

*Institute Briefing*

**The Right to Strike:  
A Comparative Perspective.**

**A study of national law  
in six EU states**

**edited by  
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## Introduction

The impact of the European Union on national law concerning the right to strike was clearly illustrated by the decisions of the European Court of Justice in the cases of *Viking*<sup>1</sup> and *Laval*.<sup>2</sup> In both cases, the Court held that collective action, where it has a transnational dimension,<sup>3</sup> could be contrary to the economic freedoms guaranteed by the EC Treaty. In seeking to understand the full impact of these judgments, it is important to gain greater insight into the current state of national legislation with regard to key topics, for example, the scope for solidarity action and the impact of strike action on the individual contract of employment. This report presents a comparative study of the national law in six EU Member States: Belgium, France, Germany, Italy, the Netherlands and the UK.

The report is based on papers prepared for a conference held at the University of Leicester, 15-18 April 2008. Each year, the European Working Group on Labour Law brings together students from a variety of European universities to examine, with a comparative perspective, a contemporary issue in labour law. Accordingly, the theme of the 2008 conference was 'a comparative perspective on the right to strike'. In advance of the conference, the student participants prepared papers analysing the state of their national law on the right to strike following a common template of questions. These papers can be found in the subsequent chapters of this report. In addition, the final day of the conference devoted special attention to analysis of the *Viking/Laval* judgments. A summary of the conference proceedings is included in this report, whilst several of the conference papers have been published in *Federation News*.<sup>4</sup>

The organisation of the conference, and the subsequent preparation of this report, could not have been achieved without the support of several organisations which provided generous sponsorship: the *Modern Law Review*, *Thompsons Solicitors*, and the *University Association for Contemporary European Studies*. Particular thanks are also due to Pascale Lorber (University of Leicester), who co-organised the conference, and Carolyn Jones (Institute for Employment Rights), who facilitated the production of this report.

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<sup>1</sup> Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti*, judgment 11 December 2007.

<sup>2</sup> Case C-341/05, *Laval un Partneri v Svenska Byggnadsarbetareförbundet*, judgment 18 December 2007.

<sup>3</sup> For example, to oppose a business relocating elsewhere in the European Union.

<sup>4</sup> Vol 8, No 1 (summer 2008).

# **1. A comparative perspective on the right to strike: conference proceedings**

*Arabella Stewart*

## **Introduction**

On 18 April 2008, the annual conference of the European Working Group on Labour Law took place at the University of Leicester. The theme of the conference was 'A Comparative Perspective on the Right to Strike'. The conference was divided into three sessions consisting of a presentation or presentations, followed by an opportunity for general discussion. The first session examined the right to strike in different European Union (EU) member states. A presentation comparing aspects of the right to strike in the 27 member states by Wiebke Warneck of the European Trade Union Institute was followed by a number of presentations based around particular themes by teams of students from universities in six member states – Belgium, France, Germany, Italy, the Netherlands and the UK. In the second session, Colm O'Conneide provided the conference with an insight into the workings of the European Committee of Social Rights and its interpretation of the right to strike enshrined in the European Social Charter. The third session focused on two aspects of EU law and the right to strike. Tonia Novitz and Claudia Bennett analysed the judgments of the European Court of Justice in the *Viking* and *Laval* cases and Diamond Ashiagbor considered the future of labour law in the European Union.

## **Session 1 – Comparing the right to strike in different member states of the EU**

Following an introduction setting out the aims of the conference by Pascale Lorber of the University of Leicester, a presentation comparing the right to strike in the 27 member states of the EU was given by Wiebke Warneck. She explained that the accessions of 2004 and 2007 had left a gap in the literature and it was thought that it would be a useful exercise to compile a report comparing various aspects of the legal framework on the right to strike around the EU.

The first aspect examined was the legal basis for the right to strike. Four different types of legal basis were identified; national constitutions, legislation, case law and collective agreements. The most common basis is the constitution, however, in a number of states the right is derived from legislation or case law. In three member states the right to strike is found in collective agreements.

The second area considered in the report is which types of industrial action are lawful. A comparison was difficult due to the absence of a single concept of what constitutes a strike. However, examples given included political strikes, which are illegal in all but five states; solidarity strikes, which are legal in some 20 states and picketing which is legal (subject to conditions) in all member states (on which information was gathered).

Other restrictions to the right to strike included in the report included peace obligations, the need for strike action to be a last resort and, linked to this, the obligation to undergo conciliation prior to taking strike action. Such restrictions were found to be quite common.

Finally, other possible consequences of strike actions were compared. The most significant of these was whether or not participation in a strike constituted a breach of the employment contract which could lead to dismissal. It was found that this was only the case in four states, Austria, Denmark, Ireland and the UK. Elsewhere the doctrine of suspension of contract applied.

A discussion about the differences between the legal framework on strikes followed. It was clear that there were many differences of opinion on what form particular types of industrial action, such as boycotts and blockades, might take. The speaker was asked whether any geographical or political groupings with similar legal frameworks had been discovered. She commented that although this approach had not been taken it might be useful in future to draw comparisons between old and new member states. In response to a final question, it was noted that the report had not included the position of non-strikers within its ambit.

Session 1 concluded with the presentation of the national student reports on aspects of the right to strike in their particular states. The reports were interspersed amongst the sessions but, for convenience, will be outlined here. The national reports were organised around a number of themes which included the constitutional and legal basis and framework for the right to strike and exceptions to the exercise of the right. These latter included the need to maintain essential public services, whether particular categories of worker were excluded from the right to strike and the designation of particular forms of action as unlawful. The national student reports also considered whether the right to strike was a fundamental right at national level and the extent of compliance of national law with Article 6(4) of the European Social Charter. The presentations revealed that there were many common strands between the laws of the six states in question, but also some significant differences in approach.

## **Session 2 – The right to strike and the European Social Charter**

Colm O’Cinneide of University College London and member of the European Committee of Social Rights (ECSR) gave a presentation examining the interpretation and application of Article 6(4), which recognises the right of workers and employers to take collective action in cases of conflicts of interests, by the ECSR. He began by outlining the mechanism under the European Social Charter (ESC) which is built around monitoring. States submit periodic reports to the ECSR which then makes legal determinations in the form of comments on whether states are in compliance with the ESC. Since 1995 there has been an additional process, which some states have signed up to, known as the collective complaints procedure. The ECSR has issued several decisions on the right to strike under this new mechanism.

Turning to the interpretation and application of Article 6(4) ESC, a number of observations were made. It was noted that the scope of the provision excludes industrial action demanding changes to existing legal rights. Accordingly, whilst the ECSR has never defined what constitutes a strike, it has interpreted Article 6(4) as excluding political strikes, although a broad view of ‘conflicts of interest’ has been taken.

A number of themes in the ‘case law’ of the ECSR were identified. In particular, the Committee has criticised states for restricting the purposes for which a strike can be called, restricting the right to strike to trade unions, imposing overly restrictive procedural requirements, for example, in relation to balloting and notice, and for adopting excessively wide definitions of ‘essential services’. The latter has been the subject of a collective complaint from Bulgaria.

Finally, the relationship and/or overlap between the jurisdictions of the ESC, the European Convention on Human Rights and the European Court of Justice (ECJ) was considered, in light of the ECJ’s recent judgments in *Viking* and *Laval*. It was observed that all three are active in relation to the right to strike which raises questions of cooperation and consistency of approach. It was concluded that there were no clear answers.

In the discussion which followed, a question was raised about the potential for conflict between the ECSR’s interpretation of Article 6(4) and that of the ECJ. The view was expressed that the ECJ is rather selective in its approach to the ESC, only citing it where it supports conclusions it has already reached. A further question inquired about the relationship between the ECSR and the International Labour Organisation (ILO). The speaker said that there were strong links between the two, with a member of the ILO sitting on the Committee, albeit in a non-voting capacity. Finally, the potential for collective agreements to restrict individual rights to strike was discussed and it was noted that the ECSR has never adjudicated on this point.

### **Session 3 – European Union law and the right to strike**

In the first part of the final session, a presentation by Tonia Novitz of Bristol University on key aspects of the decisions in *Viking* and *Laval* was followed by a detailed account of the *Viking* case by Claudia Bennet of the International Transport Workers’ Federation (ITWF). Tonia Novitz made a number of criticisms of the two ECJ decisions, arguing that the Court’s analysis undervalues collective bargaining. It was contended that the right to strike should have been excluded from the application of the free movement principles on the basis of the decision in the *Albany International* case.<sup>5</sup> Whilst the Court has recognised the right to strike as a fundamental right, it has failed to remove it from the scope of internal market principles.

Claudia Bennett’s account of the *Viking* case from the perspective of the ITWF emphasised the clash between economic freedoms and social rights. She criticised the Court’s judgment, arguing that the ECJ should have given more weight to the social objectives of the EU, such as the improvement of working conditions. In particular, Claudia highlighted the test created by the Court for assessing whether collective action could be justified. This necessitates that the union should demonstrate that the jobs or conditions of employment at issue were seriously jeopardised and that the collective action was suitable and proportionate for attaining its objective. She argued that it would be difficult for national courts to apply this test and that it weakens the

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<sup>5</sup> Case C–67/96, *Albany International BV v Stichting Bedrijfsfonds Textielindustrie* [1999] ECR I–5751.

position of trade unions. The decision was described as a missed opportunity for the ECJ to place organised labour on an equal footing with global capital.

The final presentation of the conference was given by Diamond Ashiagbor of University College London on the subject of the future of labour law in the EU. She echoed the view that the ECJ appears to be giving greater scope to freedom of movement than to social rights. It was noted that EU initiatives in the areas of employment and social policy appear to show a preference for the use of coordination and 'soft' governance mechanisms, with control resting at national level, over the use of harmonisation and legislative mechanisms. Within this new governance approach, the labour law which is being advocated promotes what is known as 'flexicurity' and foresees a flexible labour market in which workers will routinely be required to re-skill and move between sectors. This marks a shift away from traditional employment protection and can be criticised as side-lining job security and placing labour market risk upon workers rather than employers. She concluded that EU labour should place more emphasis on a social aspect of the 'social market economy' as opposed to the economic. However, the judgments in *Viking* and *Laval* suggest that the opposite is occurring.

In the discussion which followed the presentations it was suggested that classifying the right to strike as a fundamental right was not necessarily helpful as fundamental rights are essentially individualistic and are not geared to the protection of collective interests. There was a consensus that the decisions in *Viking* and *Laval* would have a negative impact on rights to take industrial action.

The conference ended with some closing remarks from Professor Mark Bell of the University of Leicester who thanked the speakers and participants for attending.



## 2. Belgium

*Karl Abelshausen, Simon Claessens, Stefanie Francken and Yoko Mondelaers*

### 1. Briefly describe the industrial relations context of strike action in recent years.

The Belgian industrial relations landscape has changed very little since 1945. For example, the principle of subsidiarity still applies, which means that the government only intervenes in conflicts when the social partners fail to agree.<sup>1</sup> The social partners are organised in Joint Committees,<sup>2</sup> which can bind unions and employers' associations by collective labour agreements. The most important means of solving collective conflicts is by negotiation and settlement. Furthermore, the Essential Public Services in Peacetime Act (Essential Services Act) of 1948 still applies today.<sup>3</sup>

The number of trade union members is very important, because the more individuals are prepared to act collectively, the stronger the trade unions. Compared to other European countries, Belgium had a relatively high rate of union membership between 1945 and 1995 and this increased from 50.2 % to 58.1% between 1990 and 2000. In the 1990s, the number of members of the three biggest trade unions<sup>4</sup> increased from 2.36 to 2.69 million members.<sup>5</sup> However, the existence of strong trade unions does not necessarily lead to a high rate of strikes. A high number of strikes could point to strong or to weak trade unions as it could either indicate that the unions can mobilise their members or that they are unable to keep their rank and file in check. Accordingly, the statistics on the number of strikes need to be examined very carefully. Firstly, questions need to be asked about how representative they are as strikes in the public sector are often excluded. Furthermore, the threat of strike action can be enough for a strong trade union to achieve results, so the numbers need to be looked at critically.

In comparison to other European countries, it appears that Belgium is evolving from a country with very few strikes into a country with a modest number of strikes. During the past two decades, there have been very few strikes. These mainly affected the public and transport sector and the car industry. The figures between 2000 and 2007 show that a great number of working days were lost mainly in 2001 and 2005, when there were 669,982 days of strike. However, in 2006, this dropped to 88,941 days. Examples of recent industrial actions include a strike in the education sector in 2001, where workers took to the streets for better wages and pension arrangements and strikes in 2005 by prison officers held to support demands for higher staffing levels.

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<sup>1</sup> The government only interferes when unions and employers' organisations fail to come to an agreement. Employee and employer organisations are therefore the main decision-makers and the state plays a secondary role.

<sup>2</sup> This is a permanent consultation body, organised by the government, for nearly every economic sector and composed of equal numbers of employers' and employee representatives. The purpose of the consultation is to conclude agreements about labour conditions in the sector. At this time there are about 100 Joint Committees.

<sup>3</sup> This law guarantees a minimum performance of services in the private sector during a strike.

<sup>4</sup> ACV (Christian-democratic), ACLVB (Liberal), ABVV (Social-democratic).

<sup>5</sup> [http://aps.vlaanderen.be/statistiek/nieuws/arbeidsmarkt/2002-09\\_syndicaat.htm](http://aps.vlaanderen.be/statistiek/nieuws/arbeidsmarkt/2002-09_syndicaat.htm).

## **2. The right to strike as a fundamental legal norm**

### **(a) Is the right to strike guaranteed in the national constitution?**

After World War II the right to strike was formally acknowledged in most European countries. In Belgium there were a number of initiatives to adopt the right to strike in the Constitution, but none were successful. In the explanatory statement to the Essential Services Act of 19 August 1948, regarding the provision of minimum services in the event of a strike, recognition of the right to strike is derived from the de-penalisation of strikes by the Act of 24 May 1921. This view did not lead to the formal adoption of the right to strike in the Belgian Constitution and the current Article of the Belgian Constitution regarding fundamental social rights, makes no explicit reference to the right to strike.<sup>6</sup> However, the right to strike can be derived from the right to collective bargaining, which is found in Article 23(3) of the Constitution.

### **2(b). Is it recognised as a fundamental right? (e.g. through case-law of the highest courts)**

As mentioned above, the right to strike has not been incorporated into the Belgian Constitution. However, the right to strike is acknowledged in several international instruments, which Belgium has ratified.

First and foremost, it must be noted that, in contrast to Germany, Italy and the United Kingdom, Belgium has a monistic law system which regulates the relationship between national and international law. This approach starts from a unity of national and international law. If national and international law are incompatible, international law prevails, however, this is subject to certain conditions. Firstly, the international regulation has to be binding on Belgium and secondly, it has to be directly applicable in the Belgian legal system. This second condition means that there has to be an intention by the contracting states to provide rights for individuals and that the conditions of the treaty are complete and accurate.

Article 8(1)(d) of the ECOSOC Treaty obliges the contracting states to safeguard the right to strike, to the extent that this right is exercised in conformity with the laws of the State concerned.<sup>7</sup> Other international instruments applicable in Belgium also refer to the right to strike. For example, the right to strike can be derived from the freedom of collective industrial organisation, as laid down in ILO Conventions No.s 87<sup>8</sup> and 98<sup>9</sup>.

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<sup>6</sup> Article 23(3), formerly Article 24 bis, adopted on 31 January 1994.

<sup>7</sup> The ECOSOC treaty was ratified by Belgium in 1981 (Act of 15 May 1981, B.S. 6 June 1983).

<sup>8</sup> This is a convention concerning freedom of association and protection of the right to organise. Article 2 of this convention states: "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization." Part two of the convention concludes that: "Each Member of the International Labour Organization for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organize."

<sup>9</sup> ILO Convention no. 98 is a convention regarding the application of the principles of the right to organise and bargain collectively. Article 1 of this convention states: "1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment. 2. Such protection shall apply more particularly in respect of acts calculated to (a) make the employment of a worker

At a regional level, Article 6(4) of the Revised European Social Charter (ESC) explicitly states that “With a view to ensuring the effective exercise of the right to bargain collectively, parties undertake [...] to promote the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.”<sup>10</sup>

Whether or not Article 6(4) is directly applicable is subject to discussion. Some legal scholars believe that the protected fundamental rights of the ESC impose only a stand-still obligation on the contracting states. This means that once these rights have been incorporated into national regulations, they can only be restricted in accordance with the ESC.

In the Netherlands, the Supreme Court has acknowledged that Article 6(4) of the ESC is directly applicable in the national legal system, in a judgment given on 30 May 1986.<sup>11</sup> Most Belgian legal scholars follow this interpretation, concluding that Article 6(4) of the ESC is directly applicable and therefore formally integrated in the Belgian legal system and that, accordingly, it will prevail over conflicting national provisions. This view is supported by a judgment of the Council of State of 22 March 1995<sup>12</sup> and a judgment of the Constitutional Court of 6 April 2000.<sup>13</sup> This reasoning also complies with the ‘case law’ of the European Committee of Social Rights (ECSR), the jurisdiction of which may not be binding, but is certainly authoritative.

The right to strike can also be derived from Article 11 of the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR).<sup>14</sup> This article provides freedom of association and assembly. Furthermore, at European Union level, Article 28 of the EU Charter of Fundamental Rights explicitly provides the right to strike.<sup>15</sup> The EU Charter of Fundamental Rights was introduced by a solemn declaration in 2000. The Treaty of Lisbon guarantees the freedoms and principles set out in the Charter, and, if ratified, will give these provisions binding legal force.

At national level, the right to strike in Belgium is not formally adopted in the Constitution. However, the legislator has implicitly acknowledged the right to strike on several occasions. This is, for instance, expressed in Article 11(3) of the Labour Agreement Act 1978, which states that a strike cannot be seen as a reason for suspending the labour contract and that a striking employee cannot be replaced by a new employee. This article was clearly adopted to protect striking employees. The

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subject to the condition that he shall not join a union or shall relinquish trade union membership;(b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.”.

<sup>10</sup> The Revised ESC was approved by Belgium by Act of 15 March 2002 and ratified on 2 March 2004.

<sup>11</sup> HR 30 May 1986, *NJ* 1986, no. 688. The High Council stated that Article 6(4) of the ESC is worded in such a way that, contrary to most other conditions of the ESC, it does not oblige the contracting parties to adopt legislation, but, on the contrary, implies that employees and employers can rely directly on the right to strike, as acknowledged in, and within the boundaries of the ESC.

<sup>12</sup> Council of State, judgment no. 52424, 22 March 1995, *A.P.T.* 1995.

<sup>13</sup> Constitutional Court, judgment no. 42/2000, 6 April 2000.

<sup>14</sup> The ECHR was ratified by Belgium on 14 June 1955.

<sup>15</sup> The EU Charter of Fundamental Rights was signed by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice on 7 December 2000.

right to strike can also be derived from the Belgian regulation on freedom of association. In addition, the implicit recognition of the right to strike is shown by the fact that a temporary employment agency cannot employ temporary employees in a company during a strike. It can also be noted that Article 3 of the Essential Services Act states that the employer has to use his own employees to guarantee services in the public interest.

Finally, the judgment of the Court of Cassation of 21 December 1981 is of great importance.<sup>16</sup> The Court held that the Essential Services Act of 19 August 1948, regarding the provision of minimum services in the event of a strike, must be interpreted as meaning that the employee has the right not to perform the work stipulated in his contract in the event of a strike, and that such strike action does not constitute an unlawful act. This demonstrates definitively that the Court of Cassation, Belgium's highest court, recognises the right to strike.

### **2(c). What is the relationship between the right to strike and other fundamental rights and freedoms? (e.g. property rights, freedom of commerce)**

The right to strike is a fundamental social right. However, it is not absolute but is limited by the subjective rights of others insofar as such limitations are prescribed by law and necessary in a democratic society for the protection of the rights and freedoms of others, or for the protection of the public interest, national security, public health or morals.<sup>17</sup>

The right to work is guaranteed by Article 23(3) of the Constitution, and provides the right of the employee to execute the agreed labour contract. Picketing falls within the scope of the right to strike, provided it is used normally and not accompanied by acts of violence ('feitelijkheden', *voies de fait*)<sup>18</sup> towards persons and property. Picketing therefore becomes illegal when accompanied by acts of violence that affect the subjective rights of other persons, for example, the right to work, which can be affected when non-strikers are denied access to the company, the freedom to conduct business and property rights which can be affected when the employer is denied access to his company.

It is generally agreed, and confirmed by summary procedures by means of ex-parte proceedings, that workers who participate in a strike cannot use acts of violence that affect an employers' freedom of commerce. It is therefore illegal for strikers to take control of the company. The principle of freedom of commerce was adopted in the French Decree D'Allarde of 1791. This provision of law was preserved in Belgian legislation after the end of the French occupation. At European level, the freedom of commerce is guaranteed by the aforementioned Charter of Fundamental Rights of the European Union which contains the "freedom to conduct a business" in Article 16. Furthermore, freedom of commerce can be derived from WTO regulations and from provisions regarding freedom of establishment in the EC Treaty.<sup>19</sup> The right to strike

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<sup>16</sup> Court of Cassation 21 December 1981, *R.W.* 1981-82, 2525.

<sup>17</sup> Article G, revised European Social Charter.

<sup>18</sup> "*Feitelijkheden*" are actions that restrict the rights of other persons in an illicit way.

<sup>19</sup> Article 43, EC Treaty.

is also limited by provisions of a penal nature. It goes without saying, for example, that strikers cannot take their employers hostage during a strike.<sup>20</sup>

Finally, there has been discussion in Belgian legal doctrine concerning the possibility of applying a ‘test of proportionality’ to strikes. Some authors state that a strike has to be in proportion to its goals but this view has not been generally supported. Other authors state that a judge cannot place himself in the position of a striker and examine proportionality, because this task belongs to the strikers. The European Committee of Social Rights supports this second opinion in stating that allowing a national judge to determine whether recourse to strikes is premature fails to comply with Article 6(4) of the ESC.

### **3. The legal framework on strike action**

#### **(a) Is there a legal definition of what constitutes a ‘strike’ or other forms of collective action?**

Before looking for a definition of strike in Belgian law, it is important to emphasise that there is a clear difference between collective action and collective conflict. Collective action is the result of collective conflict, the conflict is the basis of the action. For example, too much work pressure or too low wages can result in a collective conflict leading to collective action, such as a strike. Whilst collective actions are used in relation to a range of matters such as such as environmental issues, or alternative action, such as demonstrations or distributing fliers, the term strike is only used when the collective action involves labour matters. The concept of ‘stipulated work’ plays a part in understanding the definition and interpretation of strike. ‘Stipulated work’ means ‘the performance of work at a normal rhythm’. It is difficult to find a definition of ‘strike’, because the term is connected to the way ‘stipulated’ labour is defined. The concept of a strike could possibly include situations where this work is not performed at all and also, for example, where the work is performed at a very slow rate, or even when a factory’s assembly line is stopped every day for five minutes.

There are no clear definitions of the terms ‘collective labour conflict’ or ‘strike’ in Belgian legislation. This gap is addressed by Belgian case law and the ‘Dictionary of Social Legislation’, which defines collective conflict as ‘a conflict between a group of employees and one or more employers about labour matters, concerning legal status and working conditions.’ A description of the concept of strike can also be found in the Essential Services Act of 1948 which refers to ‘a collective and temporary stoppage of work as described in the employment contract’.<sup>21</sup> The Dictionary of Social Legislation’ gives a similar definition.

#### **3(b). Are there legal procedures for a legal strike to take place (imposed either by statutes or other means such as collective agreements or trade unions)?**

The procedure which needs to be followed in executing the intention to strike is not regulated by the Belgian legislator, but left to unions and employers’ associations in

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<sup>20</sup> This was the case during the strike in Sigma Coatings Belgium in November 2003, when strikers held members of the executive committee hostage for three days.

<sup>21</sup> Article 6 of the Essential Services Act 1948.

accordance with the principle of subsidiarity. Stipulations are included in collective labour agreements concerning the legal status of the trade union delegation. Negotiation and settlement are crucial and all possibilities must be exhausted before strike action is taken. Providing mutual information is also very important. The specific arrangements differ from sector to sector, however, they are all based on collective labour agreement No. 5, which is a framework agreement that outlines the general role for the trade union delegation.<sup>22</sup> The Joint Committees also play a very important role. Their task is to reconcile conflicts between employees and employers. Reconciliation and mediation will be discussed in more detail later in this report.

In the public sector, protocols concerning strike are often drawn up with the trade unions to regulate the progress of collective conflicts. Furthermore, the right to strike for public servants is subject to certain conditions and some requirements have to be fulfilled before strike is possible. Police officers, for example, can only go on strike if the strike has been announced beforehand by an officially recognised trade union and if a negotiation committee has met to discuss the case.

### **3(c). What types of industrial action can be lawful? (e.g. is it lawful for workers to take strike action as an act of solidarity with workers involved in a separate industrial dispute?)**

Traditionally, there are three forms of collective action; strikes, plant occupation by the workers and lock-out. Spontaneous actions, working to rule and solidarity strikes are all potentially lawful types of strike action. A plant occupation by workers means different types of action at the place of employment, sometimes combined with a production take-over. A lock-out is a situation where the employer temporarily does not fulfil his contractual obligation to provide work to the employee, in an attempt to put pressure on him. Lock-outs will be discussed in greater detail later in the report.

### **3(d). Are there guaranteed minimum public services in the event of a strike?**

During a strike, not only the employee's fundamental right of collective action is relevant, but also the public interest and the economy. These rights need to be weighed by the courts, using a test of proportionality. This is the core issue concerning the minimum provision of services.

In Belgium, there are differences between the legal framework for the private and the public sector. The private sector is governed by the Essential Services Act of 1948 concerning services of public interest, which obliges unions and employers' associations to safeguard the public interest. The government can only intervene when unions and employers' associations fail to agree. The principle of subsidiarity, therefore, plays a very important role and it is for the social partners regulate the content, the progress and the procedures regulating their mutual relations.

The Joint Committees draw up lists of vital needs and services which need to be provided during a strike or lock-out, on a sector by sector basis. The lists are ratified by Royal Decree, however, many of them were drawn up or reviewed a long time ago. This raises the question of the need to update them to reflect the current needs of an

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<sup>22</sup> Articles 25-26 of Collective Labour Agreement No.5.

economy in which the services sector has become much more important and the perception of the public interest has changed. Arguably, the effective application of this law is jeopardised by the lack of updating.

If the Joint Committees fail to compile lists of essential services, they can be obliged to do so by the minister. If no decision has been made after six months, the minister has authority to do so. The decision as to which particular employees are required to perform the essential service roles is taken by the unions and employers' associations together. They have to choose employees who work in the enterprise, however, the law does not state whether they are obliged to select employees who are prepared to work, or whether they can nominate strikers. According to explanatory parliamentary statements, an employee can be compelled to work in these circumstances and Article 7 of the Essential Services Act provides sanctions for failure to do so.

A further problem is the number of legal concepts at play. The law uses two different concepts: the 'performance of the public interest' and 'minimum services'. The Essential Services Act defines these performances of public interest as the arrangements, supplies and services that must be maintained in the event of collective and voluntary stoppage of work or lock-out in order to meet certain vital needs, to carry out urgent work on machinery or plant and to perform certain tasks as a result of force majeure or an unforeseen necessity.<sup>23</sup> Moreover, it applies to the production of goods which are necessary for the population or services which are of fundamental importance. This is a broad definition which covers more than a minimum level of services.

A final issue is the possible obstruction of the right to freedom. Since 1948, fundamental rights have become increasingly important and the right to strike is such a right. It is therefore important to examine compatibility of the obligation to perform work with this right to freedom, before casting it aside in the interest of society. Here too, the test of proportionality is important. Unlike the private sector, the public sector does not have a general act stating that minimum services have to be provided during a strike. Public servants have the right to strike. Article 6(4) ESC does not distinguish between employees or public servants. In the past, the Essential Services Act has often been used to compensate the lack of a similar law in the public sector. However, the Council of State ended this practice in 1990, by deciding that the Essential Services Act does not apply to the public sector.<sup>24</sup> This has provoked a lot of criticism, because essential services are mainly to be found in the public sector.

In the public sector, the government uses many different regulations, such as the Act of 1945 concerning the provisioning of the country,<sup>25</sup> to requisition public servants when the public's food supply is in danger, or the Act concerning the maintenance of order, to requisition the army. A further measure is the Civil Protection Act, which makes it possible to requisition striking firemen and police. However, there is no general power to requisition public servants.

Some governments also draw up 'strike protocols' with the trade unions which give an overview of the progress of a collective conflict. However, these protocols are not

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<sup>23</sup> Article 1, Essential Services Act 1948.

<sup>24</sup> Constitutional Court, 28 February 1990, [www.juridat.be](http://www.juridat.be).

<sup>25</sup> Decree-law (*arrêté-loi*) 22 January 1945.

binding on public servants, because the right to strike is a fundamental legal standard which cannot be restricted by third parties.

There are three further points of particular interest. Firstly, the law on labour relations enables the social dialogue system to extend its scope from the private sector to semi-public undertakings and the public sector. Secondly, it can be noted that the Belgian system is based on adjusted bipartism, or covert tripartism. The state is an informal party to negotiations in the framework of multi-industrial agreements. Examples of this role are that the state's approval is required for any increase in social security spending, and that the state often legally implements the outcome of dialogue between employers and employees, for instance, in multi-industrial agreements and the Generation Pact.

Finally, discussions are currently being held on the amendment of the Essential Services Act of 19 August 1948. There are plans to introduce the provision of minimum guaranteed services, for example in the transport sector. It is questionable as to whether this can be achieved by amending the 1948 Act or whether a new law will need to be drafted.

### **3(e). Does the motivation for a strike affect its legality?**

There are several forms of strike. These can be analysed according to the objective, for example, an act of solidarity or a political strike; the way they are created; spontaneous, wildcat or regular strikes;<sup>26</sup> and lastly by the means used, for example a work-to-rule, boycott or a plant occupation by the workers.

The attitude of the courts and legal doctrine towards striking employees changed considerably between 1921 and 1981. Initially strikes were regarded as an expression of the intention to end the employment contract. Later the theory of 'suspension' was developed. Taking part in a strike was considered a contractual fault, but not serious enough to justify the employer terminating the labour contract. It also happened that strikers were dismissed for just cause. The question of whether or not further professional cooperation was possible was decided according to the unlawful nature of the interruption of employment. A spontaneous or wildcat strike was not tolerated and political or solidarity strikes were usually judged in the same way. Only regular strikes were allowed.

In a judgment of the Court of Cassation of 21 December 1981, the court ended this view by stating that "there is no law that prohibits an employee from taking part in a strike that is not recognised by a representative trade union".<sup>27</sup> The court clearly states that employees have the right, on the basis of Article 3 of the Essential Services Act, not to perform the stipulated employment due to a strike, and by way of derogation from Article 1134 of the Belgian Civil Code.<sup>28</sup> Therefore, a strike is not an 'unlawful act'.

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<sup>26</sup> A spontaneous strike is one which the trade unions know about but which does not comply with the required procedures; a wildcat strike is outside the trade union's knowledge; a regular strike is one recognised by the trade unions which respects the legal procedures.

<sup>27</sup> Court of Cassation 21 December 1981, *R.W.* 1981-82, 2526.

<sup>28</sup> An agreement is legally binding and cannot be broken unilaterally.



Today, all possible strikes are legal, for example, spontaneous strikes, working to rule or solidarity action such as that seen at Volkswagen Vorst and Renault Vilvoorde. However, some authors believe that this does not apply to the public sector and that political strikes should not be allowed for public servants. A minor detail needs to be pointed out concerning plant occupations, which are sometimes qualified as acts of violence instead of strikes, and as a result declared illegal. However, in general, the motivation for a strike does not affect its legality. This position differs to that found in ILO Convention No. 87. Purely political strikes are not protected by the Convention, because they do not strive for the group's direct interests. This approach is shared by the European Committee of Social Rights.

### **3(f). Are there any categories of workers excluded from the right to strike?**

A person can only be excluded from the right to strike if the person involved is a public servant exercising authority in the name of the State and if it would compromise the safety or health of the public.<sup>29</sup> There is an exceptional prohibition of taking strike action for the military which also applied to the police for a long time. Since 1999, however, the police have been entitled to strike, subject to conditions, such as prior notification and discussion of the strike.

The fact that strikes are rarely prohibited arises mainly from international legal obligations. The right to strike is a fundamental right, so a particular group of people cannot be excluded. No particular categories of persons are excluded from the right to strike, neither public servants, nor private employees. However, specific persons needed to perform essential services or provide vital needs in the public interest under the Essential Services Act in the private sector cannot strike. The execution of their work is guaranteed by the law and justified by the public interest.<sup>30</sup>

The 'case law' of the ILO's Committee on Freedom of Association recognises that industrial action usually causes a degree of inconvenience towards consumers. However, this is not considered a sufficient reason to prohibit or restrict the workers' right to strike. Such a restriction must be based on public welfare considerations. The standard response of the supervisory bodies of the International Labour Organization to public welfare considerations is that the right to strike may only be restricted or prohibited in the following cases; in the public service, only for public servants exercising authority in the name of the State; in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population); or in the event of an acute national emergency and for a limited period of time.

### **3(g). Is there an obligation of industrial peace?**

In concluding a collective labour agreement, the parties undertake to uphold, within the time stipulated in the agreement, the 'social peace'. This is an implicit obligation in the collective labour agreement. The obligation of 'social peace' means that parties cannot undertake any action that conflicts with the collective labour agreement. Should such a conflict arise, the parties must exhaust certain procedures, before

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<sup>29</sup> Article G of the ESC, combined with the case-law of the Committee on Social Rights. See also the case-law of the ILO's Committee on Freedom of Association.

