available appeals at other levels of court. Even then, the Court must grant permission or "leave"

to appeal before it will hear the case. Leave applications are usually made in writing and reviewed by three members of the Court, who then grant or deny the request without providing reasons for the decision. Leave to appeal is not given routinely – it is granted only if the case involves a question of public importance; if it raises an important issue of law or mixed law and fact; or if the matter is, for any other reason, significant enough to be considered by the country's Supreme Court. In limited situations, the right to appeal is automatic.

e. Alternative Dispute Resolution (ADR)

Alternative Dispute Resolution ("ADR") is frequently used to resolve employment litigation. Mediation is generally encouraged and in many court and tribunal processes it is mandated. Parties frequently mediate wrongful dismissal cases before they are commenced. Arbitration is also utilized, at times in conjunction with mediation, and has been used successfully as part of a process to resolve class action employment litigation. Many employers and unions have successfully crafted mediation and expedited arbitration procedures to enable fast and inexpensive resolution of workplace disputes.

II. The Litigation Process

a. Typical Case

Each of the common law provinces has its own set of court rules, which govern court proceedings in that province and so it is critical to consult and follow the rules in the applicable jurisdiction. Quebec, which is the one civil law province, has its own rules, although its courts, like the common law courts, are ultimately subordinate to the Supreme Court of Canada.

i. Steps in the Process

Statement of Claim

Most wrongful dismissal cases are brought by way of an action. The statement of claim is the pleading that typically begins the litigation process. It gives the plaintiff the opportunity to set out his or her claim for relief.

It should be noted that once the statement of claim has been issued, certain time limits will begin to run with respect to filing a statement of defence, among other things.

In Ontario, the statement of claim must be served on all parties within six months of being issued. This is subject to Rule 78.06 which states that in certain circumstances the registrar can dismiss the action as being abandoned.[4] Personal service on the defendant is required. In practice, as a matter of courtesy, the defendant's counsel might accept service on behalf of his or her client if he or she is authorized to do so.

Statement of Defence

Once the defendant has been properly served with the originating process, it is the defendant's responsibility to serve and file a statement of defence within the time frame prescribed by the applicable court rules.

[4]See Rule 14.08 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

Reply

The reply is the plaintiff's opportunity to respond within the applicable time limitations to any new issues raised by the employer in the statement of defence. If a defendant issues a counterclaim against the plaintiff, the plaintiff also has the opportunity to respond to the counterclaim. If the plaintiff makes a reply, he or she must respond to the counterclaim in the same document. This pleading is called a reply and defence to counterclaim. It should be remembered that a reply is appropriate only where the plaintiff intends to prove a version of the facts different from that pleaded in the statement of defence (and not already pleaded in the statement of claim) or where the plaintiff intends to reply on any matter that might take the defendant by surprise if not pleaded.

Discovery

The court rules typically provide for a discovery process to ensure the exchange of relevant information and documents between the parties.

Discovery of documents from parties is generally a two-step procedure. The first step, disclosure, involves the preparation and service of an affidavit of documents. The rules regarding what documents need to be produced and when vary according to the jurisdiction; however, in general every document relating to any matter at issue in an action that is or has been in the possession, control or power of a party to the action must be disclosed, whether or not privilege is claimed in respect of the document. Documents are broadly defined to include photographs, videotapes, plans, surveys, maps and computer-stored data and information. The second step involves production for inspection. Each party is entitled to inspect every document relating to any matter in issue in an action that is in the possession, control or power of a party to the action, unless privilege is claimed in respect of the document.

Following documentary discovery, and depending on the nature of the proceeding, there may be examinations for discovery, in which each party to an action is entitled to examine the opposing party.

Offers to Settle

A party may serve on any other party a written offer to settle any or all of the claims in a proceeding on the terms set out in the offer. A written offer to settle can be made at any time before or during the proceeding. The cost system under the rules of civil procedure in Ontario is designed to encourage parties to make early and reasonable settlement offers.

Mediation

Some provinces and certain regions within provinces now require mediation as part of the litigation process. The purpose of mandatory mediation is to reduce the costs and delays in litigation and facilitate the early and fair resolution of disputes.

ii. Pretrial Proceedings

Depending on the jurisdiction and the nature of the proceeding, a pre-trial conference may be required. A pretrial conference is a meeting of the parties and counsel, and is usually held before a judge.

All pre-trial conferences address two issues: case management and resolutions. Case management includes how the trial will be conducted. Pre-trial conferences are intended to promote a fair and expeditious trial, where it is not possible to resolve a case. The pre-trial

judge will identify whether there are issues that are not in dispute, how to simplify the issues that remain in dispute, the possibility of obtaining admissions and agreements on evidence to be introduced, and the estimated duration of the proceedings.

Any discussions that occur during the pre-trial stage cannot be repeated at trial, unless all parties agree.

The judge presiding at the pre-trial conference cannot preside at the trial without the agreement of the parties, although he or she will prepare a report to the trial judge. The report cannot make any reference to resolution discussions.

iii. Role of Witnesses, Counsel and Court / Tribunal

Civility and professionalism are extremely important in Canadian court rooms. As summarized in the Canadian Bar Association's Code of Professional Conduct:

> *Civility amongst those entrusted with the administration of justice is central to its effectiveness and to the public's confidence in that system. Civility ensures matters before the Court are resolved in an orderly way and helps preserve the role of Counsel in the justice system as an honourable one.*
>
> *Litigation, however, whether before a Court or tribunal is not a "tea party". Counsel is bound to vigorously advance their client's case, fairly and honourably. Accordingly, Counsel's role is openly and necessarily partisan and nothing which follows is intended to undermine those principles. But Counsel can disagree, even vigorously, without being disagreeable. Whether among Counsel or before the Courts, antagonistic or acrimonious behaviour is not conducive to effective advocacy. Rather, civility is the hallmark of our best Counsel.*

A hallmark – and point of pride – of the Canadian Labour and Employment Bar is its collegiality and the high degree of civility exercised by lawyers practicing in this area.

Witnesses

Depending on the proceeding and the jurisdiction, a party may be required to disclose the names and addresses of all persons who may have relevant information, and who could therefore be called as a witness at trial by a party.

iv. The Appeal Process

To interfere with a trial judge's decision, there must be a palpable and overriding error. An appellate court will intervene only where "the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it".[5] This standard of review outlined by the Supreme Court of Canada has been applied to the wrongful dismissal context.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

Litigation is expensive and Canadian courts and tribunals are no exception. Litigation should only be undertaken after informal methods of resolving the issue are considered. One feature of the Canadian court system is that the losing party is typically required to pay a portion of the successful party's costs in addition to his or her own. In Ontario, a

[5] *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] S.C.J. No. 4, [1994] 1 S.C.R. 114 at 121 and 122.

party can seek to mitigate the risk of a costs award by making an early and reasonable settlement offer, based on a careful assessment of the likely outcome of the case if it were to be decided by a court. It should be noted, however, that this system of costs does not apply to proceedings before administrative tribunals.

In terms of damages in the employment law context, the common law framework that governs wrongful dismissal can be divided into three basic components. First, the relationship that exists between employer and employee is contractual in nature, whether or not a written agreement actually exists. The basic contractual law principle that is implied into most employment contracts provides that every employee is entitled to receive reasonable notice of termination (statutory notice is included within reasonable notice), or pay in lieu thereof, where just cause for summary dismissal does not exist, the contract is not frustrated or the express provisions of the contract do not provide for a pre-negotiated amount of notice in lieu of reasonable notice.

The factors that courts generally consider when determining the amount of reasonable notice were established in the seminal decision in *Bardal v. The Globe and Mail Ltd.* [1960] O.W.N. 253 (H.C.), and resulted in the development of the so-called "Bardal factors", which are described in the passage below:

> *There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.*

This judgment makes it clear that the appropriate notice period in wrongful dismissal cases is determined on a case-by-case basis, with all of the above factors to be considered. The only exception to this implied provision of reasonable notice of termination is if the parties expressly provide for an alternative arrangement within the employment contract, provided the terms of the agreement do not contravene the relevant legislation.

The second component is found in tort law, which governs the relationship between employer and employee as well as exchanges between the employee and his or her fellow co-workers. While the tort liabilities that can arise in the context of the employment relationship are unrelated to the notice period for termination, they usually relate to actions taken by either the employer or a colleague of the employee during the course of the employee's employment, especially at the point of dismissal. Examples of tort claims that often arise in the context of a dismissal include: defamation, intentional infliction of mental suffering, negligent misrepresentation, interference with contractual relations and conspiracy.

The third common law component that governs the employment relationship is found in the damages that are related to, but are separate from, the elements of the claim arising under the law of contract or torts.

The Supreme Court of Canada plainly set out that punitive damages for bad faith dismissal are only available in the case of wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own. Punitive damages are rare, given the high threshold for awarding such damages. Notably, in a recent Ontario case where punitive damages of $1 million dollars was awarded by a jury, the Court of Appeal reduced the award to $100,000 on the grounds that the award was not rationally

required to denounce or punish the employer and that the company's misconduct fell well short of the standard required to justify such a large award.[6]

The legal principles underlying mental distress or aggravated damages were summarized as[7]:

- Employment contracts are not "peace of mind" contracts. Accordingly, it is within the parties' contemplation that psychological damage to the employee, including "normal distress and hurt feelings" will arise from the termination of employment. These are not compensable.
- However, bad faith conduct i.e. conduct that is untruthful, misleading or unduly insensitive may give rise to compensable damages.
- It is within the reasonable expectation of employees and employers that employers must be "candid, reasonable, honest and forthright with their employees" in the course of dismissing them. A breach of this expectation may be compensable.
- A compensable breach of this reasonable expectation is treated as a separate head of damages and not as an extension of the notice period.

As a practical matter, although mental distress claims may frequently be plead, the twin thresholds of bad faith behaviour by the employer plus actual proof of damage (i.e. medical evidence) means that aggravated damages are difficult to prove. Even when awarded, the amounts awarded generally have been modest although employers are cautioned that there have been exceptions.

c. Trade Unions, Work Councils and Other Employee Representative Bodies

Every collective agreement is required to have an arbitration process that provides for final and binding resolution of disputes under the collective agreement. The parties to a collective agreement have latitude to develop a process that works for them, as long as it meets certain minimum requirements. Some of the arbitration options available include three (3) member arbitration boards, or a sole arbitrator. Some parties have a rotating panel of agreed arbitrators, while others agree on an arbitrator on a case by case basis, and in some cases (i.e. where the parties cannot agree on an arbitrator) the Minister of Labour may be asked to appoint an arbitrator.

Labour arbitrations are less formal than court; however, for the most part the standard rules of evidence apply and the procedure for introducing evidence is similar to that followed in court. Labour arbitrators are empowered under the various provincial labour statutes to make interim orders concerning procedural matters; require a party to produce particulars or documents; summon and enforce the attendance of witnesses and to accept the oral or written evidence as the arbitrator or the arbitration board, as the case may be, in its discretion considers proper, whether admissible in a court of law or not.

Labour arbitrators are also able to interpret and apply employment related statutes, and under certain employment statutes, unionized employees must argue their claims through the grievance and arbitration procedure in a collective agreement as opposed to through a statutory tribunal.

The Supreme Court of Canada considered the extent to which a unionized employee can have access to the courts – as opposed to arbitration – to pursue a claim against the employer. The Court opted for an "exclusive jurisdiction" model, which denies access

[6] *Boucher v. Wal-Mart Canada Canada Corp.*, 2014 ONCA 419
[7] *Honda v. Keays, supra,*

to the courts if the essential character of the dispute arises from the interpretation, application, administration or violation of the collective agreement. However, some courts have held that, even if a matter does arise under a collective agreement, courts retain a residual jurisdiction that may be exercised if there is no adequate remedy available from arbitration.

The decisions of labour arbitrators are accorded a high degree of deference in Canada. In 2011, the Court noted that an arbitrator's mandate is unique, informed by the particular context of labour relations, and that arbitrators are not required to apply legal principles as a court would. The Court's analysis emphasized the broad discretion that labour arbitrators are granted by their governing statutes and by the nature of the Canadian labour relations regime, which the Court held requires flexibility in crafting remedies in light of the ongoing relationship between the employer and the bargaining agent.

III. Tips to Avoid Litigation

The best practices that can assist in the avoidance of litigation are relatively straightforward. Well drafted and clear employment contracts entered into before employment starts are critical for avoiding litigation. Performance and conduct expectations should be made clear to prospective employees and employees. It is helpful to have well drafted and clear employment policies that are updated on a regular basis and provided to employees. Documenting an employee's performance and providing fair and well-documented warnings to employees whose performance is not meeting communicated expectations is also critical for avoiding litigation.

If a dispute does arise, it is recommended that employers look for opportunities to resolve the dispute on a reasonable basis as soon as possible.

IV. Trends and Specific Cases

a. New or Expected Developments

Constructive Dismissal

The Court of Appeal recently addressed the issue of whether an employee who had been constructively dismissed had an obligation to return to work for his former employer during his period of working notice. The Court concluded that, in this case, the employee did not have such an obligation since the employer had not expressly offered him a position following his constructive dismissal.

The employee in question was working at the Company as Operations Manager/Vice President. For economic and business reasons, the Company transferred him to the position of Purchasing Manager. This was a position which he had held some years earlier. The salary and working conditions would have been the same in this new position, but for a likely reduction in bonus. At the time of the transfer, the worker was 58 years old and had been employed with the Company for 38 years. The worker did not accept the position and sued the Company.

The trial judge found that the transfer constituted a unilateral and fundamental change to the employment contract and was therefore a constructive dismissal. She specifically noted that the transfer involved a significant change in responsibilities and duties and was a significant loss of status and prestige. Given the worker's age, the length of time he had worked for the Company, and his senior management functions at the time of the dismissal, she set the period of notice owing to Mr. Farwell at 24 months.

The trial judge further held that the worker had no obligation to mitigate his damages by accepting the Purchasing Manager position. To require the worker to do so would be humiliating and embarrassing, and mitigation in such an instance would be unreasonable. The Company appealed the decision stating that the transfer had been motivated by economic considerations, and not by any animus against the worker or any attempt to stigmatize him. The Company further argued that in circumstances whereby a restructuring was a result of a business decision, as opposed to a pretext to terminate an employee, the employee should be obliged to return to work for the employer (at least for the notice period) in spite of the constructive dismissal.

The Court of Appeal unanimously dismissed the appeal, stating that the Company's mitigation argument presupposed that it had offered the worker a chance to mitigate damages by returning to work. The Court's position was that the Company, quite simply, could not argue that the worker had failed to mitigate his damages by working as the Purchasing Manager during his period of notice, because they had not offered him the position after he initially refused to accept the transfer into it. The worker had, therefore, not breached his duty to mitigate.

This case highlights the importance of employers treading carefully in situations of economic uncertainty resulting in the reorganization of employees. While employers often choose to transfer individuals into other positions, decrease benefits, or make other similar decisions in lieu of terminating employees where there are economic challenges, such actions may also attract the risk of a constructive dismissal claim and subsequent legal and financial consequences. An employer cannot assume that an employee will accept a new position unilaterally imposed on him or her as a means of mitigating damages. Rather, based on this decision, once an employee rejects a position they have been transferred into and claims constructive dismissal, the employer must then clearly state that the same exact position (i.e the one which led to the constructive dismissal claim to begin with) is available for the employee to mitigate his or her damages.

Family Status Protection

The Federal Court of Appeal upheld two decisions of the Canadian Human Rights Tribunal, which found that the Applicants were discriminated against on the basis of family status. In its decision, the Federal Court of Appeal clarified the meaning of "family status" protections and clarified the test that should be applied to determining whether an applicant has established a *prima facie* case of discrimination on the basis of "family status."

The Court first emphasized an employee's obligation to self-accommodate, stating "it is only if the employee has sought out reasonable alternative childcare arrangements unsuccessfully, and remains unable to fulfil his or her parental obligations, that a *prima facie* case of discrimination will be made out."

The Court then outlined the test to be utilized in determining whether an applicant has established a *prima facie* case of discrimination on the basis of family status, where the issue is the requested accommodation of childcare needs:

- That a child is under his or her care and supervision;
- That the childcare obligation at issue engaged the claimant's legal responsibility for that child, as opposed to a personal choice
- That he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible; an
- That the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfilment of the childcare obligation.

The Court ultimately held that the worker had a legal obligation to care for her children, that she had made significant efforts to self-accommodate, but was unable to find alternate childcare arrangements that would be able to service her unpredictable shift schedule, and that her schedule interfered with her childcare obligations in more than a trivial or insubstantial way.

The Court also noted that "family status" protections do not extend to personal family choices, such as participation in extra-curricular activities, but only to parental obligations.

b. Recent Amendments to the Law

Ontario's *Employment Standards Act, 2000* (the "ESA") was amended on October 29, 2014 by adding three new categories to the leave of absence provisions of the ESA. These include family caregiver leave, critically ill child care leave, and crime-related child death or disappearance leave.

Employees intending to take any of these leaves must advise their employer in writing of their intent to take the leave. Employees wishing to take critically ill child care leave or crime-related death or disappearance leave must also provide the employer with a written plan setting out when they intend to take the leave. Employers are entitled to request the medical certificate qualifying an employee for family caregiver leave or critically ill child care leave.

Employers may wish to seek advice on how to incorporate these new leave entitlements into their organization's policies and procedures, contracts or collective agreements.

FRANCE

I. Overview

a. Introduction

Employment law in France is primarily subject to a special jurisdiction: the Conseil de Prud'hommes (the "Labor Court"), which has exclusive jurisdiction over individual employee/employer matters.

The Conseil de Prud'hommes is comprised of an even split of elected employers and employees, rather than professional judges.

There is no limit on the cases that may be brought before the Conseil de Prud'hommes, other than that they must concern individual litigation arising from a contract of employment.

As such, the Conseil de Prud'hommes does not adjudicate collective litigation, which is instead dealt with by traditional civil or administrative courts.

Disputes in relation to social security contributions, occupational diseases and work accidents are dealt with by the Tribunal des Affaires de Sécurité Sociale.

Litigation in relation to the election of staff representative bodies is dealt with by the Tribunal d'instance.

b. Claims

There is no prior filter to a claim before the Conseil de Prud'hommes. Hence, all claims may be recognized. The most common claims are the following:

Wrongful dismissal

- Dismissals may be based on personal reasons (misconduct, lack of performance, etc.) or economic reasons (redundancy).
- In both cases, the dismissal should rely on a real and serious cause. That is to say, it should be based on precise and objective reasons, which may be demonstrated in Court. Its cause should be sufficient to discontinue the employee's employment.
- Failure to demonstrate the real and serious cause of the dismissal will allow the employee to claim damages before the Labor Courts.

Discrimination

- Under the principle of non-discrimination, no person may be denied recruitment, and no employee may be sanctioned, dismissed or subjected to direct or indirect discriminatory measures, for example in terms of remuneration, qualifications or promotions, for any of the following reasons: origin, sex, values, sexual orientation, age, family situation, pregnancy, genetic characteristics, ethnicity (real or supposed), nationality, race, political opinions, syndical activity, legal exercise of the right to strike, religious convictions, physical appearance, name, state of health or handicap. A law adding place of residence to this list has recently been passed.
- Discrimination is considered to be direct when a person is treated in a less favorable fashion than another is, has or would be treated in a comparable situation. Discrimination is considered to be indirect when a provision, criterion or practice, neutral in appearance, entails a particular disadvantage for certain persons in relation to others, unless justified by a legitimate goal and by necessary and appropriate means.
- The court may find a dismissal to be null and void where a fundamental liberty of the employee concerned has been violated. Cases where dismissal may be

found null and void include discriminatory dismissal. In such a case, the employee concerned is entitled to request their reintegration within the company or to proceed with the termination of the employment contract whilst claiming related indemnities and the reparation of the prejudice suffered.

Wage/hour

Minimum wage

- As of 1 January 2014, the minimum gross monthly wage is EUR 1 445.38 for a 35-hour week. All employees who are employed under an ordinary employment contract (either indefinite or fixed term) are entitled to the minimum wage. Collective bargaining agreements also frequently provide minimum wages (which depend on job categories).
- Failure to respect the minimum wage requirements may result in a claim by the employee, which may be brought before the Labor Courts through a summary procedure, as well as a fine.

Working time

- When the work contract does not have any specific provision on working time, employees work a 35-hour week. In such a case, any work over 35 hours a week is payable as overtime (although there is no entitlement to additional days off).
- In any event, employees should not work more than:
  - An average of 44 hours a week during any 12 consecutive weeks;
  - 48 hours during any given week;
  - 10 hours a day; and
  - 220 hours of overtime a year (subject to applicable collective bargaining agreements)
- Litigation may arise regarding the payment of overtime, as well as the non-respect of provisions regarding minimal rest. Lately, specific provisions on working time, mainly the agreements regarding annual pay based on the number of days worked (*"forfait jours"*), have been challenged in court for not respecting the health and safety (in particular times of rest) of the employees subject to "forfait jours" agreements.
- Failure to respect the maximum working time requirements may also result in fines.

The employment contract from employee perspective (mainly requalification and constructive dismissal)

- Specific contracts (part time, fixed term, etc.) should be in writing before the commencement of work. The absence of such provisions in writing will result in recognising the contract as a regular full time indefinite term contract.
- Corporate mandates or freelance contracts may also be requalified as regular full time indefinite term work contracts, where the corporate officer or freelancer appears to be subordinated to the company or co-contractor.
- During the performance of the contract, the employee may claim constructive dismissal before the Courts (with immediate effect (*"prise d'acte"*) or at the date of the judgment by the Court (*"résiliation judiciaire"*)).

Claims by Works Councils and other representative bodies

- The claims of Works Councils or other representative bodies, based on the breach of any collective agreement or applicable law, will be brought before the traditional Civil Courts, such as the Tribunal de Grande Instance, as they do not have a relationship based on an employment contract.

- However, please note that Trade Unions may assist an employee in his/her claim and request damages before the Labor Courts on his/her behalf.

c. Administrative Agencies that Investigate or Adjudicate Claims

The Labor Authority: the Direccte

- Each region in France has a Labor Authority, called the Direccte.
- The Labor Inspector depends on the Direccte.

Powers of the Labor Authority

- The Labor Inspector controls the application of Labor Law, including reporting violations in terms of discrimination and sexual and moral harassment, among others.
- The Labor Inspector has the power to investigate the premises of companies without notice and to conduct investigations, including interviewing employees and demanding the production of documents.
- The investigations of the Labor Inspector may lead, inter alia, to a formal notice to comply with the applicable rules and regulations or a decision, for example, to remove an illegal clause in the interior regulation of the company.
- Further, the employer needs to provide the Labor Inspector with material such as the Internal Rules of the Company, Company agreements, etc. The Labor Inspector is also competent to authorize the dismissal of protected employees.
- The Direccte will also play an important role in the event of a collective redundancy, where it will control the procedure and elements, such as the measures provided for by the job preservation plan, according to the documents provided by the employer.

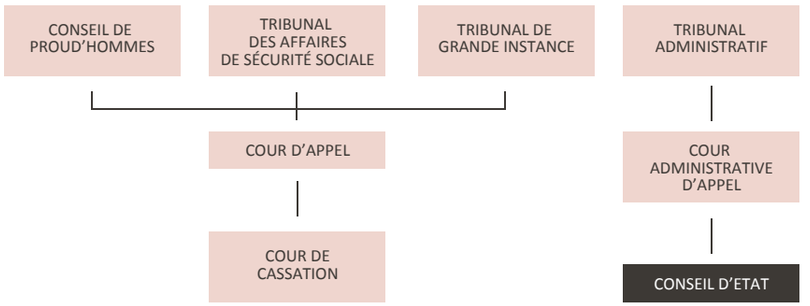
d. Court / Tribunal System

The standard court system in individual employment law matters, that of the Conseil de Prud'hommes, is as follows:

- **Cour de cassation:** applies on a national level, the equivalent of the Supreme Court.
- **Cour d'Appel:** applies on a regional level.
- **Conseil de Prud'hommes** (along with the Tribunal des Affaires de Sécurité Sociale and the Tribunal d'Instance): applies in each city or at the level of some "districts", on a first instance level.

Notwithstanding this, it is necessary to note that the following traditional jurisdictions also play a role in adjudicating employment law issues at first instance: the Tribunal de Grande Instance, which adjudicates collective litigation concerning employment law, as well as the Administrative Courts, which adjudicate litigation concerning protected employees, when recourse to the administration proves to be insufficient. Since the law dated 14 June 2013, the Administrative Courts also have jurisdiction to adjudicate litigation in relation to any decision that the Direccte may have taken to approve or to refuse the implementation of a job preservation plan in the case of collective redundancy.

The court hierarchy, including all these judicial bodies, can be depicted as follows:



e. Alternative Dispute Resolution (ADR)

Mediation

The judge has the power, with the consent of both parties, to designate a mediator to mediate the dispute and to attempt to reach an agreement. Due to court congestion, mediation is often proposed by the Courts of appeal, in practice.

The mediation is confidential and takes place before an independent, impartial mediator, who guides the parties as they play the primary role in attempting to find a solution to their dispute.

After mediation, the matter returns to the judge: if mediation is successful, for the judge to rule the discontinuance of proceedings; or if the mediation is not successful, for adjudication.

Arbitration

Arbitration is rarely used in employment law in France, with the Cour de Cassation holding that alternative dispute resolution clauses are only enforceable with the employee's express consent when litigation arises.

However, a Labor Arbitration Center (*"Centre d'Arbitrage du Travail"*) is underway, which aims to develop this alternative method of dispute resolution. This would involve the submission of the parties to the binding decision of an arbitrator, most likely a former lawyer or magistrate with expertise in employment law.

II. The Litigation Process

a. Typical Case

i. Steps in the process

Seizing the court

- The proceedings before the Conseil de Prud'hommes begin with a written or oral claim being submitted to the Labor Court by the party, which in practice, are written submissions detailing the nature of the claims and their monetary evaluation, which are registered by the clerk of the Conseil de Prud'hommes. There is no requirement of representation by a lawyer before the Conseil de Prud'hommes.
- Upon receipt of the submission, the Labor Court invites the Parties to a conciliation hearing.

Conciliation hearing

- During this hearing, the labor court (composed of one employee and one employer representative) will encourage the parties to reach an agreement.
- If no agreement is reached pursuant to the conciliation hearing, the court fixes a date for the hearing, as well as a timetable (indicative, not obligatory) for the exchange of documents and submissions, in order to respect the rule of *audi alteram partem* (i.e. the right to a fair trial where both parties disclose in due time their evidence and legal arguments).

Hearing

- The day of the hearing, the labor court is composed of 2 employee representatives and 2 employer representatives. The Court usually grants each party between approximately 15 and 45 minutes to plead their case (depending on the difficulty of the case and the legal questions at stake). As the procedure is oral, the hearing is very important, as the judges will not have analyzed the case before the hearing.

ii. Role of Witnesses, Counsel and Court / Tribunal

Witnesses have little direct participation in the trial process before the Conseil de Prud'hommes: their primary role is to produce witness statements. This is because almost the entire process is based on written documents, with little oral testimony.

The role of the Conseil de Prud'hommes is solely confined to the hearing itself: the judges have no power of investigation before the hearing. However, a party may request that the Conciliatory Bureau render a Court Order for claims that are not challengeable (such as the payment of base salary).

A party may also request the President of the Tribunal de Grande Instance, who is the guardian of civil liberties, to grant the assistance of a bailiff to conserve evidence before the trial (art. 145 of the civil code). In practice, the bailiff will seize documents necessary to prove elements of the causes of action being adjudicated in the trial. However, this measure is seldom requested as the burden of the proof is very low before the Labor Courts.

iii. The Appeal Process

Where the amount of the dispute before the Conseil de Prud'hommes is less than or equal to 4 000 euros, it is considered to be a decision of last resort and cannot be appealed. However, where it is over 4 000 euros, it is considered to be a decision of first resort and may be subject to appeal. For the Labor Courts, the appeal process is described below.

Appeal (*"Cour d'appel"* regrouped on a regional level)

- Where it is not a decision of last resort
- The deadline to appeal is a maximum of 1 month after the written decision at first instance is handed down
- Declaration of appeal at the registry of the Cour d'appel
- No assistance by a lawyer is required

Quashing (*"Cour de cassation"*, High Court of Justice in France)

- Where it is a decision of last resort
- Appeal introduced to challenge the legal grounds of a decision (the factual elements of the case will not be reviewed by the Cour de Cassation).
- The appeal may be introduced for one of the following, limited, reasons:
  - Violation of the law
  - Excess of power
  - Lack of competence
  - Lack of legal grounds
  - Procedural error
  - Insufficient reasons
- The deadline to appeal is a maximum of 2 months after the first instance decision, where a decision of last resort or the written appeal decision is handed down
- Written declaration delivered personally or by registered mail with an acknowledgment of receipt at the registry of the Cour de Cassation
- Before the Cour de Cassation, representation is compulsory. The parties should be represented by a specific lawyer registered before the Cour de Cassation.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

There is no filing fee before the Conseil de Prud'hommes. The parties are also required to pay a number of accessory costs throughout the course of proceedings, including legal fees, bailiff's fees and expert's fees, where applicable. Article 700 of the Code of Civil Procedure provides that the judge may, at their discretion, require that the losing party pays a determined amount to the other party to compensate for these costs. This specific indemnity rarely exceeds 2 000 euros and is also rarely ordered against the employee should he/she be the losing party.

Legal fees

Legal fees will depend on the length of the procedure.

Remedies and damages

Generally, compensation awarded by the Labor Courts is based on the number of months of salary. Reintegration of an employee into a given company is rare, as it is only possible when accepted by both parties, and is often converted into damages. However, reintegration may be ordered against the former employer's will in the case that the dismissal is null and void.

Where a dismissal is considered unfair, the Labor Courts will grant an employee, who has served for more than 2 years within a company of more than 11 employees, a minimum of 6 months' salary and depending on the prejudice suffered by the employee (length of service, age, etc.). The company would also be required to reimburse the unemployment agency for the allowances the dismissed employee may have received after his/her dismissal within a limit of 6 months.

When the employee has less than 2 years of service or the company has less than 11 employees, the damages awarded will depend on the prejudice that is demonstrated by the employee.

In any case, punitive damages do not exist in France. Maximum compensation would be around the range of 24 months' of salary.

Timeframe

Waiting times are very lengthy in the Paris region. A matter may take 6 months or more to be heard by the Labor Court and the appeal hearing at least 6 months after the appeal is lodged. Hence, the overall procedure may take approximately 3 years before a definitive appeal decision is made.

c. Trade Unions, Work Councils and Other Employee Representative Bodies

The litigation process conducted by the employee representatives and unions involve collective litigation which is brought before the traditional civil or administrative courts.

The litigation may regard obstruction (*"délit d'entrave"*), which is a misdemeanor brought before the criminal courts, or the challenging of an administrative decision, which is brought before the administrative courts.

In contrast with the procedure of the Labor courts, which is primarily oral, the procedure before traditional civil and administrative Courts (i.e. Tribunal de Grande Instance and Tribunal Administratif) is largely written:

- The party must be represented by a lawyer.
- The seizing of the traditional civil court is by means of a written summons delivered by a bailiff, by which the complainant summons the opposing party before the courts and which must comply with formal requirements. The president of the tribunal will then fix the date and hour of the first hearing.
- The exchange of documents, expert reports, evidence, etc. and of written submissions is conducted by the parties' representatives.
- The pleadings at the hearing are usually limited to observations by the parties' representatives on points which remain unclear to the judge.

d. Specialized Litigation Bar

There is no specialized litigation bar, however, in practice, there are lawyers specialized in Labor Law.

III. Tips to Avoid Litigation

Complying with all aspects of French employment law is furthermore not easy as it is constantly evolving.

Good practice consists in taking enough time to review the legal framework and assess all potential difficulties before implementing any important decision. Some employer's unions at a sectorial level may provide guidance on day-to-day matters and may be of great support for their members.

Lawyers may of course provide counsel before any litigation.

However, due to the fact that litigation before the Conseil de prud'hommes does not require assistance, nor does it involve major costs for the employee, litigation is frequent after a dismissal.

In France, it is not possible to simply terminate the employment contract of an employee and waive all their claims in relation to that termination by paying them a certain amount of compensation that they are entitled to under law (for example for the notice period, mandatory severance payments, etc.).

Rather, if an employer hopes to avoid conflict arising from the dismissal of an employee, they may:

- Engage in contractual termination with the employee (*"rupture conventionnelle"*) which will require an approval (that may be implicit) by the Direccte. Claims made by the employee after such contractual terminations are rare, although the employee may claim breaches of the execution of this contract.
- Dismiss the employee and pay him/her the required compensation and then engage in a settlement agreement (*"transaction"*). The settlement agreement is a contract following which the dismissed employee waives all claims that he/she may have in relation to the execution and the termination of the employment contract in exchange for a specific amount negotiated with the former employer.

IV. Trends and Specific Cases

French labor law is constantly evolving. Numerous laws and decrees, administrative regulations, as well as agreements (on a national, branch or company level), enter into force every year. Case law plays a strong role and is also in constant evolution.

Review of case law shows a proliferation of litigation in relation to the protection of employees' health, for example through litigation in relation to the validity of agreements implementing annual pay, based on the monitoring of working time in days, not in hours.

a. New or Expected Developments

Many reforms are currently under discussion either through negotiations or before the Parliament, for example in relation to Sunday work or employee saving schemes.

Proceedings before the labor courts are also likely to be amended in order for matters to be adjudicated faster, in order to reduce the congestion of the courts.

b. Recent Amendments to the Law

Since the election of François Hollande in May 2012, many reforms have occurred (and remain ongoing) which aim to increase employment flexibility, whilst encouraging the conclusion of company collective agreements and also granting new rights to employees.

The most important reform was included in the Law dated 14 June 2013, which was entered into pursuant to negotiations conducted at a national level.

This law contains many new rights for employees (for example part time work cannot be less than 24 hours a week except under certain circumstances; there is an obligation for companies to set up a complementary health insurance plan as of January 2016) and certain measures to promote the staff representative bodies' knowledge of the company's functions and strategy. Also, it fundamentally changes the proceedings to be followed in the case of collective redundancy, by providing stricter time frames and conferring sole jurisdiction over this matter on the labor authority. The law also contains many other new provisions, including the possibility of entering into company collective agreements to preserve employment and encourage internal mobility, etc.

2014 has also proved to be an active year of reform, in particular with the law on professional training, which was voted in on 5 March 2014, and aims to improve the efficiency of the system in order to facilitate access to professional training to all individuals, whether under an employment contract or seeking employment.

Another example is the law dated March 29th 2014 called *"Loi Florange"* which imposes a duty to search for a buyer before closing a site in order to avoid a collective redundancy plan. In the same line of thought, another law dated July 31st 2014 (*"Loi Hamon"*) creates a duty to inform each employee in the case that the owner of the company wishes it to be sold or to sell its business assets.

GERMANY

I. Overview

a. Introduction

In Germany, approximately 38 million people are employed as employees. More than 400,000 lawsuits are filed with the German labour courts each year. Labour jurisdiction is an independent branch of civil jurisdiction. For example, the labour court would decide a dispute between an employer and an employee regarding the termination of the employment relationship, as they have exclusive jurisdiction in labour matters. These matters are listed in the Labour Court Act (*ArbGG*). With some exceptions, the procedural rules governing labour court proceedings are the same as for regular civil proceedings. The specific regulations of the Labour Court Act mainly allow for a faster procedure. The principle of urgency is particularly important in German labour law proceedings.

German employment law is governed by many separate laws and to a large extent by case law. There is no unified law regulating the relationship between employer and employee, but rather separate laws for particular issues - i.e. the Federal Vacation Act (*BUrlG*), the Hours of Employment Act (*ArbZG*) or the Maternity Protection Act (*MuSchG*). Most provisions in German employment law require interpretation when applied to a specific case. The labour courts perform such interpretation and sometimes even establish general principles not expressly included in statutory law. Therefore, case law is very important. As German employment law mainly serves the purpose of protecting the employees, the interpretation of the labour courts is mostly employee-friendly. It is generally assumed that the employee is in need of legal protection, as he/she is economically and socially weaker than the employer. The German Federal Labour Court (*Bundesarbeitsgericht*), the highest labour court in Germany, also views the work performance of an employee as an expression of his/her personality. The right to a free development of personality is protected by the German Constitution. This confirms the importance of employment law and litigation in Germany.

b. Claims

German labour law proceedings are divided into two main areas: proceedings concerning individual claims arising out of an employment relationship and proceedings concerning the relationship between the employer and other employee representatives (e.g. the works council). This distinction is important, as different procedural rules apply to each type of proceeding. Court proceedings concerning employment relationships, and therefore individual employment law, are by far more frequent in Germany than proceedings regarding collective labour law, which concern the relationship between the employer and other employee representatives, such as the works council. These disputes are often solved internally or in front of special bodies and institutions, such as the conciliation board (*Einigungsstelle*).

German employment law recognizes a variety of claims. The most common lawsuit in German labour courts is the claim of an employee that a termination issued to him/her was unlawful and therefore did not terminate the employment relationship in a legally effective way. Lawsuits seeking protection against dismissal (*Kündigungsschutzklage*) make up more than one third of the lawsuits filed with German labour courts. Lawsuits of employees claiming payment, e.g. of salary, bonuses or other parts of remuneration, are also common. As a minimum wage of 8.50 Euros per hour is introduced in Germany with effect as of January 1st, 2015, lawsuits for the payment of this minimum wage are to be expected. Since the General Equal Treatment Act (*AGG*) was introduced in August 2006, lawsuits regarding claims for damages due to discrimination have increased in Germany. Among other regulations, the General Equal Treatment Act expressly provides that candidates who apply for a position, but are refused for discriminatory reasons, can claim compensation for material and non-material damages.

As mentioned above, court proceedings regarding collective labour law issues are less frequent in Germany. The most common court proceedings regarding collective labour law involve the employer and the works council. Under German law, the works council has a variety of co-determination rights. If the employer and the works council do not agree whether a specific measure is subject to a co-determination right, the works council may file a lawsuit with the competent labour court seeking a formal declaration of its rights.

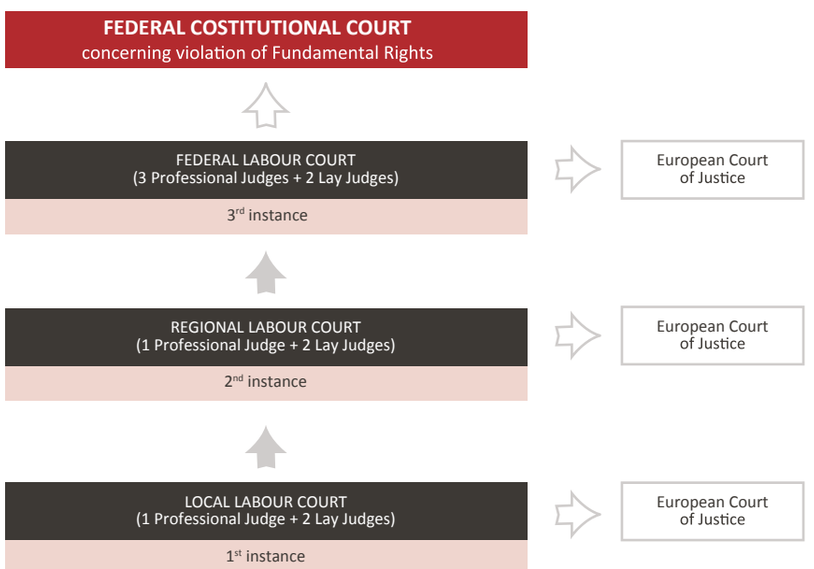
c. Administrative Agencies that Investigate or Adjudicate Claims

There is no administrative agency in Germany that investigates or adjudicates claims related to employment law. Some state agencies exist that supervise the implementation of an employer's statutory obligations in particular areas, e.g. occupational health and safety regulations, and obligations with regard to the special rights of severely disabled people, among others. However, such agencies do not investigate or adjudicate individual claims of employees.

Within the employer's organization, in principle, it is the task of the works council to supervise whether the employer complies with statutory requirements. The works council shall furthermore ensure the implementation of the laws, regulations, safety regulations, collective bargaining agreements and works agreements concluded for the benefit of the employees. However, if the employer does not fulfill his statutory obligations, the works council has no competence to investigate or adjudicate claims of individual employees. It may only claim its own right of supervision and may, upon request, provide representation to employees who wish to submit individual claims to the labour court.

d. Court / Tribunal System

THE GERMAN COURT SYSTEM IN EMPLOYMENT LAW MATTERS



The courts for labour matters are organized into three levels in Germany. The court of the first instance is the local labour court (*Arbeitsgericht*). It has exclusive subject-matter jurisdiction over all disputes arising from the employment relationship, regardless of the value of the matter in dispute. The decisions of the labour court can always be appealed when the existence or continuance of the employment relationship is disputed. In all other cases, an appeal is only permissible when the value of the matter in dispute exceeds 600 Euros or the labour court expressly allows for the possibility to appeal. When a decision of the labour court is appealed, the case goes to the competent higher labour court (*Landesarbeitsgericht*). There are 18 higher labour courts in Germany. The decisions of a higher labour court can generally not be appealed, unless the judgment expressly provides for the possibility to appeal. In case the judgment does not provide for this possibility, the defeated party can still apply for the admission of an appeal. However, this is rarely granted (approx. 3%). Upon appeal, the case goes to a third instance, the Federal Labour Court (*Bundesarbeitsgericht*). This court serves as the final court of appeal.

The labour courts in all three instances are composed of both professional and lay judges to improve the acceptance of court decisions within society. The lay judges are nominated by trade unions and employers' associations. The tribunals of the labour courts and the higher labour courts are each composed of one professional judge and two lay judges, one from the employees' side and one from the employers' side. The senates of the Federal Labour Court are each composed of three professional judges and two lay judges, one from the employees' side and one from the employers' side. The powers and rights of the lay judges are, in principle, the same as of the professional judges. However, the professional judge leads the proceedings and in most cases is the decisive party.

e. Alternative Dispute Resolution (ADR)

A conciliation hearing is mandatory in Germany in a labour court proceeding concerning individual employment law. Thus, when a lawsuit is filed with a labour court, the court first has to schedule a hearing to attempt an amicable solution. The conciliation hearing is presided over by the professional judge only; the lay judges are not present at this stage. In the course of the conciliation hearing, the judge discusses the factual and legal situation regarding the claim with the parties. The judge hereby often expresses or at least indicates his/her view on the validity of the claim. This can motivate the parties to pursue a settlement. The court may also propose a settlement to the parties. It is possible for the parties to agree on a settlement during the conciliation hearing, but to provide for a right of revocation for one or both parties within a certain timeframe, e.g. one week. Due to these diverse possibilities and the legal security provided by a court settlement, more than half of the proceedings in front of German labour courts each year, end by way of court settlement.

Other means of ADR are therefore of lesser significance in labour law disputes. In some areas, arbitration boards can be used to settle a dispute. For example, such procedures exist for disputes between apprentices and their employer regarding claims arising out of an apprenticeship or for disputes between the parties of a collective bargaining agreement, to avoid industrial action. There is however no general arbitration board for labour law disputes in Germany.

It is also generally possible to settle labour law disputes by means of mediation. During such a procedure, an independent third party attempts mediating between the contesting parties and providing an amicable solution to the dispute. However, the mediator has no legal authority. Due to this and the fact that lawsuits are often subject to short prescription periods, to date mediation has had little practical relevance in labour law disputes.

However, a new regulation was included in the German Labour Court Act in July 2012, to increase the purpose of mediation when a lawsuit is already pending with a labour court. Pursuant to this new regulation, the court may suggest that the parties pursue mediation or another form of ADR. This can happen in both the first and the second instance of a labour court proceeding. If the parties are willing to attempt mediation, the court orders that the case shall rest for three months, unless one party requests the continuance of the case during this period. After three months, the court resumes the proceeding, unless both parties declare that they are still in the process of dispute resolution. In practice, however, the new regulation has not yet led to a significant increase in the use of ADR procedures.

