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The Labour Process Fifty Years Later: a Comparative Perspective

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introduction

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The labour process fifty years later: a comparative perspective

1. Act no. 533 of August 11, 1973, completed the system of protection for workers with specific procedural rules, aligning with the substantial progress made by Act no. 300 of May 20, 1970 (the so called "Workers' Statute"). Driven by the trade union movement and the goal of fully implementing Article 3 of the Constitution, this Act has now reached its 50th year.

This exceptional milestone is certainly worth celebrating. Moreover, when it's considered that the labour law proceeding has remained unchanged in relation to its fundamental pillars over time, despite the numerous reforms of the legal labour proceeding. Nor the current model has undergone significant distortions to distance itself from the one designed fifty years ago. Additionally, this anniversary is noteworthy because new procedural laws typically create more issues than they resolve. However, over fifty years, labour law proceedings have achieved a certain stability in interpreting labour process rules.

The virtues of the labour justice system are evident: the legislative choices (carefully debated and linked to substantive law) were subsequently adopted in the civil process.

The main factors contributing to its success rest on three closely related levels: the quality of the rules, the practices, and the key participants involved. It is essential to consider all three elements.

The main features of this procedure, based on full cognition of the judge and tailored on the specificities of labour disputes, essentially lie in some fundamental rules: a) the monocratic nature of the judge in the first instance;

b) strict procedural exclusions concerning the burden of events and evidence, with careful regulation of the trial's introduction phase and limited *emendationes* allowed only with the judge's permission; c) constant cooperation between the judge and the parties, with significant powers granted to the judge (Article 421 of the Code of Civil Procedure) to ensure fair and accurate decisions, considering the differing natures of the parties, d) the provisional enforceability of decisions, effective from the operative part when read at the hearing, if favourable to the claimant in cases arising from relationships governed by Article 409 of the Code of Civil Procedure; e) the second instance trial (which should aim for a clear and logical structure with causal connections between statements, in avoidance of biased language and employing a precise subject-specific vocabulary, when it is necessary) is typically sealed.

The feature, that has undoubtedly contributed to the success of the labour disputes system, is the suitability of the procedural physiognomy for the labour proceedings, designed by the 1973 legislation. It is precisely this suitability for these specific disputes, that also determines the limits of its general application. So much so that the attempt to extend the procedural discipline of labour law to other fields has been a disappointing, not to say unsuccessful, experience.

For instance, the Article 3 of the Act no. 102/2006 (provisions on the consequences of traffic accidents) was briefly in force: it extended the labour proceeding according to the Article 409 and ff. of the Civil Procedure's Code to the lawsuits for damages for death or injuries, resulting from traffic accidents, but it was repealed after only three years by the Act 69/2009.

The 1973 reform, moreover, focused on the ordinal aspects, in the awareness that effective research for the most suitable proceeding could not disregard the organisational profile, but it had to be a direct consequence of the unbreakable synthesis between the technical-legal profiles and the purely ordinamental ones (exemplified by the creation of specialized labour law sections within judicial offices).

The same assessment can be reached by considering the high professionalism of the main characters of the legal labour proceeding, who are in constant dialogue with each other, as figured by the lawmaker. A dialogue, that has led the case-law to important and shared procedural certainties in interpreting procedural rules (e.g., Cass. sez. un., February 3, 1998, no. 1099 about the objections in the strict sense and the broad one).

However, over time, there has been an inevitable distortion in applying labour disputes, particularly in social security and welfare disputes.The main issues, nevertheless, stem from the environment rather than the legislation. The delays in civil proceedings have also affected labour law trial and the related disputes due to the limited human and organizational resources of the justice system, exacerbated by increasing demands for social justice.

Indeed, the greatest risk, arising from the numerous reformations, that has hit the civil proceeding in general is the erosion of the rules of the labour proceeding on the margins. Also in the latest reform, known as the Cartabia Act (Legislative Decree no. 149/2022), there are regulations that could potentially undermine the principles of Chiovendian memory, such as orality, concentration and immediacy, which are visible in the discipline of the labour trial (e.g. the alternative ways of carrying out the hearing, introduced in the first book of the Code, allow the contact between parties and judge only as exceptional or merely eventual according to the Articles 127 *bis* and *ter* of the Code of Civil Procedure).

A risk of erosion, that hopefully the judge, in his enhanced ability as the subject that leads the trial, will be able to avert, avoiding in this way to realize the contamination of the cornerstone principles, on which nowadays after fifty years the labour proceeding still rests.

The adoption of differentiated procedural forms fulfils the principle of effectiveness of judicial protection; and as it was mentioned above – particularly about the differentiated labour proceeding the lawmaker kept on interfering by introducing appropriate remedials to the main needs, that this type of disputes entails.Also recently, with the already named Legislative Decree no. 149 of 10 October 2022 the lawmaker felt the need to further interfere in the field of judicial protection related to the employment disputes. In particular, the new Article 441*bis* determines the "priority" of the handling and the decision of disputes concerning the instance trial against job losses, in which an application for reintegration into the workplace is presented, urging the judge to quickly resolve them.The new Article 144 *quinquies* implementing the Code of Civil Procedure lies in the same path of strengthening the judicial solution, since it stimulates the organization of the judicial office and, specifically, of the labour section (as Presidents of the section and directors of the judicial offices) to favor and verify the priority handling of the disputes according to the Chapter I-*bis* of Title IV of the Book II of the Code.

2. This special edition of the Revue aims to examine how other European Union countries and beyond adapt their forms of protection to specific circumstances. Authors are invited to reflect on the special features of labour justice, considering both contentious and non-contentious perspectives, alternative dispute resolutions, and differentiated proceedings for specific labour law aspects.

Many technical elements are shared in this analysis, but they are often articulated with significant peculiarities. Key areas of interest include: a) the establishment of specific procedures distinct from general rules; b) the participation of knowledgeable individuals, sometimes non-professional judges; c) the balance or alternative between contentious and non-contentious solutions, with varying emphasis on each.

About the first two points all the studied countries have a targeted and specific procedural structure – where undoubtedly the speed and the concentration are the transverse adjustment measure – together with an organization of the judicial offices, that suits the peculiarity of the labour subject: the British Employment Courts (once Industrial Courts) are a good para- digm of it; but also in Germany the roles of the honorary judges, nominated by the social parties, show a significant model of justice, defined by an active involvement of the delegates of the litigious parties. Another circumstance, that tends to unite the analyzed ordinamental systems, lies in the fact that they have lately undergone reformations with an obvious and inevitable urge for the use of digital technologies, that has been accelerated by the pandemic crisis.

In many countries, perhaps less in Italy, alternative dispute resolution methods are emphasized. The conciliatory petitions are already stimulated in the workplaces – the experience of the Polish Workplace Conciliation Committees is very interesting – or the arbitration proceedings are established and are sometimes reserved to collective disputes – it is the case of the Central Arbitration Committee in the United Kingdom – and are anyway supported by specific precautions and forms of pledge. There is also some interesting testing of a combined proceeding, *id est* of contentious one, that is convertible into a conciliatory instance: the French experience of the *saisie des rémunérations du travail issue* (*Loi* n. 1059, 20 November 2023) heads along these lines.

3. In conclusion to these brief preliminary notes, a general inclination towards a "particular" justice for labour disputes is evident in all contributions' readings.

On the other hand, the judicial protection of rights embodies the moment, where the substantive situation and its inner features must find proper space, because the law lives its most acute extent precisely in the crisis phase of the substantive system.The same definition of judicial protection, which is not indifferent to the subjective and objective attributes of the law, necessarily implies its adaptation and shaping to the specific needs and peculiar values of the involved subjects and of the substantive circumstances, that are typical of the proceeding.

The user is also entrusted with the task of enhancing the particular and specific demands of employment disputes: the general rules – shared by all disputes and disciplined in the Book I of the Code of Procedure – must be modulated according to the pledges prioritised by the lawmaker through the prescription of special jurisdictional techniques. It has to be considered the alternative methods of carrying out the hearing (Articles 127 *bis* and *ter* of the Code of Civil Procedure), which, although designed as exceptional to the oral hearing, must be interpretatively confined at least to the cases, in which the structure of the hearing's activities (particularly the discussion's hearing according to the Article 420 of the Code of Civil Procedure) is incompatible with the distance, that is imposed by the template in the Article 127*bis*, or with the written formality, as in replacement of the hearing, according to the Article 127 *ter*.

The fifty years of labour proceeding legislation in Italy, analyzed comparatively, reveal that despite numerous reforms, key values remain intact, reflecting principles of social justice, that indeed represent the general heritage of European legal culture.

Giorgio Fontana

The history of the legal labour proceeding in Italy. Critical comments

Contents: 1. The reasons for the labour dispute process. 2. Labour proceeding law in its historical-political context. 3. New rules for labour justice. 4. The crisis and new trends. 5. Is the end of the speciality of labour proceeding?

1. The reasons for the process of the labour disputes

It is assumed there must be a 'labour proceeding'; however, until the 1973 legal reformation (L. No. 533/1973), labour disputes concerning subordinate employment relationships lived within the same circuit of ordinary civil litigation.The diversification stems from a meditation on the interests at stake in the field of labour and from the development of a complex system, deriving from heteronomous sources of different origins and effectiveness, so much to require a specialized preparation of judges and lawyers. In this way, a non-arbitrary link could be established between the founding moments of the labour law field and the new procedural system, detached from the civil matrix. Mainly, the theoretical development of labour law due to the theorization of the "trade union system", which reflected a natural evolution as an ordered set of norms with its own rules of production and self-determined internal relations, indeed represented one of the underlying reasons for considering the legal relationships, concerning the "fact-job", as deserving of a distinction concerning the contractual relations of ordinary civil law.

Of course, there are also other reasons for this choice of judicial policy, which has seen consolidation in the labour law field as an institutional and theoretical space specifically aiming at the problems of the judicial protection

of rights[1].This includes the nature of the interests involved in labour disputes, which are not limited to the critical individual or merely economic claims since the decision on labour conflicts often goes beyond and embraces collective interests, sometimes also general interests, and touches on issues that are relevant to the political and economic structure of society itself.Although economically assessable – sometimes with difficulty – these interests can be considered linked to fundamental values and rights recognised by contemporary systems, such as the dignity of the person, equality in a substantial way and not just formal, the right to work, and more. It is, therefore, a peculiar sphere of justice, as a legal system and an institution, which, linked to a variable economic and social situation, always looks on the background, interests assumed as fundamental by the Italian Constitution and instead placed on a higher pedestal than the patrimonial interest itself. The effectiveness of the protection becomes decisive to ensure that there is no discrepancy between the legal labour system and the concrete rules applied by the contractors, which would otherwise always be possible[2].

In summary, the perspective in the labour proceeding is broader than in the civil one, justifying a specific procedural model that arises from a need to protect interests of particular importance in the legal system.

The asymmetry of power between the parties of the employment relationship also represented a specific point of reflection for the lawmaker in the elaboration of the rules of the trial because the original and contractual imbalance is inevitably repeated in the lawsuit. The labour proceeding is, therefore, axiologically oriented towards its concrete purpose of doing justice and protecting, even at the endo-procedural level, the weakest contractor. The protection of rights and procedural rules do not follow separate logics, and it can be considered in a well-founded way that 'the right asserted in the proceeding is no different from the right granted by the law: judicial protection is the continuation of substantive protection in a different form[3]. The form of the trial is never detached from the socio-economic background, and perhaps a non-arbitrary link can be established between general perspectives and procedural tendencies[4].

[1] Mazzamuto, *La prospettiva dei rimedi in un sistema di CivilLaw: il caso italiano*, in *Jus Civile*, 2019, 6, p. 720 ff.

[2] Vettori, *Effettività delle tutele (diritto civile)*, in *ED,* Annali, 2017, p. 401 ff.

[3] Mazzamuto, *cit.*, p. 721.

[4] Damaška, *I volti della giustizia e del potere*, il Mulino, 1991, p. 37.

However, the purpose of protection, which is the task of the lawsuit to ensure, seems to be challenged nowadays precisely because of the increasingly clear divergence between the inspiring principles of Law No. 533/1973, to which we owe the birth of the labour proceeding, and the usual procedures and following reformations, which seem to go against the trend, absorbing paradigms and cultural models, that have spread with the crisis of the Keynesian welfare state.

Despite simplifying as much as possible, this paper will seek to highlight the intricate evolutions of the procedural system, identify some of the underlying reasons for this crisis, follow the field's historical development, and verify whether the process of differentiating labour disputes from civil justice is still alive.

2. The labour proceeding law in its historical-political context

When presenting his famous manual of civil procedural law, five years after the approval of Law No. 533 of 1973,Virgilio Andrioli wrote that the inability to make justice effective – especially civil justice and therefore also the labour one – "it is not a less worrying phenomenon of the underdevelopment of some Italian regions, of the pollution of the atmosphere and water, of the lukewarm compliance of the rules on the prevention of workplace accidents, followed by the unenviable primacy of Italy regarding the commission of "White murders", of the unwise utilisation by public and private companies of grants and loans, provided at the expense of the community, of the concentration of media and – last but not least – of the tax evasions"[5].

The labour proceeding was born precisely to answer the problem of doing justice and doing it quickly and effectively. It seemed even more compelling after the hot autumn of 1968-69, which resulted in a considerable push for implementing the principles of solidarity. Hence, the need to create a legislative system not only to ensure rights in the workplace, as with the Workers' Statute of 1970, but also to create tooling capable of projecting those rights on the implementation level comes from.

After all, "the peculiarity" of the labour proceeding in comparison with

[5] ANDRIOLI, *Diritto processuale civile*, Jovene ed., 1978, p. 20.

the civil one had already been theorized and concretized in previous periods, although with very different forms and purposes, as in the corporate era, differentiating collective disputes (essentially regarding the application of the collective agreement: R. D. No. 1130/1926, No. 1073/1934 and subsequent amendments and additions) from individual disputes, entrusted to ordinary judges (generally deemed "particularly competent in the field"). Subsequently, with the Code of Civil Procedure of 1940, every inch of differentiation was lost, and the legal labour proceeding was reunited entirely under the same rules applying to the civil one. Essentially, the legal labour proceeding was disciplined according to the principle of "equality of arms", assuming that the parties were in a position of equality thanks to the system itself (but it was just formal equality).

With the Constitution, however, this narrow view of the labor proceeding, from which, in the best case, a judge's neutrality with respect to disputes arising at the judicial level resulted, was abandoned, and legal thinking will rather focus on the right of action as a fundamental and substantial right[6]. Article 24 of the Constitution and, subsequently, article 47 of the Charter of Fundamental Rights of the European Union will provide formal recognition at the level of constitutional sources to the right to adequate judicial protection.

The reformations of the sixties and seventies – the years of the constitutional meltwater – imposed a new idea of protecting rights; consistently, even in procedural law, there will be a significant change. The Law No. 533/1973 represented the natural development of the route, promoted by the Workers' Statute of 1970 and by the new role of the judge in labour dis- putes, so embedded into the processes of change to be rightly considered almost as an institutional component of the industrial relations system[7].

The model of the labour proceeding was based on more than just a renewed political and institutional environment. The technical solutions that the Law of 1973 provided to the problems within a slow and inefficient judicial system, which gave an enormous advantage to the stronger party of the proceedings with its baroque model, were just as important. The sole judge, who replaced the collegial one (almost always pretended) of the civil

[6] Mazzamuto, *cit.*, p. 722.

[7] Treu, *Azione sindacale e nuova politica del diritto*, in the volume *L'uso politico dello Statuto dei lavoratori* (curate by T. Treu), research's summary led by Luigi Mengoni, il Mulino, 1975, p. 17.

court, the prompt enforceability of the verdict of first instance, the strict system of foreclosures, the trade union involvement in the proceeding and the implementation of the principles of merging, orality and immediacy undoubtedly were an utter novelty, whilst being connected, as always in the great reformations, to essential theoretical papers[8].

It was a reformation that perceived the establishment of an elaborate and coherent procedural system, with a judge as an active and leading figure and obliging the parties to a dialogical and "constructivist" connection, as a prerequisite for a more advanced and effective hermeneutic activity from the point of view of balancing the interests at stake. It happened consistently; it must be said, with the increasing relevance of protection techniques, that precisely in those years, specific development and theorization in the labour law environment occurred in the so-called "remedial" perspective of the mandatory norm in labour law[9].

Although not assuming the trait of a "special" proceeding, in other words, self-sufficient and closed to inclusion with the different principles of the Code of Civil Procedure, and therefore remaining in all aspects an ordinary proceeding[10], the differentiations of labour proceedings regarding civil practices and techniques were significant and prominent. It was a true Copernican revolution in which the verification of the truth seemed to prevail over the purpose of the proceeding as a mere instrument to end a dispute[11].

With the trade union activity, the judicial policy became a critical moment in social life and industrial relationships. The collective disputes were new for the legal culture and the same judicial practice. It would have wanted a significant role of the union (Mancini criticized Law No. 533 for the scarce involvement of the union in the labour proceeding[12]), but in any case, it is

[8] The reference to the judicial tradition represented by the work of Giuseppe Chiovenda, is underlined by Tarzia, *Manuale del processo del lavoro*, Giuffrè ed., fifth edition, p. 82.

[9] It must be mentioned the volume of De Luca Tamajo, *La norma inderogabile nel diritto del lavoro*, Jovene, 1976, a cult-classic for labour law experts.

[10] In this sense, the labour proceeding is subject, like the others, to the general regulations of the Code of Civil Procedure, Book I and to the ones of Book II about the trial before the court, as they are applicable.

[11] Taruffo, in the same place, p. 118.

[12] Mancini, *Il sindacato nel nuovo processo del lavoro*, il Mulino, 1976, p. 225 ff. For a recent revival of these issues, Candini, *Il giudice necessario? Brevi riflessioni sul giudice togato e monocratico quale giudice inevitabile del rito lavoro*, in *RIDL*, 2017, 1, p. 17 ff.

undeniable that the labour justice, thanks to the connection with the social situation, took on an extensive political role (in the best way)[13]. As Treu observed in the 1970s with the labour proceeding, "the shortening of the distance between the place of legal mediation and the place of social action has received a sharp acceleration... which has radically changed the area of application and the technical tools of judicial involvement"[14].

3. New rules for labour justice

How did the legal labour proceeding differ from the civil one, indicating the beginning of a new era regarding the judicial protection of the rights of the weaker classes? To answer this question, you must take a closer look at the procedural regulations that qualify the distinctive features of the labour proceeding.

First, it is essential to emphasize this in the draft of L. No. 533 the specific and distinctive nature of the principles of the merging of procedural activities and of orality of the verdict, which differentiated the labour proceeding from the civil one, defined by a long procedural process in which the preliminary and defensive activities unravelled, by a written process, in which the direct communication between the judge and the parties was considered an exception, so much that it was not even expressly covered.

Articles 414 and 416 of the Code of Civil Procedure, which governed (and still govern) the preliminary activities of the parties, served the procedural principles mentioned above.

These are the rules governing, respectively, the introductory act of the trial by the petitioner and the act of formation in a court of the defendant, and they are fundamental to allow the judge to have complete knowledge of the case under his examination.

In summary, the rules implemented by the lawmakers with the 1973 reformation – as well as different from the civil trial – wanted the parties to be compelled to "spill the beans", meaning to lay the cards on the table with which they plan to "play" that strange chess game, that is the judicial quarrel. Thus, on the one hand, the petitioner is compelled to explain all the actual

[13] Giugni, in *Conclusioni*, in D'Antona, De Luca Tamajo, *Introduzione*, in *Giudici del lavoro e conflitto industriale*, ESI ed., 1986, p. 112.

[14] Treu, *Azione sindacale e nuova politica del diritto*, *cit.*, p, 20.

circumstances and the related legal deductions on which the charges are based, specifying the pieces of evidence and depositing the papers that he plans to use, as well as, in the same way, the defendant – employer must exhibit in his act of appearance all his defences and the actual circumstances preventing the determination of the right, claimed by the employee, with the same commitment to specify all the pieces of evidence from the beginning.

Both positions (no longer editable) are evident from the beginning. In the event of omissions or delays, the expiry is triggered, which implies the subsequent inadmissibility of the same *de facto* deductions and/or the not listed evidence for the entire proceeding and the following degrees of judgment. In a nutshell, the procedural mechanism based on these two rules (articles 414-416 Code of Civil Procedure) prevents the parties from holding back "moves" that will be carried out later on, as it happens in the civil proceeding, where they can constantly "adjust the shot", and this allows the judge to be able to lead the trial with full awareness of all *de facto* or *de jure* issues to solve. In this way, a dialogical environment is created where both the parties and the judge can navigate, knowing the contentious points, the circumstances to explain and prove, and the legal problems to solve.The proceeding can be carried out through debate between the parties and the judge, and in compliance with the principle of orality, in such a way to deal with the legal and factual issues, arranging the investigative activities assumednecessary under the principle of procedural merging.

The hub of the system, in its discussion hearing, is then represented by a regulation (article 420 Code of Civil Procedure) that, for its topic, can be described as a real break point with the old procedural tradition. It is not a coincidence that, first, it provides a close meeting between the parties and the judge for the "free questioning" of the parties, through which the "free belief" of the judge is formed.

According to the processual route of Law No. 533, article 420 of the Code of Civil Procedure would, then, demand at the end of the free questioning and of the conciliation's attempt, the prompt judgment of the judge about the possibility of finalizing the lawsuit, without further preliminary activities. Of course, this implies a necessary and already formed at the first hearing knowledge by the judge about the suit and its factual and legal coordinates.The procedural system, defined by the Law of 1973, was therefore built so that from the beginning, everyone must be fully aware of the facts and the law on which the verdict relies.

Moreover, the fifth subsection of article 420 of the Code of Civil Procedure allows the judge, in the same hearing, in the eventuality that he does not believe it possible to decide the trial, to admit the pieces of evidence asked by the parties, ordering their "prompt gathering" or postponing it to another hearing, but "no later than ten days from the first one". Following the principle of merging procedural activities, gathering evidence should terminate during the same hearing or, if necessary, during hearings on the following weekdays.To ensure the effectiveness of these principles, the prohibition of "mere adjournment hearings" must be mentioned when no procedural activity is carried out.

Another peculiarity of the labour proceeding, of great importance, consists of the judge's power on his own, that, according to article 421 of the Code of Civil Procedure, can order at any time the admission of evidence assumed necessary, even outside the limits provided by the Civil Code, in addition to the power to demand written information from the trade unions.This command can be recognized as the distinctive element of the labour proceeding, drifting it away from the principle of party disposition ruling in the ordinary civil one: "revolutionary" law for the procedural tendencies of the period, which portrays the profile of the labour judge as a judge that operates in the dispute, leads the proceeding and searches for the facts, even without the action of the proponent. Still within the framework of article 421 of the Code of Civil Procedure, to manifest the new role of the labour judge, the lawmaker has regulated the possibility of using as evidence and assessment (at the party's petition) the judge's immediate access to the workplace, commanding if it is necessary the examination of witnesses on the worksite.

Moreover, it is the ability granted to the judge in the dual perspective of dissuading stalling tactics and ensuring prompt and effective protection of the weakest party to require the prompt payment of the "undisputed sums" or a "provisional" by an always reversible ordinance in favour of the employee when the judge assumes the right being verified and in the limits "of the amount, in which he believes the proof has been reached" (article 423 of the Civil Procedure Code). It is relevant to the power of the judge to resort to technical advice dominated by speed and orality, so much as to allow the advisor to "report verbally", and in conclusion, the duty of the judge to deliver the verdict at the end of the oral debate of the trial, reading of the operative part of the judgment during the hearing (article 429 of the Civil Procedure Code, edited by Law Decree No. 112/2008).

These are the central procedural norms that, at the time of the introduction of Law No. 533/1973, constituted a total innovation concerning the rules of the civil trial. However, the break also concerned the prosecution in the appeal court, where the lawmaker also wanted to speed up the procedural system, according to article 435 of the Civil Procedure Code, providing the schedule of oral hearing within five days after lodging the appeal, holding it within sixty days. It is in line with the principles of merging and orality the disposition of article 437 Code of Civil Procedure, according to which the Board of Judges, after hearing the lawyers of the parties, utter a verdict by reading the reasoning in the same hearing.

Additionally, in the second appeal, the Board of Judges was granted its own powers of pre-trial nature so that new evidence can be allowed if it is essential for the solution, regardless of the parties' claims, therefore by way of derogation from the principle of party disposition.

In short, it is precisely thanks to the reformation of the labour proceed- ing that the mindset of the judge and the other leading figures of the trial has changed profoundly, creating an osmosis between the prosecution and the social aims of the Constitution.According to legal-positivism principles,the labour law judge has been appointed to play a very different role than a mere executor of the *voluntas legis*, up to the person directly applying con- stitutional principles in legal relationships.

4. The crisis and new trends

However, this environment will last as long as it is in the judicial system. The new political and economic forces will not make room for other trends, which are equally essential but of different course. It is no coincidence that already at the end of the seventies, the labour law doctrine wondered critically about the role of the judge, about the political and ideological alterna- tive that lies ahead of him between being "warrantor of the rationality of the system, of the balances achieved by the subjects that stand for the strong interests of the job market or (...) guardian of the reasons of the weak interests and the excluded minorities"[15].

[15] D'Antona, De Luca Tamajo, *Introduzione*, in *Giudici del lavoro e conflitto industriale*, *cit.*, p. 11.

In this scenario, the idea that the role of the judge should return to being that of the "mouth of the law" (in the name of the traditional neu- trality of the judicial office) will advance, challenging the active role of the Italian judiciary, in its most advanced members, in the project of change of the underdeveloped Italian society[16]. Standardization of the role of the judge (and of the proceeding, which will go back to the place of the neutralization of disagreements)will take over in an agnostic and indifferent to the "social issue" light[17]. Hence,Treu, one of the most careful observers of the relationship between trial and labour law, remarked a "change in the quality and also a downsizing of judicial involvement"[18]. It is precisely the "quality" of the first victim of the new times, so much that it has led to the non-application in the practice of the main solutions adopted by Law No. 533/1973, as described above, that made the legal proceeding efficient and fast to secure the enforcement of labour law in a prompt time to the regulated by it group of legal relationships.

The first reformation that hurt the labour proceeding was probably Legislative Decree No. 51 of 1998, which decided the cancellation of the magistrate's office and the allocation of the jurisdiction of labour disputes to the courts in single-member sitting, resulting in the gravitation of all labour disputes, arising in the sometimes vast area, which was included within the remit of the judicial office, in front of a judge far away from the workplace, from which the protection's claims arise[19]. It was a reformation that aimed to solve the problem of the definite disparity between the demand for justice and the resilience of the judicial establishment[20], followed by the devolution of the rule of second instance judge to the Courts of second instance, but perhaps with unforeseen effects of centralization and distancing of the judge from the local environment[21].

[16] Giugni, *Conclusioni*, in D'Antona, De Luca Tamajo, *Giudici del lavoro e conflitto industriale*, *cit.*, p. 113.

[17] Rodotà, *Le politiche del diritto, ieri e oggi*, in Mannuzzu, Clementi, *Crisi della giurisdizione e crisi della politica*, Franco Angeli ed., 1988, p. 157.

[18] Treu, *Neocontrattualismo e mediazione giudiziaria*, in D'Antona, De Luca Tamajo, *Giudici del lavoro e conflitto industriale*, *cit.*, p. 93.

[19] About the reformation under discussion read the comment of Balboni, *Quale futuro per il giudice del lavoro?* in *LG*, 1999, 9, 805.

[20] Luiso, *L'ordinamento giudiziario in evoluzione*, in *GI*, 1993, 3.

[21] About these issues De Angelis, *La tutela differenziata del lavoro tra strumenti di deflazione e impatto della riforma del processo civile*, in *Foro.it.*, 1992,V, c. 6 ff. and by the same author, *Il processo del lavoro tra funzionalità e rispetto delle garanzie*, in *RIDL*, 1994, I, 339 ff.

In this way, it will end up robbing the employment disputes of a judge in the area, as they say nowadays "neighbourhood", with obvious repercussions on the engagement and involvement of the employees in the trial. It will also make it objectively more difficult for the weakest part of the employment relationship, weaker also procedurally, to pursue action. It could also result in a lower involvement of the judge in the events and problems to consider.

A mention goes to the following revision of the judicial "geography" with the suppression of the so-called branch offices, which will deal an additional blow to the pledge of the "natural judge" by expanding excessively the geographical area of interest of the judge of first instance[22].

It will witness the paradox of a judicial system that provides a stronghold of justice for minor civil proceedings – so-called trifles – through the structure of the Peace Court offices across the country, while for labour disputes, it chooses to centralize and distance the judge from the worksites where hostilities and claims for justice arise.

To these steps, all the projects, changes and new procedures aiming to dissuade judicial actions, which have had an even more negative impact on the relationship between labour justice and the weakest groups, must then be added. First of all, it refers to the estimate of the cost of admission to the trial, which will invalidate one of the critical principles of labour justice, its (at least tendential) gratuitousness, causing fees that are not always affordable for the employees, especially for the instances, following the first one and in the event of losing (with ridiculously punitive damages such as the duplication of the expensive tax contribution). All this will complement the legal rule of the imposition for the judge to prosecute and the employee to pay the litigation costs in the event of losing, apart from exceptional circumstances, which remained valid until the statement of the Constitutional Court with decision no. 77/2018 (that has been carried on in practice, especially facing the superior courts, with very little interest in the discrepancy of economic situations of the parties).

[22] It should be noted that with the reorganization of the so-called judicial 'geography', in application of Legislative Decree No. 155/2012, 29 courts and 220 branch sections were suppressed.

5. Is the end of the speciality of labour proceeding?

Since the nineties, these regulatory policies have been followed by wider procedural reformations of civil law, designed to be applied also to labour law proceedings. Paradoxically, these reformations have proven to be among the leading causes of the surfacing of "old defects", both in the legal class and in the judiciary itself.

As Taruffo spotted, it should always be remembered that "the inconveniences and malfunctions of the procedural law system do not cause the same consequences for everyone" since a socially and economically weak individual "gets hurt to a larger extent from the malfunctions of the system, and he will be more easily persuaded to not protect his rights or to drop out of a trial that is too long and ineffective"[23].

The numerous legislative amendments to the proceedings, implemented to reduce conflict flows and make the judicial proceeding more effective, often had counterintuitive effects in the labour law field.

To speed up the proceeding, the parties were sent away from the palaces of justice, and the judges were isolated from the main character of the con- flict. At showdown, the judicial protection of rights was made much more difficult and twisting (and certainly not more effective).

It should be reminded of the reformations about the second degree and Supreme Court trial, which have enormously aggravated the procedural route, almost forgetting that the first regulating principle in the procedural field should be to remove obstacles to the decision regarding the substance of the contested right. Instead, with formalistic and byzantine rules, an ob- stacle race has been created that caused and still causes, unavoidably, mere ritual decisions at a steady pace, with dire consequences of "denied justice", especially in the Supreme Court's assessment, which affects the constitutionalpledge of action (article 24, first subsection, of the Constitution) which necessarily includes the power of those who consider themselves as the owner of a right unfairly prejudiced by an order regarding the substance to sue a Superior Court[24]. However, the Italian lawmaker has forgotten this lesson. This is not to mention the abstruse reasoning regarding artificial and for-

[23] Taruffo, *Razionalità e crisi della legge processuale*, in *Sui confini*, Il Mulino, 2002, p. 59.

[24] Olivieri, *Il quesito di diritto nel procedimento davanti alla Corte di Cassazione*, in *GI*, 2008, 6, 1578 ff., who rightly points out the 'serious concern' arising from these regulations.

malistic issues, which have created a trial full of obstacles and "traps", between which it is necessary to untwist[25].

Another tricky issue is the judge's remoteness, especially in the higher ranks and in the Supreme Court, where almost all the parties and their lawyers can orally discuss the vexed legal issues since the lawmaker chose the one in the council chamber as the ordinary rite.

Recently, then, with the norms provided for in the new text of articles 127 and ff. of the Code of Civil Procedure, which are also relevant for the labour proceeding and in each grade of trial, the trial can be conducted "from a distance" or even through the exchange of written papers ("certificated hearing") electronically, with the consequence of creating an invisible and insurmountable barrier between the judge and the parties. In this way, it makes a trial "between absentees", only virtually present, which shows obvious suitability problems with the procedural law principles of Law No. 533/1973. The extreme technicality implanted into the old trunk of the labour proceeding is one of the consequences of reformations that have greatly aggravated the trial to the point of making it difficult to reach a substantive verdict on the controversial theme.

By making the procedural path more difficult, by moving away from the judge from the parties, and by imposing so often high costs, there was indirectly a remarkable reduction of controversy, but at the price of a more significant obstacle to judicial protection precisely for the weakest groups of the population, which reproduced that different accessibility to justice that was one of the reasons for the birth of the labour proceeding[26]. Also, the procedural difficulties, not only the economic costs, impact selectively and end up damaging the weaker part of the employment relationship, also procedurally weaker and therefore less able to avoid the numerous threats that are littered along the judicial route at the behest of the lawmaker, but also of the judiciary. These obstacles have an amplified harmful relevance in the labour.

Proceeding, which was born as a simplified and expedited proceeding

[25] About it the European Court of Human Rights with the verdict of 28 October 2021, *Succi* commented in a very critical way, detecting the violation of Article 6 of the Convention. The verdict can be read in *Foro.it*, 2022, 3, IV, col. 113 ff. with footnote by Damiani.

[26] Sassani, *Il nuovo giudizio di cassazione*, in *RDP,* 2006, p. 223. About these changes it should be read the volume edited by Ianniruberto e Morcavallo, *Il nuovo giudizio di cassazione*, Giuffrè, 2007.

based on the Chiovendian principles, and it has been transformed, unfortunately, into a procedural model full of difficulties and with some neglect, it must be said, for the questions of justice and perhaps also for the very significance of the labour proceeding, that is diminished to a simulacrum.

The labour judge, disconnected from the social situation, no longer seems to understand the axiological significance of labour justice and his role, back to a bureaucratic insight, in behalf of a neutral and purely technical conception of the proceeding.

Ferrajoli, in one of his old writings, remarked that the jurisdiction has two distinct sources of entitlement: a formal one and a substantive other.The first stems from the judge's submission to the law and the principle of legitimacy.The latter comes from its purpose of defending and granting the fundamental rights of citizens and, regarding the labour proceeding from the protection of the weak contractor, originates from the enforcement of labour law[27]. Nowadays, only the first leg of these two sources of entitlement, which asks the judge to be obedient to the legislature, is still perhaps standing, while the other seems to be wholly cut off.

The trial is again a "playing field" that dissuades those who do not have commensurate tools and where there is a formalistic "equality of arms" between unequal players. It seems to be moving towards a separate and elite specialized knowledge, so much so that it makes it difficult for individuals who cannot "buy" the required support on the professional market. On theother hand, influential law firms can look after substantial contractors suitablyand influence case-law directions in their development.

In this way, the labor trial becomes a technical proceeding with high specialization, where the "right determination" is no longer linked to justice criteria but only to its entitlement or legitimacy, or rather its adherence to the positive rule that applies to the individual case according to a strict formalist view or, at most, according to pure "procedural justice"[28].

At the end of this paper, it is no longer well understandable what the *ratio* of labour law proceeding's distinction from the civil trial would be. In the meantime, the civil one was subject to changes that embraced a theoret-ical baseline layout, precisely the original one of the labour proceeding.

[27] Ferrajoli, *Precarietà dei valori di riferimento ed emergenze*, in Mannuzzu, Clementi, *Crisi della giurisdizione e crisi della politica*, *cit.*, p. 179.

[28] Taruffo, *Idee per una teoria della decisione giusta*, in *Sui confini*, *cit.*, pp. 220-221.

The problem of the reunion of labour law proceeding to its native matrix could, therefore, be raised again (and indeed, there are those who wonder about it) since, on the basis of reformations and customary, there is no longer a discrepancy to defend, taking into account that also from the point of view of procedural timeframes, there are no longer significant distinctions.

The labour proceeding's crisis may then develop into a surprising proceeding reformation for those who still have in mind (and in the heart) the labour law proceeding like a place where a driven judge was often able to reconcile law and justice.

Abstract

This paper discusses the origins and history of the legal labour proceedings from Law No. 533 of 1973 to the most recent period, discussing the various trends that occurred over time. Labour justice has been an abnormality in Italian civil justice due to its highly advanced technical solutions and the function of protecting rights, but these characteristics have gradually weakened. The author discusses the labour pro- ceeding's crisis, connecting it to legislative amendments on the proceeding and the return of old practices, considering that the reasons for the differentiation from the civil one are now blurring.

Keywords

Process, labour, justice, crisis, rights.

Francisco Vila Tierno

Algunos aspectos sobre el proceso laboral en España. Un análisis de diversos problemas de aplicación de la Ley Reguladora de la Jurisdicción Social

"*Todo hombre se debe mucho guardar en su palabra,*
de manera que sea acertada y pensada antes que la diga;
ya que después que sale de la boca,
no puede hombre hacer que no sea dicha".

Alfonso X el Sabio (1221-1284), rey de Castilla

1. Introducción

En el tronco común de las relaciones entre privados, el derecho del trabajo y de la seguridad se configura como, es sabido, como una escisión del derecho civil, en tanto que se conforma como disciplina con unos caracteres específicos vinculados al desequilibro de las partes en una relación laboral.Y, en paralelo, el procedimiento judicial previsto para solventar las discrepancias entre los sujetos del contrato de trabajo (aunque se desborda este planteamiento inicial hacia todo el conocimiento de lo social), también se separa del procedimiento que ordena la tramitación procesal de los conflictos en el ámbito civil.

Cómo no puede ser de otro modo, la norma procesal se adapta al espí-

ritu de la norma sustantiva. En este sentido, la propia evolución social ha conllevado la creación de un orden jurisdiccional independiente del civil (como no ha ocurrido, por ejemplo, con la materia de carácter mercantil), una evolución social que obligó a dar respuesta a la cuestión social como fenómeno socio-político que tuvo que ser afrontado por los poderes públicos.

De ahí, que por razón de la materia y por una cuestión estrictamente técnica, la tramitación de los asuntos entre obreros y patronos se aparta de la Ley de Enjuiciamiento Civil de 1881 – en adelante LEC, también para las versiones posteriores – ante la insuficiencia del derecho común para dar cabida al fenómeno social, y se reconducía a las leyes de Tribunales industriales, primero de 1908 y después de 1919.

Se trataba, en síntesis, de adaptar la norma procesal, regulando un procedimiento especial (hoy con sus modalidades procesales) que se diferenciaba del común ordenado en la LEC.

Todo ello se ha consolidado hasta imponer, de un modo definitivo, la absoluta autonomía procesal y científica del proceso laboral frente a otros, con unos caracteres singulares en cuanto a sus principios y contenido, esto es, una singularidad material que se reflejan en una especificidad formal a través de una regulación propia y diferenciada.

A día de hoy, la ley 10 de octubre 2011 n. 36, reguladora de la jurisdicción social – en adelante LRJS – se reconoce como la norma rituaria para el desarrollo del proceso laboral en España. El objeto de la misma, como se describe en su parte expositiva, es la de dar "una respuesta más eficaz y ágil a los litigios que se puedan suscitar en las relaciones de trabajo y seguridad social, y ofrece un tratamiento unitario a la diversidad de elementos incluidos en el ámbito laboral para una mejor protección de los derechos". En cualquier caso, el intento de articular de manera adecuada y actualizada la realidad social que representa el mundo de las relaciones laborales y de seguridad social, debe ser puesto en entredicho tras doce años de aplicación. Piénsese, por ejemplo, que, a pesar de que entre los principios específicos del proceso laboral se encuentra el de celeridad, encontramos que procedimientos urgentes como los de vulneración de derechos fundamentales o despidos se emplazan a tres años vista o más, lo que pone claramente en duda la posibilidad de atender al derecho de tutela judicial efectiva o el posible resarcimiento el daño causado. O que el acceso a órganos judiciales superiores a los efectos de una revisión de la decisión judicial inicial se restrinja hasta lo extraordinario, fundamentalmente, por obstáculos procesales.

Nuestro proceso laboral, por tanto, puede considerarse claramente mejorable.Y lo es no sólo por los motivos anteriores, sino porque se puede ir comprobando como un significativo número de resoluciones judiciales lo que resuelven son cuestiones, exclusivamente, de índole procesal. Ello no supone, sin embargo, que haya que minusvalorar las bondades y aspectos positivos que esta ley presenta.

En este sentido, como se ha afirmado "nadie duda que la LRJS marcó un 'antes y un después' en la conformación y en la dinámica real del proceso social, también del papel del orden social en el sistema jurisdiccional ordinario español, ampliando sus competencias a todas las que pueden calificarse como propias de la 'rama social del derecho'. Aunque, por cierto, nunca se definió este enigmático concepto ni tampoco se logró una regulación coherente con esa vocación expansiva. Precisamente estas deficiencias y otras que se sucedieron en esta docena de años de vigencia, hacen que […] estemos hoy ante una nueva necesidad de reforma profunda, desde un enfoque no rupturista, sino de perfeccionamiento, del avance que significa la LRJS"[1].

Tenemos, en este sentido, una norma relativamente reciente, pero que ha debido pasar en los últimos años por una serie de acontecimientos tan relevantes como la transformación digital, las consecuencias de una pandemia mundial (y el retraso de los señalamientos), los conflictos laborales que han afectado al personal de justicia, a los problemas derivados de los desencuentros en la política y que han tenido como consecuencia la falta de sustitución de magistrados en las altas instancias y en los órganos de gobierno de los jueces, a los sucesivos problemas procesales que han ido surgiendo de la aplicación de la propia norma (como la especial dificultad para la revisión judicial) o, por último, el progresivo deterioro del principio de celeridad, propio del proceso social.

Parte de estos problemas se han intentado resolver mediante la aprobación del Real Decreto Ley 19 de diciembre 2023 n. 6, por el que se aprueban medidas urgentes para la ejecución del "Plan de Recuperación,Transformación y Resiliencia" en materia de servicio público de justicia, función pública, régimen local y mecenazgo, en la que se han introducido una serie de

[1] Guadalupe Hernández, Segoviano Astaburuaga, Molina Navarrete,Tarajano Mesa (eds.), *Retos de la Jurisdicción Social en los nuevos escenarios del trabajo: balance y perspectivas de futuro*, CEF, 2023, p. 13.

modificaciones en la LRJS[2] con el ánimo de facilitar la transición digital – superando la reforma que, en este ámbito, en su día supuso la ley 5 de julio 2011 n. 18 – al tiempo que han incluido herramientas que potencien la economía procesal y la agilidad en la resolución de procesos.

En cualquier caso, para poder resolver los inconvenientes, es preciso reflexionar sobre los caracteres del proceso en el Orden Social.Todo ello justifica que, al hilo de la exposición sobre el desarrollo y principios del propio proceso laboral, se vayan analizando todos y cada uno de los problemas que entendemos más significativos para atender a los fines que dicho proceso persigue. Ordenamos esta exposición en tres grandes apartados: ámbito competencial, principios y proceso.

2. Ámbito competencial

Partiendo del art. 122 de la Constitución Española – en adelante CE – en el que se fija que "la ley orgánica del poder judicial determinará la constitución, funcionamiento y gobierno de los Juzgados y Tribunales…" es posible formular unas bases sobre las que se pueda hacer una delimitación competencial del ámbito de actuación del Orden Social.

Aquel mandato al legislador, esto es, el de articular las normas de constitución y funcionamiento de los órganos judiciales, "según ha declarado el TC, en el significado de estos términos – "constitución de los Juzgados y Tribunales" – se incluye la institución de los diversos órdenes y la definición genérica de su ámbito de conocimiento litigioso; es decir la determinación de cuántos y cuáles hayan de ser y los criterios básicos que fijen sus respectivas competencias"[3]. De este modo, las competencias que corresponden a aquellos órganos judiciales en relación a la materia, deben venir predeterminadas por una Ley orgánica, que no es otra que la mencionada LOPJ[4].

En cualquier caso, tanto la constitución como funcionamiento de aquellos órganos judiciales parten del "principio de unidad jurisdiccional". Ello

[2] Vila Tierno, *Análisis de urgencia de las modificaciones introducidas en el RDL 6/2023, de 19 de diciembre, en la Ley Reguladora de la Jurisdicción Social*, en *Brief AEDTSS*, 2023, 72, p. 1.

[3] Lasaosa Irigoyen, *La extensión de la jurisdicción social en materia de seguridad social en el presente*, en *REDT*, 2013, 159, p. 151. Cita al respecto: SSTC 1 de julio 1993 n. 224; SSTC 21 de septiembre 1994 n. 254; SSTC 19 de diciembre 1996 n. 213.

[4] Vid. al respecto STC 27 de noviembre 1989 n. 198.

se traduce en que el poder que detenta esta función es único, pero mientras que el poder legislativo y el poder ejecutivo se concentra (Cortes Legislativas y Gobierno, respectivamente), el poder judicial se desarrolla de manera parcelada. O dicho de otro modo, "teóricamente el ejercicio de la potestad jurisdiccional debería corresponder a un órgano único, pero dado que ello es prácticamente imposible, han de aparecer varios órganos jurisdiccionales […] de manera que esa pluralidad de órganos jurisdiccionales […] se estructura en una organización compleja, presidida por los principios de división de trabajo y de una moderada especialización, que sobre la base de adoptar un criterio material nos lleva a la diferenciación de cuatro órdenes jurisdiccionales: civil, contencioso-administrativo, penal y social, que vienen a constituir lo se denomina jurisdicción ordinaria […] por lo tanto, desde un punto de vista técnico no se puede hablar de distintas jurisdicciones […] porque la jurisdicción es única e indivisible y se atribuye en su totalidad a todos y cada uno de los órganos jurisdiccionales […] pero sí podemos hablar de órdenes jurisdiccionales, concepto que hace referencia a la diferenciación por razón de la materia y de la especialización que la misma lleva consigo"[5]; esto nos llevaría a especificar que cuando, por ejemplo, se habla de jurisdicción social, no se hace de un modo estrictamente técnico, por más que ésta sea la denominación que adopta la Ley reguladora.A aquel mandato constitucional (art. 122 CE), obedece, precisamente, el art. 9 LOPJ, cuando, de manera respectiva, en sus apartados segundo, tercero, cuarto y quinto, delimitan el alcance del orden civil, penal, contencioso-administrativo y del social[6], esto es, desglosa la unidad jurisdiccional por razón de la materia.