<sup>30</sup> Articles 6 and 7 of the Essential Services Act 1948.

proceeding to collective action. These procedures are called 'reconciliation procedures' and respecting these is generally considered to be a moral obligation, which is binding on the unions and employers' associations, but not on individual employees.<sup>31</sup>

The concepts of reconciliation and mediation are often confused in Belgium. Mediation is a technique which uses an objective third party to solve the conflict. Arbitration and reconciliation are forms of mediation. Arbitration involves bringing the conflict before an objective third party, who makes a decision, which may be binding or not. Reconciliation goes one step further: instead of taking a decision, the third party helps both parties to work out a solution, rather than providing a solution for one of the parties.

Mediation is of crucial importance for collective labour relations. It has evolved into the most important way of avoiding collective action and forms an integral part of the collective relations system. It is aimed at defusing a conflict, before the decision to take collective action is taken, by intervening early on in the negotiations. There is no uniform system of social mediation in Belgium. Conflict resolution measures are adopted at the sectoral level in collective labour agreements or in the Joint Committees' internal regulations.

ILO Recommendation R092 recommends that member states provide an infrastructure for collective mediation procedures. Although there is no uniform system of mediation in Belgium, the infrastructure is made available. The Belgian government has taken measures to comply with these recommendations. It has developed a legal framework where certain persons and bodies have been given the authority to intervene in collective labour conflicts. However, there is no such thing as an obligation to reconcile. This has two consequences; parties cannot be forced to reconcile and other persons and bodies other than those appointed by the government can be used to conduct mediation.

The procedure regulated by the government foresees several possibilities. Attempts are always made to resolve the conflict at the company level. This can be done, for example, by negotiations between the individual employer and other parties, or their delegates, involved in the conflict. Most conflicts can be resolved at this level. If no solution can be found, government-regulated procedures can be used. Firstly, Joint Committees can establish conciliation boards. Article 38 of the Collective Labour Agreements Act describes the prevention and resolution of conflicts as one of the main duties of a conciliation board, which consists of the chairman of the Joint Committee, a secretary and several members.<sup>32</sup>

A conflict or impending conflict is brought before the chairman who will decide if it is necessary for the conciliation board to meet. It can also meet at the request of a

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<sup>31</sup>Labour Appeal Court (*Cour du travail*) Charleroi 12 June 1989, *Soc. Kron*. 1989, 349, note J. Jacqmain, and Labour Appeal Court (*Cour du travail*) Bergen (1<sup>st</sup> Chamber) no. 17789, 17800, 7 May 2002, *J.T.T.* 2002, No. 842, 481.

<sup>32</sup> The chairman and members are elected according to the Joint Committee's internal regulations. Half are members of the employer's organisation, the other half are drawn from the unions.

member within the Joint Committee. The procedure is generally as follows.<sup>33</sup> Firstly, the parties involved in the conflict are heard. By this time the conciliation board will have a clear insight into the entire situation. Secondly, an informal contact round is held during which the chairman meets with the members of the conciliation board to work out a solution.

The outcome of this contact is a recommendation, a report of non-reconciliation or a collective labour agreement. In the case of a recommendation, a non-binding proposal is submitted that can be accepted by the parties. If there is a report of non-reconciliation, the parties can appeal to the chairman, to have him act as a social mediator. He can solve the conflict at his own discretion, or at least try to do so.

Another option is to invoke the aid of the Federal Public Service Employment, Labour and Social Dialogue.<sup>34</sup> It has a special division, the Service for Industrial Relations, which deals with the prevention and negotiation of social conflicts, and has its own staff of social mediators. Its duties include preventing social conflicts, performing social mediation, handling communications and submitting reports.<sup>35</sup> The social mediator is usually also a chairman of a Joint Committee, where he performs his mediation tasks.

#### **4. Is the employer entitled to react to the industrial action?**

The employer can react to the strike in several ways. The first way which will be examined is the lock-out. A lock-out can best be defined as the unilateral, temporary non-implementation of the employers' contractual obligation to employ his employees. By taking recourse to such action, the employer's aim is to exert pressure on his employees.

After the French Revolution, associations of workers and employers were criminally sanctioned on the basis of the *le Chapelier* law. These principles were incorporated in Article 414 and 416 of the Penal Code. This was subsequently replaced in 1866 by new Article 310 of the Penal Code, which provided that strikes and actions by employers were no longer prohibited as long as strict conditions were respected. If, for example, a strike or lock-out was accompanied by acts of violence or intimidation, it remained a criminal offence. Lock-outs, followed in some cases by mass dismissals, were quite frequently used in the early part of the twentieth century, mainly in order to break strikes, oppose the introduction of new collective agreements or as a show of solidarity between employers.

Today, lock-outs are relatively rare. The most obvious reason is that the law of 24 May 1921, which guarantees freedom of association and eliminates Article 310 of the Penal Code, enabled a consultation system to be developed which took the sharp edge off labour disputes. By removing Article 310 from the Penal Code, strikes were removed from the ambit of the criminal law. From then on, civil rights principles were

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<sup>33</sup> As cited above, there are no uniform procedures. The particular procedure to be followed will be set out in the collective labour agreement, or internal regulations.

<sup>34</sup> Art. 1, Royal Decree of 23 July 1969, *B.S.* 30 July 1969.

<sup>35</sup> Art. 2, Royal Decree of 27 July 1964, *B.S.* 12 August 1964; Art. 5, Royal Decree of 23 July 1969, *B.S.* 30 July 1969.

applied to collective conflicts. Since 1985, the courts have played a much greater role in mediating collective conflicts. Wildcat strikes were no longer curbed and the employer looked to alternatives such as the summary procedure by means of ex-parte proceedings. As a result, the weapon of the lock-out has become obsolete.

The legal basis for lock-out remained rather controversial until 1991 when employers found a new legal basis in Article 6(4) of the ESC. The characteristics of a lock-out can be defined as follows. Firstly, it is a unilateral operation which distinguishes it from force majeure, or technical unemployment. Secondly, it is a temporary non-implementation of the employment contract. The employer by no means seeks to unlawfully dismiss his employees. When the conflict has ended, the agreement or contract is implemented again.<sup>36</sup> Thirdly, it constitutes a suspension of the employer's contractual duty to employ. The employment contract continues to exist during a lock-out. Dismissal protection is not an issue here, as the employer's contractual duty to employ has only been suspended. The employer is obliged to honour the other obligations set out in the employment contract.

The employer will resort to a lock-out when he wishes to exert pressure on his employees. A distinction must be made between offensive and defensive lock-outs. An offensive lock-out is provoked by the employer in order to force his employees to give in to his demands. A defensive lock-out occurs when the employer reacts to collective action of employees. Some authors believe that a repressive lock-out is also possible.

In a judgment of 1984, the Court of Cassation recognised the possibility of lock-out and this is reflected in Belgian legal doctrine. The Essential Services Act 1948 recognises the right of the employee not to carry out the work as set out in the contract, due to lock-out. As this law regulates the use of lock-out, the court deduced that employers can exclude employees. Although this may seem a valid deduction, it is not. Regulating the use of certain situations does not explicitly legalise them. Nevertheless, the court concluded that the employer has the right to apply a lock-out in two situations, either where a lock-out was an exception to certain non-implementation of contract principles or in response to force majeure.<sup>37</sup> However, this ruling has now become obsolete following the ratification of the ESC. Although lock-out is not mentioned explicitly in Article 6(4) ESC, it is generally assumed that employers have the right to collective action. Apart from the provisions of Article G ESC, no conditions are linked to the exercise of this right. This means that a restriction is only allowed if the legislature intervenes, which has not yet happened.

In conclusion, it is important to note that in Belgian labour relations, lock-out is rarely used. An employer can avoid a lock-out, because of its unpopularity, by using more accepted techniques, such as 'technical unemployment'.

Another way in which employers can react to industrial action is by going to court. Employers will generally do so in response to an occupation of the workplace to have the occupiers removed with an expulsion order. Occupation of the workplace covers a whole range of different means of action which have in common that they take place

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<sup>36</sup> Article 1 of the Essential Services Act wrongly defines a lock-out as a form of 'collective discharge'.

<sup>37</sup> Force majeure indicates cases where an employer is totally unable to provide work due to a cause outside his control which is unpredictable and unavoidable.

on the job. There are four types of occupation; occupation of the workplace without taking over production when there is an employment contract; occupation of the workplace including a production takeover when the employment contract still exists; occupation of the workplace without a production takeover after the employer has terminated the employment contract and occupation of the workplace with a production takeover after the employer has terminated the employment contract. Only the first two types of occupation actually fall within the scope of labour law. To assess the lawfulness of these forms of occupation, property law and Article 6(4) ESC play an important role. In addition to strikes at work, Article 6(4) also recognises other forms of collective industrial action, provided they are exercised taking into account the provisions of concluded collective labour agreements.

## **5. How does the law regulate the impact of strike action on the individual contract of employment?**

It must be noted that collective action can have an impact on the individual labour agreement at different levels. In particular, the impact upon pay, time off in lieu,<sup>38</sup> and the termination of the labour agreement will be examined.

In relation to remuneration, the principle which is applied here is simple: no work, no pay. However, some further remarks can be made. It is important to distinguish between the positions of strikers and non-strikers. Non-strikers who cannot work, or arrive too late for work, for reasons that are beyond their control, for example, because of a strike in another company, or in the public transport sector, are entitled to guaranteed daily pay under Belgian law subject to certain conditions.<sup>39</sup> Firstly, the employees must be fit for work and be physically and mentally capable of working. Secondly, their lateness or non-arrival must be beyond their control; they must make every reasonable effort to get to the workplace and to keep their lateness to a minimum. They must go to work 'normally' and, finally, the delay causing their lateness must occur during their journey to work and not be before, or unconnected with, it.

There is no right to guaranteed daily pay for non-strikers if the collective action takes place within the company.<sup>40</sup> In principle, however, non-strikers can demand compensation from the employer, who is obliged as a result of the labour agreement to provide work to enable the employees to earn a wage. In practice, most employers will pay non-strikers voluntarily, to encourage non-strikers and put pressure on the strikers.

Strikers are not entitled to guaranteed daily pay because they participate in the strike on a voluntary basis. They may be entitled to compensation from their union, although the rates are usually low. However, the fact that trade unions have such strike funds, in order to pay, albeit moderate, compensation, is very important from a political point of view.

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<sup>38</sup> Time off to compensate for overtime or for having to work on a rest day.

<sup>39</sup> Article 27 of the Labour Agreement Act 1978. For example, a public transport strike for several days and announced in advance, does not oblige the employer to pay guaranteed pay.

<sup>40</sup> Article 27(2) of the Labour Agreement Act 1978.

The question of whether an employer can force his employees to take time off in lieu on strike days is highly disputed. In principle these days are chosen by mutual agreement of the employer and employee. However, the Labour Agreement Act 1978 stipulates that if this cannot be mutually agreed, the employer can decide when and how these days are taken. The employer can therefore choose to allocate these days to strike days, if no prior agreement was made. There are no legal obstacles to prevent this. However, in practice, this happens only very rarely because it is detrimental to social relations. After all, the employer has to work with his employees again after the strike. In conclusion, therefore, it is only a theoretical possibility.

Another hotly debated issue is the question of whether the employer can terminate the labour agreement in the event of a strike by dismissing the employees. Before discussing this, some principles of Belgian dismissal law will be outlined.

Firstly, in Belgium, employers have an almost unlimited right to dismiss employees. This is known as the principle of 'ontslagmacht' or 'pouvoir absolue de licencier'. This means that the labour agreement can be terminated at any time. However, a period of notice has to be respected except in the case of just cause. If no period of notice is given, severance pay is due.<sup>41</sup> The labour agreement can therefore be terminated at any time, but certain rules must be respected, or compensation must be paid. Certain categories of employees, such as pregnant women and union representatives enjoy special protection. Although they can still be dismissed, their severance pay will be higher.

A second point that needs to be stressed is the basic right to collective action. As mentioned earlier, there are hardly any rules on collective action. However, collective action is recognised in Belgian case law and legal doctrine.<sup>42</sup> An employer cannot simply dismiss an employee who participates in a strike. However, under Belgian dismissal law striking employees can be dismissed, provided compensating measures are observed.

In practice, strikers are rarely dismissed because to do so would be very detrimental to labour relations. However, an exception must be made in the case of a dismissal for just cause. An employment contract can be terminated without notice, and also without severance pay, for this reason. The question is whether participating in a strike, whether regulated or not, constitutes just cause. According to case law and doctrine, the analysis is that everyone has the right to strike and participation in a strike does not constitute a substantial reason for dismissal nor justify terminating the labour agreement.<sup>43</sup> However, the way an employee conducts himself during a strike may constitute just cause for dismissal. For example if the objective is illegal, or unreasonable, or when the employee exercises his right unlawfully.<sup>44</sup> In such cases just cause is invoked not for the actual strike as such, but for the type of action taken.

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<sup>41</sup> In most cases, compensation will be paid. The dismissal disturbs the labour relations in such way, that this is usually the best solution.

<sup>42</sup> The Court of Cassation declared this as a basic right in a judgment of 21 December 1984, *R.W.* 1981-1982, 2525.

<sup>43</sup> Some of the older jurisprudence deviates from this position. Compare Labour Court (*Tribunal du travail*) Chaleroi, 5 April 1982, *J.T.T.* 1983, 35 with Labour Court (*Tribunal du travail*) Bergen, 7 May 2002, *J.T.T.* 2002, 481 or Labour Court (*Tribunal du travail*) Brussels, 1 December 1989, *J.T.T.* 221.

<sup>44</sup> The strike will be regarded as unreasonable if, for example, there is no reason to strike. If a strike is held in such circumstances, this can be considered as an abuse of law.

## **6. Explain the role of the judiciary, if any, in the resolution of the industrial dispute.**

Since the mid 1980s, employers have frequently referred to the courts to request intervention in collective conflicts. For example, when a picket blocks access to the company's plant, the court may be asked to prohibit this action in order to protect the right to work. However, most scholars believe that the settlement of collective labour disputes does not fall under the court's jurisdiction and that they should be solved through the appropriate channels, such as conciliation boards. In principle, an employer does not ask the court to stop a collective conflict, but rather to end certain activist behaviour when subjective rights are violated, sometimes by acts of violence.

In a judgment of 31 January 1997, the Court of Cassation confirmed that the courts can only intervene in collective conflicts when subjective rights have actually been violated. It is important to note that it is not up to the court to assess whether or not a strike is expedient. The court is only competent for legal disputes and not for conflicts of interest. If the courts refuse to intervene, they are in breach of Article 6 ECHR and Article 14 of the International Covenant on Civil and Political Rights and today, intervention by the courts has been generally accepted.

In 2002, the social partners concluded a 'gentlemen's agreement', which includes a protocol concerning the settlement of collective disputes. Under this protocol, employers' associations agree to try to solve conflicts by using social dialogue and to go to court only in exceptional cases. In return, the trade unions agree to encourage their members to respect strike notices, not to use violence when organising a strike and not to use flying pickets.<sup>45</sup>

The Court of First Instance is the usual legal forum for strike-related applications. Although the labour courts might seem more appropriate, employers generally apply to the Court of First Instance for summary procedure by means of ex-parte proceedings. Article 584 of the Judicial Code provides two possibilities for referring to the President of the Court of First Instance, firstly, an application for an interim injunction (*demande en référé*) and secondly, an application for an interim injunction by means of ex-parte proceedings (*demande en référé sur requête unilatérale*). In the case of an interim injunction procedure, the adversary is summoned for a hearing. The term for issuing a summons has been shortened to two days.

An interim injunction by means of ex-parte proceedings is more commonly used. According to Article 854 of the Judicial Code, two conditions must be fulfilled: total necessity and the urgent character of the situation. To justify the necessity, the urgent character of the matter is sometimes referred to. However, the urgent character alone is insufficient justification for the interim injunction by means of ex-parte proceedings. The ex-parte procedure is not uncontroversial because the proceedings do not provide an opportunity for any form of defence. Although this is a fundamental element of Belgian legal procedure another concern is that the Court of First Instance, which is not wholly familiar with industrial relations, is asked to assess and rule on a particular component of collective action. It can be argued that this form of procedure has upset the balance of power between trade unions and employers. In addition, the

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<sup>45</sup> Pickets are used by workers to publicise their dissatisfaction. Sometimes they block access to a company and/or stop non-strikers from going to work to put the management under pressure.

Belgian legislator has favoured a solution where collective conflicts are preferably solved by mediation and consultation. However, employers practice this procedure because trade unions do not have legal personality and therefore cannot be summoned. Furthermore, the strikers' identity is often unknown.

If the court follows the employer's reasoning, it will order the picketers to end the action. This order is remitted to a bailiff who takes the writ to the business where the industrial dispute is taking place and serves it on the persons guilty of the alleged offence. To ensure compliance with the court order, the plaintiff will usually request the police to check the picketers' identities. Refusal to comply with this request may result in the payment of damages. In practice, however, strikers seldom have to pay this penalty.

**7. Article 6(4) of the European Social Charter guarantees the right to strike. Does the European Committee of Social Rights view your national law and practice as complying with Article 6(4)?**

In its report of 2004, the Committee found that the Belgian law regarding the right to strike fails to comply with the ESC in two respects. Firstly, several judicial practices limit the exercise of the right to strike beyond the restrictions accepted in Article G of the Charter. The judicial practices in question are; judgments delivered on urgent applications of civil law which forbid picketing, with coercive penalties classed as forcible methods attached, even if the pickets do not engage in any physical violence, threat or intimidation; judgments which rule on the strike itself and may prohibit, even as a preventative measure, a strike on the grounds that it constitutes an abuse of rights accompanied by criminal penalties; and judgments delivered under the urgent procedure which impose a preventive ban on strikes with a coercive penalty.

Secondly, the Committee considers that Article 6(4) of the Charter implies that a strike not only has the effect of suspending a contract of employment, but also prohibits in a sufficiently deterrent manner the dismissal of striking workers. Noting that Belgian law does not prohibit the dismissal of striking workers, the Committee considers that the situation is not in conformity with Article 6(4).

The Committee has also commented on the Protocol concluded between the social partners in April 2002, regarding the settlement of collective disputes. The provisions in this Protocol have led to a temporary end of the above-mentioned judicial practices, which failed to comply with the provisions of the ESC. However, the Committee believes that there is a fundamental problem in Belgium where courts can control, albeit indirectly, the behaviour of individual striking workers.

**8. To what extent, if any, does national law provide regulation for transnational forms of strike action?**

In Europe there is a general right to take collective action. All the EU member states have ratified several conventions and charters, such as ILO Conventions No. 87 and No. 98 and Article 6(4) ESC recognising this right. The way this right is exercised and interpreted, however, differs from state to state. There are several different



approaches, making a uniform right to take collective action nonexistent. This can cause problems in the case of collective action with a cross-border dimension.<sup>46</sup>

The following observations can be made concerning Belgium. As explained above, Belgium has a monistic system.<sup>47</sup> International and national law are part of the same unified legal order. In such a system, when Belgium approves, or ratifies an international law, that international law becomes part of the national law. Accordingly, when Belgium approves legislation such as the European Social Charter, ECHR or ILO conventions, the rights included in them are enforceable before a Belgian court. This also applies to the right to take collective action. However, as there is, at present, no European framework for the right to take *cross-border* collective action, no such laws are applicable in Belgian law.

Of course, the fundamental right to take collective action, without stipulating how it should be exercised, is recognised in several treaties and conventions, and is applicable in Belgium. However, at the national level there is no specific regulation of cross-border collective action. Collective action is an area which is evidently linked to the very specific national industrial relations systems and is therefore nearly exclusively regulated by national rules.<sup>48</sup> Because there are no specific rules available for transnational collective action, the same rules apply as for national collective action. How this right is exercised has been explained above. It is recalled that in Belgian law secondary action, such as sympathy or solidarity action, taken to support initial primary action is lawful. Transnational collective action therefore cannot be prohibited in Belgium. Of course, irrespective of how national collective action is regulated, it has to be consistent with European fundamental rights.

Problems can occur with regard to solidarity action on a transnational scale. An example of transnational secondary action would be where workers take collective action to support colleagues already engaged in collective action in another country. In some countries this is permitted whilst in other it is prohibited or restricted.<sup>49</sup> This type of situation raises questions about the need for an EU-framed right to take collective action.

There have been a number of high profile industrial actions with transnational dimensions in Belgium. For example, in February 1997, Renault announced the closure of its plant in Vilvoorde, Belgium. This provoked collective action at European level. Belgian, French and Spanish unions called for solidarity action, and thousand of workers stopped work on 7 March 1997. There were also blockades, sit-ins and political demonstrations. A further example was seen in February 2006 when over 500 Coca-Cola enterprises demonstrated against restructuring plans, including the plant in Belgium.

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<sup>46</sup> F Dorsemont, T Jaspers and A van Hoek (eds), *Cross-Border collective action in Europe: A legal challenge. A study of the legal aspects of transnational collective actions from Labour Law and Private Law perspective* (Intersentia, Antwerp 2007) 23-24.

<sup>47</sup> Court of Cassation 27 May 1971, *SEW* 1972, 42.

<sup>48</sup> F Dorsemont, T Jaspers and A van Hoek (eds), *Cross-Border collective action in Europe: A legal challenge. A study of the legal aspects of transnational collective actions from Labour Law and Private Law perspective* (Intersentia, Antwerp 2007) 75.

<sup>49</sup> For example, Germany, Ireland and UK.

A final instance of industrial action with transnational implications is seen in a series of disputes at Brussels airport in 2005 and 2007. In 2005, in response to the dismissal of one of the top union representatives, Flight Care (the luggage handling division) decided to go on strike. This caused many problems, and resulted in flight delays and cancellations. Thousands of passengers were stranded both in Belgium and abroad. This strike became notorious in Belgium and was met with massive disapproval. A later strike had a similar effect. On 13 April 2007, several airport services, including the fire department, decided to stop working, for a period of ten hours. Because this action took place at the very beginning of the Easter holidays, it caused massive problems. Only very few flights were able to depart or land at the airport. 26,000 passengers were left stranded. This caused an outcry amongst the general public and resulted in a lawsuit against the unions.

## **Bibliography**

- R Ben - Israel, 'Strikes, lockouts and Other Kinds of Hostile Actions' (1974) IECL 15/5.
- R Blainpain 'Strikes and Lock-outs in Industrialized Market Economies – Belgium' (1994) BCLR 31-39
- M De Vos 'The Actors of Collective Bargaining – Belgium' (2004) BCLR 65-93
- F Dorssemont, T Jaspers and A van Hoek (eds), *Cross-Border collective action in Europe: A legal challenge. A study of the legal aspects of transnational collective actions from a Labour Law and Private Law perspective*, (Intersentia, Antwerp 2007)
- P Humblet and M Rigaux, *Belgian industrial relations law*, (Intersentia, Antwerp 2005)
- P Humblet and others, *Synopsis van het Belgische arbeidsrecht*, (Intersentia, Antwerp 2006)
- M Jamouille, 'Le droit de la grève en Belgique: évolutions et perspectives', Soc. Kron. 8 (2003) 365-374
- F Kefer, 'Conflits collectifs et recours judiciaires' J.T. (1994) 425-431
- T Novitz, *International and European Protection of the Right to Strike. A Comparative Study of Standards Set by the International Labour Organization, the Council of Europe and the European Union* (Oxford University Press, Oxford 2003)

## **Useful websites**

- <http://www.meta.fgov.be/> (Federal Public Service Employment, Labour and Social Dialogue)
- <http://www.coe.int/> (The Council of Europe)
- <http://aps.vlaanderen.be/> (Research division of the Flemish government)
- <http://www.fgtb.be/> (Socialist trade union)
- <http://www.acv-online.be/> (Christian trade union)
- <http://www.aclvb.be/> (Liberal trade union)
- <http://www.vbo-feb.be/index.html?&lang=en> (Federation of Belgian Enterprises)

### 3. France

*Loredana Carta, Marion Deschamps, Audrey Jannin and Anne-Laure Le Luduec*

#### 1. Briefly describe the industrial relations context of strike action in recent years.

A means of action for employees, the strike is also a source of damage for employers and subsequently for their clients and partners, especially when the action lasts a long time. For many centuries, the right to strike has been considered as an infringement of other rights deemed more worthy, for example, the right of property. Regarded as a “dangerous population”,<sup>1</sup> workers had to be kept under control and by no means could they be handed over such a powerful weapon. A brief historical overview of the right to strike in France will be given before focusing on more recent developments.

The 1789 Revolution has widely promoted the concepts of Enlightenment (*philosophie des Lumières*) and especially the idea that individuals are on an equal footing. As a consequence, intermediary groups were not necessary and in the name of the freedom to contract, they had to be banned. The first regulation to note is the *Le Chapelier Act*, promulgated 14-17 June 1791, which prohibited employers’ and workers’ coalitions. The 22 *Germinal An XI Act*<sup>2</sup> introduced a difference between workers’ and employers’ coalitions, the latter being less severely repressed. This discrimination was confirmed in 1810 when new provisions were introduced in the *Penal Code*: employers’ coalitions were not punished unless they tended to “unfairly provoke the decrease of wages”, while workers’ coalitions could lead to correctional penalties, regardless of their goal.

Strikes were thus criminally prohibited and it is not until the Act of 27 November 1849 that this inequality was abolished. The criminal offence of striking was repealed by the Act of 25 May 1864. However, even if striking was no longer reprehensible, it did not constitute a right and remained a tort likely to be sanctioned, up until 1946.

The current legislation relies on the French Constitution of 1946, opening with a Preamble which echoes the 1789 Declaration of Human Rights,<sup>3</sup> and promotes new constitutional rights including the right to strike. The current Constitution of 1958<sup>4</sup> refers to this Preamble. In recent decades, the right to strike has frequently been exercised by workers and, more generally, demonstrations have been used by other groups or entities to protest against government policies or to affirm rights. Often participating in the same collective actions, workers and non-workers have joined forces in such protests. The national movement of May 1968 was a considerable example of this and constituted a milestone in the evolution of French social legislation and more widely of society. Beginning with student demonstrations, at its height this widespread movement also involved some ten million workers, representing some 20% of the French population. It led to the signature of the *Accord*

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<sup>1</sup> ‘*Classe laborieuse, classe dangereuse*’ (the working classes are dangerous) was a slogan very popular in the first half of the 19<sup>th</sup> century and especially in 1848.

<sup>2</sup> The date comes from the Revolutionary calendar applicable at the time in France. Elsewhere it was 12 April 1803.

<sup>3</sup> *Déclaration des Droits de l’Homme et du Citoyen 1789*.

<sup>4</sup> The constitution of 1958 instituted the Fifth (and current) Republic.

de Grenelle on 27 May 1968, an agreement concluded between the Government and trade unions. In this document, essential decisions were taken: the minimum wage was increased up to 40% and all wages from 10%. In addition, the working time was reduced and the retirement age brought forward. Specific trade unions institutions were introduced for the first time.

May 1968 was one of the most symbolical collective actions in French social relations where workers, students and trade unions joined in order to protest against the Government's policy. The most recent example of this trend is to be found in 2006 when thousands of people protested against the CPE.<sup>5</sup> In 2006, demonstrations organised in response to the creation of this new type of employment contract were broadcast worldwide. This opposition eventually resulted in the withdrawal of the project by the Government.

The stated aim of this new contract was to encourage the hiring of younger workers, whose unemployment rate in 2006 (23.1%) was considerably higher than the average rate of unemployment of the overall working population (9.4 %). The contract was introduced under Article 8 of the Equal Opportunities Act.<sup>6</sup> It was a permanent contract, which could be offered to workers up to twenty-six years old. Contrary to what its name suggests, an employee could be subject to this type of contract both for his or her first job and for subsequent positions, provided the age condition was fulfilled. The CPE's main feature, and the root of the controversy, was a 'consolidation period' of two years, following the usual trial period, during which the employer could end the employment contract without giving any reason or following any legal procedure except sending a letter. Furthermore, if the employee ended the contract during the consolidation period, he or she was deemed to have resigned and was not entitled to unemployment indemnities.

The CPE aroused strong opposition from a large number of university and high school students with demonstrations held at 69 out of 84 universities and over 1,000 high schools.<sup>7</sup> The movement was taken up by trade unions,<sup>8</sup> then by major left wing political parties<sup>9</sup>, and a significant section of the French population. On 4 April 2006, 3 million people took part in demonstrations in the streets of the main French cities.<sup>10</sup> The main arguments against the CPE were that it provoked unfair dismissals and precariousness of employment.<sup>11</sup>

From a legal perspective, the Court of Appeal judged that a two-year consolidation period was in violation of the ILO (International Labour Organisation) Convention No. 158 of 22 June 1982.<sup>12</sup> The parliamentary opposition introduced an application before the Constitutional Council, seeking the withdrawal of the entire bill.<sup>13</sup>

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<sup>5</sup> 'Contrat première embauche', or first employment contract.

<sup>6</sup> Law n° 2006-396, 31 March 2006.

<sup>7</sup> According to UNEF, an important student union, one of the leaders of the movement.

<sup>8</sup> CFDT called for demonstrations, notably on 28 March 2006.

<sup>9</sup> Notably the Communist party (PCF), the moderate left wing party (Parti Socialiste), the Labour party (Force Ouvrière) and the Green party (Les Verts).

<sup>10</sup> According to the CGT figures published in *Le Monde*, April 4 2006.

<sup>11</sup> See arguments in the decision of the Constitutional Court of March 30<sup>th</sup> 2006.

<sup>12</sup> For example, CA Paris, 18e ch., 6 July 2007, n° 06/06992, Proc. Rép. près TGI d'Évry et a. c/ De Wee.

<sup>13</sup> The application was made on 14 March 2006.

However, the Constitutional Council judged that the Equal Opportunities Act was generally compliant with the French Constitution,<sup>14</sup> although the ILO itself has recently stated that the probationary period for employees hired under this new recruitment contract could not be considered reasonable as required by the Convention.<sup>15</sup>

The strong opposition and protest by a significant portion of the population undermined the position of the Executive. The Act was published in the Official Journal on 2 April 2006 with a promise by Jacques Chirac (then French President) that changes would be made, in particular on a reduction of the consolidation period to one year.<sup>16</sup> Eventually, a bill presented by the Prime Minister on 10 April 2006<sup>17</sup> proposed the CPE's removal and Article 8 of the Act of 31 March 2006 was repealed.<sup>18</sup> The new Act on the access of young people to the labour market replaced the CPE with various measures 'to support the professional insertion of troubled youth'.

It can be seen that strikes in France are an instrument of progress, a way to bring about reforms by attracting the Government's attention to the problems faced by the French people. Nevertheless, strikes are primarily a means for employees to lobby employers. A brief survey of the industrial relations context in recent years will give more information as to the current situation. According to the media, the impression is that social unrest is spreading in France. However, looking at recent figures, the decreasing trend in industrial disputes is notable. A diversification in the causes of conflicts and a concentration of conflicts in particular sectors and undertakings can also be observed.

The diagram below highlights five main causes triggering strikes: working time, wages, employment, working conditions and conflicts about new laws. Working time was a particularly sensitive area between 1999 and 2001, since when conflicts concerning this issue have decreased. This can be explained by the debate surrounding the reduction in working time from 39 to 35 hours per week.<sup>19</sup> It is clear that wages have always been a subject of concern for workers. Linked with a current debate on the purchasing power of middle classes, this question has remained at the very core of industrial disputes over the past few years.

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<sup>14</sup> Decision of the constitutional court of 30 March 2006 (Decision N° 2006-535 DC).

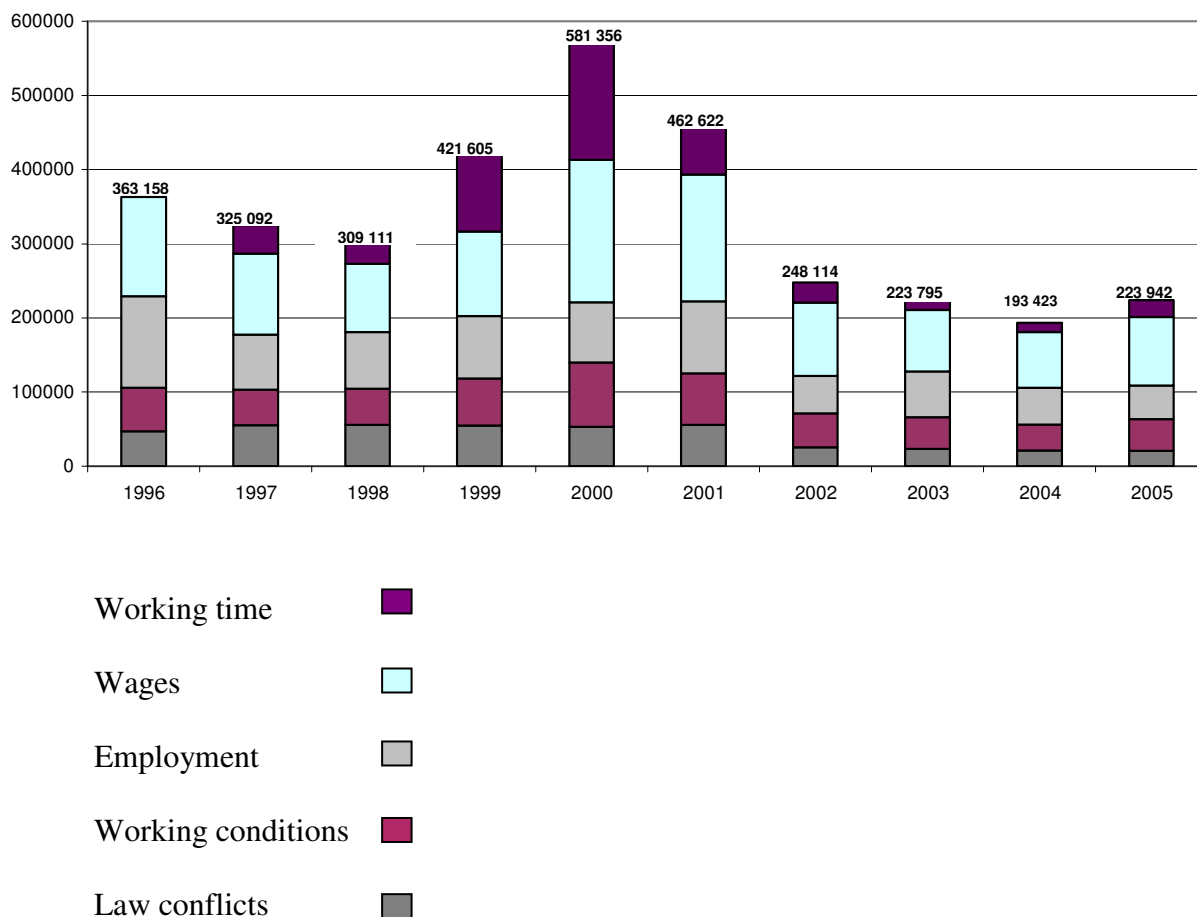
<sup>15</sup> This decision of 14 November 2007 results from a trade union referral.