II. The Litigation Process

a. Typical Case

i. Steps in the Process

Step 1: Claimant files a lawsuit

A proceeding in front of a German labour court involving an employee and an employer begins with the claimant filing a lawsuit with the court. In Germany, more than 90% of t lawsuits regarding individual employment law are filed by employees. The statement of claim must be filed in writing with the competent labour court or orally at the legal application office (*Rechtsantragsstelle*) of the court, which then records the claim in writing. It is also possible to file a lawsuit by fax, as long as the original is sent to the court in due course. In practice, this possibility is used frequently, in particular when a deadline must be observed.

Step 2: Court delivers statement of claim to defendant and schedules conciliation hearing

Once the statement of claim has been submitted as described above, the labour court delivers it to the defendant named in the statement. At the same time, the court schedules the mandatory conciliation hearing and informs both parties of the date and of other instructions, if any. Often, the court orders the personal appearance of the parties, so that a settlement can be discussed effectively during the conciliation hearing.

Step 3: Conciliation hearing

As stated above, a conciliation hearing is mandatory in German labour court proceedings. The sole purpose of this hearing is to attempt a settlement. As this is often successful, many court proceedings do not continue beyond this point. The defendant may submit a written statement before the conciliation hearing to explain his position on the case, but he is not generally obligated to do so.

Step 4: Main hearing

If the conciliation hearing is not successful, the court schedules a main hearing and issues further instructions to the parties. In particular, the defendant is then obligated to submit a statement of defense. Usually, the court also grants the claimant time to reply to this statement before the main hearing takes place. This serves the purpose of clarifying any ambiguities in the parties' statements and establishing which factual circumstances are in dispute. The parties must submit their evidence with the statements, i.e. they must attach any relevant documents that shall serve as evidence and name possible witnesses. In case the court decides hearing a witness is necessary, it will give notice to the parties and the witness to attend the main hearing.

In the main hearing, the factual and legal situation regarding the claim is discussed with the parties based on their written statements and the submitted evidence. The court will again inquire about the possibility for the parties to achieve an amicable settlement.

Step 5: Judgment

If no settlement is reached in the main hearing, the labour court will issue a judgment. This can either be done immediately at the end of the main hearing, after the end of the last court session on the same day or at a later date to be set by the court. Pursuant to the Labour Court Act, generally the judgment shall be issued immediately following the main hearing. However, in more complex cases, the court usually sets a later date for the judgment, to be able to again review the written statements and the events of the main hearing.

ii. Pretrial Proceedings

For disputes between an employee and an employer concerning claims related to their employment relationship, there is no obligation to attempt an amicable settlement or to observe any other form of pretrial proceeding before bringing the case to court. Only for disputes between apprentices and their employer regarding claims arising out of an existing apprenticeship, is the consultation of an arbitration board mandatory.

When an employer is in dispute with the works council regarding the latter's co-determination rights, this shall generally be solved through a conciliation board (*Einigungsstelle*). Normally, the employer must bear all costs incurred by the conciliation board. Prior to establishing such board, the parties must attempt to reach an amicable settlement. However, this is a rather formal requirement, as each party may at any time declare that negotiations failed.

All co-determination rights of the works council are regulated in the Works Constitution Act (*BetrVG*) and have different levels of intensity. In some cases, the works council can only claim to be informed or heard on a certain issue, while in others, the proposed measures of the employer require the prior consent of the works council in order to be legally valid. For certain co-determination rights, the Works Constitution Act provides that the decision of the conciliation board shall replace a mandatory agreement between the employer and the works council. In such cases, the employer or the works council may then unilaterally call upon a conciliation board. In all other cases, a conciliation board may only be appealed by both parties together.

The conciliation board has an impartial chairperson upon whom the employer and the works council must agree. In case no agreement is reached, the labour court will appoint the chairperson. The employer and the works council then each appoint an equal number of additional board members. Usually, each side can appoint between one and three board members, depending on the complexity of the matter in dispute. If no agreement is reached on the number of board members each side may appoint, the labour court will decide.

In the conciliation board, negotiations are held with the help of the chairperson in order to find a mutual agreement. Most of the time such agreements are reached. Only if this is not possible, does the board decide by majority vote. As the works council and the employer each appoint half of the board members, the decisive vote generally lies with the impartial chairman. In matters where the decision of the conciliation board replaces an agreement between the employer and the works council, the decision of the board is binding for the parties. They may however seek a review of the decision by the labour court. Such review is limited to determining whether the conciliation board was competent to rule on the disputed issue and whether its decision was within the limits of

its discretion. In all other matters, where the decision of the conciliation board does not replace an agreement between the employer and the works council, the decision of the board is only binding in case the employer and the works council both declare they agree to be bound by the decision. This can occur either before or after the decision is issued.

iii. Role of Witnesses, Counsel and Court / Tribunal

In court cases, the procedural rules governing regular civil proceedings apply. In particular, the parties exercise sole control over the proceeding. Therefore, a court proceeding in front of a labour court only begins when a lawsuit has been filed and ends in case the claimant withdraws the claim or the parties decide to end their dispute amicably. When issuing its decision, the court is bound by the submitted claim. As an example, if an employee claims payment of 500 Euros, the court is not entitled to order the employer to pay more than 500 Euros, even if the employee could claim a higher payment from a legal point of view.

In the first instance of a labour court proceeding, each party can decide to argue their case personally or to be represented by a lawyer, a union or an employers' association. The parties are generally responsible for presenting their case to the court. The court is only obligated to investigate the facts of the case on its own if the proceeding concerns disputes between the employer and the works council. In all other labour court proceedings, the court may only consider the facts and evidence presented by the parties in its decision. It may for example, not decide to question a witness that has not been named by either party. Therefore, the main tasks of the labour court are to formally guide the proceeding and to legally assess the facts presented by the parties.

As a general rule, each party must prove the assertions, which are beneficial to them. However, there are many exceptions to this rule, which have mainly been established by case law. In particular, the burden of proof is often lightened for the employee if he/she cannot prove circumstances that occurred in the sphere of the employer. For example, when an employee claims he/she was discriminated against, he/she must only provide evidence that indicates a certain behavior of the employer was based on discriminatory motives. The employer must then prove that he did not discriminate against the employee or that an unequal treatment was reasonably justified.

An assertion can be proven through documents, witnesses, interrogating a party, the assessment of certified experts or the on-site inspection. In practice, documents and witnesses are the most important evidence. To serve as a witness, the person may not be a party in the court proceeding. The legal representatives of the employer can therefore not be questioned as witnesses. The interrogation of a party by the court is generally only permissible if the opposing party agrees. This is rarely the case. Without such agreement, the court can only conduct an informative hearing. The results of such a hearing do not serve as evidence, but the court may still consider them in its decision-making process.

iv. The Appeal Process

The decisions of the labour court can be appealed towards the competent higher labour court if:

- the existence or continuance of the employment relationship is disputed (e.g. in case the employer terminated the employment relationship and the employee challenges the validity of this termination) *or*
- the value of the matter in dispute exceeds 600 Euros *or*
- the labour court expressly allowed for the possibility to appeal.

The appeal must be submitted within one month after the written judgment of the labour court was delivered to the appealing party and must be justified by submitting a written statement within two months after delivery of the judgment. In the second instance of a labour court proceeding, the parties must be represented by a lawyer. Only a lawyer is authorized to appeal the judgment of the labour court.

The higher labour court reviews both the facts and the legal accuracy of the labour court judgment. The parties can again present their case to the court and provide the relevant evidence. New facts and evidence may only be presented if this does not delay the court proceeding.

The decisions of the higher labour court can generally not be appealed, unless the judgment of the higher labour court expressly provides for the possibility to appeal. The judgment must provide for this possibility if:

- the case has a fundamental legal relevance (e.g. because it raises legal issues that will potentially be relevant for a large number of other cases) *or*
- the judgment of the higher labour court significantly deviates from a judgment of one of the highest courts in Germany or, in case the Federal Labour Court has not yet ruled on the issue, from the judgment of another higher labour court *or*
- the right to be heard in court or basic procedural rules were violated (e.g. the court was not composed correctly or a biased judge was involved)

In case the judgment of the higher labour court does not provide for the possibility to appeal, the defeated party can apply for the admission of an appeal. However, this is rarely granted, as the claiming party must demonstrate that one of the requirements listed above is fulfilled.

Where an appeal is possible, it must be submitted to the Federal Labour Court (*Bundesarbeitsgericht*) within one month after the judgment of the higher labour court was delivered to the appealing party and it must be justified by submitting a written statement within two months after the delivery of the judgment.

Unlike the higher labour court, the Federal Labour Court does not review the facts of the case. It is bound by the facts established in the judgment of the higher labour court. The Federal Labour Court only reviews whether the judgment of the higher labour court is in line with German employment law and existing case law. It serves as the final court of appeal.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

The typical costs incurred in labour law litigation are court fees and the costs for legal representation. In a regular civil proceeding, the defeated party has to reimburse the other party for its costs, including the costs for legal representation. However, in the first instance of a labour court proceeding, the other party cannot claim reimbursement for the costs of their legal representation from the defeated party. The reasoning behind this is that employees might otherwise be prevented from pursuing their rights, for fear of high costs should they not win.

The court fees depend on the value of the matter in dispute, which is determined by the court according to the statutory regulations. The fees are generally lower than in regular civil proceedings. Furthermore, if the proceeding ends by way of court settlement, the parties do not have to pay any court fees. In court proceedings between the employer and the works council, no court fees are incurred.

The most common proceedings in front of German labour courts involve employees seeking protection against a termination of their employment relationship. Under

German law, such claims are directed towards reinstatement of the employee, i.e. the continuance of the employment relationship. There are therefore no statutory regulations on severance payments. However, in practice, the parties often agree upon a severance payment by way of court settlement. The amount of such severance is a matter of negotiation. The position of each party also depends on the legal risks it faces regarding the lawsuit. As a rule of thumb, a severance payment is often calculated as 0.5 monthly salaries per year of service.

A labour court proceeding is usually completed faster than regular civil proceedings. The provisions of the Labour Court Act are aimed at a fast procedure. For example, when a proceeding concerns the existence or continuation of an employment relationship, the conciliation hearing shall take place within two weeks after the lawsuit has been filed. Any main hearing shall be prepared in a way that allows for a complete assessment of the case, so that in principle, no second hearing must be scheduled. Furthermore, labour court proceedings are often end with a settlement that was either underway during the conciliation hearing or occurs shortly thereafter. Approximately 70% of labour court proceedings are completed within three months after the claim was filed. Appeal proceedings before a higher labour court take approximately 6-12 months from the time the appeal of the judgment was submitted. The duration of a third instance proceeding before the Federal Labour Court is difficult to predict, as the length of these proceedings is subject to great variations. On average, such proceedings take approximately 12 months.

c. Trade Unions, Work Councils and Other Employee Representative Bodies

Labour court proceedings between an employer and a union generally follow the procedural rules outlined above for proceedings between an employer and an employee. In particular, a conciliation hearing takes place and the parties are responsible for presenting their case to the court.

For court proceedings between the employer and the works council or other employee representation bodies within the employer's entity, different procedural rules apply. The employer and the works council shall work together in a spirit of mutual trust and cooperation for the benefit of both the employees and the business. Any trial endangers this relationship. The special procedural rules shall help alleviate the negative effects such a court proceeding usually has on the relationship between the employer and the works council. In a court proceeding between the employer and the works council, the court must itself investigate the facts of the case. This shall ensure that the actual facts are determined by an impartial institution. The court also has the competence to gather evidence on its own. It may for example, question a witness which neither the employer nor the works council has named in their written statements. A conciliation hearing does not take place. If the employer and the works council agree, it is also possible not to hold a main hearing, but to conclude the entire proceeding in writing. This can help keep emotions and personal aversions out of the proceeding.

d. Specialized Litigation Bar

There is no specialized litigation bar in Germany. Anyone who is admitted to practice as an attorney in Germany may represent clients in employment law cases both in and out of court. Attorneys have the possibility to obtain the title "certified employment law specialist" ("Fachanwalt für Arbeitsrecht"), which indicates their expertise in this area.

III. Tips to Avoid Litigation

Regarding the relationship between an employer and an employee, litigation can in particular, be reduced by carefully drafting the employment contract and including

valid prescription periods. Clear and comprehensive language can often avoid disputes. An effective HR management is also significant. Decisions regarding employment relationships should be as coherent and comprehensible as possible. Employers should also be thorough regarding documentation. As the parties in a labour court proceeding are responsible for presenting their case to the court, this can be crucial. In particular, any disciplinary measures against an individual employee should be carefully documented. For example, this includes protocols of conversations held with the employee regarding a certain conduct or situation, written warnings, documentation of practical measures (e.g. a performance plan) etc.

However, while these measures can help to reduce litigation, it is still an integral part of German employment law, in particular in termination scenarios. Employees who receive a notice of termination typically file a lawsuit to challenge the validity of the termination. This is easy to do and does not involve high costs, as the court fees are lower than in regular civil proceedings and there is no obligation to be represented by a lawyer in front of the local labour court. Furthermore, employees whose employment was terminated because of their actions, e.g. for reasons of conduct, risk being excluded from state unemployment benefits for a period of up to twelve weeks. This also motivates employees to challenge a termination.

Regarding the relationship between the employer and the works council, disputes and litigation can often be avoided by observing the rights of the works council. The Works Constitution Act grants the works council a variety of co-determination rights. Where the employer acknowledges that such a right exists due to statutory regulations, the requirements should be fulfilled thoroughly and in a timely manner. The Works Constitution Act also stipulates the principle that the works council and the employer shall work together in a spirit of mutual trust and cooperation. Also, employers should aim to uphold this principle beyond statutory obligations.

IV. Trends and Specific Cases

There are no new or expected developments in the area of labour court proceedings and litigation. However, due to the implementation of a minimum wage in Germany (see below), an increase in litigation is expected.

From January 1, 2015, a statutory minimum wage of 8.50 Euros per hour will be introduced in Germany. The corresponding legislation applies to all employees with only few exceptions, e.g. for trainees or employees under 18. As the practical application of this law is not clear in all aspects, it is probable that an increase in litigation will occur in this area.

V. Conclusion

Employment law litigation in Germany is easy to access, court proceedings are reasonably fast and the court fees are very moderate. Litigation therefore plays a significant role in German employment law. Employees often do not hesitate to resort to the labour court system, especially when the continuance of the employment relationship is at stake. From an employer's point of view, it would be desirable if there were statutory regulations regarding the procedure in termination scenarios, aside from procedural rules for court proceedings. As this is not the case and ADR methods are rarely applied in practice, employers often have to deal with labour court proceedings initiated by employees. A change of the litigation practice is not likely to occur in the near future.

ITALY

I. OVERVIEW

a. Introduction

Employment litigation is very common in Italy and has been increasing since the global economic downturn of 2008. Employment claims are dealt with by employment courts, separate from the civil courts and are heard in first instance by one professionally trained employment law judge.

The Italian employment judicial system reflects the Italian Constitutional principles regarding the employment relationship.

The general principle of Italian law regarding legal fees and court expenses paid by the unsuccessful party is usually not applied when that party is the employee.

b. Claims

According to article 409 of the Italian Civil Procedural Code, the Employment Courts are in charge of all claims regarding the **employment relationship**, for example: dismissal, resignation, mutual termination, temporary agency work, company transfer, working time, place of work, trial period, holidays, duties and tasks, career development, bullying, discrimination, Union rights, salary, indemnities, benefits, non-competition agreements, waivers and settlements.

The Employment Courts also have jurisdiction over all claims related to commercial agency, agricultural contracts, project-based work and other kinds of self-employed contracts.

The Employment Courts are in charge of all claims regarding **public sector employment**.

The Employment Courts also hear claims related to national insurance, accidents at work, occupational illness, family allowance and any other matter related to **social security contributions** (article 442 of the Italian Civil Procedural Code).

Should the employer prevent employees from exercising their union rights and freedoms, the relevant Unions at national or company level shall be entitled to go to Court against the employer, on behalf of their members.

c. Administrative Agencies that Investigate or Adjudicate Claims

The main agencies or bodies that investigate claims are:

- the **Italian social security body** (*"Istituto Nazionale di Previdenza Sociale"* or *"INPS"*)
- the **Italian Institute of Insurance for Occupational Accidents and Diseases** (*"Instituto Nazionale per l'Assicurazione contro gli Infortuni sul Lavoro"* or *"INAIL"*).
- the **Labour Inspector** (*"Ispettore del Lavoro"*), who works within the regional (*"Direzione Regionale del Lavoro"* or *"DRL"*) or local (*"Direzione Territoriale del Lavoro"* or *"DTL"*) office of the Italian Labour Minister. Within the *DTL* there are two administrative bodies:
- the **ordinary surveillance operating unit** (*"Unità Operativa di Vigilanza Ordinaria"* or *"UOVO"*) which supervises and monitors, through the ordinary labour inspectors, all business sectors; and
- the **technical surveillance operating unit** (*"Unità Operativa di Vigilanza Tecnica"* or *"UOVT"*) which supervises and monitors, through labour inspectors with specific expertise, health and safety in the workplace for specific business sectors provided by Legislative Decree 81/2008, such as the construction and railway sectors, (e.g. working in tunnels over ground and underground or underwater).

As regards to the Italian social security body and the Italian Institute of Insurance for Occupational Accidents and Diseases, it is fairly common to file claims for alleged violations of the law in order to scale back unpaid social security contributions.

As regards to c) above, this body has an important role in monitoring compliance with the civil, administrative and criminal laws regarding the employment relationship, as well as adherence with the provisions of the applicable National Collective Bargaining Agreements. The Labour Inspectors are able to inspect company sites without any specific authorization, collect information, and issue administrative sanctions for all the violations discovered. The Labour Inspectors are also able to take out injunctions and report suspected crimes to the public prosecutor's office.

d. Court / Tribunal System

THE ITALIAN COURT SYSTEM AS RELATED TO INDUSTRIAL RELATIONS AND EMPLOYMENT

SUPREME COURT OF CASSATION Employment section (5 Judges sitting)
3rd instance
APPEAL COURT in the role of Employment Judge (3 judges sitting)
2nd instance
EMPLOYMENT TRIBUNAL (1 judge sitting)
1st instance - Ordinary trial
EMPLOYMENT TRIBUNAL (1 judge sitting)
1st instance - Summary trial (if possible)

The ordinary employment judicial process is based on 3 levels of Judgement:

- 1st instance judgment before the **Employment Tribunal**
- 2nd instance judgment before the **Employment Appeal Court**
- 3rd instance Judgment before the **Supreme Court**

Please note that the Tribunal is made up of a single presiding Judge, whereas the Appeal Court and the Supreme Court are collegial bodies.

The first two instances are based on claims regarding the facts, the so-called judgement on the merits, whereas the third one is based on legal aspects of the trial (jurisdiction, procedure, witnesses and so on), so called judgement on legitimacy of the procedure.

Law 92/2012 has established a new procedure in the case of claims for unfair dismissal aimed at granting the claimant a swift remedy by way of shorter summary proceedings.

This special summary procedure applies only to claims for wrongful dismissal against employers with a headcount of more than 16 per production site (or over 61 employees overall) or, irrespective of the number of employees, in the case of discriminatory dismissals - i.e., based on sexual, religious, ethnic, health, political, etc. grounds and unlawful dismissals grounds i.e., coinciding with maternity/paternity/marriage leave - and oral dismissals - i.e., failure to dismiss in writing.

Along with a claim for wrongful termination, an employee may also bring a claim concerning the nature of the working relationship (i.e. employment, consultancy or autonomous nature). This is a faster process than the ordinary one and provides 4 levels of Judgment:

- 1st instance judgment before the **Tribunal – injunction (summary trial)**
- 1st instance judgment before the **Tribunal – ordinary trial**
- 2nd instance judgment before the **Appeal Court**
- 3rd instance Judgment before the **Supreme Court**

e. Alternative Dispute Resolution (ADR)

Law no. 92 of June 28, 2012, in respect of the dismissal procedure that is applied, has amended the regulation of individual dismissals for economic business reasons.

Under the new system, a dismissal for justified objective reasons made by an employer with more than 15 employees per production site/municipality (or more than 60 employees in total) must be preceded by a pre-emptive mandatory procedure.

Before serving the letter of termination, the employer is bound to make a preliminary attempt at settlement in front of the competent local Employment Office by sending a letter (with the employee in cc) detailing the reasons for the dismissal and the possible measures that the employer is considering (e.g., job placement services).

Having received the pre-emptive communication from an employer, the local Employment Office may open the settlement procedure within a period of seven days. Should the administrative office fail to summon the parties within this period, the employer is entitled to either dismiss the employee or wait for the summons (e.g., should the employer be interested in the employee's waiver, to possible claims he or she may have, in the form of a settlement and release agreement, which needs to be formalized before the administrative authority).

Once the settlement procedure is opened, it may last for a maximum period of 20 days. However, this period may be suspended for a maximum period of 15 days if the employee is unavailable (e.g., in case of sickness). Hence, the overall maximum duration of the pre-emptive procedure is, in theory, 42 days. However, this term may be increased by an agreement between the parties.

If there is no agreement between the parties, or if the term of the procedure lapses, an employer is entitled to serve the letter of termination. The dismissal letter can be served even during the employee's unavailability, regardless of the reason for it. Hence, even if the employee is sick, the letter of termination will be effective, provided that the above-mentioned 15-day suspension period has been complied with.

Under the Fornero Reform, the dismissal is effective as of the date that the pre-emptive communication is delivered to the Employment Office, i.e., when the dismissal procedure is commenced.

The use of arbitration in employment disputes in Italy is not very common, because it is expensive. It is often used in cases involving executives (dirigenti), where there is a specific provision in the employment contract itself, or the applicable National Collective Bargaining Agreement.

II. The Litigation Process

a. Typical Case

i. Steps in the Process

1st Instance

Regardless of the value of the case, the Jurisdiction is where:

- the employment relationship is performed;
- the offices of the company or branch which employs the employee;
- the offices of the company or branch in which the employee used to work before the termination of the relationship.

As regards to claims dealing with commercial agency and other types of collaboration, the jurisdiction is where the agent or worker has his/her own domicile.

The plaintiff files a claim called ***"Ricorso"*** with the clerk of court in the competent jurisdiction, which must indicate:

- the Tribunal;
- the plaintiff's personal details (name, surname, tax code, residence or domicile elected within the district of the Tribunal). If the plaintiff is a company, the claim must give the company name and headquarters;
- the defendant's personal details (name, surname, tax code, residence or domicile). If the defendant is a company, the claim must state the company name and headquarters;
- the subject of the claim;
- the basis of the claim both *de jure* and *de facto*;
- evidence and documents exhibited;
- signature and indication of any power of attorney;
- value of the lawsuit for tax purposes.

The plaintiff must file along with the claim an administrative document called ***"Nota di iscrizione a ruolo"***.

Within 5 days, the Judge issues an order setting the date of the hearing. Between the filing of the claim and the above hearing, no more than 60 days (80 days if the defendant is not in Italy) can elapse. The plaintiff must serve the claim (and notify the date of the hearing) on the defendant at least 30 days before the hearing (40 days if the defendant is not in Italy).

The defendant must file his/her defences at least 10 days before the hearing. The defences must include:

- a stand in relation to all the allegations;
- narrate all defences, *de facto* and *de jure*;
- indicate all the evidence and documents to be exhibited;
- formulate any counter-claims;

- list witnesses to be cited;
- oppose all the objections not opposable directly by the Judge, so called ***"obiezioni in senso stretto"***.

Please note that the defendant may also file the defences late, i.e. on the day of hearing: in this case the plaintiff will no longer be able to formulate counter-claims, indicate evidence and oppose the objection *"in senso stretto"*.

Should the defendant file a counter-claim, the Judge needs to schedule a new hearing to allow the plaintiff the chance to reply to the counter-claim. The new hearing date must be notified to the plaintiff within 10 days and 50 days has to elapse between the counter-claim and the new hearing.

At the first hearing, the Judge is obliged to try to settle the dispute, and this attempt ends with a formal settlement proposal that the parties are free to accept, modify or reject, and the Judge will take into account this behaviour during the lawsuit.

If the parties reach an agreement, it is recorded and signed by the Judge and immediately enforceable.

If the parties do not reach an agreement, the case continues and the Judge decides on the admission of the evidence. The admission should take place in the same hearing, but generally the Judge schedules another hearing.

This is the enquiry phase of the process.

Please note that the Judge has extensive investigative powers and may:

- admit any kind of evidence;
- order the exhibition of documents;
- summon as witnesses persons who are not able to testify according to civil law, such as the legal representative or the administrator of the company-employer;
- decide which is the most suitable means of evidence;
- ask his own questions to witnesses;
- ask for information from the Unions mentioned by the parties;
- point out to the parties errors in the documents, which may be corrected, setting the deadline for the corrections/improvements.

Admissible types of evidence include:

- Act in public form;
- Private deed;
- Confession;
- Extrajudicial declarations;
- Oral Testimony;
- Testimony in writing;
- Expert witnesses;
- Etc.

At the end of the enquiry phase, if requested or necessary, the Judge can give the parties a further 10 days to file additional defences, usually 10 days before the trial hearing.

At the trial hearing, the Judge listens to the lawyers' arguments, then decides and gives his ruling.

Please note that, according to case law, the Judge may also schedule another hearing just to give his ruling.

The Judgement (ruling plus reasons) must be filed before the Chancellor's office within 15 days and then the term to appeal the sentence begins running. Within the sentence the Judge decides on the legal costs as well. The sentence is immediately enforceable.

2nd Instance

The judgement in first instance may be appealed:

- 30 days from the notification (40 days if the notification is made outside Italy), so called ***short term***; or
- 6 months from the publication of the sentence if the notification did not occur at all, so called ***long term***.

The appeal must be filed before the competent Appeal Court. The President then appoints the reporting Judge within 5 days and schedules the hearing within 60 days. The appellant notifies the counterparty within 10 days.

The appeal must narrate:

- the relevant appeal Court;
- the parties;
- a brief indication of the facts and specific reasons of appeal;
- the subject of the appeal;
- the specific parts of the sentence that the appellant wants to appeal;
- the specific parts of the Tribunal reconstruction of the facts that the appellant deems wrong;
- the reasons of the breach of the law.

During the appeal process, it is **not allowed**:

- to change the original claim;
- to make new requests or objections;
- to submit new evidence or documents, unless the party proves that such delay does not depend on him/her (apart from expert witnesses).

Instead, the following is **allowed**:

- the free examination and cross examination between the parties;
- evaluating sworn statements;
- deciding sworn statements;
- supplying sworn statements.

The defendant must file his/her own defences before the relevant Appeal Court chancellor's office at least 10 days before the hearing.

At the first hearing, the parties discuss the case and the Court decides and reads the ruling, then drafts and files the sentence within the following 15 days.

The Appeal Court may also deem the appeal claim as **inadmissible** at the first hearing, in the following circumstances:

- the appeal has no reasonable chance of success;
- the appeal does not indicate the parties or the facts and the specific reasons for the appeal.

3rd Instance

The above sentence may be appealed before the Supreme Court within:

- 60 days from the notification (so-called ***short term***); or
- 6 months from the publication of the sentence if the notification did not occur (so-called. ***long term***).

An appeal before the Supreme Court may be for the following **reasons**:

- geographical jurisdiction;
- competence of the jurisdiction;
- violation or bogus application of laws, agreements or National Collective Bargaining Agreements;
- sentence or procedure void;
- omission of examination of a relevant fact which has been discussed during the process.

The relevant claim must **indicate**:

- parties;
- sentence appealed;
- brief description of the facts;
- reasons for appeal;
- proxy;
- specifically indicate the trial brief, documents, contracts or National Collective Bargaining Agreements as the basis of the claim.

The Supreme Court appeal does not prevent the enforceability of the appealed sentence unless the Court, on specific request, suspends its effectiveness, because it could cause serious damage.

The defendant may file a counterclaim or merely attend the oral discussion hearing.

Should the defendant file a counterclaim the appellant may file defences, in reply to the counterclaim. The Supreme Court may either **reject** or **accept** the appeal. In the latter case, the Court may decide the dispute or may **appoint a different Court of Appeal** for a new 2nd instance on the same matter.

Rito Fornero

As from 18 July 2014, all employment disputes related to **dismissals** that would entail the application of Article 18 of the Workers' Statute (remedy of reinstatement) to the employment relationship are subject to a new process called the *"Rito Fornero"* (as described above).

The plaintiff files the claim before the competent Tribunal chancellor's office, which must detail:

- the Tribunal;
- the plaintiff's personal details. If the plaintiff is a company, the claim must detail the name and headquarters;
- the defendant's personal details. If the defendant is a company, the claim must details the name and headquarters;
- the subject of the claim, which **cannot be different** from the above mentioned reason;

- both reasons de jure and *de facto* as the basis of the claim;
- evidence and documents exhibited (please note that the document must be attached in **duplicate copies**);
- signature and indication of the proxy.

Within 40 days following the filing of the claim, the Judge *(i)* schedules the **first appearance hearing**, *(ii)* fixes the term **to notify** the claim at least 25 days before the hearing and *(iii)* establishes the term for the defendant **to file** the defences at least 5 days before the hearing.

This first phase summarizes the claim and is informal: the Judge hears the parties, admits the evidence deemed necessary (if any) then issues an Order (*"Ordinanza"*) immediately effective.

The above Order may be appealed before the same Tribunal (it has been argued that this provision does not comply with the principles of the Italian Constitution and that the appeal should be filed before a different Tribunal, but a recent case from the Constitutional Court has declared that such a provision does not breach any constitutional principle).

ii. The Appeal Process

Appeal of the Order

The appeal must be filed within 30 days following the notification of the Order and cannot include new claims. The Judge schedules the date for the Trial within 60 days and the defendant has to file defences 10 days before the hearing. At the hearing, the Judge listens to the parties, admits the evidence deemed necessary and then decides.

The Judgement must be filed with the Chancellor's Office within 10 days after the hearing. The Judgement is temporarily enforceable and may be appealed before the Appeal Court.

Appeal of the Judgement

The appeal must be filed within 30 days following the communication of the Judgment.

New evidence or documents are not allowed, unless deemed essential by the Court, or the party proves that it was not possible to provide such documents before.

The Court schedules the hearing within 60 days and establishes a term in which to file the defences, at least 10 days before the hearing.

The appeal and the Hearing date must be notified, also through certified email (*"PEC"*) to the counterparty at least 30 days before the term assigned by the Judge to file the defences.

At the hearing the Judge may suspend the enforceability of the sentence if there are serious reasons, listen to the parties, admit the evidence deemed necessary and then decide. The Judge may also decide to grant the parties 10 days before the trial to file defences. The sentence must be filed before the Court Chancellor's office within 10 days from the Trial hearing.

Supreme Court Appeal

The Supreme Court appeal must be filed within 60 days from the communication of the judgement. The suspension of the enforceability must be requested to the Appeal Court and the trial hearing shall be scheduled within 6 months.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

The party who files the claim must pay court fees called "contributo unificato" as follows:

Value of the claim	1st instance	2nd instance	Appeal
Up to EUR 1.100,00	EUR 18,5	EUR 27,25	EUR 74,00
From EUR 1.100,00 up to EUR 5.200,00	EUR 42,5	EUR 63,75	EUR 170,00
From EUR 5.200,00 up to EUR 26.000,00	EUR 103,00	EUR 154,50	EUR 412,00
From EUR 26.000,00 up to EUR 52.000,00	EUR 225,00	EUR 337,50	EUR 900,00
From EUR 52.000,00 up to EUR 260.000,00	EUR 330,00	EUR 495,00	EUR 1.320,00
From EUR 260.000,00 up to EUR 520.000,00	EUR 528,00	EUR 792,00	EUR 2.112,00
More than EUR 520.000,00	EUR 733,00	EUR 1.099,50	EUR 2.932,00

Please note that in 1st and 2nd instance, if the plaintiff is an employee, the above court fees are due only if his/her own taxable income is higher than EUR 32.298,99.

Fees: Apart from the so called *Contributo unificato* in the table above and the reimbursement of expenses, the average fees would range from **€7,500, to €15,000** for litigation in first instance. Second instance would be more or less the same, whereas an appeal would be in the region of **€15,000 to €25,000**.

Remedies: If the employee sues the employer and wins, he/she is entitled to different remedies depending on the type of 'fault' by the employer and on the number of employees: The remedy of reinstatement is available in some very specific cases, otherwise the remedy is damages.

Damages: In the range of 12 to 24 months' salary for employers with a headcount of more than 16+ per production site/municipality (or 61+ overall); in the range of 2.5 to 6 (or 10, depending on the employee's length of service for employers with a headcount of less than 16 per production site/municipality (or less than 61 employees overall).

Timeframe: Statistics show that the average duration of an employment claim from start to finish in first and second instance is **949 days**, but there is a wide variation: 320 days in the Milan courts to 1,303 days in Catanzaro (southern Italy) whereas an Appeal could take up to 2-3 years to have the first (and only) hearing.

c. Trade Unions, Work Councils and Other Employee Representative Bodies

Anti-Union Behavior

In the event that the employer takes actions intended to limit the exercise of trade union freedom and activity, including the right to strike, article 28 of Law no. 300/1970 entitles Trade Unions to sue the employer before the Labor Court with a specific and expedited proceeding, i.e. injunctive relief.

The Employment Court fixes a hearing within two days from the date the plaintiff files the action. If the antiunion behavior is proven, the court will issue an injunction to desist against the employer. The Injunction, which takes immediate effect, can be appealed within 15 days.

d. Specialized Litigation Bar

All lawyers may appear before the Employment Tribunals. However, to appear before the Supreme Court, a lawyer must be enrolled in the Supreme Court Bar. This requires a certain number of years in practice and passing an exam.

III. Tips to Avoid Litigation

In order to avoid litigation or minimize the impact of litigation on the employer's business, good HR practices are fundamental such as:

- Choosing the right advisers (lawyers, accountants, payroll providers, etc.) who know your business and can offer you proactive and practical solutions to doing business in Italy;
- Choosing a specialist employment law firm to manage and provide day-to-day advice and support in handling all workplace matters;
- Choosing the correct type of employment contract (in Italy there are many);
- Distinguishing between employees and independent contractors from the beginning and being aware of how the relationship is conducted in practice;
- Putting in place necessary and appropriate company policies;
- Running training courses for local HR;
- Putting correct disciplinary processes in place;
- Doing performance management;
- Establishing a good working relationship with the unions (if any) and the local employers' association.

IV. Trends and Specific Cases

Italy has always been a litigious jurisdiction when it comes to employment law claims. Italy is generally considered an "employee-friendly" jurisdiction, particularly in the areas where we see high unemployment.

In recent years, employment law reforms have been one of the most important items on the Government's Agenda. Examples are noted below.

In 2012, we had the **Fornero Reform**, which was a step in the right direction of attempting to loosen the restraints on companies when hiring and firing, but it failed to go as far as was needed in order to kick start the jobs market.

We now have the **Jobs Act** (name taken from U.S President Obama's American Jobs Act 2011) - another important attempt to make the Italian labour market more flexible. The Bill is going through Parliament at the time of writing and as of 2015 new hirings on open-ended contracts will have "gradual" protections directly linked to the length of service. The remedy of reinstatement will practically disappear, except for some very specific cases (e.g. unlawful dismissal, discriminatory and disciplinary cases). Another piece of good news is that damages for unfair dismissal will be based on length of service and no longer on the judge's discretion. However, the bad news is that for the umpteenth time, the Italian legislature has failed to include "poor performance" as a statutory basis for dismissal.

For the first time, executives (dirigenti) will be included in the collective redundancy process. **Dirigenti** are top-level employees, who historically enjoy fewer protections than other employees. However, thanks to a decision of the European Court of Justice in February 2014 and the ensuing European Law 161/2014, Italy has recently passed its own law, whereby the number of *dirigente* have to be included in the calculation that triggers a collective redundancy (i.e. where a company with more than 15 employees dismisses at least 5 of them within a period of 120 days). Previously, executives had been excluded from the whole collective redundancy process: i.e. information and consultation with the unions and the application of the legal selection criteria (technical/organisational needs of the company, family dependants and length of service). With the reform, companies will need to set up a separate negotiating table with the executives' unions and apply (so it appears) the selection criteria. However, such criteria do not take into account the peculiarity of the *dirigente* relationship: i.e. the bond of trust and fiduciary duty. In the event of some defect in the procedure, the Executives would be entitled to damages of up to 24 months' salary, thus effectively providing them with protections previously enjoyed only by employees.

V. Conclusion

Italy is going through important political, social and legal changes at the moment and employment lawyers are at the forefront; seeing first-hand how all of this impacts businesses and their Italian workforce. Italy is a work in progress and the end product will hopefully be worthy of the prestigious label: "Made in Italy".

MEXICO

I. Overview

a. Introduction

Every society needs to have a body of law establishing the provisions by which individuals must abide in order to provide security to the community that lives together in a given territory.

Mexico's Labor Law is one of the governing axes of the Constitution, because it was the workers who triggered the Mexican Revolution, and for this reason our Labor Law protects the rights of the workers.

Enterprises in Mexico must therefore seek the advice of specialists in labor law, in order to be aware of all the legal requirements and conditions they must fulfil in employment relationships, as well as all the provisions to be observed in the workplace; otherwise they can be penalized by the labor authority, which may even lead to closing the establishment. In fact, individuals who are unaware of the legal provisions applicable to employment relationships may conduct themselves in a way that is not sanctioned by the legal ordinances and regulations, such as not having a safe provision of services that conforms to the law.

b. Claims

Below are the most common claims handled in the Mexican labor courts.

We have divided the conflicts based on subject, classified as individual and collective. Individual conflicts are those that affect a single worker and collective conflicts a given community of workers.

Individual

- **Unjustified Dismissal:** workers who consider the separation from their employment as unjustified may file a claim before the Conciliation and Arbitration Board, to sue the employer, demanding:
  - reinstatement
  - payment of an indemnification
- **Termination of the Employment Relationship:** Action by which the employer or the worker demands the justified termination of the employment relationship.

Collective

- **Strike:** Is the temporary suspension of work carried out by a coalition of workers, normally used in order to have the employer acknowledge certain rights of the workers.
- **Conflict of an Economic Nature:** Those whose formulation is intended to modify or implement new employment conditions.
- **Signing of a Collective Bargaining Agreement (CBA)**.

c. Administrative Agencies that Investigate or Adjudicate Claims

In Mexico, application of employment norms falls into different jurisdictions.

The Workers' Advocacy Agency: advises employees in conflicts or controversies with the employers in an administrative department or advises employees before the Conciliation and Arbitration Boards.

Ministry of Labor and Social Welfare: through inspections of the employers, it verifies that companies duly fulfill the labor laws and the technical norms the employer must meet in the workplace, and may impose penalties for the employer's failure to comply.
The Ministry of the Treasury: using its verification faculties, audits and requires the employers to present proof of due payment of the worker's share in the company's profits.

The Federal Conciliation and Arbitration Board: settles controversies between employers and workers at the federal level. Likewise, within its valid jurisdiction, it validates and authorizes special individual and collective acts of the employers and the workers.

The Local Conciliation and Arbitration Boards: settles the controversies between employers and workers at the local level. Likewise, within their valid jurisdiction, they validate and authorize special individual and collective acts of the employers and the workers.

The Labor Authorities are Administrative Federal and Local Authorities.

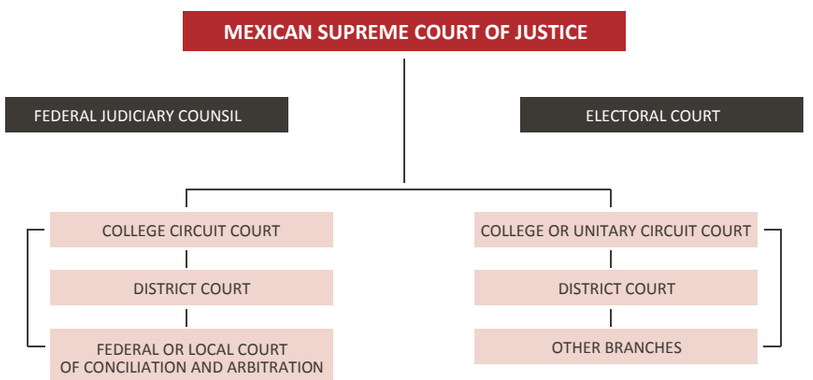
d. Court / Tribunal System

According to Mexico's Constitution, article 123, item XX, conflicts between employer and employee shall be subject to the decision of a Conciliation and Arbitration Board, formed by an equal number of workers' and employers' representatives and one Government representative.

Mexico's Conciliation and Arbitration Boards are in charge of hearings and decide on the disputes arising between workers and companies; they were created to seek agreement between the parties. When a lawsuit is filed, there is a prior mandatory conciliation stage and if this objective is not reached, the boards must issue an award solving the claims of the parties. If any of the two parties does not agree with the award they can file *amparo* proceedings before the competent courts.

The secretaries of the boards have a similar stability to that of judges. Like the courts, the boards are autonomous and independent. However, even though they belong to the executive power, they are a jurisdictional organ, and therefore they are obliged to apply the court precedents issued by the Supreme Court of Justice and by the Circuit Collegiate Courts, according to articles 192 and 193 of the *Amparo* Law.

MEXICAN COURT SYSTEM



e. Alternative Dispute Resolution (ADR)

The Conciliation and Arbitration Boards have the duty of applying conciliation. The Law provides its active intervention, exhorting the parties to agreement and proposing solution alternatives, which is applicable for any procedure filed before these jurisdictional organizations.

II. The Litigation Process

a. Typical Case

The legal framework is comprised in articles 870 to 891 of the *Federal Labor Law* and is divided into two phases – the Instruction Phase and the Resolution Stage.

Instruction Phase

First: Includes presentation of a written petition, reception, order to proceed; notifications; service of process.

Second: The initial hearing of conciliation, petition and exceptions, offering and admission of evidence is held.

Third: Stage of presentation of evidence, made based on the evidence offered by the parties.

Fourth: Close of the proceedings, after ensuring there is no pending evidence to be presented.

Resolution Stage

First: Refers to formulating the project for award.

Second: Refers to discussion and voting of the award project.

Third: Approval and signature of the award, and notification to the parties; the procedure is concluded.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

Settlement: the amount paid to the worker upon termination of the employment relationship, including the concepts of benefits to which the worker is entitled and, if applicable, includes indemnification provided by the Federal Labor Law.

Settlement is estimated based on the base salary earned in cash, which is used to calculate the proportional parts of the amounts corresponding to payment of employment benefits the worker is paid. For each day worked for the employer, workers must be paid the proportional payment of benefits: Christmas bonus, vacation leave, vacation bonus, wages pending to be paid, as well as benefits and/or extra-legal benefits.
Severance pay (indemnification): is an amount the employer is obliged to pay based on three months' integrated wages, which is paid in case of unjustified dismissal. The worker may request to comply with the employment agreement or payment of indemnification. This indemnification also applies in case the worker terminates the employment agreement for causes attributable to the employer.

Attorney Fees: in Mexico, in case of a lawsuit, attorneys usually receive a quota litigation payment for the amount of the matter, or a retainer fee for attending to the matter, plus expenses when appearing before the Labor Boards. Attorneys do not usually charge hourly fees in labor actions or a retainer for attending to it, plus the expenses for trying the case before the courts. It is unusual for the attorneys in a labor trial to charge hourly service fees.

c. Trade Unions, Work Councils and Other Employee Representative Bodies

Claims filed seeking modification of the Collective Bargaining Agreement and collective suspension of employment relations are regulated by articles 900 to 919 of the *Federal Labor Law*, and have the following characteristics:

- **Lawfulness:** This procedure is used by businesses and employers, but these approaches may also be requested by unions who hold a CBA, by the majority of workers in a company or establishment, if it affects the greater professional interest, by filing the claim in writing.
- **Requirements:** This procedure must be done in writing and must contain the name and address of the person who is promoting it, who must also prove his/her capacity. The document presented must explain the history, facts, and causes that led to the conflict, as well as the claims of the petitioner.

The writing must be presented along with:

- Public or private documents to prove the economic standing of the company or establishment and the reason why said measures are requested;
- The list of the workers providing their services to the company or establishment, providing their names, last names, job performed, wages and length-of-service in the company;
- An expert's opinion about the economic status of the company or establishment;
- Evidence the petitioner considers appropriate to accredit this; and
- The required number of copies of the claim and its attachments to summon the other party.

