BULLETIN

INTERNATIONAL SOCIETY for LABOR and SOCIAL SECURITY LAW—U.S. BRANCH

EDWIN R. RENDER, *editor*

ALVIN GOLDMAN, *co-editor*

June 2005

Note From the Chair

Alvin Goldman

The first in-country meeting of the U.S. Branch was held in Chicago on May 25th at the Chicago-Kent law school. Thanks are due to Prof. Martin Malin who was instrumental in making these arrangements and in coordinating our program with the FMCS Midwest Arbitrators Symposium.

All who attended praised the depth, breadth and intensity of the Society's sessions—a result of the top caliber participants. ISLSSL Secretary-General Arturo Bronstein provided a solid kickoff with a clear presentation describing the history, procedure and character of ILO minimum labor and employment standards. In the follow-up commentary session, chaired by Clyde Summers, Steve Willborn questioned whether such international standards are subject to the same dilemma that has been noted regarding the promulgation of model statutes—they are vague when addressing controversial issues and specific where there is sufficient consensus so that a model may not be necessary. Matt Finkin and Tom Kohler offered comments both respecting the proposition raised by Steve Willborn and discussed the often discouraging realities of implementing such standards in the face of market, cultural and political pressures. In the joint session with the concurrent FMCS conference, Arnold Zack, as chair, called attention to the protection workers have from unjust dismissal in most other employment law systems and outlined the variety of adjudicative structures for reviewing dismissal grievances. Ted St. Antoine described the interesting transition taking place in the mainland Chinese approach to resolving such questions and Bill Heekin, George Nicolau and Arnold Zack reported on similar events respectively in Croatia, Ireland (see George's condensed report, below) and South Africa. Particular attention was given to such matters as burden of proof and the nature of the remedies. With an introduction by session chair Bob Covington, who outlined the history of works councils and co-determination as part of the industrial relations systems in other countries, Charlie Craver offered the case for adopting similar legislation in the U.S. Tom Kohler described developments that may not bode well for the survival of codetermination or works councils in Europe observations and Steve Befort, Clyde Summers and audience participants provided comments regarding the feasibility and wisdom of transplanting, these institutions into US industrial labor relations. In the final session, Andrea Christensen, Roy Heenan, Steve Moldof and Tom Wilson described various ways in which U.S. labor and employment lawyers in management and union firms are frequently confronted with issues requiring knowledge of other systems and discussed the ways they find qualified overseas consultants. An interesting peripheral issue was the extent to which U.S. expectations are affecting the extent to which some European and Canadian lawyers who once practiced both sides of the fence may now be confining their practices to representing only those on side or the other.

Arturo Bronstein, who has attended dozens of these types of programs all over the world, remarked to me that he was impressed not only by the superior quality of the discussions at our conference, but also by the fact that it revealed that many North Americans are demonstrating intense interest in labor and employment law developments in other countries—something he thinks was lacking in the past.

The sole complaint respecting the conference was that the sessions were not recorded so that those not in attendance could benefit. However, it is safe to predict that much of the substance will not be lost because at least parts of future publications will reflect many of the interchanges.

At a brief post-conference meeting of the Branch there was discussion as to whether, when and how to conduct similar conferences.

Everyone expressed enthusiasm for future events of a similar nature with proposals ranging from annual to every three or four years. Although piggy-backing onto the annual National Academy of Arbitrators meeting and running simultaneously with the FMCS program had its benefits, the consensus seemed to be that we should try a different approach next time—perhaps, if they are receptive, a joint program with the International Committee of the ABA's Labor and Employment Law Section at an annual or mid-year ABA meeting.

BOLOGNA CONFERENCE

U.S. Branch members are invited to attend the VIIth European Congress of the Society which will be held in **Bologna, Italy, September 20-23**, **2005**. English will be one of the working languages and American input is always welcome at the European Congress. Indeed, John Kagel and Arnold Zack are workshop panelists for one of the sessions.

We were sent a limited number of conference brochures (which inadvertently left-out John Kagel's name) that are being randomly inserted with this Bulletin. Full details, including the registration and hotel reservation forms are to be found at www.labourlawbologna.com Alternatively, the conference organizing office can be reached by telephone at 39 051 276212 or by fax at 39 051 271042. (It may not be necessary to dial the '0' before the '51'.)