<sup>16</sup> Jacques Chirac's declaration on the law on equal opportunities, at the Palais de l'Élysée, Paris, 31 March 2006.

<sup>17</sup> Law N° 2006-457, published in the Official Journal on 22 April 2006.

<sup>18</sup> The rest of the Equal Opportunities Act was retained.

<sup>19</sup> Two acts have implemented this reduction : Loi Aubry I of 13 June 1998 and Loi Aubry II of 19 January 2000.



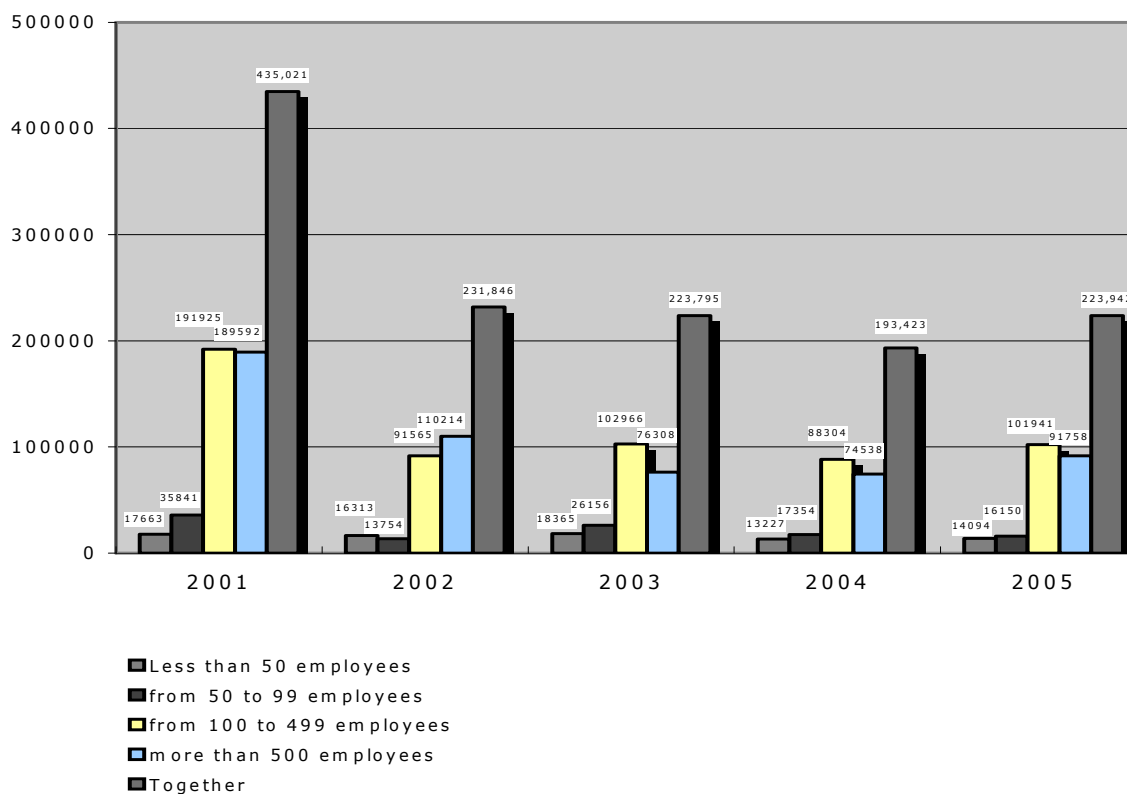
A second point of interest is that industrial disputes occur more frequently in certain sectors of activity and types of undertakings. The table below shows the percentage of companies (of more than 10 employees) in different fields of activity which faced a strike in 2005 as well as the percentage of employees whose company faced a strike in 2005. In terms of percentage of companies, energy industries, automobile industries and financial activities underwent more strikes than other sectors. In terms of the percentage of employees, we can see that this trend is confirmed.

It is notable that one third of the working population overall has faced an industrial conflict in 2005; however only 2.8% of companies were affected by a strike in the same year. This means that large undertakings are more often confronted by strikes than smaller ones.

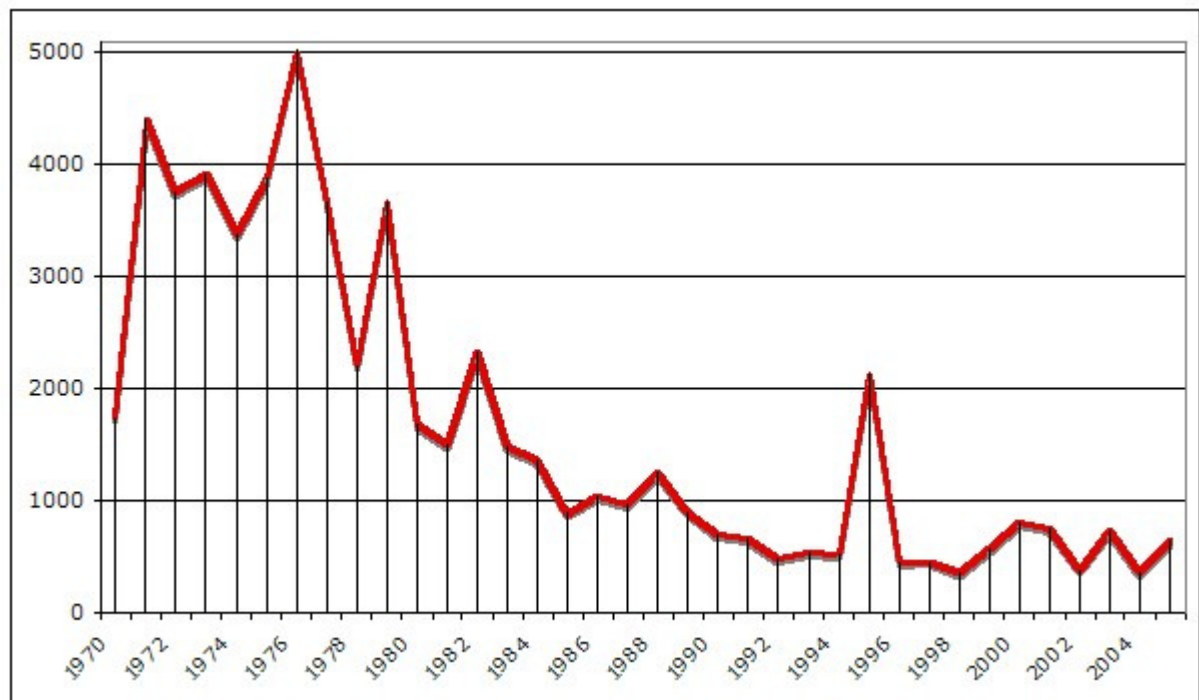
Field of activity	% of companies	% of the employed staff in the field of activity
<b>Industry</b>	<b>5,4</b>	<b>37,7</b>
Agribusiness and food industries	4,1	27,8
Consumer goods industries	3,0	20,6
<i>Automobile Industry</i>	<u>15,3</u>	<u>74,6</u>
Industries of capital goods	5,9	36,4
Intermediate goods industries	6,0	33,2

<i>Energy industries</i>	<u>22,8</u>	<u>82,9</u>
<b>Construction</b>	<b>0,9</b>	<b>5,8</b>
<b>Trade</b>	<b>0,8</b>	<b>19,6</b>
<b>Service</b>	<b>3,0</b>	<b>33,2</b>
Transport	6,7	50,8
<i>Financial Activities</i>	<u>10,6</u>	<u>57,2</u>
Real estate activities	2,9	15,1
Business Service	1,2	33,1
Service to individuals	0,7	10,6
Education, health, social and association	5,7	17,6
<b>Total</b>	<b>2,8</b>	<b>30,0</b>

From the next diagram, it can be seen that workers in large undertakings (usually from 100 to more than 500 employees) tend to go more on strike than those in smaller undertakings. However, the data must be interpreted in the light of different elements. In practice, the role of trade unions in calling a strike is very important in France and in smaller undertakings, union representation is often absent. With no intermediary to transmit workers' claims, employees usually prefer avoiding a confrontation with their employer.



In spite of these seemingly important figures, there has been a decrease in the number of strikes since the 1970s.



Number of individual days lost due to strike (in thousands).

The final diagram shows a decreasing trend in the number of strikes in the private sector from 1977 onwards due to several factors including the increase of unemployment, the annual obligation of social partners to negotiate on wages, duration and organisation of work and also an increase of other forms of protest.<sup>20</sup>

In conclusion, it can be said that in France, the strike is undoubtedly a powerful means of change for workers, if not the sole means at their disposal. Conceived as such, the right to strike is given strong protection under French law and its constitutional value has been recognised by many authorities.

## 2. The right to strike as a fundamental legal norm

### (a) Is the right to strike guaranteed in the national constitution?

Under French law, the right to strike is a fundamental right which is guaranteed by the supreme norm, the Constitution. However, there are very few texts regulating this right and the norms conceived as a whole do not constitute a unit so it has fallen to the courts to affirm this right in their decisions. Although the right to strike is a constitutional one, its impact on the exercise of other freedoms and rights must also be considered.

<sup>20</sup> M Moreau, M, *La Grève* (Economia, Paris 1998).



In 1946 the constituent authority chose to give the right to strike a particular strength in the normative hierarchy. Taking on a constitutional value, the right to strike has also been recognised by the highest courts in France. The right to strike is guaranteed by the Constitution and more precisely by the Preamble of the Constitution of 1946 (dating from the Fourth Republic), which is recognized as a part of what is known under French law as the ‘constitutionality unit’, a notion which expresses the unity of the supreme norm. Pursuant to paragraph 7 of this Preamble, the right to strike is exercised within the framework of the laws under which the right is regulated. This provision has the status of a social right which is particularly necessary to our times.

**2(b). Is it recognised as a fundamental right? (e.g. through the case law of the highest courts)**

The constitutional nature of the right to strike is a key element of the protection guaranteed to strikers. For example, they cannot be dismissed on grounds of their participation to a strike.<sup>21</sup> Because of the lack of legislation, case law plays a fundamental role in the interpretation of the scarce set of rules concerning the right to strike. The right to strike is not only protected by the Constitution, it is also promoted by the courts and principally the three highest courts in France.

The Constitutional Council<sup>22</sup> has often referred to the Preamble of the Constitution. In a decision of September 1986, the Council declared that the constituent authority intended to give a constitutional value to the right to strike.<sup>23</sup> This specific place in the normative hierarchy is recognised both in the private and in the public sector. The right to strike is recognized as a fundamental right by the Court of Cassation.<sup>24</sup> It can be restricted neither by private parties nor by judicial power. Thus, for example, it cannot be restrained by a collective agreement or an administrative regulation.<sup>25</sup> In another decision, the Court of Cassation reaffirmed that the right to strike is to be exercised within the framework in which this right is regulated.<sup>26</sup> Similarly, according to the same Court, a strike implies the existence of professional claims, however a judge cannot substitute his appraisal to the strikers’ opinion on the legitimacy of the claims. Indeed, in doing so, the judge would undermine the free exercise of a constitutional right.<sup>27</sup>

As far as the public sector is concerned, the relevant case law is that of the State Council. Before the Preamble of the Constitution of 1946, civil servants were excluded from the right to strike. Additional regulation should have been laid down in order to implement a statutory regime but the set of rules adopted so far has no

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<sup>21</sup> Article 521-1-1 of the Labour Code.

<sup>22</sup> The Constitutional Council (Conseil constitutionnel) is in charge of assessing the constitutionality of bills and acts.

<sup>23</sup> Décision N° 86-217, DC.

<sup>24</sup> The Court of Cassation (Cour de Cassation) is the highest court in the French judicial branch. It rules on questions of law and has the power to quash a decision. As far as social law is concerned, the relevant chamber is usually the social chamber (chambre sociale). Please note that citations of decisions of the social chamber of the Court of Cassation will be prefaced ‘Soc.’.

<sup>25</sup> Soc. 7 June 1995 (RJS 8-9/95 n°933)..

<sup>26</sup> Assemblée plénière, 23 June 2006 (N° de pourvoi : 04-40289).

<sup>27</sup> Soc. 2 June 1992 (RJS 1992. 501 n°906).

consistency. However, in 1950 the State Council<sup>28</sup> recognised that the right to strike is a fundamental right and that civil servants cannot be prevented from exercising it even though limitations may be implemented.<sup>29</sup> In this case, the State Council was in a difficult position. The Council could not deny that the right to strike had to be balanced with the principle of public service continuity. But as a principle of constitutional value, it could not be undermined so as to deprive civil servants from exercising a fundamental and individual right. Moreover in a decision of 18 September 1986, the Constitutional Council decided that “it is possible to restrain the right to strike for categories of public servants but only if it is justified to maintain public interest.”<sup>30</sup> The right to strike has actually been limited for some categories of state employees as shall be seen later in the report.

### **2(c). What is the relationship between the right to strike and other rights and freedoms?**

Although the right to strike is a fundamental right, it must be balanced with other freedoms of equal value. Among these rights are the freedom of trade and industry and the right to property, the freedom to work, the safety of people and goods and the continuity of public services. The exercise of the right to strike, as defined by case law, may by its very nature conflict with other rights and interests. Conciliation is necessary in order to preserve the fundamental rights of each party. Case law has identified limits to the right to strike in order to guarantee other freedoms. Thus, workers participating in a strike have a duty to respect those essential rights.

As far as the freedom of trade and industry and right of property are concerned, the right to strike does not include the possibility for strikers to occupy their workplace and the illegal confinement of the employer or managers constitutes a criminal offence. Here the employer’s direct interests could be damaged. Indeed, sit-ins might infringe both his freedom of trade and industry and his right to property. A breach of the right to property may be constituted by destruction, damage or deterioration of the employer’s goods. The Penal Code represses such acts as will be seen later in the report. Furthermore, picketing is an obstacle to the freedom of trade as it can cause damage to the employer and to his partners, clients and suppliers.

In relation to the freedom to work, the legislator has implemented an offence aiming at ensuring the freedom of work and at guaranteeing the access to offices and workshops despite industrial actions.<sup>31</sup> As regards sit-ins, according to case law, they are a “manifestly illicit disturbance in particular when [they] seriously [impede] the freedom of work”.<sup>32</sup> A judge may request the help of public forces in order to evacuate the workplace. Nevertheless, sit-ins are only considered by case law as an abuse of the right to strike, where there is an interference with the freedom to work. Indeed judges have permitted sit-ins when they are symbolic, momentary and

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<sup>28</sup> The State Council (Conseil d’Etat) is the equivalent of the Court of Cassation for the administrative branch of law.

<sup>29</sup> State Council, 7 July 1950, Dehaene, Rec. Lebon 426.

<sup>30</sup> Décision N° 86-217 DC.

<sup>31</sup> Article 431-1, Penal Code.

<sup>32</sup> In this particular case, the strikers had forbidden access to a plant to everyone and especially to the chief executive and other workers. Soc. 21 June 1984, (Lopez et a. c/ Sté La Générale Sucrière, Bull. civ. V, n°263).

harmless in that they do not infringe the freedom to work.<sup>33</sup> For example, the momentary occupation of the corridor leading to the managers' offices in order to accompany trade union members into those offices is not an abuse of the right to strike.<sup>34</sup> On the other hand, when picket lines obstruct the firm's entrance and as a consequence non-strikers cannot gain access to their workplace, it is considered as an anomalous exercise of the right to strike because it constitutes an interference with the freedom of work.<sup>35</sup>

Turning to the safety of people and goods, in the light of the Constitution and of the principles it protects, the Constitutional Council declared that it is necessary to reconcile the right to strike with the protection of health and the safety of people and goods.<sup>36</sup> As a consequence, limitations to the right to strike are allowed when called for by a legitimate aim of security. The justification of this limit is assessed in its legitimacy by the judge.

Finally, the continuity of public services must be considered. Public service continuity is a general principle of law recognised by the State Council. In a decision of 25 July 1979, the Constitutional Council stated that the right to strike has to be balanced with the need to ensure public service continuity. Furthermore, in a decision of 18 September 1986, the Council affirmed that "one cannot deduce from the recognition of the right to strike a limitation to the legislator's powers to add necessary restrictions with a view to guarantee the continuation of public service which is, as the right to strike, a principle of constitutional value under French law".

In conclusion, the right to strike, although recognised as a fundamental right, must be balanced with other principles and the forms that collective action can take will determine its legality.

### **3. The legal framework for strike action**

#### **(a) Is there a legal definition of what constitutes a 'strike' or other forms of collective actions?**

The right to strike is an individual right but it is collectively exercised. As such, the definition of strike presents many peculiarities. In particular, it is characterised by the absence of legal definition and consequently case law plays a fundamental role in defining it. The courts have thus determined the scope and the elements which make up a strike. In addition, legal procedures applying to strikes vary according to whether they occur in the private or the public sector.

The notion of strike is characterised by the absence of a legal definition. It has, therefore, been for the courts to define the concept. As regards strikes in the private sector, no legal definition can be found under French law. Although there are a few acts regulating the modalities of strike in the public sector, there has been no initiative of the legislator to give a precise definition in this sector. This could be the result of a reluctance of the legislator to confront the social partners on such a delicate subject.

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<sup>33</sup> Soc. 26 February 1992 (Cherki et a. c/ France Glaces Findus, Bull. civ. V, n°529).

<sup>34</sup> Soc. 11 February 1960 (SINCASO c/ Billard, Bull. civ. V, n°170).

<sup>35</sup> Soc. 8 December 1983 (Fontaine et a. c/ Demery, Bull. civ; V, n°598).

<sup>36</sup> Décision N° 80-117 DC.

Since the legislator has remained silent in this matter, it is for the courts, and especially the Social Chamber of the Court of Cassation, to define the notion of 'strike'. This Court has adopted a comprehensive definition of strike including different types of action as well as the motivations of strikers. Indeed those aspects, which may well in other countries be taken into account separately, are closely intertwined in France and must therefore be considered as a whole.

The Court of Cassation seems only to recognise a right to strike of wage-earners and excludes other categories such as students or independent workers, for example, doctors, from the benefit of legal protection.<sup>37</sup> This exclusion does not mean that those categories have no right to express themselves collectively, though their action will not be qualified as a strike but more likely as a demonstration. This latter is not subject to the same rules.

It is interesting to note that there is no "illegal strike" as such in France. Such a notion would result in assessing a constitutional right and perhaps in denying it. Courts must therefore distinguish between collective actions which fulfil the requirements set out by case law and collective actions which do not. Thus the former are considered as strikes and are subject to the relevant rules, while the latter are deemed illegal. Actions taken within a collective movement are considered unlawful and cannot benefit from the legal protection granted to strikes.

The notion of strike, developed by case law, can be defined as a "concerted cessation of work with a view to supporting professional claims".<sup>38</sup> The cessation of work comprises three key elements, according to the Court of Cassation: it must be complete, collective and concerted. These elements have been gradually developed over the years and will be considered in turn.

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<sup>37</sup> Soc. 15 January 1991 (Bull.civ V., n°19).

<sup>38</sup> Soc. 23 October 2007 (RJS 01/08 n°65).

Firstly, the cessation of work must be complete. Whenever work is interrupted, this requirement is fulfilled, regardless of the duration of the interruption. Whilst this rule may seem straightforward, a few comments must be made in order to clarify what is meant by it. As a general rule, the right to strike does not authorise strikers to commit misfeasance. Indeed, bound by the terms of their contract of employment, strikers must accomplish their tasks as they have been instructed. If they wish to protest, then their action must take on the form of a complete cessation of work. Misfeasance for strikers would amount to a breach of their contractual obligations and they would be liable for it. As a result, go-slow strikes and ‘grèves de la pince’<sup>39</sup> are not considered as strikes and are instead deemed to be unlawful collective actions because there is no complete cessation of work.<sup>40</sup> Working-to-rule and ‘grèves à rebours’<sup>41</sup> are prohibited for the same reason. In contrast, work stoppages, rotating strikes and key strikes are considered as fulfilling this condition. As they consist of a complete cessation of work, they are qualified as strikes.<sup>42</sup> A warning strike is also lawful and is granted the same protection.

The second requirement is that the cessation of work must be collective. This does not imply that all, or a majority, of the workers in the relevant undertaking go on strike: the action can be carried out by a minority of workers, and can therefore be confined to one establishment of the undertaking or a fraction of the workforce or to a professional category. In principle the cessation of work by one employee is not a strike but it can be qualified as such in two situations: when this striker is the only employee of the undertaking<sup>43</sup> or if he or she follows a national call, he is entitled to exercise his right to strike.<sup>44</sup> Lastly, even when a majority of strikers decides to resume working, a minority may still carry on striking because those workers are exercising their individual right to strike. Indeed even though only a minority of workers is striking, the cessation of work is still collective.

The final element is that the cessation of work must be concerted. Striking entails that there is a common will to cease working in order to support professional claims. Here the private and public sectors must be distinguished as they are not subject to the same rules. In the private sector there is no requirement regarding the entity calling a strike: it may be a trade union or a group of workers. Indeed the right to strike is an individual one, though exercised collectively. Thus the concerted character of the movement is deduced from its collective nature. Wild cat strikes are thus allowed in the private sector. The situation is quite different in the public sector where notice must be given by the unions prior to the triggering of the strike.

### **3(b) Are there legal procedures for a legal strike to take place?**

In order to explain the legal procedures which must be complied with in order to hold a legal strike, the private and public sectors must be distinguished.

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<sup>39</sup> This involves refusal to perform certain duties, e.g. ticket collectors of the SNCF (French railways) refusing to inspect tickets.

<sup>40</sup> Soc. 25 June 1991 (RJS 8-9/91 n°998)

<sup>41</sup> Working outside working hours.

<sup>42</sup> See for stoppages : Soc. 25 February 1988, Sté Montale c/ Lemaire (Bull.civ., n°133)

<sup>43</sup> Soc. 13 November 1996, Direr c/ Bolard (Bull.civ. V, n°379)

<sup>44</sup> Soc. 29 March 1995, Biraud c/ Sté Arnaud (Bull.civ. n°111)

In the private sector the right to strike, as a constitutional right, cannot be restricted or regulated by a collective agreement.<sup>45</sup> The legislator alone can lay down legal procedures in order to regulate the strike. The employer must be aware of the strikers' claims but the burden of information does not rest on strikers, so, generally speaking, there are no prerequisites as far as legal procedures are concerned. There is no specific requirement regarding strike notice in the private sector. As a consequence, the strike can be triggered either by trade unions or by workers: trade unions do not have a monopoly or an exclusive right in this respect because the right to strike is an individual right granted to every worker.<sup>46</sup> Similarly a strike can be triggered at any time: workers do not have to engage first in conciliation with the employer.<sup>47</sup> Thus lightning strikes are allowed. A strike notice organised by collective agreement cannot be imposed upon workers, it only binds the parties to this agreement, the employers or employers' organisations and trade unions.

The employer must nonetheless be aware of the demands. Claims must be transmitted to the employer before the strike occurs,<sup>48</sup> but there is no legal requirement as to the way these claims must be communicated.<sup>49</sup> Thus claims may be transmitted by strikers or trade unions but can also be communicated by the labour inspector.<sup>50</sup> Moreover, the rejection of claims by the employer is not a condition to which the strike is subjected.<sup>51</sup> Deciding otherwise would have undermined the constitutional nature of the right to strike.

In the private sector, the right to strike is exercised freely. However, in light of the need to ensure public service continuity, the situation is quite different in the public sector. The Act of 31 July 1963 underlines the fact that public services have essential functions and that if they were to be interrupted, they would put users in a difficult situation. Therefore there must be a balance between two constitutional principles: the right to strike and public service continuity.

In the public sector, according to article L 521-3 of the Labour Code, notice must be given before work ceases. As regards the entities entitled to trigger a strike, only the most representative trade unions, at a national level or other relevant level, are allowed to call a strike. This union has a duty to give notice containing the place, date, time, duration and reasons for the strike and it must be given to hierarchical authority or to the manager of the firm at least five days before the strike. The day of notification is not included in this period of time.<sup>52</sup> Within those five days, the parties have to negotiate.<sup>53</sup> If the notice procedure is not respected, the strike will be unlawful and the employer is entitled to take disciplinary sanctions against workers joining the strike. However, disciplinary sanctions are only permitted if the employer has informed the workers that the correct legal procedure has not been followed.<sup>54</sup> At an individual level, any members of a trade union who did not notify their intention to

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<sup>45</sup> Soc. 7 June 1995 (RJS 8-9/95 n°933).

<sup>46</sup> Soc. 19 February 1981, *Sté Alsthom Atlantique c/ Guillaume* (Bull.civ. V n°143).

<sup>47</sup> Soc. 26 February 1981 *Ben Omar c/ Sté Equipement Abex Pagid* (Bull.civ. n°161).

<sup>48</sup> Soc. 19 November 1996, *Sté Transvoies c/ Wahoulo* ( Bull.civ. V, n°391)..

<sup>49</sup> Soc. 28 February 2007 (N° de pourvoi : 06-40944).

<sup>50</sup> *Ibid.*

<sup>51</sup> Soc. 20 May 1992, *Pouget c/ Sté Unigard* (Bull.civ., n° 319).

<sup>52</sup> Crim. May 10<sup>th</sup> 1994 (N° de pourvoi : 93-82603).

<sup>53</sup> Article L521-3 paragraph 5 of the Labour Code.

<sup>54</sup> Soc. 11<sup>th</sup> January 2007 (N° de pourvoi : 05-40663).

go on strike are nevertheless allowed to join an action for which valid notice has already been given.

**3(c). What types of industrial action can be lawful? (e.g. is it lawful for workers to take strike action as an act of solidarity with workers involved in a separate industrial dispute?)**

As described elsewhere in the report, various types of strike action are lawful including sit-ins and solidarity strikes, subject to certain conditions.

**3(d). Are there guaranteed minimum public services in the event of a strike?**

Stringent conditions for strike action exist in the public sector due to the need to guarantee minimum public services either by avoiding the strike through successful conciliation between the parties or by adopting procedures designed to maintain a minimum service during the strike.

Guaranteeing minimum public services has always been a sensitive subject in France because of the clash between the interests of civil servants and users. The legislator has tried to find a solution acceptable to both parties by requiring that a minimum service is maintained during strikes, but the process is not yet complete and issues remain unresolved in certain sectors such as education.

An employer may be forced to maintain a minimum service for reasons of public safety, the security of facilities and/or environmental security.<sup>55</sup> The Act of 18 March 2003 regarding interior security gives the local administrative authority the right to requisition striking hospital staff, in both private and public hospitals, in order to maintain a sufficient workforce to ensure the safety of patients and the continuity of medical care. However, it can only take measures which are required in an emergency and are proportionate to maintaining public order.

The Act of 2 August 2007 on social dialogue and continuous public services has been validated by the Constitutional Council. In its decision, the Constitutional Council reiterates that the Constitution provides that the right to strike is exercised within the framework of the laws under which the right is regulated. This provision allows the legislator to implement a legal framework for strike action but in doing so, the legislator must balance the defence of workers' interests with the general interest, which may be threatened by strikes in the transport sector.<sup>56</sup>

The Act establishes minimum services in the public transport sector from 1 January 2008. Prior to this law, some agreements had been signed but their provisions were not compulsory and they were ineffective in practice. The Act only covers regular terrestrial public transport services, air and maritime transport and transport for tourists and goods are excluded. It can be divided in two parts: conflict prevention and the organisation of services in case of strikes or other disruptions. The effects of the Act cannot yet be measured because its implementation is very recent.

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<sup>55</sup> Soc. 20<sup>th</sup> February 1991 (N° de pourvoi : 89-40280).

<sup>56</sup> Decision n°79-105 DC.

Nevertheless, its provisions are innovative because they give the social partners the ability to set up a framework for the right to strike in terrestrial transport.

As previously explained, the Court of Cassation refuses to allow collective agreements to contain provisions which limit the right to strike.<sup>57</sup> Although the new law might seem to be in contradiction with the judicial decision, in fact the two are complementary as the decision of the Court of Cassation applies in the absence of legislation providing for this possibility, whereas the Act gives the possibility of organising a strike by a collective agreement within the framework laid down by it.<sup>58</sup> Under Articles 2 and 3, social partners in terrestrial transport firms have a duty to negotiate a framework agreement. This agreement must provide that a strike notice can only be given if there has been a previous negotiation which cannot exceed eight days.<sup>59</sup>

The other important point in the Act is the individual declaration for workers participating in the strike. Employees willing to join the strike have to inform their employer at least 48 hours before the strike begins. If this requirement is not fulfilled, the employer is entitled to take disciplinary measures under Article 5-II. The Constitutional Council has emphasised that this requirement cannot deprive workers of their right to join the strike at a later stage and adopts its own interpretation regarding this obligation. According to the Council, the requirement is not unconstitutional due to its limited scope. A future report will propose useful legislative measures for other public services. Maintaining public services during a strike is at the core of the debate. A topical example of this debate is found in relation to public sector schools. The Ministry for Education would like to implement a minimum public service requirement so that if teachers go on strike, some will have to look after the pupils. It was supposed to be applied a few months ago but it failed due to a lack of organisation and information. According to some people, this measure is a threat to the right to strike, but for others it is necessary to balance this with other rights, such as the freedom to work of parents.

### **3(e). Does the motivation for a strike affect its legality?**

In addition to the three requirements discussed above, in order for a strike to be lawful, professional claims must be expressed. This relates to the motivation for the strike. The notion of professional claims is at the core of the strike. The notion has been given a broad meaning by the courts which do not assess their legitimacy unless there is an abuse. There are, however, cases which must be given particular attention, namely self-satisfaction strikes and sympathy strikes. The claims of the workers which are supported by this complete, collective and concerted cessation of work must have a professional nature. The term “professional claims” excludes purely political strikes from its ambit.<sup>60</sup> However, the courts have developed a broad definition of professional claims and there are numerous examples of matters which have been held to fall within the scope of the concept including working conditions such as wages<sup>61</sup>, payment of overtime hours<sup>62</sup> or even bad heating conditions<sup>63</sup>,

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<sup>57</sup> Soc. 7 June 1995 (RJS 8-9/95 n°933).

<sup>58</sup> RJS 10/07 p.863.

<sup>59</sup> Liaisons sociales quotidien, Conflits collectifs 02/07.

<sup>60</sup> Soc. 5 October 1960, Ets Panhard et Levassor c/ Levern (Bull.civ. V n°818).

<sup>61</sup> Soc. 18 April 1989 (Bull.civ. V n°278).



concerns about employment protection such as a fear for the stability of employment when an employer decided to open a new shop<sup>64</sup> or protests against a restructuring of an undertaking<sup>65</sup> and issues concerning the protection of collective rights such as the right to organise in unions<sup>66</sup> or the right to organise professional elections.<sup>67</sup>

Furthermore, judges seem to tolerate strikes which have a “macro-social” aim.<sup>68</sup> These strikes mostly aim at influencing the social and economic policy of the government which has a direct impact on working conditions, for example, a collective movement defending the level of pensions is a strike according to the Court of Cassation.<sup>69</sup> In this case, although the employer has no means at his disposal to satisfy the claims of his employees, the demands are nonetheless professional and, as such, they justify being classified as a strike.

However, in the case of a self satisfaction strike, workers do not support professional claims, for example, where workers who do not want to do overtime hours refuse to do so and call it a strike. This type of collective action does not fulfil the definition of a strike.

As for sympathy strikes, these must be assessed according to the abovementioned criteria. Two situations must be distinguished: solidarity strikes can occur within the same undertaking as the main action or outside it. When a sympathy strike is organised within the undertaking, there must be a justified collective interest at stake for strikers.<sup>70</sup> The movement is deemed illegal when collective action is carried out in response to a disciplinary sanction, for example, a dismissal, which is personal and justified.<sup>71</sup> On the contrary, if the dismissal is not justified, the action is considered as legal.<sup>72</sup> As regards sympathy strikes which are aimed at supporting strikes outside the undertaking, they often have political aims as the sympathy strikers are not directly concerned but simply expressing their support for other strikers. In such cases, the courts must determine whether the link between the groups of strikers is strong enough to reveal a common interest.<sup>73</sup>

Two further issues will now be discussed; the role of the judge in the appraisal of strikers’ claims and the consequences of an abuse of the right to strike. Concerning the legitimacy of the strikers’ claims, the Court of Cassation previously considered that claims which were obviously not reasonable rendered the collective action illegal.<sup>74</sup> However it reversed its decision in 1992 and now believes that, regarding the reasonability of their claims, judges cannot substitute their appraisal to that of the

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<sup>62</sup> Soc. 17 July 1996 (RJS 10/96, n° 1079).

<sup>63</sup> Soc. 4 April 1990 (RJS 1990 .299, n°419).

<sup>64</sup> Ibid.

<sup>65</sup> Soc. 20 May 1992 (Bull.civ. V n°319).

<sup>66</sup> Soc. 31 March 1999 (RJS 5/99, n°725).

<sup>67</sup> Soc. January 15<sup>th</sup> 2003 (JSL n°121).

<sup>68</sup> J-E Ray, *Droit du travail, droit vivant* (16th edn Editions Liaisons, Rueil-Malmaison 2007) 606.

<sup>69</sup> Soc. 15 February 2006 (N° de pourvoi : 04-45738).

