



International
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Office

Geneva

Resolving Individual Labour Disputes

A comparative overview

Edited by

Minawa Ebisui
Sean Cooney
Colin Fenwick

Resolving individual labour disputes

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Edited by Minawa Ebisui, Sean Cooney and Colin Fenwick

International Labour Office, Geneva

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Preface

This volume provides a comparative assessment of individual labour dispute settlement systems in nine OECD countries (Australia, Canada, France, Germany, Japan, Spain, Sweden, the United Kingdom and the United States), together with a synthetic overview of the key features across these systems.

In response to a dramatic increase in the number of individual labour disputes observed across the globe, together with associated widespread concerns regarding access to dispute prevention and resolution systems, the recurrent discussion on social dialogue at the 102nd Session of the International Labour Conference (ILC) in 2013 highlighted the need for the International Labour Office (ILO) to analyse *which dispute resolution mechanisms work best in different contexts and why*, recognizing the diversity among national mechanisms.

The Governing Body of the ILO further discussed and endorsed a plan of action to follow up on this ILC discussion. The plan called on the Office to conduct research on the performance of dispute resolution systems for individual labour disputes, in order to identify guiding principles for effective dispute resolution. The chapters in this volume were developed as part of the global research programme launched by the ILO in response to this call. The publication and dissemination of a selection of other country studies focusing on developing countries will follow.

In carrying out this global research programme the ILO has sought to capture the reality of dispute resolution practices and experiences. To this end, it has established a range of external partnerships, for example with dispute resolution agencies, specialized labour court/tribunal judges, academics and research institutions. These partnerships are of value in several ways, offering those who work in the field a sometimes rare opportunity to learn from one another, enhancing the quality of evidence-based technical advice, aiding in the search for practically useful experience and knowledge, and providing information on a range of innovative solutions to challenges faced by different countries in different contexts.

This volume is the fruit of one of these partnerships. Through a memorandum of understanding between the ILO and the Japan Institute for Labour Policy and Training (JILPT) for a joint seminar, the ILO commissioned studies on the nine OECD countries covered in this book, with full funding support from the JILPT. The original papers were delivered and discussed at the joint seminar, which took place in February 2015 in Tokyo. The coverage of a selection of OECD countries responds to ILO constituents' demand for comparative information on advanced mechanisms and practices.

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The successful collaboration embodied in this joint project is underpinned by the ILO's long-standing relationship with the JILPT. The Japan Institute of Labour (JIL) was founded in 1958 and restructured in 2003 as the JILPT, an independent administrative research institution whose objective is to contribute to the planning and implementation of labour policies by conducting both national and comparative research on labour-related issues. The JIL was one of the founding members of the International Industrial Relations Association, now the International Labour and Employment Relations Association (ILERA), whose secretariat is hosted by the ILO.

We would like to extend our sincere appreciation to all the authors who have contributed to this volume: Anthony Forsyth (Australia); Stéphanie Bernstein (Canada); Isabelle Daugeilh, Allison Fiorentino, Joël Merkhantar, Sylvain Niquège, Mireille Poirier, Nicolas Sautereau and Sébastien Tournaux (France); Bernd Waas (Germany); Ryuichi Yamakawa (Japan); Adoración Guamán Hernández (Spain); Jenny Julén Votinius (Sweden); Benjamin Jones and Jeremias Prassl (United Kingdom); and Aaron Halegua (United States). All are outstanding labour law scholars and/or practitioners with expertise in their home jurisdictions, and with extensive comparative experience. The views expressed are, however, the responsibility of the authors and do not necessarily reflect those of the ILO.

We are grateful to Corinne Vargha, Director of the ILO's International Labour Standards Department, for launching this global research project. We wish to thank the project team for their extensive work to make this joint project possible, and to coordinate it throughout: Minawa Ebisui, Sean Cooney, Colin Fenwick and Youcef Ghellab. We also wish to extend our sincere appreciation to JILPT colleagues for their excellent preparation and organization of the joint seminar and the follow-up, which contributed so much to the success of this collaboration: Mitsuji Amase, Hideyuki Oshima, Shinichi Nakamura and Kayo Amano. We are grateful to Xavier Beaudonnet (ILO) for introducing the project team to the Centre for Comparative Labour and Social Security Law (Centre de droit comparé du travail et de la sécurité sociale: COMPTRASEC), whose researchers jointly authored the chapter on France. Special thanks also go to Professor Takashi Araki, University of Tokyo, for his valuable suggestions and participation in the discussion at the joint seminar; to the ILO Office in Japan, for their support for the joint seminar; and to Akira Isawa, who at the time was Assistant Minister of the Ministry of Health, Labour and Welfare (MHLW) of Japan, for his contribution to obtaining the support of the MHLW, which made possible this joint ILO-JILPT project in support of the ILO's research agenda.

We wish to thank our colleagues in the Labour Law and Reform Unit: Valérie Van Goethem, Sara Martinsson, Luz Rey Novas, Valerio De Stefano, Yoshie Noguchi and Carmen Bernales-Guibo for their editorial or logistical assistance at the final stage of this publication. Finally, we would like to thank Chris Edgar and José Garcia (ILO) for providing invaluable support in the final stages of preparation for publication, as well as the three anonymous peer reviewers for their comments on the original manuscript.

This volume is intended to encourage an exchange of experience and innovation. We hope that it will be valuable reading for a wide range of people involved in the

settlement of individual labour disputes, including employers and workers; practitioners, including both judges and conciliators/mediators/arbitrators; members of labour inspectorates and similar enforcement agencies; academics and researchers; and policy-makers charged with improving national systems. We hope also for further collaboration between the ILO and the JILPT, in support of our shared commitment to global research in the areas of labour law and dispute resolution.

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Abbreviations

AC	administrative court (France)
ACA	administrative court of appeal (France)
ACAD	Act Respecting Collective Agreement Decrees (Quebec)
ACAS	Advisory, Conciliation and Arbitration Service (UK)
AD	Arbetsdomstolens Domar (Sweden)
ADA	Age Discrimination Act 2004 (Cth) (Australia)
ADR	alternative dispute resolution
AEM	Association of European Mediators
AEPCCLL	Act on the Establishment and Procedure of Conciliation Committees for Labour Law 1990 (Germany)
AHRC	Australian Human Rights Commission (Australia)
AHRC Act	Australian Human Rights Commission Act 1986 (Cth) (Australia)
AJC	administrative joint committee (France)
ALJ	administrative law judge (US)
ALT	Administrative Labour Tribunal (Canada)
AO	Officer of the Order of Australia (Australia)
ASAC V	Fifth agreement on autonomous labour dispute resolution (out-of-court system) (Spain)
ASEC III	Third agreement on extrajudicial dispute resolution (Spain)
ASEC IV	Fourth agreement on extrajudicial dispute resolution (Spain)
AUD	Australian dollar (Australia)
AVR	assisted voluntary resolution (Australia)
CAA	Collective Agreements Act 1969 (Germany)
CAB	Citizens Advice Bureau (UK; now Citizens Advice)
CAD	Canadian dollar (Canada)
Cass. soc.	Cour de cassation, chambre sociale (France)

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CBA	collective bargaining agreement
CBI	Confederation of British Industry (UK)
CCOO	Confederación sindical de comisiones obreras (Spain)
CEACR	Committee of Experts on the Application of Conventions and Recommendations (ILO)
CEO	chief executive officer
CEOE	Confederación Española de Organizaciones Empresariales (Spain)
CEPYME	Confederación Española de la Pequeña y Mediana Empresa (Spain)
CGB	Conciliation and Guidance Board (France)
CGPJ	Consejo General del Poder Judicial (Spain)
CHSCT	Comité d'hygiène, de sécurité et des conditions de travail (France)
CIJ	Centre for Innovative Justice (Australia)
CJA	Code de justice administrative (France)
CJEU	Court of Justice of the European Union
CLC	Canada Labour Code (Canada)
CNRS	Centre national de la recherche scientifique (France)
CNESST	Commission des normes, de l'équité, de la santé et de la sécurité du travail (Canada)
CNT	Commission des normes du travail (Canada)
COMPTRASEC	Centre de droit comparé du travail et de la sécurité sociale (France)
CPC	Code de procédure civile (France)
CQLR	Compilation of Quebec Laws and Regulations (Canada)
CREDESPO	Centre de recherche et d'étude en droit et science politique (France)
CRIMT	Interuniversity Research Centre on Globalization and Work (Australia)
CRT	Commission des relations du travail (Canada)
CS	Council of State (France)
Cth	Commonwealth (Australia)
C. trav.	Code du travail (France)
DAC	dispute adjustment commission (Japan)
DDA	Disability Discrimination Act 1992 (Cth) (Australia)
DBIS	Department of Business, Innovation and Skills (UK)
DTI	Department of Trade and Industry (UK)
DVLA	Driver and Vehicle Licensing Agency (UK)
EAT	employment appeal tribunal (UK)

EC	European Community
EEO	equal employment opportunity
EEOC	Equal Employment Opportunity Commission (US)
EHRC	Equality and Human Rights Commission (Great Britain)
EIA	Employee Inventions Act (Germany)
ESDC	Employment and Social Development Canada (Canada)
ET	employment tribunal
ET	Estatuto de los trabajadores (Spain)
EU	European Union
FCA	Federal Court of Australia (Australia)
FCC	Federal Circuit Court (Australia)
FLSA	Fair Labor Standards Act 1938 (US)
FRU	Free Representation Unit (UK)
FW Act	Fair Work Act 2009 (Australia)
FWC	Fair Work Commission (Australia)
FWO	Fair Work Ombudsman (Australia)
GAET	General Act on Equal Treatment (Germany)
GDR	German Democratic Republic (Germany)
HALDE	Haute autorité de lutte contre les discriminations et pour l'égalité (France)
HR	human resources
HRSDC	Human Resources and Skills Development Canada (Canada)
ICESCR	International Covenant on Economic, Social and Cultural Rights
IEAM	Institute of Experts in Arbitration and Mediation (France)
IEDP	Institut d'études de droit public (France)
ILC	International Labour Conference
ILERA	International Labour and Employment Relations Association
ILO	International Labour Organization
IMAC	Instituto de Mediación, Arbitraje y Conciliación (Spain)
INLACRIS	Independent Network for Labour Law and Crisis Studies
JILPT	Japan Institute for Labour Policy and Training (Japan)
LCA	Labour Courts Act (Germany)
LJS	Ley reguladora de la jurisdicción social (Spain)
LO	Swedish trade union confederation (Sweden)
MHLW	Ministry of Health, Labour and Welfare (Japan)

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MNE	Mediator for National Education (Médiateur de l'éducation nationale (France))
NAM	National Association of Mediators (France)
NCM	Network of Corporate Mediators (France)
NES	National Employment Standards (Australia)
NLRA	National Labor Relations Act 1935 (US)
NLRB	National Labor Relations Board (US)
NYLL	New York State Labor Law 1921 (US)
NYSDHR	New York State Division of Human Rights (US)
NYSDOL	New York State Department of Labor (US)
NYSHRL	New York State Human Rights Law 1945 (US)
OESA	Ontario Employment Standards Act (Canada)
OLRA	Ontario Labour Relations Act (Canada)
ORECLA	Organismo de Resolución Extrajudicial de Conflictos Laborales (Spain)
OSHA	Occupational Safety and Health Act (Germany)
PAA	prior administrative appeal (France)
PCMA	Parisian Centre for Mediation and Arbitration (France)
PTK	Swedish Federation of Salaried Employees in Industry and Services (Sweden)
Qld	Queensland (Australia)
QLSA	Quebec Labour Standards Act (Canada)
RDA	Racial Discrimination Act 1975 (Cth) (Australia)
RRO	Revised Regulations of Ontario (Canada)
RSC	Revised Statutes of Canada (Canada)
SACO	Swedish Confederation of Professional Associations (Sweden)
SAMA	Servicio Aragonés de Mediación y Arbitraje (Spain)
SCC	Stockholm Chamber of Commerce (Sweden)
SCR	Supreme Court of Canada (Canada)
SDA	Sex Discrimination Act 1984 (Cth) (Australia)
SERCLA	Sistema Extrajudicial de Resolución de Conflictos Laborales de Andalucía (Spain)
SI	statutory instrument (UK)
SIMA	Servicio Interconfederal de Mediación y Arbitraje (Spain)
SMAC	Servicio de Mediación, Arbitraje y Conciliación (Spain)
SO	Statutes Ontario (Canada)

TAMIB	Tribunal d'Arbitratge i Mediació de les Illes Balears (Spain)
TCO	Swedish Confederation of Professional Employees (Sweden)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TLC	Tribunal Laboral de Catalunya (Spain)
TLN	Tribunal Laboral de Navarra (Spain)
TULR(C)A	Trade Union and Labour Relations (Consolidation) Act 1992 (UK)
UGT	Unión General de Trabajadores (Spain)
ULP	unfair labour practice (US)
USDOL	US Department of Labor (US)
VOSA	Vehicle and Operator Services Agency (UK; now merged with DVLA)
WCA	Works Constitution Act 2001 (Germany)
WHD	Wage and Hour Division (of US Department of Labor) (US)
WHS	workplace health and safety

Contributors

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1. Resolving individual labour disputes: A general introduction

*Minawa Ebisui, Sean Cooney and Colin Fenwick**

1.1. The imperative for comparative research

Background

The number of individual disputes arising from day-to-day workers' grievances or complaints has been rising across the world (ILO, 2013a). The causes are complex, and vary across countries and regions. Common features include an increased range of individual rights protections; a decrease in trade union density and/or collective bargaining coverage; higher risks of termination of employment and unemployment (ILO, 2015a); reduced job quality and security due to greater use of various contractual arrangements for employment and other forms of work; and increased inequality as a result of segmented labour markets.¹ This greater complexity and diversity of individual disputes is reflected in the evolution of processes and mechanisms for preventing and resolving them.

The increase in the number and variety of individual disputes has given rise to a wide range of challenges. These include cost concerns; case overloads and delays; a lack of independence and impartiality; complicated and formalistic procedures; the fragmentation of services; limited access; ineffective remedies; and reduced scope for voluntary prevention and settlement through social dialogue. Countries have responded with reviews and reforms. Some jurisdictions have created new dispute resolution institutions. Others have reconfigured existing institutions, or modified procedural rules.

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¹ See e.g. EU, 2010; ILO, 2015b; ILO, 2016; Deakin, 2013; and a series of country studies on labour market segmentation available at: <http://www.ilo.ch/global/topics/employment-security/labour-market-segmentation/lang--en/index.htm> [accessed 9 Aug. 2016].

New techniques have been introduced, such as resolution over the telephone, and “one-stop” or “single-contact” services.² Internal processes at the workplace level have been promoted. There has been greater emphasis on capacity building and training for dispute resolution practitioners. Finally, labour administration agencies have developed a wider range of preventative measures (ILO, 2013a).

There is considerable information available at country level about laws and systems for handling individual labour disputes, although it is generally descriptive: there is a scarcity of information about what contributes to better performance, or what works well either in specific contexts or in relation to other institutions or services. Comparative information is also scarce, and suffers from similar limitations. Thus there is value in an in-depth and detailed comparative assessment of the operations and procedures of mechanisms and processes for resolving individual disputes, including how they have evolved in response to the growth and change in the number and character of individual disputes.