Immediately after receiving the claim, the Board shall summon the parties to a hearing within five days. The experts are authorized to conduct an investigation and studies they consider appropriate.

The Labor Boards have the broadest powers to practice the diligences they deem appropriate.

After the evidence has been vented, the Board will allow the parties a term of 72 hours to formulate their arguments. Once the term has concluded, the Assistant shall declare the Instruction closed, and within 15 days shall issue an opinion.

III. Tips to Avoid Litigation

The legal aspects to consider include regulations that clearly reflect the internal policies, a file of all the staff, including the incidents of the worker's life in the company, precise disciplinary systems and sanction regimes, as well as management of the labor conflict when it occurs.

In the field of Human Resources, the measures to reduce the possibility of conflict are clearly: remuneration, development opportunities, positive feedback, stability, and security in payments. In the opinion of experts in the field, the way to avoid labor disputes

is by preventing them from the time of recruitment. In this case, it is recommended for companies to sign an individual employment agreement that allows them to clearly state the employee's responsibilities and obligations in the position hired and to document any type of incident.

IV. Trends and Specific Cases

a. New or Expected Developments

Mexico ended the year 2012 with a Reform to the Federal Labor Law, seeking to implement a structural change in labor matters in the country, establishing worthy employment conditions to the workers and providing greater legal security to companies.

With this reform, it became possible for younger people, women and older adults to receive professional development, by establishing new modalities of incorporation into the workforce, such as contracts for a trial period, seasonal work and for initial training.

Furthermore, the reform established requirements to sub-hire personnel, and even sanctioned the deceitful practice of this act, by prohibiting that workers be transferred from the original company to an outsourcing company in order to reduce employment benefits.

The reform also provides greater protection to workers in case of bullying and harassment, as well as in situations of pregnancy, breastfeeding, parenting and disability. Furthermore, the rights of domestic workers, rural workers and the mining sector are strengthened.

By virtue of the foregoing, rather than waiting for further reforms or developments in the workplace, Mexico is developing an effective implementation of the legislative changes recently made.

A clear example of this, is the recent announcement of the Ministry of Labor and Social Welfare (STPS), that plans to install 66 rooms for oral hearings on labor issues in the country by 2016, in order to expedite the judicial process to modernize the facilities of the Federal Conciliation and Arbitration Board, that settles controversies between employers and workers, seeking to make the process easier and offer legal certainty to the productive sectors.

A labor trial currently takes an average of a year and a half to be resolved, and it is estimated that by implementing the new rooms for oral trials, this will be reduced to an average of 90 days.

b. Recent Amendments to the Law

Recently, the Supreme Court of Justice published a ruling settling conflicting criteria regarding the proper way to consider discounts made to workers' wages.

The Federal Labor Law establishes norms that seek to protect the workers' wages, stating that only in given cases is it permitted to make discounts to workers' income.

The Supreme Court ruled that it is permitted to garnish wages because of civil or commercial debts contracted by the employees, provided such preventive measures do not exceed thirty percent of the employee's wages that exceeds the minimum wage.

This ruling is important because it defines the compulsory criteria that must be followed by all courts in the country.

Previously, it was only permitted to deduct from the workers' wages debts owed to the employer, for alimony ordered by a judge in favor of the employee's family, or for discounts ordered by official Social Security or Tax authorities.

The Court has established limits to garnishments, because it considers that the minimum income a worker requires to live must be observed, and the maximum possible amount to be garnished is thirty percent of the income that exceeds the minimum wage.

In doing so, the Court applied the rule of deductions permitted by the Federal Labor Law for debts incurred by employees in favor of their employer, and applied the same maximum percentage of wage discounts that an employer can make and set the maximum percentage permitted to be taken from the salary of an employee, to collect payment for a civil or commercial debt acquired with a third party.

The Court states in its considerations that the defined criteria attends to aspects of economic reality, because of the diversity of income among the workers, *"while it is important to protect the salary to prevent that low-income employees put at risk their right to the minimum essential in face of the possibility of enforcing judgments related to debts incurred with third parties, the truth is that there are cases of top executives or high-income employees who can profit from a total ban on wage garnishment as a strategy to avoid fulfilling their obligations."*

By using this criterion, a major breakthrough is achieved, so that workers' creditors can collect debts more efficiently, thereby avoiding possible evasion and fraud by creditors.

V. Conclusion

While the labor environment in Mexico has improved compared to previous years, it is still necessary to seek professional advice prior to setting up a workplace, in order to attend to individual, collective and technical aspects that companies must consider, in order to avoid the impact of calls to strike, closures or suspension of activities by the authorities, or by unfair labor actions from workers, who can unfairly profit when a company begins operations in the country.

Likewise, proper advice can help create and maintain comprehensive coaching for workers to create a sense of belonging that will result in efficient services and improve results.

For this reason, by implementing a preventive integral strategy, a company can prevent conflicts within the organization and achieve greater competitiveness in national and international markets. Mexico has become a world logistics center that works as an international stepping stone to companies' operations, because of its proximity to the United States of America and has a wide range of international free trade agreements that permit improved transportation and creation of goods with added value that can make the difference in the worldwide success of an organization.

THE NETHERLANDS

Dutch procedural employment law and the law on dismissal will undergo substantial amendments in the near future. This is a presentation of the new procedural employment law that will be introduced on 1 July 2015. We will therefore not discuss the current legislation. However, a reservation is made with regard to the new legislation. Certain aspects of the new Act are still unclear and subject to amendment (remedial legislation). There is also some debate regarding the interpretation of various sections of the Act. It is unclear how the courts or the Employee Insurance Agency (UWV) will interpret and apply the new legislation. It will become clear during 2015/2016 how employment law practice will develop in the Netherlands.

I. Overview

a. Introduction

Dutch procedural employment law can be divided into two parts:

- Employment procedural law relating to claims based on or arising from the employment contract;
- Law of dismissal.

As announced, the new procedural employment law and law of dismissal will enter into force on 1 July 2015. The new legislation implies significant changes to employment law practice. At present, a request to terminate an employment contract is submitted by way of petition to the subdistrict court. All other employment law issues must be submitted by summons to the subdistrict court.

This will change from 1 July 2015: the summons procedure is making way for the petition procedure. In the future, *all* employment petitions/claims - thus not only the petition to terminate an employment contract, but also, for instance, claims for wages in arrears, disputes about non-compete clauses, etc., must be submitted by way of *petition*. In addition, the law of dismissal will undergo major changes on 1 July 2015.

The legislature's idea and intention with these changes is to make procedural employment law and the law of dismissal more accessible, quicker and cheaper. The consequences of the legislative amendments are discussed in this contribution.

b. Claims

Dutch employment law has mainly protective provisions for employees. However, both the employer and employee may have a claim under employment law.

An **employee's** claim against his/her employer may include the following:

- claim for wages;
- compensation for an occupational accident;
- changes to the number of working hours or staggering of work hours;
- compliance with reintegration obligations during incapacity for work;
- defective termination of the employment contract;
- right to holidays;
- right to other leave (parental leave, long or short-term care leave, etc.);
- annulment of the termination of an employment contract;
- annulment of a non-compete clause;
- compliance with collective employment conditions (if applicable);
- claims on the grounds of "good employment practices".

An **employer's** claim may include the following:

- repayment obligations;
- cooperating in an amendment to the employment conditions;
- compliance with reintegration obligations during incapacity for work;
- compliance with the employment contract, including confidentiality, non-compete and non-solicitation clauses;
- compliance with safety rules and staff regulations;
- claims based on "being a good employee".

Employee organizations: trade unions, works council

Besides the employer and employee, employee organizations, such as a trade union or works councils, can institute a claim.

Trade unions may claim compliance with the obligations set out in any applicable CLA (collective labor agreement). The trade union may also claim compensation for damage suffered by it and its members (if the employer fails to comply with a CLA).

As a rule, a works council must be created if an employer has at least 50 employees. The employer must ask the works council for *advice* or *consent* in relation to certain topics. These relate to decisions that the employer intends to make that can affect the company and thus the personnel. The employer requires the *consent* of the works council for every proposed decision to establish, withdraw or amend a working hours or holiday scheme, personnel evaluation scheme, etc. The employer requires the *advice* of the works council for proposed decisions to transfer control of the company, or a significant reduction, expansion or other change to the company's activities.

Every interested party, including at least the employee organizations working in the company, the employees working in the company, the works council and the business owner, may demand compliance with the obligations under the Dutch Works Councils Act (*Wet op de Ondernemingsraad*—WOR). Examples of such claims include:

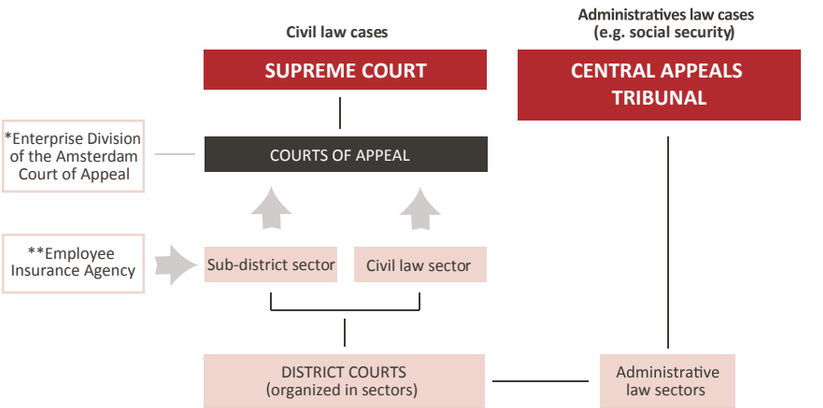
- creating or maintaining a works council or employee representation;
- nominating candidates and electing members of the works council;
- publishing agendas and minutes of works council meetings and consultative meetings.

The works council may institute claims against the employer at the Enterprise Division of the Amsterdam Court of Appeal relating to:

- compliance with the requirements of the right to be consulted or the right of consent under business law and the right to information;
- appealing against the decision of the employer (e.g. to reorganize), if the employer does not follow, or does not fully follow, the works council's advice. The Enterprise Division may then order the employer to withdraw the decision, subject to a penalty.

c. Court / Tribunal System

THE DUTCH COURT SYSTEM AS RELATED TO EMPLOYMENT MATTERS



* The Enterprise Divison of the Amsterdam Court of Appeal is the competent court for some specific matters among which disputes regarding the works council's rights to consultation.
** In case of dismissal on economic grounds and because of long-term incapacity for work, the employer must ask permission from this Agency for termination of the employment contract.

The Dutch legal system is divided among three judicial authorities:

- **First instance:** the District Courts (11 in total), which can be subdivided into the civil sector and sub district sector, among others (including for employment law cases);
- **Appeal:** the Courts of Appeal (4 in total);
- **Cassation:** the Supreme Court of the Netherlands (*Hoge Raad*).

Enterprise Division

Besides the above courts, the specialized Enterprise Division of the Amsterdam Court of Appeal is important to procedural employment law. The Enterprise Division is part of the Amsterdam Court of Appeal and is solely for disputes relating to the works council's right to consultation.

e. Alternative Dispute Resolution (ADR)

Besides arbitration, there is conflict *mediation* (intermediary and advisory services) and conflict *settlement* (binding advice and other forms of alternative and consensual conflict settlement), also known as *alternative dispute resolution* (ADR). There are a lot of alternative dispute resolution institutions in the Netherlands, including both recognized and unrecognized dispute committees. An intermediate form of dispute resolution is the complaints or disciplinary procedure.

Arbitration, a binding opinion and/or ADR are seldom used in the Netherlands for employment law. Mediation, on the other hand, is becoming increasingly common.

Mediation

Mediation is an adequate method with the necessary guarantees for dispute resolution.

An example of where it may be used is a damaged working relationship, because of a dispute or an impending long-term incapacity for work. The manner in which mediation must be conducted in the Netherlands is not yet set out in law. Most mediators working in the Netherlands are however registered at the 'MfN' (*Mediators Federation of the Netherlands*). Mediators registered at the MfN have attended an accredited mediation training course. MfN mediators are also obliged to follow a certain procedure, as established in the MfN regulations.

Parties that wish to resolve their dispute through mediation, sign a mediation agreement with each other and the mediator. This details the basic arrangements, including voluntariness and confidentiality.

The mediation begins after the mediation agreement is signed. Mediation takes place in private; there is no open hearing or public ruling. The parties organize their dispute between themselves and determine what will be made public. The process ends with a settlement agreement, by which the parties re-determine their future relationships.

II. The Litigation Process

a. Typical Case

i. Steps in the process

As from 1 July 2015, as things currently stand (on the basis of remedial legislation), every employment law claim will be submitted to the District Court (subdistrict sector) by way of a *petition*. The petitioner (employer or employee) must substantiate the claim(s) in the petition. In contrast to the summons, the petition does not have to be issued by a bailiff. The petition can simply be submitted to the District Court (subdistrict sector).

Immediately after the petition is submitted, the District Court schedules an oral hearing. Under the new Act, the oral hearing must be held no later than the fourth week following the week in which the petition is submitted.

The defendant has the opportunity to submit a written response, by means of a statement of defense. The statement of defense usually must be submitted a few days before the oral hearing on the District Court's instructions.

The intention of the legislature in introducing the petition procedure for *all* employment law claims is to make the procedure quicker and simpler. In view of the intended speed of employment law procedures, producing evidence by calling and hearing witnesses, interlocutory orders by the judge to adduce evidence, etc. are thus not always appropriate. Under the new law, it will be left up to the *judge* to decide whether the law of evidence is applicable. The judge will make this decision on the basis of factors such as urgency and complexity. Thus, a judge must hold requests for evidence against this yardstick (speed and complexity). As a result, the law of evidence will, in any event, be applicable in more complex cases that are not very urgent. It remains to be seen how judges will deal with this in practice (from July 2015) and whether the legislature's aims will be achieved.

ii. The Appeal Process

The employer or employee may appeal against all rulings of subdistrict courts to the Court of Appeal. The Court of Appeal will reassess the case again in its entirety.
As a final resort, the parties may appeal in cassation to the Supreme Court of the Netherlands (*Hoge Raad*). However, this is not a normal appeal. The Supreme Court does not re-examine the facts of a case. The Supreme Court reaches its decision based on

the facts as established by the Court of Appeal. The Supreme Court assesses whether the Court of Appeal—and, where applicable, the District Court—has interpreted and applied the law correctly in its judgment and whether that judgment is adequately and comprehensibly motivated. Cassation proceedings are aimed at promoting and ensuring the uniformity, development and protection of law.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

Attorney's fees

In view of the new legislation, it is difficult to predict whether attorney's fees for proceedings will remain the same. This will depend to a large extent on whether or not the judge declares the law of evidence applicable to the proceedings. If the law of evidence is applicable and witness testimony and interlocutory orders to adduce evidence are granted, this will increase the costs. We expect the judge to declare the law of evidence to be applicable in more complex proceedings (as is currently the case in summons proceedings) and for the costs to thus remain more or less the same.

In relatively simple or short proceedings (with just a petition, statement of defense and oral hearing), for instance, a claim for wages, compliance with a non-compete clause or dismissal proceedings (via the Employee Insurance Agency or the subdistrict court), the attorney's fees range from approximately EUR 5,000 to EUR 10,000 (excluding VAT). In a more complex case, requiring several written rounds with witness testimony/interlocutory orders to adduce evidence, the attorney's fees can range from approximately EUR 10,000 to EUR 20,000 (excluding VAT), or more.

Once again, attorneys' fees will depend largely on the complexity of the case and how judges will deal with the new legislation as from 1 July 2015.

Court registry fees

In addition to attorneys' fees, court registry fees are payable to the judicial authorities. In a subdistrict case (including employment claims) in civil proceedings, only the petitioner (who initiates the proceedings) pays the court registry fee. The defendant pays nothing. The amount of the court registry fee depends on the amount of the claim and a distinction is made between natural persons and legal entities for this purpose. The court registry fee in subdistrict court cases currently lies between EUR 77 and EUR 923 (claim exceeding EUR 12,500). It is still unclear whether the court registry fee will be adjusted under the new legislation as from 1 July 2015.

Court-approved scale of costs

It is very rare in the Netherlands—except in intellectual property proceedings—for litigants to be ordered to pay the actual procedural costs and attorney's fees of the other party. In an order for costs, the attorney's fees are estimated according to what is known as the court-approved scale of costs, under which the amount to be paid depends on the standard work performed and the importance of the case.

Although this scale is not binding, it is generally applied by the courts. In practice, the actual attorney's fees will always be higher—and often far higher—than the fees calculated on the basis of the court-approved scale of costs. The advantage of this is that a party whose claims are rejected does not have to pay the invoices of the other party's attorney, but only the amount included by the court in the judgment.

c. Trade Unions, Work Councils and Other Employee Representative Bodies

Trade unions

Reference is made to parts a. and b. of this chapter for procedural law. Just like employers and employees, trade unions are normal litigants to which the procedural rules as described above apply.

Works Council

In the aforementioned matters, the works council can appeal against the decision of the employer/business owner to the Enterprise Division by way of a petition. The employer can then submit a statement of defense. An oral hearing then takes place. The entire procedure—from the submission of the petition to the ruling—normally lasts between two and four months.

d. Specialized Litigation Bar

No, there is the Netherlands Bar Association of which all attorneys (of all specializations) are members. However, there are special associations for lawyers that specialize in employment law. The Dutch Employment Lawyers Association (*Vereniging Arbeidsrecht Advocaten Nederland*) and the Employment Law Association (*Vereniging van Arbeidsrecht*) are the most well-known associations for employment law specialists.

III. Tips to Avoid Litigation

A common way to terminate an employment contract and avoid dismissal proceedings is by entering into a settlement agreement. This is what is known as dismissal by 'mutual consent'. The employer and employee then make specific arrangements for the conditions under which the employment contract will end and the amount of the severance pay (through negotiations). This way of terminating an employment contract is popular, because the parties are certain about the conditions of the dismissal and the risk of litigation (including appeal!) is bought off. The employee retains the right to a payment (provided that the agreement is drawn up correctly).

It is essential in Dutch employment law/HR practice, and certainly will be from 1 July 2015, for an employer to have a proper personnel file for each employee. The employer should have regular appraisal interviews with the employee. If an employee's performance is inadequate, this must be brought to his/her immediate attention. The employee ought to be offered a change to improve, with or without the aid of training/coaching (the 'improvement plan'). It is important that the plan is documented properly and complies with the new statutory requirements. On the basis of the new Act, the employer is moreover obliged in any case to arrange training for the employee (for the purpose of employability) during his/her employment. If the employer fails to do so, the petition to set aside the employment contract will be denied. The new Act is stricter than the current one in this regard. The subdistrict court currently has the possibility to weigh the matter directly, which will no longer be possible under the new Act (due to the strict new grounds for dismissal).

Furthermore, it is important for an employer/HR to apply clear rules of conduct or draw up protocols, for instance with regard to sickness absence, conduct in the workplace, on social media, etc., and to then pursue an unambiguous and strict enforcement policy. This will place an employer in a strong position if it wishes to rely on and enforce these rules, for instance through dismissal. According to the case law, an important test is always whether the employee was well aware or ought to have been well aware of the

rules and/or whether the employer applied them unambiguously, so there is no question of any arbitrariness.

IV. Trends and Specific Cases

Law of dismissal: Termination of employment contracts in the Netherlands as from 1 July 2015

Employment contracts may be terminated in the following ways:

- Notice of termination once a dismissal permit is obtained from the Employee Insurance Agency;
- Termination of the employment contract by the subdistrict court;
- By mutual consent;
- Summary dismissal;
- Termination by the employee.

The manner of termination referred under bullet points 1 and 2 above, if the employer follows the formal dismissal route, is dealt with further below.

Dutch law of dismissal, preventive test

The employer must ask permission for the termination of an employment contract (other than summary dismissal/dismissal during a trial period and specific categories of employees for which an exception can be made) from the Employee Insurance Agency or initiate proceedings to set aside the employment contract at the subdistrict court. This involves what is known as the preventive test for the intended dismissal of the employee.

The law determines which dismissal route is to be followed, depending on the ground for dismissal.

- Dismissal on economic grounds and because of long-term incapacity for work is done via the **Employee Insurance Agency**. Notice of termination of the employment contract can be given with the dismissal permit of the Employee Insurance Agency.
- Dismissal on other grounds (including inadequate performance) is done via the **subdistrict court**. The subdistrict court then sets aside the employment contract (in case the request to set aside the employment agreement is granted).

Termination/setting aside of the employment contract is possible *only* if there is:

- a *reasonable* ground for dismissal **and**
- reinstatement within a reasonable period is not possible or is not logical, with or without training.

The reasonable grounds for dismissal are listed exhaustively in the Act:

Employee Insurance Agency

- Economic (jobs become redundant);
- Long-term incapacity for work.

Subdistrict Court

- Frequent absence due to illness;
- Unsuitability for the position (other than because of illness);

- Culpable acts or omissions of the employee;
- Refusal to work due to a serious conscientious objection;
- Damaged working relationship as a result of which the employer cannot reasonably be required to continue;
- Other circumstances as a result of which the employer cannot reasonably be required to continue.

It is important that every ground for dismissal which the employer puts forward is assessed separately and that every ground—in accordance with the intention of the legislature—is strictly tested by the Employee Insurance Agency or the subdistrict court. Ministerial regulations which explain the grounds for dismissal (i.e. the requirements for each ground for dismissal) are still to follow.

CLA dismissal committee

It is possible in case of a dismissal related to economic reasons (jobs become redundant) to create an independent and impartial CLA dismissal committee, which take over the testing from the Employee Insurance Agency. In that case, the CLA may deviate from the reflection principle (last in, first out principle for each age category). The CLA dismissal committee is thus expected to allow greater scope to select on the basis of the quality of employees in case of reorganizations.

Procedural law of dismissal: Employee Insurance Agency and subdistrict court

Employee Insurance Agency; permission to terminate an employment contract (a-b)

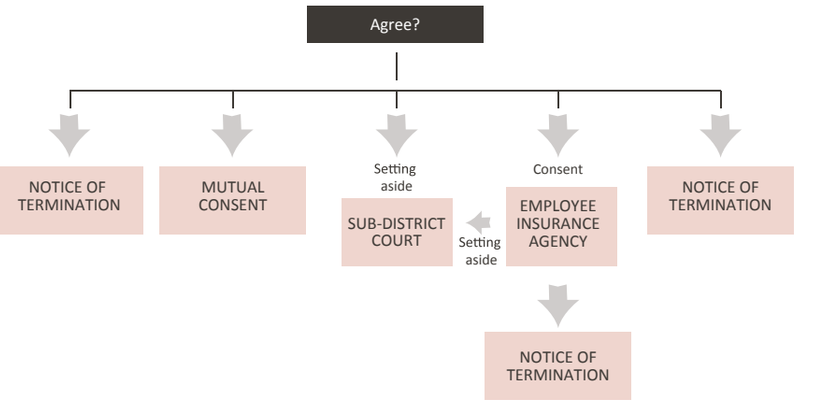
The procedure at the Employee Insurance Agency is instituted by means of a petition. The employee is then given one week in which to submit a statement of defense. The intention of the legislature is for the procedure at the Employee Insurance Agency to be completed within four to five weeks, including one written round, in principle, for the employer and employee. There is no oral hearing. Further ministerial regulations will follow on the new procedure at the Employee Insurance Agency.

Subdistrict court; petition to set aside an employment contract (c-h)

The procedure at the subdistrict court is also instituted by means of a petition, after which the respondent can submit a statement of defense. The oral hearing is scheduled for no later than four weeks after the petition is submitted. The court's ruling usually follows a few weeks after the hearing, so that the entire subdistrict court procedure takes around eight weeks.

As the legislature explicitly refers to proceedings to set aside an employment contract at the subdistrict court as urgent, the law of evidence will also not apply as from 1 July 2015. As such, there will usually (in principle) be no witness testimony or interlocutory orders given to one of the parties to adduce evidence. However, a judge may allow the tendered evidence in a more complex case, such as when there is a dispute about any serious culpability.

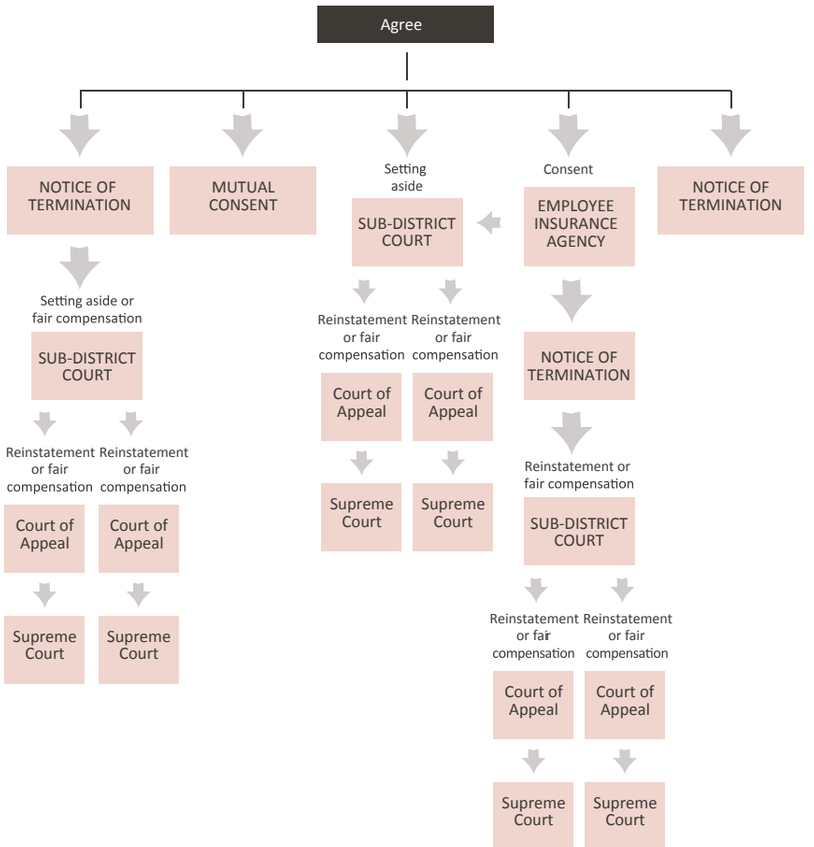
The law of dismissal, as explained above, is set out schematically below. The diagram also includes the new statutory form of dismissal, namely dismissal with consent (the employee simply agrees, without any further arrangements being made). However, it is expected that this will rarely occur in practice, because the employer and employee will usually agree on the conditions of the dismissal by means of a settlement agreement (mutual consent).



Appeals

Under the new legislation, the employer and employee may appeal against the decision of the subdistrict court or the Employee Insurance Agency, firstly to the Court of Appeal and then to the Supreme Court. The employee may request to be reinstated or alternatively ask for fair compensation on appeal. If the first request is denied, the employer may again request the termination of the employment relationship at the Court of Appeal, and then at the Supreme Court.

This involves a fundamental change in the law of dismissal. The law of dismissal is currently characterized by a short procedure, after which the employer has certainty about the termination of the employment relationship. Under the new law, there is uncertainty about the termination of the employment relationship.



The law of dismissal and the appeal options as from 1 July 2015 are set out schematically below. The overview also shows the possibility of an employer giving notice of termination without consent and which actions the employee can then take (red), as well as that an employee can also give notice of termination (blue).

Procedure to set aside an employment contract at the subdistrict court; counterclaims and related claims

As from 1 July 2015, the employee may, if the employer has submitted a petition to have the employment contract set aside, submit counterclaims in his/her statement of defense. Examples would include claims for wages in arrears, for a number of days' leave not taken, or claims on the basis of discrimination or damage to his/her health. The employee currently needs to institute separate proceedings by summons for this purpose. Under the new legislation, it will therefore be simpler for the employee to institute such claims.

However, the court will be given the power under the new legislation (remedial legislation) to *not* assess all or part of any counterclaims or other claims related to a dismissal petition, but rather to separate them. In this way, a speedy dismissal procedure can still be guaranteed; separate litigation must then take place for the other complex claims.

V. Conclusion

It remains to be seen how procedural employment law practice will develop after 1 July 2015, both as regards to general procedural practice and the law of dismissal.

In terms of general procedural practice, it is the express intention of the legislature that employment law proceedings become quicker and simpler. Even so, we doubt whether this will be achieved, particularly in the more complex cases. It is expected that judges will still have to declare the law of evidence fully applicable to such cases, even if every employment law claim is to be instituted by means of a petition as from 1 July 2015. As a result of this, the complexity and length of such procedures, and the associated costs, will probably remain the same. Complex proceedings usually take as long as one to two years.

In terms of the law of dismissal, it is expected that the number of terminations of employment contracts by means of a settlement agreement, i.e. by 'mutual consent', will increase. This is in order to buy out the increased risk of litigation, including the chance to appeal, and because an employee will soon be able to simply institute counterclaims in the dismissal proceedings (in his/her statement of defense). Employees are expected - for tactical reasons or otherwise - to make frequent use of this, even if their counterclaim is small or has a limited chance of success. An anticipated result of this is that procedural documents will be lengthier and oral hearings will last longer than is currently the case.

An important new law that employers must take into consideration is that employees are entitled to revoke a settlement agreement within 14 days of signature, without having to state reasons. The employee may do this once within a six-month period. This additional protection for the employee obviously implies greater uncertainty for the employer and must be taken into account.

Another important amendment as of 1 July 2015 is the introduction of what is known as the Transition Payment. Every employee is entitled to this payment if his/her employment contract is terminated (even by operation of law!) and has lasted at least 24 months, subject to a few exceptions (including dismissal for urgent cause). The payment amounts to roughly one-third of a month's salary for each year of service. On the face of it, this is considerably less than the current severance pay that is calculated on the basis of the subdistrict court formula (roughly one month's salary for each year of service). Collective dismissals as a result of reorganizations will therefore work out considerably cheaper for employers.

At the same time, the requirements for dismissal will become stricter. It is expected that it will be more difficult for employers to dismiss an employee as from 1 July 2015. What is likely to happen is that an employer will often pay an employee more than just the statutory Transition Payment in order to be able to terminate the employment contract by mutual consent (and avoid uncertain proceedings).

NEW ZEALAND

I. Overview

a. Introduction

The employment litigation system in New Zealand aims to resolve most employment issues quickly and informally, with minimal cost. The Employment Relations Act 2000 ("the Act") has the key aim of building productive relationships through the promotion of good faith in the employment environment and the employment relationship.

The Ministry of Business, Innovation and Employment ("MBIE") employment mediation service and the investigative tribunal the Employment Relations Authority ("Authority") are the first line in dispute resolution and adjudication of employment cases. In most cases, parties will be required to attend mediation before adjudication in the Authority is available. To ensure access to justice, parties are entitled to appear in the Authority without representation or with non-legally qualified representatives.

As employment law is highly politicised and subject to regular change, the Act recognises that while judicial intervention can be reduced, it is still important to have higher level judicial authority on employment law.[1] The Employment Court hears appeals (known as "challenges") from the Authority (including by rehearing the case in full) and can also adjudicate in the first instance in some cases or decide a point of law referred from the Authority. Questions of law can be appealed to the Court of Appeal or Supreme Court with leave from those Courts.

The majority of claims arising out of the employment relationship are brought in the Authority or the Employment Court in the first instance. However, some claims relevant to the employment relationship can or must be brought in other institutions.

b. Claims

Personal grievances

A personal grievance claim is the most widely used employee claim in New Zealand. Personal grievances are a creature of statute. Sections 101 to 128 in the Employment Relations Act 2000 ("the Act") set out the basis of the claim and remedies available. A wide range of claims can be brought as a personal grievance.[2]

Unjustified dismissal: A personal grievance claim is the only way to challenge dismissal in New Zealand (the common law claim for "wrongful dismissal" is no longer available).[3] Constructive dismissal claims (where the employee resigns, but asserts the resignation was in fact brought about by the employer, such as being given a choice between resignation or dismissal, or as a result of a serious breach of duty by the employer) are also included in this category.

Unjustified disadvantage: Known colloquially as a "disadvantage", this is a broad claim, with the employee required to prove: *"that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer."*[4]

[1] Employment Relations Act 2000 s. 143(g).
[2] Employment Relations Act 2000 s. 103.
[3] Employment Relations Act 2000 s. 113.
[4] Employment Relations Act 2000 s. 103(1)(b).

Discrimination: A claim by an employee of unlawful discrimination on the prohibited grounds in the Human Rights Act 1993 can be brought as a personal grievance claim or as a complaint under the Human Rights Act 1993 (discussed further below).[5] The employee elects which claim to pursue at the time proceedings are issued in the relevant Tribunal. The Act contains additional grounds of discrimination not included in the Human Rights Act 1993, being discrimination on the grounds of an employee's involvement in union activities or refusal to do work likely to cause serious harm.[6]

Sexual harassment: This is defined in section 108 of the Act. As with discrimination, a complaint may also be made under the Human Rights Act 1993.

Racial Harassment: This is defined in section 109 of the Act. A complaint may also be made under the Human Rights Act 1993.

Duress in relation to membership or non-membership of a union or employees organisation: This claim is defined in section 110 of the Act. It addresses a situation where the employer makes membership or non-membership of a union or employee organisation a condition of employment or otherwise tries to influence an employee in relation to such membership or activities (such as with threats or incentives).

Employer failing to comply with obligations when contracting out work: Part 6A of the Act sets out employers' obligations in the asset sale, transfer or contracting out of all or part of its business. This includes an obligation to follow an agreed process for the majority of employees to consider whether the employees can transfer and the terms and, in the case of certain protected categories of employees, the obligation to facilitate the transfer of those employees to the purchaser, transferee or contractor on the same terms and with continuous service. These provisions are to be amended in 2015, as discussed below.

A personal grievance claim must be brought by an individual. This means that a Union could not bring a claim in its own right, although it could act as an individual employee's (or employees') representative.

For a personal grievance claim, a key remedy is compensation for humiliation, lost dignity and injury to feelings ("distress damages").[7] Distress damages can be awarded in all kinds of personal grievance claims, not just where there has been a dismissal. These awards are not taxed (this is also the case with amounts paid for distress in settlements, provided a personal grievance claim exists). Awards range from less than $1000 up to the highest award to date of $50,000.[8] The majority of awards are for less than $15,000.

An employee unjustifiably dismissed may seek reinstatement to his or her former position.[9] An application for interim reinstatement may also be made.[10] However, the Authority will try to hear the unjustified dismissal claim urgently if possible where reinstatement is sought, to avoid the need for an interim application. Usual interim injunction procedures will apply and the employee will be required to provide an undertaking as to damages.

An employee who succeeds in an unjustified dismissal claim is also entitled to reimbursement of any wages or other money lost.[11] For an employee unjustifiably dismissed, this includes

[5]Employment Relations Act 2000 ss. 103, 104, 105 and 112; Human Rights Act 1993 Part 2 and s.79A.
[6]Employment Relations Act 2000 ss. 104.
[7]Employment Relations Act 2000 s 123(1)(c)(i).
[8]*Waugh v Commissioner of Police* [2004] 1 ERNZ 450.
[9]Employment Relations Act 2000 s. 123(1)(a).
[10]Employment Relations Act 2000 s. 127.
[11]Employment Relations Act 2000 s. 123(1)(b).

a right to 3 months' actual lost wages.[12] Awards can be made beyond that (for up to a year or more); provided the employee can show that he/she has made reasonable efforts to mitigate loss by looking for other work. The Authority may also make recommendations to the relevant employer (for example, about human resources systems that need to be put in place).

The amount of any remedies awarded can be reduced for contribution by the employee.[13] It is mandatory for the Employment Relations Authority or Employment Court to consider whether, when a dismissal is considered unjustified, the employee's own actions have contributed to the situation giving rise to the personal grievance. If so, the remedies that would otherwise have been awarded are reduced. The extent of contribution is usually expressed as a percentage figure and reductions of up to 100% have been made.

Consistent with the legislative focus on prompt resolution of disputes, an employee must raise a personal grievance claim with the employer within 90 days unless the employer consents to the personal grievance being raised after the expiration of that period. A personal grievance claim can be raised verbally or in writing by the employee. If a personal grievance claim is not raised in time, it may only be pursued if the employer agrees or if the Authority grants leave. Once a grievance is raised, it must be filed in the Authority or the Employment Court within three years.[14]

Disputes over the interpretation, application or operation of an employment agreement

Any person bound by or party to an employment agreement (whether individual or collective) having a dispute over the interpretation, application, or operation of that employment agreement is entitled to attempt to resolve that dispute in mediation or to have it heard in the Authority.[15]

Claims for arrears of wages

If there has been any default in the payment of wages or other money due to an employee under an employment agreement, this claim can be brought as a claim for arrears of wages.[16] Claims for other amounts owed to employees such as unpaid holidays or where there has been a failure to pay minimum wage are also included. Some of these claims (such as a claim for unpaid holiday pay) can be brought by a labour inspector on behalf of the employee.[17]

Breach of good faith

The concept of "good faith" is a cornerstone of the Act and the overriding obligation in employment relationships.[18] A claim for damages and/or for a penalty based on breach of good faith is available.[19]

Claims for penalties

A penalty claim of up to $10,000 against an individual and $20,000 against a company

[12]Employment Relations Act 2000 s. 128.
[13]Employment Relations Act 2000 s. 124
[14]Employment Relations Act 2000 ss. 114 and 115.
[15]Employment Relations Act 2000 s. 129
[16]Employment Relations Act 2000 s. 131.
[17]Minimum Wage Act 1983 s. 11; Holidays Act 2003 s. 77.
[18]Employment Relations Act 2000 s. 4.
[19]*Baguley v Coutts Cars Ltd* [2000] 2 ERNZ 409, *Slingsby v Eden*, unreported, ERA Auckland, AA378/08, 5 November 2008. Employment Relations Act 2000 s 4A

can be sought for various breaches of employment obligations.[20] Penalties are available for breaches of an employment agreement, as well as statutory provisions (e.g. good faith, not keeping wage and time records, not meeting fair bargaining obligations, breaching a settlement agreement). A claim for a penalty can be brought by an employer or an employee.

Compliance Orders

An affected party can apply to the Authority for a compliance order, requiring a person who is in breach of an employment agreement, settlement agreement, relevant statutory provision, improvement notice, order of the Authority, or enforceable undertaking, to do any specified thing or cease any specified activity within a set timeframe. The Employment Court also has jurisdiction to grant a compliance order for breach of its orders or determinations or a breach of Part 8 of the Act (dealing with strikes and lockouts).[21] The Employment Court has powers to impose fines or even imprison for breach of a compliance order.[22]

Other employment claims

The Authority and Employment Court have exclusive jurisdiction to hear claims about employment relationship problems generally.[23] Contractual claims arising out of employment relationships are heard by the Authority and it has the power to make any order the High Court or a District Court would make under relevant contract legislation (e.g. the Contractual Mistakes Act 1977 and the Contractual Remedies Act 1979).[24] A common cause of action is the enforcement of (including declarations as to the reasonableness of) restraints of trade which are designed to restrict an employee's post-employment activities.

Judicial review

An action for judicial review may be brought in the Employment Court in relation to the exercise, refusal to exercise or proposed or purported exercise by certain parties (including an employer or an officer of the Authority or the Court) of certain specified statutory powers or statutory powers of decision. Such an action is only available after the determination of any appeal and, if the issue gives rise to an employment relationship problem, it must be dealt with using the procedures applicable to such problems, rather than by way of judicial review.[25] Judicial review is not available in the Authority.

Complaints under the Parental Leave and Employment Protection Act 1987

The Parental Leave and Employment Protection Act 1987 grants employees with parental leave rights and protects their employment during that leave. An employee who has had their statutory parental leave rights breached or has in some other way been disadvantaged in this area is entitled to make a parental leave complaint.[26]

The time-frame for bringing a parental leave complaint is the later of 26 weeks from the date the subject-matter of the complaint arose, or 26 weeks from the expected date of delivery or assumption of care of an adoptive child, or 8 weeks from the expiry of

[20]Employment Relations Act 2000 ss. 133 to 136.
[21]Employment Relations Act 2000 ss.137 to 140A.
[22]Employment Relations Act 2000 s. 140(6).
[23]Employment Relations Act 2000 ss. 161 and 187.
[24]Employment Relations Act 2000 s. 162.
[25]Employment Relations Act 2000 ss. 194 and 194A.
[26]Parental Leave and Employment Protection Act 1987 s. 56.

any period of parental leave.[27] A parental leave complaint is not a personal grievance and the processes for resolving parental leave complaints differ from those for personal grievances. However, any such complaint is eventually adjudicated by the Authority.[28] Remedies available to the employee include reimbursement of lost remuneration, reinstatement and "compensation".[29] This has been held to include compensation for humiliation, loss of dignity and injury to feelings.

Complaints under the Human Rights Act 1993 or the Equal Pay Act 1972

Under the Human Rights Act 1993, employees or, in some cases, applicants for employment have the ability to make a complaint of unlawful discrimination to the Human Rights Commission (this covers a range of unlawful actions, including sexual or racial harassment and victimisation).[30] The Commission's function is to receive and assess such a complaint, to gather information, and to facilitate resolution. The aim is to assist the parties to settle, if that is a possibility.[31] If the complaint is not resolved proceedings may be brought in the Human Rights Review Tribunal by the Commission on behalf of a complainant or the complainant can bring proceedings on their own behalf.[32] The Human Rights Review Tribunal is discussed further below.

The Equal Pay Act 1972 requires that employers can't pay different rates of pay between employees where the only difference between them is their gender. Section 2A sets out grounds for of claim unlawful discrimination in employment by providing different terms on the basis of sex. The claim would be pursued in the Authority. Where the same facts also give rise to a complaint under the Human Rights Act 1993, the affected party must chose under which legislation to pursue the complaint.

Privacy Complaints and the Office of the Privacy Commissioner

This Privacy Act 1993 protects and promotes individual privacy through 12 Privacy Principles.[33] These Principles cover the collection, use and disclosure of "personal information" as well as access to and the ability to correct the information on the part of those individuals. "Personal Information" is broadly defined as any information about an identifiable individual. Breaches of the Principles are investigated and dealt with in the first instance by the Privacy Commissioner, who has the role of watch dog and educator in relation to privacy issues as well as the ability to issue specific codes of practice.[34]

The access provisions in the Privacy Act 1993 also give employees an almost unqualified right to access all information held about them by the employer (this includes, for example, internal emails sent by management or human resources discussing the employee, and is not restricted to written information). The Privacy Act 1993 sets out a process for requesting and disclosing such information, with the employer's response open to review by the Commissioner if a complaint is lodged.[35] This process is frequently used as a type of informal discovery by employees.

Individuals can complain to the Privacy Commissioner if they believe their privacy has been breached.[36] The Commissioner can investigate and will work on achieving an

[27]Parental Leave and Employment Protection Act 1987 s. 56(2).
[28]Parental Leave and Employment Protection Act 1987 s. 58.
[29]Parental Leave and Employment Protection Act 1987 ss. 65 and 66.
[30]Human Rights Act 1993 ss. 22 and 23, ss. 61 to 69.
[31]Human Rights Act 1993 s. 83.
[32]Human Rights Act 1993 s. 92B.
[33]Privacy Act 1993 s. 6.
[34]Privacy Act 1993 ss. 13, 46.
[35]Privacy Act 1993 Part 5.
[36]Privacy Act 1993 Part 8.

agreed resolution if there has been a breach (often based on remedying the particular breach with an assurance there will not be a repetition). The Privacy Commissioner's views, however, are not legally binding, except for deciding whether or not a private sector agency has imposed an unreasonable charge for access to personal information.[37] Only the Human Rights Review Tribunal can determine legal issues at first instance, but it cannot do so unless the Privacy Commissioner has first investigated the complaint.

If an agreed resolution can't be reached, the Director of Human Rights Proceedings or the complainant can bring proceedings before the Human Rights Review Tribunal.[38] Proceedings of the Human Rights Review Tribunal are discussed further below.

c. Administrative Agencies that Investigate or Adjudicate Claims

Ministry of Business, Innovation and Employment ("MBIE")

Formerly known as the Department of Labour, this government department has oversight of employment matters in New Zealand. MBIE Labour Inspectors have broad powers to enter workplaces, inspect and review documents, and conduct interviews for the purposes of ensuring minimum employment legislation has been complied with.[39] Where there is evidence of non-compliance, they have a range of tools available including making recommendations, issuing improvement notices, proposing enforceable undertakings or issuing demand notices. Labour Inspectors can also bring claims for wage arrears in some cases (for example, where holidays are unpaid).