<sup>70</sup> Soc. 16 November 1993 (N° de pourvoi : 91-41024).

<sup>71</sup> Sanction following gross misconduct of an employee, i.e. throwing paint at a colleague: Soc. 30 May 1989, Boultam c/ Sté Norinco (Bull.civ., n° 405). See also Soc. 18 March 1982, Cora c/ Sté Le Colisée (Bull.civ. V n°182) (a cashier insulting clients).

<sup>72</sup> Soc. 27 November 1985 Sté Créations Hénon c/ Carneva (Bull.civ. V, n° 559).

<sup>73</sup> Soc. 23 October 1969, (Bull. Crim. n°267).

<sup>74</sup> Assemblée Plénière, 4 July 1986 (Droit social 1986, 745).

strikers.<sup>75</sup> This contributes to guaranteeing that the judiciary does not interfere with a constitutional right.

As for the consequences of an abuse of the right to strike, it should firstly be noted that when a collective action cannot be qualified as a strike, legal protection provided by Article L521-1 of the Labour Code will not apply and workers participating to this movement are likely to be sanctioned through disciplinary measures or even dismissed depending upon the degree of their fault. In addition, illegal acts committed during the strike may either be curbed by the disciplinary power of the employer or through judicial proceedings.

Finally, the question arises as to the consequences of illegal acts of individual strikers on the legality of collective actions and, in particular, whether a movement can still be called a strike when its members are liable for such acts. In principle, a strike fulfilling the requirements laid down by case law remains qualified as such, even where illegal acts are perpetrated by strikers. However, when those illegal acts provoke the disorganisation or a risk of disorganisation of the undertaking, the exercise of the right to strike can degenerate into an abuse which is legally reprehensible.<sup>76</sup>

### **3(f). Are any categories of workers excluded from the right to strike?**

For some public services, the principle of continuity has prevailed over the right to strike so that civil servants in those sectors are expressly excluded from the ambit of the right to strike. This is justified by the fact that their presence is necessary to maintain an element of service which, if it were to be interrupted, would disturb essential needs of the country.<sup>77</sup>

The legislator has successively banned the following categories from exercising their right to strike: the CRS (riot police)<sup>78</sup>, the police<sup>79</sup>, prison officers<sup>80</sup>, judges<sup>81</sup>, military personnel<sup>82</sup> and some categories of employees in air navigation.<sup>83</sup> Furthermore the right to strike has also been restricted for radio and television services by means of successive acts.<sup>84</sup>

### **3(g). Is there an obligation of 'industrial peace'?**

In France, there is no obligation of industrial peace which could counterbalance the right to strike.

## **4. Is the employer entitled to react to industrial action?**

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<sup>75</sup> Soc. June 2 1992 (RJS 1992 501, n°906).

<sup>76</sup> Soc. 30 May 1989 (Bull.civ. V, n°404).

<sup>77</sup> Décision N° 87-230 DC.

<sup>78</sup> Act of 27 December 1947.

<sup>79</sup> Act of 28 September 1948.

<sup>80</sup> Decree of 6 August 1958.

<sup>81</sup> Decree of 22 December 1958.

<sup>82</sup> Act of 13 July 1972.

<sup>83</sup> Act of 31 December 1984.

<sup>84</sup> Act of 7 August 1974, Act of 26 July 1979 and Act of 29 July 1982.

When employees are on strike, it can be difficult for the employer to maintain activity, and consequently to comply with his contractual obligations. The employer can nevertheless react to industrial action, but his powers are restricted by legislation. Changes in working time and the replacement of workers are allowed under certain circumstances but lock-outs are firmly prohibited.

In order to face the increasing workload caused by a strike, an employer can ask non-striking employees to work overtime subject to maximum limits set out by legislation. Employees asked by their employer to work overtime cannot refuse to do so, according to the relevant legislation.<sup>85</sup> Likewise, strikers cannot object to the fact that their non-striking co-workers work overtime. To do so would constitute gross misconduct.<sup>86</sup> However, non-strikers cannot be required to stand in for strikers when the task does not match the employee's qualifications and what has been agreed upon in the contract of employment.<sup>87</sup> This would require a variation of contract and must be done with the employee's consent. Refusal to consent to such a variation is not a ground of dismissal.

According to Article L212-2-2 of the Labour Code, which contains an exhaustive list of situations when the employer may resort to the making up of lost hours without paying any additional wages, employers cannot require strikers to make up lost hours of work in the event of industrial action. Certainly if employers were able to require strikers to make up lost hours this would minimise the effect of the strike on the undertaking's activity and subsequently deprive collective action from any meaning.

The employer can replace the striking workforce, but this possibility is regulated by law. As a general principle, the employer cannot hire employees on fixed-term contracts or through temping agencies in order to replace strikers. The legislator has implemented this ban in the Labour Code.<sup>88</sup>

However, this rule does not apply to the recruitment of employees on fixed-term contract for reasons other than the replacement of strikers. Illness of a worker or the increase of workload due to the strike could constitute legitimate reasons to resort to those contracts. Other replacements are lawful, for example, the employer can hire new employees under permanent contract.<sup>89</sup> According to case law, subcontracting is legal except when the other party is a temping agency.<sup>90</sup> An employer can also use voluntary workers in order to maintain activity during the strike.<sup>91</sup>

The most drastic way in which an employer might seek to respond to a strike is by imposing a lock-out. In French law lock-outs are prohibited, but the courts have allowed the closure of an undertaking under particular circumstances. Since lock-outs are prohibited they constitute a contractual misconduct by the employer, who has a duty to provide work to non-strikers and to pay their wages.<sup>92</sup> As a consequence, the

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<sup>85</sup> It is so in any normal situation, provided they are counted within the legal quota of overtime hours (220 hours per year, per employee).

<sup>86</sup> Soc. 12 January 1983 (Bull.civ. V n°12).

<sup>87</sup> Soc. 4 October 2000, Sté Goodyear France c/ Da Silva Mota (Bull.civ. V n°313).

<sup>88</sup> Articles L 124-2-3 and L 122-3 of the Labour Code.

<sup>89</sup> Soc. 24 July 1952.

<sup>90</sup> Soc. 15 February 1979 (Bull.civ. V n°143).

<sup>91</sup> Soc. 11 January 2000 (Bull.civ. V n°15).

<sup>92</sup> This obligation results from non-strikers' freedom of work and the contractual obligations of the employer.

closure of an undertaking is not allowed under French law except in case of a 'constraining situation' endured by the employer. A constraining situation can be defined as a soft version of force majeure, and could, for example, result from the inability of an employer to provide work to non-strikers<sup>93</sup> or from a threat to safety conditions.<sup>94</sup> In such situations, the employer is freed from his obligations provided that he can demonstrate that he was prevented from maintaining the activity by the circumstances of the strike.<sup>95</sup>

The existence of a constraining situation is not easy to prove. For instance, the Court of Cassation has ordered an employer to pay damages to non-strikers, whom he had put on short time working. Due to the strike, plant production had been stopped for safety reasons, but the employer had not proved that he was in such a constraining situation that he was not able to "provide non-strikers with tasks in relation to their contract of employment".<sup>96</sup> Moreover, an employer is not justified in anticipating the negative consequences of a strike by closing an establishment before the beginning of the strike: in this case there is no constraining situation. In addition, it would be a violation of the freedom to work. The reaction of the employer is thus reduced to the necessity of maintaining the activity of the undertaking. He is not allowed to react by intentionally impeding the strike action and lock-out is therefore prohibited. This approach aims at guaranteeing the right to strike.

## **5. How does the law regulate the impact of the strike on the individual contract of employment?**

Article L 521-1 of the Labour Code regulates the consequences of the strike for workers who have taken part in it in the following terms:

"A strike does not breach the contract of employment except when the employee commits gross misconduct.

Its exercise cannot be used by the employer as grounds for discriminatory measures in relation to remuneration and fringe benefits.

Dismissals pronounced in violation of paragraph 1 are null and void."

From this article, the courts have deduced three consequences of strike action on the individual contract of employment. Firstly the strike suspends the contract of employment. Secondly discriminatory measures concerning remunerations and fringe benefits are prohibited. Lastly dismissals are not allowed on the grounds of the normal exercise of the right to strike. In addition, the Labour Code prohibits pecuniary sanctions. This prohibition has special consequences in relation to strikes. These consequences will now be considered in more detail.

Under Article L521-1 of the Labour Code, taking strike action does not break a striker's contract of employment, it merely suspends it for the duration of the strike. In consequence, the parties are temporarily released from their obligations.<sup>97</sup> The

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<sup>93</sup> Soc. 4 July 2000, CGT c/ Cie générale des matières nucléaires (n° 98-20.537).

<sup>94</sup> Soc. 21 March 1990 Ferrie c/ Sté La Chapellerie (Bull.civ. V n°131).

<sup>95</sup> Soc. 11 March 1992 Sté CIAPEM c/ Blanchon (Bull.civ. V n°168).

<sup>96</sup> Soc. 30 September 2006.

<sup>97</sup> Soc. 24 June 1998, Nio c/ Sté Lanvaux (Bull.civ. V n°335).

striking employee does not have to execute his job while the employer does not have to provide him with remuneration.<sup>98</sup> This rule does not apply, however, in the case of workers put in a constraining situation by the conduct of their employer through a serious and deliberate breach of the latter's obligations. In such a case, workers are forced to strike in order to have their fundamental rights respected. Consequently, the employer may be ordered to pay an award equivalent to wages lost during the strike.<sup>99</sup> The courts have accepted that there is a constraining situation if workers have not been paid for their overtime hours<sup>100</sup> or in the case of delayed payment of wages.<sup>101</sup>

On the other hand, some cases have not been considered as serious breaches by the courts and wages were not, therefore, awarded to strikers, for instance, where an employer did not comply in part with his annual obligation to negotiate on wages.<sup>102</sup> In any event, wages may be paid whenever a settlement provides for the payment of wages lost during the strike.<sup>103</sup>

In accordance with the principle of suspension of the contract of employment, the reduction of wages must be proportional to the exact duration of the cessation of work.<sup>104</sup> If not, this must be considered a pecuniary sanction. Article L122-42 of the Labour Code nullifies pecuniary sanctions, whether disguised or not.<sup>105</sup> For example, the employer cannot deduct a lump sum from wages.<sup>106</sup>

Concerning the pecuniary outcome of the strike, the legislator has set out rules which aim at imposing equal treatment between strikers and non-strikers whether in regard to wages or other fringe benefits. As mentioned above, Article L521-1, paragraph 2, lays down a strict rule in this regard. The employer cannot operate discrimination in wages or fringe benefits between his workers by taking into account their participation in a strike. Indeed this would result in an infringement of their right to strike. Article L122-45 of the same code stipulates a similar rule that "no employee may be [...] submitted to discriminatory measures because of his participation in a strike."

An example is seen in the extensive case law regarding assiduousness bonuses. Suppressing this type of bonus in cases of participation in a strike while maintaining it where there have been other types of absence (authorised or not) is a prohibited discrimination.<sup>107</sup> There is also discrimination when the employer creates an assiduousness bonus after the triggering of the strike and alters its amount according to the participation in the strike.<sup>108</sup> However, the employer is allowed to take into account all other absences in order to withhold the bonus because, in this case, strikers and non- strikers are treated in the same way and consequently there is no

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<sup>98</sup> Soc. 21 February 1990 (Bull.civ., V, n°726).

<sup>99</sup> Soc. 29 May 1996 *Zaragora c/ ADAPEI d'Ille-et Vilaine* (Bull.civ. V n°214).

<sup>100</sup> Soc. 3 May 2007 (RJS 07/07 n°886).

<sup>101</sup> Soc. 7 June 2006 (RJS 8-9/06 n° 989).

<sup>102</sup> Soc. 5 January 2005, *SAS Giraud Champagne Ardenne c/ Antoine* (n° de pourvoi 03-40.075).

<sup>103</sup> Soc. 29 March 1987.

<sup>104</sup> Soc. 8 July 1992, *Droit social* 1992, 841 and see Soc. 16 May 1989, *Sté normande de presse républicaine c/ Bayeux*, (Bull.civ. V, n°496).

<sup>105</sup> Soc. 17 April 1991, (RJS 1991, 351).

<sup>106</sup> Soc. 7 January 1988 *Fleuret c/ Sté Pierre Guérin* (Bull.civ. V, n°10).

<sup>107</sup> Soc. 28 March 1989 *Sté Ets Le Blan et Cie c/ Warie* (Bull.civ. V, n°260).

<sup>108</sup> Soc. 2 March 1994 *Sté Nozal c/ Bazier* (Bull.civ. V, n°75).

discrimination.<sup>109</sup> According to the same rule, an employer cannot take participation in a strike into consideration in order to delay a pay rise linked to the employee's length of service in the undertaking.<sup>110</sup> In contrast, this rule does not prevent the employer from granting a specific bonus to non-strikers when its sole aim is to reward their efforts in standing in for their striking co-workers while the workload increased as a consequence of the strike.

Finally, the position regarding dismissal will be considered. Here, again, Article L521-1 leaves no doubt as to the risks an employer would take if he were to dismiss an employee for his participation in a strike. This ultimate disciplinary sanction is null and void according to both Articles L521-1 paragraph 3 and L122-45 paragraphs 2 and 5<sup>111</sup> and the reinstatement of an illegally dismissed employee in his previous position or an equivalent position is required.<sup>112</sup> As a consequence, wages due for the period of time when the contract was illegally breached must be awarded to an employee: he has a right to a lump sum independent from personal injury<sup>113</sup> and equivalent to his loss of wages.<sup>114</sup>

The protection granted to strikers does not, however, extend to cases of gross misconduct. Indeed Article L521-1 paragraph 1 provides the possibility for the employer to dismiss them in this case. The Court of Cassation has extended the scope of this rule to all disciplinary sanctions in relation to gross misconduct committed during a strike.<sup>115</sup> To constitute gross misconduct, the fault must be personal: if personal participation to illicit acts is not proven,<sup>116</sup> then there cannot be gross misconduct.<sup>117</sup> Gross misconduct may take many forms such as infringement of the freedom to work,<sup>118</sup> for example, a complete blockade or picket,<sup>119</sup> sit-ins, despite a judge's order of expulsion,<sup>120</sup> violence<sup>121</sup> or the destruction or deterioration of property.<sup>122</sup> Gross misconduct usually accompanies an abuse of the right to strike. According to the Court of Cassation, if strikers commit illicit acts during the strike, there is no abuse of the right to strike unless the situation generates a disorganisation of the company.<sup>123</sup> In contrast, a disorganisation of production is considered as a "logical consequence" of the exercise of the right to strike and cannot lead to disciplinary sanctions.

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<sup>109</sup> Soc. 28 March 1989 *Sté Ets Le Blan et Cie c/ Warie* (Bull.civ. V, n°260).

<sup>110</sup> Soc. 9 February 2000 *CPAM du Nord Finistère c/ Henry* (Bull.civ. V, n°58).

<sup>111</sup> Soc. 15 May 1991 *Sté SATMA c/ Balzard* (Bull.civ. V n°235).

<sup>112</sup> Soc. 10 October 1990 *Sté Thermo fromage méditerranéen c/ La Rocca* (Bull.civ. V, n°434).

<sup>113</sup> In particular, whether he/she has received another form of remuneration during that time or not.

<sup>114</sup> Soc. 2 February 2006, *Sté Colas Ile-de-France Normandie SA c/ Bitat* (Bull.civ. n° 03-47.481).

<sup>115</sup> Soc. 7 June 1995, *EDF c/ Silvente* (Bull.civ. n°181).

<sup>116</sup> The burden of proof is on the employer : Soc. 5 May 1960.

<sup>117</sup> Soc. 9 March 1989, *Browet c/ Capelle Caron* (Bull.civ. n°1).

<sup>118</sup> Soc. 4 November 1992, *Cherki c/ Sté glaces Findus* (Bull.civ. V n°529).

<sup>119</sup> Soc. 30 June 1993, *La Faou c/ Sté Nomul* (Bull.civ. V n°185). The case concerned a blockade on all entrances to the plant preventing workers and vehicles from entering the premises and causing the disruption of the undertaking.

<sup>120</sup> Soc. 30 April 1987 *Mouesca c/ Guérin* (Bull.civ. V n°238).

<sup>121</sup> Soc. 26 May 1981, *Bouchet c/ Sté des ets Sauzet* (Bull.civ. V n°467). The case involved the beating up of a co-worker who refused to join the strike. See also Soc. 1 April 1997, *Barbarin c/ Sté Pain Jacquet* (n°95-42.246). Here there was an illegal confinement of the manager in his office

<sup>122</sup> Soc. 4 April 1979, *Clerc c/ Sté Laboratoires Cerba "La Delphinère"* (Bull.civ. n°313)

<sup>123</sup> Soc. 9 March 2004 (N° de pourvoi 02-30294)

## **6. Explain the role of the judiciary, if any, in the resolution of industrial disputes.**

The Labour Code organizes the settlement of collective disputes. It consists mainly in extra-judicial proceedings in which the judiciary plays a limited role. Thus, the judge does not resolve conflicts. On the other hand, the intervention of a judge is necessary to expel strikers and to resolve cases concerning civil liability or criminal responsibility arising from strike action.

A number of extra-judiciary procedures for resolving conflicts are set out in the legislation, including negotiation of a settlement, which is a written agreement containing two types of clauses: the strikers' professional claims and the matter of dispute triggering the conflict. The Labour Code also covers conciliation<sup>124</sup> and arbitration<sup>125</sup>, which are not often used in France, and mediation by a third party.<sup>126</sup> This latter strategy can take place when there is already a way to conclude an agreement, and solutions are engaged between strikers and the management of the undertaking.

The judiciary are called upon to resolve certain types of issue, for example, whether an employer has the right to expel strikers from the workplace. There are some arguments to support expulsion, provided that some limitations are set. For example, the employer may ask the court to order the strikers' expulsion in the case of a sit-in in order to ensure the company's safety. It must be noted that the employer cannot act on his own: he must obtain a binding decision of the relevant court.

When the freedom to work is infringed, sit-ins constitute a "manifestly illicit disturbance" which the judge can resolve by ordering the expulsion of workers. However two conditions must be fulfilled under Article 809 of the Civil Procedure Code: the situation must require urgent measures and there must be no serious dispute concerning these measures. The expulsion can be carried out with the help of public forces. If strikers requested to evacuate refuse to comply with this order, they commit gross misconduct which can lead to dismissal.

The judiciary may also be called upon in situations where industrial action gives rise to civil claims or criminal liability. With regard to the former, strikes may cause damage to firms or to non-strikers by causing loss of wages. Strikers and trade unions can be sued when their acts are not within the lawful scope of the strike. Different types of action may arise including action by the employer against the strikers or trade unions and action by the workers against the strikers. To establish the civil liability of a striker, the claimant must bring his action before the correct tribunal. In order to sue strikers, an employer or non-striking workers must bring their claims before the competent jurisdiction, the employment tribunal called the Conseil de Prud'hommes.<sup>127</sup> The claimant must prove damage, fault and the direct link between these elements. The fault must be personal, thus liability *in solidum* is excluded.<sup>128</sup> Moreover an employee entrusted with a mandate is not considered as being the

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<sup>124</sup> Article L 523-1 of the Labour Code.

<sup>125</sup> Article L525-1 of the Labour Code.

<sup>126</sup> Article L524-1 of the Labour Code.

<sup>127</sup> Soc. 25 October 1978 (Bull.civ., V n°710) or see also Soc. 3 March 1983 (Bull.civ., V n°129).

<sup>128</sup> Soc. 6 June 1989 (n°87-40.738).

principal of strikers and he is not liable for unlawful acts committed by trade unions. He cannot be sued for full compensation for harm done and will only be liable for his own acts. The claimant must establish a direct link between the damage and the acts committed. For example, the Court of Cassation rejected an employer's action because he did not prove that unlawful sit-ins made it impossible for non-strikers to work.<sup>129</sup>

Actions against trade unions are dealt with by another tribunal. Claimants must bring actions concerning collective disputes in labour relations before the Tribunal de Grande Instance or the Tribunal d'Instance, depending on the amount of the claim. In a similar way to establishing the civil liability of strikers, fault, damage and the link between the two must be established. The Court of Cassation has held that trade unions are not the principal of strikers.<sup>130</sup> The fault committed by the trade union must be personal, consisting of an incitement of the trade union to commit unlawful acts. For example, the presence of the trade union's secretary on the picketing day does not constitute misconduct,<sup>131</sup> but the incitement to commit unlawful acts, for example, by organising those unlawful actions, does.<sup>132</sup>

Strikers and trade unions may also be criminally responsible. Forms of criminal offences committed by strikers are numerous. Examples include interfering with the freedom of work, illegal confinement and violence. Article 431-1 of the Penal Code penalises breaches of the freedom of work when it is established that they result from a concerted action. The offence is punished by one year's imprisonment and a 15 000 € fine. When the offence is accompanied by violence, assault and/or destruction, the sentence is three years' imprisonment and a 45 000 € fine. However, the employer cannot claim damages before a criminal court for financial losses arising from the closure of the business. The Penal Code only protects the freedom to work and damages incurred are an indirect outcome.<sup>133</sup>

The illegal confinement of the employer or other staff members may lead to two to five years' imprisonment for a confinement of less than five days and up to twenty years' imprisonment if the confinement lasts for at least five days. It will be an offence whether or not the strikers have used violence against their hostages.<sup>134</sup> Nevertheless the penal judge has the ability to moderate the sentence according to particular circumstances applying to the case.

Destruction, damage and deterioration of employer's or employees' property is punished by a 30 000 € fine and two years' imprisonment, except where the consequences of those acts are merely light damage, according to Article 322-1 of the Penal Code. The notion of "assault" encompasses all means to create fear, for example picketing is not considered as an assault except if it is threatening as an eventual use of violence.<sup>135</sup>

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<sup>129</sup> Soc. October 1994 Citroen c/ CGT (LS lég. Soc. n°7149).

<sup>130</sup> Soc. 9 November 1982 (Bull.civ., V n°615).

<sup>131</sup> Soc. 29 January 2003 (JSL n°123).

<sup>132</sup> Soc. 11 January 2006 (RJS 3/06 n°377).

<sup>133</sup> Crim. 23 April 2003 (N° de pourvoi : 02-84375).

<sup>134</sup> Crim. 23 December 1986.

<sup>135</sup> T. Corr. Dijon, February 10th 1939, Gaz. Pal. 1939.



**7. Article 6(4) of the European Social Charter guarantees the right to strike. Does the European Committee of Social Rights view your law and practice as complying with Article 6(4)?**

As regards national law and practice in the private sector, the European Committee of Social Rights (ECSR) considers that the French system complies with Article 6(4) of the European Social Charter (ESC). However, on numerous occasions the Committee has concluded that rules implemented in the public sector fail to comply with the requirements laid down by the European Social Charter. The members of the Committee have pointed out two main infringements to the right to strike as defined by the ESC.

Firstly, according to French law, only the most representative trade unions in the public sector are entitled to call a strike. As a result this right, which is fundamentally an individual one both at national level and under the ESC, is only available to the most representative unions at the relevant level, depriving other groups and individuals of the right to pursue their claims through strike action.

In its 2004 report the ECSR expressed disquiet in relation to this position, stating that:

‘(T)he Committee considers that the reference to “workers” in Article 6(4) relates to those who are entitled to take part in collective action but says nothing about those empowered to call a strike. In other words, this provision does not require states to grant any group of workers authority to call a strike but leaves them the option of deciding which groups shall have this right and thus of restricting the right to call strikes to trade unions...However such restrictions are only compatible with Article 6(4) if there is complete freedom to form trade unions and the process is not subject to excessive formalities that would impede the rapid decisions that strike action sometimes requires...

A fortiori, the Committee considers that limiting the right to call a strike to the most representative unions at national level is a restriction on the right to strike which is not in conformity with Article 6(4) of the Revised Charter.’

The second area of non-compliance relates to the fact that deductions from wages are not always proportional to the duration of a strike.<sup>136</sup> Under French legislation, one thirtieth of the monthly salary of state civil servants and other national public servants is automatically deducted in the event of a strike of less than one day, regardless of the duration of the strike. In its 2004 report the Committee found that this provision acts as a deterrent to state employees willing to exercise their right to strike.

Both of the abovementioned comments were reiterated by the European Committee of Social Rights in a further report issued in 2006. This suggests that the remarks were not taken into account by the French Government on the first occasion they were expressed and that the situation has not changed since. The French authorities have tried to justify their position on these matters by arguing firstly that the rate of unionisation is very low in France and that a trade union which is not considered to be representative at the respective level for the purpose of collective bargaining can

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<sup>136</sup> This is the case under the relevant national law.

combine with one that fulfils the representativeness requirements in order to issue a lawful strike notice. Furthermore the French Government has underlined the fact that only a few strikes were challenged by public employers on this ground. However, according to the European Committee of Social Rights, those arguments do not outweigh the impact of this restriction on the right to strike for civil servants. As far as the deductions are concerned, the French Government has argued that they result from an accounting rule and that there is no question of imposing a financial penalty on strikers. The Committee is, however, sceptical on this matter and considers that the reasons for this rule are irrelevant. Finally it can be noted that France has not yet been found guilty of any breach of Article 6(4) ESC under the collective complaints mechanism.<sup>137</sup>

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<sup>137</sup> Implemented by the Additional Protocol to the European Social Charter providing for a system of collective complaints, CETS No. 158; in force since 1998.

## **8. To what extent, if any, does national law provide regulation for transnational forms of strike action?**

There is no legislation or case law in France covering transnational collective actions. However, as the situation seems similar, it may be that the solution applied to sympathy strikes could be extended to transnational actions. If such an extension could be contemplated, there are some practical arguments against such a solution.

As seen earlier in this report, sympathy strikes, when they support other strikers outside the undertaking, must be assessed according to the degree of similarity between the groups and a common and professional interest must be at stake. In the case of transnational strikes, this would mean that strikers from both undertakings, settled in different countries, must share the same professional interests in striking. This could be the case for transnational groups, however, it is questionable as to whether a court faced with strikes occurring in different groups and different countries would find the link between workers to be strong enough to justify a transnational sympathy strike. As a final point, even if such an action could be considered as lawful in France, this may not be the case in other countries which may not have the same regulation. In this respect, the strike would be lawful in some countries and unlawful in others.

### **Bibliography**

- A Castelot and A Descaux, *Histoire de la France et des Français* (Robert Lafont, Paris 1996).
- Census report of 1968, INSEE.
- Ouvrage Tableaux de l'Économie Française - Édition *Chômage des jeunes de 15 à 24 ans dans l'Union européenne* and *Chômage dans l'Union européenne*, (INSEE, 2007).
- J-E Ray, *Droit du travail : droit vivant* (16 edn Editions Liaisons, Rueil-Malmaison 2007), pp. 595-608
- La Semaine Juridique - Social n° 11, 14 Mars 2006, act. 96 “Le contrat première embauche, aperçu rapide”.
- La Semaine Juridique - Social n° 29, 17 Juillet 2007, 1565, « Une période de consolidation de deux ans n'est pas conforme aux exigences de la convention OIT n° 158”, Patrick Morvan
- La Semaine Juridique - Social n° 15, 11 Avril 2006, 1289 « Le contrat de travail première embauche », Patrick Morvan
- Le Monde Newspaper, article published April 4, 2006 : “Mobilisation anti-CPE : les syndicats revendiquent une participation supérieure à celle du 28 mars ».
- Semaine Sociale Lamy - 2006 - n°1255 - 03-04-2006, Actualités ÉGALITÉ DES CHANCES.
- Les Cahiers Lamy du CE - 2006 - n°49 - 05-2006, Actualité Sociale par Marie-Charlotte Tual « Emploi des jeunes : état des lieux »
- Revue de Jurisprudence Sociale
- Lamy Social « Droit du travail Charges sociales », Editions Lamy 2005 pp.1536-1565, n°3256-3316
- Dictionnaire permanent, Social, Volume 2, Editions législatives, pp. 2671-2688

## Useful websites

INA, the national audiovisual institute (Institut national de l'audiovisuel): [www.ina.fr/](http://www.ina.fr/)

UNEF (about the CPE): [http://www.unef.fr/delia-CMS/index/article\\_id-2023/topic\\_id-4,22,/retrait-du-contrat-premiere-embauche.html](http://www.unef.fr/delia-CMS/index/article_id-2023/topic_id-4,22,/retrait-du-contrat-premiere-embauche.html)

CFDT (calling for demonstrations against the CPE): <http://www.cfdt-sante-sociaux-62.org/article.php?sid=25>

The Newspaper LCI (about the massive demonstrations of March 28, 2006): <http://tf1.lci.fr/infos/france/0,,3292606,00-villepin-invite-syndicats-anti-cpe-preparent-greve-.html>

PCF (about the CPE): <http://www.pcf.fr/spip.php?article149>

Parti Socialiste (about the CPE): <http://presse.parti-socialiste.fr/2006/03/31/declaration-de-la-gauche-sur-le-cpe-a-lissue-de-la-reunion-de-la-gauche/>

Force Ouvrière (about the CPE): <http://www.force-ouvriere.fr/cpe/index.asp>

Les Verts (about the CPE): [http://lesverts.fr/mots.php3?id\\_groupe=9&id\\_mot=422](http://lesverts.fr/mots.php3?id_groupe=9&id_mot=422)

Declaration by Jacques Chirac on the law on equal opportunities, at the Palais de l'Élysée, Paris, March 31, 2006:

[http://www.elysee.fr/elysee/elysee.fr/francais\\_archives/interventions/discours\\_et\\_declarations/2006/mars/declaration\\_du\\_president\\_de\\_la\\_republique\\_sur\\_la\\_promulgation\\_de\\_la\\_loi\\_sur\\_l\\_egalite\\_des\\_chances.45843.html](http://www.elysee.fr/elysee/elysee.fr/francais_archives/interventions/discours_et_declarations/2006/mars/declaration_du_president_de_la_republique_sur_la_promulgation_de_la_loi_sur_l_egalite_des_chances.45843.html)

Institut supérieur du travail: <http://istravail.com>

European Industrial Relations Observatory on-line:

<http://www.eurofound.europa.eu/eiro/>

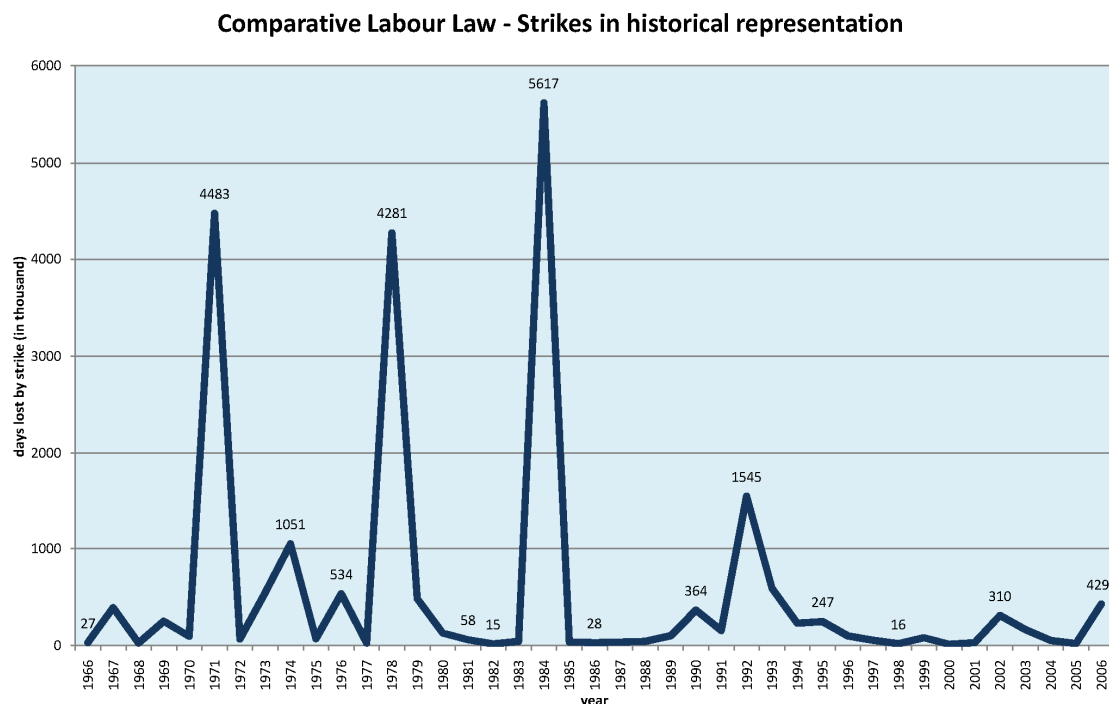
Légifrance: <http://www.legifrance.gouv.fr/>

## 4. Germany

*Franziska Klauf, Hilmar Rölz, Sebastian Rabe and Stefan Reitemeyer*

### 1. Briefly describe the industrial relations context of strike action in recent years.

The chart below shows that the number of working days lost due to strikes in the last 50 years is low. Only four spikes are visible and should be explained briefly.



Three of the spikes relate to disputes in the metal industry. In 1971 some 240,000 metal workers went on strike and were locked out. The dispute concerned a claim for a 7.58% wage increase and a single payment to the value of 90 euros. In 1978, 270,000 workers from the metal industry took action once again, calling for higher wages and better social security. Of these, 85,000 workers went on strike and 177,000 were locked out. Finally, in 1984 almost 210,000 workers from metal industry stopped work, of whom 60,000 were on strike, and the remainder locked out. The strike was held to support claims for a 38.5 hour week. In Germany this campaign became known as “38.5 Stundenwoche”. The strike lasted for seven weeks and, in support of the same demand, workers from the printing industry went on strike for twelve weeks.

