FACULTY OF LAW
Lund University

Ibrahimova Sabina

One step from employee to complainant: Unfair dismissals in violation of employees' labour rights

JAMM07 Master Thesis

International Human Rights Law
30 higher education credits

Supervisor: Lee Swepston

Term: 1 February – 31 August

CONTENTS

Acknowledgments

I would like to take this opportunity and express my words of gratitude to those whose support played a huge role throughout my study journey at Lund University.

In the first place, I have to thank Swedish Institute for holding me worthy of a scholarship and granting me a chance to receive an education of the best possible quality. It has been an honour to be a part of Network for Future Global Leaders, and I will do my best to meet the aspirations of the Swedish Institute throughout my professional career wherever life may take me.

I am grateful to all the academic and administrative staff of Lund University's Faculty of Law and Raoul Wallenberg Institute of Human Rights and Humanitarian Law. The programme provided by these two institutions gave me a chance to become a truly passionate Human Rights Lawyer. Many thanks to all my professors for their input to my education and personal development.

Lee Swepston and Thomas Constance! They inspired me with their extensive experience at International Labour Organisation and with their passion to educate us. I am grateful to Lee in particular, as to my supervisor, whose constant support and constructive comments made my writing process much easier. He wanted me to truly enjoy the process and I did.

Finally, my achievements would be impossible without the endless support of my family. They were by my side from the very beginning always encouraging and having faith in me like nobody else.

27.05.2021

With endless gratitude,
Sabina

Summary

Protection against unfair and unjustified dismissal has been crucial since the advent of employment law. Nevertheless, termination of employment remains as a sensitive issue till today. Protection of employees from wrongful terminations should be reflected in every national legislation and the real practice should be monitored. Moreover, for the effective protection, employees should have a right to appeal to an impartial body in case of their dismissal. This, in turn, is directly related to the effectiveness of dispute resolution which is an important element for both protection against unfair dismissals and maintaining sound labour relations.

This study aims to establish the most effective way of resolving unfair dismissal disputes based on experience in several countries and international law. First, the analysis of the scope and content of protection of employees against unfair dismissals in international law is presented. The legal basis is examined based on different international human rights instruments, ILO Conventions, European Union Directives and other legal sources. After examination of the legal framework, the study proceeds to an examination of the most common forms of wrongful terminations such as collective redundancies, dismissals based on discrimination, pregnancy-related dismissals, disability-related dismissals, etc. This analysis allows to discover national laws and practices of different countries on the functioning of protection mechanisms. Further, the comparative research is conducted on different dispute resolution mechanisms available for the settlement of disputes related to wrongful terminations. Through the comparative analysis, this thesis elaborates key principles and elements of effective dispute resolution. In the end, the laws and practice in Azerbaijan are analysed and possible solutions provided to the problems identified.

Keywords: alternative dispute resolution, collective redundancies, conciliation, discrimination, dispute resolution, employees' rights, mediation, unfair dismissals, unjustified dismissals, wrongful terminations.

Abbreviations

ADR	Alternative Dispute Resolution
CCAS	ILO Conference Committee on the Application of Standards
CEACR	ILO Committee of Experts on the Application of Conventions and Recommendations
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CNESST	Commission des normes, de l'équité, de la santé et de la sécurité du travail
CRPD	Convention on the Rights of Persons with Disabilities
ECtHR	European Court of Human Rights
EHRC	Equality and Human Rights Commission
EPL	Employment Protection Legislation
ESC	European Social Charter
EU	European Union
EWC	European Works Council
FWA	Fair Work Australia
ICESC	International Covenant on Economic, Social and Cultural Rights
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ILC	International Labour Conference
ILO	International Labour Organisation
LCAR	Labour Code of Azerbaijan Republic
SLIS	State Labour Inspection Service under the Ministry of Labour and Social Protection of the Population of the Republic of Azerbaijan
QLSA	Quebec Labour Standards Act
TFEU	Treaty on the Functioning of the European Union
UDHR	United Nations Universal Declaration of Human Rights
UK	The United Kingdom
UN	The United Nations
USA	The United States of America

I. Introduction

1.1. Background

Termination of employment is a legal question which concerns any employee in any place in the world. The right of the employees to employment continuity should always be backed up with effective protection against unfair dismissals. Moreover, as it will be argued below, termination laws should be weighted in favour of an employee. This does not necessarily mean the interference with the rights of employers to maintain their economic interests or improve hiring strategies. However, as the power imbalance is most tangible in employment relationships, it may easily put employees in a disadvantaged position. Implications of dismissal are in any case more severe for the employees rather than employers. It carries a lot of risks not only for the employee but also his/her family. Loss of income constitutes a circumstance leading people to poverty and always has negative repercussions on a psychological well-being of people.

Therefore, it is crucial for countries to regulate the procedures for dismissals in national laws and have effective dispute resolution systems in place for settling disputes related to unfair dismissals. The effective implementation of protection against arbitrary dismissal enshrined in national legislation directly depends on the effectiveness of the dispute resolution mechanisms operating within these disputes. In other words, a well-functioning dispute resolution mechanism, be that litigation or any alternative form, serves as a protection for employees and deterrent for employers in employment relationships.

Unfortunately, many employees around the world are being arbitrarily dismissed and are unable to vindicate their rights for various reasons. The right of an employee to be protected against unfair dismissals has not become universal. There are many countries that have not ratified the Convention of International Labour Organisation (ILO) on Termination of Employment and have no regulations in place. The problem of discrimination still persists and represents the major ground of termination which employers usually try to disguise. Pursuing their economic interests, employers tend to get rid of employees who pose any risk for productivity, such as pregnant women, disabled employees, or employees with HIV infections. However, what must be decisive during the termination is the employee's capacity and work conduct.

This thesis will attempt to contribute to the existing scholarship by providing recommendations on how to protect employees from unjustified dismissals and how to establish the mechanism that will be capable of enforcing this protection.

1.2. Problem, Purpose and Research Questions

What induced the author to come up with such a specific thesis subject is the presence of the pressing issue of unfair dismissals in her home country, Azerbaijan. Some employees are being forced to terminate an employment agreement so that it looks like being of their own volition when it is actually typical redundancy; while others are being dismissed due to their pregnancy but with attempts to disguise the unlawful ground. Ultimately, disputes on wrongful termination comprise the bulk of the cases with which courts are dealing.

This problem has set certain purposes for the thesis. First, it is crucial to obtain an understanding of the essence of the problem which is directly related to the labour rights of employees. For the effective implementation of the right to employment continuity, it is mandatory to establish a protection mechanism that would be capable of securing employees against arbitrary dismissals. The primary purpose of this thesis is to analyse the protection mechanism from the perspective of international and regional human rights instruments as well as national laws and practices. Secondly, as unfair dismissal easily develops into a dispute, the thesis also seeks to analyse this subject from the perspective of dispute resolution law and determine the elements that are crucial for the effective settlement of these disputes. The integral part of this analysis comprises a comparative study which allows to examine different forms of dispute resolution mechanisms in developed countries and trace core elements for achieving a high level of effectiveness in settlement of unfair dismissals disputes. Finally, the purpose not less important than the other two is to provide an analysis of the current situation on the matter in Azerbaijan and provide solutions where possible.

In order to achieve above discussed purposes, it has been considered necessary to answer the following research questions:

- √ What is the scope of protection of employees from unfair dismissals in the international legal framework?

- √ What are the main characteristics of the effective and well-functioning resolution mechanism in disputes related to unfair dismissals?

1.3. Delimitations

The topic of labour disputes and methods of their resolution is quite broad. For the purposes of this thesis, this subject has been carefully narrowed down to preserve its relevance as well as contribute to the existing scholarship. Bearing this in mind, first of all, it was decided to study disputes specifically related to

wrongful terminations. Wrongful terminations, or unfair dismissals, have been a pressing problem in employment law and can have severe implications on employees' human rights. Secondly, labour disputes regardless of the matter can be collective or individual. As each of these types possesses a capacity of being a separate research subject, it was considered necessary to focus only on individual disputes.

Further, it is also noteworthy that having a focus on individual disputes on unfair dismissal, this thesis leaves out gig workers. Within this study, the target group is limited to full-time employees working in a formal and standard employment environment rather than freelancers and independent contractors because these constitute a separate kind of employment relationships and therefore, are being regulated differently, if at all.

Similarly, regulations vary depending on the economy sections, whether it is public or private. With these considerations, it was deemed necessary to limit analysis mainly to workers employed in the public sector. The inclusion of both sectors in the analysis could cause the extension of the scope far beyond the desired objectives.

Lastly, comparative analysis occupies an important place throughout the current thesis. Comparison is conducted among different States and contexts with the main focus on European and other developed countries. However, it should be noted that the study has left out the United States of America (USA) while analysing the laws and practices of various countries. Why? The reason is that until today the right of an employee not to be unfairly dismissed is not recognized in this country. The national legislation of the USA in this field is based on the "employment at will" concept which prioritises the discretionary power of the employers and thereby, allows dismissing an employee without a valid reason which is completely contrary to the principles set by the ILO as well as the main concept of this thesis.

1.4. Methods and Materials

It can be presumed that the thesis generally consists of two major parts and methods accordingly.

The primary method used in this study is a traditional legal doctrine method. It is particularly referred to in Chapter 2 which summarises the legal sources of international law covering the protection of employees. This method continues to be applied in Chapter 3 as well in combination with the descriptive approach. The method of legal doctrine is of significant importance for answering the primary

research question on the scope of protection of employees from unfair dismissals in the international legal framework.

The main method employed in Chapter 4 is the comparative legal method. Thorough analysis is conducted to compare different forms of dispute settlement in countries such as Australia, Canada, Germany and Japan. The relevant findings achieved through the comparative method shed light on the core elements of effective dispute resolution mechanism and thereby contributed to the second research question.

Chapter 5 is mainly built on an interdisciplinary approach which allows elaborating on the subject matter by bringing results of comparative analysis into the examination of the specific context.

Turning to the materials applied in this study, it would be impossible to study this subject without materials drafted on behalf of ILO. Scholars and staff from ILO have done a huge job in research of the unfair dismissals topic and reflected their findings in a wide array of working papers, surveys and other sources. The main principles of termination institute have been examined referring to the ILO Conventions and Recommendations. Additionally, other human rights instruments have also been referred to while determining the rights of employees. In the analysis of European practices, the study relied on EU Directives as well as the case-law of the Court of Justice of the European Union (CJEU). Specific journal articles written by the representatives of compared countries have also been useful during the analysis. For the analysis of the current situation in Azerbaijan, materials used mainly consist of national legislative acts.

1.5. Outline

The purpose of this outline is to provide the reader with an overview of the structure of this thesis and to introduce the path chosen for answering the research questions. The thesis is structured in such a way which will allow to follow the argumentation seamlessly and have a clear picture of employees' rights against wrongful terminations and how they can be effectively vindicated. The present thesis consists of 6 chapters.

Chapter 1 is of an introductory nature and, thus, primarily sets the background of the subject. Here, the reader will become familiar with the purpose of the study and research questions. Importantly, this chapter will highlight the limitations of the conducted research. The methods employed will also be reflected in this chapter as well as the materials referred to. The chapter is concluded with the present outline.

Chapter 2 aims to determine the legal framework for the protection of employees against arbitrary dismissals. After delving into the historical background of termination legislation, a detailed analysis of human rights instruments is conducted, and the main principles are identified. The essence of the chapter consists of providing readers with a comprehensive background on the existing legal basis.

Chapter 3 is divided into several subchapters which investigate the most common grounds of unfair dismissals such as collective redundancies and dismissals based on discriminations related to pregnancy, disability, and HIV infections. The analysis provided in this chapter reflects the national laws and best practices of different countries.

Chapter 4 concerns the second research question which deals with the dispute resolution mechanisms. Here, recognizing the importance of the effective settlement of labour disputes, the chapter primarily introduces international labour standards in this field. Then, different ways of dispute resolution mechanisms are outlined and defined. A major part of this chapter consists of a comparative analysis of 4 developed countries with diverse mechanisms, recognized as best within separate contexts. The chapter concludes with answering the second research question by highlighting principles and elements for implementing effective and well-performing resolution mechanism for disputes related to wrongful terminations.

Chapter 5 addresses the legal regulation issues existing in Azerbaijan. First subchapter represents induction to the Azerbaijani termination law, where Labour Code and practice in Azerbaijan are analysed. Further, different methods of dispute resolution are outlined and analysed from the perspective of the study's findings. The chapter is concluded with the analysis of current problems in the system and possible solutions to them.

Finally, in Chapter 6 concluding comments and remarks are reflected by relating to the research questions set in the beginning.

II. Protection of employees against arbitrary dismissals: background and legal regulation

2.1. Historical development

To have a clear picture of the regime established in the field of termination of employment, it is important to refer to the historical events that took place during the emergence and development of the international employment protection legislation (EPL).

If we trace back to the first half of the 20th century, it becomes apparent that it was the aftermath of the First World War when the tensions accumulating around the world of work burst through to the surface. Global industrialization led to the transformation of the economy which resulted in mass movements of workers from the agricultural sector to industrial. As a consequence, the urgency arose to regulate national legislations in relation to work relationships, including matters such as equality and decent incomes. The First World War caused the radicalization of trade unions throughout Europe, which triggered increased attention to labour rights. Some of the major achievements in the field of labour law date back to that period. In the mid 20th century, the workers' movements achieved the regulation of working hours. It began from France's initiative to put limits on working hours and culminated with the adoption of the first Convention of the International Labour Organisation in 1919.[1] Another key achievement of this period was related to the establishment of the unemployment insurance systems. England was the first country where unemployment insurance became compulsory.[2]

In the wake of the Second World War, reconstruction occurred which shifted the priorities with the return of social institutions and the respect for basic human rights at work. Due to the achieved success in a form of full employment within the industrialized labour market and improvement of work conditions, the focus was shifted to the regulation of EPL. As the globalisation was still continuing and technological progress was increasing, the pressing need within EPL became to protect employees from frequent changes and adjustments in the labour market. In other words, the protection of employees from unfair dismissals became the heart of EPL and certain limitations were put on the employers' ability to fire employees at will. Even though these regulations started to be reflected in some States' national legislation earlier, EPL in its solid form was established in the

[1] Hours of Work (Industry) Convention, 1919 (No. 1)

[2] Mariya Aleksynska, Alexandra Schmidt, A chronology of employment protection legislation in some selected European countries, International Labour Office, Inclusive Labour Markets, Labour Relations and Working Conditions Branch. - Geneva: ILO, 2014, at 4-5

second half of the 20th century. Therefore, what today constitutes the heart of EPL is a concept of a post-war period.[3]

This general information regarding the historical evolution of EPL allows to see the broad picture of how this field emerged and developed throughout history and which factors impacted the need to protect the employee. If we look more narrowly and confine ourselves to the question of termination of employment only, it was the 19th century, when the first standards on termination of employment were reflected in the civil code provisions regarding the hiring of services. Those provisions were based on the idea of economic liberalism and, thus, allowed freedom in hiring and dismissal.[4] In case of contracts with indeterminate duration, the legislation allowed to terminate it without cause, requiring only the prior notification. This type of regulation represents the foundation of what is known today as 'employment at will'. Basically, this traditional regulation of the 19th century can be characterized as symmetric, where neither party was obliged to bring justifications to their actions. However, in fact, the rights of the parties couldn't have the same consequences. If termination of the contract by the employee exercising his/her right to freedom of work, can result in some inconvenience for the employer, the termination of the contract by an employer can result in more severe consequences for the employee and his or her family, such as insecurity and poverty.[5] This very factor led to the above-discussed movements which resulted in certain reforms in the second half of the 20th century. The period of notice was extended, the payment of a severance allowance was introduced, and the employer became obliged to provide a justification for the termination of the contract.[6]

After setting the historical background, this Chapter will now follow to discuss the legal framework of termination of employment established on the international level and then proceed to discuss common forms of unfair dismissals.

2.2. The coverage of unfair dismissals under the ILO Conventions and other Human Rights Instruments

Employees' rights encompass a large proportion of human rights from the right to work and freedom of association to the protection against discrimination and arbitrary dismissals. Protection of employment is acknowledged by a number of human rights instruments. A specific legal framework established by the

[3] Ibid, at 5-6

[4] International Labour Organisation, Termination of employment digest: A legislative review, Geneva, International Labour Office, 2000, at 9

[5] Protection against unjustified dismissal, Committee of Experts on the Application of Conventions and Recommendations, General Survey, International Labour Conference, 82nd session, Geneva, 1995, para 2

[6] Ibid

international and regional human rights instruments underlies the protection of employees from arbitrary dismissals. In the following subchapters, the legal framework will be analysed starting from the international human rights instruments following with regional instruments and concluding with the standards of the International Labour Organisation which stand as a fundamental tool of regulation in the field of employment protection.

2.2.1. International Human Rights Instruments

To begin with, a core document of international human rights law, the Universal Declaration of Human Rights (UDHR) by setting a foundation for all fundamental human rights has also provided important provisions regulating the right to work:

> "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment."[7]

The recognition of 'protection against unemployment' by this universal document has played a great role in the formation and development of the EPL on the international level.