[5] Gil Plana, *La razón de ser del procedimiento laboral*, en *REDT*, 2014, 169, p. 197.

[6] Artículo 9: "1. Los Juzgados y Tribunales ejercerán su jurisdicción exclusivamente en aquellos casos en que les venga atribuida por esta u otra Ley. 2. Los Tribunales y Juzgados del orden civil conocerán, además de las materias que les son propias, de todas aquellas que no estén atribuidas a otro orden jurisdiccional […].

3. Los del orden jurisdiccional penal tendrán atribuido el conocimiento de las causas y juicios criminales, con excepción de los que correspondan a la jurisdicción militar. 4. Los del orden contencioso-administrativo conocerán de las pretensiones que se deduzcan en relación con la actuación de las Administraciones públicas sujeta al derecho administrativo, con las disposiciones generales de rango inferior a la ley y con los reales decretos legislativos en los términos previstos en el artículo 82.6 de la Constitución, de conformidad con lo que establezca la Ley de esa jurisdicción.También conocerán de los recursos contra la inactividad de la Administración y contra sus actuaciones materiales que constituyan vía de hecho […] 5. Los del orden jurisdiccional social conocerán de las pretensiones que se promuevan dentro de la rama social del derecho, tanto en conflictos individuales como colectivos, así como las reclamaciones

No obstante, la STC 7 de julio 2011 n. 121, afirma que "es asimismo doctrina de este Tribunal que no toda la materia competencial debe estar residenciada en la Ley Orgánica del Poder Judicial. Del propio art. 9 LOPJ puede deducirse que, siempre que se respete el diseño o la definición in abstracto que de cada uno de los órdenes jurisdiccionales haya efectuado el legislador orgánico, cabe que el legislador ordinario "concrete las materias objeto del conocimiento de tales órdenes" o "atribuya a determinado orden jurisdiccional el conocimiento de tales o cuales asuntos, integrando los enunciados genéricos de la LOPJ", produciéndose, de este modo, una colabora- ción entre ambas formas normativas – ley orgánica y ley ordinaria – que no obsta a la reserva establecida en el art. 122.1 CE y que, por tanto, resulta constitucionalmente lícita (en el mismo sentido, STC 6 de noviembre 1986 n. 137).

Del diseño anterior resulta un sistema en el que la Ley Orgánica del Poder Judicial establece los criterios generales de atribución y las leyes ordinarias concretan esos criterios en cada ámbito específico. Una función de concreción de los enunciados del art. 9 LOPJ que es cumplida primordialmente por las normas procesales de cabecera de los diferentes órdenes jurisdiccionales (Ley de enjuiciamiento civil, Ley de enjuiciamiento criminal, Ley de la jurisdicción contencioso-administrativa y Ley de procedimiento laboral), sin perjuicio de que pueda también llevarse a cabo en otras normas procesales.

De esta forma, la LOPJ, se limita a establecer cláusulas genéricas de atribución competencial que requieren su concreción. A estos efectos, será la Ley Ordinaria, en su caso, la LRJS, la que especifique, de manera más explícita, como hemos adelantado, las competencias que se corresponden con la rama social del derecho.

Expresión compleja y poco clara, como también se adelantó.Y es que, como ya, de manera tradicional se ha mantenido, "la ambigüedad de la frase 'rama social del derecho', principalmente derivada de que no exista una disciplina jurídica bajo tal denominación, no permite atribuir a la misma un desmesurado significado que propicie sea comprensiva de todo ordenamiento que atienda a finalidad social. La tradición legislativa procesal de trabajo sirve para delimitar el correcto significado de la tan repetida frase, haciendo que

en materia de Seguridad Social o contra el Estado cuando le atribuya responsabilidad la legislación laboral".

haya de entenderse como únicamente comprensiva de las materias que correspondan al derecho del trabajo, tanto en su aspecto individual como colectivo y sindical, y al derecho de la seguridad social"[7].

En cualquier caso, todo ello requiere una labor de concreción, más aún porque uno de los problemas con los que se enfrentan los litigantes es el difícil deslinde entre las materias sometidas al ámbito de uno u otro orden jurisdiccional social.Y es que, a pesar del esfuerzo del legislador en delimitar el campo de actuación de cada uno de los órdenes, la interrelación entre las distintas facetas de los supuestos fácticos sometidos a enjuiciamiento lleva, en más de una ocasión, a no tener claro el ámbito procesal en el que insertar una reclamación judicial.

A la par, no siempre resulta nítida la clasificación o definición legal de la materia objeto de competencia, más aún en aquellos casos en los que existe, por ejemplo, un reparto de competencias en función del objeto concreto de la disputa, como puede ocurrir respecto a la seguridad social[8].

No es, sin embargo, algo aislado, sino algo que se sucede, de manera frecuente con diversas materias fruto de que la cláusula general del art. 9 LOPJ. Cláusula que reconduce a una legislación procesal laboral específica que no se libra de las dudas interpretativas y de las zonas grises que nos llevan a tener dudas sobre la jurisdicción competente[9] y que son objeto de pronunciamientos reiterados en nuestros Tribunales de justicia[10].

[7] ATS 2 de diciembre 1991 n. 325. Por el interés en el contenido del Auto, se añade acceso directo al mismo: https://www.poderjudicial.es/search/AN/openDocument/-4c11292625659d13/20051027.

[8] Vid. al respecto: Vila Tierno, *Orden Jurisdiccional competente en materia prestacional. Pronunciamiento sobre actos de encuadramiento y sus consecuencias derivadas: los coeficientes reductores: comentario a la STS núm. 4218/2015 (Sala de lo Contenciosos-Administrativo), de dos de octubre de dos mil quince (Id. CENDOJ: 28079130042015100286)*, en *RSS*, 2016, 7, p. 133 ss.

[9] Vid. v.gr. Vila Tierno, *Orden jurisdiccional competente en materia de responsabilidad por retrasos en el pago de FOGASA*, en *DRL*, 2017, 7, p. 631.

[10] Cítese, por ejemplo, la STS 25 de septiembre 2019 n. 659, sobre las dudas competenciales entre juzgados de lo mercantil y el orden social: "La cuestión litigiosa se centra y limita a determinar si la competencia para el conocimiento de un despido corresponde al orden jurisdiccional social, estando declarada en concurso la empleadora, cuando se ejercita la acción además frente a empresas del grupo no concursadas, por entender que constituyen un grupo de empresas […] Con arreglo a nuestra más reciente doctrina, cuando se quiere cuestionar la validez del despido acordado en el seno del concurso hay que accionar (individual o colectivamente) ante el Juzgado de lo Mercantil. Eso es así incluso si se desea plantear la existencia de un posible fenómeno empresarial de agrupación. Se trata de criterio acogido tanto antes cuanto después de

Sea como fuere, la LRJS, intenta acotar el ámbito de actuación, como hemos reiterado, del Orden Social a través de tres preceptos complementa- rios:

- Delimitación genérica (art. 1); en la que, como se ha señalado, se reitera la previsión del art. 9 LOPJ respecto a la referencia de las materias objeto de conocimiento por este Orden[11].

- Delimitación positiva (art. 2); mediante la enumeración de cada una de las materias que, de manera concreta y con mayor desarrollo, son competencia de la jurisdicción social (lo que requiere un análisis más detallado).

- Delimitación negativa (art. 3); descripción de aquellas materias que están expresamente excluidas de este Orden. En este sentido, es particularmente significativa la referencia de aquellas materias que, aun conservando un origen vinculado al ámbito de las relaciones laborales o de seguridad social, se atribuyen a otro ámbito jurisdiccional, como el contencioso-administrativo o civil (vía juez del concurso)[12].

Dentro del marco de la delimitación positiva a la que nos hemos referido, se encuentran, por tanto, las materias que el proceso social reclama como suyas.Y, en este sentido, se incluyen – de manera sistematizada conforme a la cláusula genérica del art. 1 LRJS – las siguientes (art. 2):

- Cuestiones vinculadas al desarrollo de la relación laboral individual, desde su propia conformación o reconocimiento, hasta su extinción, pasando por los derechos y deberes de las partes en dicho contexto (incluyendo las relativas a la prevención de riesgos laborales y también, en esta materia, relativas a los funcionarios públicos)[13], los derechos fundamentales inespecíficos

las modificaciones introducidas en la LC que entraron en vigor a principio de enero de 2012. Pero si no se cuestiona la validez del despido concursal, sino que se reclama el abono de determinadas cantidades derivadas de la extinción contractual que comporta (sean indemnizatorias o retributivas) la solución debe ser la opuesta. La competencia exclusiva del Juez Mercantil desaparece cuando se trata de una reclamación laboral dirigida frente a quienes no son sujetos concursados. La excepcionalidad de la atribución competencial en favor del Juez del Concurso juega en favor de la jurisdicción social cuando no aparezca una norma explícita que le asigne el conocimiento de determinado asunto […]"

[11] "Los órganos jurisdiccionales del orden social conocerán de las pretensiones que se promuevan dentro de la rama social del Derecho, tanto en su vertiente individual como colec- tiva, incluyendo aquéllas que versen sobre materias laborales y de Seguridad Social, así como de las impugnaciones de las actuaciones de las Administraciones públicas realizadas en el ejerciciode sus potestades y funciones sobre las anteriores materias".

[12] Vid. nota n. 7.

[13] STS 5 de mayo 2021 n. 487: hemos precisado que, tras la LRJS, son competencia del

en el marco del contrato de trabajo[14] y el posible resarcimiento de los daños causados como consecuencia de la prestación.

- Cuestiones de naturaleza colectiva. En este marco, junto a los derechos fundamentales de naturaleza laboral (huelga y libertad sindical) y otros inespecíficos, podemos citar, todas aquellas controversias que afecten a sindicatos y asociaciones empresariales (régimen jurídico, constitución, reconocimiento y responsabilidad; controversias o cuestiones de índole electoral), o la modalidad de conflicto colectivo, así como la impugnación de convenios y acuerdos colectivos o laudos arbitrales.

- Cuestiones en materia de seguridad social en relación con prestaciones de seguridad social. Siendo éste un campo especialmente complejo, se debe de partir de la premisa de que aquello que es estrictamente 'seguridad social' está al margen de la jurisdicción contenciosa[15] y, por tanto, forma parte del elenco de competencias de la Social. En esta línea, entre otras, es especialmente clarificadora "la STS (Sala de lo Social) de 10 diciembre 2014 (RJ\2014\6771), porque repasa de un modo detallado los lindes actuales entre jurisdicciones. Como primer elemento de referencia, se pone de manifiesto que la LRJS abandona criterios basados únicamente en la propia naturalezadel acto"[16]. Y es que se determina que son "los Juzgados y Tribunales del

orden social todas las reclamaciones en materia de prevención de riesgos laborales que afecten al personal de las administraciones públicas, cualquiera que fuera la naturaleza de dicho personal, laboral estatutaria o funcionarial, señalando que "Los actos o decisiones de la Administración pública empleadora respecto de los trabajadores a su servicio de cuya impugnación conoce siempre el orden social (arts. 1, y 2 let. a, b, e, i LRJS), si bien cuando tales afectos afectaren conjuntamente al personal laboral y al funcionarial y/o estatutario, la LRJS ha optado por atri- buir el conocimiento de la impugnación de tales actos en materia laboral o sindical (materia de derechos de libertad sindical y huelga, pactos o acuerdos *ex* EBEP o laudos arbitrales sustitutivos) al orden contencioso-administrativo (art. 2 let. f y h y art. 3 let. c, d y e LRJS), salvo en materia de prevención de riesgos laborales en que la competencia del orden social es plena (arts. 2.e y 3.b LRJS)".

[14] Vid. en sentido amplio: Monereo Pérez,Vila Tierno, Álvarez Cortés (dir.), *Derechos laborales fundamentales inespecíficos*, Comares, 2020. En esta monografía, el Prof. Rojo Torrecilla los define como "derechos fundamentales que se integran en el seno de una relación contractual, concretamente en el contrato de trabajo que vincula a quien aporta su valor profesional con el que lo recibe, en un juego cruzado de derechos y deberes por ambas partes" (Capítulo "Los derechos laborales fundamentales inespecíficos. Marco conceptual y constitucional, y entronque con la normativa internacional y comunitaria").

[15] Vid. al respecto, Orellana Cano, *Las competencias en materia de Seguridad Social en la ley reguladora de la jurisdicción social*, en *RMESS*, 2012, 99, p. 131 ss.

[16] Vila Tierno, *Orden jurisdiccional competente*, cit., p. 140.

orden social quienes tienen asignado legalmente, en desarrollo del art. 9.5 LOPJ el conocimiento, como regla, de todas "las reclamaciones en materia de Seguridad Social" incluido el control jurisdiccional de los actos de las Administraciones públicas (entre ellas, la Administración de la Seguridad Social), singulares o plurales (no las disposiciones generales art. 3.a LRJS) sujetos a derecho administrativo y que pongan fin a la vía administrativa, dictadas en el ejercicio de sus potestades y funciones en materia de Seguridad Social, dejando aparte el control de los actos prestacionales que igualmente le incumbe (arg. ex arts. 1, 2.0 y 2.f LRJS)". De este modo, las excepciones a esa regla general están tasadas y su interpretación debe ser restrictiva, de modo que solo las señaladas en el art. 3, let f), LRJS, son las que, en materia de se- guridad social quedarían sujetas al Orden contencioso-administrativo. Siendo así, insiste el TS, que de "la aplicación de la normativa y de los principios expuestos [...] se constituye, como regla, a los Juzgados y Tribunales del orden social como los competentes para el control jurisdiccional de los actos de la Administración de la Seguridad Social, especialmente en materia prestacional".

De manera enumerativa, por tanto, es posible incluir las cuestiones que versen sobre la valoración, reconocimiento y calificación del grado de discapacidad, prestaciones del sistema de dependencia, mejoras de la acción protectora de la seguridad social, complementos de las prestaciones o indemnizaciones en esta materia, resoluciones de la Administración pública (también sanciones) y las disputas entre mutualidades y asociados o fundaciones y beneficiarios.

Esta primera enumeración que sirve como desarrollo a lo previsto en el art. 1 LRJS, debe completarse, necesariamente, con una serie de materias que también se atribuyen al conocimiento del Orden social, pero que no están directamente incluidas en la reiterada declaración genérica del citado precepto respecto de lo que debe entenderse de la rama social del derecho[17].

[17] En la jurisdicción social se conocerá también la eventual impugnación de resoluciones y actos administrativos relativos a imposición de sanciones en este ámbito, aquellas relativas al ejercicio de potestades y funciones en materia laboral y sindical siempre que no esté atribuido a otro orden, responsabilidad de la Administración pública con arreglo a la legislación laboral (incluida la intervención del Fondo de Garantía Salarial), y en materia de intermediación laboral. Pero también las discrepancias entre socios trabajadores y cooperativas de trabajo asociado (exclusivamente en lo que se refiere a su prestación de servicios) o sobre el régimen profesional de los trabajadores autónomos económicamente dependientes. A este marco competencial, se

Ello no supone, sin embargo, que se cierre de manera absoluta este listado, en tanto que el cajón de sastre del art. 2, let. f), LRJS, incluye en el marco de competencia de los órganos del orden jurisdiccional social "cualesquiera otras cuestiones que les sean atribuidas por ésta u otras normas con rango de ley".

El reparto competencial por materias, a pesar de la ordenación legal, es un tema que ofrece una importante conflictividad y una fuente significativade problemas interpretativos como ha sido puesto de manifiesto de manera reiterada por la doctrina científica[18].

Se ha afirmado, en tal sentido, que "la siempre conflictiva delimitación de fronteras de la competencia de jurisdicción del orden social en relación con el resto, en especial el contencioso administrativo, también el civil, sobre todo con respecto a los juzgados de lo mercantil. Justamente en materia de unificación competencial a favor del orden social de todas las materias configurables como sociales (laborales – individuales y colectivas – riesgos laborales, sindicales, seguridad y asistencias sociales) quedaron pendientes diversos temas cuyo traspaso al orden jurisdiccional social no se logró plenamente. En otros supuestos, aunque la finalidad legislativa pretendía su plena integración, ha resultado que en su interpretación jurisprudencial se ha venido sustentando un criterio restrictivo de la competencia del orden social; en muchas ocasiones mantenerse una mentalidad disgregadora clásica al buscarse resquicios legales para no asumir el cambio jurisdiccional"[19].

adiciona según lo previsto en el art. 4 LRJS – en virtud del principio de colaboración institu- cional y en paralelo con lo establecido en el art. 42 de la LEC – que los órganos judiciales del orden social extienden su competencia al conocimiento y decisión de las cuestiones previas y prejudiciales que, aunque sean ajenas a dicho orden, estén directamente relacionadas con las atribuidas al mismo; salvo excepciones tasadas, por ejemplo, cuando estemos ante cuestiones prejudiciales penales que supondrán la suspensión del proceso laboral cuando concurra falsedad documental y sea preciso su resolución para resolver en el ámbito social (art. 4.3 LRJS). Estas cuestiones serán objeto de tratamiento en la resolución judicial que ponga fin al proceso, sin que produzca efectos más allá de éste.

[18] En este sentido, resulta especialmente interesante la valoración efectuada por Salinas Molina, *Una visión general de los desafíos de la jurisdicción social: propuestas de reforma legislativa a partir de una experiencia práctica crítica* en Guadalupe Hernández, Segoviano Astaburuaga, Molina Navarrete, Tarajano Mesa, *cit*., p. 400, realiza, integrando su condición de ex Magistrado del TS.

[19] Ibídem.

3. Principios y desarrollo del proceso laboral

Expresamente el art. 74 LRJS dispone que "los jueces y tribunales del orden jurisdiccional social y los secretarios judiciales en su función de ordenación del procedimiento [...] interpretarán y aplicarán las normas reguladoras del proceso social ordinario según los principios de inmediación, oralidad, concentración y celeridad […] orientarán la interpretación y aplicación de las normas procesales propias de las modalidades procesales […]"[20].

Estos principios que informan e impulsan el desarrollo del proceso – y están presentes desde la primera norma que ordena el procedimiento laboral en España, la Ley de Tribunales Industriales de 1908 – no solo ordinario, sino también en el ámbito de las modalidades procesales, tienen una interconexión entre ellos, no planteándose la concurrencia de unos y no de otros. Si algo es característico del proceso laboral, es precisamente, la existencia de estos principios informadores, que marcan de manera absoluta el desarrollo, la regulación y el estudio de esta materia. No obstante, no encuentran su ordenación exclusiva en la LRJS, sino que es compartida en el contexto de normas de más amplio espectro como la LOPJ o del proceso civil, como la LEC, que siempre se aplicarán de manera supletoria. En cualquier caso, la aplicación de los principios distingue claramente al proceso civil, de dónde toma causa y origen, del Social: "la oralidad, inmediación, concentración, celeridad y gratuidad como principios informadores del procedimiento laboral en contraste con los principios que han dominado el procedimiento civil, caracterizado por la escritura, la mediación, la dispersión, la lentitud y la no gratuidad, ha llevado a la doctrina, tanto iuslaboralista como procesalista a sostener que la diferenciación de la manifestación social del proceso respecto de la manifestación civil radica en el procedimiento de una y otra, y más concretamente, en los principios que los informan, sin perjuicio de que dichos principios puedan ser asumidos por otros procedimientos"[21].

Bien es cierto, no obstante, que el procedimiento civil se ha ido acercando y asumiendo los principios propios del laboral. Centrémonos en aquellos principios más relevantes en la órbita de lo Social[22].

[20] La referencia a secretarios judiciales debe entenderse hecha a Letrados y Letradas de la Administración de Justicia.

[21] Gil Plana, *La razón de ser del procedimiento laboral (II)*, en *REDT*, 2015, 172, p. 61.

[22] Junto a ellos, en el marco del proceso laboral también se pueden reconocer el principio

3.1. Inmediación

Es este un principio que se plantea con carácter general en cualquier procedimiento judicial. De hecho, el art. 229 LOPJ dispone que las "declaraciones, interrogatorios, testimonios, careos, exploraciones, informes, ratificación de las periciales y vistas, se llevarán a efecto ante Juez o Tribunal con presencia o intervención, en su caso, de las partes y en audiencia pública, salvo lo dispuesto en la ley"[23].

De manera más concreta en el ámbito de lo Social, la LRJS establece una obligación específica vinculada a la resolución judicial, en el sentido que "si el Juez que presidió el acto del juicio no pudiese dictar sentencia, deberá celebrarse éste nuevamente". De hecho, si se dicta sentencia por juez distinto se entenderá la nulidad de la misma (existiendo una remisión a la LOPJ si se celebró en órgano colegiado, siendo también objeto de rechazo que se sustituya a un magistrado que actuara en juicio, por uno que no hubiera participado).

Se trata, mediante el mismo, de garantizar un conocimiento directo del juzgador sobre el asunto, de manera que el que conoce el pleito y sus caracteres, es el que va a resolver, evitando la posibilidad de que el que asume la decisión final lo haga sin tener un acceso directo a todos los medios de prueba y al desarrollo del proceso. En este sentido, es fundamental su relación con el principio de oralidad que, a la postre, es sobre el que giran el resto de principios.

de buena fe y proscripción del fraude de ley y del abuso de derecho, el principio equilibrador o de búsqueda de la igualdad material, el principio de publicidad, de oficialidad y de gratuidad. Además de la eliminación del denominado formalismo enervante en favor del principio *pro actione* y un mayor margen de protagonismo y de participación de las partes en el proceso y en la toma de decisiones.

[23] En el mismo sentido el art. 137 LEC, aplicable al resto de órdenes jurisdiccionales, viene a disponer, bajo el título, "Presencia judicial en declaraciones, pruebas y vistas" dispone que "1. Los Jueces y los Magistrados miembros del tribunal que esté conociendo de un asunto presenciarán las declaraciones de las partes y de testigos, los careos, las exposiciones, explicaciones y respuestas que hayan de ofrecer los peritos, así como la crítica oral de su dictamen y cualquier otro acto de prueba que, conforme a lo dispuesto en esta Ley, deba llevarse a cabo contradictoria y públicamente. 2. Las vistas y las comparecencias que tengan por objeto oír a las partes antes de dictar una resolución se celebrarán siempre ante el Juez o los Magistrados integrantes del tribunal que conozca del asunto. 3. Lo dispuesto en los apartados anteriores será de aplicación a los Letrados de la Administración de Justicia respecto de aquellas actuaciones que hayan de realizarse únicamente ante ellos. 4. La infracción de lo dispuesto en los apartados anteriores determinará la nulidad de pleno derecho de las correspondientes actuaciones".

3.2. Oralidad

Si ha existido una característica del proceso civil tradicional, ha sido el un desarrollo en el que prima la tramitación por escrito. Sin embargo, en el Orden social prevalece de un modo extraordinario la oralidad, salvo los trámites precisos, mínimos y necesarios, que requieren su formalización por escrito.

Ello supone que la práctica totalidad del desarrollo del proceso en su fase básica y fundamental ante el juez de lo social (o el órgano que asume la función de instancia), se produce de manera oral, con la intervención de las partes mediante la exposición de viva voz, de sus pretensiones y alegaciones, aunque con la documentación precisa que se refleja en el acta. De este modo, se van repitiendo las intervenciones permitidas por el juzgador, sin que se admita la posibilidad de presentación de escritos de preguntas y repreguntas en el interrogatorio de testigos, ni que las conclusiones se formulan por escrito. Ello no evita, sin embargo, que se presente prueba documental o pericial, o que se dicten resoluciones verbales durante la vista, se conformen las diligencia de ordenación de forma escrita, o exista la opción de dictar la sentencia *in voce*.

El fundamento de la oralidad es la de dar una mayor rapidez y facilidad para el avance del proceso, de manera que se pueda dar una respuesta urgente a frente a la petición de parte, de un modo ágil que permita responder a la tutela judicial efectiva. Pero, al tiempo, es por su necesaria conexión con el principio de inmediación, de forma que el órgano judicial tenga una relación directa con las partes, alegaciones y medios de prueba cuando no hay prueba preconstituida.

3.3. Concentración

La propia finalidad del proceso laboral, de dar una respuesta urgente a las partes en conflicto, otorga un lugar de privilegio a este principio en el contexto del proceso laboral. El mismo supone que el juicio oral concentra todas las fases del proceso en acto único (aunque éstas vengan perfectamente diferenciadas), de manera que se suceden, sin solución de continuidad (sin que se produzcan divisiones o interrupciones en el transcurso del acto del juicio), alegaciones, pruebas y conclusiones e, incluso, la sentencia cuando ésta dicta *in voce* (y las cuestiones previas, incidentales y prejudiciales que se puedan plantear).

No obstante, puede haber una suspensión para permitir, por ejemplo, examinar una documental compleja y extensa. Hasta tal punto tiene virtua- lidad este principio que se prevé, de manera conjunta, conciliación judicial y vista oral. Sin embargo, en el procedimiento civil existe una audiencia pre- via y una vista oral (arts. 414 y ss. LEC).

3.4. Celeridad

Ya hemos advertido de la configuración de un proceso que pretende dar un rápida respuesta a los litigantes.Y, para ello, el principio informador básico de la celeridad, estrechamente vinculado con los ya citados principio de oralidad, inmediación y concentración, implican el desarrollo de un proceso de un modo urgente.Todo ello es porque se da respuesta a necesidades esenciales para las personas trabajadoras – frente al poder económico que representa el empleador – que pueden estar relacionadas con derechos fundamentales, extinción del contrato, etc.

Lo que se traduce en la celeridad predicable en el proceso ordinario, pero no menos importante, sino todo lo contrario, en modalidades procesales que se priorizan en función a su naturaleza. Al tiempo, también explica que el reiterado proceso laboral tenga una única instancia – extensible a otros principios – conformándose como de doble grado, evitando la prolongación excesivamente extensa y reduciendo la capacidad de recurrir a recursos o vías de impugnación extraordinarias que no implicarán, como en el orden civil, una revisión completa de lo analizado, sino de lo que pueda separarse y conformar una causa de impugnación de conformidad con la misma LRJS.

Esta misma celeridad supone que el plazo de dictar sentencia – en teoría – es muy reducido – tres o cinco días según el proceso – o que el mes de agosto y otras fechas festivas se consideren plazos hábiles y que el señalamiento sea especialmente rápido, esencialmente respecto determinadas modalidades y materias (como derechos fundamentales o despido). Sin embargo, estas previsiones se están quedando en el plano hipotético, no real.Y la muestra de ello se hace evidente con los señalamientos que se están produciendo en tiempos recientes, sirvan de ejemplo: citación: 10 de septiembre de 2023, comparecencia: 10 de febrero de 2026; citación: 12 de septiembre de 2023, comparecencia: 28 de abril de 2026; citación 21 de marzo de 2024, comparecencia: 21 de junio de 2028.

Este es hoy uno de los grandes problemas del proceso social y una de las más importantes quejas de los operadores jurídicos que ven como los dilatadísimos plazos alejan la posible celebración de las vistas y de la obtención de una satisfacción a los intereses de los clientes. Algo que no casa, ciertamente con lo previsto, de manera taxativa y clara en el art. 24 CE: "Todas las personas tienen derecho a obtener la tutela efectiva de los jueces y tribunales en el ejercicio de sus derechos e intereses legítimos, sin que, en ningún caso, pueda producirse indefensión. Asimismo, todos tienen derecho al Juez ordi- nario predeterminado por la ley, a la defensa y a la asistencia de letrado, a ser informados de la acusación formulada contra ellos, a un proceso público sin dilaciones indebidas y con todas las garantías, a utilizar los medios de prueba pertinentes para su defensa, a no declarar contra sí mismos, a no confesarse culpables y a la presunción de inocencia".

En síntesis, no parece que se corresponda con la prohibición de las dilaciones indebidas.

3.5. El desarrollo del proceso

Los principios hasta ahora comentados son los que marcan el desarrollo del proceso laboral, como proceso específico y autónomo que responde a unos caracteres propios. En tal sentido, uno de los elementos básicos que lo diferencian del proceso civil es la diferente posición de las partes, en tanto que el principio de igualdad que tiene que verse directamente reflejado en cualquier orden jurisdiccional, en el Social, viene condicionado por un carácter tuitivo que trata de equilibrar la situación de desequilibrio entre las partes de una relación laboral. De este modo, es el trabajador el que se ve revestido, con carácter general, con una protección reforzada para la defensa procesal de sus derechos[24]. Todo ello en el interés de salvar la desigualdad existente entre los sujetos de la relación laboral.

Otro elemento que, sin duda, es muy significativo e implica un importante reto para la jurisdicción social es el cambio digital, al que ya se hizo referencia. Una transformación que se extiende de manera absoluta por cualquier campo de la vida diaria y, entre ellos, la Justicia. En esta línea, es interesante el debate que se suscitó y se ha seguido suscitando sobre la prueba electrónica al amparo del art. 90.1 LRJS y 382 a 384 LEC. Al respecto, gran

[24] En este sentido: Gil Plana, *La razón de ser*, cit., p. 61.

parte de aquel debate se ha centrado en discutir la viabilidad, como prueba – una vez aceptado el correo electrónico o la influencia del TEDH y el TJUE en el contexto de las grabaciones o acceso a determinados elementos privativos – de las redes sociales o de aplicaciones de mensajería instantánea como *Whathapp*[25].

A estos efectos, resulta ilustrativa la STS 23 de julio 2020 n. 706 de cuando afirma que "el avance tecnológico ha hecho que muchos documentos se materialicen y presenten a juicio a través de los nuevos soportes electrónicos, lo que no debe excluir su naturaleza de prueba documental, con las necesarias adaptaciones (por ejemplo, respecto de la prueba de autenticación). Si no se postula un concepto amplio de prueba documental, llegará un momento en que la revisión fáctica casacional quedará vaciada de contenido si se limita a los documentos escritos, cuyo uso será exiguo. En consecuencia, debemos atribuir la naturaleza de prueba documental a los citados correos electrónicos […] Ello no supone que todo correo electrónico acredite el error fáctico de instancia, al igual que sucede con los documentos privados. Para ello será necesario valorar si se ha impugnado su autenticidad por la parte a quien perjudique; si ha sido autenticado, en su caso; y si goza de literosuficiencia".

No parece que existan grandes impedimentos para trasladar las mismas conclusiones a las aportaciones de redes sociales y *whathapps* (atendiendo también a su autenticidad), más aún si lo recogido en tales instrumentos era, en puridad, un documento que se adiciona, adjunta o inserta en los mismos, si bien, en cuanto a ello, habría que remitirse a las consideraciones que, con carácter general, se pueden hacer sobre los medios de prueba. La conclusión, por tanto, es que nos movemos en un elevado margen de incertidumbre que deberá resolverse en el marco del proceso laboral.

Sea como fuere, es necesario destacar el importe esfuerzo que ha supuesto el citado RDL 6/2023 que, como expresamente indica en su parte expositiva que "el derecho a la tutela judicial efectiva que reconoce nuestra Constitución en su artículo 24, dentro de los derechos fundamentales y de las libertades públicas, no puede comprenderse desconectado de la realidad en la que, igual que ocurre con el resto de los derechos, se desenvuelve […]

[25] Vid. Valle Muñoz, *Las redes sociales como medio de prueba en el proceso laboral*, en *REJLSS*, 2023, 6, p. 118 ss. Id. *Las aplicaciones de mensajería instantánea como medio de prueba en el proceso laboral*, en *LS*, 2023, 13, p. 1 ss.

la consolidación en nuestra sociedad de las nuevas tecnologías, la evolución cultural de una ciudadanía consciente de los retos que comporta la digitalización y, sobre todo, la utilidad de los nuevos instrumentos y herramientas tecnológicas al servicio de una mejor y más eficiente gestión de los recursos públicos, también en el marco de la administración de justicia, implica para los poderes públicos el imperativo de abordar correctamente este nuevo marco relacional y, con él, delimitar y potenciar el entorno digital con el propósito de favorecer una más eficiente potestad jurisdiccional […] el presente real decreto-ley persigue, en primer lugar, la adaptación de la realidad judicial española del siglo XXI al marco tecnológico contemporáneo, favoreciéndose una relación digital entre la ciudadanía y los órganos jurisdiccionales y aprovechando las ventajas del 'hecho tecnológico' también para fortalecer nuestro Estado social y democrático de derecho mediante la disposición de medidas orientadas a la transparencia, la eficiencia y la rendición de cuentas de los poderes públicos".

De otro lado, por último, es preciso referirse a los problemas que plantea el acceso a los recursos como vía de revisión de las decisiones judiciales. Es cierto que el sistema de recursos que se prevé en la norma procesal, no parece oponerse al derecho de tutela judicial que reconoce el anteriormente reproducido art. 24 CE, por cuanto será el legislador el que garantice tal derecho mediante el desarrollo correspondiente, primero por la LOPJ y, posteriormente por la LRJS habilitada por la anterior. No es menos cierto, sin embargo, que una restricción de la vía de acceso a la revisión podría suponer en la práctica, la imposible restitución del derecho vulnerado al litigante.

En este sentido, el primer paso natural ante una sentencia desfavorable en el primer pronunciamiento, teniendo en cuenta que estamos ante un proceso de instancia única y doble grado, es el recurso extraordinario de suplicación, que únicamente servirá para solicitar una revisión por motivos tasados, ante resoluciones concretas (no en todos los casos y por todas las materias) y respecto de los aspectos que se señalen de manera expresa (no del conjunto de la decisión judicial originaria). Esto nos sitúa ante un importante escenario de irrecuribilidad o inadmisibilidad. El problema es que si se cierra este paso, no es posible continuar en el Orden Social (habría que saltar a la revisión por el Tribunal Constitucional o ante instancias supranacionales).

Entendemos, de tal modo, que parece preciso revisar el contenido de los arts. 191 y 193 LRJS en lo que afectan al recurso de suplicación (y en pa-

ralelo, a la casación). Se trata, de este modo, de ganar seguridad jurídica, rebajar la incertidumbre del litigante y adecuarse a la doctrina judicial que va marcando el camino y respondiendo a los problemas que la práctica real presenta y que hay que resolver. Al tiempo, permitiría eliminar cambios de criterios jurisprudenciales basados en la amplitud o indeterminación de la norma. En este sentido, debemos insistir en la necesidad de clarificar el acceso a la Suplicación (o la posible estimación) de un modo amplio: sea mediante una regulación menos compleja; mediante una clarificación más exacta de las posibilidades del recurso cuando se invocan derechos fundamentales en procedimientos sin acceso a la suplicación; a través de una redacción más clara que evite la interposición de recursos basados en un único motivo de revisión fáctica; y, por último, con una aclaración de qué se considera prueba documental, especialmente en lo relativo a la utilización de las TIC[26].

Todos estos problemas tornan de una especial dimensión cuando la política interfiere en el poder judicial.Y es que, en los últimos tiempos, las desavenencias de los partidos mayoritarios impiden la adopción de acuerdos, de conformidad al procedimiento legalmente establecido y que requiere una mayoría de las cámaras, para los nombramientos en los órganos de gobierno de los jueces. Este efecto se transfiere a los propios órganos judiciales, me- diante la imposibilidad de sustitución de los jueces que causan baja definitiva en el Tribunal Supremo, lo que se ha traducido en una infrarrepresentación de las Salas, entre ellas la Social, con 7 magistrados en activo sobre un total de 13 puestos.

Al importantísimo número de inadmisiones de recursos de casación por las dificultades procesales que la norma contiene – entre otras la exigencia de aportación de una sentencia de contraste en la que se aprecie una triple identidad (de sujeto, hecho y fundamento) aplicada de una forma estricta – se une las dificultades de una Sala de lo Social que apenas reúne el número mínimo de integrantes para reunirse en Pleno y formar secciones.

Se pone, seriamente en duda, por tanto, la aplicabilidad del reiterado derecho de tutela judicial efectiva.

[26] Vila Tierno, *El acceso a la suplicación. Algunas cuestiones complejas*, en Guadalupe Hernández, Segoviano Astaburuaga, Molina Navarrete,Tarajano Mesa, *cit*., p. 244.

4. Unas breves conclusiones

En síntesis, podemos concluir que estamos ante un proceso autónomo que ha evolucionado y se ha separado del proceso civil, si bien, sus normas se aplicarán de manera supletoria.

Los caracteres del derecho del trabajo y su naturaleza tuitiva, tiene que verse reflejada en la norma procesal para las situaciones de conflicto que, en consecuencia, adopta unos principios propios y un desarrollo particular. Pero siempre dentro del marco competencial definido en la misma.

No obstante, la significativa controversia judicial, precisamente en materia de competencia[27] que la actual conformación en la LRJS no ayuda a resolver de un modo definitivo, dificultan, en parte, el desarrollo del proceso laboral. Las tenues fronteras entre los distintos órdenes jurisdiccionales así como la existencia de cuestiones que, por sí solas y en cuanto a todo su conjunto, no pueden atribuirse a uno solo de ellos, nos condenan, necesariamente, a permanecer en esta situación de incertidumbre y que, clama en el sentido de demandar una posible reforma legislativa de esta materia.

No obstante, no puede decirse que se trata de un problema estrictamente procesal, en tanto que, en más de un caso, se requiere un cambio en cuanto al fondo, en lo que respecta al aspecto sustantivo que, a la par, tenga una trascendencia en la norma rituaria. Es el ejemplo, entre otros, del régi- men jurídico del personal que presta servicios en el marco de las Adminis- traciones públicas. La ausencia de un régimen unitario que se desglosa en personal laboral, funcionarial, administrativo y estatutario, nos lleva a dilucidar las cuestiones en diferentes órdenes, aun teniendo éstas un claro perfil laboral. Pero, al tiempo y, en sentido contrario, sin parecer muy coherente con lo an- terior, apostar por integrar la Prevención de Riesgos Laborales, sea cuál sea el tipo de empleado público, dentro del orden social.

Por último, principios como el de celeridad se están viendo afectados de una manera importante ante la existencia, cada vez mayor, de señalamientos muy lejanos en el tiempo, hasta el punto de poner en duda el cumplimiento o la garantía del derecho fundamental de tutela judicial efectiva. Y ello a pesar de las medidas adoptadas por el RDL 6/2023 que viene a señalar que "A la digitalización debe añadirse la necesidad de introducir los meca-

[27] A tal efecto, puede consultase, v.gr. la relación de sentencias que el Boletín Oficial del Estado selecciona sobre esta materia vinculadas al art. 2 LRJS: https://www.boe.es/buscar/act.php?id=BOE-A-2011-15936&tn=5&bj=a2#.

nismos eficientes que resultan imprescindibles para hacer frente al incremento de la litigiosidad y para recuperar el pulso de la actividad judicial, al compás de la recuperación económica y social tras la finalización de la situación de crisis sanitaria ocasionada por la COVID-19; así como las reformas correspondientes en las leyes procesales como medidas de agilización de los procedimientos en los distintos órdenes jurisdiccionales […] dichas medidas de agilización procesal se introducen básicamente en la […] la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil; en la Ley 36/2011, de 10 de octubre, reguladora de la Jurisdicción Social […]".

La misma duda antes señalada, que se extiende, de una parte a las dificultades existentes, en el plano procesal, para poder revisar las sentencias judiciales y, de otra, a las distorsiones que la política está creando sobre el poder judicial, tanto a sus órganos de gobierno como a la composición del mismo Tribunal Supremo.

Asunto

El procedimiento laboral en España siempre ha tenido unos caracteres que lo ha hecho diferenciarse del proceso civil, con un menor rigor formalista, pero con una mayor apuesta por principios como la inmediación y la celeridad. La ralentización de la justicia y el retraso en la obtención de una resolución justa, junto con la necesaria digitalización de la Administración de Justicia, ha obligado a asumir recientes e importantes cambios en la norma procesal, llamados a revertir los problemas para los justiciables y agilizar la toma de decisiones.

Palabras Claves

Procedimiento laboral, celeridad, inmediación, legislación procesal, Orden Social.

Rüdiger Krause

Labour Jurisdiction in Germany - Past, Present and Future

Contents: 1. Introduction. 2. Historical development. 3. Judges at the labour courts. 3.1. The composition of the bench. 3.2. Qualification and recruitment of the presiding judge. 3.3. Appointment, qualification and position of honorary judges. 4. Characteristic features of the legal proceedings. 4.1. General aspects. 4.2. Priority of conciliation and mediation. 4.3. Costs of the litigation. 4.4. Representation in court. 5. Current developments. 5.1. Digitalisation of the legal proceedings. 5.2. Decrease in the number of labour court cases. 6. Concluding remarks.

1. Introduction

"A legal system that allows itself a special labour jurisdiction expresses that it is particularly committed to the human, material and non-material needs of people.This is the claim to be realised by labour jurisdiction in the past, present and future; the raison d'être of this special branch of jurisdiction is based on this"[1].

With these words, which can also be found on the homepage of the Federal Labour Court[2], the eminent labour law professor *Peter Hanau* (*1935) summarised decades ago[3] the special circumstance that Germany has a labour

[1] Originally: "*Eine Rechtsordnung, die sich eine besondere Arbeitsgerichtsbarkeit leistet, drückt damit aus, dass sie dem Humanen, den materiellen und ideellen Bedürfnissen des Menschen in besonderer Weise verpflichtet ist. Dies ist der zu verwirklichende Anspruch an die Arbeitsgerichtsbarkeit in Vergan- genheit, Gegenwart und Zukunft; darauf beruht die Daseinsberechtigung dieses besonderen Zweiges der Gerichtsbarkeit*".

[2] Available at: https://www.bundesarbeitsgericht.de/.

[3] Hanau, *Neue Zeitschrift für Arbeitsrecht* (NZA), 1986, p. 813.

judiciary that is completely separate from the ordinary judiciary in terms of organisation and personnel in all three instances, with equal participation of employers and employees.

The outstanding importance of an independent labour judiciary in the German legal system is already reflected in its constitutional basis. Art. 95(1) of the Basic Law (*Grundgesetz* = GG) of the Federal Republic of Germany provided the establishment of a Federal Labour Court as one of the supreme courts of the Federation[4]. Furthermore, the mentioning of the labour judiciary guarantees their existence as such under constitutional law and at the same time guarantees a core set of subject matter jurisdiction for labour law disputes[5]. The lively discussion about merging the labour judiciary and the ordinary judiciary that took place around twenty years ago[6] would therefore require a constitutional amendment.

Germany devotes considerable resources to realising the constitutionally guaranteed independence of the labour judiciary: In addition to the Federal Labour Court based in *Erfurt* [7] with its current ten senates, 18 regional labour courts and 106 local labour courts are spread across the country. Around 935 professional judges work at these courts[8], who dealt with around 260,000 disputes[9] in 2022[10] (with a total number of around 42 million employees)[11]. The fact that around 95 % of these proceedings are brought by employees[12], while employers can regularly protect their interests unilaterally without the help of the courts, illustrates the relevance of the existence of the labour

[4] Until 1968, regulated with a slightly different wording in Art. 96 (1) GG.

[5] Detterbeck, *Grundgesetz*, in Sachs (Ed.), 9th Ed., 2021, Art. 95, para. 4; Vosskuhle, *Grundgesetz*, in Mangoldt, Klein, Starck (Eds.), 7th Ed., 2018, Art. 95, para. 22, pp. 27-29.

[6] For this, see only Rieble, *Zukunft der Arbeitsgerichtsbarkeit*, in Rieble (Ed.), Zaar, *Schriftenreihe*, 2005,Vol. 3, pp. 9-30 with references in fn. 2. From a socio-historical perspective Rehder, *WSI Mitteilungen*, 2007, pp. 448-454.

[7] Established in 1954, the Federal Labour Court was initially based in Kassel before being relocated to Erfurt following German reunification in 1999.

[8] *Bundesamt für Justiz*, *Richterstatistik,* 2020, available at: https://www.bundesjustizamt.de. The figure refers to full-time equivalents. In comparison: in 2019, around 13,000 judges ruled on 925,000 cases at the ordinary courts.

[9] Available at: https://www-genesis.destatis.de.

[10] The figure refers to the so-called judgement procedure. In addition, there are regularly over 12,000 so-called order procedure per year, cf. Grotmann-Höfling, *Arbeit und Recht* (AuR), 2022, p. 17.

[11] Available at: https://statistik.arbeitsagentur.de.

[12] Cf. Grotmann-Höfling, *AuR*, 2019, p. 452.

courts for asserting the interests of employees as the generally weaker party in working life. In terms of content, this mainly involves disputes about the existence of the employment relationship, payment claims and the correct pay scale classification[13].

The present article examines this particular branch of the German juridical system and highlights its special features. Following a review of the historical development of judicial conflict resolution in labour matters (II.), the issues relating to judges in the labour judiciary will be examined in more detail (III.), before moving on to the characteristic features of labour court proceedings (IV.) and finally to current developments in the labour judiciary (V.).

2. *Historical development*

The idea of a special judiciary separate from the ordinary courts for the settlement of labour-related disputes has a long history[14]. Even if some traditions go back further (guild jurisdiction, factory courts), the actual forerunners of modern labour judiciary are the municipal industrial tribunals that emerged at the beginning of the 19th century in post-revolutionary France.The starting point was the establishment of the first industrial tribunal in Lyon in 1806, at the initiative of entrepreneurs (particularly the silk manufacturers based there) who were dissatisfied with the slow and impractical decision-making process of the ordinary courts and administrative authorities[15]. Strictly speaking, it was originally a council of trade experts ("Conseil de prud'hommes"), made up of employers and workshop managers (but not

[13] Cf. Grotmann-Höfling, *AuR*, 2019, p. 452.