The remaining spike on the chart relates to a major industrial action which took place in 1992 when 400,000 workers from the civil service<sup>1</sup>, railways and postal service

<sup>1</sup> Note that in Germany civil servants are prohibited from striking, however, there are categories of employees working in the civil service who have the right to strike.

went on strike demanding a 5.4 % wage increase and an extra Christmas bonus to the value of 100 euros. A further example of a recent action was a strike by bus drivers in 2004 which lasted 395 days. This exceeded the previous record length of 114 days, for a strike in the metal industry in northern Germany in 1952. However, there is generally a decreasing trend in industrial action. It can be argued that collectivisation is becoming less significant in the metal industry than it has been in the past. Germany's biggest trade union, IG-Metall, has about 2.5 million members. However, during the last 15 years there has been a decline in membership of almost one-third. In comparison with other European countries there is relatively little industrial action in Germany. The Institute of Labour Market and Occupational Research believes that the existence of special collective agreements for large geographical areas is responsible for the low rate of industrial disputes.<sup>2</sup> In addition, the downsizing of production and upsizing of service operations can also help to explain the position.

## **2. The right to strike as a fundamental legal norm**

### **(a) Is the right to strike guaranteed in the national constitution?**

Neither the Constitution of the Weimarer Republic (WRV) nor the Constitution of the Bundesrepublik Deutschland (GG) contain a right to strike. However, the freedom of coalition is constitutionally ensured<sup>3</sup> and a further provision guarantees the organisation of unions and their agreements.<sup>4</sup> The Constitution of the Bundesrepublik Deutschland, Article 9(3) guarantees the right to form associations, to safeguard and improve working and economic conditions to everyone and to all occupations. It further states that agreements which restrict or seek to impair this right shall be null and void. The law on constitutional states of emergency of 24 June 1968 interprets Article 9(3) of the Constitution as recognising collective action.<sup>5</sup> This means that measures which are taken in cases of defence or states of emergency are not able to restrict industrial conflicts. Nevertheless, the provision does not constitute a direct constitutional establishment of the right to strike.

### **2(b). Is it recognised as a fundamental right (e.g. through case-law of the highest courts)?**

Strikes, lock-outs and other possible forms of collective action are not guaranteed as a "fundamental right" in the text of the German Constitution. Article 9(3), GG only guarantees individuals the right to form associations, whether trade unions or employers' associations.

The case-law of the Federal Labour Court and of the Constitutional Court is the most important legal source in this field. In a judgment of 1991, the Constitutional Court developed a precise interpretation of Article 9(3), GG. The Court held that the associations referred to therein are characterised by having the purpose of

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<sup>2</sup> Flächentarifvertrag.

<sup>3</sup> Article 159, Constitution of the Weimarer Republic (WRV) and Article 9(3) of the Constitution of the Bundesrepublik Deutschland (GG).

<sup>4</sup> Article 165(I), WRV.

<sup>5</sup> Article 9(3), GG.

safeguarding and improving working and economic conditions. This purpose involves the conclusion of collective agreements. The associations are free to choose the means they think necessary in order to come to such agreements. The Constitution therefore guarantees the right to strike in such situations.<sup>6</sup> On the other hand, the Federal Labour Court developed the “parity principle”, giving employers the right to lock out workers, in order that each side should have an equal chance to influence the outcome of collective bargaining.<sup>7</sup>

In summary, although the right to strike is not recognised directly in the German Constitution, it has been developed through case-law of the highest courts on the basis of Article 9(3), GG.

### **2(c). What is the relationship between the right to strike and other fundamental rights and freedoms (e.g. property rights, freedom of commerce)?**

There is no legislation governing industrial conflicts and the right to strike. The area is mainly regulated through the jurisprudence of the Federal Labour Court, which has created principles and rights which limit the right to strike in order to preserve parity between the bargaining agents. Proportionality is the main requirement for the legitimacy of an industrial conflict. As an industrial conflict affects external rights, it is important that disputes are conducted within the framework of the system of collective agreements. Furthermore, the principle of proportionality dictates that the strike can only be ‘ultima ratio’. A strike cannot start as long as negotiations are taking place, even if the period of the peace obligation has ended. The principle of ultima ratio preserves the freedom of negotiation.

Besides the principle of proportionality, the right to strike is limited by the property rights of the employer. In particular, strikes which lead to annihilation or erosion of the assets of the employer are completely forbidden. Moreover, an employee is obliged to carry out emergency and preservation works to preserve the business of an employer. Since neither trade unions nor employees are well-placed to assess whether and to what extent such works are necessary to prevent damage, this is left to the employer to determine. This does not mean, however, that the employer is authorised to nominate particular striking employees for the execution of emergency preservation works, because this would be contrary to the subjective right to strike of an individual employee. Therefore, trade unions are responsible for specifying which employees will be available for employment, as whether an employee can take part in a strike depends upon the union’s agreement. In summary, the trade union is obliged to ensure emergency works and preservation works are undertaken during an industrial conflict in order to save the property rights of the employer.<sup>8</sup>

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<sup>6</sup> BVerfG (Bundesverfassungsgericht), 26.06.1991, Az: 1 BvR 779/85 = NZA (Neue Zeitschrift für Arbeitsrecht) 1991,809.

<sup>7</sup> BAG (Bundesarbeitsgericht), 10.06.1980, Az: 1 AZR 822/79 = NJW (Neue Juristische Wochenschrift) 1980, 1642.

<sup>8</sup> Article 14, GG.

### **3. The legal framework on strike action**

#### **(a) Is there a legal definition of what constitutes a ‘strike’ or other forms of collective action?**

In Germany there is no definition of what constitutes a ‘strike’ and no single law that exclusively deals with strikes. It is instead the role of the courts to find a definition of ‘strike’ and create a framework within which collective actions are legal on the basis of Article 9, paragraph 3 of the Constitution. ‘Strike’ has been defined as a systematic and collective work stoppage by a group of employees, without the employers’ approval, in order to improve or safeguard economic and working conditions. This aim excludes the right of retention which is not seen as a collective measure in an industrial dispute.<sup>9</sup> In that connection employees are only given the right to refuse to work when they get no wages. Finally the legality of strikes cannot be judged in general and each case has to be examined individually. This has led to the development of an extensive body of case-law.

#### **3(b). Are there legal procedures for a legal strike to take place (imposed either by statutes or other means such as collective agreements or trade unions)?**

Strikes have to meet several general requirements. Only those associations which are allowed to conclude collective agreements have the right to call a strike. This applies to trade unions and employers’ associations as well as to individual employers. In addition, the strike must have the aim of the conclusion of a collective agreement and in particular of terms which can form the legal content of collective agreements. Furthermore a strike is illegal if a valid agreement exists because there is a ‘peace obligation’ which prohibits the calling of a strike in relation to matters which are validly regulated in a collective agreement or closely linked with existing regulations.

Apart from these requirements, the legality of strike depends on certain general principles. The parity principle requires a balance of power between the parties involved and the principle of proportionality means that a strike is only legal if it is necessary and the ultimate measure to solve the industrial conflict.<sup>10</sup>

#### **3(c). What types of collective action can be lawful? (e.g. is it lawful for workers to take strike action as an act of solidarity with workers involved in a separate industrial dispute?)**

According to a case decided in 2007 which involved printers striking to support journalists in their industrial dispute, under certain circumstances a solidarity strike may be lawful.<sup>11</sup> Firstly, it is necessary to consider whether a solidarity strike is

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<sup>9</sup> The right of retention is a general principle of German contract law relating to mutual obligations.

<sup>10</sup> A Junker, *Grundkurs Arbeitsrecht* (6th edn Beck Juristischer Verlag, München 2007) 602.

<sup>11</sup> BAG, 19.06.2007, Az: 1 AZR 396/06 = NZA 2007, 1055.



included in a union's freedom of activity guaranteed in Article 9(3) of the Constitution. Beyond individual protection concerning positive and negative freedom of association, unions may decide themselves which actions to take to safeguard or improve economic and working conditions. One option may be a solidarity strike. This applies not only in cases where the union calling a solidarity strike and the union organizing the main industrial conflict are identical but also in cases where they are different. Although the employees are not striking to achieve their own aims, their purpose is to achieve an advancement of other people's working conditions and this meets the necessary legal requirements.

Solidarity strikes are part of the unions' freedom of activity and are therefore at the core of Article 9(3) of the Constitution. The legitimacy of particular actions is judged by the development of this right in the legal system. A no-strike clause in a collective agreement, or peace obligation, is considered a restriction but the peace obligation towards the employer who is involved in the solidarity strike is not usually violated because agreement with that employer is not affected. Furthermore restrictions in a collective agreement cannot limit industrial action outside its geographical area. Such a restriction would also contradict the right to strike in Article 6(4) of the European Social Charter.

The principle of proportionality can also be seen as a limit on the legitimacy of solidarity strikes. According to this principle, a solidarity strike has to be an appropriate instrument to safeguard or improve economic and working conditions. Flowing from the unions' freedom of activity it is the unions' task to judge the suitability as a part of its strategy. They are allowed to choose the instruments to lead the industrial conflict to reflect recent circumstances and to create a balance of power. Accordingly, they can exercise pressure by calling out a solidarity strike that affects an employer who does not belong to the same employers' association as the main antagonist in the industrial dispute but who, despite this, has great influence on the latter's decisions. The solidarity strike only becomes illegal if the individual activity is obviously not able to influence the employer who is party to the main industrial conflict. Unions enjoy broad discretion concerning the necessity of the activity. In this connection it is unremarkable if unions call solidarity strikes even if this could intensify the main industrial conflict. Finally, the conflicting interests of the employers and the labour unions need to be balanced. In particular, the affected employer is in need of protection because he is not able to influence the conditions of the collective agreement that shall be concluded by giving in. Against this must be balanced the unions' freedom of activity and the right to strike from Article 6(4) ESC, at least where the union which calls a solidarity strike is also leading the main industrial conflict. However, involving third parties in industrial disputes is basically legal, as seen, for example, in the fact that lock-outs also affect employees who are not union members.

In contrast, solidarity strikes are always illegal if the main industrial conflict is illegal, if they take place beyond the time frame of the main conflict or if the main focus is transferred to the solidarity strike and it becomes the centre of the main conflict. Apart from that, the legitimacy depends on the local, organisational and economic closeness of the solidarity strike to the supported main industrial conflict. It will always be legal if the companies affected by the strikes belong to one parent company, if there is a relationship concerning production, service or supply or if the company affected by the solidarity strike has already interfered in the main conflict.

As an additional point it can be noted that since 2007 it has also been lawful to take industrial action in relation to a redundancy programme.<sup>12</sup> It is the task of the works council to negotiate with the employer with the aim of putting into place a fair redundancy programme. The Federal Labour Court (BAG) has now accepted that trade unions can exercise pressure on employers to reach a reasonable redundancy programme by calling a strike. Therefore, an employer has to negotiate with both the union and the works council.

### **3(d). Are there guaranteed minimum public services in the event of a strike?**

German labour law does not specify a codified list of minimum public services or their quantity. The question of whether a trade union has to preserve a minimum public service is often combined with the question of whether the strike is lawful. The main problem in this area is the need to balance the right to strike of the employees and trade unions with the rights of the affected category of persons.

As mentioned above, the right to strike is as a fundamental right found in Article 9(3) GG. The right to strike is seen as a high-ranking right and is only, therefore, limited by other fundamental rights of the other parties affected by the strike. The main parties involved in a strike are the employees and the trade unions on one side and the employers and their alliances on the other. However, other third persons and the general public are often involved in a strike in the public services or are hit by its consequences.<sup>13</sup> The rights of all three groups are competing against each other and must be balanced. As mentioned above the Labour Courts have to balance those rights when they consider the proportionality of the strike.<sup>14</sup> Interference with rights of the employers mainly consists of infringements of the right of property,<sup>15</sup> the right of freedom of profession<sup>16</sup> or of the right to set up and conduct a business.<sup>17</sup> The latter does not only protect profit-orientated activities, but also common welfare-orientated activities and is a 'catch all' provision.<sup>18</sup>

In summary, if any of these rights are infringed in an improper way by a strike, the strike would be unlawful. A strike can also be unlawful if rights of third parties or the general public are harmed. However, not any infringement of a random right of a third person renders a strike unlawful. Some areas in the public service are vital to people's existence and a strike in such an area could be very damaging. It is essential that a minimum provision of such services is maintained. Because of the wide variety in life, it is impossible to have an executive list of minimum public services. The most important services include food, health, energy and water, traffic, postal services, telecommunication, broadcast services, fire brigade, cemetery services, waste management, national defence and national security. The importance of these areas does not mean that strikes and lock-outs are completely prohibited. It is a question of practical concordance as to whether a minimum public service is

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<sup>12</sup> BAG, 24.04.2007, Az: 1 AZR 252/06 = NZA 2007, 987.

<sup>13</sup> BAG, 21.04.1971, Az: GS 1/68 = NJW 1971, 1668.

<sup>14</sup> BAG, 21.04.1971, Az: GS 1/68 = NJW 1971, 1668.

<sup>15</sup> Article 14, GG.

<sup>16</sup> Article 12, GG.

<sup>17</sup> Section 823(I), 1004, BGB.

<sup>18</sup> LAG (Landesarbeitsgericht) Hamm (Westfalen), 16.01.2007, Az: 8 Sa 74/07 = NZA-RR 2007, 251.

necessary and the extent of the provision.<sup>19</sup> The minimum service orientated on common welfare goes beyond the average individual and public interests. It is also a question of respecting human dignity and fundamental rights, which the state has a duty to protect. The fundamental right to strike through Article 9(3), GG, transfers this competence to the social partners and that is why they have to consider the provision of minimum services.

Furthermore, the work of certain institutions cannot be compromised by strike action. Parliament, the government and the judiciary all enjoy protection in this regard because a strike could undermine the principle of democracy by limiting the work of the three state powers and nothing should be permitted to affect parliamentary freedom.<sup>20</sup> Until a few years ago the postal service was ruled by a state monopoly. At that time it was necessary to guarantee a minimum service. However, today there are alternative postal services available, and the need to provide a minimum service can be considered on a case-by-case basis. A minimum service is only obligatory in relation to election notices.<sup>21</sup>

In conclusion, the parties of an industrial conflict are responsible for the provision of a minimum service. This is not intended to act as a balance of their interests, but rather of their interests with those of third parties. The responsibility to ensure a minimum service is normally held by the instigator of the industrial conflict, so usually the trade unions have to provide the minimum service. However, this also has to be accepted by the other party. If the parties fail to agree a minimum service and critical danger is posed to third parties, the State will no longer remain neutral because the duty to do so only applies to lawful strikes. A strike which infringes rights of other parties in a critical way is unlawful.<sup>22</sup>

### **3(e). Does the motivation for a strike affect its legality? (e.g. a politically-motivated strike)**

In Germany strikes are closely connected with the law governing the conclusion of collective agreements. Collective actions such as strikes are designed to facilitate this process by creating a balance of power during negotiations about collective agreements. Beyond this aim strikes are not permitted, so the motivation for a strike is of decisive importance for the legitimacy of the strike. Only those strikes which campaign for aims that can legally be part of a collective agreement are lawful. Consequently, politically-motivated strikes violate the law.

### **3(f). Are any categories of workers excluded from the right to strike? (e.g. armed forces, police etc.)**

Generally civil servants, judges and soldiers are excluded from the right to strike. Civil servants' contracts of employment are based upon public law, rather than civil

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<sup>19</sup> LAG Sachsen, 2.11.2007, Az: 7 SaGa 19/07 = NZA 2008, 59.

<sup>20</sup> O R Kissel, *Arbeitskampfrecht : ein Leitfadens* (Beck Juristischer Verlag, München 2002) 123.

<sup>21</sup> See Section 36, Bundeswahlgesetz.

<sup>22</sup> O R Kissel, *Arbeitskampfrecht : ein Leitfadens* (Beck Juristischer Verlag, München 2002) 150.

law and their working conditions are regulated by law or regulation rather than by collective agreements. As a strike by civil servants cannot be related to a collective agreement, it cannot be lawful.<sup>23</sup> The special status of civil servants, judges and soldiers, which is based on Article 30 GG, precludes any possibility of participation in an industrial conflict, particularly with regard to their salary and special rights and obligations.<sup>24</sup> However, this does not mean that civil servants, judges and soldiers are unable to take any action to change their working conditions. In the event of a legal dispute about problems in their working conditions, civil servants can take their claim to the administrative court. In such cases, they can rely upon the full range of fundamental rights, which apply to civil servants in contrast to civil law based contracts.

As discussed earlier, a recent decision of the Federal Labour Court allows strikes in solidarity with other strikes.<sup>25</sup> This raises the possibility that there might be a right to strike in solidarity for civil servants. However, it is highly likely that the Federal Administrative Court would reject a right to take a solidarity strike for civil servants on similar grounds as the rejection of their normal right to strike. Nevertheless, civil servants are allowed to form unions to improve their working conditions. The work of these unions is based on public relations.

Practical experience shows that civil servants are often used during a strike to maintain minimum services. However, they cannot be forced to break a strike.<sup>26</sup>

### **3(g). Is there an obligation of industrial peace?**

As mentioned earlier, collective agreements commonly contain a ‘peace obligation’ which prohibits the calling of a strike in relation to matters which are validly regulated in a collective agreement or closely linked with existing regulations. A strike will be illegal if a valid agreement exists. Usually peace obligations are not absolute, but only relate to those matters regulated by the relevant collective agreement. A strike could, therefore, lawfully take place over matters which are not contained in the agreement. However, parties may also conclude an absolute peace obligation, or no-strike clause. If this is the case strikes are illegal in general regardless of their purpose. This restriction might appear to affect the right to strike guaranteed in the European Social Charter, however, this right is expressed to be subject to any obligations contained in collective labour agreements.<sup>27</sup>

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<sup>23</sup> T Dieterich, *Erfurter Kommentar zum Arbeitsrecht* (8th edn Beck Juristischer Verlag, München 2008) 190.

<sup>24</sup> “Beamte sind nach einhelliger und ständiger höchstrichterlicher Rechtsprechung im Hinblick auf ihre besonderen, verfassungsrechtlich verankerten Pflichten und Rechte gegenüber der Allgemeinheit gem. Art. 33 V GG, §§ 52, 54 BBG, §§ 35, 36 BRRG nicht befugt, zur Förderung gemeinsamer Berufsinteressen kollektive wirtschaftliche Kampfmaßnahmen zu ergreifen ... Deshalb und im Blick auf die ges. Regelung seiner Bezüge und sonstigen Rechte und Pflichten steht der Beamte von vornherein außerhalb des auf jeweils solidarische Vertretung der Gruppeninteressen von Arbeitnehmer einerseits und Arbeitgeber andererseits angelegten Systems von Tarifvertrag und Arbeitskampf” (BVerwG (Bundesverwaltungsgericht), 10.5.1984, Az: 2 C 18/82 = NZA 1984, 401).

<sup>25</sup> BAG, 19.06.2007, Az: 1 AZR 396/06 = NZA 2007, 1055.

<sup>26</sup> BVerfG, 02.03.1993, Az: 1 BvR 1213/85 = NJW 1993, 1379.

<sup>27</sup> Article 6(4), European Social Charter (ESC).

#### **4. Is there a right to react to the industrial action by the employer?**

The German courts have defined the classic collective action of employers - the lock-out – as the exclusion from work declared by a single or even several employers without the approval of the employees who are unpaid for the duration of the lock-out. Lock-outs are lawful if certain quotas are observed.<sup>28</sup> The number of employees to be locked out depends on the number of striking employees. If, for example, fewer than 25 percent of employees of a certain pay scale area take part in a strike, the employer would only be allowed to lock-out a further 25 percent of the employees in the same area.

It should be noted that lock-outs have not taken place in Germany for over twenty years since the establishment of the quota system in 1980. Instead employers exercise their right of temporary closure of their business during a strike which has been established by the Federal Labour Court. This closure of either the whole business or a single department is not a real collective action but has the same effects because the employees do not have to be paid for the period of the closure. This measure also affects non-striking employees and is even allowed when their occupation would be possible and reasonable. In practice the employers usually yield to the unions' pressure and want to prevent high financial losses.

Theoretically boycotts are also possible, but have not been legally defined. A boycott as a measure in an industrial conflict is the act of voluntarily abstaining from using, buying, or dealing with someone or some other organisation as an expression of protest against the economic and working conditions. Only two cases of boycott have been decided by the German courts.

#### **5. How does the law regulate the impact of strike action upon the individual contract of employment?**

Lawful strikes and lock-outs have the effect of suspending the main obligations of the individual employment contract. Accordingly, the employee is free from his or her obligation to work and the employer is free from his obligation to pay the employee. However, certain secondary contractual obligations remain in force, such as the obligation to notify the employer about illness or the obligation of confidentiality. The main obligations come back into effect once the strike or lock-out is over. Where the employer refuses to accept the employees' work after a strike, the employer acts in default of acceptance.

All employees, including those who are not associated with a trade union, cannot be dismissed for taking part in a strike held in their company, otherwise their right to strike would be compromised. Employees who take part in a strike lose their right to obtain special salary such as overtime payments, based on actual work undertaken. However, employees do not lose their entitlement to leave during a strike, because the right to leave is related to the working contract and not to appearing for work. Employees will also lose their rights to continued remuneration in cases of illness or

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<sup>28</sup> BAG, 10.06.1980, Az: 1 AZR 822/79 = NJW 1980, 1642; A Junker, *Grundkurs Arbeitsrecht*, (6th edn Beck Juristischer Verlag, München 2007), 617.

other legitimate absence (for example, parental leave or holidays), if these are not the only reasons preventing them from working.

The suspension of the main obligations of both parties involved in a strike or lock-out does not mean that the employer is entirely prohibited from dismissing his employees. The employer has the right to dismiss an employee following the general rules for a dismissal, but he has to prove that the causes of the dismissal do not relate to the strike.

**6. Article 6(4) of the European Social Charter guarantees the right to strike. Does the European Committee of Social Rights view your national law and practice as complying with Article 6(4)?**

The European Committee of Social Rights regularly examines German law and practice to see whether it complies with Article 6(4) of the European Social Charter (ESC). In its Conclusions XVII-1 of 2004 and Conclusions XVIII-1 of 2006, the European Committee of Social Rights criticises several different aspects of German labour law.

In its 2004 Conclusions, the Committee identifies three different ways in which the situation in Germany is not in conformity with Article 6(4) ESC. The first aspect criticized is that strikes which are not aimed at achieving a conclusion of collective agreement are prohibited. The second criticism is that it is difficult for trade unions to satisfy the conditions for calling a strike and, thirdly, the Committee is concerned that civil servants employed in the privatised postal and rail services, which are not bodies exercising public authority, are totally denied the right to strike. Analysis of these points can be divided into two areas; the requirements of a lawful strike and the requirements as to who can take collective actions.

With regard to the first area, in earlier Conclusions<sup>29</sup> the Committee had stated the situation was not in conformity with the Charter since there is a peace obligation on the parties to the agreement which excludes the possibility of collective actions during the negotiation of a new collective agreement. However, the peace obligation is now accepted by the Committee as compatible with the Charter as it is based on a historical commitment by the social partners.<sup>30</sup>

In addition, in 2004 the Committee considered that the principles of proportionality and fairness as requirements of a lawful strike can have a negative effect upon the effectiveness of strike actions and believed that the conditions for calling a strike are too difficult for trade unions to satisfy. The Committee also expressed concern about the unlawfulness of strikes which are not concerned with the conclusion of collective agreements and concluded that this also failed to conform with Article 6(4) ESC.

In relation to the issue of who can take collective action, the Committee concluded that the absolute strike ban applied to civil servants employed in privatised postal and rail services does not conform to the Charter. In relation to civil servants whose work does not involve the exercise public authority, an absolute strike ban cannot be justified, although their right to strike may be subject to restrictions.

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<sup>29</sup> European Committee of Social Rights, Conclusions XVI-1, Germany.

<sup>30</sup> European Committee of Social Rights, Conclusions XVII-1, Germany, p.11.

In its 2006 Conclusions, the Committee continued to criticise the fact that strikes which are not aimed at achieving a collective agreement are prohibited in Germany. Furthermore it considered the requirements to be met by a group of workers in order to form a union satisfying the conditions for calling a strike to be an excessive restriction to the right to strike. The Committee suspected that the principles of proportionality and fairness applied by the Federal Labour Court when ruling on the lawfulness of strikes, affect the effectiveness of strikes. The Committee requested further information about decisions of domestic courts which declare a strike as unlawful because of a failure to respect the proportionality principle.

Although the national German report responding to the previous Committee's Conclusions points out the reasons why strikes which are not concerned with the conclusion of collective agreements are unlawful, and explains that strikes with the aim of enforcing demands which cannot be the subject of collective bargaining are of no practical importance in Germany, the Committee continued to criticise this aspect of German law.

In a decision of 10 December 2002, the Federal Labour Court stated that the lawfulness of strikes which aim to achieve collective agreement objectives may require a review in the light of Part II, Article 6(4) ESC.<sup>31</sup> From the point of view of the Committee, this decision could be an indication that the Court might review its present case law.

For a strike to be lawful in Germany it must be organised by a trade union. The Committee considers that this requirement is inconsistent with the Charter because workers should be able to form a union for the purpose of a strike. However, the German position is based on the fact that the right to strike is not guaranteed by law, rather this only gives the right to form trade unions. In turn, this means that only trade unions have the right to organise strikes.

Finally, with regard to the right to strike of civil servants employed in privatised postal and rail services, the Committee persisted in its viewpoint that a absolute strike ban is not in conformity with the Charter and requested further information as to whether civil servants are offered the chance to transfer to a private law contract. The question implies that as long as such employees are given the opportunity to give up their civil servant status, the situation would be in conformity with Article 6(4) ESC. In practice, most employees in the privatised postal service in Germany prefer to stay in the civil service despite not having the right to strike because being a civil servant has a number of advantages, such as greater job security and preferential health insurance.

## **7. To what extent, if any, does national law provide regulation for transnational forms of strike action?**

There is no special regulation of transnational forms of strike action in Germany.<sup>32</sup> So far there are no differences between national conflicts and collective actions having a cross-border element. Furthermore there are very few court decisions dealing with

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<sup>31</sup> BAG, 10.12.2002, Az: 1 AZR 96/02 = NZA 2003, 734.

<sup>32</sup> W Däubler in F Dorsemont, T Jaspers and A van Hoek (eds), *Cross-Border Collective Actions in Europe: A Legal Challenge* (Intersentia, Antwerp 2007) 146.

transnational strike action. It is not illegal to hold “parallel” strikes in different countries. Trade unions may arrange coordinated actions in different countries if this is considered to be effective. However this form of strike can be illegal if it becomes an illegal kind of solidarity strike. Equally there are no special regulations for cross-border solidarity strikes. The same principles apply for transnational solidarity strike as for national solidarity strikes. In 1985 the Regional Labour Court of Frankfurt declared cross-border solidarity strikes to be lawful in general.<sup>33</sup> Further aspects of transnational solidarity strikes are described in doctrine. A solidarity strike would be lawful if it is against the German part of a business or company with the aim of supporting the strike action of workers in a foreign part of the same business or company.<sup>34</sup>

There may also be a right to strike for German employees if they have to undertake the work of foreign employees who are on strike. This point is illustrated by a case before the Regional Labour Court of Frankfurt in which a German stewardess had been required to undertake the task of striking Spanish cleaning personnel when their German aeroplane arrived at a Spanish airport.<sup>35</sup> The Regional Labour Court declared the refusal of the stewardess to clean the aeroplane as unlawful because she had no right to strike in that situation. Unfortunately, the Federal Labour Court has never adjudicated on whether the Regional Labour Court’s decision was correct, because a settlement was reached by the parties to the dispute. Furthermore in 1987, when the case took place, the solidarity strike was not accepted as a lawful type of collective action.

Finally, transnational strike actions in the form of a boycott taking place in Germany, against working conditions in other countries, are lawful in German law. An example was seen in the boycott by German dockworkers against foreign ship-owners for better working conditions on foreign ships. The trade unions organized a boycott to enforce the conclusion of a collective agreement about the working conditions of all crewmembers on board. This was held to be a lawful collective action by the local court of Bremen.<sup>36</sup>

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<sup>33</sup> LAG Hessen, 25.6.1985, Az: 4/10 Sa 816/81.

<sup>34</sup> C W Hergenröder in M Löwisch (ed), *Arbeitskampf und Schlichtungsrecht*, (Forkel, Heidelberg 1997) 77.

<sup>35</sup> LAG Hessen, 14.01.1987, Az: 2 Sa 1032/86.

<sup>36</sup> ArbG (Arbeitsgericht) Bremen, 07.10.1999, Az: 9 Ga 79/99 = NZA-RR 2000, 35.



## 5. Italy

*Niccolò Delli Colli, Emma Di Toro, Ambra Fabrizi and Luca Forte*

### **1. Briefly describe the industrial relations context of strike action in recent years.**

Industrial relations in the Italian system can be defined as the complex of relations among actors such as trade unions, employers and their organisations, and public institutions, in technological, economical and social-political contexts. They have been developed through processes such as collective bargaining, industrial conflict and political exchange, and different methods including collective bargaining and law. Different degrees of cooperation, agreement and conflict are found, producing a complex of rules that regulate individual and collective employment relationships.

The main industrial relations actors are trade unions, employers and their associations and the executive. Employees usually express themselves through trade unions; but spontaneous structures, collective movements and unorganised groups are also found. Trade unions are characterised by their expansion in different fields, their organisational patterns, which can be local or specialised in a particular trade, internal management, conflicts, such as the strike, and relations with political movements.

Italian industrial relations are based on a self-government principle, because in accordance with Article 39 of the Constitution “The organisation of trade unions is free”. This means that trade unions have the freedom to organise themselves and to carry out their activities, and neither the Government, nor any private person can prevent this.

In Italy, the largest trade unions are the CGIL (Confederazione Generale Italiana del Lavoro) inspired by Socialist and Communist ideology; the CISL (Confederazione Italiana dei Sindacati dei Lavoratori) inspired by a Catholic ideology and the UIL (Unione italiana del Lavoro) inspired by a socialist ideology. There are also a number of representative bodies for employers which vary between the private and public sectors. The main bodies in the private sector are Confindustria, the largest organisation for the manufacturing and services industries; CONFCOMMERCIO, which brings together commercial and services enterprises and ABI (Associazione Bancaria Italiana) which represents many banking institutions.

In the public sector the only employer organization is ARAN (Agenzia per la rappresentanza negoziale) which has represented the public administration in national collective bargaining<sup>1</sup> since 1993.<sup>2</sup> The legislator has recognised the right of the public administration to give ARAN directives through sector committees.

Government participation in industrial relations can be seen both directly and indirectly. The Government can be said to have become the third contractual party in the collective bargaining process, expending its own resources and becoming involved in the sharing of general political and social-economic targets and their

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<sup>1</sup> Title III, Legislative Decree no. 165/01.

<sup>2</sup> Legislative Decree no. 29/93.

engagement for the guarantee of coherent contractual behaviour. This participation is realised in two main ways, firstly through political acts to regulate the employment relationship, for example regarding wages and incomes policy, and secondly via political and social-economic participations including employment and welfare policy.

Article 39 of the National Constitution provides the basic principle for the regulation of the collective bargaining system by stating that:

“(T)he organisation of trade unions is free.

No obligation may be imposed on trade unions except the duty to register at local or central offices as provided by law.

Trade unions are only registered on condition that their by-laws lead to internal organisation of democratic character.

Registered trade unions are legal persons. Being represented in proportion to their registered members, they may jointly enter into collective labour contracts which are mandatory for all who belong to the respective industry of these contracts”.

The self-government principle, which is clearly enounced in this article, is the basis of the Italian industrial relations system. The legislator has not, in fact, put paragraphs 2, 3 and 4 of Article 39 into effect, because of the unions’ concerns that such legislation would be a means of government interference in trade union activity. On the basis of the key proposition of Article 39, the Italian industrial relations system regulates the relationship between employers and workers through the use of collective bargaining and represents a process of coordinated regulation of the employment relationship. In this process, one of the most important means the trade unions have to achieve their goals is the strike, regulated by Article 40 of the Constitution which provides that the right to strike is exercised according to the law.

There are three different forms of collective bargaining. The first type is seen in the conclusion of national agreements between confederations, signed by the employees and employers confederations when it is thought by the social partners that a uniform regulation of a range of issues is useful. A second form is industry-wide bargaining where the contracts are made of two parts. The normative part operates for four years and the economic part, for two years. The contracts are signed periodically by the main employee and employer organisations. A final form is decentralized bargaining, where agreements are negotiated at a local or workplace level.

During the latest period of Italian industrial relations, the phenomenon of ‘concertation’ has been developed. Concertation means to “agree to do something” and represents a policy method or procedure whereby social partners and the executive obtain an agreement about political and economical goals and the means necessary for their realisation. This approach differs from the National Constitution, securing accordance with government measures.

The use of concertation developed from 1990 onwards, in particular, after the national multi-industry agreements in 1993 which aimed to support the redevelopment of the national economy by bringing down inflation and interest rates.<sup>3</sup> The approach led to

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<sup>3</sup> Protocol of 23 July 1993 on incomes policy.

a reduction in collective conflicts because the role of the executive was to reach agreement among the social partners and then to proceed to the normative and contractual revisions.

The situation changed in 2001 when, in the so-called 'Libro Bianco', a clear move away from the concertation method took place. The new executive approach to the industrial relations system was introduced by the presentation of the Libro Bianco to the social partners. This had the aim of simplifying industrial relations as it considered concertation as a binding and slow method. However, the executive approach towards industrial relations which appeared after the publication of the Libro Bianco was one which promoted division among the trade unions in terms of debilitation of the power and the fragmentation of the normative rules. On the 5 July 2002 the Pact for Italy which represented the most important expression of the new system, was signed by the CISL and UIL, but not by the CGIL. The consequences of this method were the promulgation of Act no. 30/2003 concerning the reform of the labour market and legislative decree no. 276/2003. The new approach led to an increase in collective conflicts between 2001 and 2005. However, the introduction of the Welfare Protocol on 23 July 2007 signalled a return to the use of concertation. This protocol led to a new law, Act no. 247/2007, following a referendum in which large numbers of workers voted.

To illustrate the amount of working time lost to strikes in recent years in Italy, the graph below shows the number of working hours lost to labour disputes between 2005 and 2007.