The ILO global research project on individual labour disputes: Origins and implementation

The International Labour Office (ILO) has been increasingly called on to provide comparative information about national practices, in particular the operational features of effective dispute prevention and resolution. Comparative practice suggests that the ways in which conflicts and disputes are approached are very diverse, reflecting a range of historical, socio-economic, political and legal contexts, as well as differing states of industrial relations. Such research is particularly valuable given that international labour standards do not always offer guidance on how to respond to the changes and challenges outlined above. The Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92), and the Examination of Grievances Recommendation, 1967 (No. 130), address certain aspects of the resolution of labour disputes to different extents. But no single ILO instrument provides broad and comprehensive guiding principles for effective labour dispute resolution systems. This leaves much to be done – and to be understood – at the national level. The need is particularly acute in respect of individual labour disputes, which are addressed to a far lesser extent than collective dispute resolution mechanisms by ILO instruments, the ILO supervisory bodies and the International Labour Conference (ILC). Thus the gaps in the international labour standards system have themselves contributed to the greater demand from ILO constituents for comparative information about current practice, including the interaction between labour inspectorates and labour dispute resolution.

² For example, in Japan, one-stop consultation points are established within the local labour administration to offer information and counselling services on individual labour disputes (for more details, see the subsection of this chapter below on “Information, advice and consultation services through administrative departments and agencies”, and Ch. 6 on Japan).

In this context, the ILO Governing Body requested additional information with respect to the possible need to replace or supplement the existing instruments (ILO, 2002). Discussions at the ILC in 2013 highlighted the need for the ILO to analyse *which dispute resolution mechanisms work best in different contexts and why*, recognizing the diversity among national mechanisms.³ In the framework of the Plan of Action to implement the Conference conclusions, the ILO launched a global research project on the performance of prevention and resolution mechanisms and processes for individual labour disputes across the world, so as to identify guiding principles for effective dispute resolution.⁴ A standardized research protocol was used to guide more than 50 country studies across all global regions.⁵ Many of these studies were presented and discussed in 2015 at subregional and national research workshops.

Within this wider research initiative, and in collaboration with the Japan Institute for Labour Policy and Training (JILPT), the ILO commissioned a series of studies on selected OECD countries (Australia, Canada, France, Germany, Japan, Spain, Sweden, the United Kingdom and the United States). The country selection took account of the variety of dispute resolution systems in common law, civil law and mixed jurisdictions. It also represents a range of industrial relations contexts, including variety in the extent of the influence accorded to collective voice mechanisms. The selected countries have all undergone reforms to varying degrees in response to changes in the landscape of individual labour disputes. The nine studies formed the basis for the following chapters of the present book. The original papers on which the chapters are based were delivered at a joint ILO–JILPT seminar held in Tokyo in February 2015.

Comparative overview

The framework for the examination and assessment of individual labour dispute settlement systems in each chapter has been shaped by the ILO's research protocol. It entailed soliciting information on various detailed aspects of procedures and institutional settings for individual dispute resolution mechanisms; seeking to identify connections between them; and considering their relationship with labour inspection and enforcement agencies. This common framework for inquiry establishes a coherence across the chapters of this book, enabling the reader to identify cross-national differences and commonalities throughout the research.

³ See the Provisional Record of the Recurrent Discussion on Social Dialogue: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_216305.pdf [accessed 10 Aug. 2016].

⁴ The 319th Session of the Governing Body further discussed the Plan of Action to follow up on the ILC discussion on social dialogue, which includes research on the performance of dispute resolution systems for individual labour disputes: ILO, 2013b.

⁵ The studies were commissioned on selected countries in Africa, Asia and the Pacific, the Arab States, Central and Eastern Europe, Latin America and the Caribbean, the Russian Federation, and the selection of OECD countries covered in this volume.

The terminology used to define the concept of “individual labour disputes” diverges significantly across the countries examined, and captures different elements of the scope envisaged by ILO standards.⁶ Particularly striking is the great variation in the use of the terms “conciliation” and “mediation”: they are not always legally defined, nor even always distinguished from each other. Even where the terms are legally defined, interpretations and practice differ; and whether they are legally defined or not, these processes may also reflect different specific practices in different jurisdictions.⁷

The countries covered in this volume include five European Union (EU) Member States – France, Germany, Spain, Sweden and the United Kingdom – whose legal and institutional frameworks reflect EU law. Among other things, it appears that there is scope for more in-depth research on the extent to which various EU directives have been incorporated into each national system and given effect in the existing dispute resolution forums, particularly in the areas of equality and non-discrimination, as well as in private mediation. Although this volume addresses the impact of EU law on the functions and practices of dispute resolution to a certain extent, it does not generally consider the impact of EU law on the normative content of national law – that is, the rights of individuals – in the Member States.

The availability and coverage of data vary across the chapters. Indicators of system performance are neither universally present nor necessarily comparable. Given the variety of mechanisms and processes, a cross-country quantitative comparison cannot readily be undertaken. Data provided are thus accompanied by descriptions of the specific context.

Taking into account these limitations, this introductory chapter attempts to provide a comparative overview of the common features of the architecture and procedures used in different national contexts. We place particular emphasis on criteria frequently used to measure a system’s efficiency and fairness, such as speed, cost and access to justice. Access to justice for our purposes entails not only access to dispute resolution services or mechanisms, but also access to a wide range of other elements that can enable such access. These include free-of-charge and expeditious prevention

⁶ ILO Recommendation No. 130 provides that a grievance may arise over “any measure or situation which concerns the relations between employer and worker or which affects or may affect the conditions of employment of one or several workers in the undertaking when that measure or situation appears contrary to provisions of an applicable collective agreement or of an individual contract of employment, to works rules, to laws or regulations or to the custom or usage of the occupation, branch of economic activity or country, regard being had to principles of good faith” (para. 3). “Collective claims aimed at the modification of terms and conditions of employment” (para. 4(1)) that typically arise from collective bargaining are outside the scope of the Recommendation.

⁷ For example, in France, there is no legal distinction, but in practice judicial mediation is more flexible and informal than conciliation through the employment tribunals, as it permits different forms of meeting and/or the involvement of lawyers. In Germany, mediation is defined by law as a confidential and structured procedure in which the parties voluntarily and autonomously try to reach an amicable resolution of their dispute with the support of one or more mediators. In Japan, mediators play a more active role in offering proposals that the parties are free to accept, and conciliators assist the parties in seeking consensus. In Spain, the distinction is unclear and views on it are divided.

and settlement services, aid, information, and fair settlement processes and outcomes. Where individual labour disputes are concerned, access to justice may also turn on whether a worker is in an employment relationship; hence we consider innovative practices in addressing this threshold issue.

We also consider the role of collective voice mechanisms in resolving individual disputes: these may be trade unions or other workers' representatives or their bodies, such as works councils. The role of collective mechanisms reflects principles found in ILO Recommendations Nos 92 and 130. These call for: (a) participation/representation of workers and employers on an equal footing as a cornerstone of joint machinery for voluntary conciliation and grievance procedures; and (b) emphasis on dispute prevention, which is associated with finding voluntary solutions and settlements of disputes freely accepted by the worker and the employer.⁸ Recommendation No. 130 (para. 17(a)) also contemplates "procedures provided for by collective agreements" and/or "voluntary arbitration by a person or persons designated with the agreement of the employer and worker concerned or their respective organizations" as possible procedures for final settlement of grievances.

The rest of this chapter offers a thematic overview of the functioning of individual labour dispute resolution systems in the countries covered in this volume, starting in part 1.2 with an assessment of bipartite and unilateral procedures established with or without the participation of workers' organizations or workers' representatives. Part 1.3 examines administrative departments and agencies with a focus on dispute resolution services, as well as the role of labour inspectorates and enforcement agencies in supporting the functioning of dispute resolution systems. Part 1.4 turns to judicial and quasi-judicial mechanisms, including how they interact with each other, and with extra-judicial mechanisms. Part 1.5 considers enforcement of and adherence to dispute resolution outcomes, and part 1.6 concludes. The list of practices below is selective and is by no means intended to be exhaustive.

1.2. Bipartite and unilateral procedures

Non-state procedures can facilitate settlement of individual labour disputes early and informally, limiting the need for recourse to formal mechanisms, and the associated costs, both private and public. The chapters in this volume describe an array of such processes. Some are jointly established with the participation of employers, unions and/or workers' representatives, while others are introduced by employers, with or without engaging collective voice mechanisms. Bipartite processes may derive from a statutory mandate, or from voluntary agreements, collective or otherwise. Their coverage varies

⁸ See e.g. paras 1 and 2 of Recommendation No. 92, and paras 6, 7(1) and (2), 11, 13(1) and (2), 14 and 17(a) of Recommendation No. 130. The ILO Labour Administration Convention, 1978 (No. 150), also provides that member States may, in accordance with national laws or regulations, or national practice, delegate or entrust certain activities of labour administration to non-governmental organizations, particularly employers' and workers' organizations, or – where appropriate – to employers' and workers representatives (Art. 2).

significantly, depending on the overarching industrial relations framework. The processes may operate at workplace or company level, or outside the enterprise (for example at sectoral level), or both. Different methods are used, including grievance negotiation, conciliation/mediation and arbitration, either with or without third parties.

Internal procedures established by employers may be legally required or encouraged, publicly incentivized or monitored, depending on the country or the subject matter. Some employers, particularly large firms, have established self-regulatory procedures in response to intensified external, even global, pressures from multiple stakeholders, including consumers, media, the labour movement and non-governmental organisations, with a view not only to mitigating and resolving conflicts, but also at the same time to establishing or maintaining their reputations (Estlund, 2010). The chapters in this volume suggest that employers may also be encouraged to establish such procedures when doing so is likely to reduce their liability in litigation.⁹ Some procedures are established through engagement with private service providers outside the enterprise; others are formed internally, for example within human resources departments or by management representatives. Where appropriately designed and jointly agreed and used, arbitration may offer a cheaper, faster, more informal route to settlement than litigation, which is often lengthy and complex. However, imposing an arbitration clause as a condition of employment, limiting workers' choice of dispute resolution mechanism, and excluding collective voice mechanisms may all raise serious concerns about access to justice.

The examples highlighted below suggest that bipartite procedures facilitate joint ownership of and trust in the process, which are difficult to attain through unilateral procedures. The evidence also suggests that securing participation for workers' voices in the design and operation of the system is a key principle in promoting the effectiveness and fairness of autonomous procedures. Such procedures are far more likely to function in an effective and inclusive manner in a unionized context, or where other collective voice mechanisms are legally empowered to intervene in workplace conflicts.

Bipartite procedures involving trade unions and workers' representatives

In many countries, bipartite mechanisms exist in the framework of legal requirements and/or in the context of collective or other voluntary agreements. These mechanisms are generally associated with trade unions, and have become less effective as union density has declined. Different approaches have been used to support and assist those without access to union support: this is done in some countries by legally and institutionally

⁹ See e.g. Ch. 10 below on the United States. In the United Kingdom, employment tribunals can adjust any awards made in relevant cases by up to 25 per cent for unreasonable failure to comply with any provisions of the non-binding Code of Practice on Discipline and Grievance issued by the Advisory, Conciliation and Arbitration Service (ACAS) under the Trade Union and Labour Relations (Consolidation) Act 1992, sec. 199. The Code is available at: <http://www.acas.org.uk/media/pdf/f/m/Acas-Code-of-Practice-1-on-disciplinary-and-grievance-procedures.pdf> [accessed 10 Aug. 2016].

empowering various collective voice mechanisms; in others, through community-level initiatives by unions or other private actors.

Workplace employee representation is a common institutional feature of industrial relations in the EU, albeit diverse in form and practice. The examples below illustrate how such representation mechanisms – trade unions and/or other workers' representatives or bodies (e.g. works councils) – are by law granted powers concerning the handling of grievances, and the role they play in preventing and solving individual disputes efficiently and voluntarily.

In France, a company with 11 or more employees must have elected employee representatives. A company with 50 or more employees must also have union representatives, appointed by one or more representative unions. These representation mechanisms play a role in encouraging internal resolution of individual labour disputes. Both individual employees and employee representatives have the right to present employees' grievances directly to the employer. Employee representatives have the right to intervene in a range of areas in this grievance procedure. However, the authors of the chapter on France argue that in the absence of union representatives, the rights accorded to employee representatives are often poorly understood and implemented: the majority of individual disputes that come before the employment tribunals (ETs) are indeed referred from small companies lacking established union structures.

In Germany, internal grievance procedures for the private sector are regulated under the Works Constitution Act, which stipulates that employees have the right to raise a grievance and participate in the workplace. Employees can raise a grievance directly, either individually or by seeking assistance or mediation through the relevant workplace body or works council. In the event of a disagreement between the works council and the employer on whether the grievance is well founded, the works council (not the employee) may take the matter to a conciliation committee, comprising equal numbers of members nominated by, respectively, the employer and the works council, and an impartial third party agreed between the parties. The committee's decision takes the form of binding arbitration; it does not, however, deal with grievances related to legal entitlements, which fall under the jurisdiction of the labour court. The grievance procedure is not a mandatory step before recourse to the labour court. Nevertheless, the author of the chapter on Germany takes the view that this procedure involving the works councils has a significant role in both protecting individual employees and reducing the burden on the labour court. Arbitration can also be used to resolve disputes arising from apprenticeships, by establishing joint arbitration committees with equal numbers of employer and employee representatives. This arbitration process is a mandatory step before recourse to the labour court. However, this raises the question whether there is unequal access to the labour court as between those required to go through a committee and those who can access the court directly.

In Sweden, trade unions are granted formal powers by law to represent their members and those covered under collective agreements (90 per cent of employees) in the resolution of individual labour disputes, which must first be negotiated fully before the labour court. Binding private arbitration is also possible, except in discrimination cases, provided that it is applied through a collective agreement. In practice it is limited to a few

sectors: in banking, for care assistants and in disputes over occupational insurance. The privileged role of trade unions does not have uniform reach: while trade union density in Sweden is around 70 per cent overall, it is notably low in certain groups and sectors – young workers, fixed-term workers, those born outside the Nordic countries, and workers in the hospitality, retail, agriculture, forestry and fishing industries. While some unions are working to address the representational challenge, in the meantime unorganized workers are left to take their individual disputes to the ordinary district courts.

In Canada, unions have a duty to represent their members in filing their grievances with employers. Grievance procedures are set out in collective agreements, but are regulated in general terms by legislation. But there is a marked difference between union involvement in grievances in the private sector (union density approximately 17 per cent), and in the public sector (union density over 74 per cent). Binding grievance arbitration, involving third-party arbitrators, is common in the framework of collective agreements, although it is a time-consuming procedure. In the province of Quebec, unionized employees must pursue the avenue provided under their collective bargaining agreements. The parties to a collective agreement may request that certain terms related to wage costs be extended to cover non-unionized workers in the same sector on a geographical basis, which can be endorsed by decree. A parity committee of employer and union representatives is responsible for the decree's application and, in the event of violation, this committee is mandated to make monetary claims on behalf of non-unionized employees before the civil courts (union members claim their rights through their union). The author of the chapter on Canada emphasizes that while the number and coverage of these agreements are declining, they have been effective both in extending coverage to small firms and precarious workers, who are frequently beyond the reach of collective bargaining, and also in resolving their claims.