MBIE also provides a free mediation service for the resolution of employment relationship problems.

Worksafe New Zealand

Worksafe New Zealand ("Worksafe") is New Zealand's workplace health and safety regulator. It was created in 2013 as a crown entity by the Worksafe New Zealand Act 2013, assuming functions previously carried out by MBIE. Worksafe was created as part of a wider reform of health and safety legislation in New Zealand, which is set to continue with the Health and Safety Reform Bill currently moving through the legislative process.

Worksafe's primary goal is to promote and contribute to securing the health and safety of workers and workplaces. Its functions include advisory work, as well as enforcement and compliance.[40] Under the Health and Safety in Employment Act 1992, significant safety incidents at workplaces are reported to Worksafe.[41] Worksafe's health and safety inspectors have the power to investigate such incidents and take low level enforcement action such as issuing improvement, prohibition and infringement notices.[42] Infringement notice fines can be issued for an amount from $100 to $3,000 (except for a failure to have effective of hazard systems, which can generate a fine of $800 to $4000).[43] Where an offence is indicated, a Worksafe Inspector can file charges in the District Court.[44] The most serious offence involving acting or failing to act in breach of the legislation, knowing

[37]Privacy Act 1993 s. 78.
[38]Privacy Act 1993 s. 82.
[39]Specifically, the Employment Relations Act 2000, the Equal Pay Act 1972, the Holidays Act 2003, the Minimum Wage Act 1983, the Parental Leave and Employment Protection Act 1987, the Volunteers Employment Protection Act 1983 and the Wages Protection Act 1983. See ss. 223, 223A, and 229 of the Employment Relations Act 2000.
[40]Worksafe New Zealand Act 2013 s. 10.
[41]Health and Safety in Employment Act 1992 s. 25(3).
[42]Health and Safety in Employment Act 1992, ss. 29 to 33, ss. 39 to 54, ss. 56A to 56H.
[43]Health and Safety in Employment Act 1992 s. 56F.
[44]Health and Safety in Employment Act 1992 s. 54A.

it is reasonably likely to cause serious harm, can lead to imprisonment for a term of not more than 2 years and/or a fine of up to $500,000.[45]

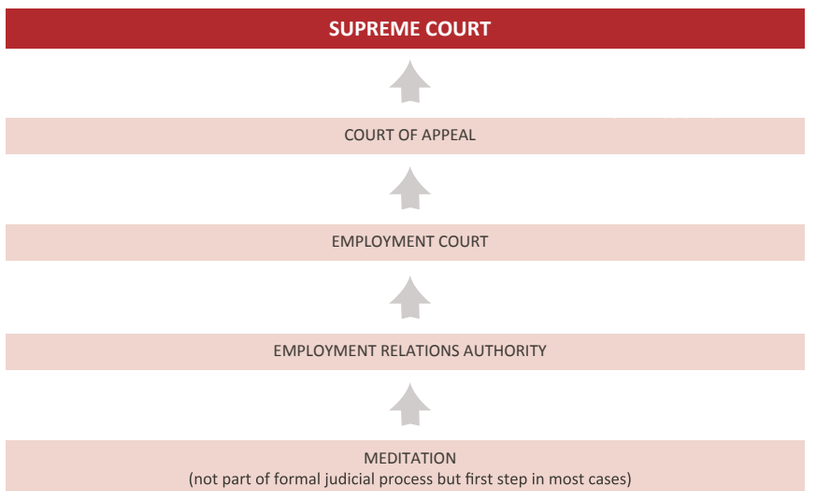
The Office of the Ombudsman

The Ombudsman has a general function of assisting the community in its dealings with government agencies. It handles complaints against government agencies and undertakes investigations and inspections.[46] In the employment context, the Ombudsman acts as a facilitator of the Protected Disclosures Act 2000. This legislation aims to encourage people to report serious wrongdoing in their workplace by providing protection for "whistleblowers".

The Ombudsman provides information and guidance to anyone wishing to make a protected disclosure and is also an "appropriate authority" to which a disclosure may be made in certain circumstances.[47]

d. Court / Tribunal System

THE NEW ZEALAND COURT SYSTEM AS RELATED TO INDUSTRIAL RELATIONS AND EMPLOYMENT



e. Alternative Dispute Resolution (ADR)

MBIE provides a free mediation service for the resolution of employment relationship problems. This service is widely used by parties to resolve employment issues, both before and after proceedings have been filed. There is a high settlement rate, with around 80% of disputes settling in mediation.

[45]Health and Safety in Employment Act 1992 s. 49.
[46]Ombudsmen Act 1975, s 13.
[47]Protected Disclosures Act 2000, ss. 3 and 6.

Mediators and the parties involved in the provision of mediation services at MBIE must (unless they otherwise consent) keep confidential *"any statement, admission, or document created or made for the purposes of the mediation and any information that, for the purposes of the mediation, is disclosed orally in the course of the mediation"*.[48] No evidence of these matters is admissible in any legal proceedings.

Before it hears a matter the Authority or Employment Court must consider mediation and, where the parties have not participated in mediation, in most cases will direct the parties to attend mediation before the matter can be heard.[49]

MBIE mediators can sign a settlement agreement under a process set out in section 149 of the Act. This has advantages for enforcement (a penalty may be sought for a breach). The process is also available for settlement agreements negotiated between the parties (or their representatives) without a mediator. It is good practice to ensure all settlement agreements are formalised using this process. The signing process can be arranged promptly through contacting mediation services and providing a copy of the relevant agreement. Before signing, the mediator calls both of the parties signing to check they understand the significance of the agreement and wish to proceed.

Parties can participate in mediation outside of the MBIE service.[50] However, if this occurs, it is common for the parties to still agree to have the settlement agreement signed by a mediator under section 149.

Private arbitration is also available. The legislation does not prescribe any particular rules relating to the provision of private mediation services or arbitration outside the legislative framework except to bar the application of the Arbitration Act 1996.[51] The intention here is to exclude the jurisdiction of the High Court.

The parties may take their agreed or arbitrated settlement to a mediator at MBIE for signing.[52] Where an issue has been submitted to arbitration, the parties may still make use of the mediation services or apply to the Authority or Employment Court.[53] For example, an arbitrated award might need to be enforced, or perhaps only one aspect of an issue requires the specialised expertise of the Authority or Employment Court for determination.

II. The Litigation Process

a. Typical Case

i. Steps in the Process

Section 143 of the Act sets out the objects of Part 10 in establishing the relevant dispute resolution institutions, including:

- supporting successful employment relationships;
- recognising that employment relationships are more likely to be successful if problems in those relationships are resolved promptly by the parties themselves;

[48]Employment Relations Act 2000 s 148(1).
[49]Employment Relations Act 2000 ss. 159 and 188(2)
[50]Employment Relations Act 2000 s 154.
[51]Employment Relations Act 2000, s 155.
[52]Employment Relations Act 2000, s. 149(1).
[53]Employment Relations Act 2000, s. 155(3).

- recognising that judicial intervention at the lowest level needs to be that of a specialist decision-making body that is not inhibited by strict procedural requirements; and
- recognising that difficult issues of law will need to be determined by higher courts.

The Employment Relations Authority

The Authority is the tribunal responsible for adjudicating most employment claims in the first instance. The Authority is an investigative body having the role of *"resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities."*[54]

The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally.[55] The jurisdiction is broad. For example, the Authority can determine personal grievances; it can order compliance with the legislation's good faith obligations; it can deal with matters concerning union rules and union registration; the entitlement of a person to be a union member; proceedings related to a strike or lockout (other than tort or injunction proceedings); matters about the recovery of wages or money; objections to demand notices issued by Labour Inspectors; and it is empowered to make orders for interim reinstatement. There is no monetary limit. It also has the power to make orders under any rule of law or enactment relating to contracts.[56]

The adjudicators sit alone and have the title of "Authority Member". They typically come from an industrial relations or legal background. The process is investigative rather than adversarial and is relatively informal.

The process for bringing a standard claim in the Employment Relations Authority

The Act provides that: *"The Authority must, in carrying out its role… comply with the principles of natural justice"*.[57] The Authority must act as it thinks fit in equity and good conscience, but may not do anything that is inconsistent with the Act, regulations made under the Act or the relevant employment agreement.[58]

Schedule 2 of the Act sets out the Authority's further powers and procedural rules. Over time, the Authority has developed its own case management process, which is set out in a practice note issued on 30 March 2011.

The litigation process in a standard Authority case usually commences with the filing of a Statement of Problem. This is an informal document, which can be downloaded online from the Authority website. The Statement of Problem should set out the heads of claim, the factual background, and the remedies sought, and attach key documents. However, as the process is investigative and applicants are often unrepresented (or represented by non legal representatives) the Statement of Problem is often not comprehensive. The Respondent has 14 days to file a Statement in Reply in similar format.

If the parties have not attended mediation, the Authority will usually issue a direction that the parties attend mediation before the matter proceeds to hearing (known as an "Investigation Meeting"). It is therefore common for a party refused mediation to file a Statement of Problem in an effort to require the other party to attend.

If the claim is not settled in mediation, the Authority will hold a telephone conference

[54]Employment Relations Act 2000 s. 157.
[55]Employment Relations Act 2000 s. 161.
[56]Employment Relations Act 2000 s. 162.
[57]Employment Relations Act 2000 s. 157(2)(a).
[58]Employment Relations Act 2000 s. 157(3).

with the parties (or their representatives). In straightforward cases, this conference will cover all matters leading up to hearing (any interlocutory issues or applications, the timetable, any further documents, the witnesses, and the date of the Investigation Meeting). Following the conference, the Authority issues a Minute setting out the matters decided and a timetable for filing witness statements, any further documents, and submissions (if any).

Interlocutory or pre-trial proceedings are generally discouraged, as these can prevent the prompt resolution of employment problems. There is no formal discovery process, but the Authority does have broad powers to investigate, including requiring witnesses to appear and provide relevant documents.[59] It is not uncommon for parties to apply for this power to be exercised. An employee can also make a request under the Privacy Act 1993 for all "personal information" the employer holds about him/her (this will cover most documents required for litigation) and, during a decision making process, the employee is also entitled to access information relevant to a decision (which will include all relevant documents) under the good faith provisions before a decision is made.[60]

Relatively common interim applications made to the Authority include applications for interim reinstatement pending hearing of an unjustified dismissal grievance or applications to declare a claim out of time. Employers also seek interim orders when seeking to enforce restraints.

In a standard case, the Applicant usually files written witness statements first, with the Respondent filing its witness statements around 2 weeks later and any reply statements from the Applicant around a week later. Witness statements are typically all filed a week or two prior to the investigation meeting. Representatives are usually expected to make oral closing submissions (if any) at the conclusion of the Investigation Meeting and a written synopsis may be filed at the time or at a later date depending on the Authority Member and the complexity of the case. There is considerable flexibility and urgent matters are obviously dealt with much more quickly and can be considered on the papers (with sworn affidavits filed).

Witnesses who provide written statements are required to attend the Investigation Meeting (unless the Authority Member has decided otherwise) and give evidence on oath. The Authority Member has a broad discretion in the way the meeting proceeds. Witnesses may be examined in turn or all at the same time. While the parties' representatives are entitled to be present and to question (and cross examine) witnesses, they do not lead the case and usually will only be allowed to question witnesses about any matters not covered by the Authority Member.[61] There is no transcript of the evidence. The Authority Member will usually invite the representatives (if any) to make brief oral submissions at the end of the hearing. Written submissions are welcome and usually provided by any lawyer acting as a representative, but are not usually required.

Authority Members can make oral determinations at the end of the Investigation Meeting, which must be recorded in writing.[62] This process may be used where there is some urgency or the matter is relatively simple. The more usual approach is for the Authority Member to issue a written determination. In a standard, non urgent employment claim, a written determination is issued around one to three months after the Investigation Meeting (but timing can vary). The process from filing of the Statement of Problem to determination could take anything from a few days (for something urgent) to 6 months or longer.

[59]Employment Relations Act 2000 s. 160.
[60]Employment Relations Act 2000 s. 4.
[61]The right to cross examine is included at s. 160(2A) of the Employment Relations Act 2000.
[62]Employment Relations Act 2000 s. 174.

The law is due to change in this area and, from March 2015, the Authority will be required to give an oral determination or oral indication of preliminary findings wherever practicable.[63]

The Employment Court

The Employment Court is a specialist court of record, with similar powers, status and procedures to the High Court. The Court has been left to determine the difficult issues of law, issues where a large number of employees are likely to be affected, such as torts or injunctive relief in relation to industrial action, and challenges to the determinations of the Authority.[64] In addition, the Employment Court is the only employment institution that has the power to make freezing orders and search orders (formerly known as *Mareva* injunctions and *Anton Piller* orders).[65]

It cannot, however, make decisions about the procedure followed by the Authority nor can it direct or advise the Authority in relation to the exercise of its investigative power.[66] The Court no longer has the power to entertain applications for summary judgment.[67]

The Employment Court usually consists of one judge sitting alone, but the Chief Judge can direct that a matter should be heard by a full Court.[68]

Adjudication by Mediation Services

MBIE mediators are empowered to adjudicate on matters covered in mediation, provided both parties agree to this in writing at the time.[69] This first potential line of adjudication provides flexibility in problem solving, allowing a matter to be resolved promptly at the first stage of engagement with a third party if both parties agree.

ii. The Appeal Process

"Challenges" under section 179 of the Act)

The term "appeal" does not apply in this jurisdiction. The main feature of challenges under section 179 is that court hearings may consider the matter afresh (de novo).

Accordingly, where a party before the Authority is dissatisfied with a determination, an election to challenge the determination must be made to the Court for a hearing of the

matter within 28 days after the date of the Authority's determination. The election must specify whether it relates to all or only part of the Authority's determination.

If the party making the election does not request a full hearing of the entire matter (a "hearing de novo"), then it must specify:

- any alleged error of law or fact;
- any question of law or fact to be resolved;
- the grounds on which the election is made; and
- the relief sought.[70]

[63]Employment Relations Amendment Act 2014 s. 69.
[64]Employment Relations Act 2000 s. 143(g).
[65]Employment Relations Act 2000 s 190(3).
[66]Employment Relations Act 2000 s 188(4).
[67]Employment Relations Act 2000 s 187(2).
[68]Employment Relations Act 2000 ss. 208 and 209.
[69]Employment Relations Act 2000, s 150.
[70]Employment Relations Act 2000 s. 179.

The Court hearing, therefore, may be held on the basis of agreed facts, or it may deal with only part of the subject matter of the determination; or it can deal with a question of law or fact only. The issues raised by the challenge (or cross-challenge) will determine the basic nature of hearing.

Where the Court does hear a matter that was previously heard in the Authority, it *"must make its own decision on that matter and any relevant issues"*. The Court thus is not to place any special weight on the original determination by the Authority.[71]

Removal or referral to the Employment Court

As an alternative to an initial hearing in the Authority, a party may apply to the Authority or, if the Authority refuses, the Employment Court itself to have the matter removed to the Employment Court for hearing in the first instance. An application for removal may be granted, for example, where an important question of law is likely to arise.[72] The Authority itself may also refer a question of law arising in proceedings to the Employment Court for determination.[73]

Court of Appeal

The Court of Appeal is a generalist court, which usually sits in criminal or civil divisions consisting of three judges. It can sit as a full court of five judges for cases of sufficient significance.[74]

Any party to a decision in the Employment Court may apply to the Court of Appeal for leave to appeal on a question of law (provided the question is not concerned with the interpretation of a collective or individual employment agreement). The Court of Appeal may only grant leave if, in the opinion of that Court, the question of law involved in that appeal is one that, by reason of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision.[75]

Under the Act, the Employment Court does not have the power to grant leave to appeal; only the Court of Appeal has that right at first instance.

The Supreme Court

The Supreme Court is the superior court of record in New Zealand. For the purposes of hearings and determinations, the Supreme Court comprises five judges. However, applications for leave to appeal are heard by two or more permanent judges.[76]
The Supreme Court can hear and determine an appeal of a decision of the Court of Appeal unless the decision is a refusal to grant leave or special leave to appeal to the Court of Appeal.[77]

Appeals to the Supreme Court can be heard only with the Supreme Court's leave.[78] The Supreme Court must not give leave to appeal to it unless it is satisfied that it is necessary in the interests of justice for it hear and determine the proposed appeal. The interests of justice are met if:

[71]Employment Relations Act 2000 s. 183.
[72]Employment Relations Act 2000 s. 178.
[73]Employment Relations Act 2000 s. 177.
[74]Judicature Act 1908 ss. 58 to 58E.
[75]Employment Relations Act 2000 s. 214.
[76]Supreme Court Act 2003 s. 27.
[77]Supreme Court Act 2003 s. 7.
[78]Supreme Court Act 2003 s. 12

- the appeal involves a matter of general or public importance; or
- a substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard; or
- the appeal involves a matter of general commercial significance.[79]

Parties also have the right to appeal a decision of the Employment Court (other than a decision on the construction of an individual employment agreement or a collective employment agreement) as being wrong in law directly to the Supreme Court, with leave, in exceptional circumstances. This test of exceptional circumstances is in addition to the Supreme Court being satisfied that it is necessary in the interests of justice for the court to hear and determine the proposed appeal.[80]

In its determination of the appeal, the Supreme Court may confirm, modify, or reverse the decision appealed against or any part of that decision. Neither an application for leave to appeal nor an appeal operates as a stay of proceedings on the decision to which the application or the appeal relates unless the court or the Supreme Court so orders.[81]

Human Rights Review Tribunal

Complaints under the Human Rights Act 1993

If the Human Rights Commissioner can't facilitate an agreed resolution of a complaint under the Human Rights Act 1993, the Director of Human Rights Proceedings or the complainant can bring proceedings before the Human Rights Review Tribunal.[82]

The Human Rights Review Tribunal is made up of three people; a chairperson and two others appointed by the chairperson from a panel.[83] The Tribunal must act according to the substantial merits of the case, without regard to technicalities. The Human Rights Review Tribunal has investigative powers similar to those of the Authority. In exercising its functions it must act in accordance with the principles of natural justice, fairly and reasonably and according to equity and good conscience.[84]

The Human Rights Review Tribunal may grant remedies including a declaration, an order restraining the continuation or repetition of the breach, damages, or an order that the defendant undertake any specified training or any other programme, or implement any specified policy or programme.[85]
There is a right of appeal from the Human Rights Review Tribunal to the High Court, and thereafter on leave to the Court of Appeal on a question of law.[86]

Complaints under the Privacy Act 1993

Where a privacy complaint has not been resolved by agreement, the Director of Human Rights Proceedings or in certain circumstances the complainant can bring proceedings before the Human Rights Review Tribunal.[87]

The Tribunal can award damages, such as addressing pecuniary loss or compensate for humiliation, loss of dignity, and injury to the feelings. It may also make a declaration,

[79]Supreme Court Act 2003 s. 13.
[80]Supreme Court Act 2003 s. 14 and s. 214A Employment Relations Act 2000.
[81]Employment Relations Act 2000 s. 214A(3).
[82]Human Rights Act 1993 s. 92B.
[83]Human Rights Act 1993 s. 98.
[84]Human Rights Act 1993 s. 105.
[85]Human Rights Act 1993 s. 92I.
[86]Human Rights Act 1993 ss. 123 and 124.
[87]Privacy Act 1993 ss. 82 and 83.

issue an order restraining the defendant from further breaches or direct the defendant to take action to remedy the interference with privacy.[88]

There is a right of appeal from the Human Rights Review Tribunal to the High Court, and then to the Court of Appeal.[89]

District Court

Health and safety prosecutions for offences under the Health and Safety in Employment Act 1992 are dealt with in the District Court. Appeals are to the High Court and then the Court of Appeal.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

Parties are not required to have representation in the Authority and it is not uncommon for one or both parties to be unrepresented. Representatives do not have to be admitted to the bar or even legally qualified (non-lawyer representatives are known as "advocates").[90] All lawyers in New Zealand are admitted to the High Court of New Zealand as Barristers and Solicitors and can appear in any court. There is also an independent bar of Barristers sole. Some of these do specialise primarily or solely in employment law, acting as litigators or in some cases practicing generally in employment law.

Costs of obtaining representation vary greatly. There are a number of advocates who provide representation for low rates or on a "no win no fee" basis. Lawyers usually charge an hourly rate, which will vary depending on the seniority of the lawyer and the area of New Zealand. Costs of representation in the Authority for a typical one-day hearing vary from under $5,000 to $20,000 or more. In the Authority, a successful party will usually only obtain costs on the basis of a daily tariff. This is currently only $3,500 per day. This means that a cost benefit analysis must be done for each client before a decision is made to proceed with litigation. *Calderbank* offers **can** lead to an increased costs award, although this is not automatic. There is ongoing debate about whether the tariff system is appropriate, but the aim is to ensure that parties are not put off seeking adjudication through fear of bearing a large costs award if unsuccessful.

Enforcement

Any order made in the Authority or the Employment Court can be filed in the District Court and then enforced as if it were a District Court judgment.[91] Alternatively, a party can seek a compliance order in the Authority and then, if this is breached, the Employment Court has powers to take further action as outlined above.

c. Trade Unions, Work Councils and Other Employee Representative Bodies

The Act's premise is that employment law has to address *"the inherent inequality of power in employment relationships"* and one of the principal ways to achieve this is to promote collective bargaining, under the exclusive domain of unions.[92] The Act gives unions a special status and role. Only unions are recognised as representing collective interests.

[88]Privacy Act 1993, s. 85.
[89]Human Rights Act 1993 ss. 123 and 124.
[90]Employment Relations Act 2000 Schedule 2, clause 2
[91]Employment Relations Act 2000 s. 141.
[92]Employment Relations Act 2000 s. 3.

A Union is also considered to be in an employment relationship with the employer and good faith obligations apply between them. This gives it status to bring certain employment claims in its own right, for example, a claim for breach of good faith.[93]

A Union can also bring various claims to enforce its rights under the Act (for example, a Union could seek a compliance order requiring an employer to ensure access to the workplace under section 20 of the Act).

A Union is a party to any Collective Employment Agreement it has entered into with an employer. By virtue of this status, it is entitled to bring a claim in its own right (for example, a dispute over the interpretation of that Collective Employment Agreement or a claim for breach of it).

A Union may also act as an individual employee's representative in bringing their claim (if it has the authority of that employee).[94]

Collective Agreements are for a maximum of three years and regular rounds of collective bargaining are frequently a source of conflict (and potentially litigation).[95] Strikes and lockouts relating to bargaining for a collective agreement are lawful in defined circumstances.[96] Where bargaining is initiated, there is currently a duty of good faith to conclude a Collective Agreement, unless there is genuine reason based on reasonable grounds, not to.[97] (This obligation will be relaxed but not completely extinguished when the law is amended as from March 2015).

The Authority has the jurisdiction, during collective bargaining and on the application of a party to the bargaining, to facilitate bargaining, but it must not accept a reference for facilitation unless 1 or more of the following grounds exist:

- a party has failed to comply with the duty of good faith and the failure was serious and sustained and has undermined the bargaining;
- the bargaining has been unduly protracted and extensive efforts (including mediation) have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement;
- in the course of bargaining there has been 1 or more strikes or lockouts and the strikes or lockouts have been protracted or acrimonious; or
- a strike or lockout has been proposed and if it were to occur it would be likely to affect the public interest substantially.[98]

In even more extreme cases, the Authority may, on the application of a party to collective bargaining, make a determination fixing the provisions of the collective agreement.[99] As of the date of writing, this has never occurred.

The Employment Court has exclusive jurisdiction to:

- hear proceedings founded on tort relating to a strike or lockout issued against a party to a strike or lockout or issued in respect of picketing related to a strike or lockout; and
- grant an injunction to stop a strike or lockout.[100]

[93]Employment Relations Act 2000 s. 4 (2).
[94]Employment Relations Act 2000 s. 236.
[95]Employment Relations Act 2000 s.52.
[96]Employment Relations Act 2000 ss. 81 to 84.
[97]Employment Relations Act 2000 s. 33.
[98]Employment Relations Act 2000 s. 50C.
[99]Employment Relations Act 2000 s. 50J.
[100]Employment Relations Act 2000 ss. 99, 100, s 187(h).

From March 2015, the duty to conclude bargaining will be removed and the Authority will be able to make a determination that bargaining has concluded.[101] This change, aimed at addressing the issue of damaging protracted bargaining, was partly in response to a high profile industrial dispute between Ports of Auckland Limited and the Maritime Union of New Zealand in 2011 to 2012. In reality, work stoppages have been at an all-time low. In 1986, there were over 200 stoppages; most recent statistics on stoppages in 2012 show there were just 10 stoppages.[102]

III. Trends and Specific Cases

There are a number of developing areas of law at present.

In November 2014, the Employment Relations Amendment Act 2014 was enacted (it will be in force from 6 March 2015). The most significant changes include:

- Amendments to the section 4 "good faith" consultation provisions, to restrict access to information in some circumstances.[103]
- Removing the obligation to conclude collective bargaining.[104]
- Removing the current requirement that new employees covered by a Collective Employment Agreement must be on an individual agreement based on its terms for the first 30 days of employment.[105]
- Changes to the current provisions in Part 6A requiring the transfer of vulnerable workers in an asset sale, transfer or contracting out, including exempting employers with 19 or fewer employees from this obligation.[106]
- Replacing the current prescriptive meal and rest break obligations with more flexible requirements.[107]
- Changes affecting strikes and lockouts, including allowing employers to make pay deductions from employees who participate in partial strikes.[108]
- The Authority must now give an oral determination or oral indication of its preliminary findings at the conclusion of the Investigation Meeting wherever practicable. An oral determination must be recorded in writing not later than one month after the conclusion of the Investigation Meeting (unless there are exceptional circumstances). Where an oral indication of preliminary findings is given, the written determination must follow within 3 months of the later of the conclusion of the Investigation meeting or the date further evidence/information requested is provided (unless there are exceptional circumstances). Reserved determinations may still be issued where there is good reason, these must be issued within 3 months of the date of the Investigation Meeting (or any later date further evidence or information is received).[109]

The Health and Safety Reform Bill, which will implement a completely new system of health and safety law in New Zealand, is currently at select committee stage, with a report due on 30 March 2015.

The application of trial period provisions in employment agreements continues to be an uncertain area generating ongoing litigation. Sections 67A and 67B of the Act introduced

[101] Employment Relations Amendment Act 2014 ss. 9 and 13.
[102] Work Stoppages: 2012 year, published by the MBIE in 2013.
[103] Employment Relations Amendment Act 2014 s. 4.
[104] Employment Relations Amendment Act 2014 s. 9.
[105] Employment Relations Amendment Act 2014 ss. 17-19.
[106] Employment Relations Amendment Act 2014 ss. 31-48.
[107] Employment Relations Amendment Act 2014 ss. 49-52.
[108] Employment Relations Amendment Act 2014 s. 62.
[109] Employment Relations Amendment Act 2014 s. 69.

the ability to negotiate and include in a written employment agreement a trial provision implementing a "trial period" of up to 90 days, with the employee unable to challenge dismissal during the trial period except on limited grounds such as discrimination.

This significant change to the employment law landscape was introduced under urgency and there are a number of gaps. Not unexpectedly, the Employment Court has taken a strict interpretation of the process requirements for negotiating and enforcing a trial. For example, a written agreement containing a trial provision must be entered into before the person becomes an employee. Failure to give the required contractual notice period on termination has also been held to invalidate the trial.[110] There are a number of interesting areas of uncertainty, such as whether an unpaid trial is still available and whether providing notice in lieu meets the strict statutory notice requirements in section 67B.[111]

Another developing area of law is employers' obligations in a restructuring. Previously, this jurisdiction has been reluctant to interfere with management decisions by employers to restructure. As case law in this area has been developed by the Employment Court, particularly taking into account the good faith obligations of the Act, it is now clear that the Court can and will enquire into whether the employer's decision to restructure is "fair and reasonable".[112] This approach has recently been upheld by the Court of Appeal.[113] Employers now need to take much more care to ensure that they have a good business case for restructuring. Employers who proceed with inadequate or inaccurate information could be found to have acted unjustifiably, even if the restructuring was done for genuine reasons.

Employers' obligations to explore redeployment for employees who have roles disestablished have also become more onerous. Until recently, although employers had to consider employees for redeployment, if a role was genuinely different there was no obligation to appoint.[114]

Recent case law has however recognised that the enactment of section 4 along with section 103A of the Employment Relations Act 2000 has changed that position. Under section 103A, all of the actions of the employer leading to dismissal, including any decision not to appoint an employee to a vacant role, will be measured against the "fair and reasonable" test. The Court and Authority are now looking much more closely at decisions not to appoint employees whose roles have been disestablished to other vacant roles. In addition, the consultation obligations in section 4 apply to any decision not to appoint, and the employer must engage with employees to discuss why they should not be appointed to a role, if this is the decision the employer is considering making.[115] This is a significant change from the previous position and one with which many employers are still grappling.

[110] *Smith v Stokes Valley Pharmacy (2009)* Ltd [2010] NZEmpC 111.
[111] *Salad Bowl Limited v Howe-Thornley* [2013] NZEmpC 152, *Hutchison v Canon New Zealand Ltd* [2014] NZERA Wellington 72.
[112] *Rittson-Thomas t/a Totara Hills Farm v Davidson* [2013] NZEmpC 39.
[113] *Grace Team Accounting Limited v Brake* [2014] NZCA 541.
[114] *New Zealand Fasteners Stainless Ltd v Thwaite* [2000] 2 NZLR 565 (CA).
[115] *Jinkinson v Oceana Gold (NZ) Limited* [2010] NZEmpC 102, *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142.

IV. Conclusion

The current New Zealand system of having a low level tribunal for speedy and relatively informal adjudication of employment disputes in the first instance, with the Employment Court as a specialist appeal and trial court of record, has been in place for nearly 25 years now. The Authority itself has been operating for over 13 years.

It is always difficult to balance the widely different interests involved in employment disputes and different interest groups will have different views on whether the current system meets the Act's goals of *"promoting mediation as the primary problem-solving mechanism", "reducing the need for judicial intervention"*, and *"acknowledging and addressing the inherent inequality of … power in employment relationships"*.[116] However, the fact that this framework has been in place for some time without significant change indicates that, for the most part, the balance is being struck.

[116]Employment Relations Act 2000 s. 3.

NORWAY

I. Overview

a. Introduction

The rules of procedure in Norway are based on the principle that disputes arising from individual employment contracts shall be settled by the general courts - the districts courts - and may be appealed to the Courts of Appeal, and possibly to the Supreme Court (any matter brought before the Supreme Court must initially be considered by the Appeals Selection Committee). However, there is a special court for collective agreement disputes: The Labor Court. The Labor Court has jurisdiction over:

- Disputes concerning the validity, interpretation and existence of collective agreements;
- Disputes concerning industrial action that contravenes the negotiated obligation to observe peace or the Labor Disputes Act's peace obligation provisions;
- Issues concerning compensation for breach of collective agreement or the statutory peace obligation.

The Labor Court has exclusive jurisdiction over these areas. The Labor Court is furthermore a one-stop shop, as its judgments as a rule cannot be appealed.

The Labor Court does not have jurisdiction in individual disputes, unless individual claims arise from breaches of collective agreements, provided these claims follow as a direct consequence of the judgment of a collective agreement dispute in the same case.

In all other matters of labor law, jurisdiction resides with the ordinary courts. Accordingly, it is the ordinary courts that have jurisdiction over rights issues concerning individuals, whether that be statutory or contractual rights, such as dismissals, wage claims, discrimination in hiring or employment, restrictive covenants, work safety and protective labor legislation, pensions and social security.

The Labor Court has a strictly limited power to determine claims based on individual employment contract. Such claims may be adjoined to a Labor Court case, by the competent organization, for instance the collective agreement party having the right of action. However, the organization does not have the obligation to adjoin an individual's claim to a collective agreement dispute. The right of the individual to bring a claim in the ordinary courts is not dependent on a refusal by the organization to pursue the individual's claim in a case before the Labor Court.

b. Claims

Employees can bring all kinds of employment claims to the courts in Norway: wrongful dismissals, wage claims, discrimination in hiring or employment, restrictive covenants, work safety and protective labor legislation, data protection, pensions and social insurance.

c. Administrative Agencies that Investigate or Adjudicate Claims

A number of administrative bodies have been set up to deal with employment and labor law related disputes. These bodies provide a more rapid and cheaper resolution of disputes, and also a need for expertise.

The National Insurance Organization and the National Insurance Court

The National Insurance Organization (NAV) administers the National Insurance Scheme. The legal framework for the National Insurance Scheme is derived primarily from the National Insurance Act. The National Insurance Scheme covers a range of benefits

including sick pay, work assessment allowance, disability pension, unemployment benefits, retirement pensions, survivor's pension, occupational injury benefits, healthcare allowance, benefits to single parents and benefits during pregnancy, birth, adoption and parental leave. Decisions by the National Insurance Organization may be appealed to The National Insurance Court (Trygderetten). The National Insurance Court is an extra-judicial tribunal whose decisions may be appealed directly to the Courts of appeal, bypassing the district courts.

The Equality and Anti-Discrimination Ombud and the Equality and Anti-discrimination Tribunal

The Working Environment Act set out rules on protection against discrimination within the workplace. The Gender Equality Act, the Ethnicity Anti-Discrimination Act, the Sexual Orientation Anti-Discrimination Act and the Anti-Discrimination and Accessibility Act also govern protection against discrimination in working life. These acts apply to all aspects of an employment relationship and establish protections against both direct and indirect discrimination.

Two independent administrative agencies enforce the anti-discrimination rules, The Equality and Anti-Discrimination Ombud (Likestillings- og diskrimineringsombudet) and The Equality and Anti-discrimination Tribunal (Likestillings- og diskrimineringsnemnda).

Handling of a complaints case by the Ombud is free and normally takes less time than the courts to process the case. When the Ombud has concluded that there has been a breach of law, the party responsible is obliged to rectify its conduct in accordance with the Ombud's statement. The Ombud's statements are however, not legally binding in the way a court judgment is. The Ombud writes on its homepage that most parties opt to rectify their conduct in accordance with the statement.

The Ombud cannot impose any legal sanctions. However, the case can be appealed to the Equality and Anti-Discrimination Tribunal. If the Tribunal upholds the statement by the Ombud, the Tribunal can issue orders to the effect that, for instance, the employer must raise an employee's wages, or change a discriminatory practice. The Tribunal can, in some cases, impose daily penalties on a party if the responsible party does not make adjustments in accordance with the Tribunal's decision.

An order to pay compensation for breach of the prohibition on discrimination can only be imposed by the ordinary courts.

The Labor Inspection Authority

The Labor Inspection Authority (Arbeidstilsynet) is the public body responsible for ensuring that enterprises comply with the provisions of the Working Environment Act and the Annual Holidays Act.

In dealing with enterprises that do not comply with the requirements of the Working Environment Act, the Labor Inspection Authority may respond with orders to correct the situation within a given time limit. This is done in writing, and the recipient has the opportunity to lodge an appeal. If the order is not complied with, coercive fines may be imposed.

Furthermore, an enterprise may be shut down with immediate effect if the life and health of its employees are in imminent danger. Shutdowns may also be imposed when enterprises fail to comply with given orders.

The authority may report enterprises to the police for serious breaches of the act. A serious violation can result in fines, or, in the worst case, imprisonment.

The Data Protection Authority and the Privacy Appeals Board

The Personal Data Act set out rules relating to the processing of personal data. These data protection rules apply to all aspects of an employer's processing of the employee's personal data.

Two independent administrative agencies enforce these data protection rules: The Data Protection Authority (Datatilsynet) and the Privacy Appeals Board (Personvernnemnda). Handling of complaints by both agencies is free.

Upon request or on its own initiative, the Data Protection Authority provides opinions on matters relating to the processing of personal data. The Data Protection Authority may order that processing of personal data in violation of the provisions in, or in pursuance of, this Act shall cease, or impose conditions which must be met in order that the processing comes into compliance with the Act. The Data Protection Authority may issue a non-recurrent fine or day fines, which will run until the order by the Data Protection Authority has been complied with.

Decisions made by The Data Protection Authority may be appealed to the Privacy Appeals Board. The Privacy Appeals Board's decisions may be appealed to the ordinary courts.

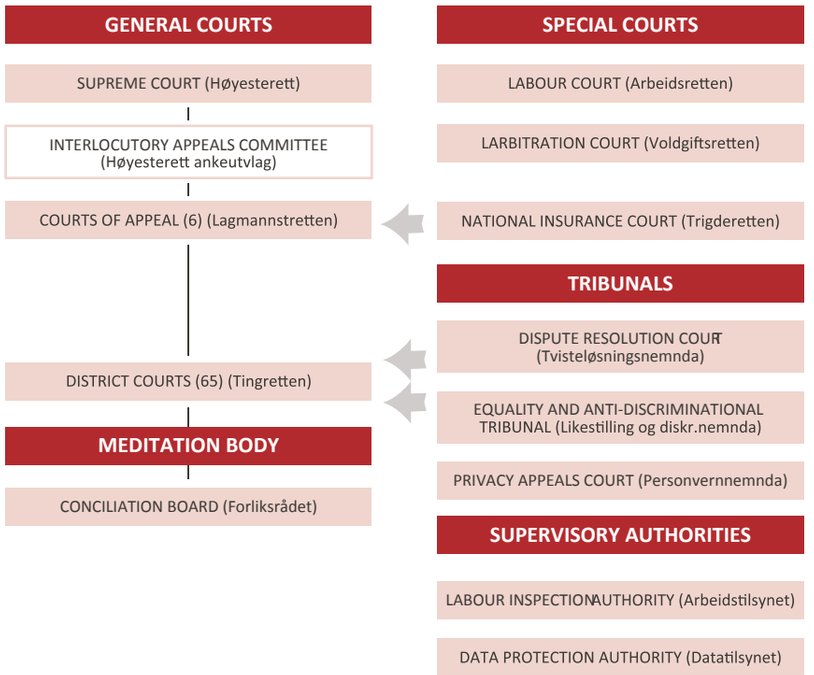
An order to pay compensation for breach of the rules relating to the processing of personal data can only be imposed by the ordinary courts.

The Dispute Resolution Board

Disputes between the employer and the employee concerning the entitlement to leave of absence to care for a child, prenatal examination, pregnancy leave, maternity leave, parental leave, partial leave of absence, time off for nursing mothers, child's or childminder's sickness, care and nursing of close relatives and/or other close persons, educational leave, military service, public office and religious holidays may be resolved by the Dispute Resolution Board (Tvisteløsningsnemnda). The same applies for disputes concerning preferential rights for part-time employees.

A dispute may not be brought before the general courts until the Board has reviewed the case. When the dispute is reviewed by a court of law, the conclusion arrived at by the Board shall stand while the matter is under review. The court may, if so demanded by either of the parties, decide upon another temporary arrangement. The time limit for bringing the dispute before the courts is eight weeks from the date of the Board's decision.

d. Court / Tribunal System



The general courts are the Supreme Court, the Courts of Appeal and the District Courts. There are also Arbitration Courts and the Labor Court.

The Supreme Court

The Supreme Court (Høyesterett) pronounces judgment in the final instance. Any matter brought before the Supreme Court must initially be considered by the Appeals Selection Committee. As well as adjudicating on appeals against interlocutory orders, the Appeals Selection Committee also functions as a filter for appeals against judgments. An appeal cannot be brought before the Supreme Court without the leave of the Appeals Selection Committee.

Each case is usually decided by five judges, but certain cases may be decided by 11 judges (grand chamber) or all 20 judges of the court (in plenary).

The Courts of Appeal

The country is divided into six appellate districts. The Courts of Appeal (lagmannsrettene) are:

- Borgarting Court of Appeal in Oslo
- Eidsivating Court of Appeal in Hamar
- Agder Court of Appeal in Skien
- Gulating Court of Appeal in Bergen

- Frostating Court of Appeal in Trondheim
- Hålogaland Court of Appeal in Tromsø

Civil cases are decided by three professional judges. In addition, two lay judges (meddommere) take part in the decision, if so demanded by one of the parties or the court so decides. If the parties and the court agree that lay judges are not necessary, the court may hear the case without lay judges. In labor law cases, the lay judges are appointed from persons with knowledge of labor issues.

The District Courts

The district courts (tingrettene) are the first instance of the courts of justice. Civil cases are decided by one professional judge, but if so demanded by the parties, two lay judges shall also participate. As regards to labor law cases, the lay judges are appointed from persons with knowledge of labor issues.

The Labor Court

Norway has only one Labor Court (Arbeidsretten). The Labor Court is composed of a President and six members, three judicial judges and four judges nominated by the labor market parties. The President and one of the professional judges must have all the qualifications prescribed for a Supreme Court Judge. In practice, however, both neutral members alongside the President have been appointed among persons who meet those requirements. The President and the Vice President are the only judges in a full time position with the court. The remaining judges serve on a part time basis, appearing when required. The four lay judges are chosen among persons nominated by the major organizations. Only employers' associations with at least 100 members and 10,000 employees, and any trade unions with at least 10,000 members, may each nominate two members with substitutes.

The Court is organized as a one-division court. Each case is heard by the full Court and decided by majority vote of the seven sitting judges. In fact, in two thirds of the cases, the judgment is unanimous. Judgments by the Labor Court are final.

The jurisdiction of The Labor Court is confined to disputes pertaining to collective agreements and industrial action. The Court handles cases concerning interpretation, validity and existence of collective agreements, questions of breach of collective agreements and of the peace obligation, and claims for damages resulting from such breaches.

In disputes involving collective agreements, only the superior party to the agreement, normally a central organization (trade unions, employers' associations) may act as plaintiff. Likewise, at the outset, only the superior party on the other side may act as defendant.

Boycotting acts are dealt with by the ordinary courts. The parties may agree that disputes regarding the interpretation of a collective agreement, as well as questions regarding compensation caused by violation of a collective agreement, are to be decided upon by a court of arbitration.

e. Alternative Dispute Resolution (ADR)

Pursuant to the Norwegian Dispute Act and notwithstanding any mediation contract, disputing parties are obliged to investigate the possibility of, and attempt to, reach an amicable settlement of the dispute before an action is brought before the court, if necessary through conciliation before the Conciliation Board, non-judicial mediation or by bringing the dispute before a non-judicial dispute resolution board. If a party resists adequate attempts of reaching an amicable settlement, this may impact a later court

decision regarding the legal costs in connection with the dispute. However, a party's non-compliance with the provision will not be grounds for dismissal of the case.

The Conciliation Boards

There is a Conciliation Board (Forliksråd) in every municipality. It is the only truly lay tribunal; consisting of three lay members elected by the municipal council for a four-year period. The conciliation board has a double function. Firstly, as its name indicates, the conciliation board shall mediate between parties with a view to achieving a friendly settlement, and secondly, it is empowered by statute to adjudicate civil claims if mediation was unsuccessful. The power of the conciliation board to deliver default judgments is particularly important in practice, as it provides the creditor of an uncontested claim with the necessary legal basis for execution. The board's powers to pass judgments have been extended step by step and since 1993 have covered any asset claim (whether contested or not, and regardless of amount) if both parties met before the board and one of them requested judgment. By caseload, the conciliation boards play an important part in Norwegian civil justice.

The Dispute Act upholds the general duty to bring the case before the conciliation board before proceedings in asset claims are instituted in the district court, albeit with a number of exceptions. Added to the list of exceptions are cases where extrajudicial mediation has taken place, or the merits have been decided by a tribunal, or the disputed claim exceeds NOK 125.000 and both parties are assisted by a lawyer. The authority to pass judgment is also maintained, but limited to cases where the parties consent, and if requested by a party, to asset claims meeting no serious objection or, if contested, not exceeding NOK 125.000, or by default.

As regards to labor law cases, the WEA Section 17-1 (3) stipulates that claims which are subject to negotiations pursuant to Section 17-3 or that have been reviewed by a Dispute Resolution Board shall not be subject to mediation by a Conciliation Board.