[14] To the following, see Leinemann, *NZA,* 1991, pp. 961-966: Linsenmaier, *NZA,* 2004, pp. 401-408; Neumann, *NZA*, 1993, pp. 342-345; Opolony, *NZA,* 2004, pp. 519-524; Prütting, *Arbeitsgerichtsgesetz,* in Germelmann, Matthes, Prütting (Ed.), 2022, Einl paras. 1-33a; Sawall, *Die Entwicklung der Arbeitsgerichtsbarkeit*, 2007; Söllner, *Die Arbeitsgerichtsbarkeit, Festschrift zum 100jährigen Bestehen des Deutschen Arbeitsgerichtsverbandes*, 1994, pp. 1-17; comprehensive presentation of the beginnings by Brand, *Untersuchungen zur Entstehung der Arbeitsgerichtsbarkeit in Deutschland*, 1990, Vol. 1, 2002, Vol. 2, 2008, Vol. 3.

[15] Leinemann, *NZA*, 1991, p. 962; for more details see Globig, *Gerichtsbarkeit als Mittel sozialer Befriedung, dargestellt am Beispiel der Entstehung der Arbeitsgerichtsbarkeit in Deutschland*, 1985, pp. 68-70.

representatives of the actual workforce) and chaired by an employer[16], whose task it was to settle disputes between manufacturers and workers.

This institution subsequently spread not only to France, but also to the areas on the left bank of the Rhine in Germany (1808 in Aachen and 1811 in Cologne)[17]. From the 1830s, industrial courts were also established in a number of other German cities[18].The Prussian Ordinance on the Establishment of Industrial Courts of 1849 (*Preußische Gewerbegerichtsverord-nung* = GewGVO) provided for the first time that a conciliation proceedings involving a conciliation committee was to precede the disputeproceedings before the industrial court (Sections 17 et seq. GewGVO)[19]. Furthermore, the Saxon Industrial Act (*Sächsisches Gewerbegesetz* = GewG) of 1861 was the first to consistently implement the idea of parity by pro- viding for a legally qualified administrative official to chair the court, with an equal number of employer and employee representatives voting assessors (Section 4 GewG)[20].This set the course for further legislative developmentsin Germany as early as the middle of the 19th century. In practical terms, however, these legal regulations initially proved to be a failure. It should also not be overlooked that the main function of the industrial tribunals was originally to discipline workers[21]. In 1841, for example, two thirds of the cases brought before the Barmen Industrial Court were filed by em- ployers[22].

The foundation of the German Empire (*Deutsches Reich*) in 1871 created the conditions for the unification of the previously fragmented legal system. However, the Imperial Justice Acts (*Reichsjustizgesetze*) of 1877 were initially a step backwards by assigning all labour law disputes to the ordinary courts, although this was corrected in favour of the industrial courts by subsequent amendments at the beginning of the 1880s[23]. However, comprehensive new regulations were not introduced until the Industrial Courts Act (*Gewer-*

[16] Globig (fn. 15), p. 77.

[17] These areas of Germany were occupied by France from 1794 to 1813.

[18] Leinemann, *NZA*, 1991, pp. 962.

[19] *Gesetz-Sammlung für die Königlichen Preußischen Staaten*, 1849, p. 110.

[20] Cf. Söllner (fn. 14), p. 4.

[21] Leinemann, *NZA*, 1991, pp. 962-963; Linsenmaier, *NZA*, 2004, p. 403.

[22] Stahlhacke, *Die Arbeitsgerichtsbarkeit, Festschrift zum 100jährigen Bestehen des Deutschen Arbeitsgerichtsverbandes*, 1994, p. 74.

[23] Cf. Söllner (fn. 14), p. 5.

begerichtsgesetz = GewGG) of 1890[24], which aimed to create the institutional conditions for the proper, quick and trust-based settlement of labour law disputes in industrial enterprises throughout the Empire[25]. At the same time, the GewGG served to pacify the politically increasingly important working class[26], which felt that its legal protection interests were not adequately safeguarded by the bourgeois-conservative judicial apparatus of the Empire[27]. In view of the discussion about modernising labour jurisdiction that had been going on since the 1870s, this law was not the exclusive fruit of the so-called "New Course", a brief phase of socio-political reform in the early years of the then *Kaiser Wilhelm II*, but it was strongly favoured by this trend[28].

However, the GewGG initially only provided for the mere possibility of establishing industrial courts for the district of a municipality. It was not until an amendment in 1901 that the establishment of such courts became mandatory for municipalities with more than 20,000 inhabitants[29]. Where an industrial court existed and had jurisdiction, the jurisdiction of the ordi- nary courts for labour disputes was thereby excluded. The industrial court was composed of a chairman (usually a senior local authority official) andone assessor from the employer side and one from the employee side. The proceedings were governed by separate rules of procedure, which referred to the general provisions of the Civil Procedure Code (*Zivilprozessordnung* = ZPO) for all issues not dealt with in the special rules, a regulatory technique that has remained in place to this day. An appeal against a judgement of the industrial court was possible under certain conditions, but then to the ordinary regional court. In contrast, there was no higher instance for labour law disputes to ensure a uniform interpretation of labour law at that time. In addition, the industrial court could be called upon to act as an arbitration board, i.e. it was competent not only for legal disputes but also for regulatory

[24] *Reichsgesetzblatt*, 1890, p. 141.

[25] Cf. *Reichstagsdrucksache,* 8/1890, 5, pp. 18-21.

[26] However, the working class in the German Empire was anything but homogeneous, cf. WEHLER, *Deutsche Gesellschaftsgeschichte* 1849-1914, 2nd Ed., 2006, pp. 772-804.

[27] Cf. REICHOLD, *Zeitschrift für Arbeitsrecht* (ZFA), 1990, p. 18; see also GLOBIG (fn. 15), pp. 177-179.

[28] Cf. REICHOLD, *ZFA*, 1990, p. 18.

[29] By the turn of the century, all large cities with over 50,000 inhabitants (with the exception of two) had an industrial court, but only 60 % of medium-sized cities with between 20,000 and 50,000 inhabitants had one.

disputes and could issue an arbitration award, although this was not binding.

The industrial courts increasingly proved to be a success story and, after initial scepticism[30], were seen not least by the Social Democrats as an effective instrument for the enforcement of workers' rights. According to a contemporary assessment, the GewGG was the "Magna Charta of the German worker"[31]. By 1896 there were already 284 industrial courts in the German Empire, 316 by 1900 and 504 on the eve of the First World War in 1913[32]. The industrial courts were popular with workers, and in 1907 there were more than 15,000 complaints in Berlin alone[33]. The rise of the industrialcourts prompted the legislator to enact the Merchant Courts Act (*Kaufmannsgerichtsgesetz* = KfmGG) in 1904[34], according to which merchant courts could or (in municipalities with more than 20,000 inhabitants) had to be established for labour law disputes in trade enterprises. Reference was made to the GewGG for all essential points of the procedure. Despite their legal independence, the merchant courts were in fact regularly affiliated to the industrial courts, with the presiding judge taking on both functions[35].With all of this, the idea of assigning labour law conflicts to a special jurisdiction with equal participation of the employer and employee sides for settlement due to their peculiarities took root in Germany more than one hundred years ago.

In the period of upheaval following the First World War, the industrial and merchant courts initially continued to exist. However, the additional arbitration committees introduced during the war continued to create an unclear situation[36]. It was not until the Conciliation Ordinance of 1923[37] that a seminal institutional separation was made between the adjudication of legal disputes with the exclusive jurisdiction of the industrial and merchants' courts on the one hand and the adjudication of regulatory disputes with the

[30] Cf. Weiss, *Die Arbeitsgerichtsbarkeit, Festschrift zum 100jährigen Bestehen des Deutschen Arbeitsgerichtsverbandes*, 1994, p. 76.

[31] Jastrow, *Sozialpolitik und Verwaltungswissenschaft*, 1902, Vol. 1, p. 405.

[32] Cf. Söllner (fn. 14), p. 6.

[33] Nipperdey, *Deutsche Geschichte 1866-1918*, 1994, Vol. I, p. 363.

[34] *Reichsgesetzblatt*, 1904, p. 266.

[35] Linsenmaier, *NZA,* 2004, p. 405.

[36] Wenzel, *JuristenZeitung* (JZ)*,* 1965, p. 749.

[37] *Reichsgesetzblatt I*, 1923, p. 1043.

exclusive jurisdiction of the conciliation committees on the other.The implementing provisions of the Arbitration Ordinance also introduced a distinction between the judgement procedure (*Urteilsverfahren*) and the order procedure (*Beschlussverfahren*) (for disputes under works constitution law), which has been retained to this day[38].

After the demand for a unified labour judiciary had already been raised in 1919[39], the specific structure was the subject of controversial debate in the following years[40]. The independent trade unions in particular demanded labour courts to be completely separate from the ordinary courts as they still harboured a deep mistrust of the conservative judiciary and its allegiance to the old forces. In contrast, the lawyers' associations and employers argued in favour of integrating the labour courts into the ordinary courts under the guiding principle of judicial unity[41]. Against this background, the Labour Court Act (*Arbeitsgerichtsgesetz* = ArbGG) of 1926[42] was a compromise. On the one hand, the local labour courts were established as independent courts in organisational terms (Section 14(1) ArbGG). However, this independence was immediately relativised by the requirement that the presiding judges should be ordinary judges (Section 18(2) ArbGG 1926). In addition, the re- gional labour courts were incorporated into the regional courts (Section 33 ArbGG), while the Imperial Labour Court was established within the Imperial Court (Section 40 ArbGG). In the Weimar Republic, it was therefore not yet possible to completely separate the labour courts from the ordinary courts.

Nevertheless, the ArbGG of 1926 marked an important turning point. It was the end of the formative phase in which energetic presidents of industrial courts shaped rather than implemented labour law in the course of settling labour-related disputes[43]. Instead, the phase of ever-increasing legal penetration of labour law by an increasingly professional judiciary began. The establishment of a nationwide and unified labour court system for all

[38] *Reichsgesetzblatt I,* 1923, pp. 1191-1192.

[39] Cf. Sinzheimer, *Arbeitsrecht und Rechtssoziologie*, 1976, Vol. 1, p. 65.

[40] For more details see *Bewer*, *Zeitschrift für Deutschen Zivilprozeß*, (ZZP), 49, 1925, pp. 74-88.

[41] Kraushaar, *Betriebs-Berater* (BB), 1987, pp. 2309-2312; Rehder, *WSI Mitteilungen*, 2007, pp. 449-450; Wenzel, *JZ*, 1965, p. 750.

[42] *Reichsgesetzblatt I*, 1926, p. 507.

[43] In that sense Reichold, *ZFA*, 1990, p. 25.

employees including the introduction of an appeal body instead of a fragmented structure of institutions[44] can also be regarded as progress.

During the National Socialist period, the regulations on labour judiciary were amended by the Labour Court Act of 1934[45], primarily to the effect that jurisdiction for all collective disputes was eliminated which was in line with the prevailing totalitarian ideology. In contrast, the regulations for individual proceedings remained largely unchanged on the outside. Internally, however, even the most elementary principles of the rule of law were increasingly undermined by a judiciary that was often compliant with the new rulers[46].

In the period after the Second World War, the Allies pushed for the independence of the labour courts with the Control Council Law (KRG) No. 21 of 1946[47], probably also under a certain trade union influence. Both the local labour courts and the regional labour courts were to be newly established separately from the ordinary courts, while reference was made to the ArbGG of 1926 for proceedings. However, different adaptation regulations in the western occupation zones led to a considerable fragmentation of the law[48]. It was not until the Federal Republic of Germany was founded in 1949 that the legal conditions for renewed unification were created[49].

This unification took place with the Labour Court Act of 1953 (ArbGG 1953)[50], which in its structure and in many details was deliberately based on the ArbGG of 1926[51] and with which the labour courts were now establishedas an independent special jurisdiction in all three instances in accordance with the constitutional requirements mentioned at the beginning.The Fed-

[44] Cf. the explanatory memorandum of the ArbGG, *Verhandlungen des Reichstags*, III/1924, Vol. 407, 2065, p. 21.

[45] *Reichsgesetzblatt I*, 1934, p. 319.

[46] Cf. Wenzel, *JZ*, 1965, pp. 749-754, (751-753). Examples of changes in labour jurisdiction during the Nazi era Leich/Lundt, *60 Jahre Berliner Arbeitsgerichtsbarkeit*, 1987, pp. 75-92.

[47] *Amtsblatt des Kontrollrats in Deutschland*, 1946, p. 124.

[48] More about the first years after 1945 Müller, *Die Arbeitsgerichtsbarkeit, Festschrift zum 100jährigen Bestehen des Deutschen Arbeitsgerichtsverbandes*, 1994, pp. 106-112.

[49] In the Soviet occupation zone and then in the German Democratic Republic, there was a different development, which will not be described in detail here and which ended after German reunification in the early 1990s.

[50] *Bundesgesetzblatt I*, 1953, p. 1267.

[51] Cf. *Bundestagsdrucksache*, 3516, p. 24.

eral Labour Court commenced its activities in 1954.This can be seen as the end point of a decades-long development that reflects not least the increasing influence of the trade unions in Germany, which have always campaigned for a labour jurisdiction that is as independent as possible from the ordinary courts.

After numerous minor amendments to the ArbGG 1953, a reform debate ensued in the mid-1970s as part of a general effort to simplify and speed up civil proceedings, leading to the Labour Court Act of 1979 (ArbGG 1979)[52] .The central aim was to settle legal disputes at first instance wherever possible, thereby reducing the burden on the appeal courts.The ArbGG 1979 has also been repeatedly amended since then, for example by the Labour Court Acceleration Act of 2000[53].

3. Judges at the labour courts

Despite the constant increase in legal regulations, the settlement of labour law disputes does not depend solely on statutory law. Rather, in view of the gaps in statutory law and the rapid pace of change in working life, case law continues to play a significant role in labour law. Furthermore, in the day-to-day work of the first and second instance, not only purely legal skills are required, but also other qualities so that the labour courts can live up to their claim of dealing with the conflicts in the world of work that come before them in a socially satisfactory manner, especially since only a small proportion of the proceedings that come before the labour courts end in a judgement. With this in mind, the following section will focus on the issues associated with the staffing of the courts.

3.1. The composition of the bench

As outlined in the historical overview, the idea of a court with equal representation of employers and employees and a chairman who does not belong to one of the two social groups, which differs from the original concept of the Conseil de prud'hommes, was established as a decision-making

[52] *Bundesgesetzblatt I*, 1979, p. 545.
[53] *Bundesgesetzblatt I*, 2000, p. 333.

body in Germany at an early stage. In continuation of older traditions, the GewGG of 1890 already provided for the courts to be composed of a neutral chairman and one assessor each from the employerand employee side (Section 22(1) GewGG). The idea behind the involvement of lay judges from the world of work is to reach decisions that are as realistic as possible and reflect the views of the parties involved. Furthermore, especially in the early phase of the labour movement and the development of a labour law separate from civil law, the aim was to ensure acceptance of this form of dispute resolution among workers by involving the employee side in the judicial decision of labour law disputes on an equal footing.

While the judges of the ordinary courts were regularly far removed from the oppressive reality of workers' lives and had a reputation for exercising "class justice", the industrial courts advanced to become, so to speak, "courts of trust" ("*Vertrauensgerichte*")[54] for workers. In a similar sense, it was pointed out decades later during the deliberations on the German constitution in connection with the question of the election of labour judges that it was important to maintain the trust of employees and trade unions in the labour courts[55]. Both aspects, namely increasing both the quality of the con- tent and the social acceptance of judicial decisions, are still cited today as key reasons for the participation of lay judges from the employer and employee side[56].

This tradition was continued and even expanded as the labour judiciary developed. The ArbGG of 1926 already provided for an equal number of laymen to act as judges in all three instances, from the local labour courts to the regional labour courts to the Imperial Labour Court (Sections 16(2), 35(2), 41(2) ArbGG 1926).The ArbGG of 1953 and 1979 continued this line (Sections 16(2), 35(2), 41(2) ArbGG 1953 and 1979).The involvement of hon- orary judges at the reviewing court is particularly noteworthy. It is true that they are always in a minority given the fact that the senates are composed of

[54] This term was used by *Hugo Sinzheimer* already in 1915, cf. Sinzheimer, *Arbeitsrecht und Rechtssoziologie*, 1976, Vol. 1, pp. 150-168; and also by Bewer, *ZZP*, 49, 1925, p. 77.

[55] Cf. Abgeordneter Dr. Suhr (SPD), *Jahrbuch des öffentlichen Rechts der Gegenwart* (JöR), 1951, Vol. 1, p. 751.

[56] BAG 19.8.2004 – 1 AS 6/03, *NZA*, 2004, p. 1118; Höland, Buchwald, Krausbeck, *AuR*, 2018, p. 405; Ide, *Die Arbeitsgerichtsbarkeit, Festschrift zum 100jährigen Bestehen des Deutschen Arbeitsgerichtsverbandes*, 1994, pp. 253-264; Opolony, *NZA*, 2004, p. 523; Stöhr, *AuR*, 2021, G13-G16 (G16).

three professional judges. However, since the reviewing court is not concerned with the establishment of facts but only with the precise legal assessment of facts, this means that the lay judges are also involved in the determination of the law as such and should not only contribute to a better understanding of the facts of the case.

3.2. Qualification and recruitment of the presiding judge

The qualifications required of presiding judges at the courts for labour law disputes have undergone repeated changes over the course of time, reflecting the general development of labour law and German history as a whole.The GewGG of 1890 did not yet impose any specific professional requirements on the presiding judge. In practice, they were usually senior municipal officials with a general legal background. In contrast, the KfmGG of 1904 required in principle the ability to become an ordinary judge, which in Germany is traditionally acquired through two state law examinations, but still allowed for exceptions (Section 11(1) KfmGG).The ArbGG of 1926 required professional judges to be "legally qualified" for all instances (Section 6(1) ArbGG).Whether this also meant that all presiding judges at local labour courts had to be capable to become an ordinary judge[57], was apparently disputed. However, due to another legal requirement (Section 18(2) ArbGG 1926), the presiding judges at the labour courts were mostly ordinary judges anyway, as mentioned above[58]. At the regional labour courts and the Imperial Labour Court, only judges working at the regional courts or higher regional courts or at the Imperial Court could be appointed from the outset (Sections 36(1), 41(1) ArbGG 1926). In addition, for all three instances, only judges with knowledge and experience[59] in labour law and social matters were to be appointed (Sections 18(1), 36(2), 42 ArbGG 1926), reflecting the increasing complexity of labour law as early as the 1920s.

In view of the difficult conditions in the destroyed Germany after the Second World War, the KRG No. 21 of 1946 remarkably dispensed with the requirement of qualification for the chairpersons of the labour courts and regional labour courts, but instead allowed special skills in labour matters

[57] In this sense Flatow, Joachim, *Arbeitsgerichtsgesetz*, 1928, § 6 para. 2.

[58] In 1930, for example, only 34 of the 610 chairmen and 677 deputy chairmen were not ordinary judges, cf. Wenzel, *JZ*, 1965, p. 751 fn. 49.

[59] At the Imperial Labour Court: "particular" knowledge and experience.

and the performance of judicial duties to suffice.The presiding judges at the regional labour courts were, however, required to have "appropriate legal qualifications" (Art. 6 n. 1(a) KRG No. 21). In addition, "recognised democratic views" were expressly required for all judges (chairpersons and assessors) (Art. 5 KRG No. 21).

The ArbGG of 1953 marked the beginning of a renewed professionalisation of chairpersons in legal terms. At the regional labour courts (as well as at the Federal Labour Court), it was now necessary to have the ability to become an ordinary judge as well as to have special knowledge and experience in the areas of labour law and working life (Sections 36(1), 42(2) ArbGG). For the presiding judges at the local labour courts, the qualification to become an ordinary judge could originally be replaced by the fact that the person concerned had acquired comprehensive knowledge and expe- rience in labour law through at least five years of work in representation before the labour courts (Section 18(3) ArbGG) in order not to force the particularly qualified non-lawyers out of office. The German Judges Act (*Deutsches Richtergesetz* = DRiG) of 1961 abolished this special regulation[60], meaning that since then, presiding judges at labour courts must also have the ability to become an ordinary judge. However, the same Act also abol- ished the special knowledge and experience relating to labour law and working life as a professional requirement for being a professional judge in the labour courts.The legislator no longer considered this useful due to thelack of verifiability and also wanted to increase permeability between the different judiciaries[61].

Specialist knowledge of labour law is therefore not expressly required by law. At first glance, this means that a lawyer can be appointed to the position of chairperson at a local labour court immediately after passing the second state examination at a relatively young age and without any previous knowledge or experience in labour law. In reality, however, various mechanisms ensure that only people with the necessary expertise are appointed to the labour courts. For example, the appointment of a chairperson at a local labour court is made on the recommendation of the competent supreme state authority (previously only the ministries of labour, since a change in the law in 1990[62]

[60] *Bundesgesetzblatt I*, 1961, pp. 1665 and 1678.
[61] *Bundestagsdrucksache*, *III*/2785, pp. 12 and 21.
[62] *Bundesgesetzblatt I*, 1990, p. 1206.

now regularly the ministries of justice)[63] after consultation with a committee, one-third of which is made up of representatives of the trade unions and employers' associations representative for working life at state level and representatives of the labour courts (Section 18 ArbGG).This procedure alone ensures that only sufficiently suitable persons are appointed to the office of chairman of the local labour courts. Furthermore, the appointment is preceded by up to five years of service as a probationary judge (Section 12 DRiG), during which the president of the respective regional labour court can adequately determine the judge's qualifications. In addition, practice tends to pay attention to prior knowledge and practical experience in labour law when appointing probationary judges in the local labour courts.The appointment of the president and the chairpersons of the regional labour courts is also made after consultation with the aforementioned committee (Section 36 ArbGG).Thus, the professional judges of first and second instance are not only democratically and constitutionally legitimised by this procedure, but are also supported by the trust of the associations on the employer and employee sides.

Judges at the Federal Labour Court are appointed by the Federal Minister of Labour and Social Affairs together with the Judges' Election Committee and appointed by the Federal President in accordance with the Judges' Election Act (*Richterwahlgesetz* = RiWG).The Judges' Election Committee consists of the relevant state ministers and an equal number of members elected by the German Parliament (*Bundestag*) in accordance with the rules of proportional representation. In addition to the professional qualifications of the candidates, the general political balance of power at federal level therefore also plays a decisive role. In addition, care is taken to ensure a regional balance in the election, so that the judges at the Federal Labour Court come from all states (*Bundesländer*) and thus achieve the broadest possible representation overall.

3.3. Appointment, qualification and position of honorary judges

The principle of equal participation of honorary judges from the employer and employee sides in the resolution of labour law disputes can be traced back to the 19th century, as explained above.

[63] For the dispute over ministerial competence, see Kraushaar, *Betriebs-Berater*, 1987, pp. 2311-2314; Rehder, *WSI Mitteilungen*, 2007, pp. 451-453.

The GewGG of 1890 still provided that the assessors at the municipal trade courts were to be elected by the employers and employees based in the court district (Sections 12, 13 GewGG).The ArbGG of 1926 had already abolished this time-consuming procedure and replaced it with an appointment by the competent authority on the recommendation of the employers' and employees' associations (Sections 20, 37, 43 ArbGG). This form of appointment of honorary judges has proved its worth and has therefore been maintained in a comparable manner to this day (Sections 20, 37, 43 ArbGG of 1979).The competent authorities are bound by the lists of nominees.This means that no other persons can be appointed as honorary judges, which underlines the strong role of the trade unions and employers' associations in the area of labour jurisdiction. Ultimately, the lay judges are thus doubly legitimised: Formally on the basis of appointment by the competent authority, materially by the relevant associations of the world of work.

The currently around 25,000 honorary judges at the labour courts in Germany[64] are appointed for five years according to their social role as an employer or employee[65], whereby re-election is permitted and common. Unemployed persons can also act on the employee side (Section 23(1) ArbGG). Understandably, no one can be an honorary judge on the employee side and the employer side at the same time (Section 21(4) sentence 2 ArbGG).

Honorary judges must work or live in the relevant court district (Sections 21(1), 37(2) ArbGG), so that regional working life is represented. However, no special professional qualification is required in the first instance. For the second instance, at least five years' experience as an honorary judge at a labour court is regulated as a "target requirement" (Section 37(1) ArbGG). In fact, most lay judges in the first two instances have no legal training. On the employee side, they are often works council members with very different professional backgrounds side, almost all of whom are trade union members; on the employer side, they are often HR managers or managing directors[66]. Experience shows that, especially in the lower instances, the honorary judges do not judge according to preconceived notions. Rather, the focus is mainly on reaching a decision that is appropriate and practical in the individual

[64] Cf. Höland, Buchwald, Krausbeck, *AuR*, 2018, p. 405.
[65] Details in Sections 22, 23 ArbGG.
[66] Stein, *BB*, 2007, p. 2683.

case[67]. In addition, trade unions and employers' associations offer further training events for lay judges. In addition to at least five years' experience as a lay judge in a lower court, special knowledge and experience in the field of labour law and working life are required to be an honorary judge at the Federal Labour Court (Section 43(2) ArbGG).

The lay judges exercise their office in full independence. In particular, they are not bound by instructions from their respective organisations and may not follow them.The honorary judges are basically on an equal footing with the professional judges and have full participation and voting rights in the deliberations, as well as a right to comprehensive access to the files. In the first two instances, this can lead to the two lay judges outvoting the professional judge. Professional judges may therefore have to justify a decision that they would not have made themselves.

The relevance of the honorary judges is reinforced by a committee formed by them at the local labour court or regional labour court, which must be consulted before the honorary judges are allocated to the chambers and before the lists for the individual hearing dates are drawn up (Sections 29, 38 ArbGG).

4. Characteristic features of the legal proceedings

4.1. General aspects

The labour courts have comprehensive and exclusive jurisdiction for all labour law disputes. The catalogue of subject matter jurisdiction leaves practically no question open and is constantly amended as new issues arise. Exclusion of labour court jurisdiction in favour of arbitration proceedings is only possible by means of a collective agreement and, in addition, limited to disputes arising from an individual employment relationship, requires that the collective agreement predominantly covers stage performers, filmmakers or artists (Sections 4, 101(2) ArbGG).

A characteristic feature of labour court proceedings is the existence of two different types of procedures, which, following their first appearance in 1923, already characterised the ArbGG of 1926, namely on the one hand the

[67] Höland, Buchwald, Krausbeck, *AuR*, 2018, pp. 407-408.

judgement procedure (Sections 46 et seq. ArbGG) and on the other hand the order procedure (Sections 80 et seq. ArbGG).While the judgement procedure applies to individual disputes between the employer and individual employees and to disputes between the parties to collective agreements, the order procedure is applicable for disputes in connection with institutional employee participation.The main difference is that in judgement procedure, the general principles of civil procedure regarding the burden of presentation and proof of facts apply. In the order procedure, on the other hand, the facts of the case are determined ex officio (Section 83(1) ArbGG).The historical background to this is the fact that the works constitution was originally regarded as part of a public-law economic constitution following the provisions of Art. 165 of the Weimar Constitution[68]. It was not until several decades later that the view prevailed that the works constitution should be classified as private social law[69], although this did not affect the continued division of labour court proceedings into two parts.

As already mentioned, the labour judiciary has a three-instance structure. Legal proceedings begin with the local labour courts as the court of first instance. An appeal against the judgements of the local labour courts can be lodged with the regional labour courts (under certain conditions, e.g. always in the case of disputes about the existence of an employment relationship or the lawfulness of a dismissal (Sections 8(2), 64 ArbGG).An appeal on points of law to the Federal Labour Court is permitted against the judgements of the regional labour courts (under very limited conditions, e.g. if a legal issue relevant to the decision is of fundamental importance) (Sections 8(3), 72 ArbGG).

In fact, the vast majority of cases are settled at first instance. According to older data, only 3.7 % of all lawsuits are appealed and only 0.24 % are appealed on points of law[70]. In 2018, around 320,000 cases were filed with the labour courts, around 13,500 cases with the regional labour courts and around 1,850 cases with the Federal Labour Court[71].

[68] In a contemporary commentary, it is said that it is not about acts of jurisdiction, but about acts of administration, cf. Flatow, Joachim, *Schlichtungsverordnung*, 1924, p. 92.

[69] Detailed information on the development by Reichold, *Betriebsverfassung als Sozialprivatrecht*, 1995.

[70] Stein, *BB*, 2007, p. 2682.

[71] Cf. Grotmann-Höfling, *AuR*, 2019, p. 453-454.

4.2. Priority of conciliation and mediation

The priority given to the amicable settlement of labour law disputes has always been a characteristic feature of the relevant procedural regulations. For example, following older traditions (cf. Section 54(3) GewGG), the ArbGG of 1926 already provided that a conciliation hearing should first take place before the chairman alone, the aim of which is to reach an amicable settlement between the parties.This has remained the case to this day (Section 54 ArbGG). A contentious hearing before the chamber with the participation of both assessors only takes place if the conciliation hearing fails and the proceedings cannot be concluded by the chairman in any other way (Sections 55, 57 ArbGG). Even in this case, however, the labour court should continue to strive for an amicable settlement of the dispute (Section 57(2) ArbGG). In practice, it is reported that around 18 cases are heard in a conciliation hearing and around 6 cases in a chamber hearing on a single day[72]. The proportion of judgements in labour courts is traditionally low and significantly lower than in ordinary courts. By 2018, only 23,100 (7.2%) of around 320,000 settled cases ended in a judgement, while over 202,000 (63%) ended in a settlement[73].

The legislator is endeavouring to promote the goal of an amicable settlement of the dispute with further regulations. Firstly, in 2012, the possibility was expressly introduced for the court to suggest to the parties to a pending dispute that mediation or another out-of-court dispute resolution procedure be carried out (Section 54a ArbGG).This involves mediation close to court and not to in-court mediation, which was also partially carried out as a pilot project in some labour courts between 2002 and 2013 without a legal basis, but which was deliberately terminated by the legislator due to the mixing of the roles of judge and mediator (cf. Section 9 Mediation Act). Instead, the figure of the "conciliation judge" was introduced, who is a judge not authorised to make decisions and to whom the parties can be referred for the conciliation hearing (Section 54(6) ArbGG)[74]. Statistically, however, referral to the conciliation judge only occurs in less than 1 % of all proceedings and is primarily recommended in emotionally highly charged situations[75].

[72] Stein, *BB*, 2007, p. 2682.
[73] Cf. Grotmann-Höfling, *AuR*, 2019, p. 451.
[74] For more details see Francken, *NZA*, 2012, pp. 836-841.
[75] Francken, *NZA*, 2015, pp. 641-643.

In addition, great importance is attached to the quick settlement of disputes in labour court proceedings in line with practical requirements. In this sense, the principle of acceleration in all instances has been expressly enshrined in law for decades (Section 9(3) ArbGG 1926, Section 9(1) ArbGG 1953[76] and 1979). Furthermore, dismissal proceedings shall be priorised due to their great importance for the economic existence of the employee (Section 61a ArbGG)[77]. Statistically, in 2018 disputes regarding the existence of an employment relationship ended at first instance after a lawsuit was filed: 28 % after one month, 45 % after three months and 91 % after six months; of the remaining proceedings, less than 5 % lasted longer than twelve months[78].

4.3. Costs of the litigation

Another peculiarity of labour court proceedings is that they are less expensive than ordinary court proceedings.This has traditionally been of considerable importance, especially for employees as the economically weaker party, as high litigation costs may deter them from asserting their rights.Various regulations exist to reduce the cost risk. Firstly, court fees, which depend on the value in dispute of the case, are lower in the labour courts than in the ordinary courts (Court Fees Act, *Gerichtskostengesetz* = GKG, Annex 1 Parts 1 and 8). Secondly, the value in dispute is capped, particularly in disputes concerning the existence of the employment relationship (Section 42(2) GKG).Thirdly, in contrast to the legal situation in the ordinary courts, there is no obligation to pay the labour court fees in advance (Section 11 GKG). Fourthly, also in deviation from the general principles of civil procedure law, the winning party in the first instance has no claim to reimbursement of legal costs against the losing party (Section 12 ArbGG).The employee therefore does not have to fear having to bear the employer's legal costs in addition to a possible loss of the case. In addition, the general provisions on legal aid apply (Section 11a ArbGG).

For disputes under works constitution law, there is also the special provision that the employer must bear all costs arising from the activities of the

[76] Cf. *Bundestagsdrucksache*, 3516, p. 26: "dominant principle of labour court proceedings".
[77] *Bundestagsdrucksache*, 8/1567, p. 18.
[78] Grotmann-Höfling, *AuR*, 2019, p. 453.

works council (Section 40(1) BetrVG). This also includes the costs of legal proceedings, including the involvement of a lawyer, regardless of the outcome of the proceedings, if this corresponds to a reasonable assessment by the works council[79]. Moreover, no court fees are charged from the outset in disputes under works constitution law (Section 2(2) GKG).

4.4. Representation in court

In order to reduce the costs of proceedings, but also to guarantee their immediacy and to prevent social inequality between employers and employees, representation by lawyers before the industrial and merchant courts was excluded (Section 29 GewGG, Section 16(1) KfmGG)[80]. For the same rea- sons, such a provision was also included in the ArbGG of 1926[81] after con- troversial discussion (Section 11(1) ArbGG)[82]. The ArbGG of 1953 then provided for the possibility of representation by lawyers at first instance undercertain conditions (Section 11(1) sentences 2 to 5 ArbGG). Since the ArbGG of 1979, representation by lawyers has also been permitted without any re- striction at first instance (Section 11(1) ArbGG).

Trade unions were also originally entirely excluded from legal representation and were only able to achieve the right to represent their members before the industrial and merchant courts through an amendment in 1922[83]. This regulation was incorporated into the ArbGG of 1926 (Section 11(1) ArbGG) and was extended to the second instance (from which the representation by a lawyer is mandatory) (Section 11(2) ArbGG). This was a response to the growing importance of legal assistance by trade unions for their members, which existed since the mid-1890s[84]. Since 2008, representatives of trade unions and employers' associations have also been able to appear before the Federal Labour Court, provided they are qualified to hold

[79] See Fitting, *Betriebsverfassungsgesetz*, 31st Ed., 2022, § 40 para. 9, pp. 21-34.

[80] Cf. the explanatory memorandum of the GewGG, *Reichstagsdrucksache* 8/1890, 51, pp. 22-23: "fairness towards the working class".

[81] Cf. the explanatory memorandum of the ArbGG, *Verhandlungen des Reichstags*, III/1924, Vol. 407, 2065, pp. 36-37.

[82] Overview on the heated debate by Otto, *AuR,* 2021, G17-G21.

[83] *Reichsgesetzblatt I*, 1922, p. 155.

[84] For the history of legal assistance by trade unions in Germany, see Buschmann, *AuR*, 2018, G13-G16; Kehrmann, *Die Arbeitsgerichtsbarkeit, Festschrift zum 100jährigen Bestehen des Deutschen Arbeitsgerichtsverbandes*, 1994, pp. 169-186; Kiel, *AuR,* 1995, pp. 317-320.

judicial office (Section 11(4) ArbGG)[85], because, as the legislator has put it, "there are no qualitative concerns with these institutions"[86]. It has thus taken almost 120 years since the making of the GewGG for the representatives of trade associations to advance to the highest bastion of the labour judiciary on the issue of representation in court[87], while lawyers vice versa have already reached the first instance in the opposite direction after around 90 years.

5. Current developments

5.1. Digitalisation of the legal proceedings

The digital transformation is not only changing substantive employment law, but is also increasingly affecting labour court proceedings[88].

In this respect, the coronavirus pandemic has triggered a significant modernisation push in recent years.Video hearings are at the centre of this. The legislator had already introduced the option of video hearings for civil proceedings in general in 2002 and made it significantly easier once again in 2013 (Section 128a ZPO), meaning that this option has also been available for first and second instance hearings in labour court proceedings since then as a result of the general reference to the ZPO (Section 46(2) ArbGG). However, this option was hardly used for a long time, especially as the labour courts were often insufficiently equipped with technical facilities.

The coronavirus pandemic has fundamentally changed this situation. Firstly, the legislator introduced a temporary special regulation in 2020.While the possibility of video participation under the general provisions only applies to parties, authorised representatives, witnesses and experts, honorary judges could also be connected temporarily (until 31 December 2020) (Sec-

[85] *Bundesgesetzblatt I,* 2007, pp. 2840 and 2853.

[86] In this sense expressly *Bundestagsdrucksache*, 16/3655, p. 94.

[87] Trade unions, however, have been admitted as legal representatives in the order procedure also at the Federal Labour Court since 1953, cf. Section 92(2) sentence 2 that had referred only to Section 11(1) but not to Section 11(2) ArbGG, 1953; cf. Fitting, *Bundesarbeitsblatt*, 1953, p. 575.

[88] Comprehensive information on this by Oltmanns, *NZA*, 2021, pp. 525-529; Oltmanns, *NZA*, 2022, pp. 1153-1159.

tion 114 ArbGG)[89]. More importantly, the option of video hearings was used much more during the pandemic and the labour courts have also upgraded their technology since then. The organisation of a video hearing is at the dutiful discretion of the court. A video hearing can neither be forced nor prevented by the parties, although they are free to appear in person at the hearing. A very recent law proposal from 2023 will expressly include the possibility of video hearings in the ArbGG and make them even easier (Sec- tion 50a ArbGG)[90]. However, in contrast to the first draft of the new law, which was heavily critized by the whole German labour law community[91],and also in contrast to the ordinary courts[92] ("hybrid bench")[93] video hear- ings are only permitted for the parties and their representatives, but not for the judges, who must all be present in the courtroom[94].

Another current development concerns the introduction of electronic communication between the labour courts and lawyers (Sections 46c, 46g ArbGG) and the introduction of electronic files, which are currently still optional but will be mandatory for the labour courts from 1 January 2026 (Section 46e ArbGG).

5.2. Decrease in the number of labour court cases

Another development concerns the continuous decline in labour court proceedings that has been observed for over 20 years. With around 675,000 lawsuits, the number of court cases peaked in 1996. In contrast, only 320,000 lawsuits were filed in 2018 and even less in 2022, around 260,000 lawsuits[95].The reasons for this have not yet been conclusively in- vestigated. For the same trend in general civil proceedings, a growing

[89] *Bundesgesetzblatt I*, 2020, p. 1055. In detail Francken, *NZA*, 2020, pp. 681-685; Francken, Natter, *NZA*, 2021, pp. 153-158.

[90] Cf. *Bundestagsdrucksache*, 20/8095, pp. 18 and 70.

[91] E.g. Francken, *NZA*, 2022, pp. 1225-1227.

[92] See Section 128a(3) ZPO new.

[93] Cf. *Bundestagsdrucksache*, 20/8095, p. 51 (although limited to significant reasons).

[94] At present, the Federal Council (*Bundesrat*), the representative body of the states (*Bundesländer*), which is responsible for all local and regional courts, stopped the entire proposal for a reform on video hearings and called on the Conciliation Committee (*Vermittlungsausschuss*), *Bundesratsdrucksache*, 604/23. In June 2024, the Conciliation Committee confirmed the proposed amendments to the ArbGG without any further changes, cf. Bundestagsdrucksache, 20/11770.

[95] Cf. Grotmann-Höfling, *AuR*, 2019, p. 452.

awareness of the effort, costs, duration and uncertain prospects of success of a lawsuit is cited[96]. For the labour courts, the (currently) good economic situation on the labour market is likely to play a role, leading to fewer dismissals and therefore fewer actions for unfair dismissal.

6. Concluding remarks

The labour judiciary as a special judiciary with equal participation of employers and employees has a tradition in Germany dating back to the 19th century.The existence of a judiciary that is completely separate from ordinary judiciary and thus, from a legal-sociological perspective, the differentiation of the judiciary[97] is an expression of the fact that working life is of paramount importance to society, meaning that the settlement of labour disputes is best handled by specialised courts. Furthermore, labour courts are best placed to deal appropriately with labour law, which structures working life in norma- tive terms and whose expansion, independence and further development was once described by the great legal historian *Franz Wieacker* (1908-1994) as one of the "few unquestionable advances in the legal culture of the 20th century"[98]. At the same time, the autonomy of the labour courts as a "production condition of jurisdiction" has contributed to an ever-increasing juridification of labour relations in Germany[99], which is further accelerated by the traditionally close professional exchange, especially between the Federal Labour Court and labour law scholars[100].

As a state judiciary additionally legitimised by the associations of working life, the labour courts have undoubtedly made an important contribution to the idea of social partnership and social peace in general over the course

[96] Meller-Hannich, Höland, Nöhre, *Erforschung der Ursachen des Rückgangs der Eingangszahlen bei den Zivilgerichten*, 2023, pp. 339-343.

[97] Cf. Rothleuthner, *Rechtssoziologische Studien zur Arbeitsgerichtsbarkeit*, in Rothleuthner (Ed.), 1984, pp. 313-356.

[98] Wieacker, *Privatrechtsgeschichte der Neuzeit*, 2nd Ed., 1967, p. 549.

[99] Cf. Kissel, *Der Betrieb* (DB), 1987, pp. 1485-149; Reichold, *ZFA*, 1990, pp. 5-41; from a social science perspective Blankenburg, Rogowski, Schönholz, *Zur Soziologie des Arbeitsgerichtsverfahrens*, 1979, pp. 19-31. Generally Simitis, *Verrechtlichung von Wirtschaft, Arbeit und sozialer Solidarität*, Zacher et al., 1984, pp. 73-165.

[100] See only the two commemorative publications on the 25th (1979) and 50th (2004) anniversaries of the Federal Labour Court.

of time. In the words of the eminent labour law professor *Franz Gamillscheg* (1924-2018)[101]: "The fact that the labour courts have found the socially 'correct' law in recent decades is a major achievement of the highest political significance. For it has played a major role in the fact that the worker has achieved and is still striving to achieve liberation from an unworthy existence not by destroying the bourgeois order, but by transforming it into a social constitutional state"[102].The times of a general mistrust of the ordinary judiciary by the working class might be a thing of the past. Nevertheless, there is still a practical need on the part of both employees and employers for practical, fast and cost-effective legal protection. Even if employees rarely file lawsuits during an existing employment relationship and the number of cases filed has been declining for some time, there is no serious alternative to the current form of labour jurisdiction in Germany in the future.

[101] GAMILLSCHEG, *Archiv für die civilistische Praxis* (AcP), 164, 1964, p. 445.

[102] Originally: "*Dass die Arbeitsrechtsprechung in den vergangenen Jahrzehnten das sozial „richtige" Recht gefunden hat, ist eine Großtat von höchster politischer Bedeutung. Denn sie hat ihren wesentlichen Anteil daran, dass der Arbeiter die Befreiung aus einem unwürdigen Dasein nicht aus der Zerschlagung der bürgerlichen Ordnung, sondern aus ihrem Wandel zum sozialen Rechtsstaat erreicht hat und noch zu erreichen trachtet*".

Abstract

The idea of a special judiciary separate from the ordinary courts for the settlement of labour law disputes took root in Germany as early as the 19th century. Since then, a series of legislative reforms have led to a fully independent labour jurisdiction, with the Federal Labour Court as a purely reviewing court as the final step of a decades-long development and expression of the influence of trade unions which have always campaigned for a separate labour jurisdiction. One of the special features of the labour courts has always been that they are staffed equally by honorary judges from the employer and employee sides and have a neutral chairman. In addition, the aim has always been to reach an amicable settlement between the parties. Further- more, the costs of labour court proceedings are lower than those of ordinary court proceedings. Currently, and driven by the coronavirus pandemic, labour court pro- ceedings are being increasingly digitalised.

Keywords

Independent labour jurisdiction, honorary judges at labour courts, priority for amicable settlement, costs of labour court proceedings, digitalisation of labour court proceedings.

Alan C. Neal

Current trends in United Kingdom labour dispute resolution

Contents: 1. Introduction. 2. Formal judicial dispute resolution bodies: the Employment Tribunals. 3. The Institutional Framework for Labour Dispute Resolution. 4. Challenges and Proposals for Reform: Catching up after Covid. 5. Challenges and Proposals for Reform: More Efficient Dispute Resolution. 6. Challenges and Proposals for Reform: Effective Enforcement of Decisions. 7. Ongoing Reform and Modernisation. 8. Comment.

1. Introduction

The mechanisms originally developed for labour dispute resolution within the United Kingdom tended to reflect a "non-interventionist" philosophy which has historically been attributed to the national system of industrial relations. Settlement of disputes was traditionally left to voluntary procedures agreed between the labour market parties – although on occasions this was entrusted to "third parties", assisting employers and trade unions to reach agreement, but, generally, on a voluntary basis without the formal sanction of legal binding effect. It may also be noted that the United Kingdom has not witnessed any significant trend towards the compulsory settling of industrial conflicts such as might be found in systems such as those which developed in Australia or New Zealand (notwithstanding both belonging to the Common Law family).

Indeed, largely due to this historical environment of non-legal intervention, with relationships conducted on the basis of collective agreements which do not carry the "binding" force of legal sanctions[1], and disputes re-

[1] For the status and role of the "collective agreement" under Common Law in the United Kingdom, see NEAL, *The Collective Agreement as a Public Law Instrument*, in BANAKAS (ed.), *United*

solved on a voluntary basis, the United Kingdom is generally regarded as unique. Consequently, what might seem familiar or "normal" characteristics which are taken for granted in other national systems cannot be approached in the same way when considering the United Kingdom situation. One example of this "uniqueness" for the United Kingdom context is that it is very difficult to draw a sharp distinction between "collective" and "individual" disputes, since frequently these overlap[2]. By the same token, disputes are sometimes classified in terms of "disputes of interest", where the focus is upon the creation of new terms for working relationships, and "disputes of rights", where what is in issue is the application or interpretation of existing terms for those relationships[3]. However, this categorisation is not recognised in, and would not be regarded as significant for, the modern United Kingdom situation, where collective bargaining – and, by extension, the means for resolving disputes – is often said to be "dynamic" rather than "static"[4].