Other Conferences

-Oct. 7-9, 2005, Los Angeles. As part of the Project on Work and Employment Regulations, the UCLA School of Law and the Institute of Industrial Relations will convene a conference on The Past and Future of Comparative Labor Law. For further information, contact Prof. Katherine Stone at stone@law.ucla.edu or Prof. Sanford Jacoby at sanford.jacoby@anderson.ucla.edu

-Oct. 31-Nov. 3, 2005, Taipei, Taiwan, 8th Asian Regional Congress, International Society for Labor and Social Security Law. (English will be one of the official languages.)

Topics will include Participation of Women in the Labor Market—Toward the Goal of Gender Equality in Employment; The Impetus for Economic Restructuring and the Protection of Women's Rights; The Old-Age Security and Pension System—The Asian Experience.

Registration information is available at: www.airroc.org.tw/ISLSSL2005

-Sep. 5-8, 2006, Paris, France, 18th World Congress of the International Society for Labor and Social Security Law. (English will be one of the official languages.)

The opening ceremony will be at the Grand Amphithéâtre of the Sorbonne University followed by cocktails. The working sessions will start on September 6 and will take place at the Palais de la Mutualité, 24 Rue Saint Victor, 75250 PARIS CEDEX O5, which is near to Sorbonne.

Registration is 300 euro and a reduced fee of 200 Euros is available for young researchers and students.

Topics to be covered are: Trade Liberalization and Labor Law; Labor Law and Outsourcing of Work; and Occupational Risks: Social Protection and Employers' Liability. U.S. Branch member Lance Compa is the General Reporter for the first topic and members James Atleson, Katherine Stone and Emily Spieler are preparing the respective U.S. National Reports for these topics.

A conference website has not yet been identified.

-Nov. 28-30, 2005, Chaussée, Port Louis, Mauritu, 4th IRRA African Regional Congress. The central theme will be "A New Vision of Industrial Relations for Africa: Harmonizing Social and Economic Strategies in a Globalizing World." Detailed information is available at: www.mef-online.org/iira.html

-September 11-14, 2006, Lima, Peru, 14th World Congress of International Industrial Relations Association**.** The themes include: Social Dialogue, Economic Freedom and Industrial Relations; Human Resource management and the New Labor Relations; Productive Employment and Education; Policies of Social Protection and Integration and Free Trade in the Americas.

Additional information is available at: http://www.apert.com.pe

Other Events

Next year the International Labour Organization will hold a standard-setting discussion

on the Employment Relationship. The International Labour Office report on this theme is currently available in PDF format at:
http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-v-1.pdf

The ILO has issued new Guidelines on *Achieving Equal Employment Opportunities for People with Disabilities through Legislation* which reflect the reappraisal of disability as a human rights issue. The Guidelines are part of a project that provides technical assistance to help selected national governments implement improvements to their law. They are available in PDF format at:
http://www.ilo.org/public/english/employment/skills/disability/download/eeofinal.pdf

Information on the annual seminar on Comparative Labour Law, Industrial Relations and Social Security, in Bordeaux, can be found at:
e-mail: dupoujo@u-bordeaux4.fr
http://www.comptrasec.u-bordeaux4.fr

Effects of NAFTA – Part II

by Valerie Fillenwarth

[In June, 2003, Ed and Valerie Fillenwarth participated in a Witness for Peace mission to Mexico to investigate the effects of the North American Free Trade Agreement. The sponsoring organization describes itself as a grassroots, faith-based, non-denominational, politically independent association that sends delegations to observe the effects of US foreign policy in Latin America. The previous Bulletin published Part I of Valarie's report on their trip. The last paragraph of Part I explained that the World Trade Organization's assistance to Vietnam's development of coffee plantations has created a glut that is driving down the price of Mexican coffee beans.

Comments for publication are welcome and should be sent to Alvin Goldman at College of Law, University of Kentucky, Lexington, KY 40502. One comment on Part I was received but, though asked, the source did not request that it be published.]

In the village of San Juan de Tepanzacoalco, the home of five hundred indigenous Zapotec Indians, Ed and I and three others spent the night in the home of Salvino and Rotila Ortiz Hernandez, a childless couple in their sixties who built their two-room house themselves. The walls are adobe and pieces of tin, the floor is plain dirt, and the roof is a sheet of tin. The tiny, smoke-blackened kitchen is separate, where Rotila starts her wood fire each morning at 5 am. She takes her corn to the community grinder and pats out her tortillas for the day. Then she works in the corn fields that go straight down the mountainsides.