Arbitration

In general, the parties may agree in writing on arbitration, if they have the right to dispose of the matter. The decision of an arbitration court has the same effect as a decision of an ordinary court, but can be appealed against only if the parties have so agreed.

Employees may not, in advance, enter into an agreement, which states that a dispute concerning dismissal, etc. shall be brought before an arbitration board. A hearing before an arbitration board may however, be agreed upon as soon as the dispute is a reality and commences. Additionally, the employer may enter into a written agreement with the chief executive of the enterprise to the effect that disputes in connection with termination of the employment relationship shall be settled by means of arbitration.

Judicial mediation before the ordinary courts

Judicial mediation is an alternative approach to settle disputes before going to main proceedings in court. Judicial mediation is often easier, faster and cheaper for the parties than hearing the case in the court. If the parties reach an agreement during the judicial mediation, the case can be concluded in the form of an in-court settlement. If the case is not concluded at mediation, it shall continue to be heard before the District Court.

II. The Litigation Process

a. Typical Case

Employment contracts that are not fixed-term are terminated by notice or by concluding a severance agreement. Most labor law cases disputed in the court of law in Norway are claims of unfair dismissals. Employees may not be dismissed unless this is objectively justified on the basis of circumstances relating to the undertaking, the employer or the employee.

The Work Environment Law provides detailed procedural rules for disputes over wrongful dismissal. Furthermore, the general rules of procedure pursuant to the Act relating to the Resolution of Disputes (the Disputes Act) will apply.

Before making a decision regarding dismissal with notice, the employer shall, to the extent that is practically possible, discuss the matter with the employee and the employee's elected representatives, unless the employee himself does not desire this.

When dismissed, the employee has the right to demand negotiations with the employer. The demand must be submitted in writing within two weeks after receiving the notice. The employer is responsible for making sure that negotiations are held no later than two weeks after receiving the demand. If the employee takes legal action instead of negotiating, the employer may demand a negotiation meeting. The employee has a right to be assisted during negotiations by a representative or other adviser. Minutes shall be made of the negotiations.

Within eight weeks after the end of negotiations, the employee may bring an action before the District Court to hear dismissal disputes, etc. If negotiations are not demanded, the action has to be brought within eight weeks from receiving the notice of termination. If the employee is only claiming damages, the deadline for taking action is six months. However, the parties may agree to a longer deadline for taking action. If the employee challenges the notice of termination, the employee will be entitled to remain in his or her position until a court has settled the case, provided that the employee has finished his or her trial period. In a worst case scenario, this may take two to three years. During this period, the employee has the right to keep working as usual and to keep receiving a salary as usual. If the court finds it unreasonable to sustain the employment during the hearings, it may issue a ruling that the employee leaves the job, if so demanded by the employer.

i. Steps in the Process

A lawsuit is institu¬ted by filing a writ of summons with the court of competent jurisdiction. The writ must include certain information, such as the identities of the parties and the competent court, the plaintiff's claim, a detailed statement of the facts and legal ar¬guments on which the plaintiff bases his or her claims, and a reference to the documents upon which the plain¬tiff relies and if appropriate, witnesses, expert judges, expert opinions, etc.

As a rule, legal proceedings must be instituted against a person before the district court in the judi¬cial district of his or her residence. A company must be sued before the district court in the judicial district of its head office, or - if no such head office exists - the judicial district of a board member or a member of the management board.

Upon receipt of the writ, the court will serve the writ on the defendant, who is given the opportunity to file a statement of defense within a stipu¬lated date, normally three weeks. The statement of defense must include the defendant's claim, a statement of counterclaim, if any, a detailed statement of the facts and legal arguments on which the

defendant bases his or her claims and/or counterclaims, a reference to the documents upon which the defendant relies and the defendant's postal address in Norway. If no statement of defense is filed wit¬hin the fixed time limit, the court will normally grant a default judgment.

ii. Pretrial Proceedings

After the defendant has filed a statement of defense within the fixed time limit, there will be a preliminary hearing before the court (normally held as a conference call), where the parties must consider judicial mediation, the legal and factual circumstances and the extent of evidence, such as expert opinions and witnesses. At the preliminary hearing, the court will list the case for trial.

The court shall proceed with the case as quickly as possible and, if necessary, schedule the case out of turn. The main hearing shall be scheduled within six months after the writ was filed. In the main hearing, the court shall be convened by the district court with lay judges from a special committee familiar with working employment relations, unless the parties agree that lay judges are unnecessary.

iii. Role of Witnesses, Counsel and Court / Tribunal

During the main hearing, the parties will be given the opportunity to present the case and adduce evidence. The Disputes Act imposes a duty to give evidence on all witnesses of fact, thus such witnesses must attend the trial and be cross-examined on their evidence. Only in limited circumstances may the witnesses be privileged. Witnesses are examined in Norwegian or by means of an interpreter before the court.

A typical main hearing may take from one to three days. The court may, at all times during the trial, attempt to mediate a settlement.

iv. The Appeal Process

Rulings by the District Court may be appealed to the Court of Appeal and further to the Supreme Court. Also in the main hearing before the Court of Appeal, the Court is convened with lay judges unless the parties agree that lay judges are unnecessary. The appeals deadline is one month.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

The district courts handled 1006 labor disputes in 2013. The trial period for these cases is normally 4.5 months.

The costs connected with a lawsuit in Norway are normally legal fees. Legal fees basically include lawyer's fees. Lawyer's fees vary from NOK 1,500 per hour to NOK 4,500 per hour. A party must pay all costs con¬nected with a lawsuit, at least until the case has been closed. As part of the judgment, the court awards costs to the successful party. As a rule, the unsuccessful party must reimburse the other party for all costs connected with the lawsuit. In reality, the successful party's costs are only partly reimbursed, because the court will award costs on a reasonable basis to the winning party. A party must therefore be prepared to bear a portion of his own costs, even if the party succeeds in the lawsuit. The court may, under specific circumstances, decide to derogate from the general rule that the unsuccessful party bears all costs.

In cases of unfair dismissals, an employee may claim compensation. There is no statuary fixed amount to be paid. Compensation is estimated at the amount the court deems reasonable, and may include both financial and non-financial losses. Non-financial loss

will normally not exceed NOK 100,000, but may also be higher, for instance in anti-discrimination cases.

c. Trade Unions, Work Councils and Other Employee Representative Bodies

In disputes involving collective agreements, only the superior party to the agreement, normally a central organization, may act as plaintiff. Likewise, at the outset, only the superior party on the other side may act as defendant.

In Labor Court cases, the organisation parties (trade unions, employers' associations) appear and act in their own name as well as on behalf of their members (subordinate organisations, individual employees or employers bound by the collective agreement). However, a suit may be filed also against members, for instance to declare a decision by an employer invalid or against employees for the payment of damages. In such instances, the relevant member must be sued and then obtain status as a defendant alongside the defendant organisation party.

The rules pertaining to the procedure in labor court cases today are contained in the Labor Disputes Act (LDA). The Labor Disputes Act lays down a requirement that prior negotiation on the disputed issue(s) – so-called "dispute bargaining" – has been conducted or that, at least, serious attempts to engage the opposite party in "dispute bargaining" have been made. Therefore, a case will normally not be admitted by the Court, unless the dispute has been subject to negotiation between the parties to the collective agreement at issue prior to filing a complaint.

Although there are a number of differences, for example regarding the status of parties and litigation costs, the essential features of the procedure in labor court cases correspond to the ordinary civil procedure. Nevertheless, the legal situation leaves the Labor Court a certain freedom in procedural matters, which allows for a high degree of expediency, if needed, and somewhat less formalized proceedings than in the ordinary courts.

Labor Court judgments are final and immediately enforceable in the same way as are Supreme Court judgments. There is no "contempt of court" remedy available.

In accordance with well-established Labor Court case law, costs are generally not awarded in ordinary disputes concerning interpretation of collective agreements. However, in disputes on the lawfulness of an industrial action, the common practice is that costs are awarded against a "guilty" party. In cases regarding breach of a collective agreement, the court sometimes awards case costs.

No court fees are charged for labor court cases. The basic legislative consideration being that court fees should not be an argument or obstacle to resolve rights' disputes peacefully and by adjudication.

d. Specialized Litigation Bar

A Norwegian lawyer is licensed to litigate in the District Courts and the Courts of Appeal. To appear on behalf of a client before the Supreme Court requires a right of audience.

III. Tips to Avoid Litigation

The daily operations of HR and personnel managers are characterized by a broad set of legal issues related to the management of employees. Major conflicts may often be avoided and constructive solutions will be reached faster by strengthening the HR managers' and the personnel managers' professional confidence through competence

training. However, a quick phone call to the company's employment lawyer may also often be enough.

Written international policies and legal templates are also key factors.

The employer's management prerogative is limited by legislation, collective agreements, individual agreements and general principles of fairness. Hence, documentation of the employer's grounds for decision-making and fair process is important.

Experience shows that it is essential that cooperation between company representatives and the employee representatives takes place in an efficient and reliable manner, and that the employee representatives are equipped and able to fulfill their tasks under Norwegian law and collective agreements. A mutually correct and trusting behavior between the company representatives and the employee representatives is thus an essential prerequisite for cooperation between the parties to succeed. The courts are also cautious to overrule decisions based on a common understanding between employer and employee representatives. Discussions with employee representatives and safety delegates will thus create leeway for the employer.

IV. Trends and Specific Cases

The Government recently submitted two bill proposals to the Parliament, which will imply a number of significant changes to the Norwegian Working Environment Act. The main purpose of the bill proposals is to create greater flexibility in the workplace. The bill proposals have caused quite a stir with the national unions. The bill proposals will be considered by the Parliament during spring 2015 and adopted changes will probably come into force from July 2015.

The bill proposal Prop. 39 L (2014-2015) implies a relaxation on the strict rules on temporary employment. Under the current regime, temporary employment is only permitted in certain instances. It is proposed to introduce a general right to temporary employment, without conditions, for up to twelve months, combined with various kinds of limitations and regulations to prevent abuse of temporary employees.

The bill proposal Prop. 48 L (2014-2015) implies several changes regarding working hours, retirement age, collective class act, hiring workers from temporary-work agencies and the penal provisions.

- It is proposed to make changes to the regulations on the average calculation of working hours, overtime work and Sunday working. Power is transferred from unions to the employer and employee, and the proposal implies that the employee and the employer can agree on more flexible solutions when it comes to average calculations of the working hours, without the involvement of the unions or the Labor Inspection Authority.
- It is proposed to raise the general age limit from 70 years to 72 years. It is further proposed that undertakings, as a rule, may not implement internal lower age limits than 70 years.
- It is proposed to repeal the collective right of action for trade unions at unlawful hiring.
- It is proposed to increase the maximum sentences for serious violations of the Working Environment Act and general law.

Also worth noting is that as of January 2014, a part-time employee who regularly works more than agreed in the last 12 months, may be entitled to an extension of his/her position, so that the employment ratio corresponds to the actual working hours.

POLAND

I. Overview

a. Introduction

In accordance with Polish law, each party to the employment relationship (employee or employer) may pursue its claims arising from the employment relationship in court. General regulations in force stress the need for solving claims in settlement proceedings. In pre-trial proceedings, this happens within the framework of conciliation commissions. During employment litigation, the court encourages ending the case with a court settlement.

Claims arising from an employment relationship are settled by **labor courts** - separate organizational units of district courts, and labor and social insurance courts - separate organizational units of regional courts. Labor law dictates the competent court of first instance – the district court or regional court (higher court), depending on the subject matter of the case, independent from the will of the parties.

Legal proceedings in employment litigation are based on the rules of general civil procedure with certain exceptions.

The most important differences between proceedings in cases within the subject-matter and scope of labor law and social insurance and general provisions in civil procedure are detailed below.

Expanded definitions of "employee" and "labour law cases" within the meaning of the labour code

Cases within the subject-matter and scope of labor law are cases concerning:

- claims arising out of or in connection with an employment relationship,
- determination of the existence of an employment relationship, if the legal relationship between parties has the features of an employment relationship, contrary to the actual agreement executed between the parties,
- claims under other legal relationships to which provisions of the labor law apply by virtue of other regulations,
- damages sought from a work establishment on the basis of provisions regulating compensation for occupational accidents and diseases.

An "employee" is widely defined. The following are considered employees:

- a member of an agricultural cooperative,
- a person working under a home work agreement,
- family members and beneficiaries of an employee, member of an agricultural cooperative or person working under a home work agreement as well as other persons entitled to seek claims within the subject-matter and scope of labor law on the basis of other regulations,
- a person seeking damages from a work establishment's right to benefits on the basis of provisions regulating compensation for occupational accidents and diseases.

Capacity to be a party to and conduct court proceedings

In employment cases, the employer also has capacity to be a party to and conduct court proceedings even if he does not have legal personality, and in cases within the subject-matter and scope of social insurance, a social insurance institution also has such capacity. This provision is an equivalent to article 3 Labor Code, which states that an employer is an organizational unit with or without legal personality, as well as an individual, which employs one or more employees.

Capacity to sue

In cases within the scope of labor law or social insurance, non-governmental organizations may, within the scope of their statutory duties and subject to the written consent of an employee or insured person, bring actions on behalf of the employee or file appeals against the decisions of pension institutions and, subject to the written consent of an employee or insured person, join them in pending proceedings.

Court is unable to reject a complaint if legal proceedings are inadmissible

A petition may not be rejected on the grounds that it does not qualify for legal action if another authority is competent to hear the case. If this instance, **the court refers the case to such authority**. A relevant decision may be issued by the court in camera. If, however, that authority has previously declined jurisdiction, the court hears the case.

If a petition is filed with the court and then referred to another authority in accordance with the preceding paragraph, the effects are the same as those associated with the bringing of an action.

Wider circle of persons authorized to be a court representative

An employee may also be represented by an agent of a trade union, a labor inspector or an employee of the workplace where the authorizing party is or was employed.

To be eligible to collect compensation awarded to an employee or insured person, a representative needs to have a special instrument of authorization issued after the enforcement order was supplied.

Less formal requirements connected with bringing pleadings

An employee unrepresented by an advocate or legal advisor may submit a petition, as well as any legal remedies used or pleadings made orally for record, with the court of competent jurisdiction.

Initial examination of the case

When a case is brought before the court, the presiding judge or a judge appointed by him, promptly reviews the case initially. The purpose of this initial review is to determine whether the pleading instituting court proceedings complies with the necessary requirements to be pursued, and to take action to enable the adjudication of the case on the first hearing. Once a case has been reviewed, the presiding judge orders any formal defects of a pleading to be corrected only if such defects cannot be corrected in the course of the investigation procedure. If, in the course of the initial review of a case within the subject-matter and scope of social insurance, it is found that the material contains major defects, and it would be very difficult to correct such defects in court proceedings, the presiding judge, or a judge appointed by him, may return the case files to the social insurance institution to be supplemented. The same applies where the decision of a social insurance institution does not include: (1) the legal and factual basis, (2) the method of calculation of payments, (3) relevant instructions on the legal effects of the decision and possibilities to appeal against the decision.

Possibility to perform an investigative procedure

The court performs an investigation procedure where this is justified by the results of the initial examination of a case and where a case has not been investigated before a

conciliation board, unless such procedure would not expedite the proceedings or is otherwise evidently pointless.

The purpose of the investigation procedure is to:

- correct formal defects in pleadings, in particular to specify the claims made,
- in cases within the subject-matter and scope of labor law, explain the attitudes of the parties and incline them to reconcile and reach a settlement,
- to determine which of the facts that may affect the outcome of the case are disputed between the parties and whether and what evidence should be taken in order to clarify them,
- clarify other facts which are important in order to resolve the case promptly and correctly.

Limitations in the liberty of concluding settlements

In employment law cases, the court also considers a settlement, withdrawal of a petition, objection or legal remedy as well as waiving or limiting a claim as inadmissible **where it is against the justified interest of an employee**.

Less formal requirements connected with the summoning of parties and other participants in trial

In employment law cases, the court may summon the parties, witnesses, expert witness or other persons in the manner that the court considers to be most appropriate and, where the court decides it is necessary to expedite the hearing of a case. This also applies to pre-trial service, in particular to requests to produce personal files and other documents as may be necessary to resolve a case.

Summons and services in accordance with the above have normal effects, where there is no doubt that it has come to the attention of the addressee.

No limits on the admissibility of witness and party testimony

In employment law cases there is an extraordinary regulation, under which, provisions limiting the admissibility of evidence by witness testimony or interrogation of parties do not apply.

In normal civil procedure, where it is required that an act in law be made in writing, witness testimony or interrogation of parties in a case between the parties of such an act in law, relating to the fact of executing such an act, is admissible only if the document that provides for said act has been lost, destroyed or removed by a third party, and if the written form was reserved for evidence purposes only - also in certain cases provided for by the Civil Code.

Moreover, witness testimony or interrogation of parties against or beyond the body of a document that provides for an act in law is normally severely limited.

In employment litigation, the above-mentioned limitations regarding admissibility of evidence do not apply, but only in those cases when the employee is a claimant. Such privilege does not refer to the employer as a claimant.

Wider scope of disciplinary measures

In employment law cases, if in the course of proceedings a party fails without just cause to comply with decisions or orders, the court may **fine them** in accordance with the

provisions relating to fines for the non-appearance of witness and/**or refuse to award costs** to that party; however, the court may not issue a warrant for that party. If the party is an organizational unit, a fine may be charged to the employee who is responsible for complying with orders or, where such employee has not been delegated or cannot be identified, to the manager of that unit.

The court may change the defendant (employer) ex officio if the claimant was mistaken

In employment law proceedings initiated by an employee, a summons to appear as defendant may also be issued by the court ex officio.

Where it is determined that an action was not brought against the person who should be the defendant party in the case concerned, the court, usually (but not in labour law cases) at the request of the plaintiff or defendant, summons that person to join the case. A person summoned at the request of the defendant may request the reimbursement of costs from the defendant only, if it is found that the request was groundless.

If it is determined that an action for the same claim may be brought against other persons who are not acting as defendants, the court may, at the request of the plaintiff, summon such persons to join the case.

Court's freedom in granting alternative claims

In employment law cases, if an employee chooses one of the alternative claims available (reinstatement), and if the claim made by the employee proves to be impossible to grant, the court may grant the alternative claim (compensation) ex officio. This possibility only works in one way – granting reinstatement in place of compensation is impossible.

Partial immediate effect of 1st instance ruling - in employment law cases, when awarding payments to an employee in cases within the subject matter and scope of labor law, the court, upon the issuing of a judgment, declares ex officio its immediate enforcement in a part not exceeding the employee's monthly salary.

When pronouncing the termination of an employment relationship to be ineffective, the judgment of the court may, at the request of the employee, include an order for the work establishment to continue his employment until the case is finally adjudicated.

b. Claims

Cases within the subject-matter and scope of labor law concern:

- claims arising out of or in connection with an employment relationship (e.g. appeals from termination, cases regarding pay, appeals from disciplinary measures, discrimination, harassment);
- determination of the existence of an employment relationship, if the legal relationship between the parties has the features of an employment relationship, contrary to the actual agreement executed between the parties;
- claims under other legal relationships to which provisions of the labor law apply by virtue of other regulations (e.g. certain public officers);
- damages sought from a work establishment on the basis of provisions regulating compensation for occupational accidents and diseases.

As a rule, the court of first instance hears a case with the use of a single judge, unless otherwise provided for in specific provisions. The court of first instance, composed of

one judge and two layman jurors, hears the following cases within the subject matter and scope of labor law:

- determining the existence, establishment or expiry of an employment relationship,
- recognizing the invalidity of termination of an employment relationship or reinstatement
  - and other claims pursued jointly with the abovementioned,
- compensation in the case of termination without just cause or illegal termination of employment relationship,
- breach of the principles of equal treatment in employment and related claims,
- damages or compensation for harassment.

In all other cases, the court of first instance will hear the case with the use of a single judge and depending on the value of the matter at issue, (e.g. total value of the overtime, remuneration, value of bonuses) – the case will be settled by a district court or a regional court.

The district court hears cases as the court of first instance if the value of the matter at issue does not surpass 75.000 PLN (approx. 18.750 EUR). When the value of the matter at issue surpasses 75.000 PLN, the case is heard by the regional court, as the court of first instance.

Claims by works councils or other employee representative bodies

In cases within the scope of labour law or social insurance, non-governmental organisations may, within the scope of their statutory duties and subject to the written consent of an employee or insured person, bring actions on behalf of the employee or file appeals against the decisions of pension institutions and, subject to the written consent of an employee or insured person, join them in pending proceedings.

Non-governmental organisations may, within the scope of their statutory duties, bring actions on behalf of a natural person, subject to his written consent, in matters concerning employment litigation. Such consent may also be a result of the employee's membership in the trade union.

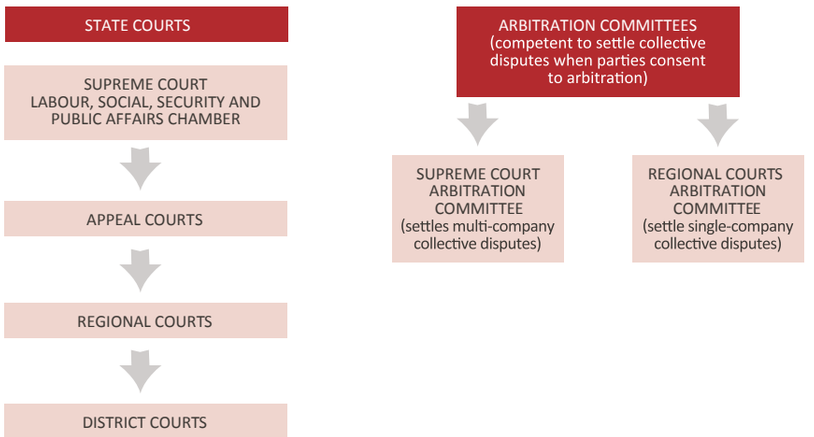
c. Administrative Agencies that Investigate or Adjudicate Claims

The governmental body competent to exercise permanent supervision over labour law is the National Labour Inspectorate. The National Labour Inspectorate is also competent in the field of health and safety at work and legal employment.

In cases for determination of the existence of an employment relationship, labour inspectors may bring actions on behalf of citizens and, subject to the plaintiff's consent, or join proceedings at any stage.

d. Court / Tribunal System

THE POLISH COURT SYSTEM IN EMPLOYMENT LITIGATION AND INDUSTRIAL RELATIONS



Poland has a Unitarian court system, which results in a uniform court model for almost all court cases. Depending on the case type, cases are filed with district courts or regional courts, with the right to appeal to the higher court. Judgement of appeal courts are final, but a Cassation to the Supreme Court may be filed in certain cases.

Proceedings in cases within the subject-matter and scope of Labour Law and Social insurance are settled by district courts, regional courts and courts of appeal.

In cases within the subject-matter and scope of Labour Law and Social insurance, the legal proceedings are settled in two instances. Each party (employee or employer) is entitled to lodge an appeal to the court of higher instance, but only when the sentence is of an unfavourable nature.

An extraordinary appeal - an appeal in cassation to the Supreme Court - is not possible in cases falling within the scope of the labour and social insurance law, if less than ten thousand Polish zlotys (approx. 2.500 EUR). Moreover, the following must be jointly met:

- an appeal in cassation to the Supreme Court is filed with the court that issued the contested ruling within two months from the date of serving the ruling, accompanied by a statement of reasons,
- the appeal in cassation is formulated and signed by an advocate or legal advisor,
- the appeal in cassation must be based on misinterpretation or misapplication of substantive law, or infringement of the rules of procedure, where such infringement could significantly affect the outcome of a case,
- One of the four is present:
  - a major legal issue is involved,
  - it is necessary to interpret legal provisions which cause major doubts or cause discrepancies in case law,
  - the proceedings were invalid, or
  - an appeal in cassation is evidently justified.

As a rule, the court of first instance hears a case with the use of a single judge, unless otherwise provided for in specific provisions. The court of first instance, composed of one judge and two layman jurors, hears the following cases, within the subject matter and scope of labor law:

- determining the existence, establishment or expiry of employment relationship,
- recognizing the invalidity of termination of an employment relationship or reinstatement
  - and other claims pursued jointly with the above,
- compensation in the case of termination without just cause or illegal termination of employment relationship,
- breach of the principles of equal treatment in employment and related claims,
- damages or compensation for harassment

In all other cases, the court of first instance hears the case with the use of a single judge.

e. Alternative Dispute Resolution (ADR)

Conciliation commissions

Current regulations allow for the creation of joint employer-trade union conciliation commissions (or employer-appointed, employee consulted conciliation commissions, where there are no trade unions active) for the purpose of settling disputes initiated by employees, though these are rare in practice.

Only non-managerial employees may be members of such commissions. A conciliation commission initiates its proceedings on the written or oral application of the employee. The initiation of proceedings before a conciliation commission interrupts limitation periods.

If a settlement is reached before the conciliation commission, the settlement is entered into the protocol of the meeting. Such a settlement may be executed just like a court judgment. If no settlement is reached within 14 days from the initiation of the conciliation proceedings, the commission, if the employee so demands, passes the case to the labour court for settlement. The employee's application takes the role of the claim in court proceedings. Instead of demanding the matter to be passed to court, the employee may file a separate claim.

Mediation

Mediation is voluntary, and conducted on the basis of a mediation agreement or a court decision to refer the parties to mediation. A mediation agreement identifies, in particular, the subject matter of mediation, the specific mediator or the method of selecting a mediator. Mediation is conducted before instituting proceedings, or, subject to the consent of the parties, in the course of court proceedings.

Mediation is not open to the public. A mediator keeps any facts disclosed to them in connection with mediation confidential, unless released from this obligation by the parties. Any proposed settlements, mutual concessions or other statements made in mediation, have no effect when invoked in the course of proceedings before a court or court of arbitration.

The court may refer parties to mediation until the end of the first scheduled hearing. After the end of such hearing, the court may refer the parties to mediation only subject to a joint petition from the parties. The court may refer parties to mediation only once in the course of proceedings (even against their will). A relevant decision may be issued in camera. No mediation is conducted if a party does not express its consent to mediation

within one week from the day on which a decision to refer the case to mediation is announced or served on a party.

When referring parties to mediation, the court determines the period of such mediation up to **one month**, unless the parties jointly request a longer period for mediation. In the course of mediation, such period may be extended upon a joint petition from the parties.

Once a settlement is reached, the mediator promptly files a report with the competent court. If a settlement is reached before a mediator, the court, at the request of a party, takes prompt actions to validate the settlement reached before the mediator. If the settlement is subject to enforcement, the court validates it by issuing a writ of execution; otherwise the court validates the settlement in camera. **The court refuses to declare a settlement enforceable or validate a settlement reached before a mediator in whole or in part, if the settlement is contrary to the law or social norms, or intends to circumvent the law, or where it is incomprehensible or contradictory.**

II. The Litigation Process

a. Typical Case

i. Steps in the process

Judicial proceedings in labour law matters are initiated by **filing a claim** by the employee or employer to the competent court.

Upon filing an action, the competent court remains competent until completion of the procedure, even if the grounds for its jurisdiction change in the course of the action.

In cases relating to financial claims, the person filing the claim has the duty to state the Value of the Matter in Issue, which influences (1) the competent court i.e. whether the matter will be settled in the first instance before the District Court or before the Regional Court (2) the need to pay the fee for the claim and (3) the amount of the costs of professional representation by a lawyer granted to the winning party.

In cases relating to financial claims, even when filed in return for another object, the stipulated amount of money is the value stated in the claim.

In cases concerning employee claims relating to the establishment, existence or termination of an employment relationship, the Value of the Matter in Issue is, in the event of **fixed-term** contracts, the sum of remuneration due for the disputed period, however not exceeding one year, whereas in the case of **contracts for an indefinite period** – for the period of one year.

In labour law cases, in which the Value of the Matter in Issue exceeds the amount of 50 000,00 PLN (approx. 13.000 EUR) a fee for a claim or an appeal equal to 5% of the Value of the Matter in Issue should be paid. In the majority of cases with a Value of the Matter in Issue lower or equal to 50.000,00 PLN, the litigation is generally free of charge.

ii. Role of Witnesses, Counsel and Court / Tribunal

Court sessions and trials are open to the public. Court sessions are scheduled by the presiding judge ex officio, whenever so required by the status of the case concerned.

The defendant (the employer or employee) may file an answer to a complaint before the first hearing. Usually the court orders the preparation of such an answer within 14 days from receipt of the claim (complaint).

After May 3rd, 2012, stronger rules for evidence preclusion have been introduced. All evidence should be stated in the claim or in the answer to the claim, unless the party proves he failed to report them in the claim or in the answer to the claim or further pre-trial pleadings due to no fault of his own, or that taking the late allegations and evidence into consideration will not delay the examination of the case, or that there are other exceptional circumstances. This regulation serves the need for concentration of evidence. In practice, this is only possible if the content of the documents is uncontested between the parties, and the Court does not need to examine witnesses or, for example, need the opinion of an expert.

Each hearing is held in such way that after a case is called, the parties, first the plaintiff, then the defendant, verbally states their respective requests and petitions as well as present allegations and evidence in support thereof. Moreover, the parties may suggest the legal bases of their respective requests and petitions.

Parties are obliged to present evidence in order to establish facts from which they derive legal consequences. The court may admit evidence which has not been presented by a party. The court will assess the reliability and validity of evidence at its discretion, following extensive deliberations of the available material.

The following in particular may be presented as evidence: documents, witnesses, expert opinions, inspections, testimony of the parties, and other evidence which may affect the result of the case.

Having closed a trial (i.e. after evidence has been taken and the parties have spoken) the court issues a judgment on the basis of the actual state of affairs at the time of the closing of the trial. In particular, the fact that a claim becomes due while a case is pending is not an obstacle to the awarding of such claim. A trial should be re-opened if important new facts are disclosed after it was closed.

The court issues a judgment following the judges' secret deliberations. Such deliberations include discussions and voting on the ruling to be issued as well as the essential reasons for the particular adjudication, and recording the operative part of the judgment.

iii. The Appeal Process

A judgment of the court of first instance may be appealed to the court of second instance. Such a case is heard by a panel of three professional judges.

An appeal should comply with the requirements of a pleading and moreover contain the following:

- reference to the judgment that is being appealed and information whether the appeal concerns the whole or part of that judgment,
- brief presentation of the allegations,
- justification of the allegations,
- if need be, reference to new facts and evidence, demonstrating why these could not be brought in proceedings before the court of first instance or why the need to bring such new facts or evidence arose at a later date,
- a demand to vary or set aside a judgment, specifying the subject-matter and scope of the requested modification or setting aside.

A trial before the court of second instance is held notwithstanding the possible non-appearance of one or both parties. After a case is called, the trial begins with a judge's report containing a summary of the status of the case concerned, and in particular the allegations and petitions presented in the appeal.

The court of second instance hears a case insofar as it is subject to appeal; however, the court considers ex officio the possible invalidity of proceedings.

Proceedings are null and void:

- if a case did not qualify for legal action;
- if a party did not have the capacity to be a party to and conduct court proceedings, did not have a representative authority or a legal representative, or if an agent of a party was not duly authorised,
- if an action concerning the same claim between the same parties brought at an earlier date is pending, or if a non-appealable judgment has already been issued in such action,
- if the composition of the court of trial was not in accordance with relevant legal regulations or if a case was heard in the presence of a judge who was subject to exclusion,
- if a party did not have a chance to defend his rights,
- if a district court adjudicated a case which falls under the jurisdiction of a regional court notwithstanding the value of the matter at issue.

The court of second instance adjudicates on the basis of materials gathered in the course of proceedings in the first instance and in appellate proceedings. However, if circumstances change, instead of the original subject-matter of the dispute, the value thereof or a new object may be claimed, and moreover in cases relating to recurring payments, original claims may be extended by further periods.

In labour cases, if e.g. the employee was reinstated, or awarded compensation, the employee may demand reinstatement in place of compensation and vice versa before the appellate court passes judgment, and the court will be bound by such a change.

The court of second instance dismisses an appeal if it is groundless. If proceedings are established to have been invalid, the court of second instance sets aside the contested judgment, annuls the proceedings insofar as they are invalid and refers the case back to the court of first instance for reconsideration. Moreover, the court of second instance may set aside a contested judgment and refer a case back for reconsideration only if the court of first instance did not adjudicate on the merits of the case or if the issuing of a judgment requires the entire evidentiary hearing to be repeated. If an appeal is accepted, the court of second instance varies the contested judgment and adjudicates on the merits of the case.

Legal assessment and indications for further proceedings referred to in a statement of reasons for a judgment of the court of second instance, are binding both on the court to which a case is referred, and on the court of second instance while the case is reconsidered. However, this does not apply if the legal status changes.

An appellate court judgment is final **as soon as it is announced**.

In labour law cases where the Value of the Matter in Issue exceeds 10 000 PLN (approx. 2500 EUR) an extraordinary remedy (an appeal in cassation) to the Supreme Court is possible if the following are jointly met:

- an appeal in cassation to the Supreme Court is filed with the court that issued the contested ruling within two months from the date of serving the ruling, accompanied by a statement of reasons,

- the appeal in cassation is formulated and signed by an advocate or legal advisor,
- the appeal in cassation must be based on misinterpretation or misapplication of substantive law, infringement of the rules of procedure, where such infringement could significantly affect the outcome of a case,
- one of the four is present:
  - a major legal issue is involved,
  - it is necessary to interpret legal provisions which cause major doubts or cause discrepancies in case law,
  - the proceedings were invalid, or
  - an appeal in cassation is evidently justified.

An appeal in cassation does not constitute a "third instance" (a right of the party to question a negative result), but at the same time, is supposed to be a remedy serving the public interest, and influencing the development of jurisprudence. The lack of any of the four prerequisites stated above, results in a dismissal of the appeal in cassation by the Supreme Court.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

The losing party, upon request of the adverse party, reimburses any reasonable costs of asserting his rights and defending himself (costs of legal proceedings). Reasonable court costs incurred by a party or his court agent other than an attorney, legal advisor or patent attorney include court costs, travelling costs of the party or his court agent to the court and an equivalent of earnings lost as a result of appearing before the court. The sum of the costs of travel and the equivalent of earnings lost combined must not exceed the fee of one attorney performing his professional activities at the court. The reasonable costs of legal proceedings incurred by a party represented by an attorney include the fee, which may in no case exceed the rates determined in separate provisions, and costs of one attorney, court costs and the costs of appearing in person before the court, as summoned by the court.

Reasonable costs of legal proceedings also include the costs of court ordered mediation. Where civil proceedings are initiated within three months from the date of completion of mediation which did not result in a settlement, or within three months of the validation of a court refusal to approve a settlement, reasonable costs also include the costs of mediation in an amount not exceeding the fourth part of a fee for the case.

Where only a portion of the claims is awarded, costs are reciprocally exclusive or proportionally shared. However, the court may oblige one of the parties to reimburse all costs if the adverse party lost only a minor part of his claim or where the amount due to the latter party depends on reciprocal calculation or evaluation by the court.

In practice, labour courts award the winning party with the costs of legal representation based on certain Polish ordinances. The costs in cases of reinstatement are largely symbolical in nature in labour law cases, to allow the employee broad access to labour courts. Such a sum in cases regarding restitution to work equals **60 PLN (approx. 15 EUR)**.

In cases regarding compensation, pay or overtime, the value of which is between 50.000 to 200.000 PLN the court is supposed to grant 3.600 PLN (9.000 EUR) and in cases with a value over 200.000 PLN – 7.200 PLN (18.000 EUR), although such cases are rare.

A separate agreement for representation of the Client should be concluded, stating the attorney's real remuneration, as state-regulated costs do not compensate the effort resulting from involvement in such a case.

c. Trade Unions, Work Councils and Other Employee Representative Bodies

Apart from the comments regarding **Conciliation commissions** stated above, in accordance with regulations regarding employees hired under indefinite-term contracts, if they are members of a trade union functioning in the workplace, the employer should communicate the intention to terminate the employee's employment contract to the trade union in writing, stating the reason for the termination. If the trade union organisation decides that such a termination would be unfounded, it may, within **five days** from receipt of the notification, provide the employer with its reservations. After considering the trade union's standpoint, or in the case of a lack thereof, the employer decides on the termination.

If the employer fails in this duty, it will result in a violation of the law on the termination of contracts, and the labour court will uphold the employee's claim without analysing its merits.

In practice, apart from the above-mentioned consultation stage, the trade unions do not appear. The employee may be represented in court by a trade union member, but as a rule the employee is represented by a legal advisor or an advocate.

d. Specialized Litigation Bar

There is no specialized labour law litigation bar. All attorneys admitted to the bar (i.e. legal advisors and advocates) may represent clients in labour law cases. There are, however, law offices specializing in labour law litigation, as well as employment law litigation departments in international law offices.

III. Tips to Avoid Litigation

Observation proves indiscriminately that (1) the low potential cost of labour law litigation and (2) the lack of will to resolve conflicts by way of out-of-court methods results in an ever larger number of labour law cases settled by labour courts.

The most common error is the **incorrect wording of the reasons of termination of the employment contract** with an employee hired for an indefinite time. As part of the court procedure, the Employer must prove that the reasons stated in the notice were true and that they were sufficient grounds for termination. Providing additional reasons than those stated in the notice is impossible. Consequently, stating true, precise and correctly worded reasons may discourage the employee from pursuing his claim in court, or – in case of incorrect wording – may encourage such behaviour.

Under Polish employment law, an employee whose employment contract has been terminated has a short period (7 days in case of termination with notice, 14 days in case of termination without notice) during which he may appeal the decision to the Labour court. Failing to meet this deadline, if not due to non-culpable circumstances or if the employee has not received instruction regarding the deadline, will cause the complaint to be dismissed, even if the employee is in the right. Thus, it is important to instruct the employees about their right to appeal the employer's decision.

IV. Trends and Specific Cases

a. New or Expected Developments

Discussions are held over the narrowing of the circle of persons which may receive reinstatement to work in case of unlawful termination. The Parliament will consider whether this right should not be limited to a select few groups of employees (trade union officers, social labour inspectors, pregnant women) instead of the current circle of all employees hired for an indefinite term. As a result, the employees could receive a compensation equal to up to 12-months remuneration, unlike the current 3-month remuneration. This would be a revolutionary change.

The second expected change is in regards to the requirement stated in jurisprudence, that a notice of termination should also state the criteria that led to choosing the employee for termination. Currently, certain courts believe that the lack thereof is a formal error, leading to the possibility of defaulting in favour of the employee without analysing the merits of the case.

The final expected development is the possibility of full equalization between regulations of fixed-term employment contracts and employment contracts for an indefinite term. This is a result of a recent ruling of the Court of Justice of the EU of 13 March 2014 (file no. C-38/13) which stated that differentiation of such contracts in Polish labour law is contrary to EU law.

b. Recent Amendments to the Law

- A new act on hiring foreigners, called the "Foreigner's Code" has changed the whole of the procedures concerning the hiring of non-EU citizens,
- Minimum monthly wage as of 1 January 2015 will be raised to 1.750 PLN (approx. 438 EUR) gross,
- From 1 January 2015, salaries of supervisory board members will be subject to social security premiums, unlike under earlier legislation.

V. Conclusion

As a general rule, employment law litigation is easily-accessible, deformalized and cheap. Therefore, it plays a major role in Polish litigation, having even a separate department (one of four) of the Supreme Court. However, due to the ever-rising tide of employment under civil law contracts, this role may decline in the foreseeable future. Another problem that Polish labour law litigation is currently coping with is the length of proceedings – reaching a final resolution is most often a question of 2 years, during which the employee is left in a state of uncertainty. The right to appeal from a notice of termination to the labour court remains firmly ingrained in Polish employment culture and as such – it remains a day-to-day reality of employment in Poland.

ROMANIA

I. OVERVIEW

a. Introduction

In Romania, Employment law regulates the individual and collective relations between employers and employees. During the last 25 years, employment legislation has been constantly, but slowly changing towards a more employer oriented system, as a result of government reforms. Nevertheless, Romanian legislation still ensures a wide range of protection for employees. Employment law litigation became an important part of civil cases presented to Romanian courts, when the country began to develop legal remedies and structures to ensure proper judicial control over the labor relationship. Coming from a state controlled system, employment law had to adjust to the new social and economic context and mirrored that context. At first, employment law matters involved a great number of collective bargaining disputes and strikes, due to the strong influence of unions, but also collective dismissals, due to the restructuring of the old state companies.

Over the last few years, there has been a significant increase in individual employment cases presented before Romanian courts. Individuals, rather than unions, realized the important role they play in negotiations related to the employment relationship. Claims became more diverse and courts became more specialized. As a result of this development, companies recognized the importance of procedural rules and internal regulations in the judicial control over employment law matters and began to consult more specialized personnel and legal advisers.

New Civil Procedure rules that apply to employment law related matters allowed the judicial process to be less time consuming. Also, years of experience in similar matters for the judges provided a more predictable litigation process.

b. Claims

In order to offer a clear overview on the specific claims that are presented to Romanian Courts, we will refer to labor related matters as **collective** or **individual** actions. Collective cases are usually initiated by unions, but there is no legal obligation for the employees to present a collective action in court only through the union.

Collective cases include issues regarding the content of collective agreements, the annulment of abusive collective agreement clauses, collective financial claims resulting from existing collective agreements or stated by law. Collective dismissal matters and claims of collective discrimination can also be filed. In order to represent the individual employees in collective actions, the union has to obtain a written consent from the employees.

Another form of collective action is the claim of unlawful strike that the employers can present in court. Due to strict regulations regarding the right to strike – that cannot be exercised when a collective agreement is in force – such matters are becoming less frequent.

A different type of collective employment law court cases are the ones represented by the establishment, registration and recognition of unions and employers organisations. As a rule, these are not contradictory cases. The judge is called to verify the fact that the organisation complies with all the legal provisions, but also that the organisation drafted all the required documents and complied with all the procedural rules and terms. Occasionally, these cases become contradictory due to the fact that other entities have an interest to prevent the court's recognition of the organisation at issue.

Individual matters include litigation concerning unlawful dismissal; individual financial claims based on the individual employment agreement, the collective employment agreement or legal provisions; discrimination; working hours; posting of the individual

employee; negotiated advantages included in the individual employment agreement or the collective employment agreement, etc.

Individual dismissals include a) dismissal for reasons concerning the employee – the two most important cases are the disciplinary dismissal and the dismissal for professional unfitness – and b) the dismissal for reasons that do not concern the employee – the most important is the reorganisation of the company for objective reasons (mainly, but not necessarily economic reasons). All of these dismissals may result in individual court cases.

Both the employee and the employer can file a claim before the court in order to obtain financial damages as a result of the other party in the individual employment relationship.

c. Administrative Agencies that Investigate or Adjudicate Claims

Alongside litigation presented before Romanian courts, some of the issues that may arise from the employment relationship can be brought to the attention of some administrative institutions specialized in specific employment law matters.

Matters regarding working time, working conditions, payment of wages and even employment without legal forms, can be verified by local employment inspectorates, administrative bodies with control attributions, that can issue a list of mandatory measures for the employer and can enforce sanctions in case of a breach of legal provisions. Employees can address the local employment inspectorates in order for them to verify the stated matters.

In cases concerning claims of discrimination, a legal administrative procedure is provided allowing the National Council for Combating Discrimination to investigate the claims and to impose measures in order for the discrimination situation to disappear and the damages repaired.

The use of administrative procedures does not exclude the right to bring cases on the same issues before the court. Often, measures imposed by the administrative bodies become distinct issues in court cases.

Other administrative bodies have a consulting role in employment law matters. As part of a tripartite dialogue system, local and national tripartite bodies can be established according to the provisions of Law no. 62/2011. This notion of tripartite dialogue refers to discussions between the employers and the employees with the participation of national and local representatives that will act as facilitators to reach a mutual point of view in employment law related matters. Also, such bodies can present proposition to authorized institutions in order to change legal provisions that are no longer suited for the factual situation. A more important role and a greater implication in the legislating process is ensured by the Social and Economic Council, a tripartite body that acts as a consultative body for the legislators on issues regarding employment law. These tripartite bodies can be used in order to present to the other party and to the legislators, the point of view of the employers or the employees. An efficient use of the tripartite bodies can result in avoiding employment law litigation.

d. Court / Tribunal System

The Romanian court system is structured in a hierarchy that includes lower courts, which handle most cases, and higher courts – Tribunal and Courts of Appeal – which handle cases considered to be more important. A single Supreme Court handles cases of even greater importance and issues general rulings when inferior courts do not have a common practice and when this fact is brought to the attention of the Supreme Court.