In what follows, the architecture of the modern United Kingdom labour dispute resolution system is presented, before comment is made about current challenges for that system. This includes presentation of the system of "Employment Tribunals"[5], which is where a majority of individual employment rights disputes are handled, together with the Employment Appeal Tribunal which acts as an appeal instance where issues of law arise, Mention is also made of the general system of civil courts in the United Kingdom

Kingdom Law in the 1980s, Butterworths/Sweet & Maxwell, 1988. On the phenomenon of the "collective agreement" in comparative legal theory, see Schmidt, Neal, *Collective Agreements and Collective Bargaining*, in *IECL*, Volume XV, Chapter 12, Tübingen, 1984. The most recent theoretical taxonomy is to be found in Neal, *In Search of the European (Union) "Collective Agreement"*, in Cosio, Curcuruto, di Cerbo, Mammone (eds.), *Il Diritto del Lavoro dell'Unione Europea*, Giuffrè Francis Lefebvre, 2023.

[2] Thus, by way of example, disputes over termination of employment for "economic" reasons and so-called "redundancy payments" could be regarded both as collective disputes and as matters of individual dispute resolution.

[3] When such a distinction has assumed significance in many European systems, it has tended to result in the establishment of different mechanisms to deal with each category of dispute.

[4] In that system, parties to an agreement will enter into undertakings which may be modified, as problems arise, in a dynamic and fluid manner. Those same parties will then establish, interpret and amend their own agreements – thereby assuming a dual "legislative" and "judicial" role in relation to the administration of those agreements. Such a process, it is said, "encourages open-ended agreements and discourages the fixing of time limits".

[5] Formerly, the "Industrial Tribunals".

whose jurisdiction covers most "collective" disputes (between employers and trade unions). For these purposes, the most common forum for labour dispute resolution is the High Court, from which appeals lie to the Court of Appeal (Civil Division) and thereafter to the Supreme Court of the United Kingdom.

2. Formal Judicial Dispute Resolution Bodies: The Employment Tribunals

Historically, "Industrial Tribunals" were created under the Industrial Training Act 1964 to deal with the question of appeals by employers against levies imposed on them by industrial training boards[6]. Other jurisdictions of an "administrative" nature followed, but a turning point came with dispute resolution jurisdiction conferred by the Redundancy Payments Act 1965, which gave those Tribunals more of a "judicial" function, since they were dealing with complaints between employers and employees[7]. In 1968, the Donovan Commission proposed that "Labour Tribunals" should deter- mine all disputes arising between employers and employees where there was

[6] Section 12 of that Act gave powers to the relevant Minister to make regulations for the establishment of "appeal tribunals" to deal with matters covered by the statute. Those powers were subsequently utilised to give rise to The Industrial Tribunals (England and Wales) Regu- lations 1965 (S.I. 1965/1101), which, having been brought into force on 31 May 1965, were modified thereafter through The Industrial Tribunals (England and Wales) (Amendment) Reg- ulations 1967 (S.I. 1967/301) which came into force on 13 March 1967. See also The Industrial Tribunals (England and Wales) (Amendment) Regulations 1970 (S.I. 1970/941), which came into operation on 3 July 1970.

[7] Albeit with "the State" implicitly involved as the guardian of what was known as "the redundancy fund". It has been noted – see WEDDERBURN, DAVIES, *Employment Grievances and Disputes Procedures in Britain*, University of California Press, 1969, Chapter 12, *The Practice of the Industrial Tribunals* – that the Minister of Labour in introducing the Redundancy Payments Bill in 1965 stressed that the tribunals in handling the cases would be "easy of access to workers and employers" and would "provide a speedy means of settling disputes with less formality and expense than might be entailed if disputes were to go to the courts." See HANSARD, 1965, Vol. 711 H.C. Deb. col. 46. That terminology expressing those aspirations was subsequently taken up by the Donovan Commission in its 1968 Report – see *Royal Commission on Trade Unions and Employers' Associations 1965-1968* (Cmnd. 3623) – in explaining their proposal for what were described as "labour tribunals" as being "…primarily, to make available to employers and employees, for all disputes arising from their contracts of employment, a procedure which is easily accessible, informal, speedy and inexpensive, and which gives them the best possible opportunities of arriving at an amicable settlement of their differences" (at para. 572).

no suitable voluntary machinery[8]. More specifically, it was suggested that these labour tribunals should be concerned with individual rights only, since collective matters should be dealt with by means of procedures emerging from the process of collective bargaining. The specific recommendation of the Donovan Commission has not been consistently adhered to, although it is clear that, so far as the protection of individual employment rights is concerned, Industrial Tribunals played a predominant role, since their jurisdiction over these kinds of disputes was increased substantially after 1968 – bringing with it a substantial rise in the work loads of those bodies[9].

In 1998 the Industrial Tribunals were renamed as "Employment Tribunals"[10], and the formerly "Chairmen" of Industrial Tribunals were redesignated as "Employment Judges"[11].

However, it is important to stress that what are now the Employment Tribunals – while "specialised" in the sense that they deal primarily with disputes arising out of working relationships – do not constitute a system of special "Labour Courts" in the sense of certain other European systems. Their range of competence is the result of a process of attributing jurisdiction

[8] *Royal Commission on Trade Unions and Employers' Associations 1965-1968* (Chairman, Lord Donovan), Cmnd. 3623, London, 1968. See especially Chapter X, under the heading "Labour Tribunals".At paragraph 576, the Donovan Commission was at pains to stress that: "In a number of fundamental respects our recommendation differs from some of the proposals for the creation of 'labour courts' or 'industrial courts' which have been placed before us. We do not propose that they should be given the job of resolving industrial disputes or differences arising between employers or employers' associations and trade unions or groups of workers, since these are matters which must be settled by procedures of, or agreed through, collective bargaining. Nor do we envisage that any matters arising between trade unions and their members or applicants for membership should be within the jurisdiction of the labour tribunals: we elsewhere recommend the setting up of a review body for the handling of such cases. Nor do we propose that the tribunals should deal with actions for damages arising from strikes or other labour disputes, except in so far as damages for breach of the contract of employment are claimed by either party to it against the other. In particular all claims for damages by reason of torts alleged to have been committed in connection with strikes would continue to go to the ordinary courts."

[9] The "trigger point" for a fundamental shift towards the granting of dispute resolution jurisdiction over normative rights arguably came with the introduction of power to deal with claims alleging "unfair dismissal", first introduced in the Industrial Relations Act 1971, which came into force in 1972.

[10] See Employment Rights (Dispute Resolution) Act 1998, s.1

[11] With effect from 1 December 2007. See Schedule 8 of the Tribunals, Courts and Enforcement Act 2007.

progressively by way of legislation, rather than a conscious and coherent move by the legislator to create a specialised component within the overall civil justice system. Consequently, the modern Employment Tribunals have developed as an institution to which has been delegated an increasing range of competence, in periods when legislation relating to the protection of employment rights was flourishing, rather than as a separate "Labour Court" as such[12].

Notwithstanding that there is no "formal" legal or reporting distinction drawn between "individual" and "collective" labour disputes, the reality is that employment-related disputes involving relations between worker organisations and employers are viewed very differently from disputes arising out of individual employment protections enjoyed by particular members of the workforce (who may or may not belong to a trade union or any other collective representative body).

Thus, while there may not be any formal definition of "individual labour disputes" in the United Kingdom, the matters commonly described in these terms include: (1) Where a dispute arises out of an alleged contrac- tual entitlement for the worker (Non-statute-based claim to the High Court or the County Court); and (2) Where a dispute arises out of an alleged statu- tory entitlement for the individual (Statutory jurisdiction allocated to the Employment Tribunal).

Historically (before 1963) such individual rights almost inevitably arose from the Common Law tradition developed within the United Kingdom legal system. Since 1963 there has been a steady (and accelerating) shift to normative individual rights being set out in legislative provisions. The primary collation of individual rights is now to be found in the Employment Rights Act 1996 – although numerous rights are contained in secondary legislation (normally, in the form of Statutory Instruments).

During the period of United Kingdom membership of what is now the European Union (1973-2020) a wide range of individual rights were transposed into United Kingdom law on the basis of European Union leg-

[12] The rapid extension of jurisdictions in the employment field also owed much to the arrangements under which the United Kingdom discharged its obligations under (what is now) European Union law to transpose the content of social policy Directives into domestic law. In the eyes of some, the Employment Tribunals offered a convenient forum for the adjudication of disputes arising out of a significant volume of social policy provisions introducing substantial new rights to workers.

islation (mainly in the form of Social Policy Directives)[13]. Where these gave rise to individual employment protection rights, the jurisdiction for dispute resolution in relation to these was almost always placed upon the system of Employment Tribunals.These provisions were normally to be found in Statutory Instruments passed by Parliament. Since Brexit, those instruments have largely remained in place[14].

By the same token, while there may not be any formal definition for "collective labour disputes", the matters commonly described in these terms include (1) Where a dispute arises out of an alleged right enjoyed by a trade union arising from a collectively agreed term (on the basis of Common Law contractual principles – always subject to the doctrine of restraint of trade and/or any statutory restriction placed upon the freedom to enter into any such binding contractual arrangement); or (2) Where a dispute arises out of an alleged right enjoyed by a trade union arising from a statutory provision.

Against this background, the question is commonly raised as to how many "labour disputes" there might be in the United Kingdom and how easy it is to identify such phenomena. However, that question is almost impossible to answer without introducing a large number of caveats. The ostensibly simple issue of defining what might be said to constitute a "labour dispute" – as well as more nuanced questions involving when what might be initially regarded as a "difference" turns into a "dispute" – leaves definitive proclamations on exceedingly thin ice[15]. In the following, therefore, some

[13] For the major European Union social policy instruments developed up to the Millenium, together with the policy documents setting out their rationale, see Neal, *European Labour Law and Policy: Cases and Materials*, Kluwer Law International, 2002 vol. I and II.

[14] Draft legislation placed before the United Kingdom Parliament initially envisaged large-scale repeal through the mechanism of a so-called "sunset clause" (designed to take effect on 31 December 2023) contained in the Retained EU Law (Revocation and Reform) Bill. However, following some indication from Ministers that the scope of that proposed "sunset clause" was under reconsideration (so that only specifically designated provisions de- rived from EU law would be repealed at the end of 2023), an announcement was made on 10 May 2023 that the "sunset clause" was to be abandoned and replaced by a list of designated measures which are to be repealed. The list has now been set out in Schedule I to the Re- tained EU Law (Revocation and Reform) Act 2023, which received its Royal Assent on 29 June 2023.

[15] For example, the 2004 Impact Assessment on the statutory dispute resolution procedures estimated, on the basis of the Legal Services Research Centre (LSRC) Periodic Survey, that there may be between 700.000 and 900.000 employment-related justiciable events each year. See Bis, *Final Impact Assessment. Dispute resolution review*, January 2010, p. 12, para. 34.

commonly-utilised indicators are presented to offer a broad-brush picture of the current United Kingdom situation[16].

The 2021 census of the United Kingdom suggests that there was a total population (mid-year 2021 estimate) of 67.026.300. The most recently reported employment rate (aged 16 to 64) for October 2023 (seasonally adjusted) was 75.7%, and the rate of unemployment for the same period was 4.2%[17].

One measure of "collective" labour disputes is the number of days lost through strikes. The figures produced by the United Kingdom's Office for National Statistics (ONS) present "Work stoppages because of disputes between employers and employees". This includes strikes and lock-outs, and presents a figure for the number of days lost in both the public and private sectors, together with the number of workers involved. From the available statistics it appears that "an estimated 2,472 million working days were lost between June and December 2022" – reflecting a particularly marked upsurge in industrial action since the end of restrictions introduced to deal with Covid-19[18].

That measure of days lost through strike action needs to be set against the background of trade union membership in the United Kingdom[19]. This has been declining over four decades, since reaching a peak in 1979 of 13.2 million, with modern-day concentration of membership being in the public sector[20]. The level of membership in 2022 was reported at 22.3% of

[16] The material presented in the following draws, in particular, upon the following: Ons, Census 2021; Ons, *Trade Union Membership, UK 1995-2022: Statistical Bulletin* (published on 24 May 2023); Ons, *Tribunal Statistics Quarterly: April to June 2023* (published 14 September 2023); Acas, *Annual Report and Resource Accounts* (various years – the most recent being for 2022-2023, published on 13 July 2023); Certification Officer for Trade Unions and Employers' Associations, *Annual Report 2022-23* (submitted to the Secretary of State for Business, published 6 July 2023); Central Arbitration Committee, *Annual Report 2022/23* (published 6 July 2023).

[17] See Ons, *Labour Market Statistics, November 2023* (published on 14 November 2023).

[18] Of these, over three-quarters (79%) came from workers in transport, storage, information and communication. See ONS, *The impact of strikes in the UK: June 2022 to February 2023* (published 8 March 2023).

[19] ONS and the Department for Business, Energy & Industrial Strategy issue various statistics in relation to trade union membership. See, in particular, *Trade Union Membership, UK 1995-2022: Statistical Bulletin* (published on 24 May 2023).

[20] According to the 2023 *Statistical Bulletin*, "Trade union membership levels as reported by the unions listed or scheduled in Great Britain reached their peak in 1979 (13.2 million) and declined sharply through the 1980s and early 1990s. From 1996 onwards the rate of decline

United Kingdom employees, reflecting trade union membership of 6.25 million.

So far as individual disputes can be identified, various approaches have been taken to measuring the level of such disputes in the United Kingdom[21]. In terms of the number of claims presented to the Employment Tribunals, the statistics focus upon the number of claims received by the Tribunals ("receipts"), and the number of claims completed and disposed of ("disposals"). They also indicate the current state of what remains a significant backlog in dealing with cases (presented in terms of "caseload outstanding", or, more recently, "open cases").The available statistics are divided into "single cases" and "multiple cases"[22]. First quarter figures for 2023 suggest that there were

slowed significantly, with occasional years of slight growth interspersed with the general annual reductions in membership. In 2020-21 unions reported membership at 6.73 million, up slightly on the year but down 15% from the 1996 level of 7.94 million. … The trend since 1995 for numbers of employees who are trade union members is similar. However, there are clearer periods of broad stability, between the mid-1990s and mid-2000s, and between 2011 and 2015, and slight recovery in 2017 to 2020, along with significant falls in the late 2000s, in 2016 and in 2021 to 2022. Overall, between 1995 and 2022 union membership levels among UK employees fell by 860,000 (12.1%) from 7.11 million to 6.25 million. … Union membership as a proportion of employees has fallen from 32.4% in 1995 to 22.3% in 2022. This is due to overall UK em- ployee numbers rising in the period by around 6.3 million to 28.3 million, while union mem- bership among employees fell."

[21] Much weight was placed by Government up until the turn of the Millennium upon work undertaken by Hazel Genn. See in particular, Genn, *Paths to Justice: What people do and think about going to law*, Hart Publishing, 1999, and the comments in relation to the propositions contained in that by Gaymer, *The Employment Tribunal System Taskforce*, in Dickens, Neal (eds.), *The Changing Institutional Face of British Employment Relations*, Kluwer Law International, 2006, at p. 119.The statistics presented by Genn in her "Paths to justice" research work led to figures being put forward which had been extrapolated from what were, in relation specifically to employment disputes, surprisingly low survey response rates. Nevertheless, these were repeatedly relied upon by government publications and swiftly became the "received wisdom".Thus, although a proposition that: "…between 1992-1997, there occurred 2.4 million serious employment problems (i.e. 500.000 per annum), while, during the same period, there were 429.280 applications to the Employment tribunals Service…" became widely accepted as a basis for governmental reform proposals in this field, the methodology for putting forward the estimate of "serious employment problems" remained somewhat opaque.

[22] "Single" claim data gives a reasonably consistent picture of "the normal state of affairs" in terms of the administration and processing of claims, whereas "multiple" claim data is presented as being "more volatile as they can be skewed by a high number of claims against a single employer". There has been a recent trend towards utilising "leading cases" whose out- come can then determine the outcomes of (often a very large number of) related cases. If the position is considered at the end of the financial year 2022/23, some five and a half thousand

7,900 single Employment Tribunal receipts, along with 6,700 multiple claim receipts. In that period, there were 7.100 single claim disposals, and 6.700 multiple claim disposals. At the end of June 2023 there were 35.000 single claim "open" (outstanding) cases, while at the same point multiple claim open cases stood at 436.000[23].

3. The Institutional Framework for Labour Dispute Resolution

As has already been indicated, there is no "Labour Court" so-called in the United Kingdom legal system – although consideration was given to this possibility during the course of the deliberations of the Donovan Commission which reported in 1968[24].

Collective labour law disputes – especially concerning strike action and the potential commission of "economic torts" – are dealt with in the High

"lead cases" were "open" at that time, giving a combined figure of all cases being listed for hearing slightly in excess of 43.000 cases.

[23] See MINISTRY OF JUSTICE, *Official Statistics:Tribunal Statistics Quarterly: April to June 2023* (published 14 September 2023). However, there are significant problems with reliance upon the statistics produced by the Ministry of Justice, since (as explained in the 2023 Q1 report): "Employment Tribunals transitioned to a new database (Employment Case Management) dur- ing March to May 2021. It has not been possible to provide full results from both databases during this migration period on a consistent basis.Therefore, Employment Tribunal (ET) data is not available for Q1 2021/22. Jurisdictional breakdowns for disposals, timeliness and outcome data are still undergoing more rigorous checks and will not be presented until the checks are complete. In addition, because of the operational differences between ECM and the previous database (Ethos), caution should be exercised when making comparisons in the statistical results before and after migration. Again, from September 2022, the Employment Tribunal has moved some cases in specific areas to a new case management system (Reform ECM). A very small proportion of cases (less than 2,000) in the new system are not included in the statistics. The numbers involved are not large enough to impact on the trends seen in the statistics." Although it is possible to find a wide variety of graphs and tables in published works which purport to offer an overview of trends over the fifty years since the introduction of statutory protection against "unfair dismissal", these need to be treated with the utmost caution. This is by reason of alterations made to the methods of data collection and the statistical evaluation of the data by the national statistical services. The nature of the changes, and explanation of the consequential impact, is usually evident in the relevant official statistical series – notwithstanding (often rather less than fair) allegations that the Government is keen to obfuscate the true picture by resorting to regular and significant changes in methodology – although it remains extremely difficult to produce truly comparable longitudinal data in this area.

[24] Cmnd. 3623, London, 1968. See *supra.*

Court, as part of the normal civil justice institutional framework. From there a right of appeal lies to the Court of Appeal (Civil Division) and thereafter to the Supreme Court. These courts exercise inherent jurisdiction over all matters[25].There is a possibility of resort to the County Court in relation to (low value) claims involving contract or tort – although very few cases actually take this route[26].

The bulk of individual employment dispute cases are first heard by an Employment Tribunal, which, like the County Court, is a "creature of statute" and thus has jurisdiction limited to that bestowed by the legislation[27].

It may be noted that the Industrial Tribunals were initially conceived of as more akin to "administrative" bodies – dealing with disputes between the citizen and the State (first with the administration of training levies, and then in 1965 with making decisions in relation to "redundancy payments" from the State-administered redundancy fund – under the Industrial Training Act 1964). Subsequently, the modern Employment Tribunals have become positioned clearly within the judicial institutions dealing with labour law[28].

Legislative reform eventually led to the Employment Tribunals becoming part of the United Kingdom's "unified tribunal system", within a newly-constituted Ministry of Justice, under the Tribunals, Courts and Enforcement

[25] The High Court also has jurisdiction to deal with individual labour disputes where specific provision has not been made for these to be dealt with elsewhere.

[26] The County Court is a so-called "creature of statute" – limited in its powers only to those powers granted by the specific legislation.

[27] In its 1994 Green Paper, the Department of Employment reported an overall twenty-two jurisdictions. See *Resolving Employment Rights Disputes: Options for Reforms* Cm. 2707, Employment Department, 1994,Annex A, at p. 69. Since then the range of jurisdictions has rapidly expanded.The most recent set of judicial codings (not available publicly – being contained in a document for administrative use only) indicates a total of 79 separate jurisdictions – although this is open to some debate, given that a number of codings can be said to cover more than one potential cause of action.

[28] Although their origins and development have continued to present challenges to traditional Civil Service approaches to a tribunal which is somehow not a "tribunal" in the sense of the 1957 Franks Committee Report on Administrative Tribunals and Enquiries. See Franks Committee Report on Administrative Tribunals and Enquiries (Cmnd. 218) published on 15July 1957.That report eventually gave rise to a Tribunals and Inquiries Act 1958 and resulted in the establishment of a body known as the Council on Tribunals. Nor has the issue entirely disappeared as to whether (and, if so, in what contexts) the Employment Tribunal constitutes "a court" for various statutory purposes: see, for example, the discussion in the case of *Advisory, Conciliation and Arbitration Service v.Woods*, (2020) EWHC 2228 (QB), per Auerbach J.

Act 2007[29]. That statute also underscored the independence of tribunal judiciary (including judicial officers in the Employment Tribunals) in the context of the Constitutional Reform Act 2005[30].

The composition of the Employment Tribunal is provided for in s.4 of the Employment Tribunals Act 1996[31]. Following a sequence of amendments which have increasingly allocated cases to be heard by an Employment Judge sitting alone, it would appear that there has been substantial departure from the original concept of the "Industrial Tribunal" set out in the report of the

[29] See Tribunals, Courts and Enforcement Act 2007, which received the Royal Assent on 19 July 2007. Following controversial treatment of the general tribunal system by a report pub- lished at the end of 2001 – see: *Tribunals for users: One System, One Service – Report of the Review of Tribunals by Sir Andrew Leggatt* (The Stationary Office, London, March 2000) – a Task Force on Employment Tribunals delivered its report during the Summer of 2002: *Moving Forward:The Report of the Employment Tribunal Taskforce*. These documents needed to be seen together with the report of the Better Regulation Task Force, *Employment Regulation: striking a balance*, pub- lished in May 2002.This led to proposals to modify the standing and position of the Employ- ment Tribunals and the EAT within the general courts and tribunals system, as had been set out in the White Paper (published by the DCA in July 2004) *Transforming Public Services: Com- plaints, Redress and Tribunals* (Cm 6243). Subsequently, see DEPARTMENT OF TRADE AND INDUS- TRY, *Better Dispute Resolution: A review of employment dispute resolution in Great Britain* (Chairman,Michael Gibbons), HMSO, London, March, 2007.

[30] See Tribunals, Courts and Enforcement Act 2007, s.1, by reference to s.3 of the Constitutional Reform Act 2005.

[31] This is a subject which has been under continual political consideration. Currently, it is envisaged that, when it is brought into force, section 35 of the Judicial Review and Courts Act 2022 will substitute new sections 4 and 28 into the Employment Tribunals Act 1996.Those new provisions will give the Lord Chancellor the responsibility to make regulations determining the number of members who are to compose the Employment Tribunal and Employment Appeal Tribunal in a particular case. Against that background, a *Senior President of Tribunals' Consultation on Panel Composition in the Employment Tribunals and the Employment Appeal Tribunal* was launched with a deadline for responses extended until 27 April 2023.The introduction to that consultation points out that the Lord Chancellor can discharge that responsibility by delegating it to the Senior President of Tribunals ("SPT"). Furthermore, it is indicated that the Ministry of Justice have shared draft regulations under which the Lord Chancellor's responsibility will be delegated to the SPT on the basis that for each matter in the Employment Tribunals, the SPT will be required to determine whether the tribunal should be composed of one, two, or three members, having regard to (1) the nature of the matters to be decided and the means by which they are to be decided, and (2) the need for members of tribunals to have particular expertise, skills or knowledge.The Employment Appeal Tribunal would be composed of a single member by default, unless the SPT determines that it is to consist of two or three members.At the time of writing, no formal position has been announced in response to the consultation process, with the senior Law Officers concerned having announced that they would await conferral of new legislative powers before committing themselves to a formal position.

Donovan Commission in 1968[32].Writing in 2009[33], this author commented that:

"The 'normal' perception of the Employment Tribunals' composition remains 'tripartite', although there have been repeated attempts to increase the proportion of cases dealt with by an Employment Judge sitting alone – mostly orchestrated by HM Treasury in the purported interest of 'efficiency gains' – which have, so far, been resisted. Indeed, the employment judiciary themselves have been vociferous in their disapproval of such proposals – as can be seen through the public representations made on their behalf by the Council of Employment Tribunal Judges".

Support for that concern was offered by reference to what was described as "recent peddling of the virtues of 'judge sit-alone' disposal of employment cases"[34]. Since the time of that observation, indeed, recent

[32] Particularly in so far as successive changes have shifted substantially away from any notions of "tripartism" developed in the middle of the 20th century – whether in the sense familiar to those concerned with the activities of the International Labour Organisation (ILO) or as to be found in national variants of "tripartite representation" on official bodies. See *inter alia* The Employment Tribunals Act 1996 (Tribunal Composition) Order 2012 (SI 2012/988), which came into force on 6 April 2012.That instrument introduced an amendment to s.4(3)(c) of the Employment Tribunals Act 1996.That section had previously been amended by the Em- ployment Rights (Dispute Resolution) Act 1998 (c.8), sections 3(1) to (3), 15, and Schedule 1, paragraph 12. Section 4(2), which is relevant to section 4(3), was amended by the Tribunals, Courts and Enforcement Act 2007 (c.15), section 48(1), and Schedule 8, paragraphs 35 and 37. Section 4(3) was amended by the Employment Rights (Dispute Resolution) Act 1998 (c.8), sections 1(2)(a), 3(1) to (5), 15, and Schedule 1, paragraph 12(1) and (3), and Schedule 2;Transfer of Undertakings (Protection of Employment) Regulations 2006 (S.I. 2006/246), regulation 20, and Schedule 2, paragraph 8; National Minimum Wage Act 1998 (c.39), section 27(1); Employ- ment Act 2008 (c.24), section 9(4); and the Employment Tribunals Act 1996 (Tribunal Com- position) Order 2009 (S.I. 2009/789), article 2.

[33] Neal, *Labour Dispute Resolution in Recessionary Times: Some Comparative Sino-British Perspectives*, paper prepared for High-Level Conference of the Chinese Academy of Social Sciences (CASS, Beijing, 24 July 2009).

[34] See, for example, Department of Trade and Industry, *Better Dispute Resolution: A review of employment dispute resolution in Great Britain* (Chairman, Michael Gibbons), HMSO, London, March 2007, at para.3.22: "There are several types of Employment Tribunal claims, i.e. those involving determinations of fact in monetary disputes, such as unlawful deductions of wages, holiday pay, breach of contract and redundancy pay, which could in most cases be settled quickly without the need for a Tribunal hearing. What is required is a quick, expert view on the legal position, and on the appropriate next steps (e.g. payment of an amount due to the Claimant, or the withdrawal of the claim), coupled if necessary with some kind of enforcement order".

developments might be suggested to have been promoting such a direction of travel to an even greater extent[35].

The issue of panel composition in the Employment Tribunals has remained at the forefront of policy review in relation to the activities of those bodies. However, the current situation provided for in s.4 of the Employment Tribunal Act 1996 is still that:

(1) Preliminary hearings (in all kinds of cases) are conducted by an Employment Judge sitting alone – unless a party has made a written request for the hearing to be conducted by a panel (consisting of an Employment Judge sitting together with two non-legal members) and a judge has decided that this would be appropriate. Thus, "case management" between the time of presentation of a claim and its eventual full trial is carried out almost exclusively by Employment Judges sitting alone.

[35] Including various attempts at the political level to limit the scope of the activities of the Employment Tribunals in general. See, in particular, an ill-fated experiment with introducing fees as a condition of accessing the dispute resolution procedures offered through the Employment Tribunals: For the first time Employment Tribunal fees were introduced by the *Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013* (SI 2013/1893). Prior to that, Claimants had not been required to pay fees to bring their claims. Fee payment was also introduced in relation to taking appeals to the Employment Appeal Tribunal.The arrangements for the imposition of fees are described in detail in the Judgment of Lord Reed delivering the unanimous opinions of the United Kingdom Supreme Court in *R (on the application of UNISON) v. Lord Chancellor,* (2017) UKSC 51 – see, in particular, paras. 16-19 and 21-25. Following the introduction of the fees regime, the volume of claims presented to the Employment Tri- bunals fell dramatically.This was summarised by the Supreme Court in terms that: "Since the Fees Order came into force on 29 July 2013 there has been a dramatic and persistent fall in the number of claims brought in ETs. Comparing the figures preceding the introduction of fees with more recent periods, there has been a long-term reduction in claims accepted by ETs of the order of 66-70%". The propriety of introducing tribunal fees was the subject of repeated judicial review proceedings. However, until the matter reached the Supreme Court, those chal-lenges failed. Eventually, on 26 July 2017 the United Kingdom Supreme Court handed down a judgment quashing the Fees Order and declaring it to be an unlawful interference with thecommon law right of access to justice. In consequence of the Supreme Court ruling, Employ- ment Tribunal and Employment Appeal Tribunal claims therefore no longer attract fees. Fur- thermore, the effect of the declaration was that fees were ruled as being unlawful from the outset, meaning that the Government had collected them unlawfully. By reason of this, the Ministry of Justice and HM Courts and Tribunals Service announced the establishment of an Employment Tribunal Refund Scheme through which those who had paid fees would be re- imbursed. The most recent report on the operation of that reimbursement scheme indicates that the total value of refunds had risen to £18.595.000 as at 31 March 2022. See *Tribunal Sta- tistics Quarterly: January to March 2022* (published 9 June 2022).

(2) Cases falling within s.4(3) of the Employment Tribunals Act 1996 are conducted by an Employment Judge sitting alone[36].

(3) All other cases are heard by a "panel", normally consisting of an Employment Judge and two other members ("non-legal members")[37].These cases thus continue to reflect something of a "tripartite" structure[38].

It should be noted that "preliminary hearings" may include hearings to determine so-called "preliminary issues" – such as whether the Tribunal has jurisdiction to hear a claim, whether a claim has been presented in time, or whether a Claimant alleging unlawful discrimination by reference to the protected characteristic of disability is able to satisfy the statutory definition of "disabled person".Where the determination of such issues could result in the final disposal of a party's claim or defence, these preliminary hearings will be heard in public (what has come to be described as "Open Preliminary Hearings")[39].

[36] The cases falling within this category are diverse and wide-ranging, including so-called "short track" cases (in particular, cases involving alleged non-payment of wages due).This category represents what are sometimes referred to as "judge-only by default" cases (with a discretion for the judge to decide that the case should be heard by a full panel instead) – to which cases concerning allegations of "unfair dismissal" were added with effect from 6 April 2012. See Employment Tribunals Act 1996, s.4(3)(c) as enlarged by The Employment Tribunals Act 1996 (Tribunal Composition) Order 2012 (S.I. 2012/988). The shift away from the "industrial jury" towards cases heard by a professional judge sitting alone has developed since the enactment of s.36 of the Trade Union Reform and Employment Rights Act 1993.

[37] Employment Tribunals Act 1996, s.4(1).

[38] Although the original model, under which the judge sat with a lay member nominated by the Confederation of British Industry (CBI) (bringing experience from the "employer side" of industrial relations) and a member nominated by the Trades Union Congress (TUC) contributing experience from the "worker side" of industrial relations, has been changed. Thus, the non-legal members are no longer nominated by the CBI and TUC, but are still split between what are described as an "employer panel" and an "employee panel". Some indication of the backgrounds from which non-legal members of the Employment Tribunals are drawn can be discerned from Ministry of Justice, *Official Statistics: Diversity of the judiciary: Legal professions, new appointments and current post-holders - 2022 Statistics* (published 14 July 2022 and updated 13 July 2023), see in particular section 1.9 (Non-legal Members of Tribunals).A drive to further diversify the judiciary has been taken up by the Lady Chief Justice of England and Wales, while calls for improvement continue to be heard. See, for example, *Increasing Judicial Diversity: An Update - A report by JUSTICE*, London, 2020, which built upon an earlier report (*Increasing Judicial Diversity*) published in 2017.

[39] The procedure in this respect has been driven by a concern to ensure that rights under Article 6 of the European Convention on Human Rights 1950 are respected.Article 6.1 provides that: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independentand impartial tribunal established by law. Judgment shall be pronounced publicly but the press

However, the normal position is that "preliminary hearings" are held in private[40].

Numerous proposals have been put forward over the half century of their existence to modernise and "make more efficient" the use of Employment Tribunal resources[41]. Many of these have sought to suggest that there should be a greater "professionalisation" of the Tribunal judiciary and a move away from the "1970s notion" of "the industrial jury"[42]. A particular theme

and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

[40] See Employment Tribunals Rules of Procedure 2013 (as amended), Rule 56.

[41] In this context, note may also be made of the statutory power to issue "Practice Directions" – see s.7A of the Employment Tribunals Act 1996 (as introduced in 2002). However, no such instruments have so far been issued under the power contained in s.7A. Instead, Regulation 10A of the Employment Tribunals Rules of Procedure 2013 has been utilised to issue directions concerning such things as the use of "Legal Officers".This power is exercised by the Senior President of Tribunals, in conjunction with the Presidents of the England and Wales Employment Tribunals and the Scottish Employment Tribunals. Powers are granted by Regulation 11 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 for the Presidents to issue "Practice Directions", while there are also powers under Rule 7 of the Employment Tribunals Rules of Procedure to issue "Presidential Guidance". Wide- ranging use of these powers has been made, including the important *Presidential Guidance (Eng- land and Wales): General Case Management* (issued on 22 January 2018; *Practice Direction (Englandand Wales): Remote Hearings and Open Justice*, issued on 14 September 2020; *Presidential Guidance (England and Wales): Alternative Dispute Resolution*, first issued in 2018 and updated on 7 July 2023; *Practice Direction (England,Wales and Scotland) Recording and Transcription of Hearings*, issued on 20 November 2023; and *Presidential Guidance (England & Wales):Vulnerable Parties and Witnesses*,issued on 22 April 2020.

[42] The expression "industrial jury" was coined by a series of judgments in the Employment Appeal Tribunal – see, in particular, *Iceland Frozen Foods Ltd v. Jones*, (1983) ICR 17, where Browne-Wilkinson J., in a case concerning "unfair dismissal", commented that: "…the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted".The expression reflected the original composition of the tribunal panel as a tripartite body comprising a judge, sitting together with two non-legal members (one nominated by the Confederation of British Industry, to pro-vide "employer" experience, and the other nominated by the Trades Union Congress, to pro- vide experience from the "worker" side of industry). It may be noted that, in the Impact Assessment for proposals under consideration in 2016 relating to the "Composition of First-tier Tribunal panels", the view was expressed that, in relation to Employment Tribunals, "The proportion of unfair dismissal cases successful at hearing has not been notably affected at around 10% between 2007/08 and 2009/10, 8% in 2010/11, 9% in 2011/12, 8% in 2013/13 and 2013/14,

in these reform proposals has been to reduce the number of cases in which a full panel sits, in favour of more cases being disposed of by an Employment Judge sitting alone[43].

Provisions in the recently enacted Judicial Review and Courts Act 2022 are, at the time of writing, waiting to be brought into force, substituting a new s.4 into the Employment Tribunals Act 1996[44]. In consequence, arrangements governing the composition of both the Employment Tribunals and the Employment Appeal Tribunal will be determined through regulations made by the Lord Chancellor[45]. With a view to discharging this obligation to produce new arrangements within the framework of the 2022 Act, the Senior President of Tribunals launched a consultation on panel composition in the Employment Tribunals and the Employment Appeal Tribunal, responses to which are, at the time of writing, being evaluated[46].

The powers and formal requirements relating to judgments being reached in the Employment Tribunals are to be found in the Employment Tribunals Rules of Procedure 2013[47]. After that, there is a right to seek "reconsideration" of a decision or judgment made by an Employment Tribu-

and 11% 2014/15.This would imply that the reduction in panel members in these cases has not significantly affected the outcome for users." (IA MoJ021/2016, p. 7 at para. 45). Whether the suggested implication could be substantiated or not remains a matter of contention, but, in any event, the proposal was not acted upon at the time – not least, given the problem arising with the unconstitutionality of the "fees regime" which arose shortly afterwards.

[43] Amongst proposals for reform may be mentioned: *Industrial Tribunals,A Report by Justice* (Chairman of Committee Bob Hepple), 1987; *Tribunals for Users One System, One Service*: *Report of the Review of Tribunals by Sir Andrew Leggatt*, 2001; Department for Business Innovation & Skills, *Resolving workplace disputes: A consultation*, 2011; The Law Society, *What is the future for Employment Tribunals?*, 2014; *Good Work: The Taylor Review of Modern Working Practices*, 2017; and the current rounds of consultation already referred to above.

[44] See Judicial Review and Courts Act 2022, s.35, which also substitutes s.28 of the 1996 Act (dealing with the composition of the Employment Appeal Tribunal).The 2022 Act contains a number of provisions (in ss.34-38) relating specifically to Employment Tribunals and the Employment Appeal Tribunal.

[45] Who, in turn, may delegate the task of producing the regulations to the Senior President of Tribunals.

[46] See Senior President of Tribunals, *Consultation – panel composition in the Employment Tribunals and the Employment Appeal Tribunal*.The consultation closed on 27 April 2023.

[47] See Rules 60-69 of the Employment Tribunals Rules of Procedure 2013 (decisions and reasons). For completeness, it should also be mentioned that there is also facility for so-called "judicial assessment" within the framework of the Employment Tribunals, as well as provision for "judicial mediation" before a dispute comes to a panel at full trial.

nal[48]. From a judgment of the Employment Tribunal an appeal lies (on a point of law only) to another "creature of statute" – the Employment Appeal Tribunal[49]. Appeals from the Employment Appeal Tribunal then may lie to the Court of Appeal (Civil Division)[50] and, finally, to the United Kingdom Supreme Court[51].

It may be noted that, unlike the position in some other countries, there is no formal "labour chamber" in the higher United Kingdom courts. Notwithstanding this, however, it is not uncommon to find that the com-

[48] Under the provisions of Rules 70-73 of the Employment Tribunals Rules of Procedure 2013.

[49] See s.21 of the Employment Tribunals Act 1996. The formal jurisdiction of the Employment Appeal Tribunal is set out in s.21 of the Employment Tribunals Act 1996, while that body's powers are provided for in s.35 of the same enactment. The composition of the Employment Appeal Tribunal is provided for by s.28 of the Employment Tribunals Act 1996 (as amended in 2013). The procedures relating to the lodging of appeals before the Employment Appeal Tribunal are set out in a Practice Direction of 2018 – see Practice Direction (Employ- ment Appeal Tribunal - Procedure) 2018. The Employment Appeal Tribunal's powers are set out in Part II of the Employment Tribunals Act 1996 (as amended) and the Employment Appeal Tribunal Rules 1993 (as amended).

[50] See s.37(1) of the Employment Tribunals Act 1996, which provides that: "...an appeal on any question of law lies from any decision or order of the Appeal Tribunal to the relevant appeal court with the leave of the Appeal Tribunal or of the relevant appeal court."

[51] During the period when the United Kingdom was a member of what is now the European Union there was power for any of these bodies to make references to the Court of Justice of the European Union in Luxembourg, under the provisions of Article 267 of the Treaty on the Functioning of the European Union. Since Brexit and the departure of the United Kingdom from those arrangements in January 2020 that power has been removed. Nor do the provisions of Article 19 of the Treaty on European Union (provision of "remedies sufficient to ensure effective legal protection in the fields covered by Union law") apply any longer, or the provisions of Article 47 of the Charter of Fundamental Rights of the European Union (Right to an effective remedy and to a fair trial). Outwith the European Union, however, it is the case that the United Kingdom remains obligated by Article 13 of the European Convention on Human Rights 1950 (Right to an effective remedy) as overseen by the Council of Europe. In relation to the effect of the Brexit Withdrawal legislation, see *inter alia HMRC v. Perfect*, (2022) EWCA Civ 330. See also pending proceedings where a 2020 decision of the United Kingdom Supreme Court in relation to an arbitration matter has become the subject of challenge by the European Commission. On 9 February 2022, the European Commission announced that it had decided to refer the United Kingdom to the Court of Justice of the European Union in relation to the Supreme Court's judgment of 19 February 2020 in *Micula and others v. Romania*, (2020) UKSC 5. See also House of Commons Library publications, S. de Mars, *Brexit Next Steps? The Court of Justice of the European Union and the United Kingdom* (CBP 8713, published on 17 October 2019).

position of the panel (especially at the level of the Court of Appeal) hearing labour dispute cases will include judges who have previously served in the Employment Appeal Tribunal (normally, as a former President of that body).

In terms of other institutional actors which could be said to fall within the umbrella of judicial bodies, mention should be made of the Central Arbitration Committee, which is responsible for disputes arising in relation to the statutory recognition of trade unions; the disclosure of information for collective bargaining; applications and complaints related to information and consultation arrangements; establishing and operating European Works Councils[52]; and complaints about the level of involvement employees have in certain decisions covered by regulations related to European companies,co-operative societies and cross-border mergers[53].

4. Challenges and Proposals for Reform: Catching up after Covid

The establishment of the original Industrial Tribunals in 1964, the creation of administrative jurisdiction in cases of economic dismissal (redundancies) in 1965, and responsibility for adjudicating party-to-party "private law" disputes over termination of employment in 1972, may be regarded as key moments in the evolution of a modern system of labour dispute resolution in the United Kingdom. So, too, have the (eventually ill-fated) introduction of substantial fees as the price of access to justicein individual employment disputes and a significant move away (over many years) from the original 1960s model of "tripartism" presented fundamental challenges to traditional notions of "industrial justice". However, it is now increasingly becoming evident that developments in the last half decade (and, in particular, measures emerging in the context of State responses to the Covid-19 pandemic) are bringing with them dra-

[52] The situation in relation to "European Works Councils" and the role of the CAC remains less than entirely clear in the context of post-Brexit arrangements. See, for example, the judgment of the Employment Appeal Tribunal in *easyJet PLC v easyJet European Works Council and Secretary of State for Business Energy and Industrial Strategy*, (2022) EAT 162.

[53] The Central Arbitration Committee, which is an independent tripartite body with statutory powers, also offers facilities for voluntary arbitration in collective disputes.The role of the Chair of the Central Arbitration Committee is quasi-judicial and decisions can be appealed to the higher courts.

matic change at a pace quite unlike anything which has been seen over the last 75 years.

For some idea of the extent of this revolution it is necessary to cast one's mind back to "how things were done" immediately before the Covid-19 "lockdown" imposed across the United Kingdom in March 2020. The Employment Tribunals held trial hearings in person in the physical location of each of the regional Employment Tribunal areas. Although a certain amount of pre-trial "case management" had been routinely dealt with by telephone conference involving a judge and representatives of the parties, this remained limited and the provision of technical facilities in the tribunal centres was – to put it at its kindest – basic. Traditional tape-recording machines in the hearing rooms, along with personal dictation machines for some of the full-time judges, were in the process of being replaced by digital recording devices, while the use of dictation/transcription software was very much a question of personal preference (or, simply, availability) for individual judges.

The case files held for each set of proceedings were in paper format, with the physical documentation being held securely in the tribunal offices. Bundles of documents for use during litigation, as well as written witness statements prepared on behalf of witnesses to be called during the trials, were assembled in paper form, with regular logistical problems arising from the inadequacies of "lever-arch files" within which to contain them. A "control file" would be collated for each case, physical possession of which was transferred from department to department within the tribunal hearing centre, and onto which was appended each additional document, handwritten note, instructions and miscellaneous items associated with the case as it progressed through the system to final trial and judgment. There was no question of this physical data being moved outside the physical location of the hearing centre itself – and, indeed, it was regarded almost as "a hanging offence" to even contemplate removal of an original document from the physical confines of the tribunal building.

Little more than three years on from the outbreak of the Covid-19 pandemic that "way of doing things" is scarcely recognisable. An early embracing of video-conferencing facilities by the senior judicial leadership of the Employment Tribunals[54], coupled with remarkable investment of goodwill

[54] See, in particular, *Presidential Guidance on remote and in-person hearings*, issued by the President of the Employment Tribunals (England and Wales) on 14 September 2020.

on the parts of both full-time and part-time judges, laid the foundations for what has already come to be regarded as "the new normal"[55].

Case documentation across the Employment Tribunal system is now routinely held electronically, along with case dossiers, "bundles" of documents for use at trial, and pre-prepared witness statements. This development, together with rapid improvements in video-link technologies and a greater availability of those technologies to the judiciary, has enabled a much more flexible and effective framework to be created for case management and trials. Almost all pre-trial "case management" activity is now conducted by judges sitting alone by way of video or audio links. Large numbers of trials now take place "on-line", with parties joining court administrators and judiciary remotely. Even where more complex trials are involved – for example, where multi-day hearings are listed for tripartite panels to adjudicate claims alleging discrimination or "whistleblowing" at work – many (if not all) of the early reservations about "effective justice" have been dispelled. Meanwhile, particular types of proceedings – such as "judicial mediation" – have shown themselves to be ideally suited to the flexibility afforded by video-link facilities.

Indeed, so far has this progress come that the Employment Tribunals established a pilot version of a "Virtual Region", whereby a limited number of judges drawn from the various geographical regions across England and Wales are available to sit (remotely, by video-link) on cases arising nationally in any of the Employment Tribunal regions. That experiment has proved highly successful, and has been taken as a model for developments in a number of other jurisdictions apart from the employment field.