Following the UDHR, the right to work was to be enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESC). This document provided workers with a large array of social rights and posed relevant obligations on State Parties to the Covenant. Article 6 of the ICESC reads as follows:

> "1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts and will take appropriate steps to safeguard this right.
>
> 2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual."[8]

Provisions protecting workers from wrongful terminations are also reflected in human rights instruments dealing with specific groups. For example, the Convention on the Rights of Persons with Disabilities (CRPD) safeguards the right to work of disabled people, including those who acquired a disability during the course of work. The Convention prohibits "discrimination on the basis of disability with regard to all matters concerning all forms of employment,

[7] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), art 23

[8] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, art 6

including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions".[9]

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) directed at the protection of women's rights prohibits dismissals "on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status".[10]

Finally, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) contains several provisions protecting migrant workers from wrongful terminations. Apart from a general provision which prohibits less favourable treatment of migrant workers with respect to work conditions one of such being the termination of employment,[11] it also provides equality of treatment with nationals in the following matters:

> "(a) Protection against dismissal;
>
> (b) Unemployment benefits;
>
> (c) Access to public work schemes intended to combat unemployment;
>
> (d) Access to alternative employment in the event of loss of work or termination of other remunerated activity, subject to article 52 of the present Convention."[12]

No less importantly, the migrant worker whose contract terms were violated by the employer is entitled to the effective remedy.[13]

2.2.2. EU legislation

Within the European Union (EU), the employment protection legislation largely differs between the Member States depending on legal and institutional traditions. While in countries with civil law system EPL is regulated by law, in common law countries this regulation is based on private contracts and different dispute resolution mechanisms. However, the existence of EU legislation and certain international obligations requires all Member States to comply with common minimum requirements with regards to the protection of employment.[14]

[9] UN General Assembly, Convention on the Rights of Persons with Disabilities (CRPD): resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106, art 27 (1)(a)
[10] UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 18 December 1979, United Nations, Treaty Series, vol. 1249, art 11 (2)
[11] UN General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW), 18 December 1990, A/RES/45/158, art 25
[12] Ibid, art 54 (1)
[13] Ibid, art 54 (2)
[14] European Semester: Thematic Factsheet – Employment Protection Legislation, 2017, at 1

EU legislation provides employment protection with regards to a number of matters dealing with the hiring and dismissal of workers, among which are:

- the lawfulness of probationary periods, mandated notice periods and severance payments (payments to workers for early contract termination);
- procedural requirements to be followed for individual dismissals or collective redundancies;
- sanctions for unfair dismissal;
- conditions for using temporary or fixed-term contracts.[15]

Protection against dismissals is recognized by the major EU documents such as the European Social Charter (ESC), the Treaty on the Functioning of the European Union (TFEU), the Charter of Fundamental Rights of the European Union (CFR) as well as specific EU Directives.

To begin with the ESC, in Part I it provides the list of social rights and principles about 70% of which are concerned with the workers. Importantly, Article 24 provides protection to all workers in cases of termination of employment. It reads as follows:

a. the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service;

b. the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief.[16]

The Article further obliges States to ensure that a worker whose contract was terminated has an effective right of appeal to an impartial tribunal.[17] Moreover, this provision is to be read together with the Appendix which provides for the interpretation of each Article of the Charter as well as Article 24. According to the Appendix provisions, there are certain categories of workers that may be excluded from the relevant protection such as workers under a temporary contract, workers on a probationary period and workers engaged on a casual basis for a short period of time.[18] Appendix further provides a list of reasons which are not considered as valid for termination of employment:

[15] Ibid
[16] Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163, art 24
[17] Ibid
[18] Appendix to the European Social Charter (revised), art 24(2)

a. trade union membership or participation in union activities outside working hours, or, with the consent of the employer, within working hours;

b. seeking office as, acting or having acted in the capacity of a workers' representative;

c. the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;

d. race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;

e. maternity or parental leave;

f. temporary absence from work due to illness or injury.[19]

Turning to the CFR, it also protects every worker from "unjustified dismissal, in accordance with Union law and national laws and practices."[20] TFEU, reiterating the principles established in ESC and CFR, encourages support for the Member States to ensure the protection of workers in cases of termination of employment.[21]

In 2017, the European Commission launched an initiative for delivering and improving social rights of all people across Europe and achieving better working and living conditions in Europe by introducing the European Pillar of Social Rights (the Social Pillar). The Social Pillar consists of 20 principles divided into 3 Chapters. Chapter 2 is dedicated to Fair working conditions and contains important principles protecting employees from unfair dismissals. [22]

Principle 5 – Secure and adaptable employment

> "Regardless of the type and duration of the employment relationship, workers have the right to fair and equal treatment regarding working conditions, access to social protection and training. The transition towards open-ended forms of employment shall be fostered.
>
> Employment relationships that lead to precarious working conditions shall be prevented, including by prohibiting abuse of atypical contracts. Any probation period should be of reasonable duration."[23]

[19] Ibid, art 24(3)
[20] European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, art 30
[21] European Union, Consolidated version of the Treaty on the Functioning of the European Union, 26 October 2012, OJ L. 326/47-326/390; 26.10.2012, art 153
[22] European Commission, European Pillar of Social Rights, 2017, available at: https://ec.europa.eu/info/european-pillar-social-rights/european-pillar-social-rights-20-principles_en
[23] Ibid, para 5

Principle 7 – Information about employment conditions and protection in case of dismissals

> "Workers have the right to be informed in writing at the start of employment about their rights and obligations resulting from the employment relationship, including on probation period.
>
> Prior to any dismissal, workers have the right to be informed of the reasons and be granted a reasonable period of notice. They have the right to access to effective and impartial dispute resolution and, in case of unjustified dismissal, a right to redress, including adequate compensation."[24]

Finally, the EU has adopted a number of Directives setting minimum requirements for the Member States for regulating collective redundancies[25], information and consultation[26], fixed term[27] and temporary work[28]. These Directives provide common minimum standards and protect workers in different circumstances.

2.2.3. International Labour Organisation

"Lasting peace can be established only if it is based on social justice"[29]

The Constitution of ILO proclaims that "all human beings irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity".[30] Within the conceptual framework of ILO, the stability of employment relationships constitutes a key element in promoting the right to work. All of the ILO instruments promote full, productive and freely chosen employment.[31]

In the field of employment termination, the role of ILO cannot be underestimated. It was almost 60 years ago when the Organisation adopted the first international labour instrument regulating the issue of terminations. The foundation was laid in

[24] Ibid, para 7

[25] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 225, 12.8.1998

[26] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation, OJ L 80, 23.3.2002

[27] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175, 10.7.1999

[28] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5.12.2008

[29] ILO, Constitution of the International Labour Organisation, 1 April 1919, preamble

[30] ILO, Declaration on Fundamental Principles and Rights at Work (Declaration of Philadelphia), Annex to the Constitution of the International Labour Organisation, para II (a)

[31] Termination of employment digest, supra note 4, at 8

1950 with the adoption of resolution where the ILO brought to the attention of the international community the fact of absence of any standards and regulations concerning termination of employment and requested reports on national law and practice on this matter. With this, the ILO paved the way for the further actions which led to the adoption of the Termination of Employment Recommendation No. 119 in 1963. It was the first time ever when the idea that employees should be protected against wrongful and unjustified terminations of their employment and the economic and social consequences of loss of income was recognized at the international level. This instrument introduced fundamental standards regarding the justification for termination, prior notification, the right to appeal, compensation, income protection, etc.[32]

In 1974, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) drafted the General Survey on the reports related to the Termination of Employment Recommendation where it observed the following:

> "Although the Recommendation is essentially intended to provide protection of the worker's security of employment, it also embodies an attempt to balance the several interests involved: that of the worker in job security, since loss of his job may mean loss of his and his family's livelihood; that of the employer in retaining authority over matters affecting the efficient operation of the undertaking; that of the community in maintaining peaceful labour relations and avoiding unnecessary dislocations due either to unemployment or unproductive economic units." [33]

The Conference Committee on the Application of Standards (CCAS) reviewing the abovementioned General Survey, came to the conclusion that Recommendation No. 119 had played a significant role in the promotion of employment security and protection against arbitrary terminations. As a result, both the Worker members and Government members argued in favour of the adoption of the new instrument in form of Convention which would create obligations for States and be subjected to supervisory procedures. Therefore, in November 1979, five years after the consideration of the 1974 General Survey, the ILO Governing Body put the issue of terminations at the initiative of the employer on the agenda of the 67th Session of the International Labour Conference (ILC) which took place in 1981. At the 68th Session, in 1982, the Convention No. 158 and Recommendation No. 166 were adopted.[34]

[32] General Survey 1995, supra note 5, para 3

[33] ILO: General Survey of 1974 on the reports related to the Termination of Employment Recommendation, 1963 (No. 119), para 3

[34] Background paper for the Tripartite Meeting of Experts to Examine the Termination of Employment Convention, 1982 (No. 158), and the Termination of Employment Recommendation, 1982 (No. 166), paras 10,12

2.2.3.1. Content of Convention No. 158 and Recommendation No. 166

Convention No. 158 on Termination of Employment consists of three parts:

- Part I lays down methods of implementation, scope and definitions.
- Part II sets standards of general application, which will be discussed in detail below.
- Part III provides supplementary provisions concerning termination of employment which occurs for economic, technological, structural or similar reasons.

Valid reason

To begin with the cornerstone provision of the Convention[35], Article 4 prohibits termination of employment unless there is a valid reason "connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service". This provision has removed the practice of "employment at will" discussed above, thereby forbidding employers to end employment relationships simply by giving prior notification or compensation in lieu thereof. Article 4 "does not merely require the employer to provide justification for the dismissal of a worker, but requires, above all, that, in accordance with the 'fundamental principle of justification', the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking".[36] Convention further provides a list of grounds which shall not be considered as representing the valid reason for the termination:

> "(i) union membership or participation in union activities outside of working hours or, with the consent of the employer, within working hours; (ii) seeking office as, or acting or having acted in the capacity of, a workers' representative; (iii) the filing of a complaint or the participation in the proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities; (iv) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and (v) absence from work during maternity leave." [37]

Recommendation No. 166 adds two additional grounds to this list:

> "(a) age, subject to national law and practice regarding retirement;

[35] Note on Convention No. 158 and Recommendation No. 166 concerning termination of employment, 2009, at 1

[36] Ibid

[37] Convention on Termination of Employment, 1982 (No. 158), art 5

(b) absence from work due to compulsory military service or other civil obligations, in accordance with national law and practice." [38]

Article 6 of the Convention has also prohibited terminations due to the temporary absence from work because of illness or injury, however, allowing States discretion in determining what constitutes temporary absence from work.[39]

Remedies

First of all, the employee shall not be dismissed for reasons of his/her conduct or performance before he/she is given a chance to defend himself/herself against the allegations.[40] While defending himself/herself, an employee can also be entitled to be assisted by another person.[41]

Article 8 allows the worker who considers his termination to be arbitrary to appeal to an impartial body within a reasonable period of time.[42] The Convention doesn't put the burden of proof on an employee alone, but introduces a provision which allows for sharing the burden providing for one of the possibilities or both:

(a) " the burden of proving the existence of a valid reason for the termination as defined in Article 4 of this Convention shall rest on the employer;

(b) the bodies referred to in Article 8 of this Convention shall be empowered to reach a conclusion on the reason for the termination having regard to the evidence provided by the parties and according to procedures provided for by national law and practice." [43]

Period of notice

"A worker whose employment is to be terminated shall be entitled to a reasonable period of notice". The only exception for this rule occurs when the employee is guilty of serious misconduct which makes it unreasonable for the employer to keep the worker at the workplace during the period of notice. The purpose of this safeguard is to prevent a worker from being taken by a surprise with immediate termination of his/her employment and to allow him/her to mitigate its adverse consequences.[44] However, the fact that the worker given a duly notice can in no way be used as justification of termination of employment without doing it on a

[38] Termination of Employment Recommendation, 1982 (No. 166), para 5
[39] General Survey 1995, supra note 5, para 137
[40] Convention No. 158, supra note 37, art 7
[41] Recommendation No. 166, supra note 38, para 9
[42] Convention No. 158, supra note 37, art 8(1), 8(3)
[43] Ibid, art 9 (2)
[44] General Survey 1995, supra note 5, para 239

valid reason. Conversely, terminating employment based on a valid reason doesn't relieve an employer from providing a period of notice.[45]

Convention requires the length of the period of notice to be of a 'reasonable' duration which is usually determined by national legislation or collective agreement and depends on different factors. Besides, Convention also envisages the possibility to replace a period of notice with the compensation which should correspond to the remuneration the worker would have received if the period of notice had been observed.[46]

Recommendation No. 166 provides that during the period of notice the worker should be entitled to a reasonable amount of time off without loss of pay for the purposes of looking for a new job. This time should be convenient for both parties.[47]

Income protection

According to Article 12 of the Convention, the dismissed worker has specific entitlements:

> (a) a severance allowance or other separation benefits, the amount of which shall be based inter alia on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions; or
>
> (b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or
>
> (c) a combination of such allowance and benefits.[48]

The severance allowance has a significant role in income protection in countries where there is not an adequate social security protection scheme established. However, it must be distinguished from both forms of compensations provided in the Convention, one paid in the event of wrongful termination recognized so by a competent body[49] and other paid in lieu of notice.[50]

It is also worth to mention about the supplementary provisions of the Convention which regulate the conduct of an employer when termination occurred for economic, technological, structural or similar reasons. Namely, when the

[45] Ibid, para 240
[46] Ibid, para 247
[47] Recommendation No. 166, supra note 38, para 16
[48] Convention No. 158, supra note 37, art 12.1
[49] Ibid, art 10
[50] Ibid, art 11

employer contemplates such terminations, he or she shall provide the workers' representatives with relevant information in good time and give them "an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations".[51] The employer shall also notify the competent authority as early as possible, providing relevant information.[52]

In addition to these instruments dealing specifically with termination, there are a number of other documents adopted by the ILO which in one way or another touch upon the issues of dismissals. For example, instruments related to the protection of collective bargaining[53], protection against discrimination in employment[54], maternity protection[55], the protection of worker's claims in case of insolvency of the employer[56], protection of part-time workers[57], workers with family responsibilities[58], seafarers[59], migrant workers[60] – all these instruments include certain provisions which, to a certain extent, protect employment security.

2.2.3.2. EPLex

ILO has launched a research programme on the basis of the Termination of Employment Convention (No. 158) which is designed to record and measure legislation governing the termination of employment throughout the world and create an understanding of its impact on the labour market and economic development.[61]

This research culminated with the development of a unique ILO database called EPLex. EPLex database is based on available data covering only national laws and collective agreements. Provisions of this database are grouped under eight key themes:

- legal coverage of employment protection,

[51] Ibid, art 13(1)
[52] Ibid, art 14(1)
[53] The Right to Organize and Collective Bargaining Convention, 1949 (No. 98)
[54] The Discrimination (Employment and Occupation) Convention (No. Ill) and Recommendation (No. 111)
[55] The Maternity Protection Convention, 1919 (No.3); The Maternity Protection Convention (Revised), 1952 (No. 103); and the Maternity Protection Recommendation, 1952 (No. 95)
[56] The Protection of Workers' Claims (Employer's Insolvency) Convention (No. 173) and Recommendation (No. 180), 1992
[57] The Part-Time Work Convention (No. 175) and Recommendation (No. 182), 1994
[58] The Workers with Family Responsibilities Convention, 1981(No.156) and Recomendation, 1981(No.165)
[59] Repatriation of Seafarers Convention (Revised), 1987 (No. 166)
[60] Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)
[61] Employment protection legislation: Summary indicators in the area of terminating regular contracts (individual dismissals) / International Labour Office, Inclusive Labour Markets, Labour Relations and Working Conditions Branch (INWORK). - Geneva: ILO, 2015, at 1

- regulations of the use of fixed-term contracts,
- regulations of probationary (trial) periods of regular (indefinite duration) contracts,
- valid and prohibited grounds for dismissal,
- categories of workers with special protection against dismissal,
- procedures for individual and for collective dismissals,
- redundancy and severance pay,
- avenues for redress.[62]

The main objectives of EPLex are:

First, to provide a comparative overview of regulations in the field of EPL, and termination of employment, in particular, through the analysis of diverse systems in geographic and legal terms; Second, to standardize legal information reflecting specificities and diversities of national systems to facilitate its use by experts.[63]

The database is regularly updated and currently covers 114 countries.