In Japan, joint consultation between employers and enterprise-based unions has played a role in building harmonious labour–management relations and in preventing and resolving workplace conflicts. Long-term employment practices and the seniority-based wage system have also worked as an incentive for workers to avoid disputes. However, this practice and its associated effects have weakened with an increase in the number of non-standard workers, who tend to be excluded both from traditional corporate practices and from union representation.

In the United States, labour arbitration mechanisms established through collective agreements provide bipartite procedures in the unionized context, but apply exclusively to the unionized workforce (approximately 11 per cent in total, and only around 6 per cent in the private sector) – a small minority of the total workforce. The parties agree on private arbitrators, who conduct arbitration in cases involving violations of the agreements and in individual grievance cases initiated by unions. Arbitrators' decisions are generally binding and final. However, the process is slow, formal, costly and complex. Thus employers bound by collective agreements sometimes use grievance mediation by third parties as a step before arbitration, or simplify the procedures.

In both Japan and the United States, community unions and workers' centres are increasingly active in reaching out to non-unionized workers and assisting them in settlement of individual disputes. Community unions in Japan organize both those who

work in small and medium-sized enterprises and those who are excluded from enterprise-level unions, and seek to initiate collective bargaining on behalf of their members. When employers refuse to bargain, the case is referred to the local labour relations commission as an unfair labour practice. Workers' centres in the United States organize and empower workers, and file complaints on their behalf, dealing with multiple employers. They have access to and are trusted by alienated workers, especially those on low wages, and migrants.

In Spain, joint procedures can be established through interprofessional agreements or collective agreements at the autonomous community level between the most representative trade unions and employers' associations, and their use is on the rise. They generally deal with collective disputes but may cover individual disputes. Dismissals are, however, usually beyond their scope. Some joint mechanisms are integrated into the public administration of the autonomous communities or the labour relations councils, while others function as a substitute for administrative conciliation. These joint procedures offer conciliation/mediation and/or arbitration, and have the potential to improve both the system's efficiency and access to its services, given the limited efficacy of administrative conciliation and the delays associated with action through the courts. Where arbitration is used, both parties' explicit consent is required. Generally, arbitration awards can be appealed. In autonomous communities where dismissals do fall within the purview of bipartite mechanisms, they play an important role, improving settlement rates even though the amounts of compensation obtained are smaller.

Unilateral processes

Although employer-driven procedures are not examined in depth in this volume, some examples are noteworthy. A survey of internal mediation procedures in two large firms outlined in the chapter on France identifies employees' lack of confidence in their impartiality, and a fear of potential repercussions for their own careers, as major challenges to the effectiveness of such procedures. Although the process was voluntary and free of charge, employees rarely used the procedures. In the United States, employers may be encouraged to create internal mechanisms for dealing with harassment and discrimination claims, through which their liability can be reduced. A majority of non-unionized workplaces in the country have employer-driven internal grievance procedures, with the aim of avoiding potential litigation and increasing productivity. Empirical evidence outlined in the chapter on the United States suggests that companies with high-level worker involvement, including training and employee participation in workplace operations and decision-making, are less likely to experience workplace conflicts and grievances. It also suggests that workers are more likely to use such procedures when either a non-managerial employee or an outside third party is involved.

A particularly controversial form of employer-driven internal procedure is private arbitration through employment contracts. In most countries covered in this volume the practice is restricted by law, or is used rarely if at all. In France, parties can include an arbitration clause in an employment contract in only three specified circumstances: disputes arising from international employment contracts, or involving journalists

or salaried lawyers. In Japan, the use of private external mediators or arbitrators in individual labour disputes has never been developed. In Sweden, private arbitration through employment contracts is permitted but its use is limited mainly to chief executive officers. In Canada, although most jurisdictions have legislation on private arbitration in civil matters, its use in individual labour disputes is much less prevalent than in the United States.

Private employment arbitration is most heavily used in the United States, where employment contracts frequently include mandatory arbitration clauses. Twice as many workers are covered by such agreements as are represented by unions. Private employment arbitration is, however, controversial as it establishes a final and binding process for all future claims against an employer.

1.3. Administrative departments and agencies

In many countries, labour administration systems play an important role in ensuring the effective organization and operation of individual labour dispute prevention and resolution systems.¹⁰ They are charged not only with operating mechanisms for prevention and resolution of disputes, but also offering free-of-charge settlement services such as conciliation/mediation, as well as providing a range of preventative services through information, advice and education that encourage voluntary settlement of disputes and voluntary compliance. In some countries these include adjudication (see section 1.4 below on “Judicial and quasi-judicial mechanisms”). In many countries, such services are provided by labour departments or public administration agencies. The proper functioning of individual labour dispute resolution systems is also directly affected by the operation of labour inspectorates and similar enforcement agencies (hereafter “labour inspectorates”) that play a role in promoting compliance. Securing proper collaboration and cooperation between the public authorities is also part of their responsibilities.¹¹

The functions, jurisdictions and procedures of individual dispute resolution mechanisms and labour inspectorates in the countries covered vary significantly. In particular, the approach to non- or underpayment of wages differs dramatically: in some countries, recovery of unpaid wages is essentially a matter for an individual labour dispute (civil claim), while in others this becomes an enforceable matter through the inspectorate. Where general labour protection standards are established (Australia, Canada, Japan, the United States), the labour inspectorate has broader jurisdiction, but this sometimes leads to a blurring of the distinction between the functions of the

¹⁰ According to Convention No. 150, a system of labour administration “covers all public administration bodies responsible for and/or engaged in labour administration – whether they are ministerial departments or public agencies, including parastatal and regional or local agencies or any other form of decentralised administration – and any institutional framework for the co-ordination of the activities of such bodies and for consultation with and participation by employers and workers and their organisations” (Art. 1(b)).

¹¹ See e.g. Convention No. 150, Arts 4 and 5.

labour inspectorate and of individual dispute resolution systems. Jurisdictional demarcation is primarily a matter for national systems. The variety canvassed in this volume points to the importance of establishing a balanced relationship between dispute resolution mechanisms and labour inspectorates to ensure respect for the rule of law and good functioning of individual labour dispute resolution systems.

Dispute resolution through administrative departments and agencies

In countries where collective voice mechanisms play a key role in the prevention and handling of individual labour disputes (France, Germany, Sweden), extra-judicial administrative dispute resolution services are not offered.¹² Conversely, in Australia, Canada, Japan, Spain, the United Kingdom and the United States, the function of collective voice mechanisms has either been reduced or is limited, and labour administrations or public dispute resolution agencies play a major role in providing free, expeditious and accessible conciliation and/or mediation services. These services aim to help the parties to reach an amicable settlement, and thereby to reduce the caseload of both the specialized labour courts/tribunals and the ordinary courts.

Clearly the majority of administrative services filter a large volume of individual labour disputes out of adjudication proceedings, and offer free, accessible and much swifter settlement. The growth and evolution of these services, however, raises questions about the extent of public intervention that is necessary to prevent and resolve labour disputes, especially where collective voice mechanisms are lacking or dysfunctional, or their role in individual grievance handling is legally restricted. Some chapters identify a critical policy choice: on the one hand, mandatory conciliation/mediation can ensure both parties' participation, although this both increases the public burden in terms of cost and staffing, and may adversely affect service quality; on the other hand, where the process is voluntary, a requirement of mutual consent can block workers' access to the process. Further, the existing performance criteria by which administrative conciliation/mediation is assessed appear to emphasize the processes' "efficiency" over their quality. There is a need for criteria to assess that quality – that is, to determine not only independence or impartiality, but also whether the process delivers fairness and access to justice.

In Canada (Quebec), complaints regarding employers' reprisals and illegal practices, and wrongful dismissals under the Quebec Labour Standards Act, were until recently taken first to the Commission des normes du travail (CNT),¹³ an independent government agency that offered mediation services, subject to the claimant's consent. If no settlement was reached, at the claimant's request the case went to the Commission

¹² With the exception of a route through human rights and non-discrimination agencies (see subsection below on "Alternative pathways").

¹³ The CNT (from 2016, the CNESST; see n. 14 below) is responsible for compliance with minimum employment standards, and for claims over reprisals, discrimination and harassment, and wrongful dismissal (see also the subsection below on the "Role of labour inspectorates/enforcement agencies").

des relations du travail (CRT), a specialized labour tribunal which was recently merged into a new administrative law tribunal (see subsection below on “Specialized labour court/tribunal procedures and their connections to the ordinary courts”).¹⁴ A similar procedure applies to wrongful dismissal cases. During 2013–14, the settlement rate through mediation at the CNT was over 50 per cent (over 60 per cent for wrongful dismissal cases), and at the CRT it was over 70 per cent (for both), while only some 7 per cent of cases (1 per cent of wrongful dismissal cases) that reached the CRT needed to be adjudicated. Cases were, however, disposed of far more quickly at the CNT – within two months or so – than at the CRT, where the delay was usually well over a year, and could be as much as 20 months (over 25 months in wrongful dismissal cases) if requiring adjudication.

In Japan, the labour administration offers three major free-of-charge services: (a) one-stop consultation points located in each prefecture offering counselling and information services (dispute resolution options, settlement procedures, applicable laws and rules); (b) administrative guidance; and (c) conciliation by the dispute adjustment commissions (DACs) established in each prefecture, comprising three neutral experts on labour and employment laws.¹⁵ These services were launched relatively recently, in the early 2000s, in response to a dramatic increase in the number of cases in the civil courts involving individual labour disputes. The DACs provide voluntary conciliation subject to both parties’ consent. In 2013, about 50 per cent of the cases referred for conciliation were disposed of within one month, and a further 42 per cent within two months. However, because of its voluntary nature, this conciliation procedure has achieved a settlement rate of only about 40 per cent. Employers, for example, often refuse to participate in the process. This procedure is more frequently used by non-standard workers (part-time, dispatched or fixed-term contract workers) than by standard employees. In employment discrimination disputes, the DACs conduct mediation rather than conciliation. In mediation, a proposal is offered for the parties’ agreement. Formerly, both parties’ consent was legally required for initiating mediation, but this condition was abolished to encourage the use of mediation. Administrative conciliation and mediation offer no-cost options to users, as the parties do not engage attorneys.

In the United Kingdom, anyone wishing to lodge a claim before an ET must first notify the Advisory, Conciliation and Arbitration Service (ACAS). ACAS provides free and telephone-based conciliation services on a voluntary basis and at any time. These services are the most commonly used method short of recourse to the ETs.

¹⁴ Following legislative changes in 2015, the CRT was abolished and a new Administrative Labour Tribunal created. The CNT and two other agencies were merged into the Commission des normes, de l’équité, de la santé et de la sécurité du travail (CNESST), which began functioning in 2016.

¹⁵ Most of the local labour relations commissions, which are independent administrative commissions comprising members representing, respectively, the public interest, workers and employers, charged with the adjustment of collective interest disputes and adjudication on unfair labour practices, are also capable of providing conciliation in individual labour disputes. Although the success rate is high, they are not very frequently used.

ACAS does provide arbitration at both parties' request, but over a very limited jurisdiction, and this option is not often used. Because of the statutory standing of ACAS, other (commercial or non-profit) dispute resolution providers are rarely used. ACAS handles a large volume of cases, of which relatively few reach formal tribunal proceedings. Of all the cases notified to ACAS in the period April to December 2014, for example, 15 per cent were formally settled, 10 per cent were resolved without the need for a formal written agreement, and only 22 per cent reached formal tribunal proceedings (ACAS, 2015a).

In the United States, the Equal Employment Opportunity Commission (EEOC) is an administrative agency that provides pre-court mediation and conciliation for discrimination claims under federal statutes. It is mandatory to file a complaint with the EEOC before recourse to the courts, and the EEOC is statutorily mandated to operate by informal methods such as conference, conciliation and persuasion. Following voluntary mediation, the EEOC determines whether or not there is "reasonable cause" to believe illegal discrimination has occurred. If reasonable cause is found, conciliation is provided. In 2014, nearly 80 per cent of mediated cases were settled, while the settlement rate through conciliation was 38 per cent. Mediation is the most accessible option for the vast majority of claimants, given the length of the full investigation process. Moreover, reasonable cause is found in only a very few cases. However, mediation is voluntary, and employers often do not agree to it: in 2014 fewer than 12 per cent of EEOC claims were mediated. The mandatory EEOC process may thus become a barrier for those who wish to have direct access to the courts.

In Spain, pre-court administrative conciliation is mandatory for individual labour disputes in the private sector, with some exceptions for certain jurisdictions. Unjustifiable non-attendance on the part of either party incurs a fine. Conciliation does not take longer than 10–15 minutes; according to the chapter on Spain, the process is used for the bureaucratic administrative registration of settlement agreements, or in order to provide access to unemployment benefits or recourse to the courts. There has been a significant increase in the use of conciliation following the 1994 labour law reform and changes to administrative conciliation in 2011. In 2013, of all the individual cases referred to administrative conciliation, more were abandoned or withdrawn (39.5 per cent) or closed without an agreement (37 per cent) than were settled (23.5 per cent). The limited functioning of administrative conciliation in Spain has nevertheless provided an incentive for the social partners to promote bipartite voluntary settlement, which has long been limited owing to legal restrictions (see subsection above on "Bipartite procedures involving trade unions and workers' representatives").

Role of labour inspectorates/enforcement agencies

Irrespective of the various services that may exist to promote access to dispute resolution mechanisms, there are many workers who will not bring claims themselves, even when they work in abusive and inhumane conditions. Labour inspectorates are thus typically given broad powers, including the right to enter premises by day and by night, and to impose or initiate the imposition of sanctions. However, the ultimate purpose of labour inspectorates is not generally to punish bona fide employers who are unaware

of their legal obligations but willing to abide by protective labour law. Their overall aim is to promote compliance, and enforcement action is used primarily where necessary to pursue this goal.

Approaches to encourage voluntary compliance

Various approaches are adopted to promoting compliance, including preventative measures, inspection visits, “correction” recommendations or orders to provide the employer with an opportunity to correct acts involving violations, and at the same time to speed up the process. The latter approaches in some circumstances dovetail with informal dispute resolution. In some countries covered in this volume, such approaches include the use of conciliation/mediation, further blurring the demarcation between enforcement and dispute settlement. This is particularly the case where complex scenarios arise in which it is not easy to clearly determine violations, or the distinction between these and disputes. In all cases, however, it is only in the event of serious violations, abusive and exploitative working conditions, and employers’ refusal to abide by an inspectorate’s recommendations or orders that their full powers are deployed for enforcement.

Sometimes employers are offered an opportunity to correct violations. Japan’s inspectorate, upon detection of certain violations, provides administrative guidance or recommendations to require employers to correct the violation and report to the labour inspectorate. In 2013, about 60 per cent of regular (unannounced) and reactive (complaint-based) inspections resulted in administrative recommendations, while those that reached criminal prosecution constituted less than 1 per cent. Although there is a clear jurisdictional demarcation between the labour inspectorate and individual dispute resolution procedures, inspectors’ correction recommendations often result in the resolution of disputes.

In Australia, Canada, Spain and the United States, settlement options are built into the procedures of the labour inspectorates, as a major step before enforcement. In Australia, the investigation process of the Fair Work Ombudsman (FWO) includes three steps: (a) assessment of the complaint; (b) dispute resolution by FWO mediators, primarily through telephone services; and (c) consideration of enforcement options by fair work inspectors. Of all complaints finalized in 2013–14, 62 per cent were resolved through dispute resolution processes and 17 per cent through the initial assessment; only 21 per cent were referred to enforcement activity. Some 94 per cent of complaints were finalized within 90 days.