Nevertheless, while progress towards more flexible modes of administering and hearing labour dispute cases has been achieved at a speed which would have been unimaginable in the pre-Covid rule-bound and conserv-

[55] The United Kingdom was not alone in this shift of attitude to former ways of working. See, for example, the experiences detailed in the Proceedings of the extraordinary meeting of the European Association of Labour Court Judges (EALCJ), held (on-line) on 6 June 2020, dealing with *Challenges and Experiences with Administration of Labour Courts in the face of Covid-19*, and the Proceedings of the following meeting (held – also on-line – to mark the 25th anniversary of the EALCJ), *The Future of Labour Law & the Role of the Labour Court*, on 19 & 20 November 2021. A survey conducted in June 2020 by the UK Council of Employment Judges provided further information across a range of jurisdictions. For more detailed indications of some of the changes which were afoot at that time, see, *inter alia*, HM Courts & Tribunals Service, *Evaluation of remote hearings during the COVID 19 pandemic: Research report*, compiled by Janet Clark, HMCTS and published in December 2021.

atively introverted administrative arrangements within the United Kingdom's public service, there remain a number of critical problems affecting the labour dispute resolution framework which are confronting the senior judiciary and policy-makers with major challenges.

Perhaps the most obvious challenge is to be seen in a significant backlog of cases within the Employment Tribunals system.As has already been noted, the most recently available statistics suggest that, by the end of June 2023, the figure for "open cases" – largely a euphemism for "backlog" – stood at 35.000 "single" claim cases together with around five and a half thousand lead cases reflecting 436.000 "multiple" claims.There are many reasons (some of which elicit more sympathy than others) for this state of affairs, although it may be noted that the extent of a growth in "open" cases attributed to the Covid-19 restrictive period appears to have been relatively limited – the present figures being compared with a backlog of just over 30.000 pre-Covid.

A long period of "cuts" to public services – within which "the justice system" is not afforded any special or enhanced protected status – provides the historical context to much of the problem.That tendency to reduce public spending on the administration of justice gathered pace during a prolonged period of what was dubbed "austerity policies" following a change of government in 2009. Furthermore, measures designed to address perceived problems in relation to "employment disputes" are not regarded politically as carrying the same degree of urgency as, for example, issues arising in relation to crime or family disputes.

Notwithstanding this, however, there has been a substantial programme of appointing new recruits to the Employment Tribunals judiciary[56]. Both

[56] An early recruitment exercise was launched in 2018, not long after the United Kingdom Supreme Court had ruled the 2013 "fees regime" unconstitutional – with a consequent return to pre-2013 levels of claims placing sudden and severe pressure upon judicial resources in this jurisdiction. See an overview of that appointment exercise by the then President of the Employment Tribunals of England and Wales, Judge Brian Doyle: Doyle, *Could you be an employment judge? Your employment tribunal needs you!*, 2018, 25 *ela Briefing* 6. Further appointment exercises took place in 2021, after initial announcement in October of that year. During 2023 two further exercises have been under way with a view to (1) recruiting 50 further fee-paid employment judges into the England & Wales system; and (2) recruiting an additional 50 full-time equivalent salaried Employment Judges for appointment primarily to the London and South-East of England – where there have been particular pressures upon judicial resources. These appointment exercises are conducted by the Judicial Appointments Commission (JAC) which is responsible for selecting candidates for judicial office in England and Wales, and for some tribunals with UK-wide powers.

salaried judges (full-time and fractional appointments) and fee-paid judges have been appointed, and the impact of this increase in judicial resources is gradually beginning to be felt as the new appointees complete their induction and early experience career development[57].

5. Challenges and Proposals for Reform: More Efficient Dispute Resolution

Even before the "shock" delivered by Covid-19, there had already been growing calls for improvement to the Employment Tribunals system on a number of fronts. More recently, a survey undertaken by the Employment Lawyers Association (ELA) in April and May 2021 (a year after the first "lockdown" measures introduced to combat Covid-19) identified widespread dissatisfaction at delay in bringing cases to trial and a general sense that tribunals were taking longer to handle standard administrative matters. The findings were summed up in terms of "…a creaking tribunal system which, in many regions, is functioning at a snail's pace and threatening access to justice for both workers and employers", while the root causes were said to lie in "…chronic understaffing, unavailability of resources and an increase in the volume of work for Tribunals".

On the other hand, the ELA survey also indicated a strong measure of approval for ways in which the Employment Tribunal system had been at the forefront of innovating with ways of working in the new circumstances. Thus, it was noted that "…Employment Tribunals have led the way in pioneering video hearings.They have been a great success in hearings and trials of fewer than three days.We believe they are here to stay".

Looking back even to developments in the past two years, it is clear that many of the most pressing issues concerning judicial resource have been addressed through large-scale recruitment into the Employment Tribunal judiciary. So, too, has the widespread acceptance of video-link hearings,

[57] However, there had remained some problematic "judicial morale" issues – in particular, as regards the continuing commitment of fee-paid judges whose judicial sittings had been reduced to negligible levels during the period of the "fees regime" between 2013-2017 – although there are encouraging signs that conscious efforts by successive Presidents of both the England & Wales and Scottish tribunals to address that unfortunate legacy have largely succeeded in mollifying any underlying dissatisfaction on the parts of judicial officers subject to a particularly unattractive public sector variant of a zero-hours contract.

electronic documentation for trials, and associated improvements to the underlying administration of the Employment Tribunals case-load been credited with some success in tackling the backlog of "open" cases and fundamental questions of "access to justice" in the employment field. Nevertheless, long delays are still encountered in bringing cases to trial – something not assisted by the increasing complexity of much of the subject-matter with which the Employment Tribunals deal on a daily basis[58].

A recurring problem in relation to the availability of judges for sittings within the Employment Tribunals is shared with other jurisdictions across the civil justice system of the United Kingdom.This is in relation to the allocation of what is described as "sitting days" – a process which is conducted in relation to financial years and which is regularly severely limited by financial constraints determined by central government[59].

For the Employment Tribunals, whose allocation of sitting days is undertaken along with all other resource allocations across all jurisdictions, the designated requirement for judge sitting days is – at least in theory – settled for the forthcoming financial year as part of the resourcing of HM Courts and Tribunals Service (HMCTS). The decision in this context is made by the Lord Chancellor, who is a political appointee. Such decisions are reached on the basis of projections of current trends in receipts, disposals and outstanding cases, together with some possible input from users[60].

[58] A "snapshot" of the position in the largest Central London tribunal centre at the beginning of December 2023 suggests that 1, 2 and 3-day hearings are being accommodated within four months, but that hearings listed for four days or more are unlikely to be brought on until the latter half of 2024. The picture varies depending upon individual regions, with some hearing centres already looking at listing cases well into late 2024.

[59] The presentation here of the procedure for allocating "sitting days" is drawn from *'Sitting days': How are they decided?*, in *https://insidehmcts.blog.gov.uk/2021/06/18/sitting-days-how-are-they-decided/* (last accessed 5 December 2023).

[60] The procedure is for the Lord Chancellor to consider the forecasts, the level of outstanding work in jurisdictions and the available judicial resource, after which a proposed allocation of sitting days will be decided. This is then shared with the Board of HMCTS, which then advises the Lord Chief Justice and Senior President of Tribunals as to whether the settlement is sufficient for the efficient and effective operation of the system. This then leads to a formal discussion between the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals, where the Lord Chancellor sets out the proposal, which includes the number of sitting days across Crown, Civil, Family and Magistrates' courts as well as for all Tribunals.The Lord Chief Justice and Senior President consider the Board's advice and respond.This may in- volve highlighting any risks associated with the proposals and concerns relating to shifting vol- umes of demand. If the Lord Chief Justice and the Senior President of Tribunals are concerned

Unfortunately, however, recent years have witnessed serious delays in determining the eventual allocation of sitting days – such that allocations have been finalised as late as the end of the second quarter of the financial year. In consequence, half of the operational year has already been completed, with listing of cases having to be done without any idea of what the eventual capacity will turn out to be. Once the final allocation figure is released, it is then possible for a more informed listing process to be completed for the remainder of the financial year. However, this gives rise to a number of knock-on problems.

Given that even single day, 2-day and 3-day cases in the Employment Tribunals are taking some four months to bring to a final trial hearing, this leaves very little flexibility in the latter part of the financial year. Once it is realised that longer multi-day cases may have to be listed a year or more ahead, the frustration of the senior Employment Tribunal judiciary[61] will be self-evident.

Furthermore, in time-honoured practice within the public service, budgets are set for a specific financial year, and the prospect that a budget allowance might not, in the end, be expended will raise the prospect of "claw-back" in following financial years, with consequential rolling under-resourcing. Such a situation can lead to frantic endeavours during the final two quarters of the financial year to ensure that any allocation is fully utilised – not necessarily an easy challenge, given that listings require not only an available sitting day, but also the availability on particular dates of fee-paid judges and non-legal members (who perform their public judicial duties alongside complementary obligations in their professional lives)[62].

that the proposed allocation is not sufficient to ensure the efficient and effective operation of the courts and tribunals, they can make their concerns known and ultimately could raise them with Parliament. Finally, a decision on the allocations will be made, and it will then be a matter for the independent judiciary to arrange the listing of cases within the allocated sitting days.

[61] Primarily, the President, at the head of the system, and Regional Employment Judges, who are responsible for the administration of cases in each of the regions. The structure for England and Wales is broadly mirrored in Scotland.

[62] While an "expanding" demand for fee-paid and non-legal member sittings may be met with general satisfaction by many, this is far from the case if the demand diminishes – as was the situation during the period of the "fees regime" between 2013 and 2017. The extent of that impact from the fees policy can be appreciated only too sharply when it is recalled that the last financial year of the fees arrangements (2016-2017) saw only just over 1.700 sitting days allocated to fee-paid Employment Judges, as contrasted with the more recent 2022-2023 figure which reached close to 12.000 days.

One developing policy approach which has met with great enthusiasm at senior judicial levels has been encouragement to promote the use of "alternative dispute resolution" (ADR) in labour dispute cases coming before the Employment Tribunals[63]. Such initiatives are seen as being complementary to the long-established range of activities already undertaken by the Advisory, Conciliation and Arbitration Service (ACAS)[64].

For a number of years there has been provision for what is described as "judicial mediation" within the employment field[65], whereby a day of judge time is provided for private mediation between the parties with a view to finding a form of non-judicial resolution which could avoid lengthy final trial hearings before a full judicial panel. Following a broadly positive evaluation of early pilot schemes conducted in Newcastle, Central London and Birmingham between June 2006 and March 2007 (involving discrimination cases)[66], a general national initiative was put in place, involving existing Employment

[63] More broadly, such developments now have to be seen against a background in which it appears that the higher courts are actively expressing support for ADR (or "NDR"). See, for example, the observations of the Court of Appeal in *Churchill v. Merthyr Tydfil*, (2023) EWCA Civ 1416 (judgment delivered 29 November 2023), clarifying that what had previously been thought to be problematic obstacles identified in the case of *Halsey v. Milton Keynes General NHS Trust*, (2004) EWCA Civ 576, should not be taken as absolute bars to a court ordering a party, in appropriate circumstances, to engage in a non-court-based dispute resolution process.This is undoubtedly an area which will be subjected to close attention as pressures upon judicial resources continue to grow. In the *Churchill* case, the Master of the Rolls (delivering a unanimous judgment of the Court of Appeal) held that: "The court can lawfully stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process provided that the order made does not impair the very essence of the claimant's right to proceed to a judicial hearing, and is proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost". However, despite discussion in the body of the judgment of a variety of possible situations, the Master of the Rolls concluded that he would "…decline to lay down fixed principles as to what will be relevant to determining the questions of a stay of proceedings or an order that the parties engage in a non-court-based dispute resolution process".

[64] The most recent data in relation to the duties and activities of ACAS can be found in Acas, *Annual Report and Resource Accounts 2022-2023*, cit.

[65] Thus, to take just one variant of ADR, an enthusiasm for "mediation" is evident more broadly than just in the employment context. See, for example, the proposals and call for evidence in relation to greater use of this facility set out in Ministry of Justice, *Increasing the use of mediation in the civil justice system*. Presented to Parliament by the Lord Chancellor and Secretary of State for Justice by Command of Her Majesty, July 2022 (CP 721).

[66] See Urwin, Karuk, Latreille, Michielsens, Page, Siara, Speckesser, with Boon, Chevalier, *Evaluating the use of judicial mediation in Employment Tribunals* (Ministry of Justice Research Series 7/10, March 2010).

Judges who were either already accredited meditators as part of their professional skill-set or who had been provided with internal training within the framework of the judicial training programmes provided for experienced judges[67]. Results from this initiative demonstrated an impressively high percentage (reported to be between 65-70%) of successful mediations, with substantial consequential savings of sitting days as a result. The arrangements proved particularly valuable during the period of "lockdown" introduced at the outbreak of the Covid-19 pandemic, with video-link arrangements being generally well-suited to the dynamics of a judicial mediation.

Most recently, following a pilot of a new form of ADR hearing in the West Midlands region of the Employment Tribunals, a form of hearing known as a "dispute resolution appointment" has been introduced into the armoury of labour dispute resolution[68]. Under these arrangements, there is a requirement for parties (particularly those involved in long complicated hearings) to attend an appointment (conducted confidentially) with a view to finding a resolution of their case which might avoid an otherwise long journey to eventual judicial resolution by way of a full trial.There is no obligation to reach a settlement at one of these appointments – or even to enter into negotiations or the like – but reported experience from the pilot scheme suggests that parties do attend the appointments and can derive benefit from that opportunity to address their dispute afresh. Facilitation of this innovation has been underpinned by fresh Presidential Guidance issued in July 2023[69].

6. Challenges and Proposals for Reform: Effective Enforcement of Decisions

A lively debate continues in relation to the effectiveness of the labour dispute mechanisms provided (especially) through the Employment Tribunals

[67] This scheme was underpinned by *Presidential Guidance: Alternative Dispute Resolution*, issued on 22 January 2018.

[68] In this context, the expression "*negotiated* dispute resolution" (NDR) has sometimes been introduced in place of "*alternative* dispute resolution" (ADR), with a view to emphasising that such arrangements are increasingly being seen as features of "the new normal".

[69] *Presidential Guidance:Alternative Dispute Resolution*, issued by the President of the Employment Tribunals (England and Wales) on 7 July 2023.The Presidential guidance on "dispute resolution appointments" was also accompanied by updated guidance in relation to "judicial mediation" and "judicial assessment". Unlike judicial mediation, there has been a widespread sense that the phenomenon of "judicial assessment" has not been particularly popular amongst tribunal users.

and the extent to which there can be said to be effective enforcement of decisions rendered by those bodies[70].

Indeed, in 2013 the United Kingdom Government published a report of research into what happens after awards are made by an Employment Tribunal[71].That research indicated that, amongst the cohort studied, around half (49%) of Claimants had been paid in full, and a further 16% had been paid in part.This left 35% who had not received any money at all. Just over a half of those successful Claimants (53%) received full or part payment without having to resort to enforcement[72].

There has long been criticism that successful parties in Employment Tribunal proceedings are not provided with a remedy (award) which is "self-executing" or which can readily be executed through the Employment Tribunal without significant additional costs associated with that enforcement[73].

[70] In relation to money awards in individual employment disputes determined by the Employment Tribunals the award made to the successful party will include interest on the judgment sum.This begins to run if payment is not made within 42 days (14 days for discrimination cases). If (normally) the employer defaults on payment, the Claimant can choose to pursue "enforcement" options. In England and Wales this could occur at any point – although historically the position was different in Scotland.

[71] See *Department for Business Innovation & Skills, Payment of Tribunal Awards: 2013 Study*, IFF Research, 2013.The report summarised the findings of a study of Claimants who had been successful at Employment Tribunal and were awarded a sum of money by the Tribunal. This study constituted a follow-up to earlier research on the subject, published as Ministry of Justice, *Research into Enforcement of Employment Tribunal Awards in England and Wales* (2009). More recentdata which might update these findings (which are over ten years old) is extremely difficult to locate. For a recent more "theoretical" treatment of individual labour dispute mechanisms in comparative perspective, see Corby, *Adjudicatory Institutions for Individual Employment Disputes: Formation, Development and Effectiveness*, in *IJCL*, 2022, Vol. 38, No. 1.

[72] The data suggested that Claimants who had received assistance from lawyers, unions or informal arrangements either before, during or after their initial hearing were more likely to receive payment without needing enforcement (58% compared to 53% overall).

[73] In England and Wales, as described in the 2013 Report, at the time of writing, individuals could choose to pursue enforcement of their award through applying to their local County Court for an enforcement order, after which enforcement officers would seek to secure payment from the employer. This process involves completing an application to the County Court and there is a fee payable for the process. It was also noted that, as part of the Government's responseto an earlier similar survey conducted in 2008, a "Fast Track" scheme had been introduced in 2010, which was designed to speed up and simplify the process of enforcing an award. Underthis scheme, a High Court Enforcement Officer would act on the Claimant's behalf to file the claim with the County Court, issue a writ and attempt to recover the money.The fee for using this service was slightly higher. Mention should also be made of a policy of "naming and sham-

The unsatisfactory situation in relation to enforcement of Employment Tribunal awards remains the subject of comment in the context of various reform proposals currently under discussion[74]. However, an absence of effective enforcement is widely acknowledged – although it remains to be seen whether the necessary political will to remedy the problem can be mustered in the sensible future[75].

By contrast, enforcement of judgments given by the High Court and the higher courts of appeal is handled in the normal manner, with the usual execution methods available throughout the United Kingdom civil justice system.

ing" employers who default on obligations to pay awards. A so-called "naming scheme" was announced on 17 December 2018 by the Department for Business, Energy and Industrial Strategy, and came into effect for all awards registered on or after 18 December 2018.The initiative came about in response to observations set out in a review of working practices which had been commissioned by the Government. See *Good Work:The Taylor Review of Modern Working Practices* (published 11 July 2017). The Department for Business, Energy and Industrial Strategy (BEIS) guidance on the scheme states that: "Individuals can register their unpaid award free of charge with the BEIS penalty scheme 42 days after the date of an employment tribunal judgment. Once an enforcement officer has verified the claim, a warning notice is sent to the employer, warning them that if they do not pay the award they will face a penalty and public naming. If the award remains outstanding after 28 days, the employer is sent a penalty notice, ordering them to pay a penalty to the value of 50% of the original award amount and 8% interest per year.At the penalty notice stage employers will be sent a naming notification letter warning that they will be named unless they submit valid representations within 14 days and the representations are accepted.This letter is only sent if the claimant has agreed for their employer to be named. BEIS will send letters to employers on the list prior to the naming round taking place.The naming round will take the form of a press release on GOV.UK. Employer names will appear on a list alongside the outstanding award after a minimum of 42 days following a warning notice." See Department for Business, Energy and Industrial Strategy, *Naming Scheme for Unpaid Employment Tribunal Awards: Policy on Department for Business, Energy and Industrial Strategy's naming scheme for employers who fail to pay Employment Tribunal awards*, December 2018.

[74] See *infra*.

[75] As has already been pointed out, during the period of the United Kingdom's membership of the (now) European Union, the duty to provide for "effective remedy" formed part of the State's obligations by reference to Article 19 of the Treaty on European Union and Article 47 of the Charter of Fundamental Rights of the European Union.Those provisions no longer have the same formal impact since completion of "Brexit". In the context of the Council of Europe, the United Kingdom remains obligated by Article 13 of the European Convention on Human Rights 1950. See, for proposals on "self-executing norms" and other innovations found in various national systems, Neal, *Enforcing EU Labour Law: Is there a need for new sanctions/means of redress?*, Report presented to an Expert Meeting of the European Commission, Brussels, 13 October 2017.

7. Ongoing Reform and Modernisation

While many of the dramatic changes to practice in the Employment Tribunals were provoked directly by the restrictions placed upon society as a whole in the face of the Covid-19 pandemic, it should also be recognised that policies to achieve reform and modernisation of the justice system (including in relation to the delivery of "industrial justice") had been taking place for some time before the outbreak of that pandemic.The current position thus needs to be placed in a broader context of HM Courts and Tribunals Service reform, which is ongoing[76].

Ever since the time of the publication of the report of the Donovan Commission in 1968, there has been no shortage of criticism and pro- posals for "improvement" of the United Kingdom system of labour dis- pute resolution. Mention has already been made of proposals emanating from a variety of official government-established bodies and other inter- ested organisations, including the private organisation JUSTICE[77], the Department of Employment[78], the Tribunals Review conducted by Sir Andrew Leggatt[79], the Employment Tribunal Taskforce[80], the Better Regulation Task Force[81],The Department for Constitutional Affairs[82], the Department of Trade and Industry[83], the Department for Business Innovation & Skills[84], the Law Society[85], the "independent report" produced at the invitation of the government under the supervision of Matthew Taylor[86], and

[76] For a pre-Covid-19 policy position on reform across the entirety of the United Kingdom legal system, see, for example, the presentation of the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals, *Transforming Our Justice* System, September 2016.

[77] *Industrial Tribunals, A Report by Justice* (Chairman of Committee Bob Hepple), 1987.

[78] *Resolving Employment Rights Disputes: Options for Reforms*, Cm. 2707, 1994.

[79] *Tribunals for users: One System, One Service - Report of the Review of Tribunals by Sir Andrew Leggatt* (2000).

[80] *Moving Forward:The Report of the Employment Tribunal Taskforce*, 2002.

[81] Better Regulation Task Force, *Employment Regulation: Striking a balance*, 2002.

[82] *Transforming Public Services: Complaints, Redress and Tribunals*, Cm 6243, 2004.

[83] *Better Dispute Resolution:A review of employment dispute resolution in Great Britain* (Chairman, Michael Gibbons), 2007.

[84] Department for Business Innovation & Skills, *Resolving workplace disputes:A consultation*, 2011.

[85] The Law Society, *What is the future for Employment Tribunals?*, 2014.

[86] *Good Work:The Taylor Review of Modern Working Practices*, 2017.

the Law Commission[87]. The most recent contribution to this debate has come from The Law Society of England and Wales, which in October 2023 published a "Green Paper" setting out specific reform proposals[88].

Currently, the policy framework for modernisation and reform of the Employment Tribunals is in the hands of HM Courts and Tribunals Service through the "Reform" programme. Delays to that programme were announced in the Spring of 2023, and an announcement from the Lord Chief Justice and the Senior President of Tribunals confirmed that the Reform Programme "will not include all the projects which were first in scope"[89].

Nevertheless, recent successful reform developments include, in particular, the appointment of "Legal Officers" who took up their duties in the Employment Tribunals from April 2021[90]. Meanwhile, technological improvements are being introduced to assist the administration of cases within the system, including a novelty, with effect from 20 November 2023, by which Employment Tribunal hearings are being recorded[91], thus bringing this jurisdiction in line with most of the rest of the civil justice system in the United Kingdom. The framework for this technological (primarily information technology related) modernisation has been located within the HMCTS "Reform" project.

Finally, it should be pointed out that when the Judicial Review and Courts Act 2022 comes into force[92], important amendments will be intro-

[87] Law Commission, *Employment Law Hearing Structures: Report* (HC308, Law Com No 390), 2020.

[88] The Law Society, *Proposals for a 21st Century Justice system* (2023). Proposals in relation to the system of Employment Tribunals are set out at page 18 of the report, reflecting proposals first put forward in 2020, under the heading "Strengthening employment tribunals".

[89] See the public statement relating to this: *The Lord Chief Justice and Senior President of Tribunals: the next stage of HMCTS Reform*, 20 March 2023.

[90] Power to make such appointments was contained in the Employment Tribunals Act 1996 – see Section 4(6B) – but it took more than twenty years for action to be taken under that power. For an overview of the duties and activities of these Legal Officers, see Higgins, *A Day in the Life of an Employment Tribunal Legal Officer*, in *Tribunals Journal*, 2023, 1.

[91] Within a framework established by *Presidential Practice Direction: Recording of Employment Tribunal Hearings and the Transcription of Recordings*, issued by the President of the Employment Tribunals (Scotland) and the President of the Employment Tribunals (England and Wales) and taking effect on 20 November 2023. See also the *Presidential Guidance* issued on 20 November 2023 in conjunction with the Practice Direction.

[92] The 2022 Act received its Royal Assent on 28 April 2022, but its provisions will only

duced to the basic legislative framework governing the operation of the Employment Tribunals and the Employment Appeal Tribunal[93].

8. Comment

All in all, after coping with the shock of a pandemic, the post-Covid-19 pace of change for the system of labour dispute resolution in the United Kingdom now shows no sign of slackening in the foreseeable future. In particular, the system of Employment Tribunals continues to undergo significant reform – both in relation to the administration of labour disputes and as regards the substantive content of the subject-matter with which the judiciary is engaged in the world of work.

The challenges arising within the system continue to pose political and financial problems, as well as raising fundamental issues of "access to justice" and the delivery of effective remedies to ensure judicial protection of the employment rights of a labour force now embracing well over 30 million citizens.

In consequence, the United Kingdom system of labour dispute resolution still has a long path to travel as it continues its journey from the Donovan Commission's original vision of "labour tribunals" as a mechanism: "… primarily, to make available to employers and employees, for all disputes arising from their contracts of employment, a procedure which is easily accessible, informal, speedy and inexpensive, and which gives them the best possible opportunities of arriving at an amicable settlement of their differences"[94].

be brought into effect once secondary legislation (in the form of Statutory Instruments) has been enacted to facilitate this. See, most recently, The Judicial Review and Courts Act 2022 (Commencement No. 4) Regulations 2023 (S.I. 2023/1194).

[93] Changes will be made to the Employment Tribunals Act 1996 and to The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (which set out in Schedule 1 the Employment Tribunal Rules of Procedure).

[94] *Royal Commission on Trade Unions and Employers' Associations 1965-1968* (Cmnd. 3623), at para. 572.

Abstract

This presentation offers a contemporaneous overview of labour dispute resolution institutions and mechanisms in the United Kingdom. An introductory section identifies the United Kinigdom's well-documented non-interventionist ("collective lasissez-faire") approach giving way to increasing legal intervention – primarily through normative provisions in legislation enacted with minimal input from the labour market actors.The historical roots of the modern United Kingdom framework are considered with particular emphasis upon the system of Employment Tribunals which deal with individual labour disputes. Attention is drawn to dramatic changes in practice which formed part of the judicial system's response to the Covid-19 pandemic. It is noted that these opened the way to a "new normal" for handling labour disputes which currently forms part of a wider "Reform" programme. Current reform initiatives are presented and comment is made on the post-Covid-19 shift towards greater use of information technology including, in particular, increasing resort to remote (on-line) hearings by the courts and tribunals. Continuing challenges are also identified, including problems with "access to justice", difficulties in enforcing remedies obtained through the legal process, and a sizeable "legacy" backlog of cases awaiting final disposal.

Keywords

Employment rights, Labour dispute resolution, Employment Tribunals, Labour Courts, Judicial procedures, Access to justice, Covid-19 challenges, Post-pandemic procedural reform, Judicial use of information technology.

Katarzyna Antolak-Szymanski

Out-of-court resolution of employment disputes in Poland

Contents: 1. Introduction. 2. The preference in Polish labour law for the amicable resolution of employment disputes and why out-of-court procedures may be helpful. 3. Different types of out of court dispute resolution procedures applicable to individual employment matters. 4. Workplace Conciliation Committees. 5. Arbitration proceedings in labour law disputes. 6. Mediation proceedings.

1. Introduction

Article 243 of the Polish Labor Code[1] sets forth the principle that, where possible, employment disputes should be amicably resolved by the parties. It follows from this provision that the employer and the employee should seek an amicable settlement of disputes arising from the employment relationship, even outside the context of a court case. This article analyzes the three majors out of court dispute resolution mechanisms that exist under Polish labor law: conciliation committees[2], arbitration[3] and mediation[4].

These proceedings are not conducted by a common court, but by a conciliation committee, court of arbitration, or mediator, respectively. The court does not participate in such proceedings. Rather, the court may only possibly perform a control function regarding the correctness of the content

[1] Ustawa z dnia 26 czerwca 1974 r. Kodeks pracy (t.j. Dz. U. z 2023 r. poz. 1465) (Labour Code).

[2] Labour Code, Articles 244-258.

[3] Ustawa z dnia 17 listopada 1964 r. Kodeks post powania cywilnego (t.j. Dz. U. z 2023 r. poz. 1550 z pó n. zm.) (Civil Procedure Code), Article 1164 of the Civil Procedure Code.

[4] Articles 183^{1}-183^{15} of the Civil Procedure Code.

of the settlement concluded, ensuring that the rights of the employee under Polish labour law are secured.

At this point in time, all three dispute resolution methods are relatively underused. Existing labour courts are relatively inexpensive for employees to use, and there is an expectation that the court – and not some other body – should finally resolve an individual employment dispute.There are structural issues with conciliation committees and arbitration that do make these methods somewhat problematic in the employment context. However, it is argued in this article that mediation does hold some promise as an effective, quick and inexpensive way to resolve individual employment disputes. Moreover, there are other institutional benefits in increasing the use of mediation in the employment context, rather than exclusively relying on labour courts. Mediation allows both employees and management to develop their own solutions to problems that may arise in the workplace.These solutions may also serve to solve future, similar problems.

2. The preference in Polish labour law for the amicable resolution of employment disputes and why out-of-court procedures may be helpful

The nature of labour disputes implies the need to resolve them amicably. It is pointed out that there is a "principle of amicable settlement of disputes", which the Polish legislator established in Article 243 of the Labour Code, according to which "the employer and the employee should strive to settle the dispute arising from the employment relationship amicably".The principle of amicable settlement of disputes applies both to the methods of settling disputes in court and as part of out-of-court procedures. Both: before and outside the court, the parties have legal options that they can use and reach amicable solutions.

Article 243 of the Labour Code, by its terms applies to all types of employment disputes. At the same time, it does not specify the exact manner or method by which the dispute should be peacefully resolved. Therefore, there is no mandatory requirement to use a particular form of dispute resolution. Indeed, amicable dispute resolution could simply take the form of the employer and employee directly agreeing between themselves to settle a dispute.

The rationale set forth for the amicable settlement of labour law cases

in the opinion of the full bench of the Labour and Social Insurance Chamber of the Supreme Court of 20 December 1969, III PZP 43/69 (OSNCP 1970, No. 3, item 40), has remained largely valid.The Supreme Court emphasized that an amicable manner of settling employment disputes has a positive im- pact on creating an atmosphere of mutual trust and a harmonious work process, and that a settlement is often of a greater value than resolving an employment dispute by a court ruling.

While there is a right to proceed to the labour court, it is not necessarily helpful for the employees or the employer if every single dispute is resolved by a judge. An endless stream of court cases does not create a cooperative or even stable environment at work. Excessive litigation closes dialogue between management and workers, as either side expects the court to ultimately de- cide whatever employment issues have arisen. Using out of court dispute resolution methods such as conciliation or mediation, on the other hand, forces the parties to work together.

Moreover, there are some institutional barriers for employees in access- ing their right to the court, particularly where the employee remains em- ployed by the company. Employees may be afraid to bring formal cases to the court involving disputes over pay, working time, and transfers, for exam- ple. They may be reluctant to do so because of possible retaliation - it is better to lose a small amount of pay rather than to lose one's job entirely. In addition, the employee may not feel comfortable bringing a court case be- cause he or she lacks the resources to hire an attorney, and does not possess the legal knowledge or skill to pursue the case themselves[5]. For these reasons, there are many instances where employees' rights actually go unprotected, to the extent the labour court is their only recourse. Once again, less formal mechanisms such as mediation would give employees the opportunity to peacefully and even confidentially vindicate their rights.

Of course, any out of court dispute resolution processes must satisfy certain minimum requirements, consistent with the objectives of Polish labour law, in order to ensure that the interests of the workers are protected. In order for the proper functioning of out-of-court procedures and for the parties to apply them effectively, it is important to guarantee: the independ-

[5] Patulski, *Spory ze stosunku pracy a inne rodzaje sporów*, Wydawnictwo Prawnicze, 1984, p. 26; Gonera, *Kodeks pracy. Komentarz*, wyd.VII, red. Florek, Wolters Kluwer, 2017, Articles 244, 245, 246, 247. Gonera, *sub* Articles 244, 245, 246, 247, in Florek (ed.), *Kodeks pracy. Komentarz*, Wolters Kluwer, 2017.

ence and professionalism of the entities involved in conducting these proceedings, the balance of power between the parties, and the speed and low costs of these procedures. If these requirements are effectively implemented, out-of-court methods should be an effective way of resolving disputes while respecting the protection of workers.

3. *Different types of out of court dispute resolution procedures applicable to individual employment matters*

Of course, it is possible for an employee to directly negotiate a settle- ment of a dispute with his or her employer, either before a labour case is filed, or while the case is pending. This, too, would be a form of amicable dispute resolution within the meaning of Article 243 of the Labour Code. However, given the inherent imbalance of bargaining power between em- ployees and employers, there are legitimate concerns over whether such a settlement would be considered fair. The provisions of Polish labour law do place a number of limitations on the content of agreements between em- ployers and employees, in light of the disparity of bargaining power between the two parties. For example, Article 84 of the Labour Code, states that an employee may not waive the right to remuneration[6]. In addition, because ofthe disparity of power, the employee may often be reluctant to approach theemployer to discuss a settlement in the first place.

Taking into account these difficulties, the parties may consider institutionalized forms of amicable settlement of labour disputes.A more structured procedure is possible in the form of conciliation proceedings before a conciliation committee appointed by a given employer (Articles 244–258 of the Labour Code).This procedure is conducted at the request of the employee. There is also the possibility of calling for a settlement attempt before filing a lawsuit. It is a conciliation proceeding which is conducted by the court after being initiated by one of the parties (Civil Procedure Code, Article 184-186). It should also be pointed out that a settlement may be reached before the court in the course of judicial proceedings (Civil Procedure Code, Article 223). The legislator also offers the parties mediation proceedings,

[6] Piątkowski, *Kodeks pracy. Komentarz*. Tom II. Articles 94-304(5), wyd.VI, red. Baran, Wolters Kluwer, 2022, Article 243. Piątkowski, *sub* Article 243, in Baran (ed.), *Kodeks pracy. Komentarz*.Vol. II, Articles 94-304(5),Wolters Kluwer, 2022.

which can be used before or during court proceedings (Civil Procedure Code, Article 183[1]-183[15]). Finally, it is also possible to submit the dispute, once it has arisen, to an arbitration court for resolution (Civil Procedure Code, Article 1164).

It should be noted that some of the above-mentioned amicable actions do involve the participation of a judge, as part of court procedures. On the other hand, strictly out-of-court procedures in which the court does not participate include mediation, proceedings before the conciliation committee and the arbitration court.

The specifics of the out-of-court possibilities offered in the Polish system of resolving out-of-court employment disputes will be presented below.

4. Workplace Conciliation Committees

The Polish Labour Code allows for the possibility of out-of-court proceedings, in which disputes may be resolved as part of proceedings before workplace conciliation committees (Articles 244-258 of the Labour Code)[7].

Conciliation Committees are social bodies of legal protection, established in workplaces, in order to settle employment disputes amicably. The Commission is intended to provide the employee with the opportunity to settle the dispute as quickly as possible, in an informal manner and close to the workplace, i.e. without the need to commit additional time and financial resources, and with the participation of people who are familiar with the working conditions in a given plant and who enjoy the trust of its staff [8]. Article 244 § 1 of the Labour Code explicitly states that conciliation committees may be appointed in order to amicably settle disputes over employees' claims arising from the employment relationship, because the employee has the right to request the initiation of proceedings before the company conciliation committee before referring a specific case to court[9]. If such a committee

[7] Introduced by the Act of April, 18th, 1985 on the examination of cases in the field of labour law and social insurance by courts (Dz.U. No. 20, item 85, as amended).

[8] Gonera, *Kodeks pracy. Komentarz*, wyd. VII, red. L. Florek, Wolters Kluwer, 2017, articles 244, 245, 246, 247; Piątkowski, *Kodeks pracy. Komentarz*. Tom II. Articles 94-304(5), wyd. VI, red. K. W. Baran, Wolters Kluwer, 2022, Article 244. Gonera, *sub* Articles 244, 245, 246, 247, cit.; Piątkowski, *sub* Article 244, cit.

[9] Article 242 § 2 of the Labour Code.

has not been established at the employer or if the employee does not want to use its services, the case may be immediately referred to the court. On the other hand, the employer is not able to initiate proceedings before the Conciliation Committee, which are only conducted at the employee's request.

The legislation does not make it mandatory to set up a conciliation committee; this is left to the autonomous discretion of the social partners.This decision, regardless of the type and size of the workplace, is therefore made by the employer together with the staff, which is represented by all trade unions, and if none of them is active for a given employer, the employees express their positive opinion in this regard, usually in the form of a referendum[10].

The provisions governing the possibility of conciliation committees also leave it to the social partners to decide on the rules and procedure for appointing the commission, the number of committee members and the duration of their term of office (Article 245 of the Labour Code), and to the conciliation committee itself to determine the rules of conciliation procedure (Article 247 of the Labour Code).

Thus, the number of members of the conciliation committee depends on the will of the conciliation committee appointers.The minimum number of such persons may not be less than three persons, according to Article 249 of the Labour Code. Due to the fact that the costs of the commission's activities are borne by the employer, it should be assumed that the employer will not be interested in a larger number of members of the committee.

Pursuant to Article 246 of the Labour Code, the committee may not include persons managing the workplace on behalf of the employer, chief accountants, legal counsels and persons handling personal, employment and payroll matters.These exclusions indicate the legislator's preference that the commission will be objective. Other staff members have the ability to be a member of the Conciliation Committee, regardless of their position. The legislation does not lay down any requirements for qualification to serve as a member of the Conciliation Committee. However, such requirements may be specified in the internal rules of the committee's functioning[11].

[10] Gonera, *Kodeks pracy. Komentarz*, wyd. VII, red. Florek, Wolters Kluwer, 2017, articles 244, 245, 246, 247; Piątkowski, *Kodeks pracy. Komentarz*. Tom II. Articles 94-304(5), wyd. VI, red. K. W. Baran, Wolters Kluwer, 2022, Article 244. Gonera, *sub* Articles 244, 245, 246, 247, cit.; Piątkowski, *sub* Article 244, cit.

[11] J. Piątkowski, *Kodeks pracy. Komentarz*. Tom II. Art. 94-304(5), wyd. VI, red. K.W. Baran, Wolters Kluwer, 2022, art. 244. Piątkowski, *sub* Article 244, cit.

The Conciliation Committee initiates proceedings at the request of the employee (submitted in writing or orally to the minutes) and conducts them collectively in accordance with the procedure laid down in the Rules of Conciliation adopted by the Committee. Conciliation proceedings are to be conducted quickly and within 14 days from the date of filing the application should lead to the conclusion of a settlement (Article 251 of the Labour Code).

If the proceedings before the Conciliation Board have not led to a settlement, the Conciliation Board shall, at the employee's request within 14 days of the end of the conciliation procedure, immediately refer the case to the Labour Court. An employee's request for an amicable settlement by the Conciliation Board replaces the lawsuit. Instead of the above-mentioned demand, the employee may also file a lawsuit with the labour court under the general rules (Article 254 of the Labour Code).

A settlement concluded before a conciliation committee which the employer does not voluntarily implement is enforceable under the provisions of the Code of Civil Procedure after it has been made enforceable by the court (Article 255 § 1 of the Labour Code), and after the court examines whether the settlement is not contrary to the law or the principles of social coexistence (Article 255 § 2 of the Labour Code). Notwithstanding this, an employee may, within a specified period of time (30 days or 14 days in cases concerning termination, expiry or establishment of an employment relationship from the date of conclusion of the settlement), apply to the labour court for a declaration that it is ineffective if he or she believes that the set- tlement violates his or her legitimate interest.

Conciliation committees only attempt to settle labour disputes amicably, without being authoritative in nature. As part of the commission's activities, no decisions are made that are binding on the parties to the dispute. At the same time, it should be emphasized that the initiation of proceedings before the Conciliation Committee was reserved exclusively for the employee. On the other hand, the costs of the Conciliation Committee are borne by the employer, who provides the Conciliation Committee with the premises and technical means to enable it to function properly.

It can be assumed that the staff of the Conciliation Committees have the opportunity to actually participate in the search for solutions to disputes that have arisen.The members of the committee are familiar with the situation in their workplace and can help find a solution to the dispute.

However, practice shows that these proceedings are not used, despite the fact that conciliation boards could prevent the escalation of the dispute and may lead to relieving the courts of the burden of deciding cases in which the parties have reached a settlement[12]. Due to the experience gained so far and the specific features of the commission's operation (including the initi-ation of proceedings solely on the initiative of the employee, and the impo- sition on the employer of the committee's operating costs), it is difficult to expect that the commission will be used in a popular way in the future.

5. Arbitration proceedings in labour law disputes

Another option that can be used by the employee and the employer, instead of initiating court proceedings to pursue their claims, is to begin proceedings before an arbitration court. This possibility was created as part of the amendment to the Code of Civil Procedure in 2005[13].

As a result of arbitration proceedings, an award is made by the arbitrator or a panel of arbitrators, but it is also permissible for the parties to directly reach a settlement. Pursuant to Article 1164 of the Civil Procedure Code, an arbitration clause covering labour law disputes may be drawn up after the dispute has arisen and must be in writing.Therefore, this provision provides for the admissibility of submitting labour law disputes to arbitration, but only after they have arisen.

This means that the employer and the employee may decide in a written arbitration clause that the dispute that has arisen between them will be resolved by the arbitration court.The main difference between the regulations concerning an arbitration clause in labour law disputes and in civil law disputes is that in labour cases, the clause may be drawn up only after the dispute has arisen. It must be emphasized that such a provision cannot be included

[12] J. Piątkowski, *Kodeks pracy. Komentarz*.Tom II.Art. 94-304(5), wyd.VI, red. K.W. Baran, Wolters Kluwer, 2022, art. 244. Piątkowski, *sub* Article 244, cit. On the other hand, K. Gonera sees the reasons for the lack of conciliation committees in the fact that 'employers generally do not tolerate the pursuit of workers' claims at all, regardless of whether it is a conciliation procedure or a court proceeding". Gonera, *Kodeks pracy. Komentarz*, wyd. VII, red. L. Florek, Wolters Kluwer, 2017, art. 244, art. 245, art. 246, art. 247. Gonera, *sub* Articles 244, 245, 246, 247, cit.

[13] The Act of July, 28th, 2005, amending the Code of Civil Procedure and certain other acts (Dz.U. No. 172, item 1438).

in the employment contract[14].The wording of the provision should indicate the subject matter of the dispute and the legal relationship from which the dispute has already arisen[15].

It is argued that the restriction on the possibility of drafting an arbitration clause only after a labour law dispute has arisen has made this procedure unpopular in employee-employer relations[16]. However, it is difficult to predict whether an amendment allowing for the possibility of an arbitration clause when concluding an employment contract itself would contribute to a wider use of arbitration in employment disputes.

Some, however, see positive effects of expanding the possibility of using arbitration in employment disputes, stating that "the decision is issued in the form of an award, which is only subject to recognition or enforceability under Civil Procedure Code Article 1212 et seq.The firm nature of an arbitration award is therefore an important alternative to settlements concluded under other methods of amicable dispute resolution. In a speedy arbitration proceeding, therefore, the parties are not forced to compromise, as a settlement requires"[17].

It should be noted, however, that Article 1164 of the Civil Procedure Code does not specify a catalogue of labour law cases that may be submitted to arbitration.Therefore, this option should be applied broadly, because pursuant to Civil Procedure Code Article 1157, unless a specific provision provides otherwise, the parties may submit to arbitration the following disputes: disputes over property rights and disputes over non-property rights, if they may be the subject of a court settlement[18]. Moreover, an arbitration clause

[14] Morek, *Mediacja i arbitra (art. 183[1]-183[15], 1154-1217 KPC). Komentarz*, C.H. Beck 2006, p. 150; Muszalski, Walczak (red.), *Kodeks pracy. Komentarz*. Wyd. 13, C.H. Beck, 2021, *commentary on Article 243 of the Labour Code*. Morek, *Mediacja i arbitra (art. 183[1]-183[15], 1154-1217 KPC)*, *Komentarz*, C.H. Beck, 2006, p. 150, *commentary on Articles 183[1]-183[15], 1154-1217 of the Code of Civil Procedure*; Muszalski, Walczak (eds.), *Kodeks pracy. Komentarz*, C.H. Beck, 2021, *commentary on Article 243 of the Labour Code*.

[15] Wójcik, *Kodeks post powania cywilnego. Komentarz aktualizowany.* Tom II. Art. 730-1217, red. A. Jakubecki, LEX/el. 2019, art. 1164. Wójcik, *sub* Article 1164, in Jakubecki (ed.), *Kodeks post powania cywilnego. Komentarz aktualizowany*, vol. II, Articles 730-1217, LEX/el. 2019.

[16] Witkowski, Wujczyk, *Przyszłość s dów pracy*, in *PS*, 2009, 11-12, p. 43.

[17] Raczkowski, Gersdorf, Rączka, Raczkowski, *Kodeks pracy. Komentarz*, wyd. III, Wolters Kluwer, 2014, art. 243. Raczkowski, *sub* Article 243, in Gersdorf, R czka, Raczkowski, *Kodeks pracy. Komentarz*, M. Raczkowski, Gersdorf, Rączka, Raczkowski, *Kodeks pracy. Komentarz*, wyd. III, Wolters Kluwer 2014.

[18] Jakubecki, *Kodeks post powania cywilnego. Komentarz*. Tom V. Art. 1096-1217, red. T.

should not prevent the parties from using conciliation proceedings before labour committees[19].

The advantages of arbitration proceedings, such as speed and informality, could support the popularity of its use in resolving employment disputes. The conclusive nature of an arbitral award is an alternative to litigation. It is also necessary to recall that it would still be possible to conclude a settlement before an arbitration court.

However, despite the advantages of this procedure, it cannot be said that this method is used in practice by employers and employees in resolving their labour disputes.This may be influenced by, among other things, issues related to the settlement of the costs of arbitration proceedings, including the determination of the remuneration for the arbitrator(s), as well as the joint and several liability of the parties for them[20]. Pursuant to Civil Proce- dure Code, Article 1179, § 1, an arbitrator has the right to be remunerated for his or her activities and to reimbursement of expenses incurred in con-nection with the performance of such activities, and the liability of the parties in this respect is joint and several.Thus, arbitration proceedings may be costlyfor the parties, which in the case of an employee, in particular, may discour- age them from agreeing to the arbitration agreement after the dispute has arisen.