#### Working hours lost for labour disputes (in thousands)

	Level			Percentage changes	
	2005	2006 (*)	2007 (*)	2006 compared with 2005	2007 compared with 2006
January	153	1,478	131	866.0	-91.1
Jan-Feb	288	1,572	194	445.8	-87.7
Jan-Mar	1,646	2,303	325	39.9	-85.9
Jan-April	2,452	2,491	554	1.6	-77.8
Jan-May	2,691	2,822	953	4.9	-66.2
Jan-June	3,373	2,926	1,303	-13.3	-55.5
Jan-July	3,821	3,025	1,482	-20.8	-51.0
Jan-Aug	3,904	3,075	1,515	-21.2	-50.7
Jan-Sept	5,063	3,204	1,574	-36.7	-50.9
Jan-Oct	5,553	3,457	3,464	-37.7	0.2
Jan-Nov	5,851	3,659		-37.5	
YEAR	<b>6,348</b>	<b>3,883</b>		<b>-38.8</b>	

It is clear that between 2005 and 2007 there was a decrease in the trend of the time working lost by strike. In the period January-October 2007, the number of lost hours for labour conflicts was 3.5 million, close to the figure for 2006 with a variation of 0.2%. The most important cause of conflicts, according to official government statistics (ISTAT), was the renewal of collective agreements with 2 million hours lost. Finally, the ISTAT statistics, updated to 14 March 2008, underline a growth of 2.5%

of the total wages per unit of work in the fourth quarter of 2007 compared to the same period of 2006 and a growth of 0.6% compared to the third quarter of 2007. The medium growth of salaries in 2007 has been 2.3% compared to 3.3% in 2006. It is probable that there will be a further growth of conflict rate compared to 2006, but a decrease compared to 2005.

## **2. The right to strike as a fundamental legal norm**

### **(a) Is the right to strike guaranteed in the national constitution?**

In Italy, the right to strike is guaranteed by Article 40 of the National Constitution which provides that the right to strike is exercised according to the law. The right to strike is recognised as a powerful means of bargaining for workers' collective organisations, because the guarantee of the right to strike permits trade unions to exist and operate in the economic system based on free market principles and private economic enterprise.<sup>4</sup>

The right to strike has not always existed in Italian law. Until 1889 there was a criminal provision in the field and strikes were treated as a crime. According to the relevant criminal code provisions all agreements among workers designed to stop business activity or to increase wages without any reason were punishable. In 1889 the prohibition of coalition was abrogated and strikes were no longer considered a criminal act, as long as they were realised without violence or intimidation. The judiciary, however, interpreted these rules strictly, because the suspension of work was regarded as a contractual breach.

In 1926, the Fascist regime revived the penal repression of strikes, characterising them as a crime against the national economy to be punished under the criminal code. After the fall of the Fascist regime and the promulgation of the National Constitution, these rules were not expressly abrogated by the legislator, neither were they considered abrogated by the courts. This caused a conflict between the old rules and the new Constitution, as Article 40 established the right to strike as a fundamental right.

The difficulty in the application of the Article 40 lies in its phrasing that the right to strike is to be exercised according to the law. The intention of the constitution makers was that Article 40 was to be regarded as a rebuttal of the earlier laws and that the right to strike would be elaborated through the promulgation of an ordinary law to regulate the exercise of the right to strike. However, this was not forthcoming and the absence of new legislation in this context have obliged the courts to reinterpret the previous legislation and attempt to reconcile this with the Constitution.

Numerous cases have affirmed the direct application of Article 40. These have guaranteed the exercise of the right to strike "besides the promulgation of legislative rules that establish limits and modalities".<sup>5</sup> Furthermore, in Decision 29/1960, the Italian Constitutional Court established the constitutional illegitimacy of Article 502

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<sup>4</sup> See Article 41, para 1, Italian Constitution.

<sup>5</sup> See the Italian Constitutional Court, Sentences 1/74 and 54/74; and Court of Cassation, Sentences 584/52, 1628/52 and 357/71.

of the criminal code, because of its conflict with the Constitution's principles of the trade union freedom and the right to strike.<sup>6</sup>

**2(b). Is it recognised as a fundamental right (e.g. though case law of the highest courts)?**

Prior to the promulgation of Act no. 146/1990 on the right to strike for essential public services, collective conflicts were entirely regulated by case law. For about forty years there was no legislation covering strikes. It was case law which introduced the constitutional rule in the legal system producing a body of definitions elaborating the notion of strike. The key Decision 711/1980 of the Court of Cassation (the Italian Supreme Court) defined the strike as "a collective abstention from work, established by a plurality of employees to reach a common goal". The strike is seen as representing the common interest of the employees and for this reason it overrules individual action. The abstention from work, which is considered to be a right, has immunity from all kinds of punishment and from any contractual liability. Participation in a strike, which is the exercise of the right in question, results only in the suspension of the workers' activity and the loss of their wages.

By referring to Decision 711/1980 of the Court of Cassation it is possible to extract the fundamental aspects of the right to strike. The Court has chosen a general notion of strike that includes all the action to achieve the employees' goals. In the Italian legal system, the strike is recognized as a Constitutional right, found in Article 40 of the Constitution. This article contemplates the strike as a subjective right, neither as a crime, nor as a freedom. According to the specialized literature and the jurisprudence of the Constitutional Court, the strike has to be considered in terms of economic professional general interests. The extent of the lawfulness of the right to strike is demonstrated by the existence of the sympathy strike and the political economic strike. It is considered to be an absolute individual right, based on the employment contract but independent of any relationship with the employer.

**2(c). What is the relationship between the right to strike and other fundamental rights and freedoms (e.g. property rights, freedom of commerce)?**

Case law has assumed a fundamental role for the elaboration of the limits and the relationship between the right to strike and other fundamental rights. Of particular importance is Decision 711/1980 of the Court of Cassation, in which the Court established the general meaning of strike and set out the limits to the assertion of this right in relation to the guarantee of the other constitutional rights. This decision confirms that the right to strike, whatever its form and the nature of the damage, is only subject to the limits inherent in the rules that protect competing interests on a priority or equal level, such as rights to life and personal safety and the right to pursue private economic enterprise.<sup>7</sup>

Article 41 of the Italian Constitution provides that private economic enterprise is free and Article 4 that the Republic recognizes the right of all citizens to work and promotes conditions to fulfil this right. Taking these provisions together it can be

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<sup>6</sup> See Article 39, para 1 and Article 40, Italian Constitution.

<sup>7</sup> Article 41, Italian Constitution.

inferred that the exercise of the right to strike has to be considered illegal where it jeopardises not the productivity, but the means of production, of a company. However the Court has held that a strike will only infringe the right to pursue private economic enterprise where it affects the economic ability of the employer to go on with his business, and not if it merely results in a loss of profit.<sup>8</sup> The Court held that each action has to be assessed on a case by case basis, with emphasis placed on the way it is exercised and any real danger posed to the right to life or to personal safety or to the integrity of production plants. Furthermore, damage to the means of production of a company represents an extra-contractual liability under Article 2043 of the civil code.

In addition, the provisions of Article 1 of Act no. 146/1990 regulate the balance between fundamental individual rights and the right to strike for the sector of essential public services. In this provision essential public services are considered, independently of the nature of their labour relations, to be those which guarantee the enjoyment of the individual, constitutional rights of life, health, freedom and safety, freedom of movement, assistance and social insurance, teaching and communications.

It is, therefore, necessary to balance the right to strike and the enjoyment of the other constitutional individual rights, through the rules and procedures which must be followed in a collective conflict, in order to assure the effectiveness of the essential rights. This will be discussed in greater detail later in the report.

### **3. The legal framework on strike action**

#### **(a) Is there a legal definition of what constitutes a ‘strike’ or other forms of collective action?**

In the Italian system there is no legal definition of the term “strike”. The *de facto* meaning of this term has been defined by the specialised literature and case law. Parts of the literature define strike as an organized collective abstention from working activity of employees in a subordinate position, in both the public and private sector, to protect common political or trade unions interest and rights.

In the Italian system there were two different stages in the definition of strike. Before Decision 711/1980 of the Court of Cassation, the case law identified a series of limits of the right to strike, the so called “internal limits”. The internal limits approach was based on the idea of a fixed pattern of strike. A series of fundamental elements were identified, and all the protest forms that did not share these elements were not considered to be legitimate forms of strike. The fundamental elements of strike referred to specific characteristics such as the totality of the abstention, the contemporary abstention by all the striking workers, the continuity of the strike during the abstention, the functionality aimed at modifying the collective agreement, and the fact that the striking workers had to be subordinates. This dynamic caused some kinds of protest to be considered unlawful. However, Decision 711/1980 provided a wider definition of strike, linked to social realities which overcame the system of

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<sup>8</sup> Court of Cassation, Sentence 711/1980.

internal limits. Instead this new vision of strike was based on “external limits”, found in “rules that protect competing subjective positions, on a priority or equal level”.<sup>9</sup>

The Court of Cassation, in Decision 711/1980, specified the concept of strike as: “... no less that a collective abstention from working activity, disposed by employee to achieve common goals, referring to the common language meaning of this term”. The Court of Cassation gave a wide meaning of the term “strike”, including all the possible and numerous protest forms considered the most effective or the only possible way to achieve the desired goals.

**3(b). What types of collective action can be lawful? (e.g. is it lawful for workers to take strike action as an act of solidarity with workers involved in a separate industrial dispute?)**

A strike is an organized, collective abstention from working activity, but it is a varied phenomenon that can be analysed according to its duration, extension, and articulation. In addition to the typical type of strike there are a number of other forms of strike which can be used to articulate different modalities of collective actions from sit-down strike to virtual strike. In particular the following strike patterns are recognised: the articulate strike, the sympathy strike, the political strike and the political economic strike. Each of these forms of collective action will be considered in turn.

The expression ‘articulate strike’ is used to denote both intermittent strikes and rotating strikes. The first of these consists of a succession of brief interruptions to work by all the employees concerned. The Italian case law recognises this kind of strike, regardless the damage caused to industrial production. The only limits are those imposed by Constitutional provisions such as the rights to health and personal safety, and the right to pursue private economic enterprise. The intermittent strike is considered unlawful when it breaches the indicated limits, that is to say, in cases of irreparable harm to a company’s productivity or the long lasting idleness of plants.

The rotating strike, however, consists of alternating the interruption of work, in turn, by employees in particular departments, groups, occupational categories or production sectors. This makes it possible to spread the financial burden of the strike between a large number of workers while at the same time maximising the damage inflicted on the employer. The two methods are often used together, indicating that the Italian system allows the trade unions to choose the most effective form of protest by maximising the cost of the dispute to the employer and minimising the impact on employees.

A sympathy strike is a strike expressing solidarity with another strike by employees of other employers or of the same employer, but at another workplace. In principle, this kind of strike is classified as a crime by Article 505 of the criminal code. Nonetheless, the Italian Constitutional Court has held that sympathy strikes can be lawful<sup>10</sup> and Article 505 of the criminal code cannot be applied when, according to Article 51 of the same code, the employees are exercising a constitutional right.

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<sup>9</sup> Court of Cassation, Sentence 711/1980.

<sup>10</sup> Italian Constitutional Court, Sentence 123/1961.

However, it remains subject to criminal sanction in cases where there is no community of interest between the two groups of striking workers. In the Italian system it is for a judge to decide in each case whether or not a community of interest exists.

A political strike is a type of non-contractual strike and is aimed at influencing or shaping general policy itself. The Constitutional Court has given authoritative backing to the political strike as an integral part of the forms of representative democracy considered to be a basic principle of the Italian system.<sup>11</sup> Following the Court's intervention, the only kinds of political strike which remain a criminal offence within the meaning of Article 503 of the penal code are ones which are designed to subvert the constitutional order, or which use methods which make it a form of pressure preventing or hindering the free exercise of those rights and powers whereby the sovereignty of the people is expressed: for example, elections or meetings of constitutional bodies. Political strikes are considered to be a freedom and not a right like the strike of a contractual nature.

A political economic strike is also non-contractual in nature and is aimed at bringing about or blocking certain government or statutory interventions or measures which are of importance to the economic interests of the workers. In Sentence 1/1974, the Constitutional Court held that Article 40 of the Italian Constitution guarantees this kind of strike as a type of action which can be used to promote the range of workers' interests included in the rules of Title III of the first part of Italian Constitution regarding economic relations. This type of strike can be used even when the claims of the protest are not closely related to the labour contract. The political-economic strike is considered different from the political strike because it represents the exercise of a right, rather than a freedom.

### **3(c). Are there guaranteed minimum public services in the event of a strike?**

The exercise of the right to strike in the essential public services is regulated by Act no. 146/90 as amended by Act no. 82/2000. In this Act, the legislator has set out a series of essential services that cannot be interrupted even during a strike.<sup>12</sup> In the first paragraph of Article 1, essential public services are defined as those aimed to guarantee the enjoyment of the Constitutional rights of the person to life, health, freedom and the security, freedom of movement, social security, education and freedom of communication. This provision has the purpose of balancing the exercise of the right of strike with the enjoyment of other personal rights which are constitutionally guaranteed. It sets out rules about the procedures to be followed in cases of industrial conflict, with the aim of securing the provision of essential public services.

The Guarantee Committee has a fundamental role in the process of balancing the various constitutional rights.<sup>13</sup> The Committee has three functions the first of which is to estimate the suitability of agreements on indispensable work agreed by the trade unions and employers organisations, and the suitability of the self-regulation codes

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<sup>11</sup> Italian Constitutional Court, Sentences 290/74 and 123/62.

<sup>12</sup> Article 1, Act no. 82/2000.

<sup>13</sup> The body is also known as the Commission for the implementation of the law on strikes in essential public services.



adopted by the associations or the representative bodies of the interested sectors. Its other functions are to prevent unlawful strikes and to sanction unlawful behaviour of labour unions, employers, self employers organization.

In order to guarantee the balance between the right to strike and other constitutional rights, Act no. 146/90 introduced the principles of the “rarefazione oggettiva e soggettiva”. This means that the right to strike can be exercised within the limits of the rules aimed at maintaining the efficiency of essential services, and that a strike must be announced with at least ten days notice. Before the notice period elapses, the actors calling the strike must communicate the length of the strike and the form(s) it will take in writing to the administration, the enterprises supplying the services and the government office with the power to seek an injunction against the strike.

The public administration and the enterprises supplying the services have collective agreements with the trade unions on the minimum essential services that must be supplied. They also decide upon the procedures to be followed and other measures to guarantee the minimum essential services prescribed by the rules. These measures can provide for the abstention from striking of quotas of workers that must supply the minimum essential services and systems to identify these workers. They also provide for periodical forms of supply of the services and must show the minimum interval between the strike and a new call to strike, in order to avoid different successive strikes affecting the same essential service or the same users.

Furthermore, under Article 2 of Act no. 146/90 the right to strike can only be exercised after a cooling-off period and conciliation procedures have been undertaken. These procedures are binding on all the actors, must be employed before the calling of the strike and must be inserted into the relevant collective agreements. The public administration and the enterprises must communicate to users, at least five days before the strike begins, details of how and when the strike will take place. They must also guarantee that the service will be quickly restored when the strike is over. Act no. 146/90 penalises the so called “announcement effect”, that is the spontaneous revocation of the called strike, because is considered an incorrect form of trade union activity.

Finally, a new Act no. 83/2000 extends these limitations on the right to strike to self-employed workers engaged in essential public services. In this way, the application of Act no. 146/90 is extended to all workers whether they are self employed or employees.

### **3(d). Does the motivation for a strike affect its legality? (e.g. a politically motivated strike)**

The right to strike is recognized by Article 40 of Italian Constitution which provides that the way in which it shall be exercised is defined by the law, and, due to the absence of legislation the motivation for the strike is immaterial for deciding its legitimacy as long as the strike is an action aimed at achieving a common goal for the employees.<sup>14</sup>

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<sup>14</sup> Court of Cassation, Sentence 711/1980.

With regard to essential public services, Act no. 146/1990, Article 2(1), imposes on the actors who call a strike the duty to communicate in writing, before the time for notice expires, the justification for the collective abstention from work, even if the bodies advised cannot verify this. In the case of the political strike, the motivation for the strike can only be considered after the strike has been called. Following the Constitutional Court's intervention in Sentence 290/74, the only kind of political strike which remains a criminal offence within the meaning of Article 503 of the penal code is one which is designed to subvert the constitutional order, or which uses methods that make it a form of pressure preventing or hindering the free exercise of those rights and powers whereby the people's sovereignty is expressed, for example, elections and meetings of constitutional bodies. It is for the courts to decide whether the strike was aimed at subverting the constitutional order or at hindering the free exercise of popular sovereignty.

**3(e). Are any categories of workers excluded from the right to strike? (e.g. armed forces, police, etc.)**

In the Italian legal system there are specific categories of workers which are subject to limitations in respect of their right to strike, and other categories which suffer prohibitions against this right. In particular, the right to strike is limited for air traffic controllers, who can only exercise a virtual strike. Act no. 242/80 provides that the right to strike exercised by air traffic controllers must not interfere with assistance for emergency flights and to flights used by state authorities or with the air connection to the Italian isles.

There are also limitations on the right to strike for employees in charge of nuclear plants. Article 49 of Presidential Decree no. 185/64 concerning nuclear plants provides that a ministerial decree must designate a number of employees whose the right to strike will have to be limited in order to maintain the security of the plant.

Strikes by employees of the armed forces, police, and prison officers are forbidden. Strike is absolutely forbidden in these special sectors where continuity of the services is necessary. Article 20 of Act no. 146/90 expressly reiterated special rules for the army<sup>15</sup> and the police.<sup>16</sup>

**4. How does the law regulate the impact of strike action upon the individual contract of employment?**

In the Italian system the strike is a fundamental and freely exercisable right. An employee is free to exercise this right with the certainty of his or her position being guaranteed in the employment relationship. The only consequences caused by the exercise of this right are the suspension of wages and other obligations of the employer and the suspension of the labour activity of the striking worker. The suspension of wages does not involve the suspension of supplementary components linked to the labour relation or to the seniority of service. The only real consequence for the employee is the absence of payment for the effective hours spent on strike and

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<sup>15</sup> Article 8, Act no. 382/1978.

<sup>16</sup> Article 84, Act no. 121/1981.

the loss of the benefits such as luncheon vouchers or training courses provided by the employer.

The right to strike as a freely exercisable right is untouched by civil law principles so it is never considered to be a contractual breach. For this reason, the strike represents a simple suspension of labour obligations, both for the employees and the employer, and the latter has no legal recourse against the striking workers. However, it seems to be reasonable to deprive the striking workers of pay for the logical reason that otherwise a strike would be a collective solicitation to paid inactivity. The loss of pay has the purpose of placing a sense of responsibility on the worker and the trade unions in the exercise of the strike.

The Italian system protects employees and trade unions representatives who exercise the right to strike. Act no. 300/1970, the so-called 'Workers' Statute', establishes specific protections against discriminatory or arbitrary acts of the employer for workers and trade union representatives who exercise the right to strike. After recognising, in Article 14, the right to association for trade union purposes and to join trade unions in the workplace, Article 15 of the Workers' Statute prohibits any dismissal or other detrimental treatment for participation in a strike based on discriminatory reasons including political or religious grounds. This provision makes it impossible for employers to harm striking workers and takes away the possibility of repercussions on the individual labour contract in cases of a lawful exercise of the right to strike.

Another means of guarantee is represented by Article 22 of the Workers' Statute, which deals with trade union representatives in the workplace. This provision seeks to prevent employers from weakening trade unions by transferring the trade union representatives who take part in a strike. Article 22 establishes that the relocation of trade unions representatives requires the approval of their trade unions. Article 28 of the Workers' Statute, moreover, introduces an urgent procedure which gives the local representations of the labour organisations represented at national level, the possibility of bringing a judicial action in order to prevent anti-union behaviour such as a preclusion of the exercise of the legal right to strike. There are also rules that protect striking workers in some kinds of flexible work. The use of fixed-term<sup>17</sup> and temporary contracts<sup>18</sup> to take the place of the striking workers, is forbidden. The Italian system, therefore, guarantees striking workers and employees who take part in trade union activities, the absence of any kind of repercussion other than the loss of pay.

**5. Article 6(4) of the European Social Charter guarantees the right to strike. Does the European Committee of Social Rights view your national law and practice as complying with Article 6(4)?**

It is first necessary to define the normative context in order to explain the comments of the European Committee of Social Rights about the scope of the right to strike in Italy. Article 6(4) of the European Social Charter establishes the right of workers and

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<sup>17</sup> Article 3, para 1(a), Legislative Decree no. 368/2001.

<sup>18</sup> Article 20, para 5(a), Legislative Decree no. 276/2003.

employers to take collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into. The European Social Charter was revised in 1996. Article 6 now provides that each contracting party may regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms of Article G of the revised Charter. The relevant part of Article G, states that the rights shall not be subject to any restrictions or limitations except as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.

In the Italian system the right to strike is a fundamental right found in Article 40 of the Constitution. The primary statutory provision on the right to strike is Act no.146/1990 which regulates the right to strike in the essential public services and protects individual fundamental rights. In the last ten years this Act has had a very important role in the regulation of industrial disputes but it has also revealed some weaknesses which were addressed by the legislator in Act no. 83/2000.

The European Committee of Social Rights (ECSR) has established that the Italian Act no.146/1990 fails to comply with Article 6(4) of the European Social Charter.<sup>19</sup> According to the ECSR there are two elements to the lack of compliance: the first is the inability of the ECSR to supervise the application of Article G when the executive grants an injunction and the second is the excessive limit represented by the notice duty placed on workers in essential public services by Article 2 of Act no. 146/1990.

With regard to the first reason given by the Committee, it can be argued that this does not, in fact, represent an excessive limit to the exercise of the right to strike. Article G establishes that possible limitations to guarantee rights and to protect public order, national safety, healthy and good behaviour, are permitted by the law, as reflected by Act no. 146/1990. This can be said to provide a necessary balance of constitutional interests as set out in by Article 1 of Act no. 146/1990. The purpose of an injunction is to protect individual fundamental rights where the exercise of the strike could damage other constitutional rights and it can be argued that that the legal conditions for imposing an injunction justify its existence in the Italian legal system.<sup>20</sup>

The possibility of damage to other constitutional rights demands the introduction of a legal solution preventing the exercise of the right to strike and guaranteeing the rights that could be damaged. The legal solution is that the system gives administrative authorities the power to prevent strikes. The authorities are able to take immediate decisions and have political responsibility for their actions. The activities of the public administration in this regard are overseen by a Commission for the implementation of the law on strikes in essential public services. This body is regulated by Act no. 146/1990 and is neutral as between trade unions and employers. It has powers to regulate collective conflicts, to characterise the modalities of strike and to be a neutral arbiter in collective bargaining. The Act also gives the Commission the power to express opinions about its use and matters. Although the Commission's opinions are not binding upon the public administration, the latter's

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<sup>19</sup> European Committee of Social Rights , Conclusions 2006 (Italy).

<sup>20</sup> Article 8, para 1, Act no. 146/1990.

discretion is tempered not only by legal conditions but also by the Commission's opinions. In summary, it is suggested that the conditions to which preventing a strike is subject render Italian law compliant with Article G of the European Social Charter.

In relation to the second reason given by the ECSR, that the notice duty placed on essential public services workers is excessive, it is accepted that this represents an excessive limitation on the right to strike. The purpose of this rule is to guarantee the fundamental rights of service users affected by the strike. However, the system guarantees the provision of minimum essential services to users in order to safeguard their rights. A requirement to indicate the strike term in advance does not permit the workers in question to extend their disagreement and sustain their opinions. Even if historically many strikes have been of limited duration, the trade unions in essential public services might in future need to extend a strike for a longer term. The limitation of the strike term also limits the workers' power in the collective bargaining process because it weakens the trade unions' most important weapon. The ECSR's opinion, in this regard, is well-founded because the rule is of secondary importance and does not necessarily guarantee the rights established by Article G of the Charter because it decreases the power of the trade unions in collective bargaining. The duty to declare the strike term in advance is not as useful as the balance of other constitutional rights and seems to cause an excessive limitation of the right to strike.

## **6. To what extent, if any, does national law provide regulation for transnational forms of strike action?**

In the Italian system there are no rules regulating transnational strikes. However, a number of cases and decisions of the Guarantee Commission incidentally deal with the field of the transnational collective action. The only published case relating explicitly to cross border collective actions is a decision of the Commission. The Commission is not a judicial institution, but an administrative body to which has the power to assess whether particular collective action is legitimate in the light of the legal rules governing the exercise of such actions. Resolution 02/97 was issued within this regulatory framework and concerned a strike in the air transport sector, which falls within the scope of Act no. 146/90 since its workers carry out an essential public service pursuant to Article 1. The Commission was asked to assess the legitimacy of a strike called in the air transport sector by Licta, an air traffic controllers' trade union.<sup>21</sup> The strike was called following a European-wide four hour strike called by the ATC – EUC (Air Traffic Controllers – European Union Coordination) for 19 June 2002. Since the Commission could not pass judgment on the action on the part of the European trade union, it considered the action whereby the Italian trade union joined the strike and evaluated its compliance with Italian rules. In light of these rules, the strike was deemed illegal, since its enforcement would have infringed the rules provided by the resolution on provisional regulation 01/92. The legitimacy assessment focused in particular on the absence of a cooling-off period of 20 days, which must elapse between the call for a strike in the air transport sector and the strike itself - the so-called objective rarefaction clause.

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<sup>21</sup> Licta is an independent union, that is to say one not belonging to any of the three confederated unions, the CGIL, CISL, and UIL.

A strike by air traffic control staff had, in fact, been called by other unions on 4 June 2002. In normal circumstances the Commission would have adopted a resolution inviting the parties to postpone the industrial action, as laid down in Article 13(d) of Act no. 146/90, violation of which incurs a double sanction. In the case at issue, however, such a resolution was not passed on the basis that “since it is participation in a European strike, an invitation to postpone this strike does not appear feasible”.<sup>22</sup> The Commission considered that in the case of a strike called throughout Europe the objective rarefaction clause could not be applied since the Italian trade union is not empowered to postpone the collective action. Obliging the Italian union to comply with the time period set out in the national rules would amount to merely banning the strike which would constitute an unjustified encroachment on the right to strike. Since it could not use its authority to intervene, the Commission referred the issue to the relevant administrative authority, in this case, the Transport Ministry, suggesting that an order to resume work should be adopted with a view to compelling a reduction of the duration of the strike so as to avoid jeopardising the operation of the service.<sup>23</sup>

There are also some examples of cases which deal with the theme of applicability of the norms of international private law in relation to the employment contract. Two different rulings of the Court of Cassation can be examined. The first, which predates Act no. 218/95, concerned a dispute between Pacific International Lines and Billyardo about the claims of the crew of a foreign ship, anchored in an Italian sea-port, against a foreign ship-owner.<sup>24</sup> The claims were aimed at gaining higher wages than had been drawn up abroad. The court decided that it lacked jurisdiction because both the ship-owner and the crew were foreign and the employment contract was signed abroad. The Court also held that a national judge could not interfere in the contractual structure between a foreign ship-owner and crew members drawn up abroad even where the conditions in the contract are in conflict with the rules of the Italian legal system. The effect is that the judge can pass sentences about similar questions only in cases where at least one of the parties is Italian.

Another important case, which came after the promulgation of Act no. 218/1995, is Sentence 15822/02 of the Court of Cassation, based on international private law principles and Article 57 of Act no. 218/1995. In this ruling the Court decided that Article 57 of Act no. 218/1995 can be applied to a question regarding the legitimacy of a dismissal, arising from an employment contract that was concluded abroad. However, the national law that has to be applied must be identified basing on the disposition of the Convention of Rome of 19 June 1980, executed by Act no. 975/1984. The Court stated that in such cases, the Labour Court, under Article 14 of Act no. 218/1995, must evaluate whether or not the foreign legal system is in conflict with Italian public order. The Court also decided that a foreign law that does not foresee any guarantee against an unjustified dismissal is incompatible with Italian public order.

On this basis, it is clear that the legitimacy of transnational strike actions is recognised in the Italian legal system, on condition that these patterns of transnational strikes respect the requirements defined by sentence no. 711/1980 of the Constitutional

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<sup>22</sup> Resolution 02/97, Commission for the Implementation of the Law on Strikes in Essential Public Services.

<sup>23</sup> Ibid.

<sup>24</sup> Court of Cassation, Sentence 10322/90.

Court. In other words, these strikes must be a collective abstention from working activity, disposed by a plurality of workers in order to reach a common goal, referring to the meaning of the terms used in common language. The central theme in relation to right to strike is that it is constitutionally guaranteed.

## Bibliography

E Ales, *Lo sciopero nei servizi pubblici essenziali in Europa tra interesse generale ed autotutela. Spunti comparatistici*, (Giappichelli, Torino, 2005)

E Ales, S Engblom, T Jaspers, S Laulom, S Sciarra, A Sobczak, F Valdes Dal-Re *Transnational collective bargaining: past, present and future. Final Report* (2006), European Commission

[www.ec.europa.eu/employment\\_social/labour\\_law/docs/transnational\\_agreements\\_al\\_es\\_study\\_en](http://www.ec.europa.eu/employment_social/labour_law/docs/transnational_agreements_al_es_study_en).

M V Ballestrero, *Lezioni di Diritto Sindacale* (Giappichelli, Torino 2004)

M V Ballestrero, *Europa dei mercati e promozione dei diritti*, WP CSDLE Massimo D'Antona- INT.55/2007, [www.lex.unict.it/eurolabor/ricerca/wp/int/ballestrero\\_n54-2007int.pdf](http://www.lex.unict.it/eurolabor/ricerca/wp/int/ballestrero_n54-2007int.pdf);

L Bellardi, *Concertazione e contrattazione. Soggetti, poteri e dinamiche regolative*, (Cacucci, Bari 1999)

F Carinci, R De Luca Tamajo, P Tosi and T Treu, *Diritto del lavoro. 1. Il diritto sindacale*, (4th edn Utet, Torino 2002)

G P Cella and T Treu, *Le nuove relazioni industriali. L'esperienza italiana nella prospettiva europea* (Il Mulino, Bologna 1998)

F Dorssemont, T Jaspers and A van Hoek, *Cross-border collective actions in Europe: a legal challenge* (Intersentia, Antwerp 2007)

G Ghezzi and U Romagnoli, *Il diritto sindacale* (4th edn Zanichelli, Bologna 1997)

G Giugni, *Diritto sindacale*, (Cacucci, Bari 2001)

A Lo Faro, 'Europei, comunitari e comunitarizzati: i contratti collettivi nell'era della sovranazionalità' (2000) *Rivista Giuridica del Lavoro e della Previdenza Sociale* I, 861

T Novitz, *International and European protection of the right to strike*, (OUP, Oxford 2003)

G Orlandini, *Sciopero e servizi pubblici essenziali nel processo d'integrazione europea. Uno studio di diritto comparato e comunitario* (Giappichelli, Torino 2003)

G Orlandini, 'Diritto di sciopero, azioni collettive transnazionali e mercato interno dei servizi: nuovi dilemmi e nuovi scenari per il diritto sociale europeo' (2006) *Europa e diritto privato* 947

G Orlandini, 'Italian labour law report', in F Dorssemont, T Jaspers and A van Hoek (eds), *Cross-border collective actions in Europe: a legal challenge* (Antwerp: Intersentia, 2007).

M Pallini, 'Il caso Laval-Vaxholm: il diritto del lavoro ha già la sua Bolkestein' (2006) *Rivista Italiana di Diritto del Lavoro* II, 229

U Romagnoli, 'Sulla titolarità del diritto di sciopero' (1988) *Giornale di Diritto del Lavoro e di Relazioni Industriali* 581.

M Rusciano, 'Lo sciopero nei servizi essenziali' (1988) *Giornale di Diritto del Lavoro e di Relazioni Industriali* 417.

F Santoni (2002), *Le regole dello sciopero. Commento sistematico alla legge n. 83/2000* (Jovene, Napoli 2002)

S Sciarra, *The evolution of labour law (1992-2003)* (2<sup>nd</sup> edn OOPEC, Luxembourg 2005)

## 6. The Netherlands

*Sarah Rook, George Rodenhuis, Wouter Kortooms and Annika Blanke*

### 1. Briefly describe the industrial relations context of strike action in recent years.

One of the characteristics of the Dutch industrial relations system is the existence of a process of consultation between trades unions and employers, known as the 'polder model'. This system results in a harmonious relationship between employers and employees. Due to this, the strike weapon is rarely utilized compared to other countries and if a conflict arises, the duration of the dispute is usually short.