[62] EPLex database, available at: https://eplex.ilo.org/about-us/o.org
[63] Employment protection legislation, supra note 61, at 2

III. Workplace Fairness: Was your firing illegal?

3.1. Introduction

Termination of employment is being regulated with consideration of several purposes and perspectives. First, it is the purpose of protecting individual justice by prohibiting arbitrary dismissal of an employee by the employer. The second purpose is directed at the protection of the workers and the economic stability of the community in cases of collective dismissals for economic, technological, structural and other reasons and aims to minimize their economic losses. Third, legal regulation also aims to protect public rights such as the right to join a trade union and the right not to be discriminated on any prohibited ground like gender or disability. The regulation does not only cover employees. Employers are protected from excessive litigation costs that may arise from termination procedures and excessive regulations precluding them from new hiring opportunities. At the same time, dismissal regulation plays an encouraging role for employers to invest in the training and development of their employees.[64]

Therefore, the question that stands before everyone during the termination of employment relationships is whether the purposes of the regulations are fulfilled, and the termination is lawful, or the regulations are violated rendering the termination wrongful and unlawful. There are a lot of other questions that arise, and answers are needed in order to detect wrongful termination.

This chapter will discuss terminations on different grounds and identify best practices of regulations in light of the national laws and legal practices of different countries.

3.2. Collective redundancies

It seems reasonable to start with collective redundancies which are considered as a type of dismissals with the most severe consequences. The reason for that is the fact that negative consequences of collective dismissal can impact not only one individual but the whole sector and labour market segment.[65] The bigger the company and the larger the collective dismissal, the worse is the impact on the local economy, and when the local economy suffers, it may lead to collective dismissals in other local firms. Other consequences are related to the families of dismissed workers and also to the health of the local population. Thus, labour

[64] Termination of employment digest, supra note 4, at 7

[65] Mariya Aleksynska, Angelika Muller, 'The regulation of collective dismissals: Economic rationale and legal practice', 2020, ILO Working Paper 4 (Geneva, ILO), at 6

legislation should regulate collective dismissals with the aim of avoiding systemic disruption of the labour market and economy.[66]

On the other hand, collective dismissals are designed to respond to the objective circumstances that occur in the events of restructuring, relocation, reorganization, downsizing or shutdown of the enterprise. In other words, collective dismissals accommodate business needs and allow employers to terminate the employment of workers in an efficient way by preserving their businesses.[67]

Therefore, the procedure of collective dismissal should be balanced and take into account its impact on employees, employers and on society as well. While deciding on this, it must be established that in a certain situation it is more efficient and optimal for both enterprise and societies to implement collective dismissals rather than several individual dismissals.[68]

The procedure of collective dismissals is being regulated at international, regional and national levels. At the international level, regulation of collective dismissals is covered by supplementary provisions of ILO Convention No. 158 discussed above. It doesn't explicitly mention 'collective redundancies' but covers them under the general notion of 'terminations for reasons of economic, technological, structural or similar reasons'.[69] Convention limits this kind of termination to be implemented with respect to the workers who represent at least a specified number or percentage of the workforce.[70] The Convention sets a specific procedure for such terminations with imposing obligations on the employer:

- to provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out,[71]
- to give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment,[72]
- to notify, in accordance with national law and practice, the competent authority thereof as early as possible, giving relevant information, including a written statement of the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out,[73]

[66] Ibid
[67] Ibid, at 7
[68] Ibid, at 8
[69] Convention No. 158, supra note 37, part III
[70] Ibid, art 13(2)
[71] Ibid, art 13(1)(a)
[72] Ibid, art 13(1)(b)
[73] Ibid, art 14(1)

- to notify the competent authority of the terminations a minimum period of time before carrying out the terminations, such period to be specified by national laws or regulations.[74]

At the European level, the 1996 European Social Charter stipulates that:

> "With a view to ensuring the effective exercise of the right of workers to be informed and consulted in situations of collective redundancies, the Parties undertake to ensure that employers shall inform and consult workers' representatives, in good time prior to such collective redundancies, on ways and means of avoiding collective redundancies or limiting their occurrence and mitigating their consequences, for example by recourse to accompanying social measures aimed, in particular, at aid for the redeployment or retraining of the workers concerned."[75]

Further, the Council Directive was adopted on the approximation of the laws of the Member States relating to collective redundancies which aimed at the harmonization of the national legislation of the Member States. The Directive provides the definition of 'collective redundancies' as following:

"dismissals effected by an employer for one or more reasons not related to the individual workers concerned, where, according to the choice of the Member States, the number of redundancies is:

i) either, over a period of 30 days:

- at least 10 in establishments normally employing more than 20 and less than 100 workers,
- at least 10 % of the number of workers in establishments normally employing at least 100 but less than 300 workers,
- at least 30 in establishments normally employing 300 workers or more,

ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question;[76]

The Directive also provides provisions reflecting consultation with workers' representatives and notification of competent authorities. However, the Directive doesn't specify a list of reasons that can be invoked for collective dismissals, which gives a wide discretion to the Member States to form their legislation on the matter.

Finally, it is also worth to mention the EU Directive on the establishment of the European Works Council (EWC), which regulates collective retrenchments with a transnational character. According to the Directive, dismissals are considered transnational when "they concern the Community-scale undertaking or

[74] Ibid, art 14(3)
[75] European Social Charter, supra note 16, art 29
[76] Council Directive 98/59/EC, supra note 25, art 1

Community-scale group of undertakings as a whole, or at least two undertakings or establishments of the undertaking or group situated in two different Member States".[77]

Over 90% of EPLex countries have national legislation with special procedures on collective redundancies (Figure 1).

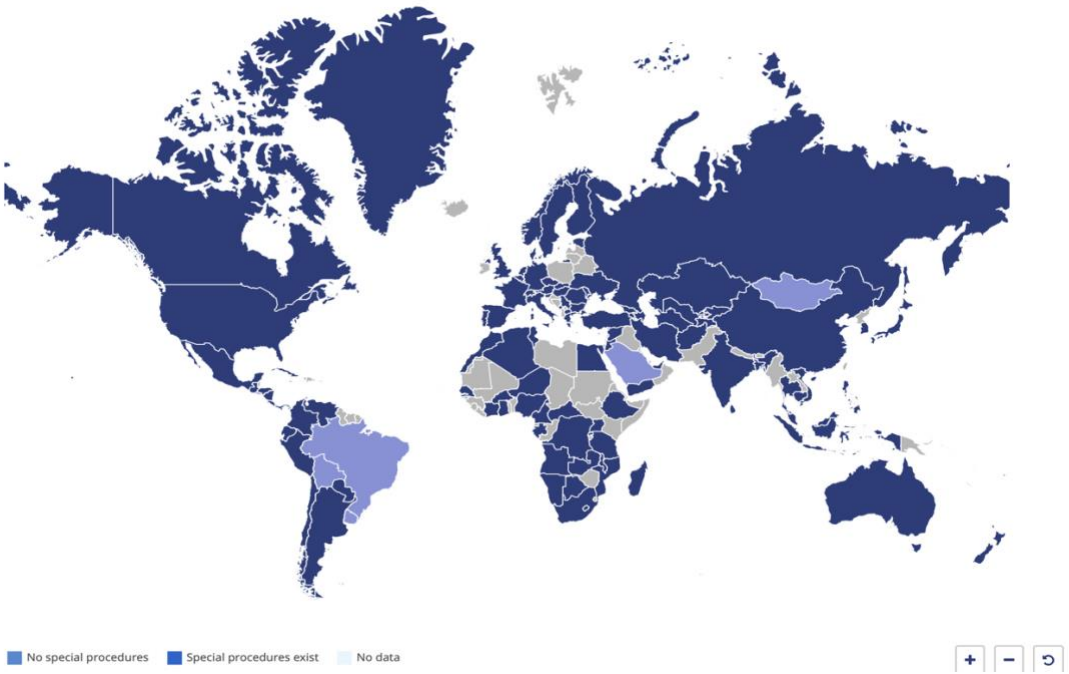

Figure 1. Availability of special procedures for terminations of workers on the grounds of economic, technological, structural or similar reasons.[78]

However, different countries have different approaches to compliance and adopt special procedures which suit their labour legislation. Relying on the statistics reflected in relevant ILO Reports, the best examples of legislation provisions with respect to the procedural requirements of collective redundancies will be highlighted below.

a. Definition of collective dismissals

Defining the termination of employment and collective dismissals, in particular, is quite important. Clear definition provided in national laws ensures that employers are unable to stagger redundancies with the aim of avoiding specific obligations with regard to the protection in the event of dismissals such as notification and consultation.[79] CJEU has made a number of decisions interpreting the definition of collective redundancies when the Member States were attempting

[77] Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council, 2009, art 1.4
[78] https://eplex.ilo.org/procedures-for-collective-dismissal/
[79] Aleksynska, supra note 65, at 16

to deliberately narrow it down and escape their obligations to follow a certain procedure.[80] For example, in the Danish case of Rockfon, the CJEU gave interpretation to the definition of 'establishment'. The applicants in order to claim under the collective redundancies' procedure had to show that a certain percentage of workers within the establishment were affected. As Rockfon was one of three units, it was necessary to identify its status of 'establishment'.[81] The Court ruled a worker-protective decision implying that an interpretation making the application of the Directive more difficult could allow companies "to escape the obligation to follow certain procedures for the protection of workers and large groups of workers could [thus] be denied the right to be informed and consulted".[82]

Generally, the definition of collective redundancies consists of two components: *substantive and quantitative*. The substantive component determines certain reasons that can trigger collective dismissals procedure. As a rule, this kind of dismissals cannot be based on a worker's capacity or other reasons related to a worker's conduct, but rather based on economic, technological or structural changes that occur within the establishment. Basically, for the reason while implementing collective redundancies to be valid, it needs to be related to the operational requirements such as the insolvency or bankruptcy of the employer, cessation of a job, downsizing, restructuring or transformation of the enterprise.

Among national laws which precisely define valid reasons, the example of the Portuguese Labour Code can be brought. Collective dismissals in Portugal are allowed on the closing of one or more sections of the enterprise, or due to the reduction of the number of workers due to economic, structural or technological reasons. Precisely, reasons are categorized in the following groups:

a) market reasons such as a slowdown in business activity caused by an unexpected decrease in demand for goods or services; or an intervening legal or practical impediment to placing these goods or services on the market;
b) structural reasons such as economic and financial imbalances, changing the business, restructuring, or replacement of dominant products;
c) technological reasons such as changes in technical or manufacturing processes, automation of production, control, or cargo-transportation tools, as well as the computerisation of services or the automation of means of communication.[83]

[80] Report on collective dismissals: A comparative and contextual analysis of the law on collective redundancies in 13 European countries /Nicola Countouris, Simon Deakin, Mark Freedland, Aristea Koukiadaki, Jeremias Prassl; International Labour Office. – Geneva: ILO, 2016, at 39

[81] *Case C-449/93 Rockfon A/S v Specialarbejderforbundet i Danmark*, in Industrial Relations Law Reports (IRLR) (1996, Vol. 168)

[82] Report on collective dismissals, supra note 80, at 39; Rockfon case, para. 30

[83] International Organisation of Employers, Survey on Collective Redundancy Procedures, IOE 2016, at 7

Turning to the quantitative component of the definition, it includes the minimum number of employees to be dismissed in relation to the size of the company, as well as the timeframe for dismissal.[84] Usually, there is a three-tier distinction between small, medium and large companies. However, the differences between the thresholds vary significantly between the countries.[85] For example, France has the lowest threshold, when the dismissal of only 2 employees within 30 days can trigger the collective redundancy procedure. Legislation of the Democratic Republic of Congo (DRC) provides very detailed regulation starting from companies employing 10 employees, where the threshold is 3 dismissed employees within 30 days, and up to companies employing 6000 workers, with the threshold of 300 dismissals within the same period. [86]

b. Information and consultation requirements

Obligations to provide information and consult with workers' representatives are the most significant within the procedure of collective redundancies. In the case of *Junk v Kuhnel*, the CJEU established that these obligations must be fulfilled "prior to any decision [having been taken] by the employer".[87] Regarding the content of information, German employers are obliged to inform the works council in writing and in a good time, and the notice must include the following:

1) the reasons for the projected redundancies;
2) the number and categories of employees concerned;
3) the number of employees normally employed;
4) the period over which the projected redundancies are to be effected;
5) the criteria proposed for the selection of the workers to be made redundant;
6) the method for calculating any redundancy payments.

In terms of the consultation requirements, the practice in Sweden implies an actual negotiation process and co-decision of certain matters. It is of significant importance that an employer launches the negotiation process in due time when there is a genuine chance for the trade unions to affect the decision of the employer. There is a Co-determination Act, which specifies that the parties to the negotiation process are obliged to do their best to reach an agreement.[88]

c. Redundancy notification obligations to competent authorities and social plans

[84] IOE Survey, supra note 83, at 7
[85] Ibid
[86] Ibid
[87] Report on collective dismissals, supra note 80, at 41
[88] Ibid, at 65-66

The obligation to notify the competent authorities is required only in 22 countries.[89] Interestingly, in many countries, this requirement seems to be replaced with the information/consultation procedure with workers' representatives. Across the countries, the competent authorities that are to be notified differ, and normally these are the Ministry of Labour or Employment, the labour inspectorate, a public employment service or social security fund.[90]

The economic and social rationale of this obligation is to introduce risk-sharing and redistribute economic losses among tripartite economic actors. Public authorities are capable of elaborating safeguarding measures with the aim of aiding employers to preserve their businesses.[91] At the same time, they can play the role of observers and safeguard the workers' labour rights.

The role of the competent authorities differs depending on different countries. While in UK public authorities historically have had only monitoring discretion, Greek authorities are mandated to systematically verify the substance of terminations and the level to which a general interest of the economy is complied with.[92] In the Netherlands, the employer must obtain the prior approval of the Social Security Institution, which may refuse to grant permission and to request additional consultations if deemed necessary. In Australia, the employer must formally notify "Centrelink" which is the federal government agency providing income support and job and training assistance. The Fair Work Commission (the Australian National Workplace Relations Tribunal) is competent to consider the dismissal unfair and order the reinstatement of the employee.[93]

Importantly, even if the authorization for termination is received on behalf of the competent authority, it doesn't preclude an employee from challenging termination in court. It is still possible for the parties to seek resolution from other authorities.[94]

Competent authorities can sometimes be involved in the elaboration of social measures aimed at the mitigation of collective dismissals. One of these measures is social plans which are usually initiated by the employer and can contain an alternative to the termination measures such as internal transfers, proposals for external employment, early retirement and compensation packages. In France, if an enterprise with more than 50 employees is planning to dismiss at least 10 workers, it has to compile a "Job Preservation Plan" ("Plan de Sauvegarde de l'Emploi – PSE") providing concrete and detailed measures to avoid or reduce the

[89] Aleksynska, supra note 65, at 23
[90] Ibid, at 22
[91] Ibid, at 23
[92] Ibid, at 24
[93] IOE Survey, supra note 83, at 13-14
[94] General Survey 1995, supra note 5, para 308

implications of the redundancies.[95] In Croatia, an employer who intends to carry out a collective redundancy after consultations with the Works Council is obliged to develop a "Redundancy Social Security Plan". This plan is elaborated in consultation with the public employment service and the Works Council and contains the provisions on relevant changes in technology and the organisation of work, as well as alternative measures to the termination such as additional training or re-employment within another enterprise.[96]

It is also worth mentioning that during the global crisis of 2008-2011 and later on, a number of countries such as Bulgaria, the Czech Republic, Estonia, Germany Indonesia, the Russian Federation introduced alternatives to termination measures through policies of 'work-sharing', 'short-time work' or 'partial unemployment'. For example, in Estonia, several medium-sized companies shifted a substantial proportion of employees to part-time work, without cutting wages accordingly, through the implementation of other balanced measures, such as abandoning the usual paid Christmas holiday or conducting work on weekends in order to meet the company demands.[97] The Russian Labour Code, on the other hand, implies an involuntary reduction of working hours for a period not exceeding 6 months. During the crisis, a number of enterprises implemented this measure, thus, avoiding a large number of collective dismissals.[98]

d. Redundancy selection criteria

Redundancy selection is based on two main principles. First, it must be non-discriminatory which means that an employee cannot be made redundant based on any discriminatory ground such as gender or disability, and second, a certain group of employees must be granted protection against dismissals. There are certain variations in the way how different States regulate the selection of workers to be made redundant. Some countries re-considered criteria established for collective dismissals which could be seen as indirect discrimination.[99] For example, the most commonly used seniority principle which is expressed in the "first in, last out" rule may discriminate employees on the ground of age. This principle implies that the employees with the fewest years of service are dismissed first. This rule ignores the fact that the majority of 'last enterers' are usually the youngest. By targeting the youngest part, employers make them feel vulnerable and insecure. The length of service is allowed to be considered only if the employer can provide justification. Otherwise, this criterion is characterized by a high probability of affecting one group of people more than another and

[95] IOE Survey, supra note 83, at 13
[96] Ibid
[97] Aleksynska, supra note 65, at 26
[98] Ibid
[99] Ibid, at 27

discriminate on the ground of age. Another example of indirect discrimination during redundancy selection is based on sex. It happens when women are granted special protection, other than pregnancy protection, and this indirectly discriminate against men and increase their chances to be redundant.

To bring the best country example in redundancy selection, in the UK the fair selection procedure includes the following criteria:

- skills, qualifications and aptitude
- standard of work and/or performance
- attendance
- disciplinary record

Neither of this criterion can in any way result in discrimination because each of them is related to work performance and work conduct.