Arbitration proceedings may also be relatively formalized, due to the possibility of taking evidence. The arbitration court may take evidence by hearing of witnesses, considering documents, inspections, as well as other necessary evidence. Moreover, if the parties do not exclude such a possibility, the arbitration court may appoint experts to consult them and require the parties to provide the expert with relevant information or to present docu-

Wiśniewski,Wolters Kluwer, 2021, art. 1164; M. Bąba, *Zapis na sąd polubowny w sporach z zakresu prawa pracy*, p. 5 et seq., ADR Quarterly No. 4(8)/2009. Jakubecki, *sub* Article 1164, in Wiśniewski (dir.*)*, *Kodeks post powania cywilnego. Komentarz*, vol.V, Articles 1096-1217, Wolters Kluwer, 2021; Bąba, *Zapis na sąd polubowny w sporach z zakresu prawa pracy*, in *KADR*, No. 4(8)/2009, p. 5 ff.

[19] Even before the admissibility of the arbitration clause in labour law cases was intro-duced,W. Muszalski argued that proceedings before the company's conciliation committee did not preclude an arbitration clause (in: Muszalski Nałęcz Orłowski Patulski, *Kodeks pracy z komentarzem*, ODDK 1998, p. 237); Gonera, *Kodeks pracy. Komentarz*, wyd.VII, red. L. Florek, Wolters Kluwer, 2017, art. 243; Gonera, *sub* Article 243, cit.)

[20] Gonera, *Kodeks pracy. Komentarz*, wyd. VII, red. Florek, Wolters Kluwer, 2017, art. 243. Gonera, *op. ult. cit*.

ments or other objects to the expert or make them available for examination (Civil Procedure Code, Article 1191). Therefore, participation in arbitration proceedings may be difficult to conduct on one's own, especially for an employee who does not always have the resources to hire an attorney.

6. *Mediation proceedings*

Mediation is another method of resolving labour disputes outside of court, provided for by the Polish legislator, as part of the amendment to the Code of Civil Procedure in 2005. Provisions governing mediation proceedings have been introduced into the provisions of this Code (Civil Procedure Code,Articles 183^{1}-183^{15})[21].The legislator provided for the application of the provisions on mediation to employment disputes, generally assuming that in cases in which the conclusion of a settlement is admissible, the court strives to settle them amicably at any stage of the proceedings, in particular by persuading the parties to use mediation (Civil Procedure Code,Article 10).The regulation applies to all cases in the field of labour law, and in the light of the provisions of Article 1 of the Civil Procedure Code, even to cases related to labour law relations[22]. There are no specific rules for the mediation of labour disputes.

Mediation is intended as a voluntary procedure in which an impartial mediator assists the parties in reaching a settlement.The principle of confidentiality of mediation, referred to in the legislation as the secrecy of mediation, has also been guaranteed.

The voluntary nature of mediation is reflected in the fact that mediation can take place on the basis of an agreement between the parties or a request from one of them, even before the case is initiated before the court (this is called contractual mediation, also known as pre-litigation mediation). In ad- dition, the labour court may refer the parties to mediation at any stage of

[21] The Act of July, 28th, 2005, amending the Code of Civil Procedure and certain other acts (Dz.U. No. 172, item 1438).

[22] K.W. Baran, *Mediacje w sprawach z zakresu prawa pracy*, PiZS 2006, nr 3, p. 2; Mędrala, 2.3. *Mediacja w sprawach z zakresu prawa pracy*, *Funkcja ochronna cywilnego post powania s dowego w sprawach z zakresu prawa pracy*, Wolters Kluwer, 2011. Baran, *Mediacje w sprawach z zakresu prawa pracy*, in *PiZS*, 2006, 3, p. 2; Mędrala, *Funkcja ochronna cywilnego post powania s dowego w sprawach z zakresu prawa pracy*, cap. 2.3, *Mediacja w sprawach z zakresu prawa pracy*,Wolters Kluwer, 2011.

the proceedings (Civil Procedure Code, Article 183[1]) by issuing an order in this regard. In this case, mediation takes place after the court proceedings have been initiated and is called "court mediation". Both the initiation of judicial and contractual mediation is subject to the consent of both parties.

In the light of the regulation adopted in Civil Procedure Code, Article 183[1] § 2, the mediation agreement should be separate.The doctrine supports the legality of including a mediation clause in an employment contract if it meets the conditions set out in Civil Procedure Code, Article 183[1] § 3, in particular if it specifies the subject matter of mediation[23]. Article 183[1] § 3 of the Civil Procedure Code provides that in a mediation agreement, the partiesshall specify in particular the subject matter of the mediation, the identity of the mediator or the method of selecting the mediator.

Article 202[1] of the Civil Procedure Code also applies in labour law cases, according to which, if the parties have concluded a mediation agreement before initiating court proceedings, the court is obliged to refer the parties to mediation in response to the defendant's objection raised before entering into a dispute on the merits of the case.

According to the applicable regulations, mediators may be: *ad hoc* mediators, permanent mediators and mediators from the lists of non-governmental organizations and universities[24]. *Ad hoc* mediators are usually not

[23] Some believe that the subject matter of mediation should be sufficiently specified, as follows: K. W. Baran, D. Książek, *Post powanie mediacyjne w sprawach z zakresu prawa pracy*, p. 35, in: K. Antolak-Szymanski, A. Góra-Błaszczykowska (red.): *Pozas dowe sposoby rozwi zywania sporów pracowniczych*, Elipsa, 2015; Baran, Książek, *Post powanie mediacyjne w sprawach z zakresu prawa pracy*, in Antolak-Szymanski, Góra-Błaszczykowska (eds.), *Pozas dowe sposoby rozwi zywania sporów pracowniczych*, Elipsa, 2015, p. 35, however, the admissibility of a broad approach to the subject of future mediation is also indicated: K. Anto- lak-Szymanski, *Perspektywy rozwoju mediacji w sprawach pracowniczych. Uwagi de lege lata i de lege ferenda*, pp. 102-103, in: K. Antolak-Szymanski,A. Góra-Błaszczykowska (red.): *Poza-sądowe sposoby*...; A.M. Świątkowski, M. Wujczyk, *Przyszłość s dów pracy*, PS, listopad-grudzień 2009, p. 44. Antolak-Szymanski, *Perspektywy rozwoju mediacji w sprawach pracowniczych. Uwagi de lege lata i de lege ferenda*, in Antolak-Szymanski, Góra-Błaszczykowska (eds), *op. cit*., pp. 102-103; Świątkowski,Wujczyk, *Przyszłość sądów pracy*, in *PS*, 2009, 11-12, p. 44.

[24] K. Antolak-Szymanski, O. M. Piaskowska, *Mediacja w post powaniu cywilnym. Komentarz*,Wolters Kluwer, 2017, p. 113; A. Rutkowska, *post powania cywilnego. Post powanie procesowe. Komentarz aktualizowany*, red. O. M. Piaskowska, LEX/el. 2023, art. 183(2).Wolters Kluwer, 2017, p. 113; Rutkowska, *sub* Article 183(2), in Piaskowska (ed.), *Kodeks post powania cywilnego. Post powanie procesowe. Komentarz aktualizowany*, LEX/el., 2023.

included in the lists of permanent mediators, and the parties appoint them as mediators for mediation proceedings, which usually take place before the commencement of court proceedings, to carry out a specific mediation[25].

Permanent mediators are persons who are entered on the lists of permanent mediators kept by the regional courts pursuant to Article 157a of the Act of 27 July 2001 Law on Ordinary Courts Organization (Ustawa z dnia 27 lipca 2001 r. Prawo o ustroju s dów powszechnych (t.j. Dz. U. z 2023 r. poz. 217 z pó n. zm.). A permanent mediator is included in the list of permanent mediators kept by the president of the regional court.The President of the Regional Court has been empowered both to maintain a list of permanent mediators and to make an entry on that list.

The third group includes mediators from lists kept by non-governmental organizations within the scope of their statutory tasks, as well as higher education institutions, which may also establish mediation centers, which provide assistance to the parties and the court in selecting a mediator suitable for the case.

It is up to the parties to choose a mediator. However, where the court directs the parties to mediation under Article 183^9 § 1 of the Civil Procedure Code, if the parties have not chosen a mediator, the court shall appoint a mediator with appropriate knowledge and skills in conducting mediation in a given type of case, taking into account permanent mediators in the first place. However, the legislator did not specify in detail the qualifications of mediators, including those to conduct particular types of disputes, such as employment disputes.The requirements for mediators to be entered on the list of permanent mediators are very general (full legal capacity, full public rights, knowledge and skills in mediation, at least 26 years of age, knowledge of the Polish language, not being convicted of an intentional crime or an intentional fiscal crime)[26].

The provisions of the Code of Civil Procedure also do not specify the role that a mediator should play in the mediation process.Article 183^3 of the Civil Procedure Code indicates that the mediator should be impartial in conducting mediation.The provisions of the Code of Civil Procedure concerning mediation have been constructed in a general way, defining the

[25] *Ibidem*.

[26] See Antolak-Szymanski, Cărăba , *The qualifications of mediators in civil matters, including Employment disputes, in Poland and Romania*, in *RECL*, 2023, vol. 53, no. 2, pp. 7-26.

course of this proceeding in a broad manner, which allows the mediator to choose the appropriate techniques in the proceedings. At the same time, the regulations provide for the admissibility of various methods of mediation, indicating that the mediator conducts mediation using various methods aimed at amicable resolution of the dispute, including by supporting the parties in formulating settlement proposals, or, at the joint request of the parties, she or he may indicate ways of resolving the dispute that are not binding on the parties. This indicates the admissibility of evaluative mediation[27] if the parties agree to do so.

The mediation procedure provided for in the Civil Procedure Code may be paid or free of charge.The mediator is entitled to remuneration and reimbursement of expenses related to the mediation, unless he or she has agreed to conduct the mediation without remuneration. On the other hand, remuneration and reimbursement of expenses are borne by the parties (Civil Procedure Code, Article 183^5 § 1). In labour law cases, a situation in which an employee would be charged with the costs of mediation should be regarded as particularly inappropriate from the axiological point of view[28]. However, the permissible coverage of mediation costs by the employer may raise doubtsas to the mediator's compliance with the principle of impartiality and whether possible pressure related to the expectations of the employer paying the mediator, somehow could have influenced the mediator's behavior.

Polish law incorporates the principle of confidentiality of mediation, stating that mediation proceedings are not public. The mediator (as well as the parties and other persons participating in the mediation) is obliged to keep confidential all facts that he or she learns in connection with the mediation, unless the parties mutually release themselves from this obligation (Civil Procedure Code, Article 183^4 § 1 and 2). The mediator may not be a witness as to the facts that he or she has learned in connection with the mediation[29]. A protocol should be drawn up on the structure of the mediation procedure, which indicates the place and time of the mediation, as well as the personal data of the parties and the mediator, as well as the outcome of the mediation (Civil Procedure Code, Article 183^{12} § 1). If the parties have

[27] On the methods of mediation, Riskin, *Understanding Mediators Orientations, Strategies and Techniques Grid For the Perplexed*, in *HNR*, 1996, no. 1, pp. 7-51; Id., *Mediator Orientations, Strategies and Techniques*, in *AHCL*, 1994, vol. 12, no. 9, p. 111.

[28] Baran, Książek, *Post powanie mediacyjne*, cit., p. 37.

[29] Art. 259^1, paragraph 1, Code of Civil Procedure.

concluded a settlement, it is included in the protocol or attached to it (Civil Procedure Code, Article 183^{12} § 2 first sentence).

Pursuant to Article 183^{14} of the Civil Procedure Code, the court has the power to approve the settlement reached before the mediator. However, the court will refuse to grant an enforcement clause or to approve a settlement concluded before a mediator, in whole or in part, if the settlement is contrary to the law or the principles of social coexistence, or if it is intended to cir- cumvent the law, or if it is incomprehensible or contradictory (Civil Proce- dure Code, Article 183^{14} § 3). The doctrine also points to the need to examine the content of the settlement agreement in terms of an additional criterion, the legitimate interest of the employee[30].

Importantly, a settlement concluded before a mediator, after its approval by the court, has the legal force of a settlement concluded before the court. A settlement concluded before a mediator and approved by making it enforceable is an enforceable title (Civil Procedure Code, Article 183^{15}).

Following the amendment of the mediation rules from 2016[31] onwards, the judge has instruments at his disposal to persuade the parties to participate in mediation, determining whether mediation can be used in a particular case. This is achieved through information meetings on amicable dispute resolution and closed sessions (Civil Procedure Code Article 183^{8} § 4 and 5). In addition, the statement of claim should state whether the parties attempted mediation or other out-of-court dispute resolution procedures, and if no such action was taken, explain the reasons why they were not taken (Civil Procedure Code, Article 187).

It should be emphasized, however, that the obligation provided for in Article 10 of the Civil Procedure Code to seek amicable settlement of the case does not mean that the labour court is obliged to mediate[32]. A judge

[30] Gudowski, *Kodeks post powania cywilnego. Komentarz*. Tom III. *Post powanie rozpoznawcze*, wyd. V, red. Ereciński, Wolters Kluwer, 2016, art. 469; Arkuszewska, Bosak, *Mediacja jako metoda rozwi zywania indywidualnych i zbiorowych sporów z zakresu prawa pracy*, J. Olszewski, *Sądy polubowne i mediacja*, Wolters Kluwer, 2008, pp. 169-170. Gudowski, *sub* Article 469, in Ereciński (ed.), *Kodeks post powania cywilnego. Komentarz*, vol. III, *Post powanie rozpoznawcze*, Wolters Kluwer, 2016; Arkuszewska, Bosak, *Mediacja jako metoda rozwi zywania indywidualnych i zbiorowych sporów z zakresu prawa pracy*, in Olszewski (ed.), *Sądy polubowne i mediacja*, C.H. Beck, 2008, pp. 169-170.

[31] Act of Septemper, 10th, 2015, amending certain acts in connection with the promotion of amicable dispute resolution methods (*Journal of Laws*, item 1565).

[32] Gonera, *sub* Article 243, cit.

may not act as a mediator (Civil Procedure Code Art. 183^2 § 2), with the exception of a retired judge. If, at the stage of the court proceedings, the parties agree to mediation proceedings, the labour court issues an appropriate order and refers the case to this out-of-court procedure.

Finally, it must be pointed out that mediation as a procedure for resolving employment disputes, should guarantee effective legal protection mainly for the employee, hence it is important to ensure that it is conducted by professional, impartial mediators with appropriate knowledge in the field of labor law. In addition, mediation should meet other guarantees, namely not only the speed with which the dispute is resolved, but also the non-expendability of the proceedings, and the proceedings should fulfil the protective function of labour law.Therefore, it is important for the legislator to introduce additional protective guarantees aimed at the more complete performance of this function, which would be conducive to parties selecting mediation in these types of cases[33].

[33] Mędrala, Wstęp, *Funkcja ochronna cywilnego post powania s dowego w sprawach z zakresu prawa pracy*, Wolters Kluwer, 2011. Mędrala, *Wstęp*, in Id., *Funkcja ochronna cywilnego post powania sądowego w sprawach z zakresu prawa pracy*,Wolters Kluwer, 2011.

Abstract

Amicable dispute resolution helps to alleviate social tensions in the workplace between employees and employers, and fosters a peaceful culture of dispute resolution. The above-mentioned out-of-court institutions for resolving labour disputes are in line with the implementation of the dispute settlement amicable directive established by the Polish legislator. When comparing the practical application of the offered out- of-court employment dispute resolution procedures, it should be noted that at the present time they are not popular among Polish employers and employees.The reasons for this are complex, and have been outlined above. However, mediation can be very helpful in resolving labour disputes, and its use has been steadily increasing since its introduction into the provisions of the Code of Civil Procedure, with the possibility of its use in labour disputes, as indicated by the statistics kept by the Ministry of Justice[34]. This may indicate that there is a growing interest in this new institution and that employees and employers are increasingly interested in using this form of dispute resolution. Mediation may therefore be a way out of a situation in which conciliation committees and arbitration have failed. It is also worth noting that mediation has been used as a well-established form of resolving collective disputes, which demonstrates its effectiveness in the context of labour relations[35].

Keywords

Meditation, conciliation, alternative dispute resolution, arbitration, employment disputes.

[34] The number of cases in which the parties were referred to mediation on the basis of a decision of the district court (Civil Procedure Code Art. 1838 § 1) was as follows: in the first year (2006) the number of individual employment cases referred to mediation was 33. However, the numbers rose significantly in more recent years: in 2021-3636, and in 2022 - 2966.

[35] Act on the Resolution of Collective Disputes.To read more about the use of mediation in employment cases in Polish system, see Antolak-Szymanski, *Mediacja w rozwiązywaniu indywidulanych sporów pracowniczych. Ujęcie modelowe,*Wolters Kluwer, 2024.

Monika Latos-Miłkowska

Settlement of labour law cases in Poland. Theoretical and practical aspects

Contents: 1. Introductory remarks. 2. A brief historical overview. 3. Organisation of the labour judiciary. 4. Material and territorial jurisdiction of labour courts. 5. Proceedings in labour law cases. 5.1. Expanding the circle of entities that can represent an employee before the court. 5.2. Distinctions in the field of evidentiary proceedings. 5.3. Guarantees of speed of proceedings. 5.4. Increasing the court's ability to act ex officio. 5.5. Limitation of litigation costs on the part of the employee. 6. Conclusions.

1. Introductory remarks

The existence of special mechanisms for the settlement of disputes arising in the sphere of employment has a long history in Poland – dating back to 1928[1].The distinctions take into account both the specificity of these cases, as well as the position of the participants in the dispute[2]. Traditionally, the protective dimension of the rules governing labour law proceedings has been recognised, based on the assumption of the factual inequality of the parties, which the legislature in some way compensates[3]. By establishing specific mechanisms for resolving labour law disputes, the legislator also implements the constitutional principles of labour protection (Art. 24 of the Constitution of the Republic of Poland), the principles of social justice (Art. 2 of the Constitution of the Republic of Poland) and the right to court (Art. 45(1) of the

[1] Boguska, Pisarczyk, *Funkcja ochronna prawa pracy a zmiany w przepisach Kodeksu post - powania cywilnego, Przegl d Prawa i Administracji CXXIV*, 2021, p. 38.

[2] *Ibidem*, p. 38.

[3] *Ibidem*, p. 39.

Constitution of the Republic of Poland), understood as the right to actual access to justice and a properly formed procedure[4].

This text is a synthetic presentation of the problems of resolving labour law cases in Poland. In particular, the organisation of labour judiciary in Poland, the scope of jurisdiction of labour courts, and their territorial and functional jurisdiction will be presented.Then the proceedings in labour law cases will be presented, focused on its special characteristics aimed at strengthening the position of the employee and bridging the differences in the actual position of the parties to these proceedings.

This text focuses on the judicial resolution of labour law disputes. A distinctive feature of labour law disputes is that they seek an amicable conclusion, primarily through a court settlement or mediation proceedings. However, these issues – due to their breadth and importance – are excluded from this text and presented in a separate study.

2. A brief historical overview

In 1918, Poland – after 123 years of partition – regained its independ- ence. As early as 1928, two pieces of legislation were enacted that became the foundation of labour law – the Presidential Decree on Employment Contracts for Labourers[5] and the Presidential Decree on Employment Contracts for White-Collar Workers[6]. At the same time, by virtue of the Decree of the President of the Republic on Labour Courts of 22, 1928 March labour courts were established[7]. Thus, the history of labour courts in Poland dates back to 1928.

This act comprehensively (although not initially nationwide), introduced a unified mechanism for resolving disputes arising from the employment and vocational training relationship between employers and employees or students, and between employees of the same enterprise[8]. The subject-

[4] Boguska, Pisarczyk, *cit.*, p. 39; Grzegorczyk, Weitz, *Constitution of the Republic of Poland. Commentary*, Vol. 1, in Safjan, Bosek, (Ed.) 2016,Wydawnictwo Prawnicze, p. 1085 ss.

[5] OJ 1928, n. 35, item 324.

[6] OJ 1928, n. 35, item 323.

[7] OJ 1928, n. 37, item 350.

[8] Baran, *Rozstrzyganie indywidualnych sporów pracy*, in *Historia polskiego prawa pracy* in *System Prawa Pracy*, Vol. 14, in Baran (Ed.),Wolters Kluwer, 2021, p. 1449.

matter scope of the labour courts' jurisdiction was broad, encompassing not only disputes relating to the employment relationship, but also disputes re- lated to the employment relationship in a functional way or in terms of thesubject-matter only[9]. Also in terms of subject-matter, the labour courts' ju- risdiction was broad – it included consideration of the cases of labourers, domestic servants, domestic caretakers, white-collar workers (with some in- clusions), students and apprentices[10].

In all categories of cases handled, the courts used the jurisdictional method. Since the beginning of labour courts in Poland, its characteristic feature has been the participation of the social factor – jurors[11].

As for procedural issues, the legislature attached particular importance to the principle of speed of proceedings[12].

Fundamental changes in the labour court system occurred after World War II. The change in the political system (socialist system) and economic system (centrally planned economy), as well as the entry of Poland into the orbit of influence of the Soviet Union caused radical changes in the regula-tion of the settlement of labour law disputes. In 1950, the labour courts de-veloped in the interwar period were abolished. In its place in the first half of the 1950s, the Soviet model of labour dispute settlement bodies was adopted[13]. Its essence was to give jurisdiction over labour matters to bodies that are, as a rule, extrajudicial in nature – company arbitration committees. Under the decree of 24 February 1954 on company arbitration committees (DCAC), such committees were established in all workplaces with more than 100 employees. If an arbitration committee has not been established at a par-ticular workplace, arbitration committees have been set up at field trade union bodies. Within the jurisdiction of the arbitration committees were disputes arising from labour relations in socialised enterprises.As for the pro-cedure before the company's arbitration committees, it was quasi-judicial in nature[14]. The case was decided at a quasi-hearing, in which the employeehad the right to participate, who could also be represented by a family mem- ber of a union representative or another employee.The primary purpose of

[9] *Ibidem*, p. 1449.
[10] *Ibidem*, p. 1449.
[11] *Ibidem*, p. 1452.
[12] Art. 28 of the Decree of the President of the Republic of Poland on Labour Courts.
[13] Baran, *cit.*, p. 1455.
[14] *Ibidem*, p. 1455.

the company arbitration committees, according to the assumptions formulated in Art. 8 of DCAC, was to settle labour relations disputes in accordance with the interests of the working masses and the welfare of the national economy. As noted in the literature, the arbitration committees – contrary to their name – did not use the arbitration method, but the jurisdictional method, when settling individual labour disputes[15].The committee's rulings could be appealed to the board of the relevant trade union, which had the option of approving the ruling or overturning it. Only if the ruling was overturned, or if the committee's decision was not unanimous, did the employee have the option of taking the case to court.As the literature points out, during this period there was a unionised justice system in labour cases, in which the importance of the courts was marginalised[16]. This was in line with the ideological assumptions of the social and economic system of the time.

This model underwent some modifications in 1975 after the Labour Code was enacted[17].

The existing jurisdiction of labour unions in the second instance was abolished.The competencies of the appellate bodies were taken over by the newly established district labour and social security courts. Still, the main burden of first instance jurisprudence was carried by company arbitration committees.

The above system was fraught with numerous drawbacks.Although the committees were intended to be social bodies guided by impartiality, in practice they were dependent on the management of workplaces and trade unions that were submissive to the authorities[18]. Hence, since the early 1980s, it has been called for change.This change was made in 1985 through a sweeping reform of the Labour Code and the Code of Civil Procedure enacted on 18 April 1985, under which the administration of justice in labour law cases was entrusted to labour courts.This system – with some modifications due to the changes that have taken place over the years in the organisational model of the general judiciary – is still in place today.

[15] *Ibidem*, p. 1456.

[16] *Ibidem*, p. 1456.

[17] Act of 18 April 1985, amending the Code of Civil Procedure Act, Journal of Laws 1985, n. 20, item 86.

[18] Dziadzio, *Zarys historii s downictwa pracy* in *Procesowe prawo pracy. System prawa pracy*,Vol. 6, in Baran (Ed.),Wolters Kluwer, 2016, p. 73.

3. Organisation of the labour judiciary

In the Polish justice system, labour courts are organisational units of general courts[19].Thus, from an organisational point of view, they are an integral component of the general courts because they have the status of a division or divisions of these courts. Their very name underlines, first of all, the distinctiveness of the procedure in labour law cases[20]. Labour courts therefore function within the structures of the general judiciary. They do not form a separate institution (such as the administrative judiciary), but op- erate according to the rules applicable to all general courts.Their separation is organisational and functional in nature[21]. Labour courts, as specialised organisational units of general courts (divisions), have been obliged by the legislator to recognise and adjudicate labour law cases[22]. By adopting such a solution, it was possible to combine, on the one hand, the organisational uniformity of the judiciary in civil cases in the broad sense, and on the other hand, the need for professional and specialised justice in labour law cases[23]. As a rule, in judicial practice, labour and social security divisions are separated in the structure of district courts. Also, higher courts (regional courts and courts of appeal) usually have labour and social security divisions.

Labour courts in the first instance hear labour law cases with a single judge as a rule. In some cases, the legislature also requires the participation of jurors who represent the social factor.This includes cases related to:

(a) determination of the existence, establishment or expiration of the employment relationship, recognition of the ineffectiveness of the termina- tion of employment, reinstatement and restoration of previous working conditions or wages, as well as claims asserted together with them and for compensation in the event of unjustified or unlawful termination and termination of employment,

(b) violations of the principle of equal treatment in employment and for claims related thereto,

[19] Art. 12 sec. 1a item 2 of the Law on the System of Common Courts.

[20] Baran, *Status organizacyjny s downictwa pracy*, in *Procesowe prawo pracy. System prawa pracy,* Vol. 6, in Baran (Ed.),Wolters Kluwer, 2016, p. 418.

[21] *Ibidem*, p. 419.

[22] Świątkowski, *Kognicja s dów pracy*, in *Procesowe prawo pracy. System prawa pracy*,Vol. 6, in Baran (Ed.),Wolters Kluwer, 2016, p. 284.

[23] Baran, *Sta*, p. 420.

(c) compensation or damages as a result of mobbing.

It should also be mentioned that due to the fact that labour courts are organisationally part of the general judiciary, the Supreme Court supervises their adjudicatory activities[24]. Labour law cases in the Supreme Court are heard by the Labour and Social Security Chamber, whose jurisprudence plays a very important role in shaping the adjudicatory practice of labour law in Poland.

4. Material and territorial jurisdiction of labour courts

Labour courts hear labour law cases. The term "labour law cases" was introduced by the legislator to define the subject matter jurisdiction of labour courts[25]. The concept of labour law cases is further clarified by Art. 476 of the Code of Civil Procedure, according to which labour law cases include those: 1) for claims from or related to the employment relationship; 1[1]) for determining the existence of an employment relationship, if the legal relationship linking the parties, contrary to the agreement between them, has the characteristics of an employment relationship; 2) for claims from other legal relationships to which, by virtue of separate , the provisions of labour law apply; 3) for compensation claimed from the employer under the on benefits for occupational accidents and diseases.

Employment relationship cases are those in which the basis of the claim being asserted is the employment relationship, regardless of whether the employee is performing work under an employment contract, appointment, election or cooperative employment agreement (Art. 2 of the Labour Code). The claim here arises from the failure or improper performance by one party to this relationship of its obligations to the other party[26].The most representative cases of employment relationship claims are those for reinstatement or compensation in the event of defective termination or termination without notice, claims for damages for violation of the prohibition of discrimination, claims for damages for mobbing, claims by the employer for

[24] Art. 183 of the Constitution of the Republic of Poland.

[25] Świątkowski, *Kognicja s dów pracy* in *Procesowe prawo pracy. System prawa pracy*, Vol. 6, in Baran (Ed.),Wolters Kluwer, 2016, p. 285.

[26] Bury, Nawrocki, *Post powanie s dowe w sprawach z zakresu prawa pracy*, 2019, p. 1.

compensation for damage caused by the employee, a claim for rectification of the labour certificate, a claim for payment of wages, a claim for cancellation of a disciplinary penalty imposed by the employer.

As a separate category of cases, the legislature has established cases for claims related to the employment relationship. Matters related to employment relationship include those that, although not directly involving a violation of the rights and obligations arising therefrom, but whose necessary basis for existence is the employment relationship.This applies to such matters that could not have arisen without the existence of the employment relationship, arising from other legal ties linking the employee and the employer, with this "other" legal relationship, from which the party's claim arises, being in close interaction with the primary link, which is the employment relationship[27]. Examples of cases for claims related to the employment relationship are: for the protection of the employee's personal rights (Art. 23 and 24 of the Civil Code) for compensation for damages related to the refusal to conclude a promised employment contract[28], for claims arising from non-performance or improper performance of a non-competition agreement after the termination of the employment relationship, against the employer for reimbursement to the company social benefits fund of funds disbursed contrary to the provisions of the Act of March 4, 1994 on the company social benefits fund[29].

Cases to establish the existence of an employment relationship are cases that seek to establish that the employment relationship linking the parties, contrary to its name, is in fact an employment relationship, since work is performed under conditions characteristic of an employment relationship. The possibility of bringing such an action allows the employee to eliminate the discrepancy between the formal name of the contract (indicating a civil law contract) and the way the work is performed, which exhibits the characteristics of an employment relationship. As a result of the procedure, it is possible to change the legal classification from non-employee to employee status[30].

[27] Świątkowski, *Droga s dowa w sprawach z zakresu prawa pracy i ubezpiecze społecznych*, Palestra 1986, 5-6, p. 23; Bury, Nawrocki, *cit.*, p. 16.

[28] *Ibidem*.

[29] Bury, Nawrocki, *cit.*, pp. 16-17.

[30] Świątkowski, *KSP*, p. 335.

Cases for claims from other legal relationships to which, under separate the provisions of the labour law apply are cases transferred to the jurisdiction of the labour court by virtue of a special provision. These are labour law cases in the formal sense. The designation by the special provision of the labour court as the competent court to hear the case prejudges the exami- nation of the case in a separate procedure for labour law cases[31]. Examples of cases in this category are cases from so-called non-employee employment relationships, which are of an administrative-legal nature, to the extent that the provisions of the service pragmatics statute the jurisdiction of the labour court, or cases for payment of benefits from the Guaranteed Employee Benefits Fund[32].

The last case classified by the legislator as labour law cases are cases for damages claimed against the employer under benefits for accidents at work and occupational diseases. These include, among others, cases to determine whether an event was an accident at work, as well as a case against an employer for compensation for loss or damage in connection with an accident to personal effects and objects necessary for the performance of work, except for loss or damage to motor vehicles and monetary values (Art. 2371§ 2 of the Labour Code).

The *majority* of labour law cases are decided in the first instance by district courts. This is due to the general rule that district labour courts have jurisdiction over all matters for which the jurisdiction of the district court is not reserved. Regional courts hear cases in the first instance with a value of the subject of litigation over PLN 100,000 and cases of a non-material nature. However, it should be noted that to the jurisdiction of district courts, regardless of the value of the subject matter of the dispute, are assigned cases for determining the existence of the employment relationship, for recognition of the ineffectiveness of the termination of the employment relationship, for reinstatement and restoration of previous working conditions or wages, and claims asserted jointly with them, and for compensation in the event of unjustified or unlawful notice and termination of the employment relationship, as well as cases concerning penalties of order and the certificate of employment and claims related thereto.These are the most common labour law cases in practice, so it is legitimate to say that labour law cases are generally

[31] Bury, Nawrocki, *cit.*, p. 22.

[32] Art. 20 (3) of the Law on the Protection of Employee Claims in the Event of Employer Insolvency.

decided in the first instance by district courts.Appeals against the judgments of the courts of first instance are heard by the regional courts and courts of appeal, respectively.

The territorial jurisdiction of the labour court is alternate in nature. According to Art. 461 § 1 of the Code of Civil Procedure, an action in a labour law case can be brought either before a court with general jurisdiction over the defendant or before a court in whose jurisdiction the work is, was or was to be performed.This is especially relevant in the case of multi-plant employers, where the employer's head office is located in a different place than the workplace where the work was performed by the employee.

5. Proceedings in labour law cases

Labour law cases – as belonging to the broader category of civil cases – are resolved according to the provisions of the Civil Code. However, the special nature of these cases has resulted in separate regulation of the rules of these proceedings in Chapter III of the Code of Civil Procedure, entitled "Proceedings in Labour and Social Security Cases"[33]. Labour law proceed- ings are therefore separate proceedings. The purpose of the separation oflabour law proceedings is primarily the need for a protective function[34]. In- deed, in procedural law, too, there is a perceived need to establish mechanismsto correct disparities in the legal position, generally affecting all employees vis-à-vis employers[35]. Special procedural arrangements are also necessary to ensure that the goals of substantive law are achieved (symbiosis of substantive and procedural law)[36].

The separation of labour law cases and the establishment of special rules for them with protective significance is justified by the nature of labour law cases, the importance of the employment relationship for its parties, especially for employees, as well as the social significance of this type of disputes, arising

[33] Świątkowski, *Prawo do s du w sprawach z zakresu prawa pracy* in *Procesowe prawo pracy. System prawa pracy*,Vol. 6, in Baran (Ed.), 2016, p. 265.

[34] Skapskiąpski, *Funkcje procesowego prawa pracy*, in *Procesowe prawo pracy. System prawa pracy*, Vol. 6, Baran (Ed.), 2016, p. 47; Mędrala, *Funkcja ochronna cywilnego post powania s dowego w sprawach z zakresu prawa pracy*, 2011.

[35] *Ibidem*, p. 47.

[36] Skapsiąpski, *cit.*, p. 45; Boguska, Pisarczyk, *cit.*, 124, p. 40.

in connection with a legal relationship that is the primary source of livelihood for most of society[37].The basic assumptions leading to the differential litigation position of the parties are the weaker economic position and lower legal awareness of the employee[38], as well as more limited access to professional legal assistance. Thus, strengthening the position of the employee by privileging them over the employer in various litigation situations serves to equalise the disparity between them and, as a result, create balance and equality between the two parties.The protective function of the procedural rules on labour law cases is delivered by several principles on which the regulation of Section III was based, which include, first and foremost, the expansion of the circle of persons who can represent an employee before the labour court, the limitation of formalism of the proceedings, the distinctiveness of the conduct of evidentiary proceedings, the increased possibility of the court to act ex officio, the speed of the proceedings, the limitation of the cost of the trial on the part of the employee.

5.1. Expanding the circle of entities that can represent an employee before the court

In order to facilitate employees' access to professional legal assistance and to bridge the differences between employees and the employer in this regard in labour law proceedings, the legislator has expanded the range of entities that can represent an employee before labour courts. According to Art. 465 par. 1 of the Code of Civil Procedure, an employee before a labour court can be represented not only by a professional trial attorney (advocate or legal counsel) but also by representatives of trade unions and social organisations, or by other employee of the workplace where the employee works.The admission to the process as attorneys of the entities indicated in Art. 465 sec. 1 of the Civil Code is based on the assumption that these per- sons, while not being professional attorneys, nevertheless have relevant ex- perience in disputes concerning the employment relationship and can assist the employee in this regard[39]. In addition, employees may apply for *ex officio* legal aid under the general rules established by the Code of Procedure. How-

[37] *Ibidem*, p. 47.
[38] *Ibidem*, p. 48.
[39] *Ibidem*, p. 48.

ever, practice shows that these solutions do not quite satisfy these functions. As a result, a real problem in labour law cases, is that it is difficult for em- ployees to access professional legal assistance.Very often, the low value of the subject matter of litigation in labour law cases makes them unprofitable from the point of view of professional trial attorneys. Also, access to *ex officio* legal aid is not sufficient. Little use is made of the possibility for representatives of trade unions and other social organisations to represent workers before labour courts. Presumably – although this is not supported by empirical re- search – this is due to the low level of union membership and perhaps the low activity of the unions themselves in this regard.

As a result, employees often do not benefit from any professional support in the process, which significantly weakens their litigation position vis-à-vis the employer, who usually has such support.

5.2. Distinctions in the field of evidentiary proceedings

In separate proceedings in labour law cases, as a rule, the general rules of evidentiary proceedings apply, unless the rules relating to this type of case regulate certain issues differently. These differences are mainly due to the protective function of these proceedings post with respect to the employee[40]. For a long time, a hallmark of labour law proceedings was the court's ability, and even obligation, to take evidence *ex officio*, for the employee. Currently, the main principle of conducting evidentiary proceedings is the adversarial principle, in which the initiative for conducting evidence rests with the parties. However, according to the second sentence of Art. 232 of the Code of Civil Procedure, the court may admit evidence not indicated by a party.The literature points out that this provision implies the court's obligation to admit evidence *ex officio* in situations where there are particularly good reasons for ordering it to properly clarify the case[41]. A peculiar feature of the evidentiary proceedings in labour law cases is the non-application of rules limiting the admissibility of witness and hearing evidence (Art. 473 of the Code of Civil Procedure) The evidentiary limitations provided for in this provision are primarily restrictions on the possibility of taking evidence from witnesses or questioning parties against or beyond the content of a document (Art. 247

[40] Flaga-Gieruszyńska, *Post powanie dowodowe w sprawach z zakresu prawa pracy*, in *Procesowe prawo pracy. System prawa pracy*,Vol. 6, in Baran (Ed.),Wolters Kluwer, 2016, p. 624.

[41] Flaga-Gieruszyńska, *cit.*, p. 624.

of the Code of Civil Procedure).This exception to the general rules under Art. 247 of the Code of Civil Procedure means that any fact relevant to the employee can be proven by any means of evidence that the court deems desirable and their admission advisable[42].

5.3. Guarantees of speed of proceedings

It should be pointed out that the speed of proceedings is one of the basic guarantees of an efficient and fair trial in all civil cases, and in labour law cases its importance is particularly momentous[43].This is especially true in matters related to workers' compensation and the existence of the em- ployment relationship. In this regard, labour law proceedings not only have a protective function, but also a social function related to the provision of basic necessities for the workers and their families.The social importance of the aforementioned problems underlies the construction of the principle of speed in labour law cases[44].The principle of speed of proceedings in labour law cases is primarily delivered by Art. 471 of the Code of Civil Procedure. For a long time, this provision stipulated that no more than 2 weeks should elapse between the time of filing a lawsuit and the date of the hearing.Thisdeadline was instructive and was significantly exceeded in court practice. However, the glaring discrepancy between the time limit indicated in Art. 471 of the Code of Civil Procedure and practice prompted the legislature to amend this provision and make the deadlines more realistic.According to the wording of Art. 471 of the Code of Civil Procedure, as amended in 2019,the chairperson and the court are obliged to act so that the date of the court hearing at which the case is to be heard is no later than one month from the date of completion of the preparatory hearing, and if no such hearing has been held, no later than six months from the date of filing the statement of defence. The literature points out that the six-month deadline seems quite far away. Adding to this, the time for filing a response to a lawsuit or prelim- inary exchange of pleadings, this may result in the reality that labour law cases will not be resolved faster than within a year in the first instance[45].

[42] Order of the Supreme Court of 17 November 2020 II UK 386/19 (L. n. 3080408).

[43] Mędrala, *Zasada szybko ci postepowania w sprawach z zakresu prawa pracy po nowelizacji K.P.C.*, *Przegl d Prawa i Administracji*,Vol. CXXIV, in Jabło ski,Tomanek (Ed.), 2022, p. 86.

[44] Mędrala, *cit.*, p. 86.

[45] *Ibidem*.

Judicial practice confirms these concerns. The protraction of proceed- ings continues to be a basic affliction of the judiciary in labour law cases. In large metropolitan areas, cases before labour courts in the first instance some-times last 3 to 4 years[46].This greatly weakens the protective function of labourlaw, both in terms of substantive law and procedural law[47].The protractedness of the proceedings also renders some of the claims from the employment relationship pointless (for example, seeking recognition of termination as ineffective, which can be adjudicated if the period of notice of termination of the employment contract has not yet expired), and some – after the passage of such a long time – difficult to implement (for example, implementation of the claim for reinstatement of the employee). It should therefore be concluded that the principle of speed of proceedings – so important in labour law cases – is not delivered in practice.

5.4. Increasing the court's ability to act ex officio

A hallmark of labour law proceedings is the greater ability of the court to act *ex officio*. Previously, this assumption was implemented by basing the proceedings on the principle of objective truth and equipping the court with a wide range of possibilities to act *ex officio*, as well as to adjudicate beyond the claim filed by the employee[48]. However, the scope of actions taken by the court has been significantly reduced as a result of changes to the labour law procedure, which were aimed at making the procedure more adversarial dispositive. Still, some elements of the increased ability to act *ex officio* have been retained.

According to the second sentence of Art. 477 of the Code of Civil Procedure, the chairperson instructs the employee on the claims arising from the facts they have cited.This is a solution that takes into account the disposition of the employee, as modification of previously formulated claims requires a request from the employee[49]. The court cannot make this modification on its own motion.

According to Art. 477(1), if an employee has made a choice of one of

[46] Conclusions from the legal practice of the author, who is an active legal counsel acting in labour law cases.

[47] Boguska, Pisarczyk, *cit.*, p. 37.

[48] Skapskiąpski, *cit.*, p. 51.

[49] Skapskiąpski, *cit.*, p. 53.

the alternative claims to which they are entitled, and the claim made proves to be unjustified, the court may, of its own motion, consider the other alternative claim.The case law has clarified that the phrase "will prove to be unjustified" used by the legislator does not mean a general lack of justification of the claim, because then the court should dismiss it and not grant another claim, but that the claim is justified in principle, but the employee has chosen, in the opinion of the court, an unjustified claim[50].

In addition, according to Art. 477^2 § 1 of the Code of Civil Procedure, when adjudicating the amount due to an employee in labour law cases, the court shall, *ex officio*, when issuing the judgment, give the order of immediate enforceability in a part not exceeding the full one-month salary of the employee. It is also an expression of the labour law's protective function – the employee receives their claim in an amount not exceeding a full one month's salary even before the judgment becomes final.

5.5. Limitation of litigation costs on the part of the employee

Another characteristic of labour law proceedings is that the employee is privileged in terms of bearing the costs of the proceedings.The issue relates to the adequate regulation of costs, the process, so that they do not create a barrier that limits access to court for employees, especially the poorest ones[51]. For a long time (since 2005), an employee whose claims did not exceed the amount of PLN 50,000 was exempt from the relative fee for filing a lawsuit (which in ordinary civil cases is 5% of the value of the subject matter of the dispute). A very important change in this regard was introduced by the amendment to the Law on Court Costs in Civil Cases, which came into force on 23 September 2023. According to the amended regulations, an em-ployee is exempt from court fees for filing a lawsuit and most other court fees regardless of the value of the subject matter of the dispute. It seems that this change will make it easier for employees to access judicial resolution of disputes from the employment relationship. However, it may result in a significant increase in the number of lawsuits filed by employees, which will translate into a further lengthening of labour law proceedings.

[50] Justification of the resolution of the Supreme Court of 30.03.1994, OSNCP 1994/12, item 230.

[51] Skapskiąpski, *cit.*, p. 52.

6. Conclusions

The regulations in force in Poland for the settlement of labour law cases deserve a positive assessment in many respects. First of all, the adopted organisational model of labour judiciary deserves approval. On the one hand, they are part of the general judiciary, which deliver the assumption of uni- formity of justice in civil cases, and on the other hand – due to the functional and organisational separation of divisons specialised in the settlement of labour law cases – ensures specialisation and substantive preparation for the settlement of disputes in this area. Proceedings in labour law cases perform a protective function, although it has undergone some modification in recent years – the court's ability to act *ex officio* has been curtailed, in favour of increasing employee activity and exerting an influence on the proceedings. In practice, however, this may translate into a weakened position for an employee acting without professional legal assistance. In principle, the exemption of employees from court fees is also to be welcomed, although perhaps in this case, it would be more appropriate to raise the amount of the value of the subject matter of the dispute, beyond which the employee would be obliged to pay these fees.

The biggest problem of the Polish judiciary in labour law cases (and not only) is undoubtedly the lengthiness of court proceedings.This significantly undermines the protective function of both labour law proceedings themselves and substantive labour law. Indeed, an employee has to wait a very long time for an adjudication of their claim – while often are of a maintenance nature. Unfortunately, the Polish legislator has not yet found an effective way to solve this problem, and the solutions adopted recently (for example, the order to continue employing an employee until the case is legally resolved) are more about "alleviating the symptoms" rather than eliminating the source of the problems. A problem observed in practice is also that employees have difficult access to professional judicial assistance.

Abstract

The settlement of labour law disputes in Poland is based on several pillars – the organisational and functional separation of labour courts, which specialise in the settlement of such cases, the separation of labour law proceedings, the purpose of which is to protect employees as actually the weaker party in these proceedings. In such proceedings, a number of solutions have been introduced to bridge the differ- ences in the position of the parties to these proceedings and to make it easier for employees to access the opportunity to assert their rights in court. The purpose of the study is to present the essential goals and features of the organisation of labour courts in Poland and separate proceedings in labour law cases, and to attempt to assess their functioning in practice.

Keywords

Labour courts, labour law cases, proceedings, protective function; employee' rights.

Laurent Posocco

Arbitrage et droit du travail en France

1. Domaine de l'étude

1.1. Arbitrage intern et international

Le domaine de l'étude est relatif à l'arbitrage tant international qu'interne. Rappelons qu'en droit français, l'arbitrage est régi par deux corps de règles : le premier, relatif à l'arbitrage interne[1], est relativement protecteur, le second, traitant de l'arbitrage international, est plus libéral. L'arbitrage international est de celui qui met en cause les intérêts du commerce international[2]. Il faut comprendre que l'opération soumise à l'arbitrage est-elle même internationale, c'est-à-dire qu'elle comporte des flux à travers les frontières entre au moins deux Etats. Ainsi le caractère interne ou interna- tional d'un arbitrage se déduit exclusivement de la nature de l'opération économique concernée, au regard de la mise en cause des intérêts du commerce international, indépendamment du lieu de l'arbitrage, de la loi applicable au fond ou de la nationalité des contractants. L'arbitrage interne

[1] CPC, artt. 1442 à 1504.