Settlement through mediation is also common in Canada. In Quebec, the CNT has handled monetary and administrative complaints arising from violations of the Labour Standards Act. The Act does not provide for mediation in such cases, but 70 per cent of claims are settled without the intervention of the Commission’s legal affairs department, and during 2013–14 such claims were either closed or settled within an average of 51 days. The department becomes involved when the investigator has established a claim against an employer that then refuses to pay. Forty-three per cent of cases in 2013–14 were settled at this stage. The claim then goes to the civil courts. In that year it was taking an average of 939 days – something over two and half years – to reach either an amicable settlement or a judgment.

Under both Ontario and Canadian federal jurisdiction, labour inspectors function as both enforcement officers and mediators with the same parties. Voluntary settlement is encouraged through all stages. In Ontario, a complaint can in general only be assigned to an employment standards (enforcement) officer if an employee has taken steps to inform their employer that they believe that the Employment Standards Act has been violated, by reference to a “self-help kit”. Employers are legally required to post a summary of employment standards in all workplaces and to give copies to all employees. At the investigation stage, in the majority of cases labour standards officers attempt to achieve a settlement through mediation. Where non-compliance is found and the employer refuses to make the required payment, officers issue various enforceable orders, such as compliance orders, payment orders, and notices of contravention. These can still be appealed to the Ontario Labour Relations Board, a specialized labour tribunal, whose labour relations officers also provide mediation. In 2013–14, 81 per cent of cases (reprisals and appeals concerning payment orders) were settled in advance of any hearing, through mediation. Under federal jurisdiction, “early resolution officers” are engaged; these send a self-help kit to the employee concerned to assist them in settling their monetary or administrative complaint with their employer. If the case is not settled, the file is then transferred to an inspector, who investigates and asks the employer to make appropriate correction. In 2012–13, 78 per cent of monetary claims were recovered, mostly through the use of alternative dispute resolution techniques (71 per cent), and through voluntary compliance and payment orders.

In the United States, the Department of Labor (USDOL), which handles wage-and-hour claims, spent an average of 125 days processing complaints in 2015. To speed up the process, USDOL provides conciliation in smaller cases, both before and after formal investigations. In New York State, the Department of Labor (NYSDOL) handles such claims under state law. NYSDOL also uses conciliation upon notification of a violation to the employer, at the employer’s request. The NYSDOL compliance officer seeks settlement between the employer and the case investigator at an informal resolution conference. Both USDOL and NYSDOL engage internal mediators or conciliators.

Naming and shaming employers is another approach used to encourage compliance in both Canada and the United Kingdom. In the latter, it is commonly used as enforcement mechanisms exist in only very limited areas, and are generally weak. However, even this approach is limited in its application: in 2015 only 37 employers were “named and shamed” in a Government press release. According to the authors of the chapter on the United Kingdom, notwithstanding the various efforts to encourage compliance, the vast majority of minimum wage violations remain undetected.

Access to justice for workers in unclear or disguised employment relationships

It is a commonplace that a worker in an employment relationship is entitled to the benefit of protective labour law. It is also notoriously difficult in practice to determine whether or not in some cases a worker is an employee of an employer, and workers increasingly risk exclusion from these protections through engagement in non-standard forms of

employment (ILO, 2015b; ILO, 2016). It follows that these phenomena are obstacles to access to dispute resolution mechanisms and/or labour inspectorates. In some countries, the labour inspectorate has power to identify the existence of an employment relationship, or to clarify the status of workers and employers, and thereby to tackle non-compliance through the use of unclear, disguised or misclassified work arrangements. Where this is possible, it often facilitates much speedier access to both labour inspectorates and dispute resolution mechanisms than going through court proceedings.

In the United States, for example, disguised employment relationships may be tackled under the Fair Labor Standard Act 1938 and the New York State Labor Law, which cover “misclassification” disputes. USDOL and NYSDOL are thus able to identify employers that avoid payment of overtime premiums by classifying their workers as either independent contractors or persons in executive or administrative positions who are legally exempt from overtime requirements, and to conduct enforcement actions. In Japan, labour inspectors investigate and determine whether a claimant is a “worker” who is employed at a business or office and receives wages, regardless of the type of occupation, in accordance with administrative circulars and/or case law. Labour inspectors thus investigate actual work relationships, recognize the status of workers, and work to ensure compliance.

Targeted/proactive approaches and access: Reaching out to vulnerable workers

In some countries the mandate of the inspectorate also provides for proactive approaches, enabling them to target certain categories of vulnerable workers and/or sectors, workplaces or geographical areas where violations of labour protection legislation are prevalent, or where workers are often unaware of applicable protective laws and standards. In these contexts, workers rarely initiate complaints, even where there are continuous or serious violations (see e.g. Weil, 2014).

In Australia, the FWO engages in compliance activities targeted at vulnerable workers, including young workers and overseas workers, as well as educational campaigns focusing on specific sectors. During 2013–14, for example, the FWO targeted cleaning services, and the child-care and hospitality sectors. The FWO also works with trade unions and other organizations, including migrant resource networks, ethnic minority business groups, community legal centres, training providers and others in raising awareness of minimum employment rights, so as to reach out to vulnerable workers. In Canada (Quebec), the inspection programme targeted farms with migrant workers from 2008 to 2013, including raising awareness among both employees and employers about their rights and obligations under the Labour Standards Act. Both Ontario and Quebec have also developed targeted proactive inspection programmes in particular sectors (e.g. retail and agriculture), and for specific categories of workers (e.g. young workers and temporary agency workers), with a view to increasing compliance. In Quebec, non-profit organizations may file complaints, thus facilitating access for vulnerable workers.

In Japan, unannounced (or “regular”) inspections are sometimes conducted as a means of proactive enforcement. Recent examples include targeting establishments where foreign trainees or industrial interns were working. There are more unannounced

inspections than complaint-based reactive inspections. Once a violation is detected, an employer is required to correct “all violations” found in the workplace.

In the United States, both USDOL and NYSDOL work with community groups or worker centres and use proactive enforcement approaches to reach out to vulnerable workers, including low-wage workers and migrant workers. Sectoral or community targets and priorities are set wherever violations are prevalent. The proportion of USDOL’s proactive investigations is rising, with violations found in the majority of these. Other procedures also facilitate access for those who are unlikely to voice their claims. Complaints may also be filed by third parties/entities. Investigations are generally conducted over the entire workplace in response to a complaint by a single worker, so as to keep the complainant’s identity confidential. Nevertheless, complaint rates in the United States are low and even declining.

Various proactive interventions are being explored, in particular to reach out to protect migrant workers, including undocumented and illegal migrants. In practice, achieving access for these workers remains a challenge, for multiple reasons including among others a lack of awareness of rights, workers’ unwillingness to engage with formal mechanisms due to a fear of retaliation, a potential risk of deportation, and cultural or linguistic barriers.

Information, advice and consultation services through administrative departments and agencies

Dispute resolution agencies and/or labour inspectorates alike are both increasingly placing an emphasis on information, consultation and advice in their services. The goal is to encourage voluntary compliance and voluntary settlement of disputes. The number of enquiries implies widespread need on the part of users for such services. In Australia, the FWO received over 20 times as many calls for advice as complaints in 2013–14: most of these enquiries related to wages, other conditions of work and dismissals (FWO, 2014). The FWO also offers “assisted voluntary resolution” as an option to complainants, to enable both parties to discuss claims, clarify issues and inform possible solutions, before the investigation process. The FWO and the FWC ensure cross-referral of claims to each other. In Japan, the volume of consultations and information regarding laws, regulations and individual labour disputes provided in 2013 through one-stop consultation points located at all prefectural labour bureaus was nearly 200 times that of requests received for conciliation (see subsection above on “Dispute resolution through administrative departments and agencies”). Cooperation between individual labour dispute settlement mechanisms and the labour inspectorate is also well established through consultation points which are located not only in the main offices of the prefectural labour offices of the Ministry of Health, Labour and Welfare, but also at labour inspection offices. Depending on the jurisdiction, both refer requests and complaints to each other.

ACAS in the United Kingdom also provides confidential advice and information on employment rights, rules and dispute resolution options over the telephone, and launched a new “Helpline Online” service in 2013. ACAS measures performance in part by the extent to which advice and information services help service users avoid ET

claims. Its research shows that 70 per cent of calls come from employees (and their representatives); 25 per cent of the employee-side callers who were considering making a tribunal claim decided against doing so as a result of their call. Furthermore, of those employer-side callers who have responsibility for making policy changes, 53 per cent went on to update or implement new policies as a result of calling (ACAS, 2015b). Inspectorates in Canada and the United States often make information available in several languages. Information is also shared through educational activities and public information campaigns.

1.4. Judicial and quasi-judicial mechanisms

Notwithstanding the operation of various non-judicial procedures and services, most of the countries covered here have experienced increased caseloads in both ordinary and specialized labour courts and/or tribunals. This rising workload has prompted many changes and innovations, and it appears that with these reforms judicial mechanisms are becoming increasingly complex in some countries, with multilayered structures and a range of functions. This section first considers specialized labour court/tribunal procedures, with a focus on their connections to both extra-judicial options and ordinary courts, as well as their interactions with alternative pathways such as non-discrimination/human rights agencies. It then examines the two common features identified across the adjudication systems of the countries covered here, regardless of which pathways are followed for individual labour disputes: in-court conciliation and mediation; and special arrangements to empower weaker individual claimants to improve their access. For practical purposes, we include here quasi-judicial administrative agencies which offer specialized adjudicative procedures for individual labour disputes.

Specialized labour court/tribunal procedures and their connections to the ordinary courts

Each of the countries covered in this volume has a specialized procedure for individual labour disputes that is distinct from ordinary court proceedings. Some have separate labour courts/tribunals or quasi-judicial agencies, while in others there are special procedures within the ordinary courts. Either way, special procedures are intended to ensure the application of expertise in complex employment and labour legislation, while also making the system less formal and legalistic, faster, more economical and thus more accessible than ordinary court procedures. Such special procedures often aim at adjusting an unequal power relationship between the parties to individual labour disputes, while at the same time reconciling this objective with the system's efficiency in terms of cost and time.

Connections between specialized procedures and those of ordinary courts

In Germany the labour courts have broad jurisdiction in relation to collective and individual labour rights disputes up to the final stage.¹⁶ In all other countries covered in this

¹⁶ The jurisdiction of the labour courts over individual rights disputes may be removed and replaced by an arbitration tribunal only on the basis of a collective agreement, and only in limited occupations (stage performers, workers in the film industry or artists).

volume, specialized courts or tribunals are connected to or interact with ordinary civil courts. Australia's FWC is a specialized tribunal charged with, among other things, resolving a range of individual disputes (63 per cent of its workload). While it has an internal system of appeals, the parties may also seek legal review of FWC decisions in the federal courts. In Canada, the provinces of Ontario and Quebec have their own specialized tribunals; while claims can also be brought to civil courts, the latter route is limited to specific circumstances, because it then blocks access to relevant administrative agencies and tribunals. Civil court procedures are also expensive and lengthy due to lawyers' fees and fee-charging mediation. Japan introduced labour tribunal procedures in the mid-2000s for individual labour disputes, although claimants may choose between them and the district civil court. In France, the ETs have jurisdiction over individual employment disputes in the private sector. Appeals are heard in special labour chambers of the appeal courts, and further appeals go to the Court of Cassation. The procedure is similar in Spain: the labour court has jurisdiction in the first instance, and appeals are heard before the labour chambers of the high courts of justice at autonomous community level. In the United Kingdom, the ET has jurisdiction over unfair dismissal, discrimination, contractual breaches not exceeding £25,000, minimum wage claims, unlawful wage deductions, failure to provide proper documentation and disputes regarding payments arising out of insolvency. The civil courts hear claims involving breach of contract, including wrongful dismissal, tortious actions, and safety and health breaches. While the tribunal has limited and specified jurisdiction mainly related to dismissal-based disputes, civil courts hear claims both where employment is continuing and where it has ended. Civil courts also hear claims when the limitation period for the tribunal has expired.

In the United States, the National Labor Relations Board (NLRB), an independent federal agency, is charged with safeguarding employees' rights under the National Labor Relations Act. Although the NLRB mainly deals with collective disputes concerning industrial relations, it also investigates and facilitates settlement, and its administrative law judges issue decisions or recommended orders concerning discrimination against individuals for engaging in "concerted activity" as unfair labour practices. The NLRB also deals with complaints over working conditions and the act of filing a complaint with an agency or court. Appeals go first to the NLRB's own appeal boards, then to the Court of Appeals, and ultimately to the Supreme Court.

The structure in Sweden is unique among the countries in this volume. The labour courts are given exclusive jurisdiction over all labour disputes in the unionized context, but non-unionized cases are handled first by the local district courts. Appeals from the district courts all go to the labour courts, which are the final instance in all cases.

Financial incentives in terms of costs and outcomes

Specialized procedures are designed to be less costly than the ordinary courts for claimants, although they generally remain more costly than extra-judicial dispute resolution procedures. The costs that affect access to specialized procedures include different levels of court fees, including reductions, exemptions or allocation between the parties;

the cost of engaging lawyers where necessary; and the availability of legal aid and representation services. Financial incentives in terms of remedies can also affect claimants' choices and access. Such financial incentives, in terms of both costs and outcomes, are commonly used to navigate users towards an appropriate avenue depending on their needs, while ensuring the system's efficiency.

In Germany the labour courts charge fees, though the amount is lower than for ordinary courts; payment is not required in advance, but both parties bear their own legal costs in the first instance. However, free legal representation can be obtained through trade unions and employers' confederations. Financial aid may be awarded by the court for those who cannot afford the costs. Settlement through internal grievance procedures may thus be financially encouraged, though parties can choose to go directly to the labour courts.

In Japan, labour tribunal procedures are designed to offer an intermediate option, in terms of cost, time and awards rendered, between administrative conciliation and the civil courts. While complex cases are typically heard by the civil courts, a large majority of termination-of-employment cases, and claims over unpaid wages and severance allowances, are handled through the labour tribunal procedure. Civil courts are also preferred by claimants who seek reinstatement in termination and dismissal cases, while those who seek monetary awards or settlement without reinstatement tend to choose the labour tribunals. The latter usually render larger awards than administrative conciliation, but if a party engages an attorney under the tribunal procedure they must do so at their own cost.

In the United Kingdom the incentives also vary between the civil courts, the ETs and ACAS services. Issue fees and hearing fees were introduced in 2013 to access the ET, together with a requirement first to notify ACAS to open up the possibility of conciliation. These changes can be considered as providing incentives for the parties to settle through conciliation. That aside, they did lead to a significant drop in the volume of claims. The tribunal however remains a lower-cost option than the civil court. Claimants naturally go to the civil courts for amounts above the £25,000 maximum award in the tribunals for breach of contract. The civil courts are also preferred in cases involving ongoing employment, where the statute of limitation for tribunal claims has expired, or when a claim is strong.

The NLRB in the United States is also a more financially accessible forum than the ordinary courts. Filing fees are not required, and translation services are offered. The board represents claimants. By comparison, it is difficult for claimants to navigate ordinary court procedures without engaging attorneys, and the process is very costly, complex and lengthy. Filing fees are charged in most courts, although they may be waived. The use of the general courts is limited to higher-salary workers, such as managers or professionals.