The outhouse is out back with their two pigs penned behind it. They have three chickens, and two bony dogs that sleep on the wood pile and look for their own food. A mountain lion carried away two of Rotila's dogs, one she sadly called "my little banana". Our supper bowl of soup had a chunk of gristly meat in it. I asked Rotila if I could give it to the dogs. She said, "No perro!". Any leftover scraps must be given to the pigs, not the dogs.

We slept outside on straw mats on the dirt, with our heads inside our sleeping bags to stay dry. In the morning, we helped Rotila make breakfast of eggs, tomatoes, and black beans, with bowls of sweet coffee that she boiled in an iron pot on the fire. She has no plates or glasses, and only two spoons for stirring. So we used her homemade tortillas to scoop up the food. The bowls are washed in a bucket behind the house. That morning we had a meeting with twelve members of the Women's Cooperative that was formed three years ago, to learn how to raise chickens and pigs and grow potatoes. The women were desperate because in 1993 they earned the equivalent of US $3.33 for one kilo (2.2 pounds) of shelled coffee beans. Now they get only 45 cents for the same amount.

This small village had a thousand residents until recently. Half of them have migrated north to the *maquiladora* sector or to the United States. One woman could not stop crying. Her son, who is only fourteen, plans to go to northern Mexico and attempt to cross the border without being shot or arrested. He wants to look for work in the United States because he knows he could never support himself or a family in San Juan. When we asked what we could do to help, the women answered, "Help us get a better price for our coffee."

At the end of our meeting, the seventeen of us and the women of San Juan stood in a circle and held hands while we prayed the Our Father in Spanish. We can see why the "home stays" are the most touching part of Witness for Peace delegations.

There are even more problems ahead. President Fox's "Plan Puebla Panama" will cause even more displacement and migration of indigenous people. The PPP is a massive development plan from Puebla through southern

Mexico to Panama. An extensive infrastructure of fifteen dams, highways, ports, and railroads are planned for the use of trans-national corporations and for tourism. This will cause great destruction to that lush, biodiverse area of the country. Like the FTAA, the PPP is not being democratically discussed with civil societies in Mexico.

We were asked to recommend changes in US foreign policy based on what we had witnessed in Mexico. We believe that these key points are important to note:

1. An immigration agreement between the United States and Mexico.
2. The re-negotiation of NAFTA to include the full participation of civil society and indigenous groups in a transparent, democratic process. NAFTA's Chapter 11 should be eliminated.
3. A rejection of the FTAA.

Comparative Approaches to Adjudicating Challenges to Dismissals:The American Shortfall

Arnold Zack

[The following is the substance of Arnold's introductory remarks, at the Chicago conference, for the panel on grievance resolution.]

It seems obvious that a society should provide protection for employees who are unjustly dismissed from their employment. Yet for that to happen there must be national statutes affording such protection. The evidence shows a wide variation in countries providing such protection against arbitrary dismissal.

In countries following the code tradition there are fairly explicit statutes detailing employment practices including dismissal with provision for severance pay based on duration in employment. In countries following the Anglo Saxon tradition the statutory mandates are less stringent. Most countries provide specialized Labor Courts with jurisdiction over such dismissal issues.

But few countries match the US in failure to provide such protections. The US has no statutory bar against unfair dismissal, nor indeed provision for notice, severance pay or the like. The employee must litigate in a court of general jurisdiction to prove that the termination violated a contractual commitment, or specific statutes prohibiting termination based on discrimination, or protected union activity, invocation of OSHA statutory protections, or the like. Our system of collective bargaining is assumed to provide the protection against unjust dismissal through appeal through the grievance procedure to arbitration. As credible a system as that might be, it applies to about a tenth of the entire workforce, and only 8% of the private sector. Because of our adherence to the concept of majoritarianism, (that the employer is required to negotiate with only the one union that a majority of the employees has designated), that leaves more than 100,000,000 workers without any such protection as victims of our "termination at will doctrine". In other countries the prevalence of multiple unions within an enterprise and the availability of works councils as the forum for workplace discussions, tend to provide a less confrontational environment for resolving workplace disputes, while government provided labor courts are left to resolve dismissal issues.