[2] CPC, art. 1504 et s.

quant à lui n'est pas directement défini par le Code de Procédure civile. Il correspond à toutes les situations dans lesquelles l'arbitrage n'est pas international.

1.2. Litige individuel

Par ailleurs, les antagonismes du travail peuvent être individuels ou collectifs. Le Code du travail français règlemente certes la possibilité d'un arbitrage en matière de conflits collectifs. La convention ou l'accord collectif de travail peut ainsi prévoir une procédure contractuelle d'arbitrage et l'établissement d'une liste d'arbitres dressée d'un commun accord entre les parties[3]. Cette hypothèse ne sera nullement envisagée. La seule question qui va être traitée est celle de l'arbitrage individuel.

2. Sécurisation de la position du salarié

2.1. Clause compromissoire inopposable au salarié

Voilà quelques années maintenant que naissent des institutions arbitrales intervenant notamment en droit du travail, alors même que la réglementation prud'hommale, inchangée, est toujours aussi hostile à la justice privée. Si la validité du compromis d'arbitrage convenu après la rupture du contrat est admise depuis longtemps[4], celle de la clause compromissoire était loin d'être évidente. L'article L. 1411-4 du code du travail, en vigueur, dispose en effet que "Le conseil de prud'hommes est seul compétent, quel que soit le montant de la demande, pour connaître des différends [du travail]". Il énonce encore que "toute convention contraire est réputée non écrite". Rappelons également la survenance d'une décision a priori dévastatrice[5], ayant d'une

[3] Code du travail, art. L2524-1 et s.

[4] Le compromis d'arbitrage, conclu après la rupture du contrat de travail, c'est-à-dire une fois le salarié hors l'influence de son employeur, est valable. La Cour de cassation a jugé que "la cour d'appel ayant relevé que le contrat de travail avait été rompu avant la signature du compromis, en a justement déduit que les parties étant devenues dès lors libres et capables de compromettre (…) elles pouvaient le faire de manière licite à la date du compromis" (Cass. soc., 5 déc. 1984 : Rev. arb. 1986, p. 47, M.-A. Moreau).

[5] Cass. Soc. 30 novembre 2011, 11-12.906: "attendu qu'il résulte de l'article L. 1411-4 du code du travail que le principe compétence-compétence selon lequel il appartient à l'ar-

certaine manière écarté le principe de compétence-compétence de l'arbitre saisi en cette discipline en l'absence de constatation de l'inapplicabilité ou de nullité manifeste de la clause compromissoire[6].Toutefois, l'arrêt incriminé rompait avec l'aversion naturelle pour la clause compromissoire en droit du travail en la rendant en matière interne simplement inopposable au salarié et non plus nulle ou réputée non écrite[7]. La réforme de 2016 du droit des obligations devait consacrer cette lecture, le nouvel article 2061 al. 2 du Code civil, issu de l'ordonnance 2016, disposant que " lorsque l'une des parties n'a pas contracté dans le cadre de son activité professionnelle, la clause ne peut lui être opposée". Le litige du travail n'est donc pas, par nature, réfractaire à l'arbitrage. Il résulte de la sanction de simple inopposabilité que la stipulation d'une clause compromissoire est sans danger pour le salarié. Il peut soit se prévaloir de la clause et contraindre l'employeur à l'arbitrage, soit préférer la compétence de la juridiction d'Etat.

2.2. Clause de choix de loi

Une autre difficulté est également à écarter. On aurait pu craindre que le choix par les parties d'une loi étrangère diminue la protection impérative du salarié. En réalité, le système appliqué en matière de clause de choix de loi applicable consiste à combiner la loi choisie par les parties et la loi objectivement applicable. Selon ce mécanisme, la loi choisie doit accorder au salarié une protection minimale. Si la loi objectivement applicable comporte des dispositions impératives plus favorables au salarié, elle sera préférée.Ainsi, on admet que les parties aient pu s'accorder sur le choix d'un droit mais on cherche à éviter que leur accord, qui a peut-être été obtenu en raison d'un éventuel déséquilibre économique, ne soit défavorable à la partie faible. Il résulte de ces deux moyens – inopposabilité de la clause d'arbitrage et application des règles impératives de la loi objectivement applicable – que la situation du salarié est relativement sécurisée.

bitre de statuer par priorité sur sa propre compétence n'est pas applicable en matière prud'homale".

[6] En principe, l'art. 1456 du CPC requiert la nullité ou l'inapplicabilité manifeste de la clause compromissoire afin que puisse être tenu en échec le principe de compétence-compétence dont jouit l'arbitre saisi.

[7] Voy. en ce sens L. Posocco, *Exclusion du principe de compétence-compétence en matière prud'homale*, in Commentaire Cass. Soc., 30 nov. 2011, n.11-12.905 et n.11,12.906, FS-P+B. Petites affiches n. 89, p. 8.

3. Pertinence du recours à l'arbitrage en droit du travail

La question qui se pose est avant tout celle de la pertinence de la méthode arbitrale en droit du travail. Son admission élargie ne peut en effet se fonder ni sur l'absence de risque encouru par le salarié, ni sur les seuls dysfonctionnements de la juridiction paritaire[8], laquelle pourrait tout simplement être réformée. La volonté d'écarter la voie de l'appel[9] ne saurait davantage motiver la mobilisation d'auteurs réputés, de juristes reconnus et de litigants en faveur de la justice privée. C'est bien en raison des atouts de la technique qu'elle mériterait une attention particulière.

3.1. Avantages non spécifiques

3.1.1. Célérité

En réalité, l'arbitrage, dans cette matière comme dans les autres, per-met un examen non seulement rapide mais aussi approfondi des conten- tieux. Une première série d'avantages dont il jouit est commune à de nombreuses disciplines. La célérité peut par exemple se révéler profitableau salarié, impatient de recevoir une indemnisation et d'en terminer avecla divergence qui l'oppose à son employeur. Il a souvent besoin, pour re- trouver un emploi, d'être disponible notamment sur le plan psycholo- gique. Il lui faut, pour cela, dépasser une querelle qui l'épuise. Pour pouvoir se tourner définitivement vers l'avenir, il doit surmonter cette étape du procès en ayant la conviction que l'attention nécessaire aura été portée à son affaire, qu'elle aura été traitée sérieusement, avec la minutieet la clairvoyance requises. L'expertise des arbitres, dans une discipline aussi complexe que la relation de travail, est assurément un atout. L'arbi- trage permet également de préserver les intérêts de l'employeur. Pour lui, les contentieux sont chronophages, ils l'accaparent. Le chef d'entrepriseet l'avocat qui ont commencé à suivre une affaire ne sont pas forcément

[8] Pour une étude complète, v. LACABARATS, *Rapport à Madame la Garde des Sceaux*, Ministre de la Justice "L'avenir des juridictions du travail:Vers un tribunal prud'homal du XXIème siècle".

[9] Les chiffres clés de la Justice, Édition 2023:Taux d'appel en 1er ressort sur les jugements au fond prononcés en 2021 pour les Tribunaux Judiciaires 13,4%, les Tribunaux de commerce 20,0%, les Conseils des Prud'hommes 62,7%.

ceux qui, quelques années plus tard, iront la discuter. Les informations se perdent, les événements s'oublient, l'origine de l'affrontement finit par devenir un souvenir imprécis enfoui dans les limbes abscons de l'histoire de l'entreprise. Chaque réunion va contraindre ces protagonistes à étudier le dossier au détriment d'actions vitales pour la vie de la structure. Il faut donc combattre ce fléau.

3.1.2. Confidentialité

Pour l'ensemble des litigants, l'arbitrage est confidentiel. Le salarié et son employeur peuvent désirer une certaine discrétion à un moment où ils pensent que des oreilles indélicates, parfois malveillantes, s'intéressent à leur dossier. Un salarié, un groupe de salariés ou une organisation syndicale peuvent, dans certaines situations, souhaiter que leur différent soit tranché à huis clos. Ceci afin de protéger la réputation et l'image de personnes particulièrement exposées. Certains employeurs peuvent encore ne pas vouloir que le montant du salaire ou des avantages ne soit dévoilé à des concurrents. La non-divulgation d'informations stratégiques permettra de limiter certaines nuisances éventuelles.

3.2. Avantages spécifiques

3.2.1. Litige polymorphe

La pertinence de la combinaison de l'arbitrage avec le droit du travail peut résulter des singularités de l'antagonisme travailliste. Admettons que le litige du travail est polymorphe ; il va, la plupart du temps, comporter des éléments juridiques, techniques mais aussi comptables et parfois même psychologiques ou médicaux. Il nécessitera, pour être mieux compris, une certaine transversalité des compétences des juges. Précisément, l'arbitrage multidisciplinaire, parfois appelé arbitrage expertise, permet en raison de la souplesse de la procédure et de la collégialité, de rejoindre la complémenta- rité recherchée. Ainsi par exemple, un expert-comptable pourra être sollicitépour mieux saisir les questions de chiffre si la physionomie du différend le commande. Dans d'autres cas, un psychologue du travail sera utilement convié à faire partie du jury.

3.2.2. Importance des éléments factuels

Par ailleurs, le litige du travail laisse une place importante aux éléments factuels. Ainsi, les dossiers prud'homaux comportent souvent des attestations écrites destinées à relater tel ou tel comportement, des courriers etc. En matière probatoire, l'arbitrage présente l'intérêt d'admettre assez facilement l'interrogatoire et le contre interrogatoire des témoins, ou encore la discussion d'experts, il propose parfois un règlement probatoire destiné à faciliter l'accueil des preuves. Le tribunal arbitral procède aux actes d'instruction nécessaires à moins que les parties ne l'autorisent à commettre l'un de ses membres[10]. L'audience arbitrale elle-même donne un espace conséquent aux parties. Tout ceci conforte l'idée que le droit du travail pourrait devenir un des domaines de prédilection de l'arbitrage.

4. Conseils de rèdaction

4.1. Perspectives

La pratique de l'arbitrage pour résoudre les litiges du travail est toutefois encore timide. Pourtant, ce mode alternatif de résolution des litiges est vraisemblablement l'avenir du contentieux social car il offre des garanties appréciables pour les justiciables. Il appartient aux acteurs du droit et des relations professionnelles de promouvoir cette technique, au bénéfice du service rendu au justiciable. Les conseils qui suivent seront destinés à surmonter certaines craintes.

4.2. Accès au juge

Une première difficulté qui peut se poser est celle de l'accès au juge. A la différence des juridictions judiciaires, les juridictions arbitrales ne sont pas régies par une carte judiciaire. Naturellement, la loi ne prévoit pas de maillage territorial des organisations arbitrales. Par conséquent, les déplacements pour les parties et leurs avocats pourraient créer un obstacle à la saisine du juge et à la bonne administration de la justice. Cet obstacle n'est pas systématique

[10] CPC art. 1467.

car, parfois, le déplacement d'un arbitre unique est moins couteux que le transport de toutes les parties, des témoins et plus largement de tous les acteurs du procès. Néanmoins, lorsque la question de l'accès au juge est susceptible de se poser, une solution pourrait être de reprendre dans la clause d'arbitrage les règles communes de compétence en droit du travail et de prévoir que les audiences se tiendront dans le ressort du domicile du salarié ou du lieu où l'engagement a été contracté. Le lieu du siège de l'arbitrage peut d'ailleurs ne pas coïncider avec celui des audiences.

4.3. Juridiction payante

La juridiction arbitrale, privée, est payante. Par ailleurs, les litiges en droit du travail sont parfois réputés porter sur de faibles enjeux. Les salariés pourraient souffrir d'une certaine forme d'asymétrie relativement aux moyens à engager pour le déroulement du procès. Le premier conseil que l'on donnera sera de ne pas mentionner le nombre d'arbitres dans la classe compromissoire. Cette dernière renverra à une institution arbitrale qui, en fonction de l'importance du litige, de sa complexité, de sa transversalité, désignera un ou plusieurs arbitres. Si le litige porte sur une valeur faible, elle nommera un seul arbitre. Si au contraire le litige est important ou connaît une complexité technique, elle désignera des arbitres aux compétences complémentaires. Cette clause d'arbitrage intègrera opportunément une phase de médiation préalable.

Une deuxième piste de réflexion serait de faire peser le cout de l'arbitrage sur l'entreprise. Cette dernière aura les moyens notamment comptables de traiter ces dépenses de manière optimale, la fiscalité des entreprises étant adaptée pour permettre aux professionnels, la plupart du temps, de ne pas souffrir de la répartition inégale du coup du procès. Dès lors que le régime fiscal permet un traitement favorable à l'entreprise, il y a lieu de lui faire assumer la totalité du cout du procès arbitral.

Résumé

L'étude s'intéresse au droit de l'arbitrage en matière de relations individuelles du travail. Elle démontre l'intérêt de l'arbitrage dans un domaine dans lequel il est encore discret. Elle propose ensuite des pistes de réflexions qui permettront le plein épanouissement de la discipline.

Mots clès

Droit du travail, arbitrage multidisciplinaire, relation individuelle, droit interne, droit international.

Guillaume Payan

La nouvelle procédure française de saisie des rémunérations du travail issue de la loi n. 2023-1059 du 20 novembre 2023: un dispositif efficace et équitable

1. Une procédure civile d'exécution peu attractive

La saisie des rémunérations, créée par l'importante loi n. 650 du 9 juillet 1991 et son décret d'application n. 755 du 31 juillet 1992, est actuellement

régie par les articles L./R. 3252-1 et suivants du code du travail, auxquels renvoie le code des procédures civiles d'exécution (ci-après: le CPCE)[1]. Elle peut être engagée par un créancier[2] pour faire saisir "des sommes dues à titre de rémunération par un employeur à son débiteur"[3]. Présentée comme étantpeu attractive – voire "exceptionnellement inefficace"[4] – en raison de ses "lourdeurs" et de sa lenteur[5], les créanciers ne l'utilisent généralement qu'en dernier lieu, alors même qu'elle est peu coûteuse pour les parties impliquées. Le nombre de procédures n'en est pas moins élevé: 124 513 saisies en 2019. Il s'agit d'un 'contentieux de masse'[6].

La règlementation de cette mesure d'exécution forcée est dérogatoire par rapport à celles applicables aux autres saisies mobilières, principalement[7] en raison de son caractère judiciaire. Devant être préalablement autorisée par le juge de l'exécution[8], elle est mise en œuvre par les services de greffes du tribunal judiciaire.

2. La perspective d'une procédure 'rénovée'

Dans l'objectif d'en renforcer l'efficacité, la perspective d'une déjudi-

[1] CPCE, art. L. 212-1 et R. 212-1.

[2] Souvent, la demande est introduite par un 'commissaire de justice' mandaté par le créancier. Les commissaires de justice ont été créés à compter du 1er juillet 2022. Ils remplacent les huissiers de justice et les commissaires-priseurs judiciaires. Ordonnance n.2016-728, 2 juin 2016 relative au statut de commissaire, *JORF* n.0128, 3 juin 2016.

[3] C. trav., art. R. 3252-1. Sur les sommes concernées, *infra* n. 9.4.

[4] C. Roth, *Les compétences du JEX mobilier depuis le 1er janvier 2020: les saisies des rémunérations et les autres*, in Gaz. Pal., 20 juin 2023, p. 11.

[5] Étude d'impact relative au projet de loi d'orientation et de programmation du ministère de la justice 2023-2027, NOR: JUST2305124L/Bleue-1, 2 mai 2023, p. 323, 324 et 326. Selon cette étude, il est "certain qu'une grande partie des mesures de saisie des rémunérations s'étirent sur plusieurs années lorsque les sommes à recouvrer sont importantes et que les revenus des débiteurs sont faibles, dès lors que les sommes saisissables sont limitées par un barème impératif. […] La procédure de saisie des rémunérations actuelle souffre d'un déficit d'attractivité du fait de sa lenteur (le délai d'audiencement des requêtes peut dépasser une année, le délai entre la requête et le premier paiement entre les mains du créancier atteint parfois deux ans) et de la complexité attachée au formalisme d'une procédure judiciaire ".

[6] *Ibid*, p. 324.

[7] Elle se singularise également par sa place au sein du code du travail, *infra* n.5, et en raison du régime de saisissabilité des rémunérations, *infra* n.9.4.

[8] Code de l'organisation judiciaire (COJ), art. L. 213-6, al. 5.

ciarisation partielle de cette procédure est périodiquement évoquée. Autrement dit, dans l'objectif – de valeur constitutionnelle[9] – de bonne administration de la justice, il est question de réaménager le rôle du juge en le cantonnant à un contrôle *a posteriori* de la régularité de la procédure, mais non de supprimer totalement sa présence. Une telle évolution avait notamment été suggérée dans le rapport de janvier 2018, intitulé "Amélioration et simplification de la procédure civile", rédigé sous l'égide de Madame le Président Frédérique AGOSTINI et de Monsieur le Professeur Nicolas MOLFESSIS, dans le contexte des 'Chantiers de la justice' lancés par Madame Nicole BELLOUBET, alors Garde des sceaux – Ministre de la justice. Cependant, l'idée n'a pas été reprise dans la loi n. 222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice[10]. Elle est réapparue dans le prolongement des 'États généraux de la justice'[11] et fait partie des propositions qui ont été formulées, en juillet 2022, par le bureau de la Chambre nationale des commissaires de justice, à l'actuel Garde des sceaux – Ministre de la justice, Monsieur Éric DUPOND-MORETTI.

3. Des travaux parlementaires mouvementés

Cette réforme a opportunément été détaillée dans le projet de loi d'orientation et de programmation du ministère de la justice 2023-2027 – tel que présenté en Conseil des ministres le 3 mai 2023 et enregistré le jour même à la présidence du Sénat[12] – dont l'objectif général est de parvenir à "une justice plus rapide, une justice plus claire, une justice plus moderne"[13].

[9] Cons. const., 21 mars 2019, n.2019-778 DC, n.22.

[10] Http://www.justice.gouv.fr/publication/chantiers_justice/Chantiers_justice_Livret-_03.pdf. Aux termes de ce rapport: "Concernant les saisies des rémunérations, il pourrait être envisagé de supprimer l'autorisation judiciaire préalable: à l'instar de la saisie-attribution, l'huissier du créancier pourrait procéder à la saisie des rémunérations pour les montants correspondant au principal, intérêts et dépens. Les dépens auraient été au préalable vérifiés par le greffier. Le juge pourrait naturellement être saisi en cas de contestation, comme aujourd'hui".

[11] *JORF* n. 71, 24 mars 2019.

[12] J.-M. SAUVÉ (dir.), *Rapport du comité des États généraux de la justice (octobre 2021- avril 2022), Rendre justice aux citoyens*, avril 2022. https://medias.vie-publique.fr/data_storage_s3/rapport/-pdf/285620.pdf.

[13] C. DELZANNO, *Commissaire de justice: en avant !*, in Rev. prat. rec., nn.7/8, juillet/août 2022, p. 3. B. DUQUERROY, O. BARET et P. IGLESIAS, *Les premiers pas du commissaire de justice*, in Procédures, mars 2023, p. 5.

À l'occasion de sa première lecture du projet de loi, le Sénat a accueilli favorablement cette réforme, tout en apportant certaines modifications – d'inégale importance – à la version initiale de l'article 17[14]. En juillet, les députés ont quant à eux décidé – d'une courte majorité (56 voix contre 54[15]) – de rejeter cette réforme. Ainsi, elle a été purement et simplement suppri- mée du projet de loi modifié par l'Assemblée nationale en première lectureet adopté le 18 juillet 2023[16], alors même qu'il figurait encore – moyennant quelques évolutions[17] – dans le texte adopté par sa commission des lois le 23 juin[18]. Par la suite, les dispositions relatives à cette réforme ont été rétablies et modifiées par la commission mixte paritaire le 5 octobre 2023 et le projet a définitivement été adopté par le Sénat le 11 octobre de cette même année[19].

4. Adoption définitive de la réforme et sa conformité à la Constitution

Après avoir été jugée conforme à la Constitution par le Conseil constitutionnel[20], dans une décision du 16 novembre, cette réforme figure désormais à l'article 47 de la loi n. 2023-1059 d'orientation et de programmation du ministère de la justice 2023-2027[21]. Cet article 47 organise le transfert de

[14] Texte n. 569, 2022-2023 du Garde des sceaux, Ministre de la justice, déposé au Sénat le 3 mai 2023 https://www.senat.fr/leg/pjl22-569.html. Aux côtés de ce projet, peuvent être utilement consultés l'étude d'impact du 2 mai 2023 et l'avis consultatif du Conseil d'État du 3 mai 2023, n.406855, point 30-31.

[15] Projet de loi, 3 mai 2023, exposé des motifs.

[16] Texte n.129, 2022-2023 adopté par le Sénat le 13 juin 2023 https://www.senat.fr/-leg/tas22-129.html.

[17] Sur ce point, voy. A. Martinez-Ohayon, *Saisie des rémunérations: les députés s'opposent à sa réforme*, in Le Quotidien, Lexbase, juillet 2023, N6299BZC.

[18] https://www.assemblee-nationale.fr/dyn/16/textes/l16t0158_texte-adopte-seance

[19] Pour l'essentiel, les modifications substantielles ont pour conséquence de supprimer certaines modifications apportées par le Sénat, afin de revenir à la version initiale présentée en Conseil des ministres le 3 mai.

[20] Il s'agit du Texte n.1440, adopté par la commission, sur le projet de loi, adopté par le Sénat d'orientation et de programmation du ministère de la justice 2023-2027, n.1346. https://www.assemblee-nationale.fr/dyn/16/textes/l16b1440_texte-adopte-commission.

[21] Sur ce projet de réforme, voy. X. Louise-Alexandrine, *La saisie des rémunérations: relooking extrême*, in Lexbase Contentieux et Recouvrement, juin 2023, n.2; J.-Y. Borel et E. Dumont, *Vers une déjudiciarisation de la saisie des rémunérations confiée aux commissaires de justice*, in Dalloz actualité, 24 mai 2023; N. Fricero, *Un vent d'efficacité et de simplification souffle sur la saisie des rémunérations!*, in Dalloz actualité, 7 juin 2023.

la gestion administrative du greffe du juge de l'exécution à un commissaire de justice. Il est prévu que les nouvelles dispositions entrent en vigueur à une date fixée par décret et, au plus tard, le 1[22] juillet 2025 et qu'elles soient en principe[23] applicables aux cessions des rémunérations ainsi qu'aux procédures de saisie des rémunérations autorisées à cette date[24].

Au regard des avantages escomptés d'une telle évolution du droit français des procédures civiles d'exécution, on peut saluer cette déjudiciarisation partielle de la saisie des rémunérations. En effet, s'il est sans doute perfectible et si le principe sur lequel il repose ne fait pas l'unanimité – ainsi qu'en témoigne notamment[25] la résolution adoptée par le Conseil national des barreaux le 12 mai 2023[26] –, l'article 47 de la loi n. 2023-1059 d'orientation et de programmation du ministère de la justice 2023-2027 – dont les modalités d'application vont être ultérieurement définies par décret en Conseil d'État[27] – emporte l'approbation. Plusieurs raisons peuvent être avancées en ce sens.

[22] Cons. Const., 16 novembre 2023, n. 2023-855 DC, points 122 et s.

[23] *JORF* n.0269, 21 novembre 2023.

[24] Des dérogations ou atténuations sont prévues notamment lorsqu'une demande incidente ou une contestation a été présentée antérieurement à la date d'entrée en vigueur du nouveau dispositif. Loi n. 2023-1059, 20 novembre 2023, art. 60, X, al. 4.

[25] Loi n.2023-1059, art. 60, X, al. 1 et 2. Plus précisément, selon le troisième alinéa du point X de l'article 60 de la loi du 20 novembre 2023, les procédures de saisie des rémunérations autorisées à la date d'entrée en vigueur du dispositif "sont transmises au mandataire du créancier s'il est commissaire de justice. Si le créancier n'est ni assisté, ni représenté à la procédure par un commissaire de justice, la procédure est transmise à la chambre régionale des commissaires de justice du lieu où réside le débiteur pour son attribution à un commissaire de justice. À compter de la transmission de la procédure au mandataire du créancier ou de son attribution à un commissaire de justice, le créancier dispose, à peine de caducité de la mesure en cours, d'un délai de trois mois pour confirmer au mandataire ou au commissaire de justice sa volonté de poursuivre la procédure de saisie des rémunérations selon les nouvelles modalités. Les modalités d'application du présent alinéa sont fixées par décret en Conseil d'État". À titre de comparaison, sur les dispositions relatives à l'entrée en vigueur de la réforme touchant la procédure de saisie des rémunérations telles que prévues dans le projet de loi de mai 2023, voy. égal.Avis du Conseil d'État n.406855 du 2 mai 2023, point 31.

[26] Voy égal. F. Guiomard, *Projet de loi d'orientation et de programmation du ministère de la Justice: une réforme modeste pour la justice du travail*, in Revue de droit du travail, 2023, p. 432. Selon cet auteur, "l'intervention systématique d'un juge (même s'il n'est chargé que de l'exécution) paraît une garantie importante de l'équilibre des droits".

[27] Dans cette résolution, le Conseil national des barreaux "s'oppose fermement à la déjudiciarisation et à l'absence de tout contrôle du juge préalablement à la mise en œuvre d'une telle mesure d'exécution forcée" et "dénonce une mesure qui ne peut qu'aggraver la précarité

5. Une réforme simplificatrice

La simplification attendue de la réforme est consécutive à l'alignement[28] qui s'opère sur le régime des autres saisies mobilières[29].

Sur le plan formel[30], tout d'abord, on peut mentionner un transfert des dispositions procédurales depuis le code du travail vers le code des procédures civiles d'exécution[31], mettant fin en cela à une situation qui ne favorisait pas la "cohérence et la lisibilité du droit"[32]. À vrai dire, le code du travail conservera notamment les articles L. 3252-1 à L. 3252-5 – présentés comme des "dispositions relatives à la protection du salaire"[33] – ayant trait au caractère saisissable des sommes dues à titre de rémunération[34].

Sur le plan substantiel, ensuite, cette déjudiciarisation partielle est conçue sur le modèle des autres procédures de saisies mobilières. En réalité,

des plus démunis et leur éloignement du juge" https://encyclopedie.avocat.fr/GEIDEFile/-CNB-RE_2023-05-12_PJL_justice_-Saisie_des_remunerations%5bP-K-ok%5d.pdf?Archive=131491395967&verif=4803124803154731524775494700254505374763064803044888244802 74.

[28] Loi n. 2023-1059, art. 47, VI.

[29] Cet alignement n'est pas total. Par exemple, si les mesures d'exécution forcée ont généralement leur pendant parmi les mesures conservatoires, cela n'est pas le cas pour la saisie des rémunérations du travail, *infra* n. 9.4.

[30] Exception faite des situations dans lesquelles les procédures civiles d'exécution sont pratiquées sur les biens des États étrangers. Voy. G. Payan, *Le renforcement des immunités d'exécution internationales*, in R. Laher (dir.), Le 10e anniversaire du Code des procédures civiles d'exécution, LexisNexis, 2023, p. 31.

[31] L'enjeu n'est pas seulement théorique. Sur les incohérences et les incertitudes procédurales liées à la place des dispositions relatives à cette mesure d'exécution forcée au sein du code du travail, voy. C. Roth, *Les compétences du JEX mobilier depuis le 1er janvier 2020: les saisies des rémunérations et les autres*, in Gaz. Pal., 20 juin 2023, p. 11.

[32] Concrètement, à la date d'entrée en application de la réforme, les articles L. 3252-8 à L. 3252-13 du code du travail seront abrogés (Loi n.2023-1059, art. 47, II, 2.) et la section 1 du chapitre II du titre Ier du livre II du code des procédures civiles d'exécution sera enrichie des nouveaux articles L. 212-1 à L. 212-14. Par ailleurs, les deux articles de la section 2 "Dispositions particulières à la saisie sur les rémunérations des agents publics" de ce même chapitre – dont les dispositions ne subissent pas de modifications substantielles – seront, quant à eux, été renumérotés et deviendront les articles L. 212-15 et L. 212-16 (Loi n. 2023-1059, art. 47, IV, 4.). Bien entendu, dans un second temps, les dispositions règlementaires du code du travail régissant cette procédure (C. trav., art. R. 3252-1 et s.) devront suivre la même évolution et intégrer la partie règlementaire du CPCE.

[33] En ce sens, voy. Étude d'impact, 2 mai 2023, p. 322.

[34] *Ibid*, p. 327.

le processus d'alignement a déjà commencé, sous l'effet de la loi n. 2022 du 23 mars 2019, par l'incorporation de cette procédure dans les compétences du juge de l'exécution. Il s'agit de le poursuivre et de l'intensifier.

6. Une réforme permettant à l'État de faire des économies

Les enjeux budgétaires de la réforme sont clairement mis en avant dans l'étude d'impact du 2 mai 2023[35] annexée au projet de loi. Il y est indiqué que la réforme projetée permettrait à l'État de faire de substantielles économies tant en ce qui concerne les frais de notification des actes[36] (4,2 millions d'euros), qu'en termes de masse salariale (4,9 millions d'euros)[37]. À ce sujet, la baisse de l'activité des services du juge de l'exécution consécutive à cette modernisation procédurale devrait permettre une "diminution du nombre de magistrats exerçant les fonctions de juge de l'exécution et de greffiers af- fectés à ce contentieux " et une " diminution de l'activité des régisseurs d'avances et de recettes des tribunaux judiciaires"[38].

Assurément, on ne saurait privilégier la solution d'une régulation des flux juridictionnels qui serait animée seulement par une logique d'organisation managériale de la justice. Néanmoins, lorsque des économies peuvent être faites sans que cela s'opère au détriment de la qualité du service public de la justice, l'argument retrouve toute sa pertinence.

7. Une réforme conforme aux standards européens de l'exécution

Avec raison, dans l'étude d'impact du 2 mai 2023, les promoteurs de la réforme relative à la saisie des rémunérations se recommandent du respect des exigences consacrées par le Conseil de l'Europe[39]. On le sait, depuis près

[35] Un renvoi à ces dispositions du code du travail est d'ailleurs expressément opéré dans le nouvel article L. 212-5 du CPCE.

[36] Étude d'impact, 2 mai 2023, p. 331.

[37] Le nombre de lettres – simples ou recommandées avec demande d'avis de réception – adressées par les juridictions aux parties est évalué à 946 000.

[38] Sur cette question, C. Roth, *Les compétences du JEX mobilier depuis le 1er janvier 2020: les saisies des rémunérations et les autres*, in Gaz. Pal., 20 juin 2023, p. 11.

[39] Étude d'impact, 2 mai 2023, p. 331.

d'une trentaine d'années, le Conseil de l'Europe œuvre dans le sens d'une amélioration de l'exécution des décisions de justice au regard des droits fondamentaux garantis par la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales du 4 novembre 1950. La jurisprudence de la Cour européenne des droits de l'homme constitue l'aspect le plus connu de cette action. La concernant, il est permis de rappeler l'existence de l'arrêt de principe *Hornsby contre Grèce* du 19 mars 1997[40] dans lequel la Cour affirme, de façon implicite, l'existence d'un droit européen à l'exécution des décisions de justice dans un délai raisonnable, en rattachant ce droit aux exigences du droit à un procès équitable[41]. Depuis, de très nombreuses affaires, soumises à l'examen de cette Cour, lui ont permis de confirmer cette solution et d'affiner la portée de ce droit à l'exécution[42]. Ainsi en est-il notamment de l'arrêt *Lunari contre Italie* du 11 janvier 2001[43], dans lequel l'existence de ce droit est expressément consacrée[44].

Cependant, aussi importante soit-elle, cette jurisprudence ne résume pas, à elle seule, l'action du Conseil de l'Europe en ce domaine. À ce propos, il convient de rappeler l'élaboration de l'importante Recommandation, Rec. (2003)17du Comité des Ministres aux États membres en matière d'exécution des décisions de justice du 9 septembre 2003[45], dans le prolongement de laquelle la Commission européenne pour l'efficacité de la justice (CEPEJ) a successivement adopté les "Lignes directrices pour une meilleure mise en œuvre de la recommandation existante du Conseil de l'Europe sur l'exécution"[46] du 17 décembre 2009 et le "Guide des bonnes pratiques en matière d'exécution des décisions de justice" du 11 décembre 2015[47]. Ces différents

[40] *Ibid*, p. 326. Le respect du cadre constitutionnel y est également visé: *ibid*, p. 325.

[41] Req. n. 18357/91.

[42] Convention européenne des droits de l'Homme, art. 6 §1.

[43] Sur cette jurisprudence, voy. N. Fricero et G. Payan, *Jurisprudence européenne en matière d'exécution, de signification et de notification: Cour européenne des droits de l'homme et Cour de justice de l'Union européenne,* UIHJ Publishing, 2e éd., 2023, 306 p.

[44] Req. n. 21463/93.

[45] G. Payan, *La jurisprudence de la Cour européenne des droits de l'homme sur l'exécution forcée*, in M. Schmitz (dir.) et P. Gielen (coord.), *Avoirs dématérialisés et exécution forcée*, Bruylant, coll. Pratique du droit européen, 2019, p. 57.

[46] Cette Recommandation définit les standards européens dans le domaine de l'exécution en matière civile et commerciale.

[47] CEPEJ (2009), 11REV2, 17 décembre 2009. Ce document a pour finalité d'assurer l'effectivité des standards européens de l'exécution énumérés dans la Recommandation précitée du Comité des Ministres. À cet effet, les 82 points de ces *Lignes directrices* appréhendent la pro-

textes ont en commun d'affirmer non seulement que les 'agents d'exécution' – parmi lesquels figurent les commissaires de justice français – devraient avoir la maîtrise de la conduite des opérations d'exécution[48] (au moyen d'une "déjudiciarisation partielle du processus d'exécution"[49] et d'une "centralisation de la fonction de mise à exécution entre les mains d'un seul professionnel"[50]), mais également que les États membres du Conseil de l'Europe devraient veiller à accroitre la 'qualité' des procédures civiles d'exécution. Dans le "Guide des bonnes pratiques"[51], sont regroupées sous cette qualification gé-

blématique de l'exécution de façon globale et cohérente, en réunissant dans une réflexion d'ensemble les principes qui régissent les procédures d'exécution et ceux qui concernent les professionnels chargés de leur mise en œuvre. Pour une analyse, voy. UNION INTERNATIONALE DES HUISSIERS DE JUSTICE, *Les Lignes directrices de la CEPEJ sur l'exécution: Un modèle pour le monde?*, INSTITUT JACQUES ISNARD *Juris-Union* n.5, février 2011, 125 p.

[48] CEPEJ, *Guide des bonnes pratiques en matière d'exécution des décisions de justice*, CEPEJ (2015)10, 11 décembre 2015. Le concernant, voy. G. PAYAN, "Le Guide des bonnes pratiques de la CEPEJ sur l'exécution des décisions judiciaires", in M. SCHMITZ (dir.) et P. GIELEN (coord.), *Avoirs dématérialisés et exécution forcée*, préc., p. 45.

[49] Il résulte du point 33 des *Lignes directrices* de la CEPEJ sur "l'exécution que les agents d'exécution définis par la loi du pays devraient avoir la responsabilité de la conduite des opérations d'exécution, dans le cadre de leurs compétences telles que définies par la loi". Ce point se poursuit en précisant que les "États membres devraient envisager la possibilité que les agents d'exécution soient seuls compétents pour : exécuter les décisions de justice et autres titres ou actes en forme exécutoire [et] réaliser l'ensemble des procédures d'exécution prévues par la loi de l'État dans lequel ils exercent".

[50] CEPEJ, *Guide des bonnes pratiques*, point 11. Cette solution concerne la répartition des fonctions entre les agents d'exécution et les juges. Concrètement, en plus de réaliser des actes matériels d'exécution, il est préconisé que lesdits agents puissent vérifier les conditions préalables à l'exécution des titres exécutoires qui leurs sont soumis et devraient avoir la maîtrise du déroulement du processus d'exécution. Inversement, sauf exception, il est indiqué que les juges ne devraient être saisis qu'en cas d'incidents contentieux auxquels les opérations d'exécution peuvent donner lieu ou pour délivrer certaines autorisations. En somme, pour la CEPEJ, afin d'accroître la célérité de l'exécution et limiter l'engorgement des juridictions, l'exécution des titres exécutoires ne devrait pas être systématiquement subordonnée à une autorisation préalable d'un juge et la procédure civile d'exécution ne devrait pas nécessairement prendre la forme d'un procès.

[51] CEPEJ, *Guide des bonnes pratiques*, point 12. Cette solution est, quant à elle, relative à l'identification des professionnels compétents pour mettre à exécution un titre. Elle privilégie le modèle dans lequel un même professionnel (l'huissier de justice/commissaire de justice) est compétent pour réaliser sinon l'intégralité, du moins la majorité des procédures d'exécution prévues par la loi nationale. Cette solution a l'avantage d'offrir à ce professionnel une vision plus complète de la situation du débiteur et de la relation qui le lie au créancier. Son influence sur la stratégie procédurale d'exécution à employer s'en trouve accrue, favorisant en cela le res- pect d'un juste équilibre entre les droits et intérêts en présence.

nérale de 'qualité', différentes préconisations tenant aussi bien à l'efficacité des procédures, qu'au nécessaire respect des droits de l'homme – des créan- ciers, comme des débiteurs – au cours de leur mise en œuvre. Autrement dit, cette qualification générale de la 'qualité des procédures d'exécution' renvoie à l'affirmation suivant laquelle ces procédures doivent être efficaces et équitables.

Ainsi, la consécration européenne[52] du droit à l'exécution dont peuvent se prévaloir les créanciers, ne signifie pas la négation des droits des débiteurs. Cet impératif semble pleinement respecté dans l'article 47 de la loi 2023-1059. Il apparaît en effet que cette déjudiciarisation partielle, qui prend les traits d'une nouvelle répartition des fonctions entre les juridictions[53] et les commissaires de justice, y soit conçue de façon à maintenir l'équilibre devant être respecté entre les droits et intérêts légitimes des créanciers et des débiteurs.

8. Efficacité accrue de la nouvelle procédure de saisies des rémunérations

8.1. Une nouvelle répartition des fonctions

La loi n. 2023-1059 abandonne la solution imposant une autorisation préalable du juge de l'exécution aujourd'hui prévue au cinquième alinéa de l'article L. 213-6 du code de l'organisation judiciaire[54]. Conformément au droit commun, il est prévu que le juge de l'exécution puisse seulement être sollicité pour opérer un contrôle *a posteriori*[55]. Par un effet de balancier, il s'ensuit la prévision de nouvelles prérogatives pour les commissaires de justice ainsi que la création d'un nouvel outil mis à leur disposition : le registre numérique des saisies des rémunérations.

[52] CEPEJ, *Guide des bonnes pratiques*, points 34 et s.

[53] Ce droit bénéficie également d'une protection constitutionnelle. À défaut d'affirmation expresse dans la Constitution, le Conseil constitutionnel prend appui sur l'article 16 de la Déclaration des droits de l'homme et du citoyen du 26 août 1789 pour le consacrer. Cons. Const., 6 mars 2015, n. 2014-455 QPC ; Cons. Const., 10 novembre 2017, n. 2017-672 QPC ; Cons. Const., 16 novembre 2023, n. 2023-855 DC, point 125.

[54] Sont surtout concernés le juge de l'exécution et le greffe du tribunal judiciaire.

[55] Alinéa dont la suppression est mentionnée au point III de l'article 47 de la loi du 20 novembre 2023.

8.2. De nouvelles prérogatives pour les commissaires de justice

8.2.1. Recentrer l'office du juge de l'exécution

Dans le nouveau dispositif législatif, l'office du juge de l'exécution est réduit et "recentr[é] sur son acception première"[56]; ce dernier devenant pour l'essentiel un organe de recours. D'une certaine façon, le contrôle *a priori* exercé en droit positif par le juge de l'exécution est conféré au commissaire de justice.

Le désengorgement des juridictions et l'allégement du travail des greffes sont attendus tant au stade du déclenchement de la procédure, qu'à celui de son déroulement.

8.2.2. Au stade du déclenchement de la procédure : des emprunts aux autres saisies mobilières

8.2.2.1. Des solutions éprouvées dans d'autres procédures civiles d'exécution

La saisie[57] des rémunérations étant une mesure d'exécution forcée, elle suppose que le créancier soit muni d'un titre exécutoire constatant une créance liquide et exigible. De même, dans le nouveau dispositif législatif, on retrouve certains actes qui s'apparentent à ceux qui jalonnent d'autres procédures civiles d'exécution mobilière françaises ainsi que des règles – de facture assez classique – régissant les obligations et les modalités d'engagement de la responsabilité des tiers saisis.

[56] À cela s'ajoutent des évolutions concernant la procédure applicable devant ce juge et notamment un alignement des modalités d'assistance et de représentation sur le droit commun. Il est ainsi proposé de supprimer, du premier alinéa de l'article L. 121-4 du code des procédures civiles d'exécution, la mention du régime dérogatoire visé à l'article L. 3252-11 du code du travail, Loi n. 2023-1059, art. 47, IV, 1. À titre de comparaison, en droit positif, les parties peuvent se faire représenter par un avocat, un officier ministériel du ressort ou par le mandataire – muni d'une procuration – de leur choix, à comparer avec CPC, art. 762.

[57] Conseil d'État, avis n. 406855 ; Étude d'impact, 2 mai 2023, p. 327.

8.2.2.2. Actes de commissaire de justice

8.2.2.2.1. Deux actes

Le déclenchement de la nouvelle procédure est rythmé par la rédaction successive de deux actes: un commandement et un procès-verbal de saisie. Ces types d'actes sont bien connus dans le droit français des saisies mobilières.

8.2.2.2.2. Commandement

Telle que décrite dans l'article 47 de la loi n. 1059 du 20 novembre 2023, la nouvelle procédure de saisie des rémunérations débute par la signification d'un commandement au débiteur. S'il s'agit incontestablement d'un commandement de payer les sommes dues, il s'agit également d'un commandement de tenter de trouver un accord avec le créancier ou, du moins, un commandement au débiteur d'avoir à se présenter à l'office du commissaire de justice afin d'y entamer un dialogue avec le créancier. En ce sens, le premier alinéa du nouvel article L. 212-3 du CPCE dispose que "le commandement de payer somme le débiteur de régler sa dette et l'invite, à défaut, à participer à l'établissement d'un accord sur le montant et les modalités de paiement de celle-ci". Sous réserve des précisions qui seront apportées par la suite sur ce point[58], on peut ici souligner l'importance accordée à la voie amiable dans le cadre de cette procédure, tout en remarquant que les dispositions relatives à cette voie amiable comptent parmi celles qui ont le plus été concernées par les modifications rédactionnelles successives réalisées à l'occasion des travaux parlementaires. Cela révèle qu'il n'est toujours pas aisé de déterminer la place idoine que doivent avoir les solutions "amiables" dans le domaine de l'exécution forcée des décisions de justice.

Dans la même veine, ce n'est qu'un mois après la signification de ce commandement que le créancier peut faire procéder à la saisie entre les mains de l'employeur de son débiteur[59]. Il y a donc une période pouvant idéale-

[58] À distinguer de la 'cession des rémunérations' qui est visée dans le projet d'article L. 212-1 du CPCE. Pour s'acquitter du paiement de leurs dettes, les débiteurs ont en effet la possibilité de céder, à un ou plusieurs de leurs créanciers, une fraction des sommes qui leur sont dues à titre de rémunération visées à l'article L. 3252-1 du code du travail.

[59] Voy. *infra* n. 9.3.2.1. et s.

ment être mise à profit pour permettre un dialogue entre les différents protagonistes.

8.2.2.2.3. Procès-verbal de saisie

En l'absence de procès-verbal d'accord conclu entre le débiteur et le créancier sur les modalités de paiement de la dette, la procédure se poursuit avec la signification d'un procès-verbal de saisie au tiers saisi. À peine de caducité du commandement, cette signification doit être réalisée dans un délai de trois mois à compter de la délivrance dudit commandement[60].

8.2.2.3. Collaboration du tiers saisi.

Comme dans toutes les procédures impliquant un tiers saisi, des obligations sont mises à sa charge et des sanctions sont encourues en cas de manquement.

8.2.2.3.1. Obligations du tiers saisi

Une obligation déclarative incombe au tiers saisi.Tout comme cela est aujourd'hui exigé par l'article L. 3252-9 du code du travail, ce tiers est tenu de déclarer au créancier[61], d'une part, la "situation de droit" qui le lie au débiteur saisi ainsi que le "montant de la rémunération versée"[62] à ce dernier[63] et, d'autre part, les cessions, saisies, saisies administratives à tiers détenteur ou paiements directs des pensions alimentaires qui sont en cours d'exécution[64]. Il n'est point besoin d'insister ici sur l'importance de savoir si d'autres procédures d'exécution sont en cours et, singulièrement, celles qui – en matière

[60] CPCE, nouvel article L. 212-2, al. 1er.

[61] CPCE, nouvel article L. 212-6, al. 1er. Ce délai et la sanction de la caducité encourue en cas de non-respect ne sont toutefois pas applicables lorsqu'un procès-verbal d'accord a été établi dans ce délai (*ibid*, al. 2).

[62] CPCE, nouvel article L. 212-8. À noter qu'il aurait été préférable que la loi précise que la déclaration du tiers saisi doit être réalisée auprès du commissaire de justice (et non du créancier).

[63] En prévoyant expressément que l'obligation d'information pesant sur le tiers saisi porte également sur le montant de la rémunération versée au débiteur, le projet de loi est plus précis que ne l'est l'actuelle rédaction de l'article L. 3252-9, 1., du code du travail.