In Sweden, different incentives apply in disputes arising in unionized and non-unionized contexts. Swedish labour courts do not charge fees, although the district courts do. In both cases the losing party is obliged in principle to pay the litigation costs. In the unionized context, trade unions cover all the litigation costs: this works as an incentive for them to seek settlement through grievance negotiations, and for claim-

ants to join unions. For non-unionized workers, means-tested financial aid is available, but this can cover only part of the litigation costs.

Expedited procedures and procedural simplicity

Most specialized proceedings deliver swifter resolution than the general courts, through measures including shorter time limits or limits on the number of hearing sessions. Such expedited procedures offer time-related incentives for disputing parties. In 2013–14, Australia's FWC rendered decisions within eight weeks of a hearing in almost 84 per cent of cases, and within 12 weeks in over 93 per cent of cases. In Germany, the importance of speedy procedures at all levels of labour court matters is explicitly referred to in the Labour Court Act. In addition, the Act provides that disputes concerning the existence, non-existence or termination of the employment relationship must be dealt with as a matter of priority. In 2012, more than 85 per cent of all cases lodged were settled within six months.¹⁷ Japan's Labour Tribunal Act requires the tribunal panel to complete its procedures within three hearing sessions. Average disposal time was nearly 75 days in 2013, while under the first-instance civil procedure it was just over 13 months. In the United Kingdom, the average disposal time for a single claim at the ET is 27 weeks. The ET's disposal time has been rising; this may be because the introduction of mandatory notification to ACAS before lodging with the tribunal has helped filter out small and less meritorious cases. In Sweden, cases adjudicated through the labour courts took around 12 months, but the average time spent on cases that went through grievance negotiations was much shorter than for those referred to the district courts.

Modifications to rules of evidence are also used to make the process faster, more informal, and thus more accessible. In Canada (Quebec), general civil rules of evidence applied to proceedings under the CRT. These are modified for claims regarding reprisals and illegal practices under the Labour Standards Act: in these cases a judge may make determinations and seek any necessary evidence to render a decision. In Japan, the same rules of evidence apply as in civil proceedings, but hearings in the labour tribunals are more informal: cross-examination does not take place in most cases, and tribunal panels have flexibility to determine the content of awards and depart from general rules of evidence. In the United Kingdom, the standard rules of evidence do not apply to ET proceedings. The use of oral proceedings (e.g. in France, Quebec and Sweden) and provision for filing procedures by telephone or online (e.g. in Canada, the United Kingdom and the United States) are among other approaches applied.

Involvement of lay judges/members

Lay judges/members representing employers and workers are a feature of the specialized procedures in France, Germany, Japan, Sweden and the United Kingdom. Lay participation helps to make court proceedings less legalistic and formal, and thus more

¹⁷ http://www.bundesarbeitsgericht.de/englisch/englische_version.pdf [accessed 10 Aug. 2016].

accessible to users, while also bringing in workplace realities and reflecting both sides' interests. Nevertheless, evidence presented in this volume suggests that the value and legitimacy of lay decision-makers can be contested owing to the cost of engaging them; there is a need to ensure the quality of lay judges, including their knowledge and expertise, as well as public trust in their role.

In France, only lay judges elected by direct suffrage are involved in the first instance, and a professional judge intervenes only when they cannot reach agreement between themselves. In Germany, Japan and Sweden, lay judges/members nominated/recommended by the social partners sit together with one or more professional judges. In Sweden, neutral persons with specialized knowledge of the labour market are also brought in as lay members. In contrast, in Canada, Spain and the United States lay judges are not a feature of the system.

The legitimacy of lay judges appears to be framed by the national industrial relations context, particularly union density, and the public trust afforded to them. In Germany, lay judges enjoy high levels of trust among both employers and workers; the author of the chapter on Germany argues that lay judges help enhance rationality and legitimacy. In Sweden, lay members' involvement is seen as critical, and the high level of trust in them is attributed mainly to the country's high union density and strongly coordinated industrial relations system. In Japan, the role of lay members is valued because of their impartiality and expertise, and in relation especially to the several abstract provisions in the labour legislation referring to "fairness" or "reasonableness", the interpretation of which can only be appropriately determined through an understanding of workplace realities and practices. However, the tribunal procedure is more frequently used by standard/regular employees, who are more likely to be unionized, while non-standard workers and those who work in small and medium-sized enterprises tend to use administrative conciliation.

In France, on the other hand, lay judges have been criticized for their limited legal knowledge and expertise due to a lack of training provided to them, and particularly for the lack of interest shown by some in points of law. In France, more than 50 per cent of ET decisions are appealed, and 20 per cent of cases end up deadlocked. A number of proposals to reform the French ETs have been made, some of which have already been adopted. The question of the cost of involving lay judges has also been raised in support of potential reform. In Germany, however, a proposal to end their involvement was strongly opposed and no changes were made. In the United Kingdom, despite the fact that the ET enjoys a high level of trust among litigants, cost considerations have contributed to a reduction in the role of lay judges in 2012, as part of recent ET reform. This included the abolition of their involvement in a range of claims, including unfair dismissal, unless the presiding judge decides to the contrary. The chapter on the United Kingdom points to a number of criticisms of this disappearance of industrial expertise.

Alternative pathways

Beyond administrative services and the specialized labour court/tribunal and ordinary court procedures examined above, in a number of countries there are alternative procedures relevant to individual labour disputes, particularly for discrimination cases and

small claims.¹⁸ Moreover, there may be other specialized dispute resolution procedures/mechanisms, for example those handling claims to do with occupational safety and health, social security and insurance, or alleged bullying or harassment; or those responsible for specific categories of workers, such as public sector workers, migrant workers or domestic workers. While not an exhaustive summary, the examples identified below are sufficient to demonstrate the complexity of national dispute resolution systems.

The operation of other specialist procedures can expand the options available, and enhance users' choices and access, provided that users are well informed about the benefits of each option and the remedies available. These procedures can also play a role in filtering claims to ensure the application of particular expertise in specific areas, and at the same time to enhance the systems' efficiency. However, in practice the complexity and fragmentation of a varied range of mechanisms can also lead to confusion. Dispute resolution institutions may have different legal frameworks for coverage of employers and workers. Where decentralized systems coexist, as may happen in federal systems, they further compound the intricacy of the picture. The highly dispersed array of dispute resolution services may hinder both access and the system's overall efficiency. Indeed, the variety that is evident from the chapters in this volume may be indicative of the absence of a holistic view at national level about the entirety of a dispute resolution system. This is no doubt the consequence of political decisions, available resources, and perhaps a lack of coordination among different administrative authorities, and between them and judicial authorities beyond the labour administration.

Human rights or anti-discrimination legislation tends to establish specialist administrative agencies with different procedures and remedies from both specialized labour courts/tribunals and/or dispute resolution agencies in most of the countries covered. Adjudication is not always available through these processes. In the EU Member States, these forums have typically been established through incorporation of the relevant EU instruments into domestic legislation.¹⁹ These bodies increasingly handle discrimination disputes arising from employment, although their overall jurisdiction is broader, covering discrimination on various grounds. While such forums seek to protect various individual rights, it is not clear how or indeed whether they are coordinated or interact with labour dispute resolution systems. Often the same dispute could be referred to one of several different forums, which can lead to confusion for users.

In Australia, there are some overlaps in the functions of various dispute resolution forums, including between the FWC and the FWO, and between the FWC and the Australian Human Rights Commission. Certain types of claims can be brought under different forums simultaneously, whereas others cannot. Employees are

¹⁸ Separate mechanisms also exist for individual labour disputes in the public sector, for example in Australia, France, Japan and Spain. The chapters on these countries include information on institutional frameworks, but indicate that data and information on their performance are either non-existent or scarce.

¹⁹ EU anti-discrimination directives require Member States to establish equality bodies for the promotion, analysis, monitoring and support of equal treatment on the grounds of racial and ethnic origin, and sex.

given the option to choose a forum, but it is sometimes not easy to decide between them. In Canada, it may be possible to lodge the same claim as unjust dismissal under the Labour Code, or as a discrimination claim (illegal dismissal) under the Canadian Human Rights Act. The requirements and procedures of the two routes differ, however, as do the remedies. In the United States it may be possible to deal with the same dispute or aspects of the same dispute before the NLRB, USDOL or state Department of Labor (as an enforcement agency) or the EEOC (then to the courts). Some users lodge claims simultaneously with two or more forums, due to differences in terms of cost, time or the available remedies. In fact, owing to the existing systemic complexity the parties often need considerable legal assistance even to identify the right forum – which implies extra cost for the majority of workers. To avoid such simultaneous claims, the New York State Division of Human Rights (NYSDHR) and the New York City Commission on Human Rights, for example, do not accept referrals to the court once a claimant chooses to use them as an alternative to the courts. While this simplifies the system, it does affect claimants' choices.

In Sweden, the Equality Ombudsman may investigate claims of discrimination and arrange settlement negotiations with the employer and representation services both for non-unionized claimants at their request, and for unionized claimants where unions refuse to represent their members. When settlement negotiations fail, cases may be brought to the labour courts. The Ombudsman system is carefully designed so as not to undermine the role of trade unions in dispute resolution, but at the same time to provide full access for non-unionized employees. However, this requires complex procedural arrangements, and also creates a highly polarized dispute resolution system. It is not clear whether the long-term impact of such a system is to provide incentives for workers to join unions, or rather to marginalize certain groups within a separate system. The author of the chapter on Sweden argues that the Ombudsman system represents an exception in a highly coordinated labour court structure, and suggests a need for further coordination. In Germany, anti-discrimination legislation establishes separate grievance procedures and the Federal Anti-Discrimination Agency for discrimination claims, although they are designed not to affect the rights of employees to use works councils for discrimination disputes. The Agency offers information, advice, legal assistance and settlement services. In practice, however, workers are often unaware of where they can bring their claims.

Separate procedures dealing with small claims, based on the amounts sought, are also available. In Ontario and Quebec in Canada, and New York City in the United States, small claims courts or procedures provide swifter, less costly and thus more accessible options than the ordinary courts. In Australia and Japan, such a simpler process is applicable to smaller claims within the ordinary courts. In both cases, due to the simplicity of claims, legal representation is uncommon, and so the cost to claimants is lower.

Promoting settlement and empowering claimants

Notwithstanding the variety and complexity in the architecture and procedures for handling individual labour disputes, two features are increasingly common within systems of adjudication. First, there is an increasing emphasis on settlement through

in-court conciliation and mediation before the trial/adjudication stage. Second, various special arrangements have been introduced to assist and empower individual workers, particularly those who are unrepresented, to improve their access to justice. In-court conciliation and mediation can promote a resolution that is agreed and mutually “owned” rather than imposed, although success in achieving this is likely to depend on the quality of the service provided. At the same time, special procedures to empower workers may be considered a form of state action – incurring a cost – that could be considered second best to the creation of regulatory frameworks that facilitate non-state dispute prevention and settlement, including through collective voice mechanisms.

In-court conciliation and mediation

Conciliation and/or mediation are widely used to expedite proceedings in all types of adjudicative institutions for individual labour disputes. The process can pursue settlement of disputes, and at the least can clarify the issues involved. In all the countries covered here, far fewer cases are adjudicated than are settled through in-court conciliation or mediation. Practices differ according to whether the process is mandatory or voluntary, free of charge or fee-charging, and who facilitates settlement. These differences in turn shape access to settlement options, and to justice for weaker-party individual claimants.

Australia’s FWC offers free-of-charge telephone conciliation, conducted by specialist conciliators, that can be initiated voluntarily with the consent of the parties, for unfair dismissal claims. In 2013–14, 79 per cent of such claims (48 per cent of the total volume lodged with the FWC) were settled through conciliation, and a mere 8 per cent through a decision or order. A three-day cooling-off period after conciliation of unfair dismissal claims has recently been introduced. This is applicable to unrepresented parties and can potentially reconcile the efficiency of speedy telephone conciliation with fairness of settlement agreements by offering time to those who are unrepresented to seek advice before committing to a settlement agreement.

In Canada, free and voluntary mediation is available in specialized tribunals/quasi-judicial commissions, and is closely connected to administrative procedures (for more details, see subsection above on “Dispute resolution through administrative departments and agencies”). By contrast, before the civil courts in Ontario mediation is both mandatory and conducted at the parties’ expense, raising questions about the balance between efficiency and justice. In Quebec, while voluntary, general recourse to fee-charging mediation was introduced into civil court proceedings in 2015. The author of the Canada chapter raises the point that the trend towards “participatory or consensus-based justice” contributes to timely settlement, but limits the development of new legal principles due to the confidential nature of mediation.

In France, free-of-charge in-tribunal conciliation at the ET is mandatory before adjudication, but is conducted by the same lay judges who adjudicate. Conciliation is pursued on average for only ten minutes, and its success rate is around 10 per cent. Newly introduced judicial mediation has also been used at some ETs and the civil courts, including appeals. Judges may propose voluntary mediation, which is provided by a private third party and paid for by the parties. Mediation fees are, however, regulated so as

to adjust the financial power balance between the parties. In principle they can agree on how to share the cost, but in the absence of agreement it is split equally, unless the judge considers this unfair in view of the respective economic circumstances of the parties.

In the United Kingdom, fee-charging judicial mediation at the ETs was recently introduced. In this model, claimants' access is assured by the requirement that the respondent pay the mediation fee of £600. Cases suitable for mediation are identified during the tribunal's preliminary hearing, and if both parties agree, tribunal judges conduct non-adversarial, facilitative mediation. Around 65 per cent of mediated cases are settled by this means.

In Germany, first-instance labour court proceedings begin with a mandatory conciliation hearing before the presiding judge or a judge appointed by the presiding judge as a conciliator. About 60 per cent of cases were settled through conciliation in 2014. Amicable settlement is encouraged at all stages of the proceedings. This increases settlement rates in practice: the parties tend to compromise and reach amicable settlement as new facts and insights emerge. The labour court may also propose third-party mediation at any time, subject to the parties' acceptance, but in practice only rarely in labour law.

In Japan, the three-party labour tribunal panel, composed of a professional judge and lay members appointed by the district court based on the recommendation of the social partners, offers mediation before adjudication, at no cost to the parties, and around 70 per cent of claims are settled this way. If mediation fails, the panel renders an award. Awards are binding and enforceable unless a party objects; such objection triggers automatic referral to the civil courts. The author of the chapter on Japan underscores the tribunal's role in clarifying legal rules, facts and issues, thereby facilitating the parties' understanding of the dispute and readier acceptance of the mediation proposal. In the first-instance civil courts, 50–60 per cent of the cases referred are also resolved through voluntary settlement.

In Spain, in-court conciliation is pursued first by court secretaries, and if this fails, by judges. They also provide suggestions and assistance for settlement after presentation of the evidence. Judges must approve any agreements that are reached. Since 2011, in-court ("court-annexed") mediation has been offered in certain autonomous communities. The judge may suggest it at any stage of proceedings, subject to both parties' acceptance. The engagement of the court in the process contributes to ensuring the quality of mediation. Mediation is conducted by professional mediators. Experience of this process has been positive for users, and is evaluated positively by judges. It plays a role in filtering the work of already overloaded judges, while offering faster and more practical solutions to users.