The declining numbers of union members suggests that the protections long assumed for workers in the US are becoming even less prevalent. We have much to learn from other countries.

Resolving Dismissal Disputes in Ireland

by George Nicolau

[At the Branch's Chicago Conference, George Nicolau, who spends part of the year in Ireland, described the grievance resolution system of that country and offered some comparative observations. Below is a condensation of his prepared remarks.]

The system in Ireland, like the systems almost everywhere else, is very different from that in the States. Here, except for [civil rights and similar] statutes and the protection of collective bargaining agreements in the increasingly shrinking unionized sector and unilaterally imposed mandatory arbitration systems, some of which are fair and many of which are not, there is no protection against unfair dismissal; employment is at will. In Ireland, employment at will does not really exist for most workers.

In Ireland, unlike here, protection against unfair dismissal is considered a basic right, one that is codified under the Unfair Dismissal Acts. If you have been continuously employed for at least a year, you are protected against dismissals for incompetence or asserted misconduct whether represented by a union or not.

Even if you haven't been employed for a year, you are protected against dismissal because of pregnancy or for exercising your rights under the Maternity Protection Act or the Adoptive Leave Act or for union activities.

Under those Acts and others, . . . a terminated worker can file a claim for redress, asserting that her termination was unfair or a violation of one of the statutory protections, *i.e.*, race, age, sexual orientation, or the expression or religious or political views. Generally, the time to file a claim is no later than six months after the date of dismissal. A claim may be brought before a Rights Commissioner or, if a party objects to the claim being heard by a Rights Commissioner, the claim goes directly to the Employment Appeals Tribunal.

Rights Commissioners are employees of . . . the national government. Upon hearing cases, Rights Commissioners make recommendations to the Employment Appeals Tribunal. If there is no objection to that recommendation, it stands. If there is an appeal, the Employment Appeals Tribunal reviews the matter and issues a determination. Such an appeal is heard *de novo*.

If a claim is filed directly with the Tribunal or if a party objects to a hearing before a Rights Commissioner, which is most often the case, the claim is heard in the first instance by the Tribunal, a three-person panel, consisting of a Chair or Vice-Chair, again employees of the State, and a representative of labor and a representative of the employers. The labor representatives . . . are nominated by the Irish Congress of Trade Unions and its constituent unions; the management representatives by the various employer organizations, such as the Irish Business and Employers Confederation, the Society of the Irish Motor Industry, etc. There are some eighty-two panel members: [A] Chair and 22 Vice Chairs, all of whom are barristers, solicitors or counsel, and 60 other members, 30 from the labor side and 30 from management. They serve three-year terms, are split into divisions and travel around the country hearing cases under a variety of Acts, now numbering 13, and two European Community Regulations.

* * *

The Tribunal, as I mentioned, is tri-partite. We in the States are not unfamiliar with tri-partite panels. They have existed by statute in the railroad and airline industries for years. Other industries, such as telephone, have incorporated them into collective bargaining agreements. The difference is that those panels are industry-specific. Moreover, they rarely deal with statutory issues. The Irish Tribunal panels are not confined to a specific industry and deal with statutory issues all the time; that is their role.

In 1998, when I first starting looking at the Tribunal system, some 3537 claims were filed with the Tribunals; by 2003, the figure had ballooned to 5596, an increase of almost 60%. By 2004, that figure had dropped to 3754, primarily due to a decrease of some 1800 claims, from 2802 to 1061, brought under the Minimum Notice and Terms of Employment Act. That Act requires employers to give employees a minimum period of notice or payment in lieu of same. It's hard to say why the claims dropped as they did; perhaps it's no more than a growing familiarity with what's required.

. . . [In T]he second largest number of claims, those of unfair dismissal, [the] employer bears the burden of proving that the termination was for incompetence, misconduct or "other substantial grounds." There is a difference by the way between 'unfair dismissal' and 'wrongful dismissal'. The latter is a breach of contract claim, used primarily by executives who sue in the civil courts. The advantage to them is that such a claim can be brought within six years rather than six months and the damages can be six years of salary rather than a maximum of two years under the unfair dismissal statutes.