British laws are also exemplary in setting a list of protected workers. Unlike the majority of countries, the UK doesn't only protect women during maternity, but also men during paternity leaves. Besides, it is prohibited to dismiss workers based on their age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex and sexual orientation, pay and working hours.[100]

Some laws provide the principle of priority in the rehiring of dismissed employees. For example, in the Republic of Korea, there is quite a long-time threshold (3 years) within which an employee is entitled to be prioritized for the position. In the Netherlands, when approving the collective redundancy procedure, the Institute for Employee Benefit Schemes (UWV) is entitled to prohibit the employer from hiring a new employee "for the performance of duties of the same nature", without first offering former employees to be rehired. [101]

This kind of provisions regulating collective dismissals plays an important role in ensuring a more objective framework for the procedures and decreases uncertainty about the nature of dismissals. They also play a safeguarding role for collective dismissals that some employers attempt to disguise and promote a worker-protective climate.[102]

3.3. Dismissal based on discrimination

Discrimination at the workplace remains a pressing issue throughout the world. Employees are being discriminated on different grounds which are prohibited

[100] Report on collective dismissals, supra note 80, at 83
[101] Ibid, at 80
[102] Aleksynska, supra note 65, at 18

under the ILO Discrimination Convention No. 111. According to the Convention, discrimination means "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation".[103] Changes in socio-cultural processes result in new forms of discrimination based on grounds such as HIV-positive status or sexual orientation. The phenomenon of discrimination is difficult to eradicate as it is usually produced from subjective perceptions and opinions rather than from objective factors. Nevertheless, elimination of discrimination at the workplace must be a priority for the purposes of achieving decent work.

Discrimination occurs when an employer treats a worker unfavourably due to characteristics other than related to an employee's job performance. It is not only direct discrimination which is typical for the employment environment. While direct discrimination is explicit in representing unequal treatment, indirect discrimination is more difficult to detect and prevent. It happens that some practice at the workplace appears neutral at first glance, but it results in an unequal treatment and disadvantages for a particular group of workers. To bring an example, part-time workers may be selected for the redundancy, but, in fact, the majority of this category workers are female.[104] However, the distinction and differential treatment triggered by reasons related to job requirements cannot be deemed to be a discrimination.[105] For example, a disabled employee can be dismissed on the ground of unsuitability after reasonable accommodation has been provided.

Discrimination in employment or work is concentrated not only in access to employment, remuneration, wages, working hours and access to training but also in terminations. Inequality in employment dismissals is a major barrier for decent work and sustainable development.

3.3.1. Pregnancy-related dismissals

Why the dismissal of a pregnant woman or a woman on a maternity leave is unlawful?

The reasons why women in such situations should be protected from dismissals are rooted in social law. First, dismissal of pregnant women affects the health of discriminated women and the unborn child directly. Loss of income leads to the lower quality of healthcare that needs to be provided to the new-born and young

[103] Discrimination (Employment and Occupation) Convention, 1958 (No. 111), art 1(1)
[104] József Hajdú, Gabriella Mészáros, 'Protection of pregnant women against dismissal: with regard to the hungarian jurisprudence' Pravne teme 09:117-136, at 123
[105] Convention No. 111, supra note 103, art 1(2)

mother. Considering the vulnerable condition of women during pregnancy, dismissal impacts their physical and mental well-being. Besides, if dismissed, the chances for a pregnant woman to find a new job during pregnancy drop to zero. She also loses her guaranteed chance to return to the labour market after a certain period, which adversely impacts her career prospects and access to certain benefits.[106] To go deeper, society also has the general interest in promoting and protecting childbearing, a function only women can perform.

Protection against dismissals is a fundamental element of maternity protection system and has been reflected in relevant ILO Conventions. Initially, the protection of maternity Conventions was limited only to the women on maternity leave, but with further development it included pregnancy period and also period following the return to the work:

> "It shall be unlawful for an employer to terminate the employment of a woman during her pregnancy or absence on leave referred to in Articles 4 or 5 or during a period following her return to work to be prescribed by national laws or regulations, except on grounds unrelated to the pregnancy or birth of the child and its consequences or nursing. The burden of proving that the reasons for dismissal are unrelated to pregnancy or childbirth and its consequences or nursing shall rest on the employer."[107]

The duration of employment protection of women in relation to maternity varies from country to country. For example, in the Republic of Moldova women cannot be dismissed from the period of pregnancy until the child reaches 6 years. In Azerbaijan, Estonia, Lithuania and Mongolia protection period is from pregnancy until the child is 3 years old.[108]

Only a few countries have progressed to such extent to provide protection against dismissal to fathers as well. This cover situations when fathers widowed or single and need to take care of their minor children. In Chile, in case the mother dies, a father takes the remainder of "maternity leave" and becomes protected against dismissal for one year. In Mongolia, single fathers are protected against dismissal until their child reaches 3. In The former Yugoslav Republic of Macedonia, the father can take maternity leave instead of the mother which makes him protected against dismissal during this period.[109]

Regional legal instruments also provide protection against discrimination based on gender, including maternity. There are two related Directives in the EU:

[106] Hajdu, supra note 104, at 122
[107] Maternity Protection Convention (No. 183), 2000, art 8(1)
[108] Maternity Protection Resource Package: From Aspiration to Reality for All/International Labour Office, Conditions of Work and Employment Programme (TRAVAIL) – Geneva: ILO, 2012, at 6
[109] Ibid, at 7

Pregnant Workers Directive[110] and Recast Directive[111]. The CJEU has interpreted these Directives in many cases and has established important principles regarding the protection of women against unlawful dismissals. In the *Melgar case*, the Court established protection over pregnant women on a fixed-term contract so that if the non-renewal of the contract is motivated by the fact of pregnancy, it is to be considered direct discrimination.[112] In the *Brown case*, the Court held that a pregnant woman cannot be dismissed for sickness absences which are related to her pregnancy.[113]

Despite the fact that pregnant women have been protected in most modern economies since the maternity protection was introduced into law, pregnancy related unfair dismissals still persist in many countries.

3.3.2. Disability-related dismissals

Employers must be particularly careful with disabled people while dismissing them as they have primary duty to provide reasonable accommodation for disabled workers. The duty of providing reasonable accommodation means to implement specific adjustments reasonable in a sense that they don't put an undue burden on the employer but provide the same access to disabled workers in doing a job as to non-disabled ones. As long as reasonable adjustments have not been made, the dismissal of a disabled worker on the basis of low productivity or absenteeism will constitute discrimination.

This approach has been reflected in the documents such as the UN Convention on the Rights of Persons with Disabilities (CRPD), Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation[114], the ILO Convention No. 159 on Vocational Rehabilitation and Employment (Disabled Persons), Recommendation No. 168 and ILO Future of Work agenda.[115] However, neither of them provides for specific measures required for reasonable accommodation. The preamble of the above-mentioned Directive gives examples of appropriate measures such as 'adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of

[110] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding [1992] OJ L 348

[111] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204

[112] *Case C-438/99 Maria Luisa Jiménez Melgar v Ayuntamiento de Los Barrios* [2001] ECR I-06915

[113] *Case C-394/96 Brown v Rentokil Ltd* [1998] ECR I-04185

[114] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303, art 5

[115] Join publication, Fundación once and the ILO Global Business and Disability Network, Making the future of work inclusive of people with disabilities [2019]

training or integration resources.'[116] As to CJEU case-law, as a measure of reasonable accommodation, the employer might need to reduce the working hours for the disabled person.[117] For example, if working full-time is problematic for the disabled worker because of increasing fatigue, the employer before dismissing him/her or considering for an early medical retirement has to consider the reduction of the working hours.[118] Another example is the case when a disabled person is persistently late for work, and this might be for different reasons such as the absence of accessible busses or the condition of disabled worker in the mornings that makes it particularly hard for to be on time. In this case, the employer would be obliged to make relevant adjustments, for instance, to change the starting time without reducing working hours.

When it comes to redundancy due to reasons not related to worker's conduct, such as shutdown of the department, the employers have to take extra measures to protect disabled people. For example, if absences are taken as selection criterion, it must be adjusted not to count the absences related to disabilities of disabled workers.

Equality and Human Rights Commission (EHRC), the UK's national equality body, recommends the following types of reasonable adjustments:

- A phased return to work if a disabled person has been off for a long time.
- Part-time or flexible hours if full-time working is difficult.
- Changes to premises, such as installing a ramp, improving signs, or moving desk nearer essential office equipment.
- Provision of additional equipment, such as specific computer software or hardware if this is relevant.
- A part-time reader if a worker has a visual impairment to help manage the volume of written information, or interpreter.
- Reassigning some elements of the job to another member of staff or transferring to another role in the organisation. [119]

Disabled persons struggle in finding new job opportunities and have more severe financial repercussions due to their condition. Therefore, it is unacceptable that employers discriminate disabled persons in the workplace by unlawful dismissals.

[116] Council Directive 2000/78/EC, supra note 114, para 20
[117] C-476/11 *HK Danmark v Experian A/S* [2013] paras 48–64
[118] Equality and Human Rights Commission, Equality Act 2010 Guidance for Employees, 2014, at 19
[119] Ibid

3.3.3. Dismissals of HIV infected employees

Another group of vulnerable people who are being stigmatized and discriminated during dismissals are people with Human Immunodeficiency Virus (HIV). HIV-infected people face discrimination everyday both from employers and fellow employees mainly because of the irrational and unjustified fear of being infected through social contact. This reaction is unfounded and causes stigma against these people.

According to research covering Western countries, the unemployment-rate among HIV-positive people ranges from 45% to 60%.[120] Stigma leads these people to be afraid of disclosing their HIV-status at the workplace. Nevertheless, to dismiss employees based on their positive HIV status is unlawful unless it affects their ability to work. The ILO has established in its Code of Practice on HIV/AIDS and the world of work:

> HIV infection is not a cause for termination of employment. As with many other conditions, persons with HIV-related illnesses should be able to work for as long as medically fit in available, appropriate work.[121]

Furthermore, ILO has adopted Recommendation No. 200 on HIV and AIDS which went beyond to protect people not only with real but also perceived status of HIV. Recommendation prohibits discrimination on the ground of mere perception that the person is HIV-infected. Persons with HIV-related illness cannot be denied the possibility of continuing their work, with reasonable accommodation if necessary, for as long as they are medically fit for the job.[122]

The exemplary decision was made by the German Federal Labour Court on this matter. The applicant in case was an employee of pharmaceutical company and was in charge of quality control of the medicines that required to work in so-called 'cleanrooms'. After finding out about the employee's HIV positive status, the employer dismissed him based on safety regulations which didn't allow employees with contagious diseases to work in cleanrooms. While Labour Court in Berlin ruled that the applicant could not file a claim under the General Equal Treatment Act because HIV related illnesses don't fall under the scope of discrimination on the grounds of disability, the Federal Labour Court made the opposite ground-breaking decision. It held that HIV infection is a chronic disease which entails a permanent medical functional impairment and in connection with social barriers restricts the participation of an individual in society; thus, it falls

[120] Wagener M.N and Others, 'Employment-Related Concerns of HIV-Positive People in the Netherlands: Input for a Multidisciplinary Guideline' (2014) J Occup Rehabil 24 790
[121] An ILO Code of Practice on HIV/AIDS and the World of Work, International Labour Office. – Geneva: ILO, 2001
[122] HIV and AIDS Recommendation No. 200, 2000, art 13

under the meaning of disability. Having established this, the employer would be obliged to take measures of reasonable accommodation before dismissing the employee.[123]

It happens also that employers undergo pressure from the staff which demands the dismissal of an infected employee. In such a case, the European Court of Human Rights (ECtHR) held that as long as the medical condition of an infected employee doesn't impact his/her job performance, the reaction of the colleagues is not justified from a scientific point of view and therefore, the dismissal is considered discriminatory.[124]

Unlawful dismissals of persons with real or perceived HIV/AIDS status constitute a major problem in the world of work and can be tackled only through an effective policy.

[123] Kurt Pärli, 'Different Ways to Fight against Unfair Dismissal on the Grounds of HIV/AIDS Status', European Labour Law Journal vol. 6, 2015, at 377-379

[124]Ibid, at 380-381*; I. B. v Greece* App. No 552/10 (ECtHR, 3 October 2013)

IV. Resolution of unfair dismissal disputes. Determining the most effective mechanism.

4.1. Introduction

Effective resolution of labour disputes is crucial for maintaining sound labour relations. It is also key in minimizing and preventing the occurrence of conflicts which are inevitable in employment relationships.[125] ILO has long been aiding States in developing systems of dispute resolution through three main stages:

- the promotion of international labour standards related to dispute prevention and resolution, and monitoring their implementation;
- research and knowledge sharing;
- technical advice and assistance in the establishment and strengthening of legal frameworks, and machinery and processes for the prevention and settlement of labour disputes, in line with international labour standards.[126]

International labour standards related to dispute resolution are set in two ILO Recommendations: Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92), and the Examination of Grievances Recommendation, 1967 (No. 130). These instruments establish the principle of participation of workers and employers on an equal footing as a cornerstone to the effective dispute resolution. Further, they promote dispute prevention through consensus-oriented systems. Paragraph 7 of Recommendation No. 130 calls for the establishment and proper functioning of a sound personnel policy, which should take into account and respect the rights and interests of the workers, based on regular cooperation with the workers' representatives. Recommendation No. 92 provides that voluntary conciliation should be free of charge and expeditious and time limits should be prescribed at a minimum.[127]

In addition, ILO has developed a special Guide which aims to provide States with a guideline and support to develop their systems of dispute prevention and resolution. The Guide complements ILO Recommendations presenting a more practical approach. It promotes the importance of introducing a range of services that respond to different needs of users, such as the provision of information, advice, counselling, training, facilitation and investigation. Besides, the Guide

[125] Labour dispute systems: guidelines for improved performance, International Training Centre of the ILO, International Labour Organization, 2013, at iii

[126] Best practices in resolving employment disputes in international organizations: conference proceedings, ILO Geneva, 15-16 September 2014 / edited by Annika Talvik; International Labour Office – Geneva: ILO, 2015, at 3

[127] Ibid, at 4

emphasizes the importance of the level of professionalism of those who handle labour disputes.[128]

For the purposes of determining the effectiveness of different forms of dispute resolution mechanisms, it is reasonable to first set clear distinctions between them.

Negotiation, otherwise called collective bargaining, is a process between two parties with a view to reaching mutually acceptable terms and conditions of employment.[129] This type of dispute resolution is being promoted by ILO in Conventions 98 and 87 as an important method for harmonious, stable, and progressive industrial relations that contribute to sustainable development.[130]

Conciliation is a form of dispute resolution where a third, neutral party, the conciliator, assists the parties in reaching an agreement or settling a conflict.[131]

Mediation is often given the same definition as conciliation; however, they differ in an academic sense. While the conciliator acts as a facilitator and actively takes part in the resolution without proposing a solution to the dispute, the mediator is more actively involved and has a duty of proposing solutions for resolving the dispute.[132]

Arbitration is a form of dispute resolution where an independent third party, an arbitrator, or an arbitration board, after considering both sides' argumentation makes a binding decision on the dispute.[133]

Litigation is a form of dispute resolution where an independent third party, a judge, takes a decision binding on the parties.[134]

It is noteworthy that dispute resolution mechanisms other than litigation are considered as alternative dispute resolution (ADR) and have a number of advantages in terms of costs, time-consuming features and efficiency.

This chapter aims to analyse different resolution mechanisms for wrongful terminations disputes throughout the world and find out which ones work best in different contexts. The ultimate goal is to identify principles and elements from

[128] Ibid, at 6
[129] Robert Heron, Caroline Vandenabeele, Labour Dispute Resolution: An introductory guide, 1999, at 15
[130] ILO Country office for Viet Nam, Convention No.98 Right to Organize and Collective Bargaining Convention, available at https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-hanoi/documents/publication/wcms_721934.pdf
[131] Heron, supra note 129, at 23
[132] Ibid
[133] Ibid, at 31
[134] Ibid, at 39

the various systems which are key for the effective and well-performing resolution mechanism.

4.2. Resolution of unfair dismissal disputes in different contexts: Diversity at its finest

Dispute resolution systems in different countries are diverse as they reflect historical, socio-economic, political and legal factors existing within specific contexts. Recognizing this diversity, the analysis of dispute resolution mechanisms within different contexts is useful in view of achieving a deep understanding and identifying key elements of effective and well-functioning dispute resolution.[135]

Hereby is presented the analysis of resolution mechanisms functioning with regards to unfair dismissals disputes in Australia, Canada, Germany and Japan. The country selection is made based on the diversity of jurisdictions and geographical contexts. Systems analysed below have proven to be successful and represent role models within separate contexts.