[64] CPCE, nouvel article L. 212-8, 1.

alimentaire ou fiscale – permettent un recouvrement prioritaire des sommes dues ; la pluralité de procédures éloignant la perspective pour le créancier d'obtenir son dû. Saisi par des députés qui contestaient la constitutionnalité du nouvel article L. 212-8 du CPCE prévoyant cette obligation déclarative, le Conseil constitutionnel indique que le législateur "a entendu accroître l'efficacité de la procédure de saisie des rémunérations" et mettre en œuvre le "droit d'obtenir l'exécution des décisions de justice". Après avoir rappelé les différents renseignements devant être communiqués, il ajoute que "eu égard à la nature de ces informations, les dispositions contestées doivent être interprétées comme imposant à l'employeur de transmettre les seules informations strictement nécessaires à l'exécution de la mesure de saisie" et poursuit en affirmant que, "sous cette réserve, ces dispositions ne portent pas une atteinte disproportionnée au droit au respect de la vie privée"[65].

Telle que prévue dans la loi n. 2023-1059, cette obligation déclarative se double d'une obligation de paiement. À ce titre, il incombe au tiers saisi de verser mensuellement – entre les mains du commissaire de justice répartiteur[66] – les retenues pour lesquelles la saisie des rémunérations est opérée "dans les limites des sommes disponibles"[67].

8.2.2.3.2. Responsabilité du tiers saisi

Afin de renforcer l'efficacité de la procédure, de façon classique[68], il est prévu que la responsabilité du tiers saisi – à qui le procès-verbal a été signifié – puisse être engagée lorsqu'il ne remplit pas correctement son office.Tout d'abord, s'agissant de son obligation d'information, conformément au pre- mier alinéa du nouvel article L. 212-14 du CPCE, le "tiers saisi qui s'abstient, sans motif légitime, de procéder à la déclaration prévue à l'article L. 212-8 ou fait une déclaration mensongère peut être condamné par le juge, à la de- mande du créancier saisissant ou intervenant, au paiement d'une amende ci- vile sans préjudice d'une condamnation à des dommages et intérêts". Pour mémoire, le montant de l'amende civile est inférieur ou égal à 10 000 euros.

[65] CPCE, nouvel article L. 212-8, 2.

[66] Cons. Const., 16 novembre 2023, n. 855 DC, points 124-126.

[67] Voy. *infra* n. 8.2.3. et s.

[68] CPCE, nouvel article L. 212-12. À rapprocher avec le premier alinéa de l'actuel article L. 3252-10 du code du travail.

Dans la version initiale du projet de loi[69], il était prévu que les déclarations 'inexactes' soient sanctionnées de la même manière. Cependant, cela n'a pas été retenu dans le texte définitivement adopté[70].

Ensuite, s'agissant de l'obligation de paiement, il est précisé que "s'il ne procède pas aux versements prévus à l'article L. 212-12", ce tiers s'expose à une condamnation "au paiement des retenues qui auraient dû être opérées"[71]. À ce sujet, la loi n. 2023-1059 est moins détaillée que ne le sont les dispositions du deuxième alinéa de l'actuel article L. 3252-10 du code du travail, notamment en ne précisant pas si le juge de l'exécution peut prononcer cette sanction d'office. Par ailleurs, comme c'est le cas en droit posi- tif [72], il est mentionné que ledit tiers peut former un recours contre le débiteur, mais seulement après mainlevée de la saisie[73].

8.2.3. Au stade du déroulement de la procédure: l'avènement du "Commissaire de justice répartiteur"

8.2.3.1. Un nouvel acteur

L'instauration du "commissaire de justice répartiteur en procédure de saisie des rémunérations" est un apport important de la réforme. Tout en laissant quelques questions en suspens (qui seront sans doute traitées dans les décrets d'application), la loi n. 2023-1059 apporte des précisions sur cette institution et sur les modalités de sa désignation.

[69] À rapprocher du dernier alinéa de l'actuel article L. 3252-9 et du deuxième alinéa de l'article L. 3252-10 du code du travail.

[70] À la faveur d'un amendement, le Sénat avait retiré l'adjectif 'inexacte'. Texte n.129, 2022-2023, adopté par le Sénat le 13 juin 2023. Cet adjectif était réapparu dans le texte adopté par la commission des lois de l'Assemblée nationale le 23 juin,Texte n.1440, adopté par la com- mission, sur le projet de loi, adopté par le Sénat d'orientation et de programmation du ministère de la justice 2023-2027, n.1346.

Https://www.assemblee-nationale.fr/dyn/16/textes/l16b1440_texte-adopte-commission.

[71] Rappelons à ce propos que l'actuel article L. 3252-9 du code du travail ne vise pas non plus les 'déclarations inexactes' dans le domaine couvert par les amendes civiles encourues par les employeurs tiers saisis.

[72] CPCE, nouvel article L. 212-14, al. 2.

[73] C. trav., art. L. 3252-10, al. 3.

8.2.3.2. Institution du commissaire de justice répartiteur

Telles que décrites par la réforme, les opérations de saisie sont placées sous la direction du "commissaire de justice répartiteur". Logiquement, toute nouvelle activité suppose une formation professionnelle adaptée. À cet égard, il a été décidé de modifier l'article 16 de l'ordonnance n. 2016-728 du 2 juin 2016 relative au statut de commissaire de justice afin de compléter les attributions de la Chambre nationale des commissaires de justice, en lui conférant celle "d'assurer l'organisation de la formation nécessaire à [cette] activité"[74].

Si tous les commissaires de justice en activité sont éligibles à une telle formation, en pratique tous ne la suivront pas. Il faut dès lors que les justiciables et les professionnels du droit soient à même de les identifier facilement. Sur ce point, il revient à la Chambre nationale des commissaires de justice "de diffuser annuellement la liste des commissaires de justice ayant satisfait à cette formation"[75]. L'opportunité d'une diffusion annuelle de cette liste semble fonction de la durée de la formation spécifique. Si la durée de cette formation est inférieure à un an et si plusieurs sessions de formation sont prévues dans une même année, une actualisation de cette liste à l'issue de chaque session de formation serait probablement plus pertinente.

En l'absence de précisions complémentaires, on déduit que ceux qui ne suivent pas cette formation spécifique ne pourront pas assurer les fonctions de 'répartiteur'. On perçoit donc une différence avec le dispositif de 'spécialisations' décrit aux articles 30 et suivants du décret n. 2019-1185 du 15 novembre 2019 relatif à la formation professionnelle des commissaires de justice et aux conditions d'accès à cette profession. Afin de déployer cette activité sur le territoire national et accroître les possibilités de choix des créanciers, il faudrait peut-être parallèlement intégrer cette formation spécifique dans la formation professionnelle initiale de tous les futurs commissaires de justice. Quoi qu'il en soit, *a minima*, il importe que cette formation spécifique – à l'attention des commissaires de justice déjà en activité ou, le cas échéant, des futurs commissaires – débute suffisamment en amont pour que les professionnels formés soient déjà nombreux au moment de l'entréeen application de la réforme.

[74] CPCE, nouvel article L. 212-14, al. 3.

[75] Loi n. 2023-1059, art. 47, I, 2., portant création d'un point 4 *bis* au sein de l'article 16 de l'ordonnance n. 2016-728 du 2 juin 2016.

8.2.3.3. Désignation du commissaire de justice répartiteur

Dans le contexte d'une procédure de saisie des rémunérations, le commissaire répartiteur est désigné – dans les conditions définies par décret en Conseil d'État – à la demande du créancier, parmi ceux qui figurent sur la liste diffusée à cette fin et actualisée par la Chambre nationale des commissaires de justice[76]. La loi comporte une précision importante, dès lors qu'il est indiqué que le commissaire de justice répartiteur "est désigné par la Chambre nationale des commissaires de justice". Cette donnée confirme l'originalité de cette mission. Si dans sa mission traditionnelle de mise à exécution des titres exécutoires, le commissaire de justice agit en sa double qualité de mandataire du créancier et d'officier public et ministériel, lorsqu'il endosse le rôle de répartiteur la première s'efface au profit de la seconde.

Par ailleurs, plusieurs précisions complémentaires devraient figurer dans le(s) décret(s) d'application et, cela, notamment en ce qui concerne l'étendue de la compétence territoriale de ce nouvel acteur. Soit – ce qui est fort vraisemblable – on considère que cette activité fait partie intégrante de la mise à exécution d'un titre et la solution de la compétence à l'échelle du ressort de la cour d'appel de leur résidence paraît s'imposer ; soit on considère qu'il s'agit d'une activité 'autonome' et, là, le choix d'une compétence nationale est envisageable.

Très logiquement, une fois que le commissaire répartiteur a été désigné, son identité et ses coordonnées sont communiquées au tiers saisi et au débiteur[77].

Il a alors pour mission de recevoir les paiements en provenance du tiers saisi et de les reverser au créancier saisissant. En cas d'une pluralité de créanciers, il est chargé de répartir les fonds[78]. L'exposé de ses fonctions appelle deux brèves remarques. D'une part, il en ressort que ce professionnel assure les fonctions dévolues aujourd'hui au greffier (pour la gestion administrative du dossier) et au régisseur[79] (pour le maniement des fonds) du tribunal judiciaire. Cette concentration est en soi une source de simplification. D'autre part, on observe que le système de concours entre les créanciers demeure

[76] *Idem*.
[77] CPCE, nouvel article L. 212-9, al. 1er.
[78] CPCE, nouvel article L. 212-9, al. 3.
[79] CPCE, nouvel article L. 212-9, al. 2.

inchangé au regard du droit positif. La loi prévoit à cet égard que tout créancier muni d'un titre exécutoire constatant une créance liquide et exigible "peut se joindre aux opérations de saisie déjà existantes par voie d'intervention"[80]. Il n'est donc point question de doter la procédure de saisie des rémunérations d'un effet attributif immédiat semblable à celui de la saisie-attribution[81]. L'éventualité de l'intervention d'autres créanciers fait d'ailleurs l'objet de précisions complémentaires. La concernant, on se bornera à indiquer que les nouveaux articles L. 212-10[82] et L. 212-11[83] du code des procédures civiles d'exécution reprennent en substance les dispositions aujourd'hui insérées respectivement aux articles L. 3252-8 et L. 3252-12 du code du travail.

8.2.3.4. Questions en suspens

Tel que visée dans la loi n. 2023-1059, cette institution du "commissaire de justice répartiteur" laisse plusieurs interrogations en suspens. On l'a indiqué, ce dernier doit être considéré comme un "tiers (de confiance)" et non comme le mandataire du créancier. En prévention d'éventuels conflits d'intérêts, cela permet d'exclure la possibilité qu'il représente le créancier devant le juge de l'exécution à l'occasion d'une contestation de la mesure.Toutefois, la question se pose de savoir s'il peut s'agir du commissaire de justice qui, à l'entame de la procédure, a été sollicité pour signifier le commandement au débiteur et/ou le procès-verbal de saisie au tiers saisi. Si ce cumul est interdit, peut-il s'agir d'un commissaire de justice travaillant dans le même office?

Plus généralement, il résulte de l'étude d'impact que les rédacteurs du projet de loi – et, par extension, ceux de la loi – n'ont pas tiré profit des expériences étrangères[84]. On peut le regretter. Celle des huissiers de justice

[80] C. trav., art. R. 3252-34.

[81] CPCE, nouvel article L. 212-2, al. 3.

[82] CPCE, art. L. 211-2.

[83] Dans son premier alinéa, ce nouvel article retient le principe suivant lequel, dans le cas d'une intervention, les "créanciers viennent en concours sous réserve des causes légitimes de préférence". Principe dont la portée doit être envisagée sous la réserve apportée dans l'alinéa 2 selon lequel "les créances résiduelles les plus faibles, prises dans l'ordre croissant de leur montant, sans que celles-ci puissent excéder un montant fixé par décret, sont payées prioritairement dans les conditions fixées par ce même décret".

[84] Aux termes de ce nouvel article: "En cas de saisie portant sur une rémunération sur laquelle une cession a été antérieurement consentie et régulièrement notifiée, le cessionnaire est

belges – dont le statut est très proche de celui des commissaires de justice français – aurait sans doute été des plus intéressantes. En effet, les huissiers de justice belges[85] assument cette mission d'agent répartiteur de longue date dans le cadre de la procédure de distribution du produit de la saisie de biens mobiliers, appelée la procédure de distribution par contribution[86].

8.3. Un nouvel outil: le registre numérique des saisies des rémunérations

8.3.1. Transparence patrimoniale

La loi n. 2023-1059 fait œuvre novatrice sur le terrain de la transparence patrimoniale, avec la création d'une nouvelle plateforme informatique: le registre numérique des saisies des rémunérations. En la matière, l'analyse des expériences étrangères –visiblement inexploitées – aurait sans doute été bénéfique pour parfaire la réforme.

8.3.2. Une nouvelle plateforme informatique

8.3.2.1. À l'égard d'une procédure de saisie des rémunérations

Aux termes de l'article 47, I, 2°, b), de la loi n. 2023-1059, il est précisé que la Chambre nationale des commissaires de justice met en place, 'sous sa responsabilité'[87], un registre numérique des saisies des rémunérations[88]. Dans des conditions fixées par décret en Conseil d'État pris après avis de la Com-

de droit réputé intervenant pour les sommes qui lui restent dues, tant qu'il est en concours avec d'autres créanciers saisissants". On remarque que le qualificatif d' intervenant a avantageusement été préféré à celui de 'saisissant' aujourd'hui employé dans l'article L. 3252-12 du code du travail.

[85] Étude d'impact, 2 mai 2023, p. 326. Au titre des 'éléments de droit comparé' pris en considération, il est indiqué: 'néant'.

[86] Cette procédure de distribution est diligentée par l'huissier de justice ayant conduit la procédure de saisie.

[87] Code judiciaire belge, art. 1627 et s. G. de Leval (dir.), *Droit judiciaire*,Tome 2, volume 3, Larcier, 2021, p. 210.

[88] On comprend que la mise en place de ce registre électronique doit être réalisée et financée par la profession des commissaires de justice. À titre de comparaison, sur la vétusté du progiciel informatique aujourd'hui utilisé par les juridictions en matière de saisies des rémunérations, voy. C. Roth, *Les compétences du JEX mobilier depuis le 1er janvier 2020: les saisies des rémunérations et les autres*, in Gaz. Pal., 20 juin 2023, p. 11.

mission nationale de l'informatique et des libertés (CNIL), ce registre a tout d'abord vocation à faciliter le déclenchement d'une procédure donnée ou une intervention dans cette procédure, en permettant "le traitement des informations nécessaires à l'identification des commissaires de justice répartiteurs, des débiteurs saisis, des créanciers saisissants, des employeurs tiers saisis" ainsi que "la conservation et la mise à disposition des informations nécessaires à l'identification du premier créancier saisissant, du débiteur saisi et du commissaire de justice répartiteur".

En pratique, le commandement – dont la signification au débiteur marque le début de la procédure – doit être inscrit, par le commissaire de justice[89], sur ce registre[90]. Il en va de même pour le procès-verbal de saisie signifié au tiers saisi[91]. Par ailleurs, doivent y être mentionnées l'identité et les coordonnées du commissaire de justice répartiteur qui a été désigné pour mener à bien une procédure de saisie[92]. Si la loi vise ainsi les informations pouvant figurer dans ce registre, il demeure en revanche muet sur les modalités d'accès à ces informations. S'il ne fait guère de doute que cet accès devrait être limité aux commissaires de justice porteurs d'un titre exécutoire et que l'information recueillie ne devrait en aucun cas être indument communiquée à des tiers, des telles précisions auraient pu avantageusement être apportées. Eu égard à leur importance, de telles garanties paraissent devoir bénéficier d'une protection législative et non, seulement, règlementaire.

De façon très pertinente, aux côtés des saisies des rémunérations, doivent être inscrites dans ce registre les demandes de paiement direct des pensions alimentaires s'exerçant sur des sommes dues à titre de rémunération[93]. On pourrait objecter que cette information n'est pas utile dans la mesure où le tiers saisi est tenu de déclarer l'existence des procédures de paiement direct des pensions alimentaires qui seraient en cours[94]. Il y a lieu de rappeler cependant que cette obligation déclarative du tiers saisi s'accomplit en réponse à la signification du procès-verbal de saisie des rémunérations. Or, il peut

[89] Nouvel article 16, point 12. *bis* de l'ordonnance n. 2016-728.

[90] On comprend qu'il s'agit du commissaire qui a procédé à la signification dudit commandement.

[91] CPCE, nouvel article L. 212-2, al. 2.

[92] CPCE, nouvel article L. 212-7. À titre de comparaison, on peut ici regretter que cet article ne précise pas que cette inscription au registre soit réalisée par le commissaire de justice. Un simple renvoi aux "conditions fixées par décret en Conseil d'État" est opéré.

[93] CPCE, nouvel article L. 212-9, al. 3.

[94] CPCE, nouvel article L. 213-5, al. 1er.

être intéressant d'avoir cette information plus tôt, c'est-à-dire au moment de décider si la signification d'un commandement est pertinente.

8.3.2.2. À des fins statistiques

De même, afin de pouvoir tirer des enseignements plus généraux sur l'application du dispositif sur le territoire national, il est demandé à la Chambre nationale des commissaires de justice de transmettre – gratuitement – au Ministre de la justice, non seulement les "données statistiques du registre numérique, dans des conditions fixées par arrêté du ministre de la justice", mais également "un rapport annuel relatif à la mise en œuvre de la procédure de saisie des rémunérations"[95].

8.3.3. Des expériences étrangères visiblement inexploitées. L'exemple belge du fichier central des avis de saisies

Là encore, il serait sans doute opportun de tirer les enseignements des expériences étrangères en matière de recherche des éléments passifs du patrimoine du débiteur, c'est-à-dire d'identification des éventuelles procédures d'exécution en cours à l'encontre d'un débiteur[96]. Avec le "fichier central des avis de saisie, de délégation, de cession, de règlement collectif de dettes et de protêt", créé par la loi du 29 mai 2000, la Belgique dispose sans doute de l'un des dispositifs nationaux de publicité des procédures d'exécution les plus aboutis[97]. On rappellera d'ailleurs que ce dispositif est présenté, par la Commission européenne pour l'efficacité de la justice, comme un exemple de 'bonnes pratiques' en matière d'exécution[98].

[95] Voy. *supra* n. 8.2.2.3.1.

[96] Nouvel article 16, point 12. *bis in fine* de l'ordonnance n. 2016-728.

[97] Ce qui n'a pas été fait, ainsi que cela transparait de l'étude d'impact du 2 mai 2023, p. 326.

[98] Sur ce fichier, voy. not. G. DE LEVAL, *Le fichier des avis réalise-t-il l'objectif fixé par le législateur*, in Ius & Actores, n.3/2013, p. 107; M. CARBONE, *Fichier central des avis de saisie, de délégation, de cession et de règlement collectif de dettes*, in J.T., 2011/38, p. 781 ou encore les actes du colloque dédié à la mémoire de CHARLES VANHEUKELEN publiés *in Ius & Actores*, n.1/2011, p. 5 et s.. Et les études de G. DE LEVAL et S. BRIJS, p. 13; de M. FORGES, p. 75 et de E. LEROY, p. 93.Voy. égal., parmi les premières analyses,V. VAN DEN HASELKAMP-HANSENNE, *La loi du 29 mai 2000 portant création d'un fichier central des avis de saisie, de délégation, de cession et de règlement collectif de dettes et modifiant certaines dispositions du code judiciaire*, in J.T., 2001, p. 257. Plus récemment, voy. G. DE LEVAL (dir.), *Droit judiciaire*,Tome 2, volume 3, Larcier, 2021, p. 77.

Plus généralement, cette modernisation de la procédure de saisie des rémunérations pourrait constituer le point de départ d'une réflexion plus ambitieuse sur la réforme du droit français de l'exécution consistant notamment dans l'introduction d'un fichier central des saisies, à l'image de celui précité qui existe en Belgique. Bien entendu, il conviendrait de tenir compte de l'expérience acquise par les praticiens belges lors de la mise en œuvre concrète de leur législation nationale.

9. Caractère équitable de la nouvelle procédure de saisies des rémunérations

9.1. Coût de la procédure : une question épineuse

Ainsi que cela a été indiqué, la réforme réalisée par la loi n. 2023-1059 est de nature à réduire les dépenses de l'État[99]. Or, mécaniquement, un tel transfert de compétence au profit des commissaires de justice n'est pas neutre pour les parties. En pratique, les coûts de la procédure, aujourd'hui intégralement mis à la charge des contribuables[100], seront supportés par les personnes impliquées et, en dernier lieu, par les débiteurs; comme c'est en principe le cas pour le recouvrement des créances privées. En effet, conformément au droit commun des procédures civiles d'exécution[101], alors qu'une avance peut être exigée du créancier, le coût final de la procédure est supporté par le dé- biteur. La question de l'évaluation de ce coût dans la procédure de saisie des rémunérations 'rénovée' est épineuse. Un juste équilibre doit être trouvé entre un montant qui serait exorbitant pour le débiteur et un autre qui ne permettrait pas une juste rémunération pour les commissaires de justice sollicités. À ce sujet, si la loi opère un renvoi au décret d'application[102] et s'en remet donc au pouvoir règlementaire, il est cependant remarquable que les rédacteurs de la version initiale du projet de loi du 3 mai 2023 – aient pris

[99] CEPEJ, *Guide des bonnes pratiques en matière d'exécution des décisions de justice*, préc., point 43 et annexe point 7.

[100] Voy. *supra* n. 6.

[101] Par exemple, la répartition des sommes saisies par le régisseur installé auprès du greffe du tribunal judiciaire est gratuite pour les parties. Il en va de même des activités assurées par le greffe de cette juridiction.

[102] Des solutions dérogatoires sont parfois prévues, comme en matière de recouvrement des créances alimentaires. G. Payan, *Renouveau du droit français du recouvrement des pensions alimentaires: quelles incidences sur la théorie générale de l'exécution?*, in Ius & Actores, Larcier, 2024/1, p. 8.

le soin de préciser que ce "décret peut comprendre, le cas échéant, des me- sures visant à préserver et concilier les intérêts des débiteurs, des créanciers et des commissaires de justice, telles qu'un plafonnement du nombre d'actes d'exécution ou du montant des frais des commissaires de justice mis à la charge des débiteurs, ou un étalement de ces frais"[103]. On peut voir dans cette prévision la retranscription littérale de l'avis formulé par le Conseil d'État en date du 2 mai 2023[104]. Il s'agit là, sans doute, d'une 'garantie'[105] que les promoteurs de la déjudiciarisation partielle de la procédure de saisie des rémunérations souhaitaient apporter sur un des points d'achoppement de la réforme afin d'atténuer la critique – facile et attendue – portant sur le coût de l'intervention du commissaire de justice. Cette critique était d'autant plus prévisible qu'elle est formulée à chaque fois qu'il est question d'étendre les prérogatives de ce professionnel[106]. Dans une certaine mesure, le législateur a pris en compte cette difficulté. Dans une formule qui réduit la latitude reconnue au pouvoir règlementaire, la loi n. 2023-1059 énonce que son décret d'application définira "le nombre maximal d'actes autorisés dans le cadre d'une procédure de saisie des rémunérations"[107]. La question proprement dite des frais d'exécution apparaît, quant à elle, dans le nouvel article L. 212- 4 du code des procédures civiles d'exécution, au moyen d'un nouvel alinéa

[103] Il est également prévu qu'un arrêté fixe la tarification des nouveaux actes entrant dans la compétence des commissaires de justice (Étude d'impact, 2 mai 2023, pp. 334-336).

[104] Projet de loi, 3 mai 2023, art. 17,VII.

[105] Avis du Conseil d'État n. 406855 du 2 mai 2023, point 30. Dans cet avis, le Conseil d'État indique qu' "au regard de l'insuffisance des éléments dont dispose le Gouvernement pour apprécier les incidences de cette mesure s'agissant des frais des commissaires de justice qui seront mis à la charge des débiteurs et des créanciers", il "n'est pas en mesure de déterminer avec précision ses effets tant sociaux, sur une population souvent vulnérable qu'une dérive même modique des coûts maintiendrait dans l'endettement, qu'économiques, privant les créanciers d'une part peut être plus importante de ce qui leur revient". Par ailleurs, il y invite le gouvernement à mettre à profit le délai restant à courir jusqu'à la date d'entrée en application de la réforme "afin d'évaluer ces incidences et d'apprécier l'intérêt et les contours de mesures correctrices". Dans le même ordre d'idées, il y recommande au gouvernement "d'établir, dans un délai de deux ans suivant l'entrée en vigueur de cette réforme, un bilan de celle-ci s'agissant de son incidence sur les frais des commissaires de justice mis à la charge des débiteurs et des créanciers et sur l'effectivité des contestations élevées par les débiteurs à l'encontre de ces procédures".

[106] Garantie à laquelle s'ajoutent d'autres mécanismes, tels que le principe traditionnel de proportionnalité des actes d'exécution. CPCE, art. L. 111-7. Étude d'impact, 2 mai 2023, p. 329.

[107] Un parallèle peut être fait avec la question de l'usage de la notification postale ou de la signification par un commissaire de justice.

2 – qui ne figurait pas dans la version initiale du projet de loi présenté en Conseil des ministres le 3 mai 2023 – selon lequel "le juge [de l'exécution] peut d'office contrôler le montant des frais d'exécution dont le recouvrement est poursuivi".

9.2. Une question d'équilibre

La nécessité de préserver l'équilibre des droits et intérêts en présence dépasse la seule problématique du coût de l'intervention du commissaire de justice, afin de s'étendre à l'architecture générale de la procédure de saisie des rémunérations. À cette fin, les rédacteurs de la loi ont prévu des voies de résolution des différends opposant les protagonistes de la procédure et ont maintenu ce qui fait l'une des originalités du droit positif, à savoir la solution d'une saisissabilité partielle et progressive des sommes dues au titre de rémunération du travail.

9.3. Préservation des voies de résolution des différends

9.3.1. Coexistence des voies amiables et judiciaires

En leur qualité d'officiers publics et ministériels et dans le respect des règles régissant leur statut, les commissaires de justice sont les premiers garants de l'équilibre entre les droits et intérêts en présence. Néanmoins, tout au long de la procédure, le débiteur doit pouvoir avoir la possibilité de saisir le juge de l'exécution d'une contestation. Dans le dispositif imaginé, ce main- tien de la voie judiciaire est alors conçu dans un contexte marqué par l'importance accordée à la voie amiable de résolution des différends.

9.3.2. Promotion de la voie amiable

9.3.2.1. Procès-verbal d'accord

Les législateurs nationaux sont encouragés à promouvoir ce qu'il est convenu d'appeler 'l'exécution participative'[108]. Cela revient à associer – autant que faire se peut – le débiteur à l'exécution poursuivie contre lui. À

[108] Loi n. 2023-1059, art. 47,VI.

vrai dire, la possibilité de s'engager dans une voie amiable est déjà prévue dans le droit positif de la saisie des rémunérations[109] avec l'organisation de l'audience de conciliation, à l'occasion de laquelle le juge de l'exécution "tente de concilier les parties"[110]. Pour mémoire, aux termes de l'article R. 3252-12 du code du travail, la "procédure de saisie des sommes dues à titre de rémunération est précédée, à peine de nullité, d'une tentative de conciliation, en chambre du conseil".

Sans surprise, la loi n. 2023-1059 s'inscrit également sur le terrain de l'amiable en prévoyant la possibilité, pour le créancier et le débiteur, de rédiger un 'procès-verbal d'accord' sur les modalités de paiement de la dette. Le choix des termes est intéressant. Les rédacteurs de la loi ont donc opté pour une formule générique, là où l'on aurait pu s'attendre à celle de 'pro- cès-verbal de conciliation'. La généralité des termes employés engendre une incertitude sur le rôle – plus ou moins actif – confié au commissaire de justice dans la recherche de l'accord. Est-il attendu de lui qu'il prenne la posture d'un médiateur ou celle d'un conciliateur?

Quoi qu'il en soit, s'il intervient avant la signification du procès-verbal de saisie[111], ce procès-verbal d'accord aurait pour effet de suspendre la pro- cédure de saisie des rémunérations[112]. Dans un souci d'équilibre entre les dif- férents intérêts en présence, il est cependant prévu que la procédure de saisie pourrait reprendre, à l'initiative du créancier, lorsque le débiteur ne respecte pas les modalités de paiement convenues ou en présence d'une signification au premier créancier saisissant d'un acte d'intervention formé par un autre créancier[113].

[109] Sur ce point, voy. not. UNION INTERNATIONALE DES HUISSIERS DE JUSTICE, *Code mondial de l'exécution – Global Code of Enforcement*, in UIHJ Publishing, 2015. L'article 10, intitulé "l'exécution alternative et participative ", énonce "les États doivent veiller à ce que le professionnel chargé de l'exécution ait la faculté d'aménager à la demande du débiteur les modalités de l'exécution selon un processus consenti [al. 1er]. Pour adapter l'exécution à la situation du créancier et du débiteur, les États doivent permettre une participation active des parties à l'exécution [al. 2] ".

[110] C. trav., art. R. 3252-12 et s.

[111] C. trav., art. R. 3252-17.

[112] Voy. *supra* n. 8.2.2.2.3.

[113] CPCE, nouvel article L. 212-3, al. 1er. Dans le même ordre d'idées, lorsqu'il est établi dans les trois mois suivant la délivrance du commandement, le procès-verbal d'accord permet d'éviter la sanction de la caducité dudit commandement normalement encourue quand le procès-verbal de saisie n'a pas été signifié au tiers saisi dans ce même délai de trois mois.Voy. *supra* n. 8.2.2.2.3.

9.3.2.2. Mission du commissaire de justice

Avant même que les discussions ne débutent entre les différents protagonistes, le succès de la voie amiable suppose non seulement que les professionnels concernés connaissent, maîtrisent et soient convaincus de la pertinence de cette voie amiable, mais également que les parties soient informées de son existence et des enjeux. À ce propos, ainsi que cela a été indiqué précédemment[114], le nouvel article L. 212-3 du CPCE précise, dans son premier alinéa, que "le commandement de payer somme le débiteur de régler sa dette et l'invite, à défaut, à participer à l'établissement d'un accord sur le montant et les modalités de paiement de celle-ci". La formulation définitivement retenue apparaît nettement préférable à celle qui avait été privilégiée, par les sénateurs, dans la version du projet de loi adoptée – en première lecture – le 13 juin 2023, suivant laquelle "dès la signification du commandement de payer en vue d'une saisie des rémunérations, le commissaire de justice informe le débiteur qu'il entre dans sa mission de lui permettre de parvenir à un accord avec le créancier, dans le respect de ses obligations déontologiques"[115]. Demeure la question des moyens dont dispose le commissaire de justice pour accompagner les parties dans la recherche d'une solution amiable. Plus généralement, il y a lieu de se demander dans quelle mesure il pourrait lui être reproché son manque – réel ou supposé – de diligence[116] et quelle sanction (disciplinaire?) pourrait être encourue.

Dans un ordre d'idée voisin, la réforme opérée par la loi n.2023-1059

[114] CPCE, nouvel article L. 212-3, al. 2. En ce sens, selon l'étude d'impact du 2 mai 2023, p. 328, il "est en effet essentiel que la recherche d'un accord ne soit pas dissuasive pour le créancier, et que celui-ci ne soit donc pas contraint de recommencer intégralement sa procédure si le débiteur ne respecte pas les termes de l'accord, ou si un tiers souhaite mettre en œuvre une procédure de saisie pour le recouvrement d'une autre créance ".

[115] Voy. *supra* n. 8.2.2.2.2.

[116] Cet amendement sénatorial suscitait des interrogations notamment à l'égard des modalités de la délivrance de l'information incombant au commissaire de justice. Si dans son principe la délivrance d'une information relative à la 'voie amiable' peut être approuvée sans réserve, plusieurs difficultés apparaissent lorsqu'il s'agit d'envisager sa concrétisation: cette information devait-elle être insérée dans le commandement (ce qui serait une solution très originale) ou être réalisée par un autre biais (dans ce cas, lequel?). Ce sont peut-être ces interrogations qui ont conduit, dans un premier temps, la commission des lois de l'Assemblée nationale (projet de loi dans la version qu'elle a adoptée le 23 juin 2023), puis, dans un second temps, la commission mixte paritaire, à supprimer cette disposition, revenant, sur ce point, à la version initiale du projet de loi – du 3 mai – présentée par le Garde des sceaux.

complète le 1° du I de l'article 1[117] de l'ordonnance n. 2016-728 du 2 juin 2016 relative au statut de commissaire de justice. Désormais, cette disposition est libellée ainsi: "les commissaires de justice sont les officiers publics et ministériels qui ont seuls qualité, dans les conditions fixées par les lois et règlements en vigueur, pour […] ramener à exécution les décisions de justice ainsi que les actes ou titres en forme exécutoire, *après avoir tenté, le cas échéant, de susciter un accord entre les parties*"[118]. Cette formulation[119] permet au commissaire de justice d'évaluer, au regard des particularités de chaque espèce et de chaque type de procédure civile d'exécution, la pertinence d'emprunter – ou non – la voie amiable. Elle permet surtout d'envisager la voie amiable non pas comme un préalable obligatoire et généralisé, mais comme une so- lution pouvant être activée à l'occasion du déroulement de la procédure d'exécution. À ce sujet, sans être pleinement satisfaisante, cette formulation est moins contestable que celle qui avait été proposée, lors des travaux parlementaires, dans un amendement adopté par le Sénat[120]. Dans cet amendement, les mots "le cas échéant" étaient absents. Si cet amendement avait été adopté tel quel, cela aurait signifié que toutes les procédures civiles d'exécution étaient concernées par cette tentative préalable amiable obligatoire. Or, une telle solution serait contreproductive[121] et nuirait à l'efficacité de certaines procédures – telles que la saisie-attribution ou les saisies conservatoires – qui reposent sur un 'effet de surprise'.

[117] Dans le sens de l'inopportunité de cet amendement, voy. X. Louise-Alexandrine, *La saisie des rémunérations: relooking extrême*, in Lexbase Contentieux et Recouvrement, juin 2023, n.2. Selon Maître Louise-Alexandrine, "le mandat du commissaire de justice est d'obtenir le paiement de la créance et il ne dispose de moyens autre que le devoir de conseil pour inviter le créancier à accepter un échéancier. Cet amendement crée une nouvelle obligation du commissaire de justice envers le débiteur, presque contractuelle, alors que même sa responsabilité vis-à-vis du débiteur est statutaire, liée à sa fonction ".

[118] C'est nous qui soulignons le membre de phrase ajouté par le législateur.

[119] Voy. Texte n.1440, adopté par la commission, sur le projet de loi, adopté par le Sénat d'orientation et de programmation du ministère de la justice 2023-2027 n.1346.

[120] Texte n.129, 2022-2023 adopté par le Sénat le 13 juin 2023, art. 17, I., 1., A.

[121] Pour une critique, voy. égal. N. Fricero, *Un vent d'efficacité et de simplification souffle sur la saisie des rémunérations!*, in Dalloz actualité, 7 juin 2023.

9.3.3. Maintien de la voie judiciaire. Ouverture des voies de contestation

Le transfert de compétence au profit des commissaires de justice et la confiance[122] qu'il traduit à l'endroit de ces professionnels, doivent être appréciés à l'aune non seulement des règles régissant leur statut – qui sont autant de garanties contre d'éventuels abus –, mais également du contrôle *a posteriori* pouvant être opéré par le juge de l'exécution. Si, dans la réforme, le juge de l'exécution n'est plus sollicité pour autoriser la saisie des rémunérations, il conserve sa compétence – exclusive – pour connaître, le cas échéant, des constatations pouvant être soulevées. L'objectif de fluidifier la procédure ne doit pas se traduire par une négation des droits de la défense[123].

Ainsi que cela a été dit[124], le juge de l'exécution peut connaître du re- cours du tiers saisi contre le débiteur. Il peut également être sollicité par le débiteur[125] pour réduire le montant des sommes dues. Il peut ainsi décider, "en considération de la fraction saisissable de la rémunération, du montant de la créance et du taux des intérêts dus, que la créance cause de la saisie produit intérêt à un taux réduit à compter du procès-verbal de saisie ou que les sommes retenues sur la rémunération s'imputent d'abord sur le ca-pital". Il est également indiqué que les "majorations de retard prévues par l'article L. 313-3 du code monétaire et financier cessent de s'appliquer aux sommes retenues à compter du jour de leur prélèvement sur la rémunéra- tion"[126].

[122] Il ressort de l'étude d'impact du 2 mai 2023 (p. 328 et p. 333) qu'il existe une "impossibilité légale de confier la mise en œuvre de la procédure de saisie des rémunérations à des professionnels autres que les commissaires de justice. […] La réserve d'activité des commissaires de justice et leur formation protègent le consommateur en lui offrant un service d'expertise efficace".

[123] À rapprocher avec l'Avis du Conseil d'État n.406855 du 2 mai 2023, point 30, selon lequel "le principe [de la déjudiciarisation partielle de la saisie des rémunérations], qui ne pose aucune difficulté d'ordre constitutionnel ou conventionnel, est peu contestable, en ce qu'elle a pour effet de recentrer le juge de l'exécution sur son office, tout en maintenant le droit au re- cours effectif des débiteurs".

[124] Voy. *supra* n. 8.2.2.3.2.

[125] En droit positif, le premier aliéna de l'article L. 3252-13 du code du travail dispose que cette demande peut également être faite par le créancier. La réforme ne vise, quant à elle, que le débiteur. Reconnaissons toutefois, qu'en pratique, l'initiative des créanciers doit être extrêmement rare.

[126] CPCE, nouvel article L. 212-13.

De même et surtout, le juge de l'exécution a compétence pour connaître des contestations soulevées par le débiteur, à qui – par hypothèse[127] – le procès-verbal de saisie des rémunérations aura été préalablement dénoncé[128]. Ce droit au recours est formulé très nettement dans le nouvel article L. 212-4, alinéa 1[129], du code des procédures civiles d'exécution qui dispose, dans son premier alinéa, que les débiteurs peuvent, "à tout moment", saisir[130] le juge de l'exécution d'une contestation de la saisie.Afin de ne pas encourager les recours dilatoires, tout en souhaitant préserver les intérêts desdits débiteurs, les rédacteurs de la loi ont tenté de trouver une solution médiane en prévoyant que les contestations ne suspendent la procédure de saisie des rémunérations que lorsqu'elles sont formées dans le mois qui suit la signification du commandement[131].

Ce nouvel article L. 212-4 du CPCE a été jugé conforme à la Constitution, par le Conseil constitutionnel, dans sa décision précitée n. 855 DC du 16 novembre 2023. Contrairement à ce que soutenaient les députés l'ayant saisi, le Conseil considère que les dispositions de ce texte ne méconnaissent pas le droit à un recours juridictionnel effectif protégé à l'article 16 de la Déclaration des droits de l'homme de 1789, pas plus d'ailleurs que d'autres exigences constitutionnelles[132].

[127] La précision ne figure pas dans la loi. Cela fait sans doute partie des précisions appelées à figurer dans un hypothétique décret d'application.

[128] On ne saurait s'en tenir à la seule inscription de cet acte au registre numérique des saisies des rémunérations.

[129] Lors des travaux parlementaires, le Sénat avait adopté un amendement précisant que la saisine devait se faire nécessairement par voie de requête. Cette solution, qui dérogeait à la règle suivant laquelle le juge de l'exécution est en principe saisi par voie d'assignation à la pre- mière audience utile (CPCE, art. R. 121-11, al. 1er), n'apparaissait pas pleinement pertinente.Elle a opportunément été supprimée de la loi définitivement adoptée.

[130] CPCE, nouvel article L. 212-4, al. 3.

[131] Cons. Const., 16 novembre 2023, n. 855 DC, points 128-129.

[132] C. trav., art. L. 3252-1 ; CPCE, nouvel article L. 212-2. En droit positif, les "sommes dues à titre de rémunération " concernées par cette saisie sont nombreuses et variées. Sont notamment visés: le salaire et ses accessoires, indemnités d'heures supplémentaires, primes… des personnes travaillant dans le secteur privé, l'allocation perçue dans le cadre du contrat de sécurisation professionnelle, l'allocation d'assurance, l'allocation de préretraite (C. trav., art. L. 5428-1), les pensions vieillesse du régime général de la sécurité sociale (Cass. avis., 21 juillet 1995, n.09-50010 ; *Bull. avis* n. 11), l'indemnité journalière d'accident du travail et de maladie professionnelle (CSS, art. L. 433-3), l'indemnité journalière de repos (CSS, art. L. 331-3: maternité), l'indemnité de départ en retraite d'un salarié partant volontairement pour bénéficier du droit

9.4. *Maintien d'une saisissabilité partielle et progressive. Statu quo*

En droit positif, la procédure d'exécution ici évoquée permet de saisir les "sommes dues à titre de rémunération à toute personne salariée ou travaillant, à quelque titre ou en quelque lieu que ce soit, pour un ou plusieurs employeurs, quels que soient le montant et la nature de sa rémunération, la forme et la nature de son contrat"[133]. Cela ne change pas dans la réforme opérée par la loi n.2023-1059.

De même, outre le maintien de l'interdiction de saisir les rémunérations du travail à titre conservatoire, la saisie des rémunérations – telle que conçue dans le nouveau dispositif – continue à se singulariser par le régime de saisissabilité. À ce titre, les articles L. 3252-2 à L. 3252-7 du code du travail ne subissent aucune modification substantielle[134].

La rémunération du travail constitue souvent la seule source de revenus des débiteurs. Ce faisant, elle représente pour le créancier la perspective d'obtenir satisfaction et, pour le débiteur, le principal moyen de subsistance. Cette confrontation des intérêts en présence se traduit dans la définition des règles de saisissabilité. À ce titre, cette rémunération n'est en principe saisissable que dans la proportion et suivant les seuils définis – et réévalués annuellement[135] – à l'article R. 3252-2 du code du travail, à savoir aujourd'hui: "1° Le vingtième, sur la tranche inférieure ou égale à 4 170 □; 2° Le dixième,

à une pension de retraite (Cass. soc., 30 janvier 2008, n.06-17531, *Bull. civ.*V n. 29), les indemnités compensatrices de préavis ou indemnités de congés payés (à rapprocher de Cass. ass. plén., 9 juillet 2004, n. 02-21040, *Bull. ass. plén*. n.11, *RTD civ*. 2004, p. 779, obs. R. Perrot). De même, sont visés, les salaires et traitements des fonctionnaires civils et les soldes des officiers ou assimilés, sous-officiers, militaires ou assimilés de l'armée de terre, de la marine et de l'armée de l'air en activité, quelle que soit leur position statutaire, ainsi que les soldes des officiers généraux du cadre de réserve. Cependant, sont exclues les primes accordées aux militaires en vertu des lois sur le recrutement (CPCE, art. L. 212-2 et L. 212-3). Par ailleurs, sont exclus du domaine de cette procédure les honoraires des professions libérales ou les produits d'exploitation revenant à l'auteur d'une œuvre de l'esprit. Ne sont pas non plus concernées les sommes à caractère indemnitaire comme les indemnités de licenciement ou pour rupture abusive du contrat de travail (lesquelles peuvent être saisies au moyen de la saisie-attribution).

[133] On relève seulement l'ajout d'un renvoi exprès au code des procédures civiles d'exécution dans le libellé de l'article L. 3252-4, loi n. 2023-1059, art. 47, II, 1.

[134] En dernier lieu: Décret n. 1648 du 23 décembre 2022. Cette réévaluation s'opère "en fonction de l'évolution de l'indice des prix à la consommation, hors tabac, des ménages urbains dont le chef est ouvrier ou employé tel qu'il est fixé au mois d'août de l'année précédente dans la série France-entière. Ils sont arrondis à la dizaine d'euros supérieure " (C. trav. R. 3252-4).

[135] C. trav., art. R. 3252-2.

sur la tranche supérieure à 4 170 □ et inférieure ou égale à 8 140 □ ; 3° Le cinquième, sur la tranche supérieure à 8 140 □ et inférieure ou égale à 12 130 □; 4° Le quart, sur la tranche supérieure à 12 130 □ et inférieure ou égale à 16 080 □; 5° Le tiers, sur la tranche supérieure à 16 080 □ et inférieure ou égale à 20 050 □; 6° Les deux tiers, sur la tranche supérieure à 20 050 □ et inférieure ou égale à 24 090 □; 7° La totalité, sur la tranche supérieure à 24 090 □"[136]. Ces seuils sont affectés d'un correctif prenant en considération les éventuelles personnes à la charge du débiteur[137] et sont déterminés au re-gard du montant de la rémunération, de ses accessoires ainsi que de la valeur des avantages en nature, après déduction des cotisations sociales obligatoires et de la retenue à la source prévue à l'article 204 A du code général des im- pôts[138].

La loi n. 2023-1059 ne revient pas non plus sur les règles donnant la priorité à la procédure de paiement direct des pensions alimentaires ou à la saisie administrative à tiers détenteur.

[136] C. trav., art. L. 3252-2; art. R. 3252-3.
[137] C. trav., art. L. 3252-3, al. 1er.
[138] Voy. not. C. trav., art. L. 3252-5.

Résumé

L'article 47 de la loi n° 2023-1059 du 20 novembre 2023 d'orientation et de programmation du ministère de la justice 2023-2027 organise une déjudiciarisation partielle de la procédure française de saisie des rémunérations. Conformément aux standards européens de l'exécution, le législateur substitue un dispositif caractérisé par un contrôle a priori du juge de l'exécution, par un dispositif où le commissaire de justice maîtrise la conduite des opérations d'exécution. Cette loi retient également l'attention en instaurant un « commissaire de justice répartiteur » et en prévoyant la création d'une nouvelle plateforme informatique : le « registre numérique des saisies des rémunérations ».

Mots-clefs

Saisie des rémunérations du travail, Déjudiciarisation, Efficacité procédurale, Commissaire de justice, Dématérialisation.

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abbreviations

The list of abbreviations used in this journal can be consulted on the website www.ddllmm.eu/dlm-int/.

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