* * *

There are some matters that should be of interest to us. Because protection against unfair dismissal is largely a matter of contract in the States, I, like my good friend, Jack Dunsford, have always taken the position that I could not impose on the employer a "hearing on the property" requirement akin to Tests 3, 4 and 5 of Carroll Daugherty's Seven Tests; that the requirement had to be in the Contract, as it is in railroad and airline agreements. Well, that won't wash in Ireland. The Tribunal has consistently held that a dismissal may be "unfair" solely on procedural grounds simply because the employer did not have proper procedures in place, or did not give the employee an opportunity to be heard, or conduct a full and fair investigation prior to termination.

[In Ireland, the remedy almost always is compensation; reinstatement is rare.] Unlike this difference in remedy, there are similarities. One, quite similar to our experience, is creep-

ing legalism; this despite the fact that 2/3's of each Tribunal is made up of laypersons rather than lawyers. And more and more claimants are being represented by lawyers. In fact, representation of claimants by lawyers or by trade union officials is higher than representation of employers by lawyers or by employer associations; 77% to 66%. And, despite the fact that the Tribunal prides itself on providing a "inexpensive, fair and informal forum for the speedy resolution of employment disputes" (sounds familiar doesn't it), the time to get to the Tribunal is increasing. At one point, 1998, the amount of time from the filing of a claim to a hearing date in Dublin, where the bulk of the cases are heard, was 10 weeks and in the provinces, 12 to 13 weeks. By 2002, the Dublin time increased from 10 weeks to 23 weeks and outside Dublin, the time went from 12-13 weeks to 19 weeks.

That, however, is only part of the story. It then takes six weeks to three months to get a decision. Offsetting this, by the way, is the fact that the bulk of the unfair dismissal cases get settled. But when they're not, one must wait for the decision. Then, there is the possibility of appeal to the Circuit Court. There are not many appeals, but when they occur, they take time. And, unless the appeal is on a specific point or the Parties have agreed to limit the appeal in some way, the Circuit Court hears the matter de novo. Beyond this, an appeal can be made to the High Court and even to the Supreme Court. The point, I fear, is that the procedure is not as swift as first might appear.

Despite this, I have not detected a chorus of criticism. The Irish Congress of Trade Unions is generally satisfied with it, as are employers.

What is important about the system is that it covers most workers, unionized and non-unionized, and provides a unified approach under which what we Americans think of as separate contractual and statutory rights can be heard.

* * * I would suggest [that here in the U.S.], it's time to press for a change. We should take no pride in what Alan Greenspan, who should be commended for other things, has called our "significantly higher capacity for job dismissal" when we lack adequate means to test the fairness of those dismissals. Our economy may lead the developed world, but so does our poverty and our inequality of income and wealth. It is time, it is indeed time, that we—American management, labor and impartial arbitrators and mediators—create a partnership to examine the systems of nations such as Ireland, to learn from and build upon those systems, and to then lead an effort in striking an appropriate balance between efficiency and justice so that what, in truth, should be fundamental protections are not sacrificed in the name of production and progress.

I agree with Ted St. Antoine, who led the fight years ago for unfair dismissal legislation, that it is time to take up that cause once again.

[Other conference participants are urged to submit for future Bulletins the condensed versions of their remarks.—Eds.]

Other Information

The International organization of the Society periodically publishes an information bulletin that is available online at:
http://www.asociacion.org.ar/ISLLSS/Ingl%E9s/index_ing.htm

* * *

The 2005 annual report on forced labor, issued by the International Labour Office, estimates that there are over 12.3 million people engaged in labor involuntarily due to physical force, threat of force, or psychological coercion. Approximately 11% are victims of commercial sexual exploitation, and close to 8 million are slaves or work under debt bondage, serfdom or a system of slave-like practices imposed by government, military forces or traditional or religious authorities. Females represent about 56% of those in forced labor and persons under age 18 constitute 40-50% of those engaged in forced labor.

The ILO definition of forced labor excludes those in the military performing military type duties, those convicted of crimes whose work is controlled by public authorities, minor communal services, and work performed in response to disasters including war. Included in the definition of forced labor are those forced to work as punishment for a strike, as a means of political education, or to carry out economic development.

Although the largest number of people in forced labor live in Asia, over 1.3 million are in South America and the Caribbean. The published estimates do not have breakouts by individual countries. The full report can be found on the internet at:
http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=5073