4.2.1. Canada

Canadian employment protection legislation can be characterized by a high level of fragmentation manifested in the unionization of workers. Protection against unjust dismissals through dispute resolution mechanism works more smoothly for unionized workers. The unionized employee who has been wrongfully terminated can file grievances, and the union will be obliged to represent an employee in dispute. The procedure for resolving such a dispute is normally set out in the collective bargaining agreement. The parties to the dispute – union and the employer – decide on the selection of the arbitrators and further bear all the fees and disbursements in accordance with the collective agreement. The employee becomes alleviated from the costs incurring from legal representation. In Canada, qualified arbitrators form professional associations and have exclusive jurisdiction over the relevant disputes upon which their awards are binding and are not subject to appeal. The positive fact arising from this practice is that during 2007-2010, 61% of cases were settled without reaching adjudication. However, it becomes less efficient with the increase of delays and costs that occur as a result of lengthy proceedings.[136]

Turning to non-unionized workers, they are being protected on the provincial level. For example, in Quebec, protection is applied under the Quebec Labour

[135] Minawa Ebisui, Sean Cooney, Colin Fenwick, 'Resolving individual labour disputes: a comparative overview' International Labour Office. - Geneva: ILO, 2016, at 2

[136] Ibid, at 84-85

Standards Act (QLSA), which is administered and applied by Commission des normes, de l'équité, de la santé et de la sécurité du travail (CNESST). The QLSA covers employees' recourse in the following disputes:

- monetary and administrative complaints,
- reprisals by the employer,
- psychological harassment,
- unjust dismissals.

Reprisals by the employer may be carried out for different reasons and may manifest themselves in a form of dismissal. In this case, employees can file a written complaint within 45 days of the reprisal. CNESST is the agency which decides on the admissibility of the complaint and further offers the employee the services of a mediator. Mediators are employees of the CNESST that have received specific training and became bound by the Code of Ethics.[137] According to this Code, mediation is:

> "a conflict resolution method whereby a qualified and impartial third party helps the employee and employer in conflict to devise a viable solution that is to their mutual satisfaction".[138]

The Code further reflects on mediator's obligations:

> "Make sure that the parties fully understand the terms and consequences of the agreement and that these terms and consequences correspond exactly to the parties' wishes. If the mediator is of the opinion that the agreement creates a clearly unbalanced situation for a given party or could give rise to injustice, [or] that it is based on incomplete or false information, he [or she] must:
>
> a) inform the parties accordingly and, if he [or she] deems it necessary, suspend or put an end to the mediation;
> b) encourage the parties to make decisions based on appropriate and sufficient information;
> c) invite the parties to consult any resource person who can provide relevant expertise and explanations;
> d) refrain from countersigning any agreement that is contrary to the public order."[139]

The mediation process in Canada is provided free of charge for the parties and is completely confidential. If the parties reach a settlement, then their agreement has an effect same as the one of the court judgements. If the settlement could not be

[137] Ibid, at 72

[138] Commission des normes, de l'équité, de la santé et de la sécurité du travail (CNESST), Code d'éthique en mediation, [2019] DC200-11483, available at: https://www.cnesst.gouv.qc.ca/fr/organisation/documentation/ethique-deontologie/code-dethique-en-mediation

[139] Resolving individual labour disputes, supra note 135, at 72

reached, an employee can refer the complaint to the Administrative Labour Tribunal (ALT). The procedure here also consists of two stages: first being mediation again, and if settlement is not reached, the case is referred to the administrative judge for the hearing. The burden of proof during the hearing lies with the employer. When the case is one of recourse for reprisals, the remedies available are only reinstatement and back pay. From the view of the length of proceedings and costs incurred, this mechanism has proven to be successful.[140]

When the case is filed under the recourse for unjust dismissal, the procedure is the same. The administrative judge, however, has more discretion in deciding on remedies. The remedies can be granted in forms of reinstatement, back pay and any other which the judge "believes fair and reasonable, taking into account all the circumstances of the matter".[141] In general, reinstatement is the most frequently used and recommended form of remedy because it is believed to increase the bargaining power of the employee. Basically, the employer is not willing to have the employee that he dismissed back at the workplace and thus, the employer is eager to pay more compensation instead.[142]

Hence, the Canadian approach prioritizes alternative dispute resolution to the adjudication. According to the reformed Code of Civil Procedure, "parties must consider private prevention and resolution processes before referring their dispute to the courts", which includes but is not limited to mediation.[143] In fact, the majority of wrongful dismissals cases in Canada are settled without reaching the courts.

4.2.2. Australia

Australia is characterized by its long-standing tradition of conciliation and arbitration which commenced with collective labour disputes at the beginning of the 20th century.[144] Throughout the history of labour relations in Australia, conflict resolution has been conducted on behalf of public agencies, which managed to gain the trust of the public due to their independence and impartiality.[145] One of them is Fair Work Australia (FWA), which is a federal body responsible for conflict resolution under the Fair Work Act. According to the Act, the FWA's role consists of resolving labour disputes through different methods such as mediation,

[140] Ibid, at 73
[141] Ibid, at 81
[142] Ibid, at 90
[143] Ibid, at 88
[144] Ibid, at 33
[145] Anthony Forsyth, 'Workplace conflict resolution in Australia: The dominance of the public dispute resolution framework and the limited role of ADR' International Journal of Human Resource Management, Vol. 23, No. 3, 476 [2012] at 477

conciliation, making a recommendation or expressing an opinion. Arbitration is allowed only with respect to the disputes explicitly enshrined in the legislation.[146]

FWA introduced a unique method of resolving disputes related to unfair dismissals: telephone conciliation. This method was adopted with the purposes of ensuring quick settlement and minimising costs. [147]

What happens at conciliation? Conciliation is an informal method of resolving an unfair dismissal dispute between an employer and employee. It is a voluntary process which is conducted through the telephone (the use of videoconferencing facilities is also possible). The conciliators are employees of FWA who received training and instructed "to play a more activist role" than a typical mediator. Importantly, conciliators do recognize the power imbalance existing between the parties and are insistent in finding a resolution. As to the resolution of the dispute, it may result either in the reinstatement of the employee or in the withdrawal of the application.[148]

The conciliation process has certain benefits:

- informal, quick and flexible method of resolving a dispute,
- quicker and less costly than a conference or hearing, and parties who are able to reach a resolution of their dispute often feel more satisfied and more in control of their situation,
- avoids the need for a conference or hearing before a member of the Fair Work Commission (the Commission), who will decide if the dismissal is fair or unfair if the matter does not resolve at conciliation. [149]

There is some criticism expressed on behalf of the practitioners representing both employees and employers who have argued that conciliation through telephone risks to negatively affect the "capacity to engage in a genuine problem solving and interests-based negotiation that is the foundation of the mediation model on which conciliation is based".[150]

Nevertheless, an independent study conducted in the early months, after the method was introduced, for the evaluation of the efficiency of the telephone conciliation system presented high levels of satisfaction. Namely, 86% of applicants, 82% of respondents and 87% of representatives reported that they

[146] Ibid, at 480

[147] Ibid, at 482

[148] Jennifer Acton, 'Where have all the cases gone? Voluntary resolution of unfair dismissal claims', ALLA National Conference, Adelaide, 19 November 2010, at 2

[149] Unfair dismissal – Guide 6: Preparing for conciliation, 15 March 2021, available at: https://www.fwc.gov.au/documents/documents/factsheets/guide_6_preparingforconciliation.pdf

[150] Resolving individual labour disputes, supra note 135, at 46

were satisfied or extremely satisfied with the service provided by the conciliators of FWA (Figure 2).[151]

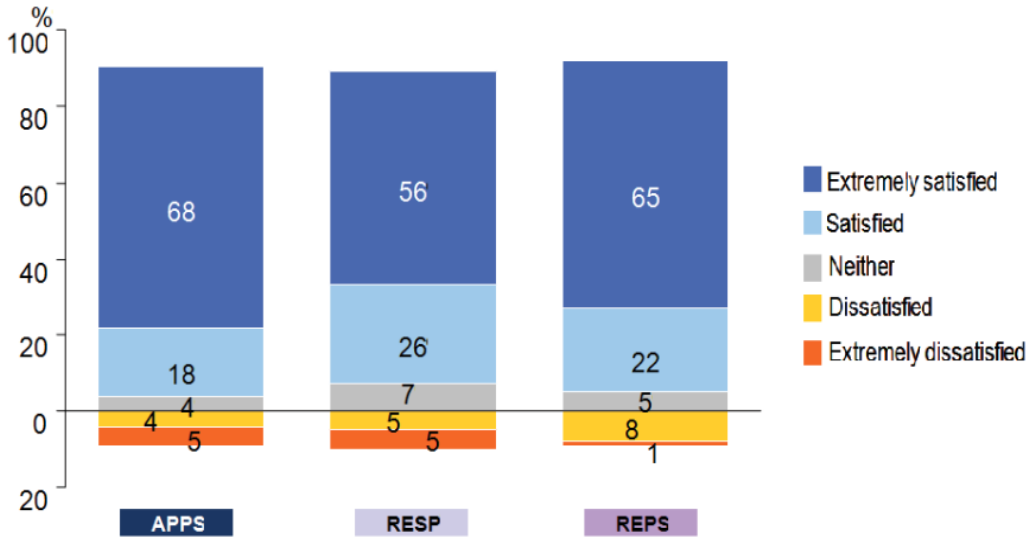

Figure 2. Overall satisfaction with the service provided by Fair Work Australia

Another interesting evaluation found out that 86% of applicants and 88% of respondents considered having the conciliation over the telephone convenient and cost-effective. While 72% of applicants and 59% of respondents reported that having the conciliation over the telephone was more comfortable than being in the same room with the other party (Figure 3).[152]

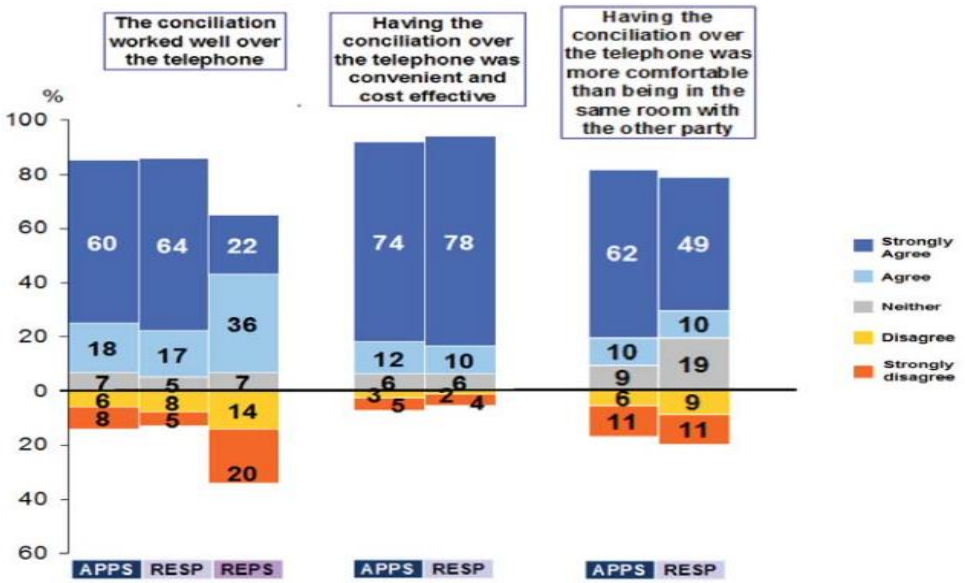

Figure 3. Telephone conciliations in Australia.

[151] Acton, supra note 148, at 2
[152] Ibid, at 6

Overall, the results show that this system has achieved clear success in terms of minimizing costs, quick and informal resolution of unfair dismissal disputes.

4.2.3. Japan

In Japan, the resolution of labour disputes is characterized by the existence of multiple systems within both judicial and administrative branches. The major procedures are the labour tribunal procedure, ordinary civil procedure and conciliation by the dispute adjustment commissions. Unfair dismissal disputes constitute the bulk of the cases within each of them.

To start with the labour tribunal procedure, this is a practice that has proven the feasibility of quick settlement through adjudication. The establishment of this body was achieved by the initiative of the interested stakeholders such as trade union organizations, employers' associations, employment lawyers and prominent judges.[153]

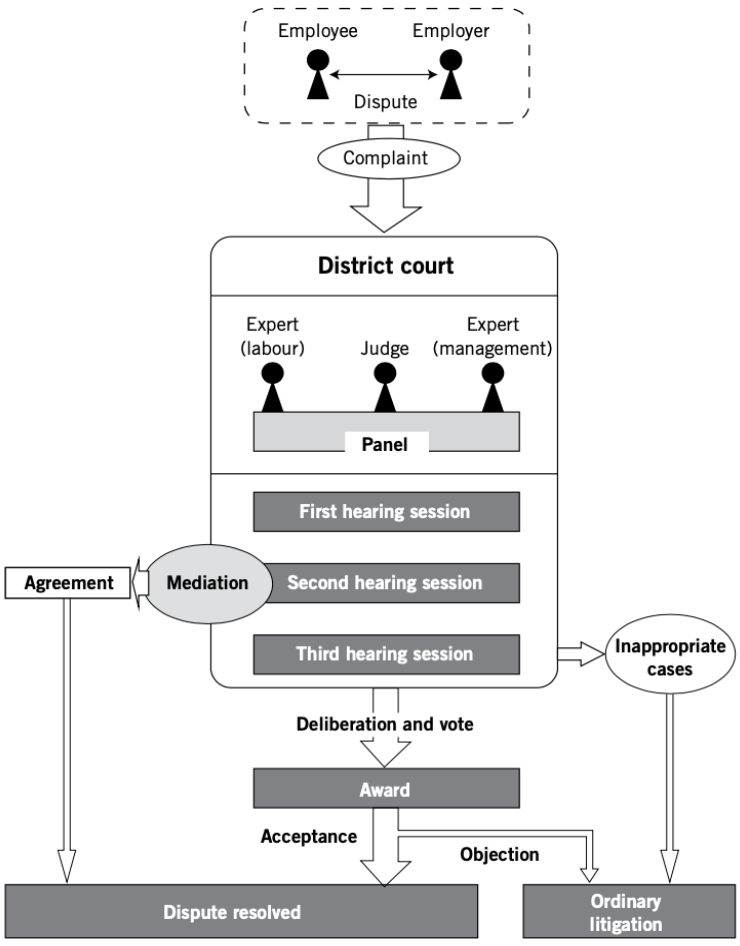

Figure 4. Labour tribunal system in Japan

Created under the Labour Tribunal Act, the labour tribunal system did not imply the establishment of a specialized labour court but the formation of a special panel with the delegation of the court's authority to it. The panel members are one professional judge and two lay members who are experts in labour and management respectively. The panel's work system is comprised of three hearing sessions. The first session is an informal hearing where parties submit their positions and documentary evidence. On the second hearing, the panel conducts mediation and provides parties with an agreement for voluntary resolution of the

[153] Resolving individual labour disputes, supra note 135, at 172

dispute. Finally, during the third hearing, the parties make a decision on the proposed agreement. In case the mediation has failed, the panel discontinues the process and issues an award, which is binding unless any party files an objection. In case of objections, the award ceases to have any effect and the case is referred to the civil court for ordinary litigation (Figure 4).[154]

Thus, the labour tribunal system represents a unique mixture of mediation and flexible adjudication. Resolution of the disputes through this system, 45% of which are related to terminations, demonstrated a very high success rate. Namely, more than 80% of cases were resolved before reaching the civil courts with 70% of them being resolved during the mediation stage. The average time of resolution did not exceed 2.5 months. Such a rapid resolution is achieved mainly due to the design of the system which requires settlement within three sessions.[155] Among other factors which contributed to the success of the system are the costs which are two times less than in ordinary litigation. Even though legal representation is not mandatory, parties are usually in need of hiring lawyers in order to manage the speedy process. Lawyers' fees are still lower than in civil courts due to the short time of hiring.[156]

Importantly, labour tribunal system is also accessible in terms of location. The procedures are conducted at the main offices of the district courts and additionally at two central branches. However, with respect to remedies available, it is quite rare that the labour tribunal procedure resolves with the order of reinstatement. Therefore, dismissed employees tend to choose litigation if they wish to be reinstated.[157] Besides, it is also preferred to recourse to civil court litigation when the parties deal with more complex cases such as collective dismissal for economic reasons which are difficult to be resolved within three hearing sessions of the tribunal.[158]

Turning to the administrative systems, they consist of three main components:

(1) a comprehensive counselling and information service provided by the prefectural labour bureau,
(2) administrative guidance provided by the prefectural labour director,
(3) conciliation provided by the dispute adjustment commission.[159]

[154] Ryuichi Yamakawa, 'Systems and Procedures for Resolving Labour Disputes in Japan' (2013) 34 Comp Lab L & Pol'y J 899, at 904-906
[155] Resolving individual labour disputes, supra note 135, at 178
[156] Ibid, at 179
[157] Ibid
[158] Ibid, at 181
[159] Ryuichi Yamakawa, supra note 154, at 919

The first service is directed at the early prevention and resolution of labour disputes and manifests itself in a form of a "one-stop" service. Employees refer to the second service when they need some sort of guidance or recommendations and no more than that. For instance, in case of an unlawfully dismissed employee, the prefectural labour director may approach the employer and recommend him to reinstate an employee. The last and the most major mechanism of resolution within an administrative system is the conciliation provided by the dispute adjustment commission. This procedure is voluntary and conducted on behalf of the three-member panel which assists the parties to reach an agreement. In comparison with the labour tribunal procedure discussed above, this system is more accessible in terms of costs and time (resolution within 1-2 months), however, it has a lower percentage of the resolved cases due to its voluntary nature.[160]

4.2.4. Germany

The German system of dispute resolution in labour law mostly relies on the judiciary and internal grievance procedures. For the disputes related to the termination of employment, employees prefer to have recourse to the Labour Court because after the dismissal it becomes pointless to claim their rights at the workplace. Thus, Germany has a long-standing tradition in resolving employment disputes through Labour Courts which date back to the 17th century. An independent system of labour courts in Germany has been functioning under the Labour Courts Act since 1926.[161]

The German system of labour courts is composed of three instances:

- Labour Court of the first instance (LC),
- Labour Appeal Courts (LAC),
- Federal Labour Courts (FLC).