For both collective and individual employment law claims the Romanian Labor Code, along with civil procedural provisions impose a double jurisdiction court system – meaning an initial ruling over the case matter and the possibility for an appeal. Employment law cases are presented in front of higher courts, the first jurisdiction is a Tribunal matter, while the appeal is handled by a Court of Appeal.

Special rules apply for the constitution of the panel that handles the case in the first jurisdiction. As a rule, the claim is presented to a single judge that will issue a ruling in the first jurisdiction. In employment law cases, the claim will be presented to a panel composed of one judge and two judiciary assistants in the first jurisdiction. The two judiciary assistants represent the two parties of the employment relationship – the employers and the employees. They have a consultative role in the final ruling, but can offer a separate opinion that will be included as part of the court ruling. The separate opinion is not legally binding for the parties and cannot be enforced.

If one of the parties (or even both in more complex matters) is not satisfied by the first ruling they can appeal to the Court of Appeal. The appeal will be handled by a panel of two judges with equal decision making powers. Judiciary assistants will not participate in the appeal. If the two judges cannot reach an agreement concerning the appeal, a new panel composed of the two initial judges and an additional one will analyze the appeal. This panel, called a divergence panel, will issue a final ruling in the appeal, even if the three judges have different opinions. The two judges with the most similar opinions will constitute the majority opinion that will become the final opinion of the court.

The system can be summarized as shown in the table below.

Procedural state	**Court**	**Panel**	**Issues**	**Not all members of the panel agree**	**Mandatory ruling**	**Definitive ruling**
First jurisdiction	Tribunal	1 judge 2 judicial assistants	An initial ruling	Non-binding separate opinion from the judicial assistants	Yes	No
Procedural state	**Court**	**Panel**	**Issues**	**Not all members of the panel agree**	**Mandatory ruling**	**Definitive ruling**
Appeal	Court of Appeal	2 judges	A definitive decision	A divergence panel of 3 judges issues the definitive decision	Yes	Yes

The parties can also choose not to appeal the first ruling and that first ruling will become final and mandatory. The first jurisdiction ruling is mandatory even if it is not final. Failure to comply with the court's ruling is a criminal offence and is punished accordingly.

In some specific cases, strictly regulated and concerning mainly procedural rules that were overlooked in the two usual jurisdictions, the parties can use extraordinary means of appeal in order to change the final ruling to their favor. These extraordinary means of appeal are judged by the Courts of Appeal.

e. Alternative Dispute Resolution (ADR)

Collective actions

We previously referred to collective and individual actions, making this distinction in order to present the different types of claims that can be brought to the court's attention. We now refer to collective conflicts. Collective conflicts may appear in three specific cases – a) when the employer or the employer's organisation refuses to start the negotiation for a collective agreement, when no such agreement is in place or the existing one has expired; b) when the employer or the employer's organisation does not agree with the employees' demands; or c) when the parties fail to reach a collective agreement by the date they settled upon.

In cases of collective conflict, the law establishes a mandatory conciliation procedure and alternative discretionary mediation and arbitrary procedures. The conciliation procedure implies the naming of an impartial delegate from the Work and Social Protection Ministry, in cases when the collective conflict involves groups of companies or industrial sectors, or a delegate from the local employment inspectorate in case of a collective conflict concerning a single company. Procedural rules must be observed during the conciliation procedure. After the mandatory conciliation procedure, if an agreement is not reached, the parties can agree to go through the mediation or arbitration procedures. These procedures become mandatory if the parties agree to them being so. The mediation procedure will involve a mediator and can result in a mediation agreement. The arbitration procedure involves a claim made to an Arbitration Office and will result in an arbitration ruling.

Individual actions

Apart from the collective conflict situations, the mediation procedure, based on common provisions on this matter, can be used by the parties in order to avoid bringing a case to court, but also in order to reach a common agreement. Both individual and collective actions can be prevented by an efficient use of the mediation procedure. The main problem with the mediation procedure is that the mediator cannot use employment law provisions in order to bring the parties to a mutual agreement. In most cases, the mediator does not even have a legal background and the mediation agreement can be easily bypassed by specialists with a more firm legal background.

For a brief period of time, common civil procedural provisions stated that it was mandatory for the parties of most civil cases, including employment law related cases, to undergo a procedure of information regarding the advantages of mediation prior to filing court cases. This provision created an additional obligation for the parties. However, it was unsuccessful, as the majority of cases were not resolved by mediation and so the provision was later declared unconstitutional by the Constitutional Court. The procedure was mainly formal and the parties considered it to be time consuming, especially in cases involving shorter terms for the filing of the court case – such as dismissal claims and claims regarding disciplinary sanctions.

II. The Litigation Process

a. Typical Case

i. Steps in the Process

When an employer or an employee considers it necessary to take judicial action against the other party of the employment relationship they will present their claim, in writing, to the Tribunal. According to civil procedural provisions that apply to employment law related cases, the claim must contain specific identification details for the plaintiff and the defendant, an indication of the facts and the legal provisions that apply to the matter, all evidence that sustains the plaintiff's request and the plaintiff's signature. The signature for a company has to be a legally binding one and will be accompanied by the company's stamp. If the plaintiff wants the court to hear witnesses, they have to be named in the claim. Also, if the plaintiff wishes to question the opposing party, and the opposing party is a company, the company will reply in writing and the questions have to be included in the claim. The registered claim is randomly assigned to a specialized judge. The claim is verified by the judge that will handle the case and any irregularities that he/she might find with the claim are to be covered in a stated term. If the irregularities are not covered, the claim will be annulled.

After the claim is verified by the judge and all the irregularities covered, the claim is transmitted to the defendant, who has the obligation to respond in writing within 25 days. The defendant's response must contain all arguments and evidence, but also all the exceptions that he prepares to raise in the matter. The defendant's response is transmitted to the plaintiff, who can respond to the defendant's argument within 10 days. The judge can establish shorter terms for the defendant and the plaintiff to send their responses. The claim and all responses can be made by a conventional representative for the party, for instance a lawyer. The proof of the lawyer's representation right will be presented with the claim or the defendant's response.

ii. Role of Witnesses, Counsel and Court / Tribunal

After this administrative procedure is completed, the judge will establish a court date. For that court date, the judge will issue subpoenas for all parties. All parties must receive the subpoena in order for the case to enter the debate part, but the presence of the parties or their representatives is not mandatory - parties have the right to request that the matter is ruled upon in their absence. However, if both parties are not present and neither of them requested a ruling in their absence, the judge will suspend the matter.

The burden of proof in employment law related cases is always the employer's obligation. This means that when the employer is the defendant, the burden of proof is inverted, the plaintiff is not required to prove his allegations, but the defendant is required to disprove the plaintiff's allegations.

Written documents are the most relevant evidence in employment law cases and must be presented in conformed copies. Most cases are judged based only on these written documents and only in exceptional cases are witnesses heard in order to establish facts that were not recorded in writing. As a rule, testimony from a witness cannot be considered true if it is contrary to a written and signed document concerning certain amounts of money. Any party can be questioned by the other party and by the judge, but parties cannot be heard on their own behalf. Some cases, especially claims against disciplinary sanctions, may require the use of audio/video recordings or photographic images. In cases concerning financial demands or the correct remuneration of working hours, a judicial expert may be necessary.

Some claims, like the ones concerning alleged discrimination, require an official point of view of a specialized body - in the case of discrimination claims, the National Council for Combating Discrimination mentioned above. The point of view is not mandatory for the court.

Depending on the evidence the judged allows to be presented, the court case can be ruled in only one court date – if all the documents are presented, no witnesses are necessary, nor is it necessary to administrate any other proof, or even in 12-14 court dates, if a judicial expert is required. Court dates are usually 1 month apart.

After all the evidence is administrated, the court hears the parties in their final pleadings, finds the debate closed and issues the ruling. The solution is pronounced the same day that the court holds the final hearing, or on a later date. The motivation for the solution and, if necessary, the separate opinion, will be transmitted to the parties in order for them to exercise their right to appeal the initial ruling.

iii. The Appeal Process

During the appeal, the court will take into consideration all evidence and arguments presented in the initial claim, but also any additional arguments and evidence the court considers necessary.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

Employment law cases are not subject to the judicial tax that usually applies to civil cases. Regardless of the value of the case, the judicial process does not imply any cost other than those related to conventional representation by a lawyer. Depending on the matter, the lawyer may negotiate with his/her client an hourly fee or a "per case" fee. An additional "success fee" can also be negotiated. The party that wins the case is entitled to receive the amount paid as the lawyer's fee, if the party asks this and presents proof of the payment. If the court considers the fee to be excessive, the amount to be paid by the party that lost can be reduced.

The court's solution depends on the type of matter. For instance, in cases regarding unlawful dismissal (the basis for the dismissal or the grounds of the annulment of the dismissal are irrelevant) if the court finds that the claim is legally justified, it will declare the dismissal decision to be annulled, the employee to be reinstated and for the employer to pay damages equal to the "to date" amount of the employee's salary for the time he was unlawfully dismissed. In cases regarding financial claims, the party that loses will have to pay a "to date" value of the amount stated in the court's ruling. This obligation to pay any amount "to date" can result in further issues regarding the enforcement of the court rulings and sometimes even in new court cases regarding the exact amount to be paid.

The time period to resolve an initial court case can take as little as 4 months to more than 1 year. The appeal is usually a procedure that takes less time, but the administrative procedure for transmitting the appeal and the subsequent response exchange presented for the initial claim implies the same terms, meaning that the appeal will take an additional 4 to 6 months.

c. Trade Unions, Work Councils and Other Employee Representative Bodies

One essential consideration is the fact that in collective actions the procedural part of the court case tends to become very important. Employees that were initially represented by a union can leave the union during the trial. It will then become necessary for the employee to express his option to continue the trial in his own name, or not. If the parties fail to agree to have a common representative, the issuing and receiving of subpoenas

in order for the trial to begin will take more time – since claims with more than 300 plaintiffs or defendants were registered lately. In these cases, it is very important to have a lawyer experienced with collective actions in order to reduce the amount of time lost with procedural issues.

Apart from the written mandate of the employees that is mandatory for the union to represent its members in court, litigations involving the unions follow the same procedural rules as any employment law case.

d. Specialized Litigation Bar

Specialized judges and judicial assistants handle employment law cases in the first instance, but no legal requirement states that the lawyers representing the parties should be specialized in employment law. However, lately both employers and employees tend to look for specialized lawyers, as they understand the importance of having experienced counsel in these types of cases.

III. Tips to Avoid Litigation

The provisions governing employment related matters rarely change and since national courts have established some common directions, even in a judicial system that does not recognize judicial precedent as mandatory, it becomes important for companies to use all available resources in order to avoid litigation.

The first step in decreasing the risk of litigation is to establish clear and simple internal procedures that all employees will have the obligation to become familiar with. Strict compliance with internal regulations can significantly reduce the risk of litigation. In order to ensure this, specialized HR personnel must be employed and for issues requiring more experience and contact with the judicial system, legal advice from specialized lawyers may prove useful.

Also, all internal documents, job offers, individual employment agreements, job descriptions, work procedures, professional unfitness procedures, and annual/periodic evaluation procedures have to be clear and well drafted. Procedural rules, stated by law or part of any internal regulation, have to be strictly respected.

An important fact to consider, especially by international companies that open subsidiaries in Romania, relates to establishing working hours for the employees and their wages. The rules in Romania concerning daily and weekly rest periods are more stringent than those provided by the European Union. Also, specific rules apply to compensating overtime, night work or work performed on weekends and on legal holiday. Correctly including the necessary information in all documents – starting with the job offer, the individual employment contract and continuing with the collective agreement contract, is very important. Any omission could result in an expensive judicial undergoing and could result in significant financial liability for the employer.

Also, all references of individual employment agreements that the company has concluded must be made in the electronic system and in careful observation of the legal terms. The correct registration of these agreements can be the difference between a legal employment relationship and work without legal forms.

Companies should pay great attention to disciplinary proceedings in order to avoid the annulment of the disciplinary sanction by the court. Again, procedural rules become important; the form of the document stating the disciplinary sanction is as important as the disciplinary offence. Correct use of disciplinary sanctions is also important.

As of 2011, the professional unfitness of the employee was enforced as an expressly stated cause for the employee's dismissal. This means that the company has to have an internal professional evaluation procedure, but also, each employee must receive clearly stated professional objectives and evaluation criteria.

All of the above-mentioned measures and attention to details, the use of highly trained personnel and legal advisers, can lower the risk of litigation and even decrease the chances of losing a court case.

IV. Trends and Specific Cases

In 2011, a new perspective on employment law regulations opened with amendments to the Labor Code and enforcement of a new law, Law no. 62/2011 of social dialogue. The law removed many privileges provided to trade unions, annulled some institutions which exceeded the balance between the employer's prerogative of decision and the social protection *guaranteed* to the employee, and aligned collective Labor relations to the general rules of the common law. Also, the law managed to unite all regulations of social partnership, gathering both Labor conflicts and Labor jurisdiction rules. Few changes have been made in the national employment law system since 2011. Therefore, the new system of regulations resulted in a more predictable outcome for most court cases. However, the same system led to an increase in the number of certain types of court cases.

Lately, there has been an increase in the number of cases filed by employees involving financial demands based on existing or passed collective employment agreements or even on legal provisions. Such cases include demands of seniority bonuses, overtime payment, and bonuses for worked performed during the weekend and on legal holidays, and compensation for failure to comply with special rules on daily and weekly rest time. Usually, these are collective actions, sometimes involving more than 300 employees with a high cost risk. Again, clear internal regulations, effective collective bargaining, and strictly following procedural rules can reduce the risk for companies that are the target of such demands. However, there are still some specific activities (like offshore activities) that are not clearly regulated by national legal provisions and that, by their nature, cannot be subject to the normal regulations on working time and weekly rest, meaning that court cases can be filed for financial demands concerning this matter.

A recent ruling of the Supreme Court held that a court judge that decides over the legality of a disciplinary sanction could change the sanction applied by the employer, if the judge believes the sanction is justified for the disciplinary offense. As a result of this new approach, employers now need to carefully analyze each disciplinary action they take against their employees. They must be aware of the importance of a correct and proportional sanctioning of their employees. There has also been an f increase in the number of such court cases. This increase is caused, on one hand, by the fact that employees who were fired as a disciplinary sanction are more likely to return to their old job and have their sanction changed. On the other hand, employers now initiate more disciplinary procedures (even for offences that are not that serious, that otherwise would have been overlooked) and apply an increased number of mild disciplinary sanctions, in order to prove the employee's general conduct, in case of a serious disciplinary offence that might justify the disciplinary termination of the individual employment contract. It remains to be seen if this tendency is a long term one.

Even if clearly regulated as of 2011, the dismissal for professional unfitness is rarely used by employers, meaning that only few cases on this matter go to court and there is no clear direction on this matter at the moment. However, courts tend to give more credit to employers when it comes to their evaluation on the way the employee performed his/

her work. This tendency can be also observed in cases concerning dismissals due to the reorganization of the company on objective grounds and in cases concerning disciplinary sanctions.

V. Conclusion

At this time, trends on the outcome of court cases in Romania reveal a tendency towards a more uniform judicial practice, making it more predictable for employers and employees to know how a case will be resolved through a court proceeding. A period of stability in national employment regulations made for a more detailed approach on each case and for more complex court cases and rulings. Employers are now more aware of the importance of good internal regulations and practice and also tend to trust more specialized legal advisors for employment law related issues, making for a higher success rate in employment law related cases.

SPAIN

I. Overview

a. Introduction

Historically, labour litigation in Spain has been substantial, due to two main factors:

On the one hand, trade unions have had a significant presence within various companies, independent of their size and relevance.

On the other hand, Labor and Social Security legislation is abstract and incomplete and therefore needs to be concluded with the Collective Bargaining Agreements, which must be approved beforehand by the legal representation of workers, the "Trade Unions", and the legal representation of companies, the "Employers' Association".

For these reasons, there are a large number of cases that end up in court.

Spanish Social Jurisdiction foresees and promotes extrajudicial conciliation between parties, mainly to alleviate the Courts of a substantial percentage of cases. The judges invite the parties to reach an agreement outside the courtroom in order to free up the Courts' extremely tight agenda, to resolve the issue in the shortest time possible, and to decrease the worker's and the Company's potential monetary damages.

In this direction, there are attributions provided to the court clerks, who can now lead a pre-trial settlement. Previously, only the judges had the authority to do this. From a practical stand point, the Judge is still the only person that really makes a difference to settle a case before a hearing.

In Spain, the Social Jurisdictions are known for having a flexible approach and the freedom to stray from formalities that the Commercial and Civil Jurisdictions are required to follow.

In favour of solving the problem or heart of the matter, the principle *"pro actione"* is applied, for it establishes that the lack of a mere formal requirement cannot result in the disqualification or suspension of the proceedings.

Finally, the Spanish Social Jurisdiction does not require judicial taxes to access the Labor Courts of Justice in first instance. A law regulating judicial taxes approved in November 2012 inserted a new tax that affects the Social Jurisdiction when appealing a Court Ruling, and has been highly criticized, since the main reason to avoid judicial taxes is also to avoid the vulnerability of workers or parties with limited means.

The combination of these factors: free and tax-free access to the courts of justice and the pre-trial conciliatory approach makes the Social Jurisdiction one of the most efficient in resolving conflicts. Before the economic crisis it was also one of the fastest jurisdictions, but this has gradually changed as many claims have been filed and no new Courts have been opened by the Administration due to financial shortages.

b. Claims

In Spain, the labor and employment legislation covers a vast variety of procedures through which the plaintiff can claim the violation of Fundamental Freedom and Rights (recognized by the Spanish Constitution) and the illegality or invalidity of any measure or abuses by the employer or the workers. The most common claims are listed below.

Claim for Unfair Dismissal: this action requires the demanding party in the proceeding to prove the existence of a defect in the formalities and or the non-existence of the dismissal cause, regarding either the objective or the disciplinary dismissal.

If the judge considers the dismissal to be unfair, the employer can choose between reinstating the worker, upon payment of the lost wages (during the time spent in the procedure), or terminating the employment contract upon payment of the difference of the cost due to inadmissibility. If the worker concerned was part of the Workers Council, the choice between the two options above is up to the worker and not the employer, since a member of the Workers Council is specifically protected by Spanish legislation. The dismissed worker has 20 working days to proceed with the filing of the claim.

Claim for Null and Void Dismissal: this action requires the claimant to prove the existence of a situation that represents (according to labor and employment law), a violation of the Fundamental Rights as an individual.

Discrimination on grounds of sex, race, religious or political beliefs constitute rights' violations. Likewise, a dismissal as a result of the legal actions undertaken by the worker in order to defend his/her rights in the Courts of Justice is also considered a violation of the freedom to access the Courts of Justice. All of the above are protected by article 24.1 of the Spanish Constitution. The employee also has 20 working days to file the claim.

Claim for Null and Void Employer's Action: company reorganization measures carried out by the company without respecting the requirements established in labor and employment law, may be claimed before the Social Courts of Justice. Measures considered illegal or disproportionate will be declared null and void and the Courts of Justice will condemn the employer to restore the previous conditions, both individually and collectively.

The employee affected has a period of 20 working days to file the claim.

Claim for Right Recognition: the worker has the possibility to claim his employment conditions when the employer decides to change them, either by not following the correct procedure or by not justifying the change sufficiently. The employee has 1 year to file the claim.

Claim of Amount Due: this type of claim is intended to make the employer pay the employee amounts due to him/her (concerning salary). The employee may only claim due amounts up to 1 year prior to the action. Any other amounts, such as severance compensations, must be requested using the dismissal action.

Claim for Violation of Fundamental Rights: the violation of a Fundamental Right by the employer is considered a serious breach in Spanish Labor Law. This action also allows the employee to claim compensation damages that must be correctly proven in Court.

Collective Conflicts: since conflicts regarding Collective Bargaining Agreements affect all workers in the specific sector and are so relevant, they must follow a specific procedure before the Courts.

Claim for Professional Disability: a worker is considered to have a permanent incapacity when, after completing the prescribed treatment and having received a medical discharge, he or she is still physically or functionally incapacitated to the point that he or she will probably not be able to perform normal work for the rest of his or her life. A person over the legal age of retirement who is entitled to an old-age pension cannot claim permanent incapacity benefits for non-work-related injury or illness. At the legal age of retirement, a permanent incapacity allowance is automatically transformed into a retirement pension. This does not change the way in which the benefits are paid. Permanent incapacity is also the incapacity that remains at the end of the maximum temporary incapacity period. In general, permanent incapacity follows a temporary incapacity.

A special scheme exists for self-employed persons.

The nature of the Disability – Permanent (in its different degrees) or Temporary - can be due to a common illness or a work accident. Common illness/disease covers situations in which the employee succumbs to illness or requires medical leave as a result of events unrelated to the performance of his/her work. A work accident, as the name suggests, refers to any disability arising from the performance of the work activity.

c. Administrative Agencies that Investigate or Adjudicate Claims

SMAC (Mediation, Arbitration and Conciliation Center or Mediation, Arbitration and Conciliation Service) is the public body responsible for pre-trial or extrajudicial conciliations regarding labor and Social Security conflicts.

SMAC (Mediation, Arbitration and Conciliation Center/Service): This centre is managed by each of the Spanish Autonomic Communities (an autonomic community is a first-level political and administrative division of Spain). The Social Jurisdiction regulatory law establishes a number of circumstances in which this centre must have knowledge of the case before allowing it to go to trial. The SMAC is intended to be an organism wherein the parties try to reach a settlement that will end the dispute. Normally, this is effective, because of the economic nature of most claims.

The main Public Bodies with regards to Labor and Employment Jurisdiction are: INSS (National Social Security Institute), SEPE (Spanish Public Employment Service) and FOGASA (Wages Guarantee Fund).

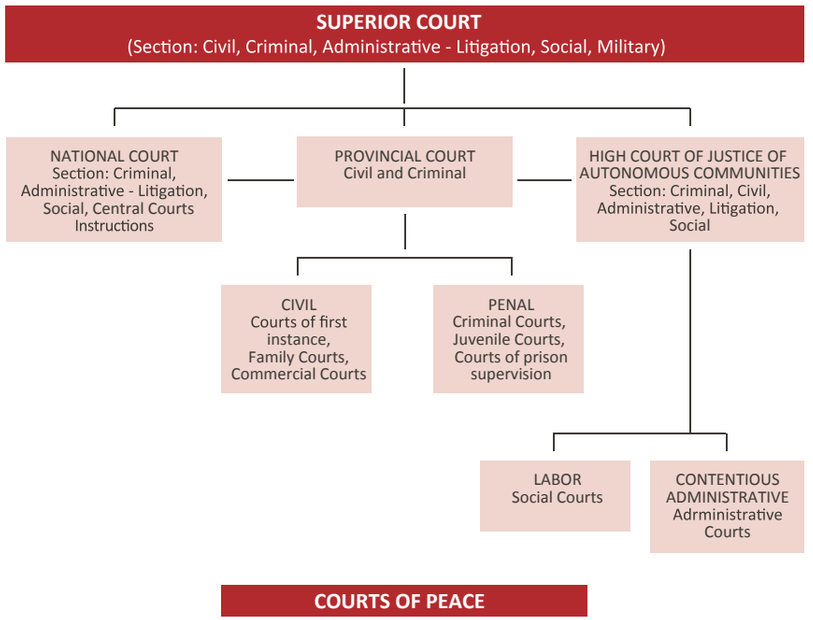
INSS or National Social Security Institute: this body is competent in all Spanish territory and has the responsibility to manage everything related to Social Security benefits for workers.

SEPE or Spanish Public Employment Service: it is an independent organism outside the Spanish Public Administration, responsible for managing the development and supervision of political labor measures. Its main function is to manage the employment situation in general and the public register of labor contracts.

FOGASA or Wages Guarantee Fund: the legal definition is set out in article 33.1 of the Workers' Statute and article 1 of the Royal Decree 505/1985, of March 6, regarding the Organization and Functioning of the Wage Guarantee Fund. According to these articles, FOGASA is:

> *An autonomous administrative body attached to the Ministry of Employment and Social Security with legal personality and legal capacity to carry out the purposes specified in Article 33 of the Statute of Workers.*
>
> *Its basic purpose, established by article 31 of Law 16/1976, of April 8th, is the guarantee of wage claims against the insolvency of the employer.*
>
> *Another purpose is to support or protect companies in crisis and encourage job retention and business continuity, by paying certain benefits on behalf of the company without obliging the employer to return the money, provided certain situations are met.*

d. Court / Tribunal System



Labour Courts are located in the capital of each province and have general jurisdiction at first or single instance over matters of a labour nature not attributed to other bodies of this jurisdictional division.

The Labour Division of the High Courts of Justice has general jurisdiction at single instance over proceedings provided for by law, regarding disputes affecting the interests of workers. It also has jurisdiction over appeals against decisions issued by the Labour Courts of the Autonomous Region and over disputes regarding the respective jurisdiction of those Labour Courts.

The Labour Division of the National Court has general jurisdiction at single instance over special proceedings challenging collective labour agreements ("convenios colectivos") to be enforced in territories superior to the Autonomous Region, as well as over proceedings regarding collective disputes ("conflictos colectivos") when then resolution affects a territory superior to the Autonomous Region.

The Labour or Fourth Section of the Supreme Court has general jurisdiction over cassation appeals and over other extraordinary appeals provided for by law regarding matters pertaining to this jurisdictional division.

e. Alternative Dispute Resolution (ADR)

It is always preferable to attempt, beforehand, to reach an out-of-court settlement or amicable solution. Spanish law promotes the use of these alternative measures by facilitating access to them and, in some cases, such as certain employment disputes, making them compulsory before having recourse to the courts.

In Spain, in addition to the private negotiation, the parties can have access to an administrative conciliation process, which must be carried out before Labor Administration Mediation Services and prior to labor litigation.

Mediation is very common in labor disputes. It is sometimes compulsory to attempt mediation before resorting to the courts. Collective disputes are usually subject to mediation and in some Autonomous Communities individual disputes are mediated.

The Autonomous Communities have employment mediation bodies which specialize in such matters. At national level, the Servicio Interconfederal de Mediación y Arbitraje, SIMA, (interconfederal mediation and arbitration service) offers a free mediation service for disputes which fall outside the remit of the bodies of the Autonomous Communities.

Law 36/2011 governing the labour courts introduces a genuine novelty by establishing a general rule that all applications must be accompanied by a certificate attesting to a prior attempt at conciliation or mediation before the appropriate administrative service, the Mediation, Arbitration and Conciliation Service (SMAC), or before bodies performing such functions under a collective agreement, although the following article lists procedures that are exempt from this requirement.

Law 36/2011 introduces express reference to mediation; not only during pretrial conciliation, but also once the court proceedings are underway.

Finally, arbitration is regulated by the Law on Arbitration, Law 60/2003 of 23 December 2003. This law also applies to special arbitration mechanisms. The one most commonly utilized in practice is related to arbitration in consumer affairs, in order to resolve disputes relating to the consumption of goods and services covered by Law 26/1984 of 19 July 1984 on General Consumer and User Protection.

Unlike conciliation and mediation, it is not considered as a prerequisite for the successful start of the process.

Arbitration in Spain can be based on law or on equity. Generally speaking, arbitration solves disputes by applying the law in force, unless the parties have given express authorization to solve the dispute solely on the basis of equity. This criterion of equity, in other words, without applying the legislation in force, is the one used to underpin an arbitration decision in some institutional arbitration proceedings, such as those relating to consumer affairs.

However, in practice, in labor procedures, arbitration it is not very common, unless it arises from electoral matters.

II. The Litigation Process

a. Typical Case

i. Steps in the Process

The main steps in the litigation process are the following:

Filing of action: the action starts with the filing of a claim before the Courts of Justice and in certain cases, where regulated as such, before the Conciliation Chamber.

Admissibility: all claims shall be filed in writing and shall meet the following general requirements:

- the identity of the body to which the claim is being presented.
- the identity of the plaintiff.
- a clear and succinct listing of the fact on which the claim is based, and any others which, according to material law, are indispensable in order to resolve the matters raised. In no event, may facts be claimed that are different from those alleged in the conciliation proceedings or prior administrative claim, unless they took place thereafter.
- the corresponding petition, in terms adjusted to the content of the claim presented.
- if the plaintiff is acting on its own, it shall designate an address within the city where the Court or Tribunal is located, which shall be used in any subsequent steps.
- date and signature.

Conciliation Act: as mentioned above, where certain requirements are met, prior to filing the judicial claim, the applicant party must file a claim before the Administrative Conciliation Chamber. This prior step is intended to promote a settlement agreement between the parties before the claim reaches the Court.

Hearing: once the court has convened a public hearing, it shall try to reach an agreement, advising the parties of the rights and obligations inherent thereto, without prejudging the content of any future ruling. If the court considers that the agreement is seriously detrimental to any party, or amounts to a fraud or abuse of law, it shall not accept the agreement.

A settlement may be approved at any time before the final ruling is issued. A certificate shall be issued of the conciliation act. If no settlement is reached in conciliation proceedings, the trial stage shall be initiated next, and the Secretary shall record all measures already taken. Thereafter, the plaintiff shall ratify or extend its claim, without, in any event, making a substantial change therein.

The defendant shall reply, specifically affirming or negating the facts of the claim, and alleging as many exceptions that may be applicable. In no event may the defendant bring a counter-claim, unless this had been announced in the conciliation prior to the lawsuit or in the reply to the prior claim, and the facts on which it is based and the exact petition made were substantially described. If a counter-claim is brought, the plaintiff shall begin to issue a reply thereto in the terms established in the claim. The same reply shall apply for procedural exceptions, if alleged.

Judicial Decision: the Judge or Tribunal shall deliver a judgment within a term of five days, which shall be immediately published and notified to the parties or their representatives within the following two days. Further to the background facts, the judgment shall provide a sufficient summary of the object of discussion during the proceedings. Furthermore, and based on the reasoning provided, it shall expressly declare the facts that it deems proved, referring to the grounds on which it basis this conclusion in the Points of Law. Finally, it shall provide sufficient grounds for the ruling handed down.

ii. Pretrial Proceedings

Preparatory acts and pre-trial proceedings can be divided into two measures: preparatory and precautionary.

Preparatory measures

Whoever wants to file a lawsuit can submit a request to the court demanding that the opposing party must provide evidence concerning the personality, ability, and legitimacy

of the claim, or for the same purpose, should provide some document which should be noted for the trial.

In addition, the person who pretends to file a lawsuit, may also request from the opposing party, information regarding the identities of the partners, shareholders, members or managers of an entity without legal personality as well as the preliminary inquiries aimed at determining who is the employer and the members of the group or business unit.

Moreover, in cases where the examination of books and accounts are imperative in order to substantiate the claim or its opposition, the party seeking to sue or the party that expects that it will be sued, may request the disclosure of their documents to the Court.

Precautionary measures

There are anticipated measures to ensure the success of the process and the satisfaction of the claims.

iii. Role of Witnesses, Counsel and Court / Tribunal

Important aspects regarding the labor and employment litigation process before the Social Court of Justice include:

Witnesses: The parties may request the declaration as witnesses of the individuals acquainted with the facts at issue relating to the subject matter of the trial.

All individuals may act as witnesses, except those who are of permanent unsound mind or unable to use their senses in relation to the facts they could only be acquainted with, using the said senses.

Those under fourteen years of age may declare as witnesses if, in the opinion of the Court, they possess the necessary capacity of judgment to know and to declare truthfully.

Counsel: lawyers in the Judicial Social Order, unlike in other jurisdictions, completely absorb the development of the financial year advising the client and celebrating the act of judgment. Also, there are no Solicitors of the Courts in Labor and Employment Jurisdiction to support the lawyer's work.

Court / Tribunal: the Courts of Justice address the session of Judgment Act and give the floor to the lawyers, witnesses and experts. Finally, a Tribunal is the entity that, after judgment and with all necessary information at hand, must resolve the dispute at issue in the case.

iv. The Appeal Process

In labor disputes, there are two possible appeals that can be filed once the initial court ruling has been issued: to the High Court of Justice and to the Fourth Chamber of the Supreme Court.

Appeal process to the High Court of Justice

The object of the appeal for reversal shall be:

- To restore the proceedings to the state in which they existed at the time of the breach of the rules or procedural guarantees that led to lack of protection.

- To review the facts declared as proved, in light of the documentary and expert evidence conducted.
- To examine any breach of material rules or case-law.

An appeal for reversal must be announced within five days following notification of the judgment; it shall suffice for the party or its lawyer/representative to merely declare, upon notification of the judgment, of its wish to lodge the appeal. It may also be announced in a hearing or through a writ addressed by the parties, their lawyer/representative to the Court that issued the challenged resolution, within the foregoing term.

If the Chamber overrules the instance judgment in full and the appellant has made a cash deposit of the amount claimed, or has secured said amount, including the deposit required in order to appeal, the ruling shall order the return of all consignments and deposits and the cancellation of all guarantees provided, once the judgment becomes final. If the appeal for reversal is upheld and payment is ordered of an amount that is less than the resolution appealed, the ruling shall order the partial reimbursement of consignments, in the amount corresponding to the difference between both sanctions, as well as the partial cancellation of the guarantees provided, once the judgment becomes final.

In all cases where the appeal for reversal is partly upheld, the ruling shall order the full reimbursement of the deposit.

Appeal before the Fourth Chamber of the Supreme Court

The Fourth Chamber of the Supreme Court shall examine cassation appeals lodged against judgments delivered in a single instance by the Industrial Chamber of the High Courts of Justice and by the Industrial Chamber of the National Court ("Audiencia Nacional").

The following may be subject to a cassation appeal:

- Judgments issued in a single instance by the Chamber referred to in the foregoing paragraph.
- Rulings resolving an extraordinary appeal brought against a ruling issued by the Chamber when enforcing judgments, if resolving substantial issues not disputed in the lawsuit, not decided in the judgment or that contradict what is being enforced.
- Rulings resolving an extraordinary appeal brought against a resolution in which the Court, immediately after the filing of the claim, declares itself non-competent on the grounds of the subject matter.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

The fees derived from the lawyer's professional activity can be freely agreed with the client, and may establish a variable of details that go from a minimum flat fee to a combined success fee scale, based on the achievement of goals.

In addition, the Lawyers Association (BAR) provides standards regarding legal fees collectively accepted by lawyers.

c. Trade Unions, Work Councils and Other Employee Representative Bodies

The litigation process with Trade Unions, Work Councils or other employee representative bodies, may imply the *challenge of a collective bargaining agreement*.

A challenge may be brought ex officio against a CBA before the competent Court or Chamber, if it apparently infringes the current legal framework or seriously injures a third party interest, through a notification sent by the relevant labour authority. If the CBA were still not registered, the workers' legal or trade union representatives, or the employers who claim its illegality, or injured third parties who so claim, must previously request that the labour authority address an ex officio notification to the Court or Chamber.

If the labour authority does not reply to the request referred to in the foregoing section within a term of fifteen days, rejects the application, or the CBA was already registered, any challenge against it may be directly brought by the parties entitled to do so, through the collective dismissal procedure.

The ex officio notification that upholds the illegality of the CBA must contain the following requirements:

- Specification of the law and the legal issues that are deemed as breached by the CBA.
- A succinct reference to the legal grounds of the illegality.
- A list of the representatives belonging to the committee that is negotiating the challenged CBA.

Protection of trade union freedom rights

Any worker or trade union with a legitimate right or interest that believes its trade union freedom rights have been infringed, may apply for protection thereof. A specific process applies whenever the petition falls within the competence of the industrial courts.

In those cases where the worker, as the injured party, is entitled to act as the main plaintiff, the trade union to which he/she belongs, as well as any other trade union that enjoys the highest representation, may appear as co-adjunct parties. The latter may not appeal or continue the proceedings separately from the main parties.

The Public Prosecutor shall always be a party to these proceedings and shall adopt, as the case may be, the measures required to clarify any conduct amounting to an offence.

d. Specialized Litigation Bar

In Spain, there is a Professional Association of Lawyers in basically every city.

III. Tips to Avoid Litigation

Procedural labor law has traditionally imposed on litigants the use of certain means for the purpose of avoiding the process, to speed up the response to claims of workers, to seek a negotiated or voluntary settlement of labor disputes, and, ultimately, to contribute to the efficiency of the labor procedure.

There are several practices to take into account in each stage:

Recruitment is the first step. To create a proper workforce, try to hire the right employees. Special attention is required when searching for employees who wish to seek a career in the company with compromise and dedication, rather than hiring those who simply search for a job that will allow them to keep their position permanently in the company. These employees usually become unmotivated and tend to cause conflict with the Management.

In this regard, a special emphasis should be made to the company's culture and values. The closer they are to the employees values, the better the relationship will develop in the future. Every organization has a culture all its own. It is up to the entrepreneur to

choose to define and build it or let it develop on its own. Screening a candidate for a cultural fit is critical.

The employer must know what motivates its employees - monetary rewards are not always the best way to encourage employees. Every HR department must set-up non-financial rewards programs like mentorship lunches, featuring special employees or better parking. Money is not the only driver.

Workplace culture, benefits and transparency are important values. Sometimes these issues even trump salary considerations. Therefore, the most crucial HR best practice that every business should implement is stressing the transparent culture of the business during interviews.

Communication with the employees and defining work expectations is absolutely crucial. If the time comes to terminate the employee, it should not be a huge surprise. Documenting the process is important, especially documenting progressive disciplinary measures. Regardless of whether the company is large or small, keeping records of the situation goes a long way to avoiding litigation, and it also ensures that appropriate procedures are followed. Having a system to identify performance objectives and advise the employee on whether they meet or fail to meet such criteria is helpful not just for termination, but also for training and motivating the staff.

Last but not least, training employees plays a very important role in the relations. Employees understand how to communicate without the stigma of discrimination or harassment. Understanding the responsibility of being an employer or a manager and using effective and efficient communication should be the subject of training the staff. If employees are trained and understand t their responsibilities, future labor disputes may be avoided.

IV. Trends and Specific Cases

a. New or Expected Developments

At this moment, there are no new or expected legal developments related to employment litigation in Spain.

b. Recent Amendments to the Law

It should be noted that the labor reform of February 2012, obviously had an important impact on employment litigation. Royal Decree-law 3/2012 of 12 February, on urgent measures to reform the labor market, significantly modifies the institutional framework of Spanish labor relations and in particular, the following amendments should be highlighted:

- The compensation for unfair dismissal has been reduced from 45 to 33 days per year of service and the maximum limit from 42 to 24 months, notwithstanding certain transitory provisions applicable to employment agreements in force on 12 February 2012;
- An administrative authorization is no longer required for collective dismissals and new reasons have been established to carry out these dismissals;
- «Express dismissals» have been eliminated and back pay is no longer payable in most cases of unfair dismissals;
- Relevant amendments have been approved to promote internal flexibility in companies as an alternative to terminating employment contracts;

- The primacy of the company collective bargaining agreement in certain areas cannot be counteracted with sector-specific collective agreements and the so called «ultra-activity» of the collective agreement (the period of time that a collective agreement remains applicable after its expiration) is limited to two years from the termination of the agreement.

V. Conclusion

Currently, we have a highly flexible legal system that allows the employer to keep the business viable. This has a direct impact on human labor relations as the company's culture should not change dramatically in a short period of time. However, the new flexibility provided to employers has increased labor disputes in Spain, but the judicial system includes a number of measures that make it possible to settle disputes fast and accurately.

In this way, the Labor and Employment Jurisdiction is quite different from the other jurisdictions in Spain, such as the Civil court, where formalism and strict procedures are its common denominator. Employment law is one of the fastest evolving legislations but nevertheless, reality and the daily life of companies tend to change at a faster speed than the Law itself.

In recent years, after the 2012 labor reform, legislation and case law is more protective, with companies responding to dismissals or conflicts in the field of changing working conditions. Still, overall, the Spanish Social Courts (following the European pattern) are still very protective of the rights of employees.

SWEDEN

I. Overview

a. Introduction

The Swedish labour market, where collective bargaining agreements (CBAs) play an important role, is characterized by self-regulation by the labour market organizations (employers' organizations and trade unions). Traditionally, the Swedish government is responsible for a small portion of the rules and regulations governing the labour market. The fundamental rules are found in the Employment Protection Act (mainly rules related to termination of employment) and in the Co-Determination in the Workplace Act (rules regarding CBAs, information and consultation obligations, as well as some procedural rules for dispute resolution).

By way of CBAs it is possible to deviate from the law, as well as to achieve independent rules in areas that lack legislation. For example, terms and conditions of employment as well as procedural rules regarding co-determination and dispute resolution are often regulated through CBAs. It is worth noting that CBAs cannot be made generally applicable (i.e. there is no procedure for the government to incorporate CBAs into law).

As a result of the Swedish labour market system, the majority of labour disputes are resolved through consultations between the labour market organizations. In cases were dispute consultations are unsuccessful, or where the organizations are not involved, disputes are generally settled through civil court proceedings. Thus, if one party claims that the other party has breached a certain rule, it is up to that party to submit said claim to court. If CBAs apply, the one and only instance for dispute resolution is generally the nationwide Labour Court. If CBAs do not apply, the dispute will be handled at a district court as the first instance, with the possibility to appeal to the Labour Court.

b. Claims

Swedish employment law can be divided into two main areas, the individual side and the collective side. The individual side concerns the relationship between employer and employee, and the collective side concerns the relationship between employers/ employers' organizations and trade unions.

The most common claim is a claim for damages due to breach of the employment protection rules, the CBA or the employment agreement. Breach of employment law or a CBA may in general incur both punitive and financial damages. Punitive damages may be awarded to the plaintiff whose right (according to employment law or CBA) has been violated by the breach. Thus, if e.g. an employer fails to observe the consultation obligation towards the trade union, it is the trade union that will be awarded such damages. On the other hand, if the employer is in breach of a provision in a CBA concerning e.g. minimum wage, the rights of both the trade union and the underpaid employee have been violated and consequently, they can both receive punitive damages for the breach.

However, normally the breach of an employment agreement is sanctioned solely through damages compensating for economic loss, unless a contractual penalty (judged reasonable) has been agreed upon between the parties.

Other common claims on the individual side are e.g. claims to declare wrongful dismissals invalid and claims related to discrimination.

c. Administrative Agencies that Investigate or Adjudicate Claims

There are two main administrative agencies that investigate employment law claims in Sweden: the Equality Ombudsman and the Work Environment Authority.

The Equality Ombudsman is an administrative agency with the principal task to ensure compliance with the Swedish anti-discrimination rules. The Ombudsman investigates employees' complaints and may represent an employee in court. The typical claim is for financial and punitive damages due to a breach of the rules. The Ombudsman mostly represents employees that are not trade union members, and will only represent trade union members if the trade union has, for some reason, refused to represent the employee. The Ombudsman also supervises employers to ensure that they adhere to the provisions of the anti-discrimination rules, and may request employers to take active measures against discrimination.

The Work Environment Authority primarily ensures compliance with the precise rules related to the work environment and working hours. The authority conducts public supervision and may issue an injunction or even a prohibition, as well as a fine.

d. Court / Tribunal System

THE SWEDISH COURT SYSTEM AS RELATED TO LABOUR DISPUTES

* A labour dispute shall be brought directly before the Labour Court in certain situations.

Employment disputes may be brought either to the Labour Court as the first and final instance, or to the district court (i.e. general court for civil and criminal cases) as the court of first instance, with the Labour Court as the final court of appeal. Hearings in the district courts, as well as in the Labour Court, are generally public.

The Labour Court is situated in Stockholm and has the whole country under its jurisdiction. The Labour Court is the court of first and final instance in disputes where the action is brought by a trade union (representing itself or an individual employee), employer's organization or by an individual employer which has entered into a CBA, if the case involves either:

- a dispute which relates to a CBA or to the Co-Determination in the Workplace Act,
- or any other labour dispute where a CBA is in force between the parties and the employee concerned is covered by the terms of the CBA.