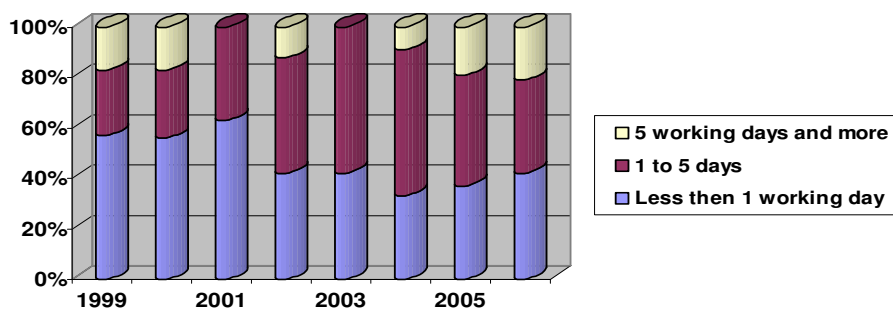
<b>Strikes</b>																
Subjects	<u>Lost working days</u>								<u>Employees involved</u>							
Years	1999	2000	2001	2002	2003	2004	2005	2006	1999	2000	2001	2002	2003	2004	2005	2006
Diverse characteristics	x 1000															
Total strikes	75,8	9,4	45,1	245,5	15,0	62,2	41,7	15,8	58,9	10,3	37,4	28,6	10,8	104,2	29,0	11,3
Total CLA (CLA-negotiations)	69,2	4,9	34,9	244,8	x	8,9	27,9	4,6	54,9	5,6	30,6	27,4	x	8,8	24,1	4,0
Terms of employment not in CLA	x	-	-	x	x	-	3,4	-	x	-	-	x	x	-	1,1	-
Working hours (questions related to)	0,3	-	-	-	-	-	x	1,0	0,4	-	-	-	-	-	x	0,5
Wage increases and other wage issues	x	x	x	x	-	-	x	-	x	x	x	x	-	-	x	-
Other matters of dispute	5,6	x	x	0,5	10,4	53,3	10,3	10,2	3,2	x	x	1,0	9,4	95,4	3,6	6,8
Matters of dispute unknown	0,6	4,5	10,2	0,2	4,6		0,1		0,4	4,7	6,8	0,3	1,3		0,2	

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The table above shows a peak of 245,500 lost working days in 2002 with relatively few employees involved (28,600). The bulk of this loss can be attributed to strikes in the construction sector.<sup>1</sup> A further explanation can be found in the political and economic situation which existed in the Netherlands around 2002. The government initiated retrenchments, which led to new negotiations concerning collective labour agreements and difficult discussions between the government and trade unions. The number of collective labour agreement negotiations in 2002 is consistent with this explanation. In 2004 there was another peak of 104,200 employees involved in 62,200 lost working days. This number can be explained by noting the occurrence of extensive strikes in the public transport sector and the willingness for collective action in this particular sector.

<sup>1</sup> <http://www.cbs.nl/nl-NL/menu/themas/arbeid-sociale-zekerheid/publicaties/artikelen/archief/2007/2007-2183-wm.htm>.





It is difficult to discern a recent trend for increasing or decreasing strike action, since the numbers of days lost due to collective action has fluctuated heavily over the last eight years. Nevertheless, it may be concluded that the tendency towards strike action has decreased in the last three years.

An interesting recent example of an industrial dispute is the long-running police strike, which started in November 2007. The action dates from 19 December 2007 and initially involved the police force refusing to fine civilians for minor offences, for example, cycling without lights in the dark. However, the strikes developed and the action extended to work stoppages, which resulted in the cancellation of soccer matches. In March 2008, the collective actions came to an end because the trades unions realized that they were not going to get a better offer from the minister. This action will affect the upcoming statistics for 2007 and 2008.

## 2. The right to strike as a fundamental legal norm

### (a) Is the right to strike guaranteed in the national constitution?

Before the right to strike in Dutch law is discussed, a short history of collective actions in the Dutch legal order will be given. Since the end of the nineteenth century, three stages can be distinguished in order to illustrate the main developments in the history of Dutch strikes.

In the first period, from the beginning of the nineteenth century, striking was approached as a criminal phenomenon. As a result of the legal prohibition of trade unions and of associations to form coalitions in general, strikes held a criminal stigma. The prohibition was contained in the Penal Code which was in force between 1811 and 1886. This was replaced by the Dutch criminal code in 1886.

In 1872 the prohibition on coalition was abolished, lifting the criminal ban on strike action. With the withdrawal of the prohibition on coalition, the question remained as to how far employers could appeal to civil penalties. The prevailing opinion was that an industrial action was to be considered a breach of contract by the employee under Article 6:74 Dutch Civil Code (DCC). In the notorious *Lindenbaum-Cohen* case, the Supreme Court decided that a provocation of strike by the trade unions should be seen as a tort under Article 6:162 DCC.<sup>2</sup> The courts were only called upon to adjudicate in

<sup>2</sup> Hoge Raad (HR) 31 January 1919, *NJ* 1919, 161.

industrial disputes in rare cases and there appeared to be an acceptance that employees and trade unions had the right to strike. However, in 1958 a district judge gave an important decision in interlocutory proceedings in which an employee asserted his right to strike.<sup>3</sup> The judge held that no such a right was recognised, as strikes were considered to be a breach of contract and calling a strike, a tort under Article 6:162 DCC. He concluded that on the basis of this reasoning, strikes were, in fact, prohibited.

The second period started in 1960. On 15 January 1960, in the *Panhonlibco* case, the Supreme Court officially confirmed the civil law approach in industrial disputes for the first time.<sup>4</sup> This reinforced the idea that taking part in collective actions, such as strikes, should be seen as a breach of contract by the employees and consequently the provocation of strike by the trade union should be seen as a wrongful act or tort. However, an exception to this rule could be made in cases where extraordinary circumstances meant that it was unreasonable to hold employees to their activities. Thus, although there was no longer a prohibition on coalition, the Supreme Court still found a way to restrict the right to strike. The underlying view was that strike action could not generally be seen as reasonable.

From 1969 there were serious negotiations between trade unions and employers. Parliament attempted to recognise the principle of the right to strike in Dutch law by introducing a bill on 29 April 1969.<sup>5</sup> This bill was formally based on advice from the Economic and Social Council and was an attempt to redraw the balance of power between employers and employees. However, although the bill recognised a right to collective action by trade unions, it did not include an individual right to strike. Furthermore, it regulated the conditions under which such actions would be seen as a tort. Due to insufficient support for this proposal, it was eventually rejected on 18 June 1980. Nevertheless, the bill became an important source of inspiration to the judiciary who used the principles laid down in the bill to fill in gaps in the law, thereby incorporating the bill into case law.

The third and final period began in 1986 when, for the first time, the Supreme Court formally recognized the right to strike in the *NS* case.<sup>6</sup> The Supreme Court derived the right to strike from Article 6(4) of the European Social Charter (ESC), a stipulation which, according to the Supreme Court, has direct effect through the monistic regime laid down in Articles 93 and 94 of the Dutch Constitution.<sup>7</sup>

The Netherlands is also party to other international instruments which confirm the right to strike, such as the International Covenant on Economic, Social and Cultural Rights and (indirectly) International Labour Organisation (ILO) Convention 87 on the Freedom of Association and Protection of the Right to Organise. However, in Dutch

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<sup>3</sup> HR 27 March 1958, *NJ* 1958, 245.

<sup>4</sup> HR 15 January 1960, *NJ* 1960, 84. The case concerned a solidarity strike directed against foreign companies (in Panama, Honduras, Liberia and Costa Rica) aiming at the improvement of the employment conditions of seafarers.

<sup>5</sup> Bill no. 10 111.

<sup>6</sup> HR 30 May 1986, *NJ* 1986, 688.

<sup>7</sup> The Netherlands ratified the European Social Charter on 22 April 1980 and the revised European Social Charter on 3 May 2006.

case law no references have been made so far to these other international instruments in order to justify the right to strike.

At the present time, the right to take collective action and the right to strike are still not embedded in any statute or in the Dutch Constitution and continue to find their basis in Article 6(4) ESC. The right to strike in Dutch law is judge-made, starting with the *NS* case in 1986. The so-called '*Panhonlibco* formula' is no longer used by the Supreme Court except in cases in which Article 6(4) ESC is not applicable. This is the case in purely political strike actions.

**2(b). Is it recognised as a fundamental right? (e.g. through case-law of the highest courts)?**

The 1986 *NS* case concerned collective strike action taken against the wage policy of the Royal Dutch railway company in the autumn of 1983.<sup>8</sup> The actions were directed against a proposed three per cent reduction in wages. The special situation in the *NS* case was that, whilst the management of the railway company was conducting the negotiations, the wage itself was more or less set by the government, as the railway company was completely subsidised by the Dutch government. On the other hand, legally speaking the Dutch railway company was the party to the collective agreement. The judgment of the Supreme Court in this case was of great importance in the Dutch legal order. The court extensively reviewed the legal position of trade unions in collective disputes. The judgment is a leading decision because it recognised the fundamental nature of the right to strike for the first time and the decision formed a precedent for future cases.

Judges primarily have to decide whether they can classify a form of collective action as falling within the actions protected by Article 6(4) of the European Social Charter. This will be the case when the strike is what might be called a 'normal type of strike'. The Supreme Court understands this to mean a complete stoppage of work in the framework of collective negotiations on employment conditions as covered by Article 6(4) ESC. Even where strike actions seem to be directed against government policy, as in the *NS* case where the management argued they had no actual competence or power to negotiate by themselves with the trade unions about wages, since they were set by the government, the legality of the strike action was regarded as falling within the 'normal type' because it was about employment conditions. The directors could not be permitted to hide behind the government otherwise this could result in a denial of the right to strike recognised by Article 6(4) ESC.

The Supreme Court has chosen this approach because the right to strike in the Dutch legal order has to be based on Article 6(4) ESC. The right to strike is based on the main principle in Article 6(4) ESC which concerns collective negotiations on conditions of employment. The right to strike constitutes the full suspension of labour to support negotiations in relation to conditions of employment. In the words of the Supreme Court, the antithesis of this is a strike based on political grounds which is directed against government policy. The Court's reasoning in the *NS* case recognised that the Dutch railway company was a 'semi-government' body because it was funded by the government from public resources. The strike action was therefore aimed

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<sup>8</sup> HR 30 May 1986, NJ 1986, 688.

against the government, however it also concerned employment conditions, and the latter type of strike action is protected by Article 6(4) ESC.

Subsequently, the Supreme Court stated that a strike which is legitimate under Article 6(4) ESC can nevertheless be illegal in two situations, in addition to the situation where a strike is prohibited due to the presence of a so-called ‘peace obligation’, or obligation not to strike, in the collective labour agreement. Firstly a strike is always illegal when ‘major procedural rules’ have been disregarded.<sup>9</sup> There are two sorts of procedural rules which have to be complied with; the strike has to be announced in a timely fashion, and a strike organized before any substantial bargaining has taken place or whilst substantial negotiations are ongoing can be illegal for not being an ‘ultimum remedium’. The strike may be premature and it is up to the court to decide when or in which situations a strike has been called too early. This second procedural rule is particularly developed in Dutch case law. In general terms a strike is not considered as ‘ultimum remedium’ if ongoing negotiations are possible, or at least not impossible, and could lead to a compromise solution between the bargaining parties. The judge has to decide whether this is the case or not. A trade union cannot therefore legitimately exercise the right to strike at a preliminary stage.

A second ground for the evaluation of the legitimacy of a strike was added by the Supreme Court in the *NS* case of 1986. A strike is also illegal where, after evaluating all specific conditions and circumstances taking into account their interconnectivity and interdependence, the conclusion must be that the unions should not reasonably have taken such action. In its reasoning the Supreme Court referred to Article 31 ESC. In this article possible restrictions to the exercise of the right to strike are listed. The Supreme Court has applied this provision in an expansive manner by introducing several norms that could restrict the exercise of the right to collective action. In this regard, the Dutch case law has been criticised by the Council of Europe’s European Committee of Social Rights. In the case law since the decision of the Supreme Court in the *NS* case, judges have elaborated on the kinds of circumstances which could lead to a prohibition of collective actions more or less in accordance with Article G of the Revised European Social Charter (Rev ESC).<sup>10</sup> This will be explained more fully later in the report.

An example can be seen in relation to the question of financial loss to employers. The fact that an employer suffers an economic loss due to a strike does not in itself render the strike illegal. However, there could be a legitimate restriction of the right to strike where the expected amount of damage is excessive, and the employer is not the main target of the strike. This is particularly the case where, by virtue of Article 6:162 of the Dutch Civil Code, which lays down the general principles of tort, it is established that the strike is a serious violation of the protected rights of third parties or of the public interest as mentioned in Article G Rev ESC. In the view of the Dutch courts a restriction could be necessary and therefore legitimate in such cases. The second procedural rule is only considered when the strike meets the requirements of the first rule.

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<sup>9</sup> Determining this is sometimes described as “testing the rules of the game”.

<sup>10</sup> Article G is the corresponding provision to Article 31 ESC in the Revised European Social Charter of 1996 which has been ratified by the Netherlands. It contains identical exceptions to those found in Article 31 ESC.

In summary, the right to strike has been recognised as a fundamental right by the Supreme Court of the Netherlands in the *NS* case. However, some restrictions can be imposed on the exercise of the right. A collective action must be examined to see whether it is legitimate on the basis of compliance with certain procedural rules. This will be more extensively examined later in the report.

**2(c). What is the relationship between the right to strike and other fundamental rights and freedoms (e.g. property rights, freedom of commerce)?**

Looking at the relationship between the right to strike and other fundamental rights, two different situations can be distinguished; cases where the right to strike conflicts with another fundamental right of one of the parties involved and those in which the right to strike conflicts with a fundamental right of a third party.

With regard to the first type of situation, a typical collective action case involves three parties: the employer, or sometimes the employer's organisation, the trade union(s) supporting the strike and the employees who participate in the strike. Looking at the infringement of the fundamental rights of parties involved in the strike it can be seen that there are only a few fundamental rights in Dutch law that can possibly be infringed by the right to strike, for example, Dutch law does not recognise rights such as a freedom of commerce.

Two particular rights can be examined; the property rights of the employer in case of an occupation and the right to work of the employees who remain willing to work. The collective action of occupation, where the employer is prohibited from entering the premises of the company seems to conflict with the property rights of the employer. In the famous *Enka* case, employees occupied the plant after they heard that it would be shut down due to a surplus of production capacity. Although initially it was argued that the occupation was illegal because it was an obvious infringement of the property rights of the owner of the plant, later legal academics regarded the occupation as legal because this type of action was the only effective type of collective action in the given case. Where there are conflicts between different fundamental rights, Dutch case law applies the 'ultimum remedium' test as well as the proportionality test.<sup>11</sup> In the *Kip/Sloetjes* case the occupation of the plant was considered to be illegal as the Supreme Court argued that the occupation was not the 'ultimum remedium' and that other less drastic forms of action would have been more appropriate.<sup>12</sup> The Supreme Court avoided the question of the hierarchy between the fundamental right to strike and the property rights of an employer.

The right of a non-striker to work has never been considered to be a fundamental right, although a non-striker has the right to be paid his wages in specific circumstances and this is addressed later in the report.

Turning to the second type of situation, on occasion third parties become involved in a conflict between employers and employees or unions. A distinction must be made between the infringement of third party interests and the infringement of the fundamental rights of third parties. In Dutch case law, during a public transport strike,

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<sup>11</sup> Article G, ESC.

<sup>12</sup> HR 19 April 1991, *NJ* 1991, 690.

the right to public transportation was not considered to be a fundamental right of the public but was considered to be a mere interest of the public.<sup>13</sup> The proportionality test was, therefore, found to be applicable and as a result the strike was declared legal only between the hours of ten in the morning and three in the afternoon. However, when medical specialists intended to take collective action in order to protest against wage policies of the government, the Supreme Court judged these actions to be illegal as the fundamental right to medical treatment could be in danger.<sup>14</sup> Once again, the collective action was considered to be illegal on the basis of Article G Rev ESC.

Looking at the fundamental rights of third parties one could also consider the hypothetical case where the purpose of a collective action is the infringement of a fundamental right of a third party, for example if employees of a newspaper went on strike to prevent publication of a specific article or cartoon. Here the fundamental right of freedom of speech would be infringed by the actions of the employees, but as the collective action is in no way related to conditions of employment, the collective action would not fall within the scope of Article 6(4) ESC and would therefore be illegal. In such a case regular tort law is applicable.<sup>15</sup>

### **3. The legal framework on strike action**

#### **(a) Is there a legal definition of what constitutes a ‘strike’ or other forms of collective action?**

In Dutch law no legal definition exists of what constitutes a strike or other form of collective action. In the legal literature efforts have been made to develop a definition of what constitutes a strike. A strike is seen as a collective action whereby the fulfilment of normal labour performance has been interrupted with the aim of applying pressure to reach a certain goal but with the intention of returning to work after the action when the goal has been reached. In a strike situation the courts take all the circumstances into account in order to decide whether a strike comes within the scope of Article 6(4) ESC.

#### **3(b). Are there legal procedures for a legal strike to take place (imposed either by statutes or other such as collective agreements or trade unions)?**

According to the Supreme Court, judges have primary responsibility for deciding whether they can classify a form of collective action as protected under Article 6(4) ESC. When a strike is found to be illegal by a decision in court, the employees participating in or continuing to take part in a strike are acting in breach of contract and can be subject to disciplinary action including dismissal. Unions supporting an illegal strike are committing a tort and may therefore be held responsible for the damages caused by the strike. This judgment by the Supreme Court based on Article 6:162 DCC is wider than the test under Article 6(4) and Article G Rev ESC. As the right to strike is not an absolute right, the Supreme Court has placed various restrictions upon it.

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<sup>13</sup> HR 21 March 1997, *JAR* 1997/70.

<sup>14</sup> HR 22 November 1991, *NJ* 1992, 508.

<sup>15</sup> In particular, Article 162, DCC.

According to the Supreme Court in its landmark ruling in the *NS* case, strikes are illegal when major procedural rules have been disregarded. This includes cases in which a strike is organised before any substantial bargaining has taken place, no minimum safety precautions have been taken or the strike conflicts with a no-strike obligation contained in the collective agreement.

With regard to the latter example, collective agreements can include a peace obligation which prohibits collective actions aimed at changing a collective labour agreement whilst it is in force. These agreements can also set out the procedure to be followed in the event of a conflict between the trade unions and the employer, such as arbitration and mediation. A violation of these provisions of the collective labour agreement leads to the finding of an illegal strike action breaching the agreement. It should be noted, however, that Dutch courts tend to interpret peace obligations restrictively in order to keep their scope narrow.

A strike is considered as ‘ultimum remedium’. The relevant rules and norms have to be taken into account in deciding whether a strike is legal. In some cases, after evaluating all the specific conditions and circumstances of the strike, it is concluded that the unions should not reasonably have taken such extreme action. The court will consider whether the right to strike has been misused in light of Article G Rev ESC. This mainly concerns cases in which the damage caused by the strike is excessive in comparison to the interests at stake.

In later judgments the Supreme Court has confirmed that a strike can only be justified if it does not disproportionately encroach on the rights of others. This proportionality test is important for the Dutch courts to balance the right to strike against other values and the interests of others. In addition to the restrictions mentioned in Article G Rev ESC such as public order/interest, public health and national security, the court evaluates other aspects connected to the collective action and its consequences.

**3(c). What types of collective action can be lawful? (e.g. is it lawful for workers to take strike action as an act of solidarity with workers involved in a separate industrial dispute?)**

As there is no legal definition of what is to be considered a collective action within the meaning of Article 6(4) ESC, it is necessary to examine the case law to understand which types of collective action have been held to fall within the scope of the provision. In particular, it is important to consider different forms of collective action, the nature of the goal of a collective action and the differences, if any, between organised and wildcat strikes.

Looking at the form of the collective action, it can be seen that, in addition to the traditional strike, almost all types of collective action can fall within the protection of Article 6(4) ESC. In the *NS* case the Supreme Court decided that work-to-rule actions and go-slow actions come under the protection of Article 6(4) ESC. Even the collective action of public transport personnel which involved offering free transport to everyone over a two day period was considered to be a collective action in the sense of the provision.

Picketing is also considered a collective action unless employees who are willing to work are threatened or abused. Picketing is mostly considered to be a collective action in combination with a classic strike and has never therefore subject to a decision by the judge on the illegality of a strike. However, according to the judgment in the *Ferro* case, picketing involving roadblocks and blockades only falls under the protection of Article 6(4) ESC in specific circumstances relating to factors such as the timing of the blockade and its duration.<sup>16</sup>

In the *Enka* case the Supreme Court had the opportunity to clarify whether the occupation of a plant also could be considered as a collective action covered by Article 6(4) ESC, however, it failed to answer the question, stating that the specific action was unlawful because it failed the ‘ultimum remedium’ test described earlier.<sup>17</sup>

Another kind of action is the solidarity strike. There are relatively few Supreme Court rulings on cases of this kind. In the most recent case, it was held that a collective solidarity action only falls under Article 6(4) if the collective action is designed to guarantee the right (of employees of another (allied) company) to exercise freely the right to negotiate collectively in case of a conflict of interest.<sup>18</sup> Solidarity strikes are not prohibited and are usually assessed according the normal criteria of legality.

A final category which can be examined is the wildcat strike. In Dutch law a wildcat strike is not assessed any more severely than an organised strike called by a trade union. On the contrary, it seems according to the rare case law that fewer restrictions are placed upon wildcat strikes, as the procedural rules described above only apply to organised strikes.

### **3(d). Are there guaranteed minimum public services in the event of a strike?**

As stated above, the right to strike is not absolute. Until recently the Dutch case law has not used or referred to the concept of minimum public services in assessing whether collective actions could harm such services. The courts approach such situations in another way but the result is quite similar to that found in legal systems which do use the concept. In particular, Dutch case law takes the approach of considering the rights and interests of third parties in addition to the need to protect public order and public health care. The effect is that the right to collective action may be limited when third parties would suffer damage.<sup>19</sup>

The Supreme Court has ruled in various cases that if the strike were allowed the interests of a third party will be harmed disproportionately to the interests of the trades unions in exercising the right to strike. In other words, the courts have found an imbalance between the goal and the means to achieve it, for example, by assessing whether the duration of the particular action is disproportionate to the suffering of third parties (patients, consumers, users of public transport). In these cases the collective action is not totally prohibited but the way in which the action is conducted will be limited. An example was seen in a 1997 judgment that striking was prohibited

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<sup>16</sup> Pres. Rb. Amsterdam , *NJ* 1980, 403.

<sup>17</sup> HR 7 July 1982, *NJ* 1983, 35.

<sup>18</sup> Rechtbank Amsterdam, 26 August 1998, *JAR* 1998/195.

<sup>19</sup> CJ Loonstra and WA Zondag, *Arbeidsrechterlijke themata* ( Boom Juridische Uitgevers, Den Haag 2005) 276.



during rush hours.<sup>20</sup> Another ruling of the Supreme Court excluded the right of collective action in the railway sector, since the strike would lead to disproportionate damages for travellers and even the railway company by arguing that the company had guaranteed travellers that they would be transported. This was regarded as damaging to the company.<sup>21</sup> In relation to medical personnel, the Supreme Court ruled that in the case of a collective action a minimum level of sufficient medical treatment must be available.<sup>22</sup> These rulings are based on the exceptions in Article G Rev ESC and additionally in the national law on tort (6:162 DCC).

In recent judgments the court has ruled on the question of whether collective actions by the police force must be allowed in view of whether essential vital services would continue to be available in this event. In one judgment the court ruled that the police were entitled to strike during soccer games, since the fundamental right to strike of the police outweighed the interests of the sports clubs.<sup>23</sup> However, in another case the court prohibited a collective action by the police which would have lowered the protection of consulates and diplomatic posts. The rationale for the decision was that the action might lead to serious and unforeseeable consequences for public order and safety, because the level of protection would decline beneath the essential level of security.<sup>24</sup>

### **3(e). Does the motivation for a strike affect its legality? (e.g. a politically-motivated strike)**

Pure political strikes are never covered by Article 6(4) ESC. However in the *NS* case the Supreme Court made a clear distinction between purely political strikes and strikes involving a political issue directly connected to negotiations over conditions of employment in the broad sense. Such strikes can be lawful. Political strikes directed at government policy without a connection to normal collective bargaining issues will be assessed on the basis of the *Panhonlibco* formula. These kinds of action only can be legal in very exceptional cases.

### **3(f). Are any categories of workers excluded from the right to strike? (e.g. armed forces, police, etc.)**

As stated above, the right to collective action in the Netherlands is based on Article 6(4) ESC. The restrictions on this right found in Article G Rev ESC are applicable, which means that the right to strike can be limited when it is prescribed by law and when necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of the public interest, national security, public health, or morals. The law in this area is judge-made and there is no category of workers which is totally excluded from the right to strike. However, it is generally accepted that military personnel, prison guards and the judiciary are not allowed to strike for a substantial period, since the exemption in Article G Rev ESC on grounds of national

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<sup>20</sup> HR 21 March 1997, *NJ* 1997, 437.

<sup>21</sup> Rechtbank Zutphen, 20 March 2001, *JAR* 2001/65.

<sup>22</sup> HR 22 November 1991, *NJ* 1992, 508.

<sup>23</sup> Rechtbank Utrecht, 8 March 2008, LJN: BC6990 and Rechtbank Amsterdam, 14 December 2007, LJN: BC0279.

<sup>24</sup> Rechtbank Utrecht, 4 January 2008, LJN: BC1196. The case concerned possible terrorist attacks.

security and public order is applicable.<sup>25</sup> Another example is the ruling of the Supreme Court mentioned above, in which it was held that doctors do not fall under this restriction, as long as there is sufficient treatment available, because the importance of public health can restrict the right to strike.<sup>26</sup> The police are another important group whose work is essential to public order. The European Committee of Social Rights (ECSR) has heavily criticised an absolute injunction on the right to strike for this group on several occasions.

### **3(g). Is there an obligation of ‘industrial peace’?**

There is no legal requirement in the Netherlands for an obligation of industrial peace. Nevertheless, most collective agreements contain no-strike clauses or peace obligations. These impose on the signatory parties the obligation to respect the provisions of the collective agreement throughout its duration and to refrain from any industrial action to change existing conditions within the term of the collective agreement. The signatory organisations must exert pressure on their members to respect the collective agreement and trade unions cannot support a strike which runs counter to its provisions. If a union called a strike during the period covered by the peace obligation the Court would order it, by summary procedure, to withdraw from the strike under pain of payment of fines.

The no-strike obligation is only binding on the unions and their members if the unions are signatories to the collective agreement. If this is not the case, the union may start or continue strike action to obtain a more favourable collective agreement, even during the period the collective agreement is in force. They concern only matters which are regulated by the agreement. In principle, the no-strike obligation expires at the moment the collective agreement expires or is terminated by agreement. This implies that no-strike obligations do not prohibit collective actions aimed at future negotiations unless an absolute peace obligation exists.

### **4. Is there a right to react to the industrial action by the employer?**

Article 6(4) ESC also provides a right for employers to take collective action. Collective action by employers consists of a lock-out where employers lock out their employees, thereby preventing them from working, in order to support other companies in the same sector which are suffering collective action by their employees. In the Netherlands, this type of action is considered to be highly theoretical as, to date, employers have never used or considered using this form of collective action.

### **5. How does the law regulate the impact of strike action upon the individual contract of employment?**

Firstly, a distinction must be made between an employee who takes part in the strike and an employee who does not. Participation in a strike does not constitute a

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<sup>25</sup> F Dorssemont, T Jaspers and A van Hoek, *Cross-Border Collective Actions in Europe: A Legal Challenge* (Intersentia, Antwerp 2007) 185.

<sup>26</sup> HR 21 March 1997, *NJ* 1997, 437.

repudiation by the employee of the employment contract. Legally speaking, the employee's performance of the contract will be suspended and, once the strike is over, the employment contract continues as before. An employee who participates in the strike has no right to claim continued payment of his wage, according to article 7:627, Dutch Civil Code, which states there will be no payment if no work is actually performed for any reason. Consistent with this provision, an employer is not obliged to pay wages for the time when an employee has failed to accomplish his agreed labour or has refrained from performing his tasks as agreed upon in the employment contract and the employee has no right to lodge a claim for compensation in these circumstances.

On the other hand, participation in a strike which has not been forbidden by a summary procedure judge is not, in principle, grounds for dismissal. The ability of an employer to impose sanctions on an employee is very limited. According to a Supreme Court judgment in the 1988 case of *Veurink/FNV*, disciplinary actions against employees are rarely possible.<sup>27</sup> The Supreme Court stated that in a situation when employees take part in a collective action following the call to strike by a trade union, no disciplinary sanctions can be taken against the employees whose actions are within the scope of the strike. This position only varies where the action has been forbidden by a summary procedure judge, or when it must have been absolutely clear for the employee participants that the strike action exceeded the boundaries of what constitutes a legal strike action. This will only be the case in very exceptional circumstances, and the judge must take into account the general knowledge an employee can reasonably be expected to have as well as the employee's awareness of the consequences of taking part in such an action.

During the strike action, the duty to perform work is suspended for the duration of the legitimate action. When strike actions have been forbidden by a summary procedure judge and are, therefore, no longer permitted, the postponement of the duty to perform the agreed labour expires and the employee has to comply with his contractual obligations. If he chooses not to do so, he takes the risk of being dismissed or facing disciplinary sanctions. Protection against dismissal during a collective strike action only lasts for the duration of the legitimacy of the strike concerned. Thus, when a strike action has been forbidden and thereby judged to be illegal, and an employee nevertheless takes part in the strike, the employer is able to dismiss the employee. Normal law relating to dismissal will apply and in this situation, summary termination seems to be the most appropriate procedure. The employer has to give notice of the termination of employment and give immediate notification of the reason for the termination. The employer also has to prove the existence of an urgent reason for the summary termination. In these cases he will be able to do so, especially when a warning to the employees has been given. In addition, it is possible to state that the employee could have known and must have been aware that an urgent reason for dismissal would result from his behaviour. Judges have shown a willingness to accept these arguments in the absence of special circumstances. On the other hand real damage to the employer is limited while there is no duty to pay for the employees wages, and this must be taken into account when giving evidence of the urgent reason. Real damage to the company has to be proven by the employer.

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<sup>27</sup> HR 22 April 1988, *NJ* 1988, 292.

Turning to the position of an employee who refrains from participating in a strike action, in certain circumstances, a non-striker has the right to claim continued payment of his wages under Article 7:628, Dutch Civil Code. This Article must be seen as an exception to the Article 7:627, Dutch Civil Code, mentioned above. Article 7:628, Dutch Civil Code states that an employee retains his right to continued payment in a situation where the agreed labour is not performed due to a cause which is reasonably the responsibility of the employer. The employee must be willing to perform his labour, but be unable to do so due to the strike action. The rationale for Article 7:628 of the Dutch Civil Code must be viewed from the point of view of the employee. If the employer had given in to the demands of the striking employees, there would have been no strike action. In a case where the employee is explicitly willing to perform his labour but is unable to do so due to the strike action, he is entitled to his normal wages during the period in which he cannot work.

The Supreme Court describes two kinds of situations in its judgment in the 1976 case of *Wielemaker/de Schelde*; an organised strike over conditions of employment and a wild cat strike of short duration which has been joined by only a small number of employees.<sup>28</sup>

In general terms an organised strike about conditions of employment lies within the risk-sphere of the employee. He does not get paid during the strike and he is considered as a member of the group of employees who would benefit from the success of the strike action. The other situation, a wild cat strike of short duration which had been joined by only a small number of employees, lies more in the risk-sphere of the employer. Here non-strikers willing to work have the right to claim continued payment of their wages, subject to evidence that they are willing to perform the work and also that they are not involved in the strike action in any way. In practice, employers will often prefer to continue to pay wages, in order to prevent legal claims. It is, therefore, possible that the balance of power will be disturbed where an employer against whom strike action is taken, must bear the costs of the action and has also to pay the wages of employees who are willing, but unable, to work.

These considerations must be taken into account when a judge determines the legality of a strike action. All specific conditions and circumstances of the strike are taken into account when a strike action is considered in light of Article G Rev ESC including whether a union should reasonably have taken the action.

## **6. Explain the role of the judiciary, if any, in the resolution of the industrial dispute.**

There is no great tradition of striking due to the approach in Dutch industrial relations known as the ‘polder model’, which involves the promotion of consensus or compromises which the parties can agree to. This inclination to come to a consensus by debate means that there are very few industrial disputes. Since this is the case and since legislation about collective action does not exist in the Netherlands, the judiciary has great influence and an important role to play as to the assessment of the legality of strikes. In cases concerning an industrial dispute, judges will be aware of

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<sup>28</sup> HR 7 May 1976, *NJ* 1977, 55.

the impact of these disputes on Dutch society and will take these considerations into account in reaching judgments as to whether or not the strikes are legal.

As described above, judges consider the nature of a dispute, the form of the collective action, the extent of compliance with procedural rules and the question of damage to the interests of third parties. There have been many criticisms of this approach because the result can be to restrict excessively the right to strike. The European Committee of Social Rights, which monitors the fulfilment of obligations under the ESC by member states, has criticised the Dutch Supreme Court in relation to its application of Article 6(4) ESC. The work of the judiciary in industrial disputes is mainly through interlocutory proceedings, the object of which is to determine whether a collective action is or is not lawful. The judges examine whether the strike meets the first procedural test and the second proportionality test which is related to Article G Rev ESC.

It is particularly the first procedural test which gives judges strong influence and control over the trade unions. Judges take this test very seriously, exploring the question of whether the trade unions in fact concluded their negotiations or whether they could reasonably have been expected to negotiate further. Because of this strict approach, the Supreme Court decided in the *Douwe Egberts* case that when a strike is covered by Article 6(4) ESC, the courts should be cautious in applying the ‘ultimum remedium’ test.<sup>29</sup> The reason for this is that the right to strike is first and foremost a fundamental right. The question of whether there are other possible remedies to an industrial dispute depends on different interpretations of the circumstances and an appraisal of the possible results of other remedies. These questions have to be answered within a very short time frame and are important considerations for the Dutch judiciary. Accordingly, judges are, generally speaking, inclined to be moderate and reserved when applying the exceptions in Article G Rev ESC.

### **7. Article 6(4) of the European Social Charter guarantees the right to strike. Does the European Committee of Social Rights view your national law and practice as complying with Article 6(4)?**

The European Committee of Social Rights has commented upon the compliance of Dutch law and practice with Article 6(4) in its Conclusions both in recent years and in previous decades.<sup>30</sup>

There are two main areas of criticism. In summary, the first concerns the proportionality test, namely the fact that a strike is considered to be illegal by Dutch courts if it undermines the rights and interests of third parties or the general public to such an extent that restrictions of the right to strike become necessary for the interests of society. In making decisions, the courts resort to a proportionality criterion by balancing the interest in the exercise of the right to strike against those which are infringed by collective actions. In doing so, the judge must assume that the interest involved in the exercise of this basic right for the trade union in question and its members is considerable. The Committee acknowledges that the right to strike is not

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<sup>29</sup> HR 28 January 2000, *NJ* 2000, 292.