With respect to courts' structure, LCs and LACs are composed of a panel with one professional judge, otherwise called career judge, and two lay judges, one being appointed from the rank of employees and the other from the rank of employers. In FLC, a panel is composed of a presiding judge, two career judges and two lay judges appointed similarly as at lower instances. The impartiality and independence of the judges are not contested. [162]

[160] Ibid, at 920-922
[161] Manfred Weiss, 'Dispute Resolution in German Employment and Labour Law' (2013) 34 Comp Lab L & Pol'y J 793, at 795
[162] Ibid, 796

Court's procedure is designed to promote more accessible and accelerated procedure than ordinary courts. Court hearings start from the mandatory conciliation procedure where only a career judge presides. The judge-conciliator examines all the facts and circumstances of the case and attempts to bring the parties to a compromise. When parties reach a compromise, it is possible to pursue an additional hearing for the complete settlement.[163] Since 2012, the voluntary procedure of court-facilitated mediation has been introduced which co-exist with mandatory conciliation. The Court presents both procedures to the parties and lets them choose without any pressure. If parties go for mediation, the Court orders the procedure to be suspended.[164]

Among the special features of this system is its accessibility in terms of legal representation, costs and rapidity. Hence, in LC and LAC, there is no obligation to have legal representation. Besides, if employees wish to be represented, they can choose between attorneys or representation provided by trade unions.[165] With respect to the fees, for the purposes of minimizing employees' risk, in LC each party bears its own costs without the need to pay in the event if they lose. In general, proceedings in Labour Courts are less expensive than in ordinary courts.[166] Moreover, in dismissal cases, the reference value is limited to three times of monthly salary of the dismissed employee. [167]

The promptness of the proceedings is also exemplary. More than one-third of all cases are settled within no more than three months. An applicant is given only one week for appeal which is two times shorter than in civil proceedings.[168] However, if the appeal takes place, it can take years for the dispute to be resolved. In wrongful termination cases, this fact causes economic troubles for the employer because if the case ultimately resolved in favour of an employee, the employer is obliged to pay wages from the time of launching the proceedings.[169] The problem of expeditiousness is almost always present when a litigation mechanism involved.

According to the evaluation statistics from 2014, 236,689 cases out of a total of 381,965 were settled by way of a compromise. In disputes related to dismissals, the time spent for resolving was as follows:

62,825 cases were resolved within one month,
90,342 cases were resolved within one to three months,

[163] Ibid, 801
[164] Resolving individual labour disputes, supra note 135, at 152
[165] Ibid, at 140
[166] Manfred Weiss, supra note 161, at 803
[167] Ibid, 802
[168] Resolving individual labour disputes, supra note 135, at 141
[169] Ibid, at 159

38,729 cases were resolved within three to six months,
21,461 cases were resolved within six to 12 months,
3,306 cases were resolved within more than 12 months. [170]

Statistics demonstrate the overall picture as a successful practice which has made Germany serve as a model for many European countries in employment dispute resolution.[171]

4.3. Discussing the findings

The analysis of diverse dispute resolution methods of unfair dismissals, each proven as successful per se, allows seeing key factors that have led those systems to success. In other words, there are certain core elements which make the process of resolution effective and well-functioning regardless of the context within which it is performing.

Which elements and factors must be considered within an effective dispute resolution mechanism? The list described below represents some sort of guiding principles for effective resolution of unfair dismissal disputes which are derived from the comparative analysis provided above.

1. *Accessibility in terms of costs*

Reduced costs play an encouraging role for the employees to vindicate their rights. In other words, if a dismissed employee, who has already lost the income, is required to pay considerable legal fees and all the costs of his/her employer in case of defeat, this will indirectly prevent an employee from bringing a claim.

For these purposes, labour disputes resolution mechanisms should imply lower costs than ordinary civil litigation. Besides, it is reasonable at a minimum that at the first stage of the process, whatever form it takes, each party bears its own expenses regardless of the outcome. Legal representation should be accessible for the employees what also implies it not to be mandatory. Availability of free of charge legal representation provided by trade unions is also a practice which contributes to the accessibility.

2. *Efficiency and expeditiousness*

One of the factors contributing to the accessibility of the resolution process is its speediness. As the analysis has shown, although some countries managed to establish a rapidly performing litigation system for resolving labour disputes, this

[170] Ibid, at 157
[171] Manfred Weiss, supra note 161, 803

method is still not as expeditious as alternative methods such as mediation or conciliation. Disputes related to unfair dismissals particularly require quick resolution as otherwise, it may cause challenges for both employee and employer. A dismissed employee wishing to be reinstated risks facing poverty as a result of income loss for the whole period of the process (litigation may take years). Employer, on the other hand, may have economic risks as German practice has shown where the employer is required to pay all lost wages in case of an employee's win. Therefore, considering the specifications of dismissals disputes, its rapidity plays a huge role in its general effectiveness.

It is also a link observed between the system's efficiency and cost-effectiveness in that regard that the shorter the time taken for the resolution, the less time is required for the lawyer's representation which means the lower fees.

3. Availability of alternative dispute resolution

The major conclusion that can be derived from the comparative analysis provided in this chapter is the importance and effectiveness of alternative ways of dispute resolution in unfair dismissals. The availability of ADR makes the resolution process much more effective in terms of accessibility. First, it cuts timelines and contributes to the expeditiousness of the settlement. Second, it is normally less expensive than traditional forms of dispute resolution. Third, ADR is a less rigid form of dispute resolution which is more reasonable during such a sensitive type of dispute as termination. It allows parties to reach an amicable settlement with the assistance of a neutral party without anyone forcing the decision upon them. Thus, reinstatement of the employee becomes more feasible than after ages of suing.

Therefore, even where adjudication is functioning as the main method of resolution, it is reasonable to introduce ADR, for example, mediation as the first stage of the process and give parties a chance to come to a compromise and avoid litigation. It would be in the interests of both employer and employee as well as relieve the burden of the courts.

4. Expertise and professionalism of participants

The next important principle is the level of expertise and professionalism of participants, namely, people who serve as providers of settlement. People in charge of labour dispute resolution have to possess certain knowledge and skills in labour law and employment. The most effective way of resolving termination disputes has proven to be delivered by a panel consisting of lay members both from the side of employee and employer. This way professionals from both sides with knowledge in the field of labour, employment, human resources as well as

procedural law can better contribute to the quick and effective settlement. As concerns mediators and conciliators, preliminary training must be provided in the relevant fields.

5. Independence and impartiality of providers

Apart from professionalism, people in charge of the settlement must be independent and impartial for gaining the trust of the parties. They must be independent from both governmental powers and the parties.[172] These two principles are key for access to justice in general. Impartiality, as well as expertise, is a crucial factor on the basis of which employees decide to go through with bringing a claim as they have the faith in adjudicator and believe their rights can be restored.

6. Level of informality

Formalism has always put constraints to access to justice. The more informal is the resolution method, the more accessible it will be for the dismissed employees. Informal procedures tend to facilitate the resolution of disputes in a more flexible and responsive way rather than informal litigation which is usually lengthy and complex. Especially during termination disputes, it is important not to exacerbate relationships between employee and employer which is more probable through informal hearing.

7. Accessibility in terms of location

The geographical location of dispute resolution bodies also plays a role in terms of accessibility.[173] For being accessible, the distances required to commute must be relatively short, for example, labour courts offices must be available in each district, especially within a large city, as well as in the regions. Non-availability of district offices may discourage dismissed employee from pursuing claims because of inconvenience resulted from inaccessible locations.

8. Remedial power

An effective dispute resolution mechanism shall provide dismissed employees with a range of available remedies, such as reinstatement, back pay or compensation in lieu of reinstatement. Special attention must be granted to the remedy of reinstatement as it has proven to be the most important guarantee for employees' tenure. As mentioned before, the fact that a dispute resolving body has the power to order reinstatement provides an employee with larger bargaining

[172] Forsyth, supra note 145, at 488

[173] Resolving individual labour disputes, supra note 135, at 179

power. Considering the power imbalance existing between the employer and the employee, this benefit given to the employee is of crucial importance. By claiming reinstatement, the employee gets a chance to return to the workplace and has his/her rights restored. At the same time, if the employer doesn't wish the employee to be back to the work, he/she will be willing to pay as much compensation as it is possible to prevent this, which won't harm the employee as well.

9. Dispute prevention

The effectiveness of dispute prevention is as much important as of the dispute resolution. The main component of dispute prevention is the availability of workplace bodies which are responsible for mitigating conflicts and preventing them from developing into disputes. Similarly, consultation and information services provided in some countries have the power of preventing disputes. Such services are usually the most accessible, free of charge and operate under the relevant agencies.[174]

To conclude, these are the main principles that contribute to the effectiveness of dispute resolution mechanisms with respect to the disputes related to unfair dismissals. The quality and success of the system directly depend on how many of these principles and elements are present within it. The more elements the system manages to embody, the more effective and well-performing it will be.

[174] Ibid, at 184

V. Azerbaijan. Current situation on unfair dismissals and resolution of disputes related to them

5.1. National law and practice

According to the Constitution of the Azerbaijan Republic, "labour is the foundation of individual and public welfare".[175]

This Chapter will examine the protection of employment mechanism under the national legislation of Azerbaijan and provide an analysis of the resolution mechanisms related to unfair dismissals disputes. Bearing in mind the findings of the analysis provided throughout this study, laws and practice in Azerbaijan will be analysed to identify existing problems and suggest solutions where possible.

To begin with, the Labour Code of Azerbaijan Republic (LCAR) enshrines the fundamental provisions regarding the protection of employees against arbitrary dismissal. The basis of the regulation is in line with the ILO's principle: in case of the termination on the initiative of the employer, a valid reason is required.

Termination grounds are set under the Article 70 of the LCAR and are as following:

a. an initiative of one of the parties,
b. expiration of the employment contract,
c. alteration of working conditions.
d. change of the ownership of an enterprise (only with respect to heads, deputy heads, senior accountants and other division managers directly performing managerial functions),
e. cases not depending on the will of the parties,
f. cases established by the parties in an employment contract.[176]

Initiative to terminate the employment contract can emanate from the side of an employee as well as an employer. In case the employee wishes to resign, he/she has an obligation to notify the employer in writing one calendar month in advance. An employee is exempt from this obligation if a valid reason exists such as retirement, admission to an educational institution, signing of employment contract with a new employer, change of place of residence or in case of sexual harassment. It is prohibited to use force or threats to make the employee resign.[177]

[175] Constitution of the Republic of Azerbaijan (amended up to 2009) [Azerbaijan], 15 March 1994, art. 35(I)
[176] Labour Code of Azerbaijan Republic (LCAR), adopted on 1 February1999, № 618-IG, art 68
[177] Ibid, art 69

Regulations become stricter when the initiative of termination is taken by the employer. The Labour Code stipulates an exhaustive list of grounds that are considered valid and allow to dismiss the employee:

a. liquidation of the enterprise;
b. staff redundancy;
c. decision of the authorized body that the employee doesn't comply with the relevant position due to lack of professionalism and qualification;
d. employee doesn't fulfil his/her labour functions or obligations under the employment contract or engages in gross misconduct as indicated in article 72 of the LC. The mentioned article precisely lists the cases which are considered as gross misconduct and allow immediate termination.
e. employee fails to meet the expectations during the probation period;
f. employee working in a state-funded enterprise reaches the age limit.[178]

This list is strictly exhaustive, and the employer has to justify the termination under one or more of these grounds, otherwise, it will be unlawful and violate employees labour rights. Moreover, there is a certain procedure during the termination that must be complied with.

Notice periods

The notice period is stipulated in Labour Code with regards to the termination as a result of redundancy. Namely, in case of staff cutback, the employer shall officially notify the employee, and the notice period is identified based on the length of service:

> length of service - up to 1 year – at least two calendar weeks;
> length of service - 1 to 5 years – at least four calendar weeks;
> length of service - 5 to 10 years – at least six calendar weeks;
> length of service - more than 10 years – at least nine calendar weeks;[179]

Moreover, during the notice period, the employee shall be released from work for at least one working day in order to look for a new job with retaining his/her salary.[180]

In case of alteration of employment conditions, the employee shall be notified as well. The notification must be given in writing and at least one month in advance. If an employee doesn't wish to continue employment under the new working conditions, he/she must be transferred to another position. Only if there is no

[178] Ibid, art 70
[179] Ibid, art 77.1
[180] Ibid, art 77.2

possibility to transfer the employee, he/she can be dismissed under the Article 70 (c).[181]

The notice period is also envisaged for the termination of employment by the end of the probationary period. Either party is entitled to terminate the contract by notifying the other party in writing 3 days prior to its end.[182]

There are no notice periods provided by the legislation for terminations under the grounds other than the ones mentioned above, thus termination for those is carried out immediately. Importantly, in practice, when notification is given, it is always in writing and signed by both parties.[183]

Severance payments

Labour Code also envisages severance payments to the dismissed employees in certain cases. First of all, the employer is obliged to provide dismissal compensation during terminations on the grounds of liquidation of the enterprise and redundancy. These payments depend on the length of service as well:

> if the length of service is up to 1 year - in the amount of the average monthly salary;
> if the length of service is from 1 to 5 years - at least 1.4 times the average monthly salary;
> if the length of service is from 5 to 10 years - in the amount of at least 1.7 times the average monthly salary;
> if the length of service is more than 10 years - at least twice the average monthly salary.[184]

With the consent of the employee, the employer can substitute the notice period with paying severance to the dismissed employee. Notice periods described above can be replaced as follows:

> 0,5 of the average monthly salary instead of the two-week notice period,
> 0,9 of the average monthly salary instead of the four-week notice period,
> 1,4 of the average monthly salary instead of the six-week notice period,
> 2 of the average monthly salary instead of the nine-week notice period. [185]

[181] Ibid, art 56
[182] Ibid, art 53
[183] Deloitte Legal Perspectives, International Dismissal Survey, February 2018, available at: https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Legal/dttl-legal-international-dismissal-survey-2018.pdf
[184] LCAR, supra note 176, art 77.3
[185] Ibid, art 77.4

Other severance payments are paid during the following cases:

- termination due to the alteration of working conditions – a dismissed employee is entitled to an allowance of no less than twice the monthly average salary;
- termination due to military commencement of military or alternative service – an employee is entitled to benefit of no less than twice the monthly average salary;
- termination due to the impossibility to perform labour functions complete loss of working ability for a continuous period of more than six months unless the law sets longer period - dismissed employee receives an allowance of no less than twice the monthly average salary;
- termination due to the death of employee – heirs receive a three-fold average salary of the employee;
- termination due to the change of ownership of the enterprise – dismissed employee is entitled to three-fold average monthly salary;[186]

Further requirements

There are some additional obligations provided by the legislation for the employer to adhere to during dismissals.

If an employer decides to terminate an employment contract due to staff redundancy or failure to fulfil labour functions and obligations with the employee who is a member of a trade union, he/she is obliged to apply to that trade union with prior reasoned submission in writing. This submission shall present valid motivation for the dismissal and contain all the relevant documentation for justification. The union shall respond with its reasoned decision in writing no later than 10 days after the receipt of the submission.[187]

Further, Labour Code envisages dismissals of employees performing direct managerial functions (heads, deputy heads, senior accountants, and other division managers) during the change of proprietor of the enterprise as a valid ground. However, the new proprietor or the employer are prohibited from undertaking mass termination of employment contracts by abusing his/her right to entrepreneurial activities and without assessing the level of professionalism, ability to perform labour function of employees and revealing any incompetence that may cause damage to the new owner's business. The Code provides definition for the "mass termination of employment contracts" as following:

[186] Ibid, art 77.7
[187] Ibid, art 80.2

If the total number of dismissed workers within 3 months (at the same time or at different times) from the date of acquisition of the right of ownership to the relevant enterprise is:

- in enterprise with 100 to 500 workers – more than 50 percent,
- in enterprise with 500 to 1000 workers – more than 40 percent,
- in enterprise with more than 1000 workers – more than 30 percent.[188]

Contracts are also terminated with the expiration of their duration. In this case, the employer is entitled to dismiss the employee within one week, otherwise, the agreement will be deemed to be extended for the same period defined previously. If an employee's contract expires while he/she is absent from work for an excusable reason (illness, vacation, mission etc.), then the employer may terminate the contract only upon the employee's return to the workplace but no later than one week from the first day of the return.[189]

Dismissal protection

Dismissal protection applies to employees both in form of priority rules and prohibitions with respect to certain categories of workers. To begin with, the redundancy selection criteria in Azerbaijan is based on the level of professionalism and qualifications of the workers. In other words, during staff redundancy, the employees with a higher qualification required to perform a job have the advantage of being retained. In case several workers possess the same level of qualifications, a certain list of workers is granted with the benefit of priority. Those are the following persons:

- family members of martyrs, *
- war veterans,
- spouses of soldiers and officers,
- workers with two or more dependent child under the age of 16,
- workers disabled as a result of an industrial accident or occupational disease at that enterprise,
- special IDPs, persons equated to them, and refugees,
- other persons as stipulated in collective agreements and employment contracts. [190]

Another group of workers is completely protected against dismissals, except for the cases when the enterprise is liquidated or the expiration of the contract's term. Those are:

[188] Ibid, art 63
[189] Ibid, art 73
[190] Ibid, art 78
*Azerbaijan participated in two wars, I Karabakh war (1988-1994), II Karabakh war (2020), which is the reason for such legislation framed to support family members of martyrs, war veterans, IDPs and refugees.