In Sweden, judges attempt to conciliate disputes with the parties' consent during the pre-hearing stage in both labour courts and district courts. Conciliation can be replaced by mediation if the parties agree. In-court conciliation by judges is free of charge, but parties usually pay for mediators who are appointed by the courts. According to the Government's 2012 report of an analysis of termination and dismissal cases between 2005 and 2010, only 10 per cent of the cases referred to the first-instance labour courts were settled through pre-hearing conciliation, and judgments were rendered in 90 per cent of cases. This suggests that only the cases that are difficult to resolve

through grievance negotiation are coming to the labour courts. On the other hand in the district courts about 70 per cent of the cases referred were settled amicably through judges' conciliation, and judgments were rendered in 30 per cent of cases.

Various forms of conciliation or mediation are also used in the United States. In 2014, for example, of the total of unfair labour practice charges filed with the NLRB, 36 per cent were settled, while over 60 per cent were either withdrawn or dismissed; only 2 per cent were adjudicated. The federal district court for the Southern District of New York has a mandatory in-court mediation programme for all employment discrimination claims. The proportions of full or partial settlement reached in 2014 were 50 per cent in cases represented by attorneys, and 65 per cent in unrepresented cases where counsel was appointed. The NYSDHR also uses mediation before and at the hearing stage, which has improved the system's efficiency.

An increasing emphasis on amicable settlement in the course of both administrative and judicial mechanisms suggests the efficiency of conciliation and mediation processes, to the extent that they are fairly and impartially used without suppressing a weaker party. When the parties own the outcome, they are likely to be satisfied with it and to comply with it; the likelihood of the relationship between the parties being restored and sustained tends to increase, and the cost of reaching a settlement, in terms of time and money, also drops significantly. However, when processes are used at the parties' cost they are likely to limit claimants' access, as well as the possibility of achieving fair settlement outcomes. Another policy implication that arises from this volume concerns the quality of conciliation and mediation. While fairly rich evidence is available on the cost and time efficiency of such processes, the *quality* of settlement outcomes – whether they appropriately take into account fairness and justice – is not always carefully examined. This deficit is compounded by – and may reflect – the further challenge that it is difficult to assess quality given the confidential nature of the processes.

Legal standing

Individual workers are often reluctant to voice their claims, fearing retaliation or the inability to proceed alone against their employers. In order to reduce this barrier to access, most adjudication systems provide that a claim can be pursued on a claimant's behalf by another individual, an administrative agency, a trade union or another employee representative. In Australia, Canada and the United States, administrative enforcement agencies may initiate proceedings in the specialized courts/tribunals or general courts. In France, union representatives are legally authorized, under certain conditions, to pursue claims on behalf of workers, particularly taking into account the vulnerability of certain categories of employees. In Sweden, trade unions can lodge claims with the labour courts without the explicit consent of the union member concerned. Ombudsman systems in France and Sweden, and the Equality and Human Rights Commission in the United Kingdom, have their own legal standing and can bring action directly to the specialized labour courts/tribunals or courts on behalf of claimants.

In some instances in the United States, individual rights disputes are addressed collectively, using multiple-plaintiff arrangements in the ordinary courts. There are two

mechanisms: collective ones that allow multiple workers to litigate their claims jointly in a single claim; and “opt-out” class actions and “opt-in” collective actions that establish a “class” of plaintiffs.²⁰ Collective claims are adjudicated through litigation, unless individuals choose to opt out. Collective actions are a very effective dispute resolution approach in terms of cost and access, particularly for low-wage workers.

Legal representation and legal aid

It is also common to provide free legal representation or aid for a claimant to facilitate access. Specialized procedures in all the countries covered attempt to facilitate access either by not *requiring* legal representation, or by providing free legal representation. However, when each party can choose to be represented by a lawyer at their cost, this option is frequently exercised by the respondent in practice, thus limiting the effect of a rule that representation is not required.

Trade unions, or employee representatives, where they exist, typically provide representation and other support to their members. In the United Kingdom, this includes early assessment of the viability of claims, the preparation of claims, provision of funding for legal assistance, and representation. In some countries, in addition to administrative agencies, non-governmental organizations and other non-state actors are quite active in providing legal aid and representation services, particularly for non-unionized workers. In Australia, the FWC launched a pilot programme providing legal advice for self-represented claimants through the Employment Law Centre of Western Australia. Some 76 per cent of claimants who sought this advice subsequently amended or withdrew their claims. The FWC also engages with pro bono legal service providers so as to extend legal advice services to self-represented claimants. In Ontario in Canada, a government-funded Human Rights Legal Support Centre provides free legal representation before the Ontario Human Rights Tribunal, which hears employment discrimination claims. In the United Kingdom, pro bono clinics provide voluntary representation services, operated partly by practising lawyers and law students (e.g. the Free Representation Unit in London). The Citizens Advice Bureau also provides nationwide legal advisory services, but does not provide representation services. In the United States, attorney fee-shifting procedures are available for most federal workplace discrimination claims and for federal and state wage-and-hour claims. Winning claimants are able to recover a reasonable proportion of their attorneys’ fees from the employer. Nevertheless, in practice it is often difficult for workers to secure legal representation.

Many of these special arrangements, in most of the countries covered here, can be considered ways to empower individual claimants through forms of collectivism. These arrangements are considered necessary and effective means of ensuring access to justice for individual workers, particularly unrepresented low-wage workers or other vulnerable workers, who otherwise might simply give up their claims. This observation, however, poses a broader policy question regarding how systems can best be designed

²⁰ Class action procedures are also possible in Australia, for example, but in this volume the issue is raised only in the chapter on the United States.

to promote effective and just resolution of disputes, including through collective voice mechanisms, so as to avoid disputes being externalized when employment relationships are still in existence, given the physical, financial, temporal and mental stress that claimants often undergo in accessing justice mechanisms. An increasing trend towards the externalized handling of individual disputes entails more reliance on publicly funded systems, implying greater cost to the economy and to society as a whole. Conditions of financial crisis, and the shrinking public sector that many countries face as a result, compound the challenge of how best to allocate limited resources to effectively improve the efficiency and justice of national systems.

1.5. Enforcement and adherence to settlement agreements

Even after claimants have been through cumbersome procedures, adherence to settlement agreements, judicial orders or rulings, and to compliance/enforcement orders, may be lacking or limited. Any such deficiency in implementation poses a serious challenge to the very purpose of a dispute resolution system, and may significantly discourage access. This outcome can also be compounded by a lack of speedy procedures for enforcement.

Some chapters paint a disturbing picture of workers left unpaid, underpaid or unprotected whichever route they take to pursue their claims. This is a result of failure to adhere to settlement agreements, court orders and judgments, insufficient enforcement and/or under-resourced inspectorates/dispute resolution mechanisms. And this happens despite all these extensive and varied procedures and services being geared towards better dispute resolution and enforcement.

In Australia, if an arbitrated award of compensation or reinstatement by the FWC in an unfair dismissal claim is not adhered to, the claimant must seek judicial enforcement – which can take time. In Canada, there are no publicly available administrative data on whether reinstatement orders in case of dismissals are appropriately implemented – only a few dismissal cases reach adjudication, and settlement agreements through mediation are confidential. In the United States, the implementation of remedies poses a challenge that can discourage workers from seeking access. Collecting back wages and fines is a challenging issue for NYSDOL, for example: some employers appeal, while others use someone else's name, hide their assets or declare bankruptcy during the long enforcement process. In 2009, over half of the back wages and fines assessed by NYSDOL (US\$25,338,643) against employers went unrecovered. The volume of wage-and-hour claims filed in the courts has expanded dramatically in the past decade, but even the enforcement of court rulings is challenging.

In the United Kingdom, nearly half of tribunal awards had not been paid fully in 2013, with a further third seeing no compensation paid at all, after extensive filtering out of claims through both legislative hurdles and ACAS conciliation. To tackle this, the Small Business, Enterprise and Employment Act was passed in 2015, introducing financial penalties for employers' failure to pay sums ordered by an ET or due under settlement agreements. Its impact is yet to be seen.

1.6. Conclusions

The nine case studies in this book demonstrate that systems of individual labour dispute resolution have undergone considerable change in recent years, frequently propelled by rising numbers of individual disputes, themselves fuelled by declining union density and the consequent unavailability of collective dispute resolution structures to many workers. Despite the obvious differences between countries, certain commonalities emerge.

First, there have been many efforts to reduce the cost and increase the speed of labour dispute resolution. Some of these efforts appear to have been successful; others less so.

Second, there has been a general trend towards conciliation and mediation, both as part of formal court processes and as stand-alone mechanisms, often established by the labour administration. Again, the results are mixed. In some instances, conciliation/mediation appears to be only perfunctory, whereas in other instances it significantly reduces the burden on more formal procedures of arbitration and adjudication. Evidence of the quality of conciliation/mediation as well as of settlement outcomes is generally limited. Some chapters suggest that there is a need to establish criteria by which to assess that quality in order to ensure meaningful access to justice, taking into account the power imbalance between the negotiating parties.

Third, in several jurisdictions greater importance has been attached to the information, advisory and educational functions of labour administrations and state agencies, with a view to preventing disputes from escalating to the point where formal settlement processes and litigation are required. These functions are exercised by both labour inspectorates and dispute resolution agencies.

Fourth, across all types of institutions examined, there is an emphasis on empowering and reaching out to weaker-party workers. The weaker these workers are, the less likely they are to gain access by themselves. Access to justice is an essential element of the rule of law. Barriers to access in practice reinforce social exclusion; the system should thus be inclusive in realistic terms at all levels. The evidence in this book suggests that community-level initiatives, the adoption of inclusive strategies by trade unions and proactive enforcement appear to be the approaches that provide the most meaningful access for the most vulnerable – low-wage workers and (irregular) migrant workers. Adjudication systems are increasingly exploring ways of making access more readily available in practice, trying to correct the structural inequalities common in such systems. Even so, the courts remain psychologically, financially and physically remote from the most vulnerable workers. There is a need to strengthen procedures for resolution before disputes get as far as formal mechanisms. The system should be designed so that, as far as possible, more disputes are prevented and resolved in individual workers' daily work relationships. Such needs are growing, particularly where bipartite procedures have been weakened significantly, and because more and more workers are not bound to a single workplace.

While innovation in dispute resolution systems is widespread, it is not in itself always entirely beneficial. A proliferation of systems, while creating multiple paths for both workers and employers, can lead to duplication, complexity and inconsistency. As

each system is linked to particular legislation and administrative agencies, designing the most rational dispute resolution matrix possible is far from straightforward.

More broadly, the domestic – and sometimes international – political economy can greatly influence the structure and operation of dispute resolution institutions. Resources for and access to such institutions can fluctuate greatly. The New York City Commission on Human Rights has faced a 90 per cent staffing cut over the past two decades. In Spain, the economic crisis dramatically increased the volume of court referrals, mostly related to dismissals. This coincided with a reduction in the number of judges. Again, in Australia, the volume of unfair dismissal claims increased significantly after a wide range of restrictions on tribunal access were removed following a change of government. On the other hand, access to the ETs in the United Kingdom has been reduced recently, following a series of labour law reforms, including lifting the qualification threshold for unfair dismissal protection. It would be beneficial to attempt a cross-country evaluation of these contrasting initiatives, but it is often difficult to reach consensus around what constitutes a successful reform.

Political and economic factors, then, operate alongside the particularities of individual countries' legal and industrial relations systems to maintain distinctions between States. Nonetheless, those interested in identifying innovative good practices will find in these chapters considerable material to reflect on. It is true that labour institutions are notoriously difficult to transfer from one country to another (Kahn-Freund, 1974). But reforms to dispute resolution institutions in one country that have clearly reduced the time it takes to resolve disputes, and/or have provided greater access to effective resolution mechanisms at low cost, may suggest feasible options for constructive, consensual change in other countries.

Regardless of the wide variety of forums described in these chapters, the evidence in this book suggests that the national dispute resolution system should be designed from a holistic perspective rather than on the basis of any individual forum, in order to deliver fair outcomes through the most appropriate means at a proportionate cost, while respecting the rule of law. To achieve this requires a broad examination of the interactions between the various institutions within the system as a whole, as well as the role that labour laws play not only in constructing regulatory frameworks for such institutions, but in defining their coverage in terms of who can access them and individual workers' access to collectivism.

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2. Australia

*Anthony Forsyth**

2.1. Introduction

Australia has a long-standing tradition of conciliation and arbitration for the resolution of collective labour disputes, dating back in fact to 1904 (Kirby, 2004).¹ This was a highly centralized approach to the determination of minimum employment standards, with strong powers accorded to the federal industrial tribunal to compel the involvement of employers and unions in the processes of conciliation and arbitration (Mitchell and Naughton, 1993).

However, the period since the early 1990s has seen a major shift away from that traditional model:

- first, through the move to enterprise-based bargaining as the main mechanism for determining employees' wages and other employment conditions (although with a comprehensive framework of industry-level awards as the basis for agreement-making);²
- second, through the advent of individual employment rights claims, starting with those relating to unfair dismissal but later expanding considerably in number and variety.

This evolution of Australia's workplace conflict resolution landscape is consistent with trends in many other developed economies, where the decline of unions and collective bargaining, the transformation of work and workplaces, changing employment patterns and the growth of individual employment rights have produced more individual than collective disputes in recent years (see e.g. Dix and Barber, 2015).

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¹ The main outcome of these processes was an "award", a legally enforceable instrument setting down minimum wages and other employment conditions for employees. Many different awards were made for different industry or occupational groups across the Australian economy. These instruments are now known as "modern awards".

² See e.g. the special issue of the journal *Labour and Industry* (Vol. 23, No. 3, 2012) examining the Australian model of enterprise bargaining on its 20th anniversary. Enterprise agreements made between employers and employees/unions remain an important feature of the Australian labour law system, with a "better off overall test" to ensure that employees are treated favourably under an agreement compared with any applicable award.

The enduring legacy of the traditional Australian model is the high level of individual dispute resolution by tribunals and other public agencies – and the considerable levels of confidence and trust in that approach among both the parties directly involved in individual employment claims and other stakeholders (Forsyth, 2012).

This chapter examines the legal framework for individual labour dispute prevention and resolution in Australia, including the key institutions and processes within that system. The performance and effectiveness of the public agencies involved in settling individual labour disputes are then evaluated. The extent of interaction between these various bodies, with the objective of enhancing effectiveness, is also considered. A number of recent trends in individual labour dispute resolution are highlighted. Some concluding observations follow, including discussion of likely future directions in this area in the light of the Productivity Commission's recent review of Australia's workplace relations framework.

Before examining these substantive issues, a brief overview of the Australian scheme of labour regulation is necessary.

2.2. Overview of the Australian labour law system

Under the Australian federal system of government, employment and workplace relations are regulated by federal, state and territory legislation and the common law. The employment of most private sector employees is covered by federal legislation: the Fair Work Act 2009 (Cth) (FW Act). This includes regulation of minimum wages and other employment conditions such as working hours and leave entitlements, either directly through the National Employment Standards (NES)³ or indirectly through modern awards and enterprise agreements made under the FW Act.⁴

Federal public sector employees and those in the State of Victoria, the Australian Capital Territory and Northern Territory are also covered by the national system of workplace regulation under the FW Act. The employment of public service employees in the remaining five states (New South Wales, Queensland, South Australia, Tasmania and Western Australia) is regulated by specific legislation in each state.⁵

Anti-discrimination/equal employment opportunity (EEO) statutes apply at the federal level and in each state and territory. Legislation at all three levels of government establishes various EEO dispute resolution institutions including courts and tribunals.⁶ Workplace health and safety (WHS) is also a matter of federal, state and territory regulation, but falls outside the scope of this chapter.