It should be noted that most claims between these parties cannot be tried in court before a formal consultation has taken place between the employer/employers' organization and the trade union.

For other disputes, i.e. primarily disputes involving individual employees and employers that are not members of any organization (or not supported by their organization), the district court is the court of first instance, with the possibility to appeal to the Labour Court. Historically, the Labour Court has granted leave to appeal in approximately 30 % of all appealed cases.

The Labour Court normally consists of seven members. However, in cases without precedential significance, and in other issues of a simple nature, the court may consist

of only three members (five members in cases related to discrimination). A chairperson may also take preliminary measures by him- or herself and strike out or stay a case, etc. provided that there are clear procedural rules.

In the normal seven-member-seating there are three neutral members, two representing employee interests and two representing employer interests. Among the impartial members, the chairman and vice chairman are legally qualified. The third impartial member is a person with expert knowledge in labour law matters.

The four members representing employee and employer interests are nominated by the employees' and employers' organizations. The idea is that the four partisan members are able to provide the court with inside knowledge on the opinions amongst the labour market organizations, and also help to legitimize the Labour Court (and its central role in developing the law in this field) in the eyes of the social partners.

e. Alternative Dispute Resolution (ADR)

The majority of labour disputes are settled promptly by consultations between the labour market organizations. However, other forms of ADR (mainly mediation and arbitration) involving third parties are also used to some extent.

Both the Labour Court and the district courts actively strive to facilitate amicable settlements as early as the prehearing, and the courts can, to some extent, act as a mediator in the dispute. However, the courts must properly balance the interest of facilitating the conclusion of a settlement with the strict requirement of objectivity for the courts.

The National Mediation Office mediates disputes in the labour market concerning the conclusion of CBAs (between unions and employers/employers' organizations), especially when there is a risk of industrial action. The Office may appoint a mediator in these disputes if the parties concerned jointly agree to it. If the Office assesses that there is a risk of industrial action, or if an industrial action has already commenced, a mandatory mediator may be appointed without the consent of the parties.

The mediator shall try to persuade the parties to settle the dispute by calling the parties to consultations, and, if appropriate, by putting forward proposals for resolving the dispute. If a party does not participate in the consultation, the mediator may, under certain circumstances, issue a fine. In 2013, the National Mediation Office appointed a mediator in a total of 25 disputes.

Another alternative dispute resolution procedure is *arbitration*, which may be prescribed by the CBA or the individual employment agreement. As a basic rule, the arbitration clause constitutes a procedural impediment both in the Labour Court and in the district courts. However, arbitration clauses are normally not enforceable in disputes regarding discrimination or the right of association. Furthermore, an arbitration clause in an individual employment agreement may be judged unreasonable, and set aside or modified by the court. Arbitration clauses are normally considered reasonable for employers with managerial or equivalent positions, and for employees that have qualified tasks and individualized employment agreements. Arbitration clauses are commonly used in management level employment agreements.

Primarily, the benefit of using arbitration instead of proceeding through the public courts is that arbitration is generally swift and the dispute remains confidential. Further, relevant expertise within the labour law area can be ensured through the appointment of an experienced arbitrator or arbitrator board.

II. The Litigation Process

a. Typical Case

i. Steps in the Process

Normally, the first step for labour market organizations, individual employers that have entered into a CBA and employees/employers that are members of a labour market organization, is to initiate consultations to settle the dispute. If the consultations are unsuccessful the organizations (and individual employers that have concluded CBAs) may typically make their own claims, as well as claims on behalf of their members, directly to the Labour Court as the court of first and final instance.

For other labour disputes (primarily those involving employees and employers that are not members of any organization), the district court is the court of first instance. The district court's judgment in labour disputes may be appealed to the Labour Court as the court of final instance (leave to appeal must be obtained).

When the plaintiff has filed a claim, the court will order the respondent to submit a statement of defense. This constitutes the start of the process leading up to the trial. The main objectives during this process are to clarify any ambiguities in the parties' claim or respective defense, and to establish the factual circumstances that are in dispute. The latter is particularly important, since the parties' only opportunity to present their evidence is at the main hearing. The court will also inquire about the possibility for the parties to achieve an amicable settlement.

The process leading up to the trial normally includes both a preliminary hearing and written submissions from the parties. However, there is, in general, no preliminary hearing in the Labour Court cases that are appealed from the district courts (in most cases there has already been a preliminary hearing conducted in a similar manner, and also a main hearing, in the district court). During the process leading up to the trial, the court will order the parties to finally state the evidence that they invoke. After the expiration of time to submit this information, the parties may not submit any new evidence unless they can reasonably prove that they have had a valid reason for not submitting the evidence earlier, or the proceedings are not substantially delayed.

The court may, in some cases, pass judgment without a final hearing. However, in most cases the final step in the litigation process is a main hearing in which the parties present their respective cases.

In summary, the main hearing is conducted as follows. First, the plaintiff presents its claim and then the respondent states its position to the claim. After that, the plaintiff presents the particulars of the case and the written evidence in support of the claim, and in turn the respondent presents the particulars of the defense and the written evidence in support thereof. Hereafter, examinations of the parties normally take place. First, the parties will be interrogated by their respective legal counsels then a cross-examination will take place, conducted by the counterparty's legal counsel. After the examinations of the parties, the witnesses, if any, will give testimony. These examinations are conducted in the same way as the examinations of the parties. Finally, the parties present their closing arguments.

The Labour Court's judgment is based on what has been presented during the main hearing only. Normally it takes a few weeks to pass the judgment.

ii. Pretrial Proceedings

Consultations may be requested (by a trade union on the one side, and employer/employers' organization on the other) according to the Co-Determinations Act in many different situations. The basic rule is that a trade union may call for consultations on all issues concerning the relationship between its member and the employer. The employer has a corresponding right to call for consultation with the trade union. Pretrial dispute consultation is nearly always a prerequisite for court proceedings in labour disputes, where the employee concerned by the dispute, is a trade union member. However, there is generally no obligation to consult with any trade union if the dispute only concerns an employee who is not a trade union member. Procedural rules for the dispute consultations are stipulated in law and supplemented by more detailed rules (or deviations from law) in the CBA. In these regulations, time limits within which the counterparty must be notified and a claim must be raised are established. If the time limits are not observed, the right to bring a claim will normally lapse.

Consultations typically take place at two levels before court proceedings are commenced: 1) locally between the employer and the local trade union and 2) centrally between the employer and the trade union at the national level. If the consultations have been concluded without a successful settlement, the case may be brought before the court.

The main purpose behind the requirement to consult before going to court is to facilitate amicable settlements. According to a recent government survey, the majority of dismissal disputes are settled without bringing the dispute before the court. For other disputes, there are no official statistics available concerning how often dispute consultations are successful. Considering the fact that roughly only 450 cases are brought before the Labour Court each year, it is quite clear that the parties, in practice, are able to settle the majority of disputes. Additionally, only around 150 judgments are made by the Labour Court annually, due to the fact that a large number of cases are withdrawn as the parties reach settlements during the prehearing.

The dispute consultations also have a function as a preparation phase, where the parties are forced to sort out the relevant contentious questions, which is especially important since judgments in the Labour Court are final.

iii. Role of Witnesses, Counsel and Court / Tribunal

Standard court procedures for civil litigation are applied. This means that it is up to the parties (in practice their legal representatives) to present their case before the court. The court is prohibited from taking any claim or objection into account that has not been invoked by a party in court, and the court may not pass judgment on anything other than what has been presented by the parties. Consequently, all oral and written evidence must be presented by the parties at the main hearing. The parties are free to invoke any evidence deemed necessary to support their claim. However, the oral evidence generally consists of examinations of the parties and witnesses. Witnesses are often of fundamental importance to the outcome of the case.
The main rule states that the parties are responsible for ensuring that invoked witnesses appear for the hearing. Examinations of witnesses are, in principal, also handled by the parties. However, the court may ask questions for clarification purposes.

iv. The Appeal Process

An appeal may be filed with the Labour Court against a judgment of a district court in labour disputes. Generally, the Labour Court will grant a leave of appeal if:

- there is any reason to believe that the Labour Court will come to a different conclusion than that of the district court,
- it is deemed important to establish a precedential judgment in the case, or
- there are other extraordinary reasons.

Historically, leave of appeal has been granted in approximately 30 % of appealed cases. Judgments by the Labour Court are always final and thus, no appeal may be filed against them.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

The typical costs in labour litigation include attorney's fees, compensation for loss of income and travel expenses for parties and witnesses. Attorney's fees vary considerably depending on the complexity of the case.

The basic rule in court is that the losing party shall reimburse the winning party for the litigation costs. If there are several claims in the same case and/or the parties win in different parts respectively, each party can be ordered to bear its own costs, or one of the parties can be awarded adjusted compensation for his costs. In labour disputes, there is an additional rule that the winning party may be ordered to bear its own costs, if the court deems that the basis for bringing the dispute to court was reasonable.

The usual claims in labour disputes are for financial damages (compensating for economic loss) and punitive damages (varying depending on several factors e.g. the severity of the violation and negligence). In case law, there are examples of punitive damages amounting to more than 500 000 SEK, but typical punitive damages do not exceed 100 000 SEK per employee or organization affected by the violation.

Financial damages to employees for economic loss after the termination of employment are maximized by law to 16, 24 or 32 months' salary depending on the employee's total period of employment. However, if a dismissal is declared invalid, but the employer refuses to comply with the judgment, the employer has to pay standardized damages at the previously described levels. It should be noted that the employee is entitled to salary and benefits if the employee is entitled to remain in the position during the court proceedings.

A recent government survey showed that the majority of the disputes related to dismissals tried by the Labour Court take more than 17 months from the dismissal until judgment. If the dispute is tried by the district court as the court of first instance, it takes even longer. Approximately 50 % of trials before the district court that are appealed to the Labour Court, take 35 months or more from the dismissal to the final judgment of the Labour Court.

Concerning other types of labour disputes, there are no official statistics, but the Labour Court estimates that it normally takes around six months from application until judgment.

c. Trade Unions, Work Councils and Other Employee Representative Bodies

In Sweden, trade unions are the only employee representative body involved in labour litigation. The general description of the litigation process above also covers trade unions.

As previously mentioned, trade unions (together with employers' organizations) have a predominant role in Swedish labour disputes both at the consultation stage and in the court proceedings. Trade unions can however, be involved in litigation in different ways. On the collective side, i.e. in disputes primarily concerning the relationship between employers/employers' organizations and the trade unions, the trade unions are naturally involved to protect their own rights. For example, a trade union may claim punitive damages from an employer on the ground that the employer has violated a provision in the CBA.

Trade unions may also bring an action on the individual side (i.e. concerning the relationship between employer and employee), on behalf of its member. For example, a claim for wrongful dismissal or vacation pay may be brought by the trade union on behalf of its member against the employer.

When a trade union member is involved in labour disputes, the union may also be involved as the employee's attorney or as legal assistant (since an attorney must be an individual person, formally, it is the trade union representative who personally takes on the role of attorney).

d. Specialized Litigation Bar

Any individual deemed suitable by the court, considering that person's honesty, knowledge, and earlier activities, may appear as an attorney. Also, the attorney must be able to speak the Swedish language in court.

In practice, labour litigation is typically handled by lawyers specialized in labour law, working at unions, employers' organizations or law firms.

III. Tips to Avoid Litigation

Employers who acknowledge the important role that the trade unions have in the Swedish labour law system, by e.g. complying with the obligations to inform and consult with the unions (as prescribed by law or CBA), and also, in general, maintain good relations with them, can often significantly reduce the risk of labour disputes. There are many ways for trade unions to legally disrupt the business, and unnecessary aggressive actions towards trade unions shall always be avoided. The best practice in dispute resolution is to seek cooperation, with a give and take understanding on both sides, with the concerned trade unions.

Nevertheless, when a dispute arises, it is important to carefully consider if it is a dispute that is suitable for litigation. Employment disputes can be both lengthy and disruptive to the business. Thus, the possibility for a settlement out of court should always be considered at an early stage. A good rule of thumb is to actively seek an amicable settlement in all disputes, except in questions of principal importance (typically concerning interpretation of CBAs).

The mandatory dispute consultations described above will normally present an opportunity for settlement negotiations.

IV. Trends and Specific Cases

a. New or Expected Developments

The parties within the Swedish building industry, (i.e. the trade union Svenska Byggnadsarbetareförbundet on the one hand, and the employers' association Sveriges Byggindustrier on the other hand) recently entered into a CBA regarding main contractor's responsibilities for employees employed by a subcontractor. The issue was raised by the trade union due to their concern that a large number of employees in the building industry may be working under questionable employment conditions. In order to manage the situation, the parties have agreed to include a specific insurance, which guarantees that the employees will receive the minimum salary stipulated in the applicable CBA. The insurance is financed by the employers' organisation. All employees working either in a company that is a member of Sveriges Byggindustrier, or in a company that is engaged by a company that is a member of Sveriges Byggindustrier, may apply for compensation and will, under certain conditions, be entitled to compensation. Further, the main contractor will be responsible for monitoring all subcontractors that are engaged and shall investigate any suspected irregularities. Therefore, it is foreseeable that the main contractor will set up certain conditions that must be fulfilled by the subcontractor before it is engaged in the project.

Further, on the working environment area, it should be noted that the number of employers subject to corporate fines due to violations of the work environment regulation, has increased over time. We believe this increase has to do with new routines for handling corporate fines at the prosecution office.

b. Recent Amendments to the Law

For employers within the agency worker sector, new rules implementing the EC Directive on Temporary Agency Work (2008/104/EC) entered into force in Sweden on 1 January 2013. Since the legislation provides possibilities to deviate from the equal treatment principle, provided that the terms and conditions at the agency worker company are regulated by CBAs, the new regulation will mainly be of significance to employers that are not bound by a CBA. There has not yet been any public dispute in court concerning the new rules.

From 1 July 2013, foreign employers have to report postings of employees to Sweden and provide details for a contact person in Sweden. If the employer does not report a posting and a contact person for registration in due time, the Work Environment Authority will impose a fine on the employer.

Since 1 July 2014, a new system of civil penalties is in force for violations against work environment and working hours' regulations. The new system means that the Work Environment Authority may issue a fine to an employer that violates the rules (without having to prove intent or negligence), instead of referring the matter to the police and prosecutors. The fines vary up to 1 000 000 SEK depending on the seriousness of the offence and the number of employees engaged by the employer. In our opinion, it is likely that this new civil sanction system will lead to an increase in litigation regarding work environment matters.

SWITZERLAND

I. Overview

a. Introduction

In Switzerland, as in most jurisdictions, the settlement of individual disputes should be distinguished from the settlement of collective disputes. While individual disputes are, in principle, submitted to the courts, most collective disputes are settled by arbitration panels or other social organizations.

For many decades, the procedural law and judicial organization rested mainly within the competence of the cantons. However, on 12 March 2000, the Swiss people and the cantons accepted a revision of the new Federal Constitution, which transferred to the Confederation the competence to unify civil (and penal) procedures. The new Swiss Code of Civil Procedure (SCCP) came into effect on 1 January 2011. Despite this, the 26 cantons are still responsible for organizing the court system. Therefore, depending on the jurisdiction, either a labor court or an ordinary district court will hear employment-related complaints.

Depending on the language of the region in which the competent court is located, the proceedings are either held in German, French or Italian.

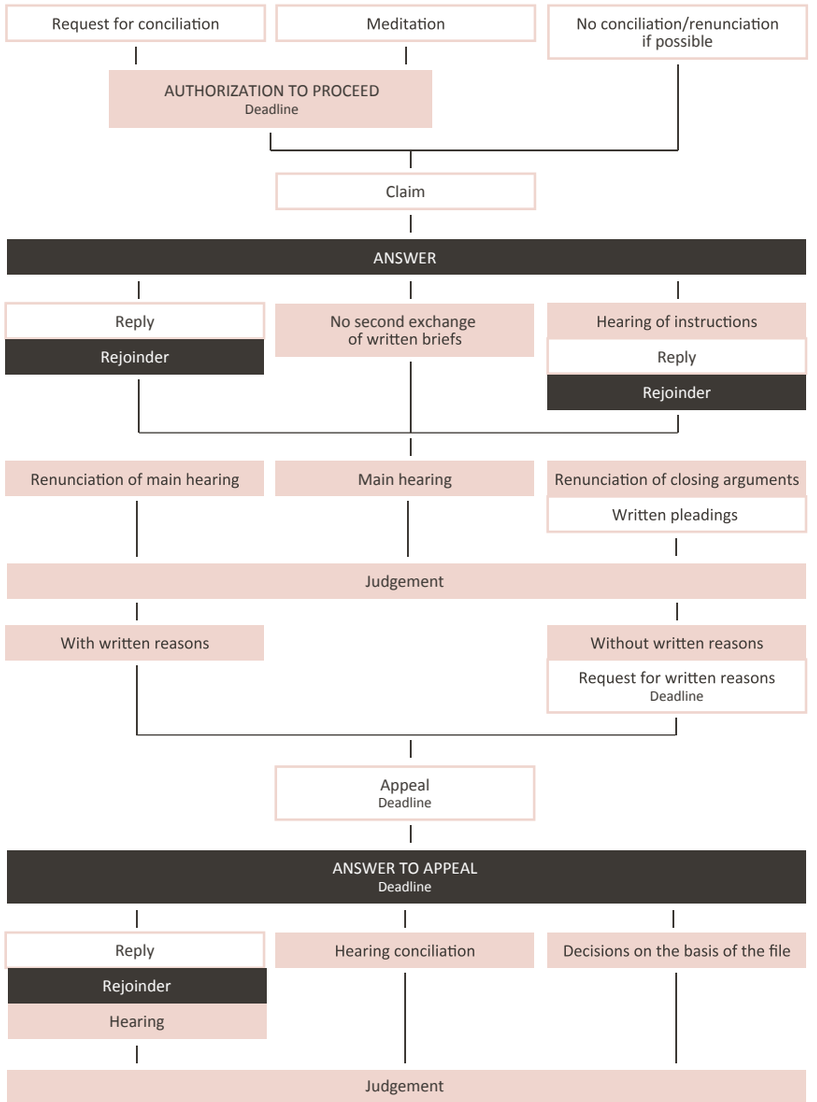
b. Claims

“Numerus clauses” do not apply to employment-related claims. The most common claims, however, concern wrongful dismissal, wage (including bonus claims), compensation of overtime and accrued vacation, written work reference, mobbing, gender discrimination and liability issues.

c. Administrative Agencies that Investigate or Adjudicate Claims

Each canton has a labor inspectorate, which is the inspection and enforcement authority for the implementation of labor legislation. In addition, trade unions carry out checks; in particular in cases where violations of collective agreement provisions have been reported.

d. Court / Tribunal System



The courts which can hear individual disputes arising from employment relationships vary according to the cantonal constitution or legislation. There are three main systems, but the situation is complicated by the fact that in some cantons there are differences according or the communes or the category of workers concerned.

The main systems are as follows:

- Litigation is brought before the ordinary civil courts.
- Litigation is brought before a special court (labor court, industrial court, tribunal de prud'hommes) when the amount at issue does not exceed a given sum (in most cases CHF 30'000 this is to say 25.000€). Above this amount the ordinary courts are competent.
- Litigation is brought, whatever the amount in dispute, before a special labor court. This is the case in some French speaking cantons, for example Geneva and Jura.

In most of the cantons, where there are special labor courts, these courts consist of a lawyer (generally a professional judge who is a member of a civil court) and, in equal numbers, representatives of the employers and employees. In some cantons, the president is competent to decide small cases on his own (generally if the amount in dispute is below CHF 30'000 this is to day about 25.000€).

The Swiss judiciary system offers two levels of appeal: Cantonal and Federal appeals.

At cantonal level, the appeal is brought before an ordinary civil court of appeal.

The Federal Court has no special chamber for cases arising out of employment contracts. These disputes are submitted either to civil law chambers or public law chambers, depending on the case.

e. Alternative Dispute Resolution (ADR)

According to Article 354 SCCP, any claim can be subject to arbitration, insofar as it comes within the parties' free disposal. In the field of labor law, the latter provision must be set in connection with Article 341 para. 1 Code of Obligations, according to which the employee cannot relinquish, throughout the duration of the contract and during the month which follows, the claims resulting from mandatory provisions of the law or from a collective agreement.

Very few collective agreements provide that individual disputes between employers and employees shall be brought before arbitration panels.

At all times during conciliation or court proceedings, parties can, by common request, turn to mediation.

II. The Litigation Process

a. Typical Case

i. Steps in the Process

In labor law disputes, there is a mandatory conciliation hearing before a claim can be filed. When the amount in dispute is equal to or greater than CHF 100,000 – this is to say about 85.000 € -, the parties can mutually agree to omit conciliation proceedings. These proceedings are not public.

ii. Pretrial Proceedings

Conciliation proceedings are initiated by filing a request for conciliation in writing or by oral deposition before a conciliation authority. This request may take the form of a brief summary of the dispute or of a comprehensive statement of claim. As a rule, the parties

must appear in person at the conciliation hearing. Parties domiciled/seated abroad or out of the canton where the proceedings take place, as well as parties prevented from attending for serious reasons, are exempt from appearing personally and may send a representative instead.

Upon the claimant's request and when the value in dispute is below CHF 2,000 – this is to say about 1.500 €, the conciliation authority can, without being so obliged, render a decision on the merits. In disputes with a value of up to CHF 5,000 – this is to say about 3.500 € - the conciliation authority may choose to submit a 'proposition of decision' to the parties, which becomes final and binding unless a party objects to it within a period of 20 days. The conciliation authority may thus be considered as a type of small claims court.

A settlement reached by the parties in the conciliation proceedings has the effect of an enforceable decision. If the conciliation fails or if a party rejects the 'proposition of decision', the claimant is granted a leave to pursue the claim before the ordinary courts.

iii. Role of Witnesses, Counsel and Court / Tribunal

Types of Proceedings

The SCCP provides for three types of proceedings: ordinary proceedings, simplified proceedings and summary proceedings.

Each of the three types of proceedings consists of three stages: the assertion stage, where the parties may plead their arguments and offer evidence available to them; the evidentiary stage; and the post-hearing stage, where the parties may comment on the result of the evidentiary phase before the judgment is rendered.

Courts are usually prepared to outline their preliminary view of the case during the first hearing. The majority of cases are settled based on such preliminary assessments.

Ordinary Proceedings

Ordinary proceedings are regulated by Articles 219 to 242 of the SCCP. This set of rules applies to all labor disputes where the value in dispute exceeds CHF 30,000 (25.000€).

Proceedings are initiated by filing a fully substantiated, written statement of claim. The statement must contain the names of the parties, the alleged facts, the value in dispute, and must list all available evidence substantiating the alleged facts. The claimant may include legal reasoning.

Upon receipt of a statement of claim, the court assesses whether the procedural prerequisites are satisfied. If they have been satisfied, the court will serve the defendant with a copy of the statement of claim and will set a deadline for the defendant to file a written statement of defense and the necessary supporting evidence. This deadline may be extended upon a reasoned request by the defendant. Courts have broad discretion regarding the length of the extension. The claimant has no right to object to or appeal against a court order rendered in this respect.

When filing its statement of defense, the defendant may include a counterclaim, provided that the same type of proceeding applies to the counterclaim. If the defendant does not include the counterclaim in his statement of defense, he is barred from filing a counterclaim in the same proceedings, but may initiate separate proceedings.

Under the SCCP, a second exchange of briefs is not mandatory and should remain the exception. The court may call the parties for an oral main hearing directly after the first

exchange of briefs. However, the court may, at any time, hold an 'instruction hearing' in order to clarify the matter in dispute, complete the facts, attempt a settlement, or generally prepare the main hearing.

At the main hearing, the parties defend their pleadings orally. New facts and new evidence are, as a rule, only allowed at the main hearing if they occurred or were discovered after the exchange of briefs or after a possible instruction hearing, or if they existed earlier but could not be submitted despite reasonable diligence. If there was no second exchange of briefs or no instruction hearing, it is possible to present new facts and evidence without limitation at the beginning of the main hearing.

For a limited number of proceedings where the court has to establish the facts and take evidence ex officio, such as for labor law disputes with a value of up to CHF 30,000, new facts and evidence may be presented until the court has deliberated and rendered its decision.

Simplified Proceedings

Simplified proceedings apply to labor disputes where the value in dispute is below CHF 30,000. The disputes are referred mostly to a single judge who has to establish the facts of the claim ex officio.

Simplified proceedings are exempt from court charges, less formal, favor oral submissions, and provide a more active role to the courts.

Contrary to ordinary proceedings, a claimant may submit his claim orally before the court. In practice, however, oral depositions will presumably remain exceptional. When a statement of claim does not include any legal reasoning, the court will call the parties directly for a hearing. At the hearing, the claimant will have to further substantiate his claim orally and present the evidence available to him.

Likewise, the defendant has to answer the claim orally. This first round is followed by an oral reply from the claimant and a rejoinder from the defendant. As in ordinary proceedings, if the claim has been filed in writing, the court sets a deadline for the defendant to file its written statement of defense.

Summary Proceedings

The SCCP provides for summary proceedings in Articles 248 to 270. These summary proceedings go even further in terms of simplification and expediency. They apply, in particular, to urgent requests and requests for provisional measures.

They also apply to 'clear-cut cases', which are non-contentious matters or matters where the facts can be immediately proven or where the legal situation is straightforward and non-disputable.

As in simplified proceedings, a claimant may present his claim orally, provided that the facts of the case allow such a course of action. Here again, it is to be expected that, in practice, such an oral deposition remains exceptional.

In the context of summary proceedings, the evidence available is limited to documents. Other means of evidence are only admissible if the taking of such *evidence does not delay the proceedings, or is indispensable for the purpose of the proceedings, or if the court has to establish facts ex officio*.

Evidence

Each allegation must generally be supported by corresponding evidence. The statement of claim must include a list of evidence detailing all items of evidence.

The Code of Civil Procedure provides for a conclusive list ("numerus clausus") of admissible evidence: testimony, physical records, inspection, expert opinion, written statements, questioning and deposition of the parties.

The court appraises the evidence at its discretion. The judges are of course not bound by the judicial assertions of the parties ("iura novit curia").
As there is a statutory deadline of three months for filing a claim after the authorization to proceed was granted by the conciliation authority, the analysis and documentation of evidence must begin at an early stage.

iv. The Appeal Process

Each canton has a second-instance, appellate court. At the cantonal level, the SCCP offers three appellate remedies: appeal, complaint, and revision. Subsequent appeals against final cantonal decisions can, in limited cases, be filed with the Swiss Federal Supreme Court. Such appeals are governed by the Federal Court Act.

An appeal is the ordinary remedy against final and interim decisions at first instance and decisions on interim measures, if the value in dispute amounts to at least CHF 10'000. The value in dispute is determined on the basis of the relief sought in the statement of claim and not on the basis of the issues still in dispute when the decision subject to appeal is rendered.

An appeal must be filed within 30 days after notification of the court decision. This is a statutory deadline, which cannot be extended. The grounds of appeal are not restricted. They may be based on grounds such as the incorrect application of law and/or incorrect establishment of facts. In principle, an appeal suspends the legal effect of the decision concerned. However, in exceptional cases where an appeal is devoid of any chances of success, the appellate court may authorize early enforcement.

Complaint

When an appeal is not admissible, such as when the threshold set for the value in dispute is not given, a party may raise a complaint. This is a subsidiary form of appeal. The grounds upon which a complaint may be brought are more restrictive. Incorrect establishment of facts may be raised as a ground only if it is flagrant.

The deadline for filing a complaint is 30 days. In case of summary proceedings, it is 10 days. Contrary to an appeal, a complaint does not, as a rule, stay the enforcement of the challenged decision. However, exceptionally, a stay may be granted. Contrary to an appeal, new evidence and/or new facts are, in principle, not admissible.

Revision

A party can apply to the court of last instance to reopen proceedings leading to a final judgment if significant facts or evidence are discovered, which were not available in the proceedings beforehand. Revision of a decision may also be requested when the decision was unlawfully influenced to the detriment of a party — for instance, by a felony or misdemeanor.

A revision must be filed within 90 days from discovery of the ground for revision and, at the latest, within 10 years after the decision has been rendered. Similar to a complaint, a revision does not suspend the legal effect and enforceability of the decision.

Federal Appeal

The Federal Court decides appeals on issues of federal or constitutional law. For labor disputes, the minimum amount in dispute is CHF 10'000. The Court, however, will deal with cases below this threshold if a question of law is of "fundamental significance". An appeal must be filed within 30 days of the service of the preceding judgment. The scope of re-examination is limited to questions of law. An exception exists if the finding of facts by the lower instances was obviously incorrect or in violation of the law.

b. Costs, Attorney's Fees, Remedies / Damages, Timing, …

As a rule, courts determine the costs of the proceedings in the final judgment. The principle 'costs follow the event' is applicable. Accordingly, the unsuccessful party has to bear all costs. Costs include court fees and part of the legal expenses of the prevailing party ('party compensation'). A party that proceeds in bad faith or wantonly can be made liable for costs even in proceedings for which, as a rule, no costs are charged. In the same perspective, unnecessary costs are charged to whoever caused them.

Costs of employment-related procedures are free where the amount in dispute does not exceed CHF 30'000. The same is true, regardless of the value of the dispute, if the litigation is based on the Federal Act on Gender Equality and the Federal Act on Information and Consultation of Workers in the Enterprise.

Court costs are regulated by cantonal tariffs. In financial disputes, court costs depend on the amount in dispute. Other factors can have an influence, such as the type of procedure, the complexity of the case, and the time spent by the court on the matter. The legal expenses reimbursed to the prevailing party, which do not necessarily cover a party's full legal costs, are taxed according to official rates. Costs for cantonal appeal proceedings are calculated based on the same principles.

The claimant is requested to pay an advance on court costs up to the amount of the expected court costs. Even if the claimant prevails, the advance is not paid back to him, but directly set off against the costs of the proceedings. Courts leave it up to the prevailing claimant to recover the paid court fees from the unsuccessful defendant. If a claimant has no permanent residence or registered seat in Switzerland or if he appears to be insolvent, the defendant may require the claimant to provide security for the estimated party compensation. However, such security deposit is prohibited by the 1954 Hague Convention for parties falling within the ambit of this Convention.

The conciliation proceeding should take a few weeks only. Thereafter, a straightforward claim in an expedited oral proceeding (i.e. the amount in dispute is below CHF 30'000) should take less than six months. Other cases might be pending for one to two years (first instance)

c. Trade Unions, Work Councils and Other Employee Representative Bodies

The capacity of the industrial associations (employers' associations and trade unions) to take action at law has to be examined from two different points of view: at public level and at private level.

Associations can appeal against sentences of cantonal and federal authorities. Nevertheless, according to case law, a provision authorizing these types of associations to defend the interests of their members has to appear in their statutes.

At private level, industrial associations may take action at law when they intend to defend a collective interest, e.g. to safeguard the economic interests of their members. Before acting the organizations are required to attempt conciliation with the employer. Apart from that, they act in their own name and have the same rights as any individual complainant.

d. Specialized Litigation Bar

Professional representation of parties before any court in Switzerland is reserved to lawyers admitted to a cantonal bar. However, there is no specialized litigation bar.

III. Tips to Avoid Litigation

Proper contract drafting and the enactment of the most relevant employment policies (incl. policies on mobbing and sexual harassment) are crucial in order to avoid litigation. Moreover, employers should handle work conflict situations with due care and take all necessary measures for the safety at work.

For larger companies, it is advisable to have a staff representative body in place helping to anticipate, discuss and settle potential conflicts.

IV. Trends and Specific Cases

a. New or Expected Developments

The Swiss legislator is currently discussing an amendment to the Code of Obligations with the aim to better protect whistleblowing at the workplace.

b. Recent Amendments to the Law

The obligation to record working time has recently been eased for the middle management. It is no longer necessary to record the working time in detail (incl. breaks etc.), but it is sufficient to record the overall work time per day /week.

V. Conclusion

An important factor in Swiss employment litigation is the value in dispute. If it does not exceed CHF 30’000, no court costs will be imposed and the simplified proceedings apply. Most cases are indeed settled in court, sometimes under substantial influence from the judge.

UNITED STATES

I. Overview

a. Introduction

In an increasingly global economy, the need to understand the employment law obligations in different jurisdictions becomes increasingly important, especially for employers looking to expand operations into the United States. Unlike other countries where there is one national policy governing employment law obligations, in the United States an extensive set of federal, state, and local laws govern the rights and duties of employers and employees. These laws, which create employment obligations for employers and private causes of action for employees, allow employees to freely bring lawsuits if they believe these rights have been violated. Non-compliance with federal and state laws can carry steep penalties for employers including civil penalties, compensatory and punitive damages, back pay, and attorney's fees. Further, a few federal statutes also allow for criminal penalties, including fines and imprisonment, for egregious violations. Defending the individual lawsuits and class-actions can be very expensive and time-consuming in the American system of broad-ranging pretrial procedures and jury trials. Thus, it is critical for employers to understand the various areas of potential liability within the U.S. employment realm and to learn the best methods and strategies to mitigate their risks.

At-will employment

The most prominent feature of U.S. employment law from the point of view of practitioners in other jurisdictions is undoubtedly the doctrine of "employment at-will," which prevails in all states except Montana. Absent a contrary agreement between parties, at-will employment is the general rule in most jurisdictions. The at-will doctrine allows the employment relationship to be terminated by the employer or the employee at any time with or without notice and with or without a reason. At-will employment status is often conveyed and emphasized to employees at the time they are hired in the written offer letter and may also be described in disseminated personnel policies, such as an employee handbook.

Although employment at-will allows for the easy termination of the employment relationship for "any or no reason", the doctrine is not without restriction in that the various laws described below define impermissible reasons for discipline or termination. For instance, an employer may not dismiss an employee on discriminatory grounds, in retaliation for exercising a protected right, taking protected leave of absence (such as a leave of absence protected under the FMLA) or for reporting company conduct that can reasonably be found to be a violation of the law (whistleblowing).

Different terms of employment, other than employment at-will status, may apply to a unionized workforce under a collective bargaining agreement. The union may have negotiated with the employer that termination and discipline may only be for "just cause." Just cause can mean many different things, but it usually means that (1) the employer must prove that the employee did what the employee was accused of doing and (2) the amount of discipline must fit the seriousness of the offense.

b. Claims

Historically, there has been a distinction between "labor law" and "employment law" in the United States.

Labor law primarily pertains to the relations between management and unions, while employment law covers laws that are generally applicable to all workplaces, whether unionized or not. Employment law can include wage and hour laws, federal antidiscrimination laws, and occupational safety laws, among other laws.

In the U.S., major labor and employment law claims at the federal level are statutorily-based and are derived primarily from Congress' authority to regulate interstate commerce. Beyond federal statutes, additional obligations are derived from the federal regulations promulgated by the governing federal agencies. There are also state and local labor and employment law claims available as well to employees, which are primarily derived from local and state statutes and common law principles. This section will provide an overview of the major labor/employment statutes that apply to the majority of workplaces.

The National Labor Relations Act

The National Labor Relations Act (the NLRA) grants most employees in private employment the right to form, join, and assist unions, collectively bargain, engage in strikes, picket, and engage in other concerted activities. A union is an organized group of workers who collectively join together to pursue policies and goals beneficial to all workers in the union. When a U.S. employer has a unionized workforce, the company and the union negotiate and enter into a collective bargaining agreement, which sets the terms of employment for all employees in the bargaining unit that the union represents. The NLRA regulates what employers can and cannot do in response to employee collective activity and in terms of bargaining with unions. Enforcement powers under the NLRA are granted to the National Labor Relations Board (NLRB). Its role includes protecting employees from employer reprisals for union activity and making determinations on how unions will represent employees. Employers that violate the NLRA are subject to "unfair labor practice" charges. Allegations of unfair labor practices (ULP) go before the NLRB, which then investigates the claims, holds hearings, and institutes remedies if it finds violations of the law. If the ULP charge is found to be valid, and unless there is a settlement, the NLRB will issue a complaint, which will lead to a hearing before an administrative law judge. Based on the facts and evidence presented by the parties, the judge will file a decision recommending either (1) an order to the employer to cease and desist from the unfair labor practice and providing affirmative relief to the plaintiff or (2) a dismissal of the complaint.

The Board, which is composed of five presidentially nominated members that are confirmed by the Senate, provides appellate review of administrative law judge decisions. Any or all parties can appeal by filing exceptions. Usually, a panel of three Board members decides the case by reviewing the case record and all documents produced from the regional investigation. They will take one of three actions: (1) dismiss the ULP charge; (2) find that the respondent committed the ULP charge and order the respondent to cease and dismiss and to remedy the ULP; or (3) remand the case to the administrative law judge for further action. A full panel of five board members decides cases that are novel or potentially precedent changing. As prescribed under Section 10 of the NLRA[1], Board decisions may be appealed to an appropriate U.S. court of appeals and the U.S. court of appeals decision may then be further appealed to the U.S. Supreme Court.

The Fair Labor Standards Act

Enacted in 1938, the Fair Labor Standards Act (FLSA) governs certain aspects of employment including establishing a national minimum wage, offering incentives for employers to maintain a 40-hour work week in private employment in the form of mandated overtime premium pay, and governing the classification of employees as being subject to or exempt from wage and hour restrictions.

The minimum wage nationally, as prescribed under the FLSA, is $7.25 per hour for covered, non-exempt workers. However, this figure is higher in several states and a few

[1]29 U.S.C. §160(f).

cities (for instance, it is $8.05 per hour in Arizona and Florida and $10.30 per hour in San Jose, California). Under the FLSA, employees must be compensated for any time worked during the week. For non-management employees, non-senior administrative and non-professional employees who work more than 40 hours per week, overtime payments must be provided at 150% of the employee's regular hourly wage rate. The FLSA does not require overtime pay for work on Saturdays, Sundays, holidays, or regular days of rest, unless overtime is worked on such days. As a general rule, all employees are covered by the FLSA's minimum wage and overtime requirements unless they are working in occupations specifically exempted from coverage under the statute. Examples of occupations and businesses exempt from coverage are independent contractors and businesses that are not engaged in interstate commerce, or in the production of goods for interstate commerce, although such enterprises would be covered by any applicable state minimum wage requirements.

FLSA violations tend to revolve around two primary statutory issues: the underpayment of wages for time worked, including overtime, or mistakenly misclassifying employees as exempt from coverage under the FLSA. The FLSA is administered by the Wage and Hour Division of the U.S. Department of Labor. The statute can be enforced either through recovery by the Wage and Hour Division on behalf of an aggrieved employee or by suit in federal district court by the Secretary of Labor or by an aggrieved employee or employees. Liability for an FLSA violation can be significant as the employer can be subject to fines and "liquidated damages" (double the overtime pay owed to employees) and, particularly in a large enterprise, the numbers of affected employees can be substantial. In recent years, class actions under the FLSA and analogous state statutes have become extremely popular with plaintiffs' attorneys in the U.S.

The Equal Pay Act of 1963

The Equal Pay Act (EPA) prohibits an employer from discriminating between employees on the basis of sex by paying lower wages to employees of one sex for jobs requiring equal skill, effort, and responsibility. The EPA provides an employee a private cause of action and allows the employee to bring a lawsuit against his employer in a federal district court or to file a charge with the EEOC. The aggrieved employee is not required to first file a charge with the EEOC prior to bringing a lawsuit in a federal district court. Remedies from the lawsuit can include back pay, attorneys' fees, and court costs.

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 prohibits discrimination in recruitment, hiring, wages, assignment, promotions, benefits, discipline, discharge, layoffs and almost every aspect of employment based on race, color, religion, sex and national origin. An amendment was added to Title VII in 1978, the Pregnancy Discrimination Act, which prohibits discrimination on the basis of pregnancy. Title VII applies to private employers, labor unions and employment agencies. The statute sets a limit on the amount a plaintiff can recover, which is based on the number of employees the employer had during the current or preceding calendar year. These damage limits are the maximum total amount of compensatory and punitive damages that may be awarded to a plaintiff.

Compensatory damages pay a plaintiff's out-of-pocket expenses caused by the alleged discrimination (such as costs associated with a job search or moving expenses) and for any emotional harm suffered (such as mental anguish, inconvenience, or loss of enjoyment of life). Punitive damages may be awarded to punish an employer for what the court may find to be an especially malicious or reckless act of discrimination. The damage limits are as follows:

- For employers with 15-100 employees, the limit is $50,000.
- For employers with 101-200 employees, the limit is $100,000.
- For employers with 201-500 employees, the limit is $200,000.
- For employers with more than 500 employees, the limit is $300,000

Title VII also created the U.S. Equal Employment Opportunity Commission (EEOC), a five-member commission with the mission to eliminate unlawful employment discrimination. The Commissioners are appointed to five-year terms by the President and confirmed by the Senate. Title VII is enforced primarily through private actions brought in federal district courts by aggrieved individuals. The major functions assigned to the EEOC under Title VII are to investigate charges filed by employees and to determine if the charges likely contain merit. If the EEOC finds that the charges contain merit, it issues "right to sue" letters, which allow charging employees to commence suit in federal court using a private attorney.

The Americans with Disabilities Act

Enacted in 1990, the Americans with Disabilities Act (ADA) prohibits employment discrimination against a qualified individual with a disability. A "disability" is defined under the ADA as a physical or mental impairment that substantially limits one or major life activities of an individual. Employers are required to provide reasonable accommodations in the workplace that will allow a qualified person with disabilities to perform essential job functions. "In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."[2] There are three categories of "reasonable accommodations":

- *"(i) modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or*
- *(ii) modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or*
- *(iii) modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities."*[3]

However, employers are not required to make accommodations if it would impose an undue hardship on the employer. The ADA is primarily enforced by private causes of action brought in federal district court. Similar to Title VII, the EEOC investigates charges filed by the aggrieved individual or individuals, determines if the charges contain merit, and issues a "right to sue" letter if it finds that the charges are valid.

The Age Discrimination in Employment Act

Enacted in 1967, the Age Discrimination in Employment Act (ADEA) prohibits employers from failing or refusing to hire, discharging, limiting, segregating, or otherwise discriminating against employees with respect to their compensation, terms, conditions or privileges of employment because of their age. The ADEA protects employees who are at least forty years old and applies to all employers with twenty or more employees employed in an industry affecting commerce. Although the EEOC also has the power

[2]29 C.F.R. pt. 1630 app. § 1630.2(o).
[3]29 C.F.R. § 1630.2(o)(1)(i-iii).

to file suit, the primary enforcement mechanisms are private lawsuits by aggrieved individuals brought in federal district court. A right to sue letter from the EEOC is not required prior to commencing a lawsuit in federal district court. Instead, a claimant may file a lawsuit in federal court 60 days after their original charge was filed with the EEOC.

The Worker Adjustment and Retraining Notification Act

The Worker Adjustment and Retraining Notification Act (WARN) requires employers, in certain circumstances, to provide 60 days advance notification to employees of a pending plant closure or mass layoff. This notice must be provided to either the affected workers or their representatives, such as a labor union.

Employers in general are covered by WARN if they have 100 or more employees, excluding employees who have worked less than 6 months in the last 12 months and excluding employees who work an average of less than 20 hours a week. The employees that are entitled to notice under WARN include hourly and salaried workers and managerial and supervisory employees. A covered employer must give notice if an employment site (or one or more facilities or operating units within an employment site) will be shut down, and the shutdown will result in an employment loss for 50 or more employees during any 30-day period. A covered employer must also give notice if there is to be a mass layoff which does not result from a plant closing, but which will result in an employment loss at the employment site during any 30-day period for 500 or more employees, or for 50-499 employees if they make up at least 33% of the employer's active workforce.

Failing to provide proper notification of a mass layoff under the WARN Act may result in workers bringing individual or class action lawsuits in federal district court and being entitled to recover compensation that includes back pay and benefits.