- pregnant women, women with a child below the age of 3 and men independently upbringing the child below the age of 3,
- employees upbringing a child below school age with the only income source being from this job,
- employees temporarily lost the ability to work,
- employees due to the diagnosed diabetes or multiple sclerosis,
- employees due to their membership in a trade union or any political party,
- employees with dependent family members with limited health under the age of 18 or I group disabled,
- employees on vacation, on a business trip or engaged in collective negotiations.[191]

Discrimination

Labour legislation in Azerbaijan prohibits any kind of discrimination in labour relations. Article 16 of Labour Code stipulates:

> "Any kind of discrimination among employees on the grounds of citizenship, sex, race, religion, nationality, language, place of residence, property status, socio-economic origin, age, marital status, convictions, political views, affiliation with trade unions or other public associations, professional standing as well as professional qualities, competency, other factors unrelated to job performance or direct or indirect granting of privileges or benefits and restriction of rights based on these grounds is prohibited."[192]

Last decade the Labour Code was revised to include the prohibition of discrimination against persons with HIV status, persons having multiple sclerosis and disabled persons. Thus, with respect to the abovementioned categories of workers, it is prohibited to refuse to hire, promote or dismiss persons due to the fact of infection/sclerosis/disability, except cases when employment for those persons is forbidden according to valid legislation. [193]

It is also noteworthy that the Azerbaijani government has responded to the COVID-19 crisis with certain measures directed at the protection of employment and social protection of unemployed and dismissed. In addition, during the

[191] Ibid, art 79
[192] Ibid, art 16.1
[193] Ibid

quarantine regime, the government recommended a moratorium on undertaking termination of employment contracts with employees.[194]

5.2. Dispute resolution mechanisms

5.2.1. Traditional forms of dispute resolution

According to the Constitution of the Azerbaijan Republic, individual and collective labour disputes are resolved in accordance with the law.[195]

Legal regulation of individual labour disputes arising in labour relations and the right to individual labour disputes, in general, is an important guarantee in the regulation of labour relations. In this regard, the Constitution of the country provides a basis for the regulation of individual labour disputes by legislation. However, the broad definition of individual labour disputes, forms of labour disputes, rules, and procedures for their resolution, as well as rules and procedures for out-of-court and judicial settlement of individual labour disputes are determined by the Labour Code and other normative legal acts.

Labour Code defines individual labour dispute as follows:

> "Individual labour disputes are disagreements between an employer and an employee arising from the application of an employment contract, collective bargaining agreement, as well as labour legislation and other normative legal acts and resolved on the basis of the principles of equality and the rule of law."[196]

Termination of employment represents one of the major subjects of labour disputes regulated by the legislation. In general, several forms of dispute resolution mechanisms are stipulated in Labour Code:

- appeal to the court,
- appeal to the pre-trial review bodies under the trade union within the enterprise (only in case such mechanism is provided by the collective agreement),
- strike of an individual employee (which is not relevant anymore after the dismissal),

[194] Employment 2020, Law and Practice in Azerbaijan (contributed by Ekvita LLC), Chambers and Partners, available at: https://practiceguides.chambers.com/practice-guides/comparison/507/5683/8860-8863-8869-8872-8874-8877-8881-8887-8890

[195] Constitution, supra note 175, art 36.3

[196] LCAR, supra note 176, art 287

- other mechanisms stipulated in an individual employment contract.[197]

In practice, employees in order to restore their violated rights also can file a claim to the State Labour Inspection Service (SLIS) under the Ministry of Labour and Social Protection of the Population of the Republic of Azerbaijan which is a specialized institution monitoring the compliance with labour legislation.[198] According to the Ministry's Annual Report from 2019, the SLIS ensured the reinstatement of 88 employees whose employment was terminated for unlawful reasons.[199]

It is worth to mention that at the moment, the SLIS carries out daily control over the "Employment Contract Notification" electronic subsystem in order to prevent unjustified dismissal of employees during the special quarantine regime. As part of control measures, the employers who have notified them of the termination of employment contracts through the system are contacted. The reasons for termination are clarified, and if the termination does not comply with the law, the reinstatement of relevant employees is ensured. At the same time, social dialogue is established with the relevant employers in case of termination without good reasons. They are advised to adhere to the principles of social responsibility and to be sensitive to employment issues during the quarantine period. There is already a positive experience of cooperation with employers in this area. In total, the SLIS has reinstated more than 700 employees whose employment contracts were terminated during the quarantine period.[200]

Judicial settlement is the most common mechanism for the resolution of termination disputes. To begin with an introduction to the Azerbaijani court system, it consists of three stages – courts of the first instance, appeal instance and cassation instance. Thus, the dismissed employee is entitled to appeal to the court of the first instance within one calendar month from the date of discovery of the violation of the employee's rights.[201] In case an employer fails to comply with the rules of terminating the employment contract stipulated in legislation, the court upon examination of the employee's statement of claim and facts of the case decides on the reinstatement of the employee and obliges the employer to pay all the lost wages from the moment of dismissal OR issues a resolution approving the conciliation agreement between the parties. The decision of the court may also provide for the payment of damages caused to the employee by the employer. The damages caused to the employee imply the average monthly salary due to

[197] Ibid, art 294-295

[198] Citizens' Labour Rights Protection League, 'Individual Labour Disputes' 2011, at 16

[199] Annual Report, the Ministry of Labour and Social Protection of the Population of the Republic of Azerbaijan, 2019, at 12

[200] News on the website of the Ministry of Labour and Social Protection of the Population of the Republic of Azerbaijan, https://www.sosial.gov.az/3435

[201] Civil Code of the Republic of Azerbaijan (adopted 28 December 1999) 780-IG, art 172.2

employee's unemployment, the expenses incurred for the legal representation (attorney) in the court as well as moral damages requested by the employee's application, debts due to the unemployment, sale of personal belongings and other expenses.

In practice, courts are inclined to take the side of the employee, and in case of minor discrepancy in the termination procedure, the court decides on reinstatement. In terms of effectiveness, court proceedings in labour disputes are cost-effective as in case of success all the expenses of the employee are reimbursed by employer. Resolution of the dispute by the court usually takes place at the 1st instance without reaching 2nd and 3rd instances within 2 to 3 months, which can be considered as efficient. It is also accessible in terms of location as courts of the first instance are district courts.

Turning to the other method of dispute resolution of conciliation which stems from the collective agreement, this method has an advantage in a sense that unlike judicial settlement it doesn't allow the dispute to extend beyond the enterprise, thus, makes it easier to continue normal labour relations after the resolution of the dispute. Unfortunately, this method is not commonly used in practice and has drawbacks in regulation which will be discussed later.

While signing an employment contract, parties can include provisions on other mechanisms of dispute resolution before resorting to a court such as a method of negotiations. This method allows to reach an amicable settlement and retain good relations between employer and employee.

5.2.2. Emergence of mediation

As the comparative analysis has demonstrated, despite the functioning of ordinary courts which undertake the resolution of labour disputes, the availability of ADR allows achieving more effective resolution of disputes related to unfair dismissals. Historically, ADR has not been practised in Azerbaijan, and it's only today that the institute of mediation is paving the way to enter the world of labour disputes.

On 29 March 2019, the Law on Mediation was adopted which was supposed to enter into force on 1st July 2020 but, unfortunately, was then twice postponed. Now, the date of entry into force falls on 1st July 2021.[202] This law has been drafted based on the principles of UNCITRAL Model Mediation Law and CEPEJ guidelines.

[202] Law on Mediation of the Republic of Azerbaijan (adopted 29 March 2019) № 1555-VQ

The Law on Mediation envisages key definitions, aims and principles of mediation, requirements for mediator, rights, obligations, and responsibility as well as procedure regulations. Thus, the underlying aims and principles of the Law are as following:

- voluntariness,
- equality and cooperation of the parties,
- impartiality and independence of mediators,
- inadmissibility of interference in the mediation process,
- confidentiality.[203]

Further, the Law sets requirements for anyone who wants to become a mediator. It is enough to be older than 25 years, possess higher education in any field, have 3 years of work experience and to obtain an initial mediation training certificate.[204] In general, the system is governed by Mediation Council, thus, mediators, mediation organizations and mediation training organizations must be accredited by the Council.[205]

Coming to the question of how the mediation is to be carried out, it is noteworthy that the Law envisages the application of mediation to the disputes related to civil and commercial cases, labour relations, family relations and cases arising from administrative relations.[206] From 1st July 2021, the parties to the dispute prior to referring to the court will be required to participate in a mandatory initial mediation session. If the parties fail to reach an agreement, either party may apply to a mediation organization. After the appointment, the mediator consults with the parties and schedule an initial mediation session inviting the parties to the session. In case of absence of any party, the mediator issues a certificate which allows the present party to apply to the court. A similar certificate is given to both parties in case they participate in the initial mediation session but fail to proceed to the full mediation session. In case the parties proceed to the full mediation session but do not reach a resolution of their dispute, they may still apply to the court.[207] The chart below provides a brief visual description of the process:

[203] Ibid, art 4
[204] Ibid, art 10
[205] Ibid, art 18
[206] Ibid, art 3
[207] Constantin-Adi Gavrila and Ruslan Mirzayev, 'Azerbaijan is preparing to implement the Law on Mediation', Kluwer Mediation Blog, 14 December 2020, http://mediationblog.kluwerarbitration.com/2020/12/14/azerbaijan-is-preparing-to-implement-the-law-on-mediation/

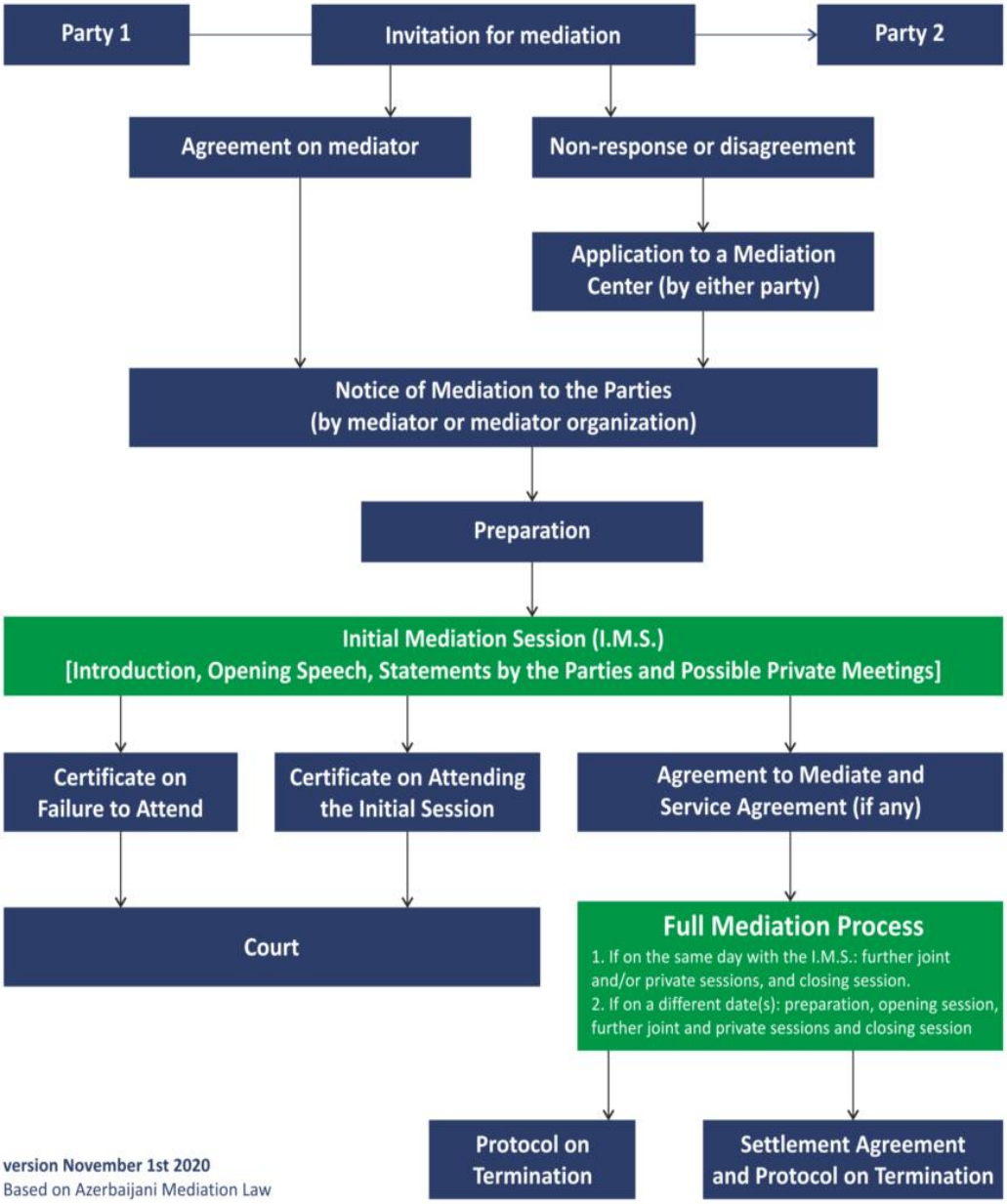

Figure 5. Visual description of the mediation process in Azerbaijan [208]

In addition to the mandatory initial mediation process, the court may, at any stage of the proceedings and taking into account the circumstances of the case, on its own initiative and with the consent of the parties, or at the request of one of the parties and with the consent of the other party, refer the process to mediation. In this case, the proceedings shall be suspended until a settlement agreement achieved.[209]

During the mediation process, the mediator may have joint or separate meetings with the parties, cooperate with them, make written or oral suggestions. The

[208] Ibid

[209] Law on Mediation, supra note 202, art 31.1

mediator must be impartial, thus, refrain from actions which may put any of the parties in a superior position or restrict their rights. The parties are entitled to attend the mediation process in person or through representatives. The parties can use the assistance of attorneys, translators, experts, and specialists in the relevant field. In the mediation process, in order to agree on the settlement of the disputes, the parties make oral or written suggestions reflecting their position on the issue.[210]

According to the law, the total duration of the mediation process may not exceed 30 days. Given the complexity of the dispute, the mediation process may be extended for another 30 days by agreement of the parties. The specific period of the mediation process is determined by the "agreement on the application of the mediation process", taking into account the term established in law.[211]

With respect to the costs incurred from mediation, they consist of:

- remuneration paid to the mediator or mediation organization, as well as reward paid to the mediator or mediation organization in case of positive settlement of the dispute through mediation,
- expenses incurred by the mediator or mediation organization in connection with the mediation, including expenses for accommodation, meals and travel.

The costs of mediation shall be divided equally between the parties unless otherwise is provided by the agreement concluded between the parties. The exception includes the cases when a party who does not participate in mediation for an unjustified reason must reimburse all mediation costs incurred by the other party. Additionally, if the mediator refuses to conduct mediation due to circumstances that impede his/her impartiality, he/she must refund the amount already paid by the parties.[212]

When the parties achieved a settlement agreement, it is considered binding on them from the date of its signing, unless otherwise provided by the agreement. If the settlement agreement does not specify a separate period between the parties, it must be executed voluntarily within 10 days from the date of signing. Failure to voluntarily perform the amicable agreement entails liability under the Civil Code of the Republic of Azerbaijan. If any party refuses to execute the agreement voluntarily, the other party may apply to the court or notary for the compulsory execution of the settlement agreement.[213]

[210] Ibid, art 24
[211] Ibid, art 24.7
[212] Ibid, art 36
[213] Ibid, art 34

5.3. Problems and possible solutions

Before analysing laws and practice in Azerbaijan, this study has conducted thorough examination of different international practices that have proven to be successful both with respect to legal regulation of unfair dismissals and resolution mechanisms of disputes arising from them. What elements that constitute reasons for the success in those countries are missing in Azerbaijan? What problems does the termination law of Azerbaijan face?