Australian labour law has been going through a process of almost constant change since the early 1990s (see e.g. Bray and Stewart, 2013). The federal scheme operating

³ FW Act, Part 2-2.

⁴ FW Act, Parts 2-3 and 2-4 respectively.

⁵ See e.g. Industrial Relations Act 1996 (NSW); Industrial Relations Act 1999 (Qld).

⁶ While many claims are brought under state and territory EEO statutes – e.g. Anti-Discrimination Act 1977 (NSW); Equal Opportunity Act 2010 (Vic) – the discussion in this chapter focuses mainly on the processes for resolution of anti-discrimination claims operating at the federal level.

under the FW Act is essentially collectivist in character, requiring collective bargaining where a majority of employees in a workplace wish to be covered by an enterprise agreement, and the imposition of good faith bargaining obligations on all bargaining representatives (Creighton and Forsyth, 2012). This represents a significant shift from the approach under labour legislation in operation between 1996 and 2009,⁷ which did not compel collective bargaining and permitted the making of individual workplace agreements undercutting collective standards (Murray, 2006). Those laws also sought to downgrade the role of the federal industrial tribunal and removed many of its public dispute resolution functions (Forsyth, 2012; Riley, 2009), although most of these have now been restored under the FW Act (as outlined in this chapter).

2.3. The legal framework for individual labour dispute prevention and resolution

What are “individual labour disputes” in the Australian context?

In the Australian labour law system, the term “individual labour disputes” refers to a wide range of disputes that may arise in the context of an employer–employee relationship. These include grievances raised by an employee, and/or disputes between the parties, relating to:

- the contract of employment (which is regulated by a combination of common law rules and various statutory minimum standards, rights and obligations);
- issues arising under the terms of an applicable modern award or enterprise agreement;
- disciplinary action against an employee;
- termination of employment (unfair dismissal);
- adverse treatment (e.g. reduced entitlements, discrimination, dismissal) on the basis of an employee’s exercise of workplace rights or engagement in industrial activity (or non-participation in such activity);
- discrimination on the basis of other protected attributes such as race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction, social origin, etc.;
- sexual harassment;
- workplace bullying;
- workplace health and safety;
- enforcement of minimum employment conditions (under legislation, or an award or agreement).

⁷ Workplace Relations Act 1996 (Cth) and Workplace Relations Amendment (Work Choices) Act 2005 (Cth).

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The terms “individual employment rights” and “individual claims” are increasingly used to describe the various claims that employees may lodge with the Fair Work Commission (FWC) under the FW Act. The FWC’s workload is increasingly dominated by resolution of individual rights claims. Whereas in 1998–99 two-thirds of applications were collective in nature, “by 2011–12, [the] proportions [were] reversed, with 63 per cent of applications lodged by individuals and 37 per cent related to collective matters” (Hamberger, 2014).

With 70.8 per cent of the workforce covered by the national workplace relations system under the FW Act (on one estimate: Productivity Commission, 2015a, p. 6), most individual employment rights disputes in Australia are dealt with at the federal level.⁸

Federal dispute resolution institutions

Fair Work Commission

The FWC is Australia’s national workplace relations tribunal,⁹ established under Part 5-1 of the FW Act. The FWC is made up of labour relations, business and legal experts who are appointed by the Government of the day.¹⁰ Members of the FWC may exercise the following powers when performing their functions in matters that come before the tribunal:

- a member may inform him/herself in such manner as he/she considers appropriate, including requiring the attendance of persons and/or the production of documents, inviting oral or written submissions, and taking evidence under oath;¹¹
- private conferences and/or public hearings may be held;¹²
- a range of dispute resolution methods may be used, including mediation, conciliation, making a recommendation or expressing an opinion;¹³
- arbitration and/or the making of orders are available only where this is permitted by a specific provision of the legislation.¹⁴

Although the FWC is not formally bound by rules of evidence and procedure,¹⁵ these rules are generally followed in the conduct of proceedings in the tribunal.¹⁶ An appeal

⁸ The major exception is EEO/anti-discrimination claims, many more of which are brought under the various state/territory statutes than under federal laws.

⁹ Predecessors of the FWC have existed under federal industrial legislation dating back to 1904. Most recently, the tribunal has been known as the Australian Industrial Relations Commission (1988–2009); Fair Work Australia (2009–12); and now the FWC (since 1 January 2013). See Giudice, 2011. Note that the FWC is not a court and does not exercise judicial functions (see the discussion below of the role of federal courts in the workplace relations system).

¹⁰ FW Act, secs 626–627. See McCallum, Riley and Stewart, 2013.

¹¹ FW Act, sec. 590.

¹² FW Act, secs 590(2)(h)–(i), 592 and 593.

¹³ FW Act, sec. 595(2).

¹⁴ FW Act, sec. 595(3).

¹⁵ FW Act, sec. 591.

¹⁶ See also FW Act, sec. 578(b), requiring the FWC to have regard to “equity, good conscience and the merits of the matter”.

against a decision of a single member of the FWC may be brought before a Full Bench, by leave (based on a public interest test).¹⁷ Judicial review of FWC Full Bench decisions may be sought in federal courts on the basis of jurisdictional error.¹⁸

In addition to its roles in setting minimum wages, maintaining the system of modern awards, overseeing collective bargaining, approving enterprise agreements and regulating industrial action (see Acton, 2011), the FWC has jurisdiction over many different kinds of individual employment disputes. Primarily, these are as follows:¹⁹

- Unfair dismissal:²⁰ the FWC handles claims for reinstatement and/or compensation by employees alleging they have been unfairly dismissed by their employers. Most claims are initially dealt with in a telephone conciliation conference.²¹ Claims not settled at conciliation are then determined in an arbitration hearing by a member of the FWC.²²
- General protections:²³ employee claims of unlawful adverse action on the basis of workplace rights or industrial activity are initially lodged with the FWC, where a conciliation conference is held. If no settlement is reached, the FWC may arbitrate dismissal-related general protections claims (if both parties agree), while other types of claims must be pursued in the Federal Circuit Court or Federal Court of Australia.
- Workplace bullying:²⁴ since 1 January 2014, workers may bring applications for anti-bullying orders before the FWC. The tribunal has power to make orders that bullying conduct cease or not occur in future, where a worker can show that he/she has been subjected to repeated unreasonable behaviour by another individual or group (although reasonable management action does not constitute bullying). To date, bullying claims have overwhelmingly been resolved through conciliation/mediation.
- Disputes arising under awards and agreements:²⁵ the FWC hears and determines disputes brought by parties (including individual employees) under the dispute

¹⁷ FW Act, secs 604 and 613.

¹⁸ Australian Constitution, sec. 75(5); Judiciary Act 1903 (Cth), sec. 39B; FW Act, secs 563 and 567. See McCallum, Riley and Stewart, 2013, pp. 864–866.

¹⁹ Note that a filing fee (69.60 Australian dollars [AUD] at the time of writing) is imposed for the first three categories of claims discussed below: unfair dismissals, general protections cases and applications for anti-bullying orders. Note also that a 21-day time limit applies to unfair dismissal claims and general protections claims involving dismissal: FW Act, secs 366 and 394.

²⁰ FW Act, Part 3-2.

²¹ It is not mandatory for parties to participate in telephone conciliation; see the discussion of this process in sec. 2.4 below.

²² The arbitrated outcome of an unfair dismissal claim before the FWC (e.g. an award of compensation or reinstatement of an employee) is not self-enforcing; the employee would need to seek an enforcement order in a federal court (see below).

²³ FW Act, Part 3-1.

²⁴ FW Act, Part 6-4B.

²⁵ FW Act, Part 6-2.

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resolution clause of an applicable modern award or enterprise agreement. These disputes may relate to any of the terms of the award/agreement – e.g. if a dispute arises in relation to award/agreement provisions regulating hours of work or shift rosters, this could be resolved by the FWC under Part 6-2 in accordance with the relevant dispute settlement procedure.²⁶

- Disputes relating to NES entitlements:²⁷ the FWC also has the power to deal with disputes relating to an employee’s minimum entitlements under the NES (e.g. four weeks’ annual leave, ten days’ personal/carer’s leave, etc.). To exercise this power, a dispute resolution clause in the employee’s employment contract or an applicable award/agreement must confer jurisdiction on the FWC.²⁸
- Equal remuneration:²⁹ the FWC may make an equal remuneration order (i.e. an order to ensure equal pay between men and women workers for work of equal or comparable value), on application by an employee, a union or the Federal Sex Discrimination Commissioner. Only a few cases have been brought under these provisions, all initiated by trade unions.³⁰

The FWC has traditionally not focused on dispute *prevention* to the same extent as comparable bodies in other countries – for example, the UK’s Advisory, Conciliation and Arbitration Service (Forsyth and Smart, 2009). However, the “Future Directions” engagement strategy implemented since 2012³¹ by Justice Iain Ross AO, President of the FWC, has seen a greater emphasis on dispute prevention and the provision of information about how the tribunal operates on its website.³² This is likely to continue following a legislative amendment in 2013 clarifying the FWC’s role in “promoting cooperative and productive workplace relations and preventing disputes”.³³

Office of the Fair Work Ombudsman

The Office of the Fair Work Ombudsman (FWO), established under Part 5-2 of the FW Act, is, in ILO terms, Australia’s labour inspectorate. Its functions include:

- promoting cooperative and harmonious workplace relations, and compliance with the FW Act and awards/agreements made under the legislation, including through provision of education, assistance and advice to employees/employers and their representative organizations;

²⁶ Further rules apply to the FWC’s exercise of dispute resolution powers in this context: see FW Act, sec. 739.

²⁷ FW Act, Part 6-2.

²⁸ FW Act, sec. 738.

²⁹ FW Act, Part 2-7.

³⁰ For more on this area of FWC jurisdiction, which is not discussed further in this chapter, see Charlesworth and MacDonald, 2015; Smith and Stewart, 2014.

³¹ Fair Work Australia, 2012; and see further sec. 2.6 below.

³² See e.g. <https://www.fwc.gov.au/about-us/resources/fact-sheets-guides> and <http://benchbooks.fwc.gov.au/benchbooks/> [accessed 5 Mar. 2016].

³³ FW Act, sec. 576(2)(aa). See Stewart et al., 2014; also sec. 2.5 below.

- inquiring into and investigating acts or practices that are contrary to the FW Act or awards/agreements;
- bringing court or FWC proceedings to enforce the FW Act and awards/agreements.³⁴

The FWO combines traditional approaches to enforcement of workplace laws with a preventative compliance approach (see Hardy and Howe, 2009). Indicative of the latter are the many FWO initiatives to provide information, education and advice to employees, employers, unions and other stakeholders, with the aim of fostering voluntary compliance with Australia's workplace relations laws (FWO, 2014, p. 15).

The FWO's website includes information for employers and employees relating to a wide range of employment issues, including pay, leave, performance management and dismissal.³⁵ The website also provides detailed information for employees about initiating FWO's investigation processes in relation to a possible contravention of workplace laws;³⁶ mediation services offered by the FWO;³⁷ and the small claims process available where the amount claimed is less than AUD20,000.³⁸

The FWO's dispute prevention focus also includes an Online Learning Centre, offering facilities such as programmes to assist employees and employers in having difficult conversations with each other; PayCheck Plus, an online tool for calculating award pay rates for employers and employees; and two telephone inquiry services, Small Business Helpline and Fair Work Infoline (FWO, 2014, pp. 15–21). In addition, the FWO produces best practice guides on 13 different topics including effective dispute resolution in the workplace.³⁹

As for traditional enforcement, the FWO may bring court proceedings to enforce a range of "civil remedy provisions" of the FW Act.⁴⁰ These include provisions requiring employers to provide employees with minimum wages and other entitlements under the NES,⁴¹ and to comply with awards⁴² and agreements.⁴³

A number of other options short of commencing enforcement litigation are available to the FWO: these include the power to issue employers with compliance notices⁴⁴ or to require them to enter into enforceable undertakings.⁴⁵

³⁴ FW Act, sec. 682.

³⁵ See <http://www.fairwork.gov.au> [accessed 5 Mar. 2016].

³⁶ See <http://www.fairwork.gov.au/how-we-will-help/how-we-help-you/help-resolving-workplace-issues/working-with-you-to-resolve-workplace-issues> [accessed 5 Mar. 2016].

³⁷ Ibid.

³⁸ See <http://www.fairwork.gov.au/how-we-will-help/how-we-help-you/help-resolving-workplace-issues/taking-legal-action-in-the-small-claims-court> [accessed 5 Mar. 2016].

³⁹ See <http://www.fairwork.gov.au/about-us/policies-and-guides/best-practice-guides> [accessed 5 Mar. 2016].

⁴⁰ FW Act, Part 4-1 (the civil remedies that may be imposed by the courts are discussed below).

⁴¹ FW Act, sec. 44.

⁴² FW Act, sec. 45.

⁴³ FW Act, sec. 50.

⁴⁴ FW Act, sec. 716.

⁴⁵ FW Act, sec. 715.

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Employees can lodge claims with the FWO – free of charge – regarding alleged contraventions of the FW Act, awards or agreements. The FWO can investigate⁴⁶ and take enforcement action in respect of complaints up to six years after the alleged breaches have occurred.⁴⁷

Federal Circuit Court and Federal Court of Australia

The Fair Work Divisions of the Federal Circuit Court (FCC) and Federal Court of Australia (FCA)⁴⁸ have jurisdiction⁴⁹ in relation to several areas that intersect with individual employment rights under the FW Act. For example:

- general protections claims not resolved in the FWC may be pursued in the FCC or FCA;
- claims may be initiated in either court by employees seeking to enforce their entitlements under the NES, awards or agreements (as discussed above, such claims may also be initiated by the FWO on behalf of employees); claims seeking recovery of less than AUD20,000 may be pursued through a simpler process in the FCC or a state magistrates'/local court.

The orders that the FCC and FCA may make in these cases, and others involving breaches of civil remedy provisions in the FW Act, include injunctions; orders for compensation or reinstatement; and civil penalties of up to AUD10,800 for an individual and AUD54,000 for a corporation.⁵⁰

Australian Human Rights Commission

The Australian Human Rights Commission (AHRC) is established under the Australian Human Rights Commission Act 1986 (Cth) (AHRC Act). It is the federal body responsible for dealing with complaints of unlawful discrimination⁵¹ on the basis of race, sex, disability and age under the applicable federal legislation.⁵²

Once a discrimination complaint is lodged, the AHRC inquires into it and attempts to resolve the complaint by conciliation.⁵³ The AHRC may instead terminate a complaint on grounds such as that it is trivial or vexatious; that the alleged discrim-

⁴⁶ The FWO investigation process can involve the use of various dispute resolution approaches to resolve claims; see sec. 2.5 below.

⁴⁷ FW Act, sec. 544.

⁴⁸ FW Act, Part 4-2.

⁴⁹ FW Act, secs 562–563 and 566–567; see also Federal Circuit Court of Australia Act 1999 (Cth) and Federal Court of Australia Act 1976 (Cth).

⁵⁰ FW Act, secs 545–546.