The Family and Medical Leave Act

The Family and Medical Leave Act (FMLA) requires eligible employees working for employers with fifty or more employees to be allowed to take up to twelve weeks of unpaid leave per year for reasons that include the birth or adoption of a child, a "serious health condition" of the employee or spouse, the parent or child of the employee, or for a qualifying exigency arising out of the fact that a spouse, child or parent of the employee is a member of the Armed Forces and is on active duty (or has been notified of an impending call or order to active duty). A "serious health condition" is defined under the FMLA as an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider.[4]

To be eligible for FMLA leave, the employee must have worked twelve months or longer with his or her employer, performed at least 1,250 hours of service for the employer in the twelve months prior to the date of leave, and must work at a site within seventy-five miles of which the employer has fifty or more employees. When leave is foreseeable, the employee is required to give the employer at least 30 days' notice. The form of notice for foreseeable leave is not specified in the Act's provisions. If, on the other hand, the leave is not foreseeable, notice must be given as soon as practical under the circumstances.

The FMLA allows an employee to sue for a civil right of enforcement in both state and federal court or for the Secretary of Labor to sue the employer on the employee's behalf. If the Secretary of Labor brings a suit on the employee's behalf, the employee's right to individually sue the employer is terminated.

[4]29 U.S.C. §2611(11).

The Occupational Safety and Health Act of 1970

The Occupational Safety and Health Act (OSH Act) is a comprehensive workplace safety measure that was enacted by Congress in 1970. Under the OSH Act, employers are required to furnish their employees with a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees. Employers must also comply with occupational safety and health standards which are issued under the Act.

A sub-agency of the U.S. Department of Labor, the Occupational Safety and Health Administration (OSHA), enforces the requirements of the OSH Act and creates occupational safety and health standards. Citations issued for noncompliance with both the OSH Act and the safety standards can result in civil and criminal penalties that include fines and, when violations cause the death of an employee, possible imprisonment.

The Occupational Safety and Health Review Commission (OSHRC), an independent administrative agency, serves as the impartial adjudicator of disputes between OSHA and private employers. OSHRC consists of two levels of review: trial level review that is provided by federal administrative law judges and discretionary appellate review of the administrative law judge decisions provided by three presidentially appointed Commissioners (currently, only two Commissioners sit on the Commission). The Commission decisions are further reviewable in the federal courts of appeals. Unlike the employment laws already discussed, there is no private cause of action for employees aggrieved under the OSH Act. Instead, the OSH Act is enforced entirely by OSHA through administrative litigation within OSHRC and the federal courts of appeals. A minority of states have also chosen to develop and enforce their own plans setting and enforcing occupational safety and health standards.

The Employee Retirement Income Security Act of 1974

The Employee Retirement Income Security Act (ERISA) is a detailed regulatory scheme that governs the provision of pension benefits to employees by ensuring that pensions are adequately funded. It also protects and regulates the welfare benefits provided by employers with regards to medical, dental and vision insurance, life insurance, and disability income plans.

One of ERISA's purposes is to enhance the reliability and fiscal health of pension and welfare plans established by private employers. Another purpose is to enhance the ability of pension benefits to be portable, by allowing workers to earn nonforfeitable benefit increments in successive jobs. ERISA does not require that benefits be provided by employers and does not prescribe particular levels of benefits for employees. It simply regulates the provision of these benefits if an employer chooses to provide them to its employees and requires that if benefits are offered, they comply with regulations prohibiting discrimination and are administered fairly under the terms of the benefit plan. The administration and enforcement of ERISA is divided amongst the IRS, the Pension Benefits Guaranty Corporation, and the Department of Labor.

ERISA also includes a provision that pre-empts state laws governing employee benefit plans and arrangements. If an employee wants to file a claim against the pension plan, they must first use the internal claim and dispute resolution process that is required to be provided directly under the pension plan. After this process is exhausted, the claimant may pursue a claim in the judicial system but the employer has the right to have the case decided in a federal court in lieu of a state court.

Health Insurance Portability and Accountability Act of 1996

Employers that administer health insurance plans for their employees may be subject to the Health Insurance Portability and Accountability Act (HIPAA), which, among other things, protects the confidentiality and security of healthcare information. It requires that individuals receive notice on the use and disclosure of the information that pertains to their mental or physical health, healthcare, or payment for health services. It also gives individuals the right to request an accounting of such disclosures, to view and correct any disclosures, and to limit the purposes for which the information may be used without the individual's consent. HIPAA also imposes nondiscrimination requirements on employers, group health plan providers and insurers to ensure that individuals are not excluded from coverage, denied benefits, or charged more for coverage offered by a plan or issuer, based on health status-related factors.

If covered by HIPAA, the documents regarding the health plan must include provisions stating that the covered entity will comply with all the requirements of HIPAA. Violations of HIPAA, even if committed by the plan administrator instead of the employer, may lead to severe civil or criminal liability.

State level employment law claims

The laws which govern employment relationships vary greatly from state to state, but almost all states have employment discrimination/harassment prohibitions that mirror federal law. In fact, some states expand the federal categories of protected persons and allow unlimited damages, and in those jurisdictions the state law is far more commonly relied upon than federal law by employees asserting claims. Other states have more stringent requirements than the minimum wage and overtime provisions under the FLSA. To the extent the state law versions of the FLSA provide for better benefits than the federal law, such as with a higher minimum wage, the state law will supersede federal requirements. A number of states have their own versions of the WARN act, which differ from the federal requirements, including the California WARN Act, Illinois WARN Act, New Jersey WARN Act, and New York WARN Act.

Both federal and state discrimination laws typically feature specific provisions prohibiting retaliation by the employer against an employee who asserts discrimination claims. These are quite important in the U.S. context, as frequently juries who may be unsure about whether discrimination actually took place will more readily find that the employer, even if innocent of the discrimination charge, took action against the employee to punish him or her for having brought the complaint and/or to intimidate other employees from pursuing their own discrimination claims.

Another type of claim available in certain federal contexts and in some states is the whistleblower cause of action, in which the employee asserts that (s)he was retaliated against by the employer because (s)he objected to or challenged illegal or non-compliant activity in a variety of areas. Examples include Sarbanes-Oxley, a congressional act passed in 2002 that establishes a broad array of standards designed to increase corporate responsibility, enhance financial disclosures and combat corporate and accounting fraud, and state laws such as the New Jersey Conscientious Employee Protection Act. This is a popular claim with employees and potentially perilous to the employer because it may easily result in enhanced or punitive damages.

In addition to the various state level labor and employment statutes available, workers' compensation is also available in all fifty states and the District of Columbia. Workers' compensation is best understood as a no-fault insurance system for paying workers who are injured during accidents that occur on the job and is the exclusive remedy individuals have against their employers for these injuries. It removes the option to file a lawsuit and

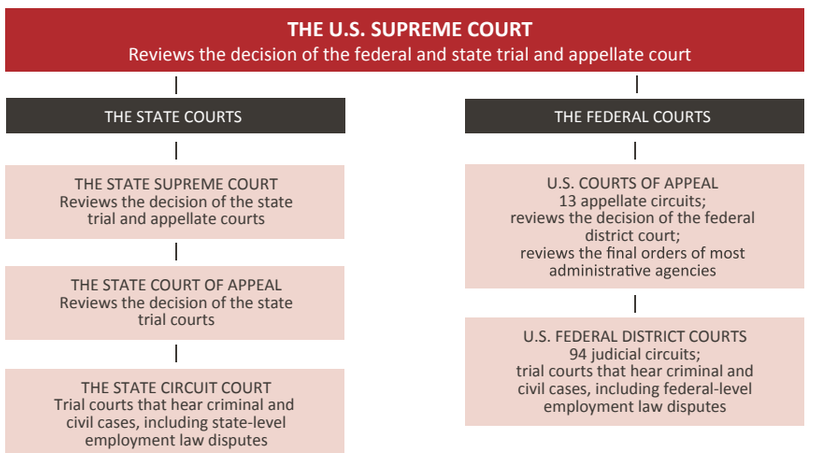
allows for guaranteed benefits for injured workers. If a worker is injured, she receives immediate compensation for her medical expenses and then receives cash benefits for lost work after three to seven days. If a worker is killed, the survivors generally have the costs for the funeral expenses covered and may receive wage-replacement benefits. Employers pay for workers' compensation typically in one of three ways: premiums to a state-run insurance program, payments to an insurance company, or they self-insurance and pay benefits directly to workers.

c. Administrative Agencies that Investigate or Adjudicate Claims

Enforcement of the employment rights created by federal and state laws primarily takes on two distinct forms: administrative enforcement by agencies or private litigation by individuals with causes of actions. With the administrative enforcement model, a specialized agency tasked with enforcing a federal statute, such as the Department of Labor and the NLRB, interprets regulatory standards and pursues instances of violations through investigation and litigation. The litigation may occur within a different division of the enforcing agency itself or through an independent adjudicatory agency. Any further judicial review takes place in the federal courts of appeals with final review resting with the Supreme Court. In contrast, the private litigation model involves an aggrieved employee or an agency with the authority to represent employees in court filing a lawsuit and asserting the statutory rights that have been violated. Depending on if it is a federal or state case, these court decisions are reviewable in federal or state courts of appeals. The U.S. Supreme Court or the highest court of the state in question provides final review after the appellate courts.

d. Court / Tribunal System

THE U.S. COURT SYSTEM



e. Alternative Dispute Resolution (ADR)

Alternative dispute resolution, in the U.S. context, is a proceeding or process used to resolve a dispute outside of litigation. It includes mediation and arbitration. As defined by one writer, arbitration is "a simple proceeding voluntarily chosen by parties who want a

dispute determined by an impartial judge of their own mutual selection, whose decision, based on the merits of the case, they agree in advance to accept as final and binding."[5]

Arbitration is an adversarial proceeding in which the parties present evidence and argue the case to the arbitrator, who then decides which party wins. The process is abbreviated and less formal than a trial. Arbitration awards are virtually immune from judicial review. Absent proof of fraud or corruption, a court will likely enforce an award no matter how unreasonable it may seem. Some US employers require employees to agree to mandatory arbitration as a condition of employment; others prefer to litigate employment disputes.

Mediation is the process where parties attempt to negotiate a settlement with the use of a neutral third party. The parties select the mediator, who meets privately with each party to discuss the strengths and weaknesses of each side's case. The mediator helps the parties identify the risks of the case and encourages them to consider how those risks can affect their goals. In order for any settlement to be concluded, the parties must voluntarily agree to accept it. The mediator does not have the power to force the parties to agree on a settlement. Unlike arbitration, both parties can still decide to pursue litigation. Mediation is a very popular alternative in US employment matters given the time, expense and exposure of litigation. Settlement is the process where the parties reach an agreement outside of the courtroom. In fact, most employment law matters settle before reaching the trial stage. Settlement can be discussed by any party at any time during litigation and can happen in the beginning of the litigation or shortly before the parties meet for the trial. It is often a cost-effective alternative to trial.

II. The Litigation Process

a. Typical Case

Labor and employment lawsuits take place in federal courts, state courts, federal administrative agencies, and within state administrative agencies. All federal court litigation occurs under uniform procedural rules.

In the United States, each state's court system exists independently of the federal court system and on questions confined to state law, federal courts have no power to supervise or review the courts of the states. The federal courts are composed of three levels: district courts, courts of appeals, and the U.S. Supreme Court. District court decisions may be appealed to the court of appeal within whose circuit the district court lies. Decisions by federal courts of appeal are subject to review by the U.S. Supreme Court, which has discretion to grant or deny review, but as a practical matter reviews very few cases. Each state has its own system of courts of first instance and appellate tribunals, generally leading to a state supreme court which will review selected matters.

The plaintiff in the lawsuit is the person bringing the action, i.e., the employee(s). The defendant is the company and, possibly, individuals who were involved in the termination decision or other allegedly discriminatory act. Typically, an aggrieved employee will hire a plaintiff's lawyer that represents the employee on a contingent fee basis, where the plaintiff will not be required to pay for any legal fees if the lawsuit fails. Some of the more remarkable aspects of the US litigation system to civil law practitioners include its high costs, extensive burden on the parties, delay, and eye-catching levels of exposure. While the federal and various state systems vary considerably in their procedural details, they share a number of characteristics, which help explain these qualities.

[5]Chappel, Arbitrate...And Avoid Stomach Ulcers, 2 ARB. MAG., Nos. 11-12, at 6, 7 (1944).

i. Steps in the Process

Initiating the Lawsuit/Notice Pleadings

In federal and state court, a lawsuit starts with the filing of a complaint by the plaintiff with the court and with the formal delivery of a copy to the defendant. The complaint describes what the defendant did (or failed to do) that caused harm to the plaintiff and the legal basis for holding the defendant responsible for that harm. A complaint must contain all claims the plaintiff has. Unlike many civil law jurisdictions, the federal and state court systems in the U.S. require very little detail in the initial pleadings as long as the employer is put on notice of the nature of the claim. It is assumed that the details will be developed in the pretrial discovery process described below.

The defendant typically then files an answer to the complaint and any counterclaims it may have against the plaintiff, again in a fairly general way. Instead of filing an answer, a defendant may choose instead to file a procedural or dispositive motion in an effort to immediately put an end to the litigation. Once an answer is filed, discovery is permitted under the court's supervision. Civil lawsuits generally proceed through distinct steps: pleadings, discovery, trial, and possibly an appeal. However, parties can halt this process by voluntarily settling at any time. Most cases settle before reaching trial. Arbitration is sometimes another alternative to a trial.

The Discovery Process

During discovery, the parties ask each other and third parties for information about the facts and issues of the case. Discovery consists of written questions to be answered under oath, requests to produce documents or data, requests for inspections and examinations, and depositions (the oral examination of prospective witnesses under oath outside the court's presence). The elaborate pretrial proceedings in U.S. employment litigation—so alien to employment matters in most of the world—become easier to understand when viewed in the context of the very open-ended quality of discrimination and other U.S. employment law claims, together with the adversarial nature of the U.S. litigation process. U.S. discrimination litigation, for example, often hinges on intent of the employer and its managers; yet witnesses do not normally create documents or make statements admitting explicitly that they have engaged in discrimination. The question becomes one of surrounding circumstances, treatment of similarly situated employees, and statements from which one might infer a malicious intent. This is a far more complex inquiry than the typical civil law question of whether there was "good cause" to terminate an employee. Moreover, courts in the U.S. system act more as "referees" than active inquisitors, leaving more freedom for each party to present its case with a broad view of relevance.

Document Requests

The parties will nearly always file requests for production of documents, which ask the opposing party to disclose relevant documentation about the case. These requests are far more sweeping than those encountered in a civil law system; the concept goes far beyond the identification of individual specifically-described documents to encompass broad categories of files which need not even be admissible in evidence at trial, as long as their disclosure might reasonably be expected to lead to the identification of other admissible evidence. The complexity of responding to document requests has increased dramatically in the electronic age, as e-mail and other electronic documents have come within the ambit of routine discovery.

Interrogatories

Information about the case and the other side's position can also be gathered formally through written questions known as interrogatories that are to be answered in writing under oath. This technique, long subject to overuse, has been controlled in the federal system and in some but not all states. There are still jurisdictions where a party may propound over 100 detailed questions requiring extensive research and careful drafting of answers by the other party.

Depositions

A deposition is a question and answer session under oath. One side notices (requests) a deposition of a particular witness or corporate representative. A plaintiff's deposition may take anywhere from one to two (sometimes even three or more) days, depending on the complexity of the case. The typical goals of a deposition include (a) finding out what an adverse witness knows about the case and is likely to testify about at trial; (b) obtaining testimony which may be used in a pretrial motion for "summary judgment" (a request to the court to resolve the case for a party without the need for a trial); (c) obtaining testimony to be used at trial from a witness who will not appear in person at the trial; and (d) eliciting statements which may be used to "impeach" (contradict) the witness' testimony at trial. Preparation for the deposition of a key witness is arduous and exacting for both the party conducting the examination and the party whose witness is being examined.

ii. Role of Witnesses, Counsel and Court / Tribunal

Jury Trials

The unique U.S. feature of a jury trial to determine an employment suit colors all of the preparation of the case and can greatly increase its time and expense. In cases with significant exposure, it is common to engage jury research firms and stage mock trials just to test themes a party intends to present and gauge the likely reaction to its key witnesses. In even the simple case, the attorneys must carefully prepare their witnesses for testimony, develop lines of cross-examination for adverse witnesses, identify and prepare expert witnesses, prepare opening and closing statements, propose written instructions for the court to give the jury, and argue orally and in writing the many legal issues that will emerge before and during the presentation of evidence.

Damages and Other Exposure

In a typical employment case, the employer is potentially exposed to back pay for the period from termination to trial, compensatory and punitive damages, and payment of the plaintiff's attorney's fees if the employee prevails. (The reverse is seldom true, that is, the employer can rarely recover its attorney's fees if it prevails.) These amounts can easily reach several million dollars where the jury finds the employer acted badly or where the employee is highly compensated. Given the potentially high exposure and the labor-intensive pretrial process in the U.S., it is not unusual in many U.S. jurisdictions for trial of a single-employee matter to cost $250,000 or more in legal fees alone.

Class Actions

Class actions are lawsuits, which aggregate a large number of employee claims into a single matter, before a single court and jury. In the employment law setting, typical class action claims include wage and hour disputes and class-wide discrimination on race, gender, age or other grounds. The complexity and potentially massive exposure associated with recovery by a large group of employees generates even more extensive pretrial proceedings and preparation than the single-employee suit.

iii. The Appeal Process

A party dissatisfied with the result of a trial may appeal the decision to a higher court. At the federal level, there are twelve courts of appeals in the United States each within a designated judicial circuit. These courts of appeals hear both district court decisions and the final orders of most administrative agencies. Typically, a panel of three judges selected from the appellate judges appointed to that particular appellate court will hear and decide an appeal. At the state level, typically parties can appeal a state court decision to a state supreme court or state court of appeals. The parties will argue their positions in briefs submitted to the appellate court and the record of evidence from the trial will be submitted to the appellate court to help the court understand the case and make a decision. Typically, the appellate court reviews the case for a legal error only and will only review the factual evidence or override a jury's finding of fact in unusual circumstances. The appellate court's decision is presented in an opinion where the court affirms the verdict if it finds that there was no error. If there was an error, the appellate court will reverse the verdict or order the trial court to administer a new trial. An appeal can add additional time to the litigation process by a year or more.

III. Tips to Avoid Litigation

An employer can take several proactive steps to reduce the likelihood of litigation:

- Train managers and supervisors to monitor inappropriate behavior and employment problems and to document all actions taken related to compliance with federal and state laws.
- As violations can stem from both the action and inaction of a supervisor and the failure to recognize a situation that may have legal consequences, it is important to train managers and supervisors to avoid violations of applicable laws or employee rights and to take action if they learn of a potential issue that may violate applicable laws.
- Institute policies where any complaints of discrimination and harassment are immediately investigated, and, if warranted, institute prompt remedial measures to prevent any future reoccurrences of discrimination or harassment.
- Have a legitimate business reason for dismissing an employee and have backup documents to prove the reason if the employee claims the dismissal was unlawful.
- Treat employees with fairness, dignity and respect during employment and during the termination process.
- Put all policies in writing and communicate them to employees through the use of an employee handbook. Use stand-alone memos from time to time to clarify or highlight particular polices.
- Ensure employees are paid in accordance with applicable laws.
- Maintain accurate documentation of everything (why an employee was terminated, what led to the termination, the overtime hours of non-managerial employees, etc.) and ensure the documents are easily accessible and stored safely.
- Since employees usually complain before they file a claim, a charge, or a lawsuit, ensure employees have a well-publicized avenue for expressing their complaints without fear of retaliation.
- Before making a final decision to discharge an employee, determine if the action will be viewed by the employee as unfair, a surprise, or inconsistent with situations involving other employees. Determine if an employee that is within a protected class due to race, sex, age, national origin, religion, or disability, and if there is arguably any pattern of activity that could be perceived as violating federal and state anti-discrimination laws. Assessing how an employee will respond to a particular job action before making a final decision will allow an employer to communicate the decision more effectively.

- Ensure that all government mandated non-discrimination notices are posted in areas accessible to employees.
- Ensure that your personnel policies are regularly updated and that your policies are consistently applied and enforced across-the-board upon all employees in the workforce.
- Train managers in performance management techniques, and conduct regular performance evaluations of employees, taking place at least once a year. Document performance problems including verbal warnings and performance-related counseling. These items can help defend a lawsuit and provide proof as to the reason for a termination, demotion, or decision not to promote.

Best Practices

There are several key best practices that can minimize the risk of litigation and put employers in the best footing. It is important to have well-drafted personnel policies in place that are memorialized in writing, because they prevent and minimize employment law liabilities, put employees on notice as to what is expected of them, and enable employers to treat employees in a fashion that workers regard as more fair and just than if personnel policies were unwritten. These policies also give employers more discretion to terminate employees who do not follow the company's rules and expectations and can provide support for an employer's disciplinary decisions more easily in front of a judge or jury.

It is important to have procedures in place where employees can raise and resolve work-related grievances or complaints. This will allow a grievance to be immediately identified and quickly resolved before it escalates to an employee filing a lawsuit or filing a complaint. The written grievance also serves as a record of the employee's problem and locks them into a certain version of the facts that led to the grievance.

To avoid running afoul of FLSA requirements, employers should regularly evaluate their payroll practices and compensation decisions, as well as their job descriptions. Employers should also institute an anti-harassment policy that prohibits harassment in the workplace based on an employee's sex, race, color, religion, age, national origin, disability or any other categories protected by federal, state or local laws. It is also important to institute a complaint procedure and to ensure that the anti-harassment policy is both disseminated to all employees and is rigorously enforced if there are any complaints.

Employers should maintain an Equal Employment Opportunity (EEO) policy that states that all employees and job applicants will be judged on the merits of their performance and experience, and not their sex, age, national origin, religion, race, disability, or other legally protected categories under federal, state or local laws. Having an EEO policy in place in an employee-initiated lawsuit can be helpful in defending a discrimination lawsuit; while not having one in place can work to the disadvantage of the employer during the lawsuit.

There should also be a reasonable accommodation policy that shows all employees that the employer is committed to providing reasonable accommodations to any employees with a disability that asks for it. This will place the burden on employees to request reasonable accommodations on a timely basis and can help defeat a lawsuit where an employee or rejected applicant claims that the company should have provided them with an accommodation. Similarly, it is best practice to have a religious accommodation policy that allows employees to seek time off for observing religious holidays and that places the burden on employees to notify the employer if a religious accommodation is needed. The lack of such a request by the employee and a subsequent lawsuit can make the religious discrimination lawsuit easier to defend.

Finally, employers should implement a personnel policy that describes the basic leave policies in place and the actions employees must take to affirmatively seek a leave of absence. Having a leave of absence policy in place will help the employer comply with the FMLA and other state and federal leave of absence statutes. It will also allow the employer to have the appropriate methods in place for responding to requests from employees for a leave of absence.

EUROPEAN UNION

I. Overview

a. Introduction

There are four types of procedures that are central to EU litigation: the request for preliminary ruling; the action for annulment; the action for infringement and State liability for breach of EU law.

These four procedures will be presented in a clear, concise and reader-friendly manner. To this end, the explanation of each procedure will be accompanied by examples and practical tips so that the reader can easily understand how EU litigation may be relevant to the daily practice of employment law.

Before examining EU litigation per se, the principles of primacy and direct effect will be explored so as to show how national and EU law intertwine as is often the case before the national judge.

II. Primacy

a. Notion

The principle of primacy is one the cornerstones of the European legal order. Together with the direct effect, it regulates the relationship of EU law with the national laws of Member States. According to the principle of primacy, EU law is **superior** to the national laws of Member States so that Member States may not apply a national rule that contradicts EU law.

With EU law having precedence over national law, the uniform protection of citizens across the national territories of the EU is ensured, since Member States cannot validly invoke their national laws as an excuse for not applying EU law.

The principle of primacy is not set forth in the treaties on which the EU is based, yet it is a fundamental principle of EU law which has been enshrined by the Court of Justice of the European Union (CJEU) in its well-known Costa v. Enel Case of 15 July 1964.

In this case, the Court declared that the laws issued by the European institutions are to be integrated into the legal systems of the Member States, who are obliged to comply with them. Therefore, EU law takes precedence over national laws, so that if a national rule is contrary to a European legal provision, Member States' authorities cannot apply it. National law is neither rescinded nor repealed, but its binding force is suspended.

b. Scope

The CJEU has made clear that the primacy of EU law is absolute:

- **All national acts** are subject to this principle, irrespective of their nature: acts, regulations, decisions, ordinances, circulars, etc., irrespective of whether they are issued by the executive or legislative powers of a Member State. The judiciary is also subject to the primacy principle. Member State case-law should also respect EU case-law. The CJEU has ruled that even national constitutions should be subject to the principle of primacy. As such, it is the responsibility of national judges not to apply the provisions of a constitution which contradict EU law;
- Likewise, it applies to **all European legal acts** with binding force, whether emanating from primary legislation, mainly the Treaty on the European Union and the Treaty on the Functioning of the European Union (TFEU), or secondary legislation (regulations, directives and decisions).

c. Consequence: the National Judge Suspends the Application of National Law

As for the direct effect principle, the CJEU is responsible for ensuring that the principle of primacy is adhered to. Its rulings may impose penalties on Member States who infringe it once the Commission brings an action for failure to fulfill an obligation of EU law (cf. *infra*).

It is also the task of national judges to ensure that the principle of primacy is adhered to. Should there be any doubt regarding the implementation of this principle, judges may make use of the reference for a preliminary ruling procedure (cf. *infra*). Most importantly, national judges, of their own motion, are under the **obligation to refuse** to apply any conflicting provision of national legislation, even if it is adopted subsequently, and it is not necessary for them to request or await the prior setting aside of such provisions by legislative or other constitutional means.

The principle of primacy entails refusal to apply national law, but it does not replace it with the provision of EU law with which it is in conflict. For that, the European provision must be directly applicable within the national legal order so that it can be invoked before the national judge.

III. Direct Effect

a. Notion

Direct effect is a cornerstone of the European legal order. Together with the principle of primacy, it defines how the national and European legal orders intertwine. The direct effect of EU law has been enshrined by the Court of Justice in its famous *Van Gend en Loos* judgment of 5 February 1963.

In this judgment, the CJEU states that EU law not only engenders obligations for Member States, but also rights for individuals. Individuals may therefore take advantage of these rights and **directly** invoke them before national courts. As a result, it is not necessary for the Member State to adopt the European act concerned into its internal legal system. Individuals may invoke it directly, despite the absence of any prior implementation into national law.

The direct effect is an undisputed principle of EU law, but it is subject to conditions, which vary depending on the legal act at issue. It is also important to specify against whom that legal act may be invoked, the state or another individual.

b. Conditions

There are two aspects to direct effect: a **vertical** aspect and a **horizontal** aspect.

Vertical direct effect is concerned with relations between individuals and the State. This means that individuals can invoke a European provision in relation to the State.

Horizontal direct effect pertains to relations between individuals. This means that an individual can invoke a European provision in relation to another individual.

According to the type of act concerned, the CJEU has accepted either a full direct effect (i.e. a horizontal direct effect and a vertical direct effect) or a partial direct effect (confined to the vertical direct effect).

Direct effect and primary legislation

As far as primary legislation is concerned, i.e. the treaties at the top of the European legal order, the CJEU established the principle of the direct effect in the *Van Gend en Loos* judgment. However, it laid down the condition that the obligations must be **precise**, **clear** and **unconditional** and that they do not call for additional measures, either national or European.

In the Becker judgment of 19 January 1982, the CJEU rejected the direct effect where the States have a margin of discretion, however minimal, regarding the implementation of the provision in question.

Direct effect and secondary legislation

The principle of direct effect also relates to acts of secondary legislation, such as those adopted by European institutions on the basis of the founding Treaties. However, the application of direct effect depends on the type of act:

- The **regulation** always has direct effect. In essence, Article 288 TFEU specifies that regulations are directly applicable in the Member States. This direct effect is vertical as well as horizontal;
- The **directive** is an act addressed to Member States and must be transposed by them into their national laws. However, in certain cases, the CJEU recognizes the direct effect of directives in order to protect the rights of individuals. Therefore, the CJEU rules that a directive has direct effect when its provisions are **unconditional** and sufficiently **clear** and **precise**. However, it can only have direct vertical effect and it is only valid once the transposition deadline has elapsed;
- The **decision** may have direct effect when it is addressed to a Member State. As a consequence, the CJEU only recognizes a direct vertical effect.

c. Consequence: the National Judge Applies EU Law

Once the conditions for direct effect are met, the individual can invoke the European rule before the national judge, who must apply it to resolve the case, as he/she would with national law. Whereas primacy leads to a national law being set aside, direct effect replaces it with legal obligations directly flowing from EU law with which the national judge must comply.

d. Examples and Practical Tips

The importance of direct effect and primacy may be illustrated by the following example directly taken from case-law.

In the *Defrenne* case, the CJEU had to deal with a preliminary reference arising from an action before a Belgian court between an air hostess and her employer. The air hostess was claiming she had been discriminated against by her male colleagues, because she was paid less to perform the same job. Back then (1976), Belgian law did not provide for protection against discrimination based on sex and her salary was paid according to the contract she had signed.

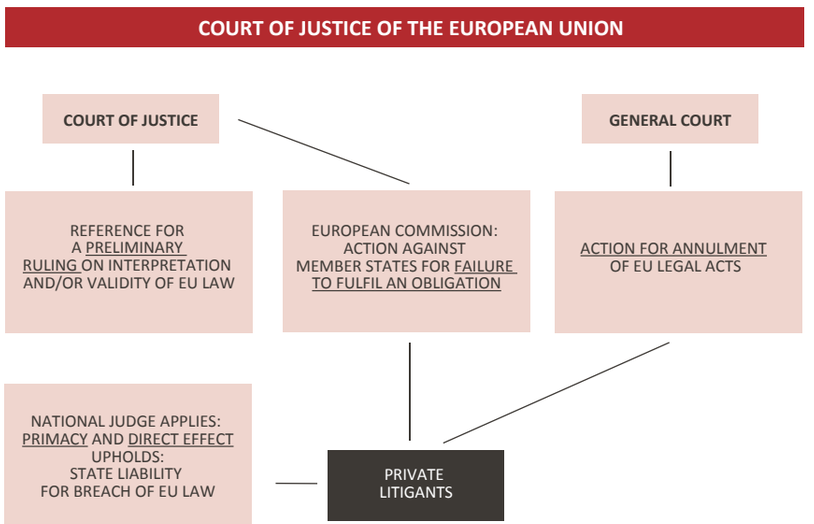
The CJEU took the position that the principle of equal pay for equal work set forth in the treaties overruled the contractual provision at stake by virtue of the principle of primacy. Therefore, the latter had to be set aside and replaced by the principle of equal pay for equal work found in EU law, which the CJEU deemed directly applicable in the Belgian legal order. As a consequence, the air hostess was able to claim compensation despite the contract in force on the basis of a right directly flowing from EU law.

This is only one example among many to show that it is important for employers to **look beyond national law**. They have to respect EU law as well even when it is not part of their own national law. As such, nothing prevents a national judge from setting aside a contractual provision, a collective labor agreement or even a piece of legislation which is contrary to EU law, and replace it by a provision of EU law which meets the conditions for direct effect.

As a consequence, EU law as well as the CJEU case-law must be closely followed, in particular regarding the issue of non-discrimination.

IV. The Reference For a Preliminary Ruling

THE EU COURT SYSTEM



a. Notion

The reference for a preliminary ruling is a procedure exercised before the CJEU. This procedure enables any national court to question the CJEU on the interpretation or validity of EU law. The reference for a preliminary ruling therefore promotes active cooperation between the national courts and the CJEU and the uniform application of EU law throughout the EU.

In contrast to other judicial procedures, the reference of a preliminary ruling is not a recourse taken against a European or national act, but a question presented to the CJEU on the application of EU law, an answer to which is deemed important by the national judge to solve the case at hand.

b. Personal Scope

Where a question pertaining to the validity or interpretation of EU law is raised before a national court or tribunal, that court or tribunal **may** request a preliminary ruling if it considers that a decision on the question is **necessary** for it to provide a judgment. However, where such question is raised before a national court or tribunal against whose decisions there is no judicial remedy under national law, that court or tribunal **must** request a preliminary ruling.

In order to determine whether the jurisdiction that asks the question is a court or tribunal within the meaning of EU law, various criteria will be taken into consideration including whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies the rule of law, and whether it is independent.

The place of the parties to the main proceedings in a preliminary ruling procedure is quite limited since it is for the national judge to decide if a question has to be asked to the CJEU or not. The parties may only suggest that a reference be made and try to frame the question before it is asked. Once the question is asked, the parties can still provide observations as to how the question should be answered (cfr. *Infra*).

c. Material Scope

The preliminary reference must pertain to the **validity** or **interpretation** of EU law.

There are additional requirements to be met. In that respect, the national judge may consider that a ruling is not necessary if:

- the CJEU has **already ruled** on the matter. In this case, the CJEU will not formally decline to answer, but will simply refer to previous case-law;
- the correct application of EU law is so **obvious** as to leave no scope for any reasonable doubt. This is called the “acte clair” doctrine.

The CJEU will, on the other hand, decline to provide a ruling if:

- the question referred is **hypothetical**;
- the question is **not relevant** to the substance of the dispute;
- the question is **not sufficiently clear** for any meaningful response;
- the facts are insufficiently clear for the application of the legal rules.

d. Effects

The submission of a reference for preliminary ruling calls for national proceedings to be **stayed** until the CJEU has given its ruling. The CJEU Decision has the force of **res judicata**. It is binding not only on the national court on whose initiative the reference for a preliminary ruling was made, but also on all of the national courts of the Member States.

In the context of a reference for a preliminary ruling concerning validity, if the European instrument is declared invalid all of the instruments adopted based on it are also invalid. It then falls to the competent European institutions to adopt a new instrument to rectify the situation.

e. Procedure

It is important to note that, in addition to the text of the questions referred to the CJEU for a preliminary ruling, the request for a preliminary ruling must contain:

- a summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based;
- the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;
- a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

It is for the national court to decide at what stage of the procedure such a request should be made.

Once the preliminary ruling is referred to the CJEU, the following are authorized to submit observations to the Court:

- the parties to the main proceedings,
- the Member States,
- the European Commission, and
- the institution which adopted the act, the validity or interpretation of which, is in dispute.

Once the observations have been submitted, the CJEU will deliver its judgment after having held oral hearings if deemed necessary. The CJEU only gives a decision on the constituent elements of the reference for a preliminary ruling presented to it. The national court therefore remains competent for the original case.

The preliminary ruling procedure lasts approximately two years. However, a reference for a preliminary ruling may be subject to an **expedited** procedure when the nature of the case and exceptional circumstances require it to be handled quickly.

Preliminary ruling proceedings before the CJEU are free of charge and the CJEU does not rule on the costs of the parties to the proceedings pending before the referring court or tribunal; it is for the referring court or tribunal to rule on those costs.

f. Examples and Practical Tips

Preliminary rulings have been central to the development of the CJEU's case-law. In sensitive cases, the CJEU has delivered rulings which have changed the course of European employment law. The Defrenne case (see supra) is an outstanding example of this, since the CJEU decided therein that the principle of equal pay for work of equal value could be directly invoked before national courts.

Other famous examples are the *Viking* and *Laval* cases. In both cases, the CJEU ruled that industrial action represents a restriction on the freedom of establishment and the freedom to provide services if it makes the exercise of that right "less attractive", but is acceptable if it pursues a legitimate aim and is justified by overriding reasons of public interest (such as the protection of workers and jobs that are "under threat").

The following practical tip might therefore be suggested. If you do not like the way the jurisdictions of your Member State interpret EU law or if you find that a provision of EU law is invalid, it is possible to suggest a preliminary reference during a national litigation process. The answer of the CJEU will be legally binding for the judge that referred the question, but also for all other national judges in Europe.

The preliminary ruling procedure is especially interesting if you want to circumvent unfavorable case-law from your supreme court, for any national judge may ask the question at any time and will be bound by the CJEU's ruling.

The preliminary ruling also gives you the opportunity to challenge the validity of EU law despite the expiry of the time-limit for annulment proceedings, which are anyway not accessible to private litigants in most cases.

V. Action for Annulment

a. Notion

The action for annulment is one of the actions that may be brought before the CJEU. Through this action, the claimant requests the annulment of an act adopted by a European Union institution, body, office or organization. The CJEU will annul the act concerned if it is judged to be contrary to higher rules of EU law.

b. Personal Scope

Article 263 TFEU distinguishes between several categories of plaintiffs. First, it refers to **preferential plaintiffs**. These are Member States, the Commission, the European Parliament and the Council. These plaintiffs are 'preferential' in the sense that they may bring an action for annulment before the CJEU without having to demonstrate any interest in taking action.

More importantly for the purpose of this contribution, private litigants may also refer an action to the CJEU. They constitute the category of **non-preferential plaintiffs**. In contrast to preferential plaintiffs, private litigants must demonstrate an interest in taking action in order to request the annulment of a European act. Thus, the contested act must be **addressed** to the plaintiff or must concern him or her **directly** and **individually**.

A novelty introduced by the Treaty of Lisbon is that private litigants may also bring an action for annulment against any regulatory act, which is of direct concern to them and does not entail implementing measures. By regulatory act, the CJEU means a non-legislative measure of general application. Despite this opening of the *locus standi* rules, challenging European legal acts still remains a remote possibility for individuals because of the narrow meaning given to the requirement of "individual concern" which is still applicable for legislative acts as opposed to regulatory acts.

Furthermore, there is a strict time-limit for filing the action for annulment. Indeed, plaintiffs have a period of two months for filing the action. This period begins either from the date of publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter.

Accounting for those limits, the only realistic way for private litigants to challenge the validity of EU law will therefore be through a preliminary ruling on validity, which they may only suggest to the national judge who can then sovereignly decide to refer or not.

c. Grounds for Review

Once an action for annulment has been referred to the CJEU, it shall assess whether the act conforms to EU law. It may then annul the act based on the grounds of:

- lack of competence;
- infringement of an essential procedural requirement;

- infringement of the Treaties or of any rule of law relating to their application; or
- misuse of powers.

d. Effects

If the action is well-founded, the CJEU may annul the act in its entirety or certain provisions only. The annulled act or provisions shall therefore no longer have legal effect. Moreover, the institution, body, office or organization which adopted the act is required to fill the resulting legal void in accordance with the judgment delivered by the CJEU.

e. Examples and Practical Tips

If you find an EU legal act to be unlawful, it will often be a waste of time and resources to file a case against it before the CJEU, even if the time-limit to do so is respected, considering the existence of restrictive *locus standi* rules for private litigants.

However, keep in mind that you may still rely on the preliminary reference for validity which delivers the same result indirectly and without time-limit, with the important caveat that the national judge may however refuse to ask the question.

VI. Action for Failure to Fulfill an Obligation

a. Notion

Proceedings for failure to fulfill an obligation may be brought before the CJEU. These proceedings may be brought by the Commission or by a Member State against a Member State which has not complied with EU law.

Proceedings for failure to fulfill an obligation are based on Articles 258 to 260 TFEU.

b. Nature of the Failure

The failure can stem from **instruments** (laws, decrees, administrative decisions, etc.) or be the result of **facts** (administrative practices, etc.).

It can be the consequence of **positive** behaviors (actions) or **negative** behaviors (abstentions, omissions). Thus, actions can, for instance, consist of the adoption of a text contrary to EU law or the expressed refusal to repeal a national measure that is contrary to EU law. Abstentions or omissions can, for example, consist of delays in transposing a directive or failure by Member States to notify national implementing measures to the Commission.

The act must be attributable to the Member State. For this reason, the concept of State is interpreted broadly by the CJEU in that it may mean all of the State bodies such as the government, the parliament, federated entities or sub-national bodies, etc.

c. Procedure

Proceedings may be brought either by the Commission, which is most often the case in practice, or by a Member State:

- When the Commission initiates proceedings, it must first address a reasoned opinion to the Member State, which has not complied with EU law. If, after a certain period, the Member State has still not rectified its failure to fulfill its obligation, the Commission may then bring proceedings against the Member State before the CJEU;

- When a Member State initiates proceedings, it must first bring the matter before the Commission. The Commission then delivers a reasoned opinion after having heard the arguments of the Member States concerned. The plaintiff Member State may then bring the matter before the CJEU.

Private litigants also have an important role to play in these proceedings, since they will, in most cases, be the ones who warn the Commission about the Member States' failures to fulfill their obligations. To this end, the Commission has set up a specific mechanism where private litigants may submit a complaint in writing to the Secretariat-General of the Commission, who will then gather information and open infringement proceedings if deemed appropriate.
The filing of a complaint is open to all and free of charge. It does not guarantee that proceedings will be brought before the CJEU. However, it provides complainants with administrative guarantees such as the right to be informed about the course of any potential infringement procedure and the right to confidentiality.

d. Effects

Once the matter has been referred, if the CJEU finds that there has been a failure to fulfill an obligation, it shall deliver its first judgment, which includes the measures to be adopted by the Member State in order to rectify the situation. Subsequently, if the Commission considers that the Member State has not taken the necessary measures, it shall bring the matter before the CJEU a second time. If the Court confirms that the Member State has not complied with its first judgment, it may then impose a fine upon the Member State.

e. Examples and Practical Tips

The most common failure to fulfill obligations sanctioned by the CJEU is where Member States infringe European employment law by not transposing directives within the prescribed time-limit or because they incorrectly or partially transpose these directives.

In a recent judgment, the CJEU has for instance declared that, by not introducing a requirement for all employers to make reasonable adjustments, where needed in a particular case, for all persons with disabilities, the Italian Republic has failed to fulfill its obligation to ensure the correct and full implementation of Article 5 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

We may gather from this example that if a Member State either fails to implement EU law or implements EU law late or incorrectly, a complaint may be filed before the Commission, which may eventually lead to a finding of infringement by the CJEU.

Filing a complaint with the Commission is free of charge and open to all. It should not be underestimated, because it is, in most cases, through individual complaints that the Commission will become aware of infringements with the consequence that it may then go before the CJEU to have these infringements sanctioned.

VII. State Liability for Breach of EU Law

a. Notion

In the famous *Francovich* case, the CJEU came to the conclusion that *"it is a principle of Community law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible"*. Through this judgment, the CJEU established the principle of State liability for breaches of EU law.

b. Conditions

The following three conditions have to be met for establishing State liability for breach of EU law:

- the rule of law infringed must be intended to confer **rights** on individuals;
- the breach must be sufficiently **serious**;
- there must be a direct **causal link** between the breach of the obligation resting on the State and the loss or damage sustained by those affected. It is a question of assessing whether the alleged loss or damage flows sufficiently and directly from the breach of EU law by the Member State to render the Member State liable to rectify the breach.

As regards to the **seriousness** of the breach, the CJEU has made clear that where, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no discretion, the mere infringement of EU law may be sufficient to establish the existence of a sufficiently serious breach. The breach will, for instance, be sufficiently serious if the Member State has not transposed a directive in time.

Besides, State liability may be invoked in any case in which a Member State breaches EU law, whatever the organ of the State whose act or omission was responsible for the breach, even where the judiciary is responsible for it. This is particularly important when the principles of primacy and direct effect are not respected by national judges or when a jurisdiction of last resort declines to refer a preliminary ruling where it should have done so.

c. Procedure

It is within the framework of national liability law that the Member States must rectify the consequences of any loss or damage caused by an infringement of EU law. Therefore, it is up to the national courts both to assess, on the basis of the cases in question, whether the complainants are entitled to reparation for any loss or damage they may have sustained as a result of an infringement of EU law by a Member State and, if so, to determine the amount of the reparation.

However, there are two principles with which the conditions laid down by national law must comply, namely that they must not be less favorable than those relating to similar domestic claims (**principle of equivalence**) and that they must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation (**principle of effectiveness**).

d. Examples and Practical Tips

State liability for breach of EU law is an overarching framework, which complements the different types of procedures analyzed hereinabove. Therefore, it is advisable to seek damages if:

- a national court refuses to set aside national law as a result of primacy or to apply EU law directly as a consequence of the direct effect;
- a national court of last resort refuses to refer a preliminary ruling whereas it was under the obligation to do so; and finally
- a Member State is found to infringe EU law and/or refuses to comply with a judgment of the CJEU.

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