To begin with the *legal regulation of unfair dismissals*, the first and the largest problem in Azerbaijan is that the legislation has not incorporated some of the international standards set forth by the ILO. This fact has a number of implications that have been negatively reflected in Azerbaijani labour legislation. The main form of dismissal that lacks regulation is collective redundancies.

1. There is no definition of collective redundancy in the Labour Code and no relevant quantitative threshold. The only reference is made to 'staff redundancy' which is a general term without any identified scope. What should be considered as staff redundancy? How is it regulated? How many workers can be made redundant? Within which period? None of the answers to these questions can be found in the legislation. The Labour Code or some other legislative act should envisage the notion of collective dismissal and the procedure that must be followed by every employer when dismissing a large number of employees. Unfortunately, what happens in practice is that the employers disguise the redundancy by negotiating with employee and convincing him/her to resign.

2. There is no regulation requiring consultations with workers' representatives before undertaking collective redundancy within an enterprise. Although Azerbaijani Labour Code requires notifying the trade union when dismissing an employee during staff redundancy or due to his/her failure to fulfil labour functions, this is only confined to employees who are members of trade unions.

3. There is no regulation requiring notifying the competent authority during collective dismissals. The absence of this regulation complicates the job of SLIS which tries to reach out employers by themselves and examine the lawfulness of dismissal. This should be a mandatory condition to fulfil for dismissing a large number of employees.

The other pressing problem existing in practice and directly affecting termination law in Azerbaijan consists of the fact that frequently, despite the characteristics of the work performed or the service provided require the establishment of an employment relationship by concluding an employment contract, employers

prefer to conclude "service contracts" with the employees which are covered under civil law. By doing this, employers escape from a number of obligations that they would have if they signed an employment contract including terms of termination. Fortunately, very recently (while this thesis was drafted), on 7th May 2021, the amendment has to the Labour Code of Azerbaijan has entered into force which prohibited the formalization of employment relationships by civil law contracts.[214] With this amendment, the definition of employment relations has been added to the Code as follows:

> "Employment relations – are relations defined by mutual agreement with the employer in accordance with the obligations provided for in the labour legislation, collective contracts and agreements, and based on the employee's personal performance of the job function for which he / she was hired (appointed), elected, reinstated in the workplace, the observance of internal disciplinary rules, the employer's protection of the employee's working conditions, guarantees and occupational safety, as well as on the principles of the Code."[215]

Based on this definition, the amendment also included the list of cases when exactly the relations are deemed employment relations and cannot be formalized by civil law contracts. The list is framed in such a way as to prevent employers from any chance to conclude civil contracts with individuals who are supposed to enter into employment relationships. [216]

As a further step on the path to reforms, ratification and implementation of the ILO Convention No. 158 on Termination of Employment could bring harmony to the termination law in Azerbaijan as well as ensure the protection of employees during collective dismissals. Further, Labour Code would have to be brought in conformity with the ILO standards and extend the protection of employees.

Turning to the problems existing in the field of *dispute resolution mechanisms*, although Labour Code has a basis for the conciliations, it is barely regulated under the legislation. Thus, Labour Code envisages the possibility to appeal to the pre-trial review bodies under the trade union within the enterprise; however, this mechanism in legislation is not imperative and operates only in case it is provided by the collective agreement. This is the only sentence devoted to this method of resolution in LC. The Code lacks any provisions regulating the establishment of a specific conciliation commission, its structure, rights and obligations, the procedure of settlement etc. For example, the "Metal-work" Trade Union Federation has drafted the Charter of the Commission on consideration of individual labour disputes of enterprises, departments, organizations under trade

[214] Law of the Republic of Azerbaijan on Amendments to the Labour Code of the Republic of Azerbaijan (adopted 2 April 2021, entered into force 7 May 2021)
[215] LCAR, supra note 176, art 3 (4-1)
[216] Ibid, art 7 (2-3)

union committees. This proves that even if the establishment of commission would not be relevant within small enterprises with little number of employees, they can be established within larger fields of work uniting workers of similar professions.[217]

With respect to emerging mediation in Azerbaijan, today there are a number of questions that concern different stakeholders who are quite sceptical about the future functioning of the institute of mediation. For example, whether the mandatory mediation will lead to the prolongation of dispute settlement or questions regarding the level of professionalism and impartiality of mediators. Another issue may arise in regions in relation to access and training of mediators. As there has been no basis and practice of mediation until today, a lot needs to be done, including the formation of local capacity and raising awareness. The success of mediation institute in Azerbaijan depends on many factors and, a lot will become clearer after the system starts operating in practice which hopefully will not be delayed again.

To conclude, there is a room for further improvement of Azerbaijani law on termination and development of ADR in this regard. In general, Azerbaijan being a post-Soviet country, has made considerable efforts in reforming its labour legislation since gaining independence and has great potential of forming a model labour legislation in the region.

[217] Individual Labour Disputes, supra note 198, at 14-16

VI. Concluding Remarks

This study provided the analysis of the legislative framework on the protection of employees against arbitrary dismissals existing on international level including mainly standards set by ILO as well as other international human rights instruments and European documents. Along with this, the thesis examined the most common forms of wrongful terminations by referring to national laws and practices existing in different countries which allowed to discover the best mechanisms protecting employees during collective redundancies or dismissals based on discrimination, pregnancy-related dismissals, disability-related dismissals, etc. Further, the thesis analysis switched to the matter of resolution mechanisms related to the disputes arising from previously discussed unfair dismissals. The study presented the comparative research which was based on dispute resolution mechanisms available in different countries and recognized as successful per se. This analysis allowed the author to elaborate key principles and elements of an effective resolution mechanism in relation to unfair dismissals disputes. After the study managed to measure and identify what exactly the effective dispute resolution mechanism needs to embody, it turned to the laws and practice in Azerbaijan in order to examine it from the perspective of the relevant findings of the study.

To answer the research questions set in the beginning, first, the scope of the protection of employees against unfair dismissals in international legal framework is considered to consist of international, regional and national laws covering specific procedures for lawful dismissals. The regulations imply the existence of valid reason for the termination, specific notice periods, consultation with workers' representatives, notification of competent authorities, remedies available, severance payments and other benefits. Second, the main characteristics of the effective and well-functioning resolution mechanism in disputes related to unfair dismissals are identified as follows:

- √ *Accessibility in terms of costs*
- √ *Efficiency and expeditiousness*
- √ *Availability of alternative dispute resolution*
- √ *Expertise and professionalism of participants*
- √ *Independence and impartiality of providers*
- √ *Informality of the process*
- √ *Accessibility in terms of location*
- √ *Broad remedial power*
- √ *Availability of dispute prevention mechanisms*

Even if due to the contexts being different with diverse historical, socio-economic, political and legal characteristics it is not feasible to measure the effectiveness and recognize one specific method of dispute resolution as the most effective for all countries, it is possible and necessary to identify elements which can contribute to the effectiveness of dispute settlement regardless of the applicable context. In other words, there is no single best model of dispute resolution, but these elements can be combined in different ways and adapted to different national contexts.

As to Azerbaijan, being a post-Soviet country, it has taken considerable steps to develop employment protection legislation. However, termination law in Azerbaijan is confined to the national laws and leaves out the international standards set by ILO such as those envisaged in Termination of Employment Convention (No. 158). Azerbaijan would definitely benefit from the ratification of the Convention as it would strengthen the protection mechanism against dismissals for all employees and would trigger the reformation of Labour Code in accordance with up-to-date standards. In addition, dispute resolution mechanisms in Azerbaijan are traditional and not really welcoming to the alternative methods. The procedure provided in labour legislation which resembles conciliation lacks proper regulation, thus, doesn't work in practice. Mediation, on the other hand, has been recently emerging but still hasn't succeeded. The development of the alternative dispute resolution in relation to labour disputes requires proper regulation at the legislative level as well as efforts to be taken by different stakeholders in practice.

As this study has been conducted during the global COVID-19 pandemic, it is also important to mention its implications on employment relationships all over the world. Many businesses suffered from Covid crisis and were forced to reduce the workforce while large number of employees faced unemployment. States implemented different measures to protect employees from mass dismissals such as moratoriums on undertaking terminations during the pandemic or implementing alternatives to termination with temporary layoffs or by reducing wages. This kind of 'disaster' makes employees more vulnerable and demonstrates the importance of employment protection against dismissals.

In conclusion, protection against wrongful terminations is of absolute importance for employment protection as well as income protection and well-being of employees. States' legislation should reflect detailed and protective regulation of employment termination and provide effective mechanism which would allow wrongfully dismissed employees to vindicate their labour rights.

Bibliography

ILO Conventions and Recommendations

1. Discrimination (Employment and Occupation) Convention, 1958 (No. 111)
2. Discrimination (Employment and Occupation) Recommendation, 1958 (No. 111)
3. Examination of Grievances Recommendation, 1967 (No. 130)
4. HIV and AIDS Recommendation, 2010 (No. 200)
5. Hours of Work (Industry) Convention, 1919 (No. 1)
6. Maternity Protection Convention, 1919 (No.3)
7. Maternity Protection Convention, 2000 (No. 183)
8. Maternity Protection Convention (Revised), 1s952 (No. 103)
9. Maternity Protection Recommendation, 1952 (No. 95)
10. Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)
11. Part-Time Work Convention, 1994 (No. 175)
12. Part-Time Work Recommendation, 1994 (No. 182)
13. Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173)
14. Repatriation of Seafarers Convention (Revised), 1987 (No. 166)
15. Termination of Employment Convention, 1982 (No. 158)
16. Termination of Employment Recommendation, 1982 (No. 166)
17. The Right to Organize and Collective Bargaining Convention, 1949 (No. 98)
18. Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92)

19. Workers with Family Responsibilities Convention, 1981 (No.156)

20. Workers with Family Responsibilities Recommendation, 1981 (No. 165)

ILO sources (Surveys, Working Papers)

1. Aleksynska M, Schmidt A, 'A chronology of employment protection legislation in some selected European countries' International Labour Office, Inclusive Labour Markets, Labour Relations and Working Conditions Branch. – Geneva: ILO, 2014

2. Aleksynska M, Muller A, 'The regulation of collective dismissals: Economic rationale and legal practice' ILO Working Paper 4 – Geneva: ILO, 2020

3. An ILO Code of Practice on HIV/AIDS and the World of Work, International Labour Office. – Geneva: ILO, 2001

4. Best practices in resolving employment disputes in international organizations: conference proceedings, ILO Geneva, 15-16 September 2014 / edited by Annika Talvik; International Labour Office – Geneva: ILO, 2015

5. Employment protection legislation: Summary indicators in the area of terminating regular contracts (individual dismissals) / International Labour Office, Inclusive Labour Markets, Labour Relations and Working Conditions Branch (INWORK). – Geneva: ILO, 2015

6. General Survey on the reports related to the Termination of Employment Recommendation, 1963 (No. 119), Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 59th session, Geneva, 1974

7. Heron R, Vandenabeele C, 'Labour Dispute Resolution: An introductory guide' International Labour Office, 1999

8. International Labour Organisation, Constitution of the International Labour Organisation, 1 April 1919

9. International Labour Organisation, Declaration on Fundamental Principles and Rights at Work (Declaration of Philadelphia), Annex to the Constitution of the International Labour Organisation

10. International Labour Organisation, Termination of employment digest: A legislative review, International Labour Office. – Geneva: ILO, 2000

11. Labour dispute systems: guidelines for improved performance, International Training Centre of the ILO, International Labour Organization, 2013

12. Maternity Protection Resource Package: From Aspiration to Reality for All / International Labour Office, Conditions of Work and Employment Programme (TRAVAIL). – Geneva: ILO, 2012

13. Note on Convention No. 158 and Recommendation No. 166 concerning termination of employment, Committee of Experts on the Application of Conventions and Recommendations, 79th session, Geneva, 2009

14. Protection against unjustified dismissal, General Survey on the Termination of Employment Convention (No. 158) and Recommendation (No. 166), 1982, Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 82nd session, Geneva, 1995

15. Report on collective dismissals: A comparative and contextual analysis of the law on collective redundancies in 13 European countries / Nicola Countouris, Simon Deakin, Mark Freedland, Aristea Koukiadaki, Jeremias Prassl; International Labour Office. – Geneva: ILO, 2016

16. Resolving individual labour disputes: a comparative overview / edited by Minawa Ebisui, Sean Cooney, Colin Fenwick; International Labour Office. – Geneva: ILO, 2016

17. Termination of Employment Instruments, Background paper for the Tripartite Meeting of Experts to Examine the Termination of Employment Convention, 1982 (No. 158), and the Termination of Employment Recommendation, 1982 (No. 166), International Labour Office. – Geneva: ILO, 2011

Other legal sources

1. Acton J, 'Where have all the cases gone? Voluntary resolution of unfair dismissal claims' (ALLA National Conference, Adelaide, November 2010)

2. Bundesarbeitsgericht, 6. Senat, Judgment from 19th December 2013, AZR 190/12.

3. Case C-394/96 Brown v Rentokil Ltd [1998] ECR I-04185

4. Case C-438/99 Maria Luisa Jiménez Melgar v Ayuntamiento de Los Barrios [2001] ECR I-06915

5. Case C-449/93 Rockfon A/S v Specialarbejderforbundet i Danmark [1996] IRLR 168

6. Case C-476/11 HK Danmark v Experian A/S [2013]

7. Civil Code of the Republic of Azerbaijan (adopted 28 December 1999) 780-IG

8. Commission des normes, de l'équité, de la santé et de la sécurité du travail (CNESST), Code d'éthique en mediation [2019] DC200-11483

9. Constitution of the Republic of Azerbaijan (adopted 15 March 1994, amended up to 2009) [Azerbaijan]

10. Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979) UNTS 1249 art 13

11. Convention on the Rights of Persons with Disabilities (adopted 24 January 2007 UNGA Res 106 A61 (CRPD)

12. Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999] OJ L 175

13. Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding [1992] OJ L 348

14. Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies [1998] OJ L 225

15. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303

16. Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163

17. Deloitte Legal Perspectives, International Dismissal Survey, February 2018

18. Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation [2002] OJ L 80

19. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204

20. Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work [2008] OJ L 327

21. Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council [2009]

22. Employment 2020, Law and Practice in Azerbaijan (contributed by Ekvita LLC), Chambers and Partners

23. Equality and Human Rights Commission, Equality Act 2010 Guidance for Employees, 2014

24. European Commission, European Pillar of Social Rights, 2017

25. European Semester: Thematic Factsheet – Employment Protection Legislation, 2017

26. European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02

27. European Union, Consolidated version of the Treaty on the Functioning of the European Union, 26 October 2012, OJ L. 326/47-326/390; 26.10.2012

28. I. B. v Greece App. No 552/1 (ECtHR, 3 October 2013)

29. Individual Labour Disputes, Citizens' Labour Rights Protection League (ISBN: 978-9952-8037-5-4) 2011

30. International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 23 March 1976) 993 UNTS (ICESCR)

31. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

32. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990) UNGA RES 158

33. International Organisation of Employers (IOE), Survey on Collective Redundancy Procedures [2016]

34. Join publication, Fundación once and the ILO Global Business and Disability Network, Making the future of work inclusive of people with disabilities [2019]

35. Labour Code of the Republic of Azerbaijan (adopted on 1 February1999) № 618-IG

36. Law of the Republic of Azerbaijan on Amendments to the Labour Code of the Republic of Azerbaijan (adopted 2 April 2021, entered into force 7 May 2021)

37. Law on Mediation of the Republic of Azerbaijan (adopted on 29 March 2019) № 1555-VQ

38. Unfair dismissal – Guide 6: Preparing for conciliation, 15 March 2021

39. Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)

Journal articles

1. Hajdú J, Mészáros G. 'Protection of pregnant women against dismissal: with regard to the Hungarian jurisprudence' (2017) Pravne teme 09 117

2. Pärli K, 'Different Ways to Fight against Unfair Dismissal on the Grounds of HIV/AIDS Status (2015) European Labour Law Journal 373

3. Wagener M.N, van Opstal S.E.M, Miedema H.S, Brandies D.P.M, Dahmen R, van Gorp E.C.M, Roelofs P.D.D.M, 'Employment-Related Concerns of HIV-Positive People in the Netherlands: Input for a Multidisciplinary Guideline' (2014) J Occup Rehabil 24 790

4. Forsyth A, 'Workplace conflict resolution in Australia: The dominance of the public dispute resolution framework and the limited role of ADR' (2012) 23 International Journal of Human Resource Management 476

5. Yamakawa R, 'Systems and Procedures for Resolving Labour Disputes in Japan' (2013) 34 Comp Lab L & Pol'y J 899

6. Weiss M, 'Dispute Resolution in German Employment and Labour Law' (2013) 34 Comp Lab L & Pol'y J 793

Websites and blogs

EPLex database at https://eplex.ilo.org

ILO Publications at https://www.ilo.org/global/publications/lang--en/index.htm

The official information source of the Ministry of Labour and Social Protection of Population of the Republic of Azerbaijan at https://www.sosial.gov.az

Kluwer Mediation Blog at http://mediationblog.kluwerarbitration.com

List of figures