<sup>30</sup> See for example European Committee of Social Rights, Conclusions XVIII-1 (Netherlands) and Conclusions XVIII-2 (Netherlands).

absolute and may be restricted, but only in accordance with the conditions laid down in Article G of the Charter.

The second area relates to the ‘ultimum remedium’ test, namely the determination by a judge as to whether or not recourse to strike action is premature. This test impinges on the very substance of the right to strike as it allows the judge to exercise one of the trade unions’ key prerogatives, that of deciding whether and when a strike is necessary. The Committee has concluded that, in this respect, Dutch law does not conform with Article 6(4) of the Charter.

## **8. To what extent, if any, does national law provide regulation for transnational forms of strike action?**

In the Netherlands there are no high-profile examples of transnational strikes. As with the general approach to collective actions, the law on transnational action is judge-made. In considering the legal position of transnational strikes in the Netherlands the main focus will be on strikes in the Netherlands that have involved companies or parties from other countries and whether collective actions such as those seen in the important *Laval*<sup>31</sup> and *Viking*<sup>32</sup> cases could occur in the Netherlands, in view of its legal framework on strikes.

An early case in the Netherlands with a transnational dimension was the *Panthonlibco* case.<sup>33</sup> It must be noted that the judgment in this case was issued before the Netherlands ratified the ESC. The facts of this case were that the International Federation of Transport asked the unions to refuse to load and unload ships with so-called ‘flags of convenience’ (e.g. Panama, Honduras, Liberia, Costa Rica) since the labour conditions for the workers on these ships were poor. The Supreme Court stated that the employment contract should be the guideline for working conditions and therefore prohibited the strike as unlawful.

A second important case is the *Saudi-Independence* case.<sup>34</sup> In this case the Supreme Court held that a choice of jurisdiction provision in a contract prevailed over the law of the flag. The facts of the case were that a Philippine crew went on strike with their ship alongside a dock in the Netherlands. The choice of law in the contract was that of the Philippines, however, the ship was owned by Greek nationals and was registered in Saudi Arabia. Nevertheless, the court found the law of the Philippines to be applicable.

The *KLM/NWA* case is a third example which can be given.<sup>35</sup> In this case KLM pilots held a collective action to support their colleagues from the American company Northwest Airlines, who were involved in a conflict concerning their employment conditions. It was held to be a sympathy strike, which was prohibited as unlawful by the court.

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<sup>31</sup> Case C-341/05, *Laval un Partneri v Svenska Byggnadsarbetareförbundet* [2007] ECR 0000.

<sup>32</sup> Case C-438/05, *International Transport Workers’ Federation, Finnish Seamen’s Union v Viking Line ABP* [2007] ECR 0000.

<sup>33</sup> HR 15 January 1960, *NJ* 1960, 84.

<sup>34</sup> HR 16 December 1983, *NJ* 85, 311.

<sup>35</sup> Rechtbank Amsterdam, 26 August 1998, *JAR* 1998/195.

Lastly, the two main cases of the European Court of Justice (ECJ) on this issue, *Laval* and *Viking*, should be mentioned.<sup>36</sup> It can be noted that the criteria established by the ECJ are similar to the approach of the Dutch Supreme Court in that both involve questions of proportionality and whether the strike is the ‘ultimum remedium’.

## **Bibliography**

M G Rood, *Staken in Nederland* (Academic Service, Economie en Bedrijfskunde, Schoonhoven 1991)

S van der Velden, *Stakingen in Nederland Arbeidersstrijd 1830-1995* ( Stichting Beheer IISG / NIWI, Amsterdam 2000)

H L Bakels, I P Asscher-Vonk and W J P M Fase, *Schets van het Nederlandse arbeidsrecht* (Kluwer, Deventer 2005)

A Ph C M Jaspers, Y. Konijn and C.J. Loonstra, W.A. Zondag, *Rechtspraak Arbeidsrecht* (SDU Uitgevers, Den Haag 2007-2008)

F Dorssemont, T Jaspers, A van Hoek, *Cross-Border Collective Actions in Europe: A Legal Challenge*, (Intersentia, Antwerp 2007)

W C L van der Grinten and W H A C M Bouwens, *Arbeidsovereenkomstenrecht* (Kluwer, Deventer 2005)

L Tilstra, *Grenzen aan het stakingsrecht proefschrift* (Kluwer, Deventer 1994)

L A J Schut, *Internationale normen in het Nederlandse stakingsrecht* (SDU, Den Haag 1996)

A Ph C M Jaspers, *Nederlands stakingsrecht op een nieuw spoor?* (Kluwer, Deventer 2004)

## **Website**

<http://www.cbs.nl>

## **Cases**

HR 30 May 1986, *NJ* 1986, 688;

HR 31 January 1919, *NJ* 1919, 161;

Rechtbank Amsterdam 27 March 1958, *NJ* 1958, 245;

HR 15 January 1960, *NJ* 1960, 84;

HR 21 March 1997, *JAR* 1997/70;

HR 22 November 1991, *NJ* 1992, 508;

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<sup>36</sup> For more detail on these cases, see the conference proceedings at the beginning of this report and M Bell, ‘Understanding Viking and Laval: an IER Briefing Note’: <http://www.ier.org.uk/system/files/Understanding+the+Viking+and+Laval+cases.pdf>.

Pres. Rb. Amsterdam 13 May 1980 , *NJ* 1980, 403;  
Rechtbank Amsterdam 26 August 1998, *JAR* 1998/195;  
HR 21 March 1997, *NJ* 1997, 437;  
Rechtbank Zutphen 20 March 2001, *JAR* 2001/65;  
HR 22 November 1991, *NJ* 1992, 508;  
Rechtbank Utrecht 8 March 2008 (LJN: BC6990) and Rechtbank Amsterdam 14  
December 2007 (LJN: BC0279);  
Rechtbank Utrecht 4 January 2008 (LJN: BC1196);  
ECJ, Case C-341/05, 18 December 2007 (*Laval*);  
ECJ, Case C-438/05, 11 December 2007 (*Viking*);  
HR 15 January 1960, *NJ* 1960, 84;  
HR 16 December 1983, *NJ* 85, 311;  
Rechtbank Amsterdam 26 August 1998, *JAR* 1998/195.



## 7. The United Kingdom

*David Barrett, Kate Earl and Kevin Lynch*

### 1. Briefly describe the industrial relations context of strike action in recent years.

Trade union membership fell 0.6% to 28.4% in 2006, showing a continuing decline in membership from 1998 where membership was over 35%. The sharpest decline in trade union membership is in men, with women's membership between 1998 and 2006 only falling 0.3%. This results in a greater percentage of women (29.7%) being members of trade unions than men (27.2%).

England has the lowest average trade union membership within the UK at 27%, with Scotland at 34.6%, Wales 35.9% and Northern Ireland the highest at 39.7%.<sup>1</sup> Age also plays a major factor in trade union membership with a steady increase the older a person gets.

Surveying British industrial relations history, there are two events which still exercise considerable influence in public and political debate. First, the so-called 'winter of discontent' involved a widespread strike movement from September 1978 to March 1979 which at its height saw mass demonstrations across the United Kingdom and by January 22<sup>nd</sup> a total of 1.5 million workers in many industries were on strike. While the workers achieved pay increases to match the rate of inflation which was at a staggering 26.9%, many public services including hospitals and schools were forced to close during this period and the industrial action resulted in 29,474,000 days being lost.

The second defining industrial dispute was the miners' strike (1984-1985), where 187,000 people downed tools for an entire year. Despite the miner's union being one of the strongest in the land and their members being forced to live on food parcels and donations, the pit closures went ahead. The perceived victory of the government in this dispute undoubtedly had a damaging effect on morale amongst the wider trade union movement. In the subsequent two decades, there has been a continuous decline in trade union membership. It is arguable that some of the political misgivings about industrial action continue to stem from the winter of discontent and the miners' strike. Indeed, these episodes are quickly invoked by the media in any contemporary discussion of reform of industrial action law.

### 2. The right to strike as a fundamental legal norm: is the right to strike guaranteed in the national constitution?

As the United Kingdom has no written constitution, any right to strike is not protected in any superior document but rather regulated by statute and common law. In terms of fundamental rights, the most significant legal instrument is the Human Rights Act

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<sup>1</sup> H Grainger and M Crowther, 'Trade union membership 2006' (Department of Trade and Industry, London 2007).

1998. This incorporated the European Convention on Human Rights (ECHR) into British domestic law. Amongst its core requirements are the following:

- s. 2: a duty on courts and tribunals to take into account judgments of the Court of Human Rights when interpreting the scope of a Convention right;
- s. 3: a duty to interpret existing legislation in a way which is compatible with the Convention rights;
- s. 4: the possibility to issue a declaration of incompatibility when primary legislation is incompatible with a Convention right;
- s. 6: it is unlawful for a public authority to act in a way which is incompatible with a Convention right.

Given the significance of the ECHR to interpreting the scope of fundamental rights in the UK, it is worth considering the extent to which this instrument may confer a 'right to strike'.

Article 11(1) of the ECHR provides that 'everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.' While the ability of an individual to join a trade union is essential to engage in effective strike action, the Strasbourg Court has held that strike action is not essential to effective trade union membership<sup>2</sup> due to the possibility of recourse to other actions. However the Court in *Schmidt* has made it clear that trade union membership and strike action are closely related with regard to an individual's rights under Article 11:

'The grant of a right to strike represents without any doubt one of the most important ...means [of an effective enjoyment of trade union freedoms], but there are others. Such a right, which is not expressly enshrined in Article 11, may be subject under national law to regulation of a kind that limits its exercise in certain instances. The Social Charter of 18 October 1961 only guarantees the right to strike subject to such regulation, as well as to "further restrictions" compatible with its Article 31...'<sup>3</sup>

In order for British law to be compliant with the European Convention any restriction on an individual's ability to strike must be in accordance with Article 11(2). This means that it must be:

- (a) Prescribed by law; and
- (b) Necessary in a democratic society;
- (c) Based on one of the following grounds –
  - (i) In the interests of national security or public safety;
  - (ii) For protection against disorder or crime;
  - (iii) For the protection of health or morals;
  - (iv) For the protection of the rights and freedoms of others.

While the European Court has recognised that trade union members have a right to protect their interests and to be heard,<sup>4</sup> they have stopped short in providing a strong

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<sup>2</sup> *Schmidt and Dahlstrom v Sweden* (1979-80) 1 EHRR 632 at para 36.

<sup>3</sup> *Ibid.*

<sup>4</sup> *National Union of Belgian Police v Belgium*, Judgment of 22 October 1975, Series A, No. 19; (1979-80) 1 EHRR 578.

protection for the right to strike due to the perceived economic consequences and the political nature of the action. Thus the European Court has given member states a wide margin of appreciation in the area and it seems that a breach of Article 11 will only occur if strike action was the only recourse left for the employees in order to protect their interests or the state's actions were disproportionate. The application of a proportionality test can be seen in *NATFHE v UK*.<sup>5</sup> This case concerned sections 226A and 234A of the Trade Union and Labour Relations (Consolidation) Act 1992 (hereafter 'TULRCA') which required a trade union to inform the employer of the individuals involved in strike action. Even though English Law provides an employer with a right to seek damages against his employees for strike action,<sup>6</sup> the European Commission of Human Rights found that these provisions were not detrimental to the interests of trade union members and proportionally there was no breach of Article 11.

Although this case was decided by the Commission (which no longer exists), it shows the cautious nature of the Strasbourg institutions and the limited impact that the Human Rights Act has had in protecting the right to strike. A recent illustration of this point is provided by the judgment in *Ministry of Justice v Prison Officers' Association*.<sup>7</sup> The case concerned an unsuccessful challenge to an injunction against the Prison Officers' Association requiring it not to 'induce, or authorise or support any form of industrial action'.<sup>8</sup> With regard to the impact of the Human Rights Act, the judge concluded that either Article 11 ECHR did not confer a right to strike or, if it did, 'considerable latitude is afforded to a contracting state to regulate the circumstances in which the right may be removed'.<sup>9</sup>

### **3. The Legal Framework on Strike Action**

#### **(a) Is there a legal definition of what constitutes a 'strike' or other forms of collective action?**

Statutes in English law do not give a definition of the term 'strike'. While there is much law surrounding how to carry out a strike and what a strike may legally involve, there is nothing to say exactly what a strike is, in general. However, there is some definition provided for certain specific parts of statutes, for instance a 'definitions' section of TULRCA which defines a 'strike' as "any concerted stoppage of work".<sup>10</sup> Section 235(5) of the Employment Rights Act 1996 also gives a definition for certain parts of the Act, stating:

“‘strike’ means—

- (a) the cessation of work by a body of employed persons acting in combination, or
- (b) a concerted refusal, or a refusal under a common understanding, of any number of employed persons to continue to work for an employer in consequence of a dispute,

done as a means of compelling their employer or any employed person or body of employed persons... to accept or not to accept terms or conditions of or affecting employment.’

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<sup>5</sup> *NATFHE v UK* (1998) 25 EHRR CD 122.

<sup>6</sup> *Russell v Amalgamated Society of Carpenters* (1912) AC 421.

<sup>7</sup> [2008] EWHC 239, (QB).

<sup>8</sup> *Ibid* para 1.

<sup>9</sup> *Ibid* para 61.

<sup>10</sup> s 246 TULRCA.

Academics and writers on the subject generally accept a strike to be ‘a withdrawal of labour by a group of workers who are in dispute with their employer.’<sup>11</sup> Strikes usually occur to secure better terms for the members of a trade union and other workers. A legal strike must follow the procedures set down in the Trade Union Labour Relations (Consolidation) Act 1992. These procedures cover the details of postal ballots and independent scrutiny, as well as the notice that must be given to the employer and the rules that must be followed while the workers are actually out on strike, for example the restrictions on picketing.

**3(b). Are there legal procedures for a legal strike to take place (imposed either by statutes or other such as collective agreements or trade unions)?**

There are stringent guidelines contained in English law statutes regarding procedures for a legal strike. Mandatory strike ballots were introduced by the Trade Unions Act 1984, which made majority support in a ballot a precondition for immunity from liability in tort. However, most of the statutory provisions can be found in the Trade Union and Labour Relations (Consolidation) Act 1992.

- s 226 provides that strike action is not protected unless there has been a ballot.
- s 226A states that the trade union must give the employer seven days’ notice of the ballot and a copy of the ballot paper at least three days before the ballot takes place.
- s 227(1) provides that entitlement to vote must be accorded equally to all trade union members.
- s 231 and s 231A set out the post-ballot procedures, which include notifying members of the result, and notifying the employer of the result.
- s 234 states that the ballot is effective for four weeks. This period may be extended if agreed between the employer and the trade union.

**3(c). What types of collective action can be lawful?**

At common law, industrial action will almost invariably be unlawful as a tort. Any strike action will inevitably break the terms of the contract between employer and employee. English law does, however, protect industrial action as an economic tool. This was affirmed by s 219 TULRCA. However, when there is some question over the legality of a particular action, the courts have tended to be less favourable towards trade unions and more sympathetic towards employers. Courts have been especially hostile towards solidarity action; secondary action is not lawful as the legal immunities are generally not available to actions inducing a breach of contract with an employer who is not a party to the dispute.<sup>12</sup>

Picketing is lawful but must remain peaceful and may only be done in contemplation or furtherance of a trade dispute.<sup>13</sup> It is hemmed in by statutory restrictions, but is allowed by law.

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<sup>11</sup> H Collins, K D Ewing, A McColgan, *Labour Law Text and Materials* (2005, 2<sup>nd</sup> ed) 863

<sup>12</sup> s 224(2) TULRCA.

<sup>13</sup> s 220 TULRCA.

### **3(d). Are there guaranteed minimum public services in the event of a strike?**

There is no guarantee of any minimum public services in the event of a strike under English law.<sup>14</sup> However, there are certain measures in place which make it unlikely for public services to be completely absent. Individuals have the right to work through a strike, and this right is protected by law. In the event of a strike by, for example, an emergency service, the state may intervene using police powers or emergency measure. The Emergency Powers Act 1964 states that the government may use troops for 'urgent work of national importance' without emergency regulations.

### **3(e). Does the motivation for a strike affect its legality?**

While industrial action is protected, strikes intended to promote a wider social or political objective have been treated with suspicion and intolerance by the courts. Such strikes usually face the problem of not fulfilling the term of being a trade dispute between an employer and its workers.

In the case of *BBC v Hearn*, the Association of Broadcasting Staff (ABS) threatened to prevent the transmission of the FA Cup Final to the rest of the world unless the BBC agreed not to broadcast to South Africa. The BBC sought an injunction against ABS and this was granted by the Court of Appeal. The threat did not amount to a trade dispute; it was a politically motivated threat and thus did not fall under the necessary category.<sup>15</sup>

Only strikes which involve a trade dispute between a trade union and the relevant employer are protected and the accepted motivation tends to be restricted to economic reasons.

### **3(f). Are any categories of workers excluded from the right to strike?**

The armed forces are prohibited from taking industrial action, as are the police.<sup>16</sup> This includes inducing a police officer to withhold his or her services under the Police Act 1996.<sup>17</sup> Section 138 of the Criminal Justice and Immigration Act 2008 makes it an offence to induce a prison officer to take industrial action.

There is some legislation relating to postal workers, in that the Postal Services Act 2000<sup>18</sup> makes it an offence to delay or interfere with the transmission of a postal package. However, this does not apply when in contemplation or furtherance of a trade dispute.

There are some rare instances in which workers have agreed not to strike. In 1997, the possibility for civil servants working at Government Communications Headquarters to join a trade union was restored, subject to a legally binding agreement on a no strike deal.

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<sup>14</sup> See further, S Deakin and G Morris, *Labour Law* (4<sup>th</sup> edn, Hart Publishing, Oxford 2005) 1043.

<sup>15</sup> *BBC v Hearn* (1977) ICR 686 (CA)

<sup>16</sup> Deakin and Morris (n 14 above) 969.

<sup>17</sup> s 91, Police Act 1996.

<sup>18</sup> ss 83-84, Postal Services Act 2000.

### **3(g). Is there an obligation of ‘industrial peace’?**

Generally speaking, there is no obligation of industrial peace. However, some individual collective agreements might bind workers not to engage in strike action for a length of time.

### **4. Is there a right to react to the industrial action by the employer?**

There is no specific right to react to industrial action but there are three main ways an employer can react. Firstly, if industrial action is sufficiently serious it may amount to a repudiatory breach<sup>19</sup> by the worker of their contract. If this occurs the employer may be able to dismiss the worker.<sup>20</sup> Secondly, each individual is liable for personal loss and they can be sued for this. For example, assembly line workers would be liable for the value of the lost production minus the costs which the employer would have had to incur as part of the process of production.<sup>21</sup> However, it is rare for an employer to sue individuals for losses stemming from their breach of contract. Thirdly, an employer can conduct a lock out. This is where an employer closes the place of employment, suspends work or refuses to employ a person employed by him in consequence of a dispute.<sup>22</sup> This can either be done preceding or following industrial action. If it precedes industrial action it is likely to be a breach of contract and the worker can then withhold their labour until the employer ends the lock out or can give notice to terminate their contract. If they terminate their contract, they would be unable to claim unfair dismissal unless the requirements set out below are satisfied.<sup>23</sup> They can also sue for losses resulting from the breach providing they can show they were ready and willing to work. If a lock-out follows industrial action, the contract of employment would have already been breached and so an employer can refuse to allow workers to work while they continue to take industrial action.

### **5. How does the law regulate the impact of strike action upon the individual contract of employment?**

The general position is that ‘[a]ny form of industrial action by a worker is a breach of contract’.<sup>24</sup> However if there is a repudiatory breach by the employer, an employee may be able to withhold their labour until the employer is willing to perform his part of the contract or they may be able to give notice to terminate their contract.<sup>25</sup> The United Kingdom, unlike many other European countries does not have a doctrine of suspension of contract. This was expressly rejected by the Donovan Commission in

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<sup>19</sup> This is a breach which is sufficiently serious to entitle the innocent party to bring the contract to an end.

<sup>20</sup> This is discussed in more detail below.

<sup>21</sup> *Ebbw Vale Steel, Iron and Coal Co v Tew* (1935) 79 Sol Jo 593.

<sup>22</sup> s 235(4), Employment Rights Act 1996.

<sup>23</sup> They would however have a wrongful dismissal claim.

<sup>24</sup> *Miles v Wakefield MDC* [1987] AC 539, (HL) at 539 (Lord Templeman).

<sup>25</sup> P Elias, ‘The Strike and Breach of Contract: A Reassessment’ in K D Ewing, C A Gearty and B A Hepple (eds.), *Human Rights and Labour Law* (Mansell, London 1994).

1968.<sup>26</sup> The fact that any form of industrial action is generally a breach of contract has major implications for protection from dismissal and consequences for wages.

### **Protection from dismissal**

An employee dismissed for taking official industrial action prior to 1999 could not bring a claim for unfair dismissal unless it could be shown that the employee had been selectively dismissed (i.e. they had been dismissed but another employee that had taken industrial action had not been) or that other dismissed employees had been re-engaged within three months of the dismissal and they had not been.<sup>27</sup> In relation to an employee dismissed while taking unofficial industrial action there was no protection from unfair dismissal at all.<sup>28</sup>

This gave some protection to employees who took official industrial action as an employer would either have to dismiss every employee that took industrial action or dismiss no one. However, there were examples of employers dismissing all the employees who participated in industrial action.<sup>29</sup> As a result, the Committee of Independent Experts (now the European Committee of Social Rights) concluded that British law was in breach of Article 6 of the European Social Charter.<sup>30</sup>

The Labour government, who came to power in 1997, agreed with this conclusion believing the current regime in relation to employees dismissed for taking part in lawfully organised official industrial action was 'unsatisfactory and illogical'.<sup>31</sup> As a result, the Employment Relations Act 1999 was passed which inserted s 238A into the Trade Union and Labour Relations (Consolidation) Act 1992. This provides that it is automatically unfair to dismiss an employee who took protected industrial action where:

- (i) The dismissal was within the protected period;
- (ii) The dismissal was after the end of the protected period and the employee had stopped taking protected industrial action before the end of the period; or
- (iii) The dismissal was after the end of the protected period, the employee had not stopped taking industrial action before the end of the period and the employer had not taken reasonable procedural steps to resolve the dispute.

The protected period was originally eight weeks but this was increased to twelve weeks by the Employment Relations Act 2004. This protection is wide in scope because there is no need for the employee to satisfy the normal qualifying conditions for unfair dismissal.<sup>32</sup>

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<sup>26</sup> Royal Commission on Trade Unions and Employers' Associations 1965-1968, Cmnd 3623, 1968, para 943.

<sup>27</sup> s 238 TULRCA.

<sup>28</sup> This is now contained within s 237 TULRCA.

<sup>29</sup> For example in 1988 P&O European Ferries dismissed over 2,000 seafarers who took part in a strike: *P&O European Ferries (Dover) Ltd v Byrne* [1989] IRLR 254.

<sup>30</sup> Council of Europe, Committee of Experts, Conclusions XI-1 (1989) 90.

<sup>31</sup> Fairness at Work, Cm 3968, 1998, para 4.22.

<sup>32</sup> Where dismissal is not automatically unfair an employee cannot bring a claim unless they have been employed for twelve months.

Although this improves upon the position before 1999, there are five main problems with this protection. Firstly, it only protects employees<sup>33</sup> and not workers,<sup>34</sup> which can mean that a lot of individuals are not protected. Secondly, where industrial action exceeds twelve weeks and the employer has taken reasonable procedural steps to resolve the dispute it is not automatically unfair dismissal if an employee is dismissed.<sup>35</sup> Thirdly, even where employees are found to have been unfairly dismissed, they cannot be reinstated against the wishes of the employer and so the only remedy is compensation, which is often insufficient.<sup>36</sup> Fourthly, this protection only protects against dismissal, it does not protect against action short of dismissal, for example, where an employee is demoted. Finally, the protection only applies in relation to protected industrial action. In relation to an employee, if the action has not been authorised or endorsed by the union, any industrial action will be unofficial and as a result there is no right to complain of unfair dismissal.<sup>37</sup> This means that employers can freely dismiss any employee who takes unofficial action. As a result it can be concluded that the 1999 reform is ‘a welcome but still unduly limited reform’.<sup>38</sup>

### Consequences for wages

Under normal time-service contracts ‘the employee promises to be available and willing to work according to the employer’s instructions for the hours prescribed in the contract.’<sup>39</sup> If the employee either fails to work the prescribed hours or perform according to the employer’s instructions, this will be a breach of contract and the employer can withhold wages or seek compensatory losses which resulted from the breach.<sup>40</sup> If the employee attends work but only works for some of the prescribed hours the employer can either refuse to accept the work at all and thus withhold all the employee’s wages for this period or accept the work offered and reduce payment for

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<sup>33</sup> An ‘employee’ means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment’: Employment Rights Act 1996, s 230(1).

<sup>34</sup> Worker is defined in Employment Rights Act 1996, s 230(3). Deciding whether a person is an employee or worker is often quite complex. Whether a person is an employee is generally determined by reference to multiple factors (*Ready Mixed Concrete (South East) Ltd v Minister for Pensions and National Insurance* [1968] 497). These factors include whether the employer controls the person (*Yewens v Noakes* (1880) 6 QBD 530), whether work done by the person is an integral part of the business (*Stevenson, Jordan & Harrison v MacDonald & Evans* [1952] 1 TLR 101) and whether there is mutuality of obligation (*Airfix Footwear Ltd v Cope* [1978] ICR 1210).

<sup>35</sup> In these situations the employer will have to show that the reason for dismissal was potentially fair (under Employment Rights Act 1996, s 98(1)). The tribunal then decide whether the employer acted reasonably or unreasonably in treating the reason relied on as sufficient. This is decided by reference to whether the employer’s conduct was in the range of reasonable responses (*Iceland Frozen Foods Ltd v Jones* [1983] ICR 17). An employee would be unlikely to be successful as at least some employers would dismiss employees that took industrial action that exceeded beyond twelve weeks and as a result dismissal is likely to be within the range of reasonable responses.

<sup>36</sup> Friction Dynamics: J Hendy and G Gall, ‘British Trade Union Rights Today and the Trade Union Freedom Bill’ in K D Ewing (eds.), *The Right to Strike: From the Trade Disputes Act 1906 to a Trade Union Freedom Bill 2006* (The Institute of Employment Rights, Liverpool 2006) 253-254.

<sup>37</sup> s 237 TULRCA.

<sup>38</sup> Deakin and Morris (n 14 above) 1088.

<sup>39</sup> Collins et al (n 11 above) 77.

<sup>40</sup> The employer cannot deduct the compensatory losses from the wages; *Cooper and Others v The Isle of Wight College* [2007] EWHC 2831, (HC).



the hours not worked.<sup>41</sup> This means that if an employee strikes they will not be paid and even if they work at some point during the strike they still may not be paid for the work that they do if the employer rejects it. The same is true for minor industrial action, i.e. if the employee is available for work during the prescribed hours but will not perform some aspect of the job. In this situation the employer can refuse to accept part performance and withhold all of the employee's wages.<sup>42</sup> In order for the employer to do this they must make clear 'in advance of the services being undertaken...[that they] decline to accept the proffered partial performance.'<sup>43</sup> This is also likely to be the position if the employee carries out all the employer's instructions but work is not of a reasonable quality.<sup>44</sup> Finally, an employer can also refuse to accept part performance where an employee works to rule (i.e. works to the exact terms of their express written contract and does not do anything more) as this would breach the implied term of goodwill.<sup>45</sup>

## **6. Explain the role of the judiciary, if any, in the resolution of industrial disputes.**

The judiciary in the United Kingdom have no official role in the resolution of disputes. They do, however, often prevent industrial action by granting interim injunctions to employers. An injunction is 'an order by the court to a party to do or refrain from doing a particular act.'<sup>46</sup> In the case of industrial action it is an order for a trade union not to take industrial action. If a trade union does not comply with an injunction, they would be in contempt of court. Possible sanctions for contempt of court include a fine or sequestering of property.<sup>47</sup> Sequestering of property is where union officials would lose control of the assets of the union<sup>48</sup> and as a result cannot fund things, e.g. information to its members.

However, the availability of injunctions depends on the approach of the judiciary. Traditionally the principles on which injunctions were granted were governed by *American Cyanamid Co v Ethicon Ltd*.<sup>49</sup> Under *Cyanamid* the balance of convenience had to be examined, this included whether damages would be sufficient if the employer succeeded at the final trial. In most cases damages could never compensate an employer and an interim injunction would readily be granted to employers and this effectively prevented a high majority of industrial action. As a result, new measures were introduced specifically to deal with industrial disputes. Under the Trade Union and Labour Relations (Consolidation) Act 1992, s 221, the courts should have regard to the likelihood of the employer succeeding at trial. This approach is more favourable to unions as the courts consider the likelihood of the union establishing a defence at trial.<sup>50</sup> However, despite this 'it continues to be relatively easy for employers to obtain interim relief'.<sup>51</sup> This can be seen in *BT plc v*

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<sup>41</sup> *Miles v Wakefield Borough Council* [1987] AC 539, (HL).

<sup>42</sup> *Wiluszynski v London Borough of Tower Hamlets* [1989] ICR 493, (CA).

<sup>43</sup> *ibid* 503.

<sup>44</sup> *Sagar v Ridehalgh & Son Ltd* [1931] 1 Ch. 310 (CA).

<sup>45</sup> *British Telecommunications Plc v Ticehurst* [1992] ICR 383 (CA).

<sup>46</sup> J Martin, *Hanbury and Martin: Modern Equity* (17<sup>th</sup> ed., Sweet and Maxwell, London 2005) 766.

<sup>47</sup> *News Group Newspapers v SOGAT 82* [1986] IRLR 227.

<sup>48</sup> Collins et al (n 11 above) 938.

<sup>49</sup> [1975] AC 396, (HL).

<sup>50</sup> *Dimbleby & Sons Ltd v NUJ* [1984] ICR 386, (HL) at 406 (Lord Diplock).

<sup>51</sup> Collins et al (n 11 above) 933.

*CWU*<sup>52</sup> where Burnton J granted an injunction because BT would make a substantial loss if the injunction were not granted, whereas the union would make little loss if it were. This favourable approach to employers by the judiciary undermines the statutory framework<sup>53</sup> as a trade union can comply with all the formalities for taking industrial action, yet still be prevented from doing so by the courts.

### **7. Article 6(4) of the European Social Charter guarantees the right to strike. Does the European Committee of Social Rights view your national law and practice as complying with Article 6(4)?**

The most recent report of the European Committee of Social Rights regarding the UK's observance of Article 6(4) is from 2006.<sup>54</sup> As with the preceding reports of the Committee, there are several areas where UK law is not in conformity with Article 6(4).

First, the Committee holds that the scope for workers to take collective action is 'excessively circumscribed' by the requirement for collective action to be between workers and their employer (ie prohibiting solidarity action).<sup>55</sup> Secondly, the Committee reaffirms its earlier view that the requirement for a union to give notice to an employer prior to a ballot on industrial action is 'excessive'.<sup>56</sup> Whilst acknowledging that the obligation was simplified by the Employment Relations Act 2004, the Committee notes that there is still a further requirement to give notice prior to a strike and therefore is not convinced of the necessity of notice prior to a ballot on industrial action. Thirdly, the Committee concludes that 'the protection of workers against dismissal when taking industrial action is insufficient'.<sup>57</sup> Notwithstanding its extension to a 12 week period, the Committee regards the time limitation of dismissal protection as arbitrary. It also criticizes the fact that protection is limited to official industrial action. This means that the industrial action must have been endorsed by a trade union, whereas the Committee views Article 6(4) as conferring rights on all workers, irrespective of whether the industrial action is supported by a trade union.

### **8. To what extent, if any, does national law provide regulation for transnational forms of strike action?**

This issue has not been expressly addressed in UK legislation, however, it has been brought into focus by recent litigation. The most notable example is the *Viking* case.<sup>58</sup> Following a dispute between the Finnish ferry company 'Viking' and the Finnish Seamen's Union (FSU), the International Transport Workers' Federation (ITF) issued a circular to its members requesting them not to enter into negotiations with Viking. ITF is based on London, so Viking brought legal proceedings in the English courts

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<sup>52</sup> IRLR 58, (QBD).

<sup>53</sup> Deakin and Morris (n 14 above) 1089.

<sup>54</sup> European Committee of Social Rights, Conclusions XVIII-1, Vol 2.

<sup>55</sup> Ibid 819.

<sup>56</sup> Ibid 820.

<sup>57</sup> Ibid 822.

<sup>58</sup> Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti*, judgment 11 December 2007.

seeking an injunction requiring ITF to withdraw the circular and for the FSU to refrain from action which interfered with its economic freedoms under the EC Treaty. This was granted by the Commercial Court. On appeal, the Court of Appeal referred several questions to the Court of Justice concerning the application of EC law to the dispute.

Analysis and critique of the judgment of the Court of Justice in *Viking* can be found elsewhere in this report, in the chapter on the conference proceedings.<sup>59</sup> Normally, there would have been a subsequent judgment from the English Court of Appeal deciding whether or not to maintain the original injunction granted against the FSB and ITF in the light of the judgment from the Court of Justice. The case was, however, settled out of court by the parties before it returned to the Court of Appeal.

Litigation about transnational strike action continues in the English courts. The British Airlines Pilots' Association (BALPA) had intended to take industrial action in spring 2008 in order to object to British Airway's plans to open a separate entity (OpenSkies). This company would be based in other EU Member States, flying routes to the USA. OpenSkies would use BA airplanes, but its pilots would not enjoy the same terms and conditions as BA pilots. BA threatened legal proceedings if BALPA proceeded with the industrial action, invoking Article 43 EC and the principles established in the *Viking* case. BALPA subsequently suspended the industrial action, but it has started legal proceedings at the High Court seeking a declaration on whether such industrial action would be lawful.

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<sup>59</sup> See also, M Bell, 'Understanding Viking and Laval: an IER Briefing Note': <<http://www.ier.org.uk/system/files/Understanding+the+Viking+and+Laval+cases.pdf>>.