⁵¹ AHRC Act, sec. 46P. On the arrangements for resolution of discrimination and harassment complaints in all Australian jurisdictions, see Rees, Rice and Allen, 2014, ch. 12.

⁵² Racial Discrimination Act 1975 (Cth) (RDA); Sex Discrimination Act 1984 (Cth) (SDA); Disability Discrimination Act 1992 (Cth) (DDA); Age Discrimination Act 2004 (Cth) (ADA).

⁵³ AHRC Act, secs 46PD and 46PF.

ination occurred more than 12 months prior to the lodgement of the complaint; or that the allegation of unlawful discrimination cannot be substantiated.⁵⁴

Where a discrimination complaint is not resolved through conciliation by the AHRC,⁵⁵ the complainant may pursue the allegation of unlawful discrimination in the FCC or FCA (within 60 days of termination of the complaint by the AHRC).⁵⁶

The AHRC may also inquire into complaints of employment discrimination other than those arising under the RDA, SDA, DDA or ADA, on the grounds of a worker's criminal record, trade union activity, political opinion, religion or social origin. However, these complaints can only be the subject of conciliation by the AHRC – there is no option to pursue unresolved complaints in the courts.⁵⁷

The AHRC also has a strong educative function, raising awareness in the general community and promoting best practice by employers in relation to EEO and the prevention of all forms of discrimination.⁵⁸

The role of private dispute resolution providers

The great majority of individual labour disputes in Australia are resolved through the various public dispute resolution bodies discussed above (as well as the various state and territory anti-discrimination tribunals). The strong reputation and efficient operation of these public agencies/tribunals have meant that Australia has not seen the development of a “private ADR [alternative dispute resolution] industry” for individual employment claims (as has occurred in the United States) (Forsyth, 2012).

That said, it is possible for disputes arising under awards and agreements to be resolved by recourse to private mediators and arbitrators (rather than the FWC),⁵⁹ as long as those dispute resolution providers are independent of the parties to the dispute.⁶⁰ The use of external mediators/arbitrators in such cases is not widespread. However, many firms and public sector bodies have internal workplace mediation and grievance resolution processes and use external providers for assistance with managing conflicts involving allegations of discrimination, harassment, bullying and similar matters (Forsyth, 2012; Hamberger, 2012). The increasing volume of individual rights claims has also resulted in greater use of ADR techniques – including conciliation and mediation – by the formal dispute resolution bodies themselves (MacDermott and Riley, 2012).

⁵⁴ AHRC Act, sec. 46PH.

⁵⁵ Leading to termination of the complaint: AHRC Act, sec. 46PE.

⁵⁶ AHRC Act, sec. 46PO.

⁵⁷ See <http://www.humanrights.gov.au/complaints/complaint-guides/what-you-can-complain-about/complaints-about-discrimination-employment> [accessed 5 Mar. 2016].

⁵⁸ See <http://www.humanrights.gov.au/human-rights-education-and-training> and <http://www.humanrights.gov.au/education/business-and-human-rights> [accessed 5 Mar. 2016].

⁵⁹ FW Act, sec. 740.

⁶⁰ FW Act, sec. 186(6)(a).

2.4. Assessment of the performance and effectiveness of individual labour dispute resolution in Australia

Fair Work Commission

Performance criteria

The FWC's performance is considered in the discussion below by reference to its main areas of jurisdiction over individual employment claims. Unless otherwise stated, all data are derived from the FWC's 2013–14 annual report (FWC, 2014a).

First, some overall statistics are provided on the FWC's caseload and the different ways in which it deals with matters that come before it. In 2013–14, a total of 37,066 applications were made to the FWC; 19,620 hearings were held, resulting in 13,302 decisions and orders being issued (FWC, 2014a, chart 4, p. 26).

The FWC's workload is now dominated by individual employment disputes – primarily unfair dismissal applications and general protections claims involving dismissal, which together represent around 48 per cent of matters handled by the tribunal.

The FWC introduced timeliness benchmarks for delivery of reserved decisions (across all categories of cases), applicable from 1 July 2012. The tribunal performed reasonably well against these benchmarks in 2013–14: 83.9 per cent of reserved decisions were delivered within eight weeks of hearing (against a benchmark of 90 per cent), while 93.4 per cent of decisions were delivered within 12 weeks (against a benchmark of 100 per cent) (FWC, 2014a, chart 7, p. 31).

General protections claims

The FWC's data indicate that timeliness targets for general protections claims involving dismissal are slipping to some degree, as the volume of these cases increases year on year (FWC, 2014a, tables 6 and 7, p. 36). The year 2013–14 saw 2,879 of these claims lodged, up from 2,429 in 2012–13 and 2,162 in 2011–12. Over the period 2011–12 to 2013–14, the median time from lodgement of such a claim to first conciliation conference increased from 48 to 59 days (in 90 per cent of matters); and the median time from lodgement to finalization of claims rose from 97 to 106 days (in 90 per cent of matters).

Unfair dismissal claims

In 2013–14, 14,797 unfair dismissal claims were lodged with the FWC, slightly fewer than the 14,818 claims in 2012–13 but above the 14,027 in 2011–12 (FWC, 2014a, p. 39).⁶¹ By far the majority of these claims are settled through conciliation by the tribunal: 79 per cent of cases were resolved in this way in 2013–14, with only 8 per cent requiring a decision/order following a hearing (FWC, 2014a, chart 13, table 13, pp. 40–41). Of the 1,200 arbitrated unfair dismissal cases, 374 were dismissed on the basis of jurisdictional objections and 175 on the merits (i.e. the termination of employ-

⁶¹ The main reason for the increase in unfair dismissal claims under the FW Act since 2009 was the Act's removal of some previously existing wide-ranging exclusions from the unfair dismissal jurisdiction (e.g. employees in businesses with under 100 employees were totally excluded): see Freyens and Oslington, 2013.

ment was found to have been fair); the employee's claim was upheld with an award of compensation and/or reinstatement in only 192 cases (FWC, 2014a, table 15, p. 42).

Timeliness in resolution of unfair dismissal claims (measured by time taken from lodgement to first conciliation, and from lodgement to finalization) deteriorated in 2013–14: between 2011–12 and 2013–14, the median time from lodgement of an unfair dismissal claim to first conciliation conference increased from 36 to 61 days (in 90 per cent of matters) and from lodgement to finalization from 108 to 146 days (in 90 per cent of matters) (FWC, 2014a, table 16, p. 43). The FWC attributed the decline in timeliness to a spike in application numbers in the first quarter of the year, and staffing shortages among conciliators, leading to a backlog in dealing with unfair dismissal cases (FWC, 2014a, p. 40).

Workplace bullying

Figures are provided here on the FWC's new anti-bullying jurisdiction in its first six months of operation (1 January to 30 June 2014). Compared with an expected 3,500 applications a year for anti-bullying orders,⁶² only 343 claims were lodged with the FWC in the initial six-month period (although interest in the jurisdiction was high, with the tribunal receiving more than 100,000 unique website hits and over 3,500 telephone enquiries about bullying) (FWC, 2014a, p. 70).

Recognizing the emotional and psychological issues often involved in bullying cases, the tribunal has adopted a unique case management process involving:

- early assessment of a claim for any jurisdictional issues, the nature of the alleged bullying and how it should be dealt with;
- contact with the parties within 24 hours to discuss how the claim will proceed;
- referral to a staff mediator, or (more commonly) to a member of the tribunal for a conference/hearing (FWC, 2014a, pp. 70–73).

In practice, FWC members are mindful that the bullying jurisdiction involves parties who will need to maintain a future working relationship. Therefore, when conciliating these claims:

Most members are taking a graduated approach ... dealing with them initially in an informal way, exploring options and potential resolution and proceeding to hearings only where appropriate.

A reasonably high number of matters have been resolved through these initial stages, partly because the kind of orders that can be made by the Commission are preventative and may be considered by the employer to be constructive and good HR [human resources] practice and partly because the prospect of the parties giving evidence against each other is ... daunting. (Hamberger, 2014, p. 13)

⁶² “FWC prepares the ground for bullying regime”, *Workplace Express*, 20 Nov. 2013.

Of the 343 bullying claims lodged in the first six months of the new jurisdiction, 197 were finalized, as follows: 59 were withdrawn early in the case management process; 34 were withdrawn prior to proceedings; 63 were resolved during proceedings; 20 were withdrawn after a conference/hearing (but prior to any FWC decision being issued); and 21 were finalized by decision (with an anti-bullying order issued in only one of those 21 cases) (FWC, 2014a, tables 27 and 28, pp. 71–72). These figures illustrate the success of the FWC’s bullying case management model in resolving the bulk of claims through informal dispute settlement methods, in the early phase of the anti-bullying jurisdiction’s operation.

Disputes arising under awards and agreements

The FWC deals with large numbers of matters brought before it under the dispute settlement clauses of awards and agreements – some 2,366 applications in 2013–14 (FWC, 2014a, p. 34). The tribunal’s data do not indicate what proportion of these cases involve individual employment issues, but it is likely that the majority are collective disputes between employers and trade unions relating to the interpretation and application of award/agreement provisions.⁶³

Contexts

The FWC’s overall lodgement figures, broken down by location, show that in 2013–14 the highest numbers of applications were lodged in the more highly populated Australian states: for example, 13,857 matters were lodged in Victoria, 10,037 in New South Wales and 5,692 in Queensland, compared with only 658 in Tasmania (FWC, 2014a, table 1, p. 27).⁶⁴ This is consistent with long-term trends. Unfair dismissal lodgements reflect the geographical distribution for overall lodgements: 4,913 unfair dismissal claims were lodged in Victoria in 2013–14, 3,831 in New South Wales and 2,747 in Queensland, compared with 275 in Tasmania (FWC, 2014a, table 12, p. 39).

The FWC’s annual reports do not provide any further data on the contextual nature of individual employment claims, such as the categories of workers bringing claims, enterprise size/type or sectoral distribution.

However, some of this information is provided in the FWC’s quarterly reports on the anti-bullying jurisdiction for its first six months of operation.⁶⁵ The following trends are evident from these reports (FWC, 2014b, 2014c; see also Hamberger, 2014):

- most bullying applications related to the complainant worker’s manager, although some have concerned bullying allegations against co-workers;

⁶³ On the nature of award/agreement dispute resolution under pre-FW Act provisions, see Sutherland, 2005; Riley, 2009.

⁶⁴ The higher proportion of lodgments in Victoria than NSW, despite the latter having a higher population, most likely reflects the fact that more FWC members and staff are located in Melbourne, Victoria, and many national unions and employer organizations have their headquarters there.

⁶⁵ The FWC is required to provide quarterly reports to the federal Government on a range of matters covered by the FW Act: see <https://www.fwc.gov.au/about-us/reports-publications/quarterly-reports> [accessed 5 Mar. 2016].

- between 33 per cent and 50 per cent of these applications came from workers in organizations with fewer than 50 employees;
- the highest number of applications was from the clerical industry, followed by educational services, health and welfare services, aged care, retail and the finance industry.

Key factors for success or limitations

A senior member of the FWC recently observed that:

One of the challenges posed by the increasing web of individual employment rights is the provision of accessible, cost-effective and efficient methods of resolving disputes about these rights.

Jurisdictions around the world have been trying to grapple with the costs imposed by a steady increase in litigation in employment tribunals and courts. (Hamberger, 2014, p. 3)

The FWC has responded to the ever-increasing numbers of individual employment claims coming before it by introducing a range of measures to improve the experience of parties involved in tribunal proceedings and to enhance access to justice. These initiatives have formed part of the FWC's "Future Directions" engagement strategy, which is examined later in this chapter (see section 2.6 below). The remainder of this section explores more closely one particular aspect of the FWC's performance in dealing with individual employment claims: telephone conciliation.

The tribunal's telephone conciliation process for unfair dismissal claims has been the focus of considerable attention in recent years. The increasing volume of these claims led the FWC to introduce telephone conciliation conferences, conducted by specialist conciliators (rather than tribunal members), in 2009 (Acton, 2010a, pp. 9–10). While the parties are not compelled to participate in this process, the vast majority do so – and, as the data reported above show, telephone conciliation is generally both prompt and effective, achieving a settlement in around four-fifths of unfair dismissal cases. Early data from an independent study conducted for the FWC indicated high levels of user satisfaction with the telephone conciliation process, highlighting its convenience and cost-effectiveness (Acton, 2010b).⁶⁶

⁶⁶ The qualitative experience of parties involved in unfair dismissal conciliation is considered further in Southey, 2012; in this paper, the author also discusses the concern, common among employers, that conciliation (whether conducted by phone or in person) encourages the paying of "go away money" to settle unmeritorious unfair dismissal claims. This issue was addressed as part of a broader Productivity Commission review of the FW Act in 2015: see Productivity Commission, 2015b, pp. 2–3. The Commission found in its draft report that "[w]hile it no doubt occurs, there is insufficient data about the extent of go away money, and how it can be distinguished from cases where the employer and the employee agree that the justification for dismissal is not clear cut" (Productivity Commission, 2015a, p. 27).

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However, around the time of the introduction of telephone conciliation for unfair dismissal claims, practitioners representing both employers and employees argued that the dynamics of face-to-face conciliation meetings (which are conducive to achieving a settlement) would be lost over the telephone.⁶⁷ Similarly, MacDermott and Riley have argued that:

What is absent in telephone conciliations is the personal interaction and visual clues that come from being present in the same space. ...

This can affect the rapport that develops between the parties, which may in turn affect [their] 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. (MacDermott and Riley, 2012, pp. 94–95, footnote omitted)⁶⁸

In a submission to the 2012 Fair Work Act Review, Forsyth and Stewart argued that the research commissioned by the FWC on users' experiences (referred to above):

perhaps overstates the degree of satisfaction that representatives have with the system of conducting conciliation over the phone rather than face-to-face. We would also question how a system of this kind can send the right signals to management and workers about what constitutes fair or unfair dismissal, when the vast majority of claims are neither ruled to be untenable at some initial stage nor dealt with by way of formal adjudication.

Nevertheless, in terms of dealing quickly with claims and minimising costs, the present system must be considered a success. (Forsyth and Stewart, 2012, p. 32)⁶⁹

Another point to note about the telephone conciliation process for unfair dismissal cases is that it is not conducted under any provision of the FW Act,⁷⁰ but rather has been introduced as an administrative measure by the tribunal – hence its voluntary nature (Acton, 2011, p. 592). Overall, though, the process may be viewed as an adaptation of, rather than a departure from, the long-standing Australian tradition of conciliation in industrial disputes (Acton, 2011, p. 592; MacDermott and Riley, 2012, pp. 100–101).

⁶⁷ “Practitioners sceptical about telephone conciliation of unfair dismissals; FWA says responses positive overall”, *Workplace Express*, 7 Aug. 2009.

⁶⁸ The authors also consider competing arguments: *ibid.*, pp. 95–96.

⁶⁹ See also O’Neill, 2012, pp. 33–35.

⁷⁰ Nor are the specialist conciliators formally delegated any power to conduct conferences under sec. 625(1)(c) of the FW Act: see Creighton and Stewart, 2010, p. 644.

Fair Work Ombudsman

*Performance criteria*⁷¹

The FWO's performance is considered in this section with reference to its: (i) preventative compliance work; (ii) investigation of claims; and (iii) enforcement activity. All data are obtained from the FWO's 2013–14 annual report (FWO, 2014).

(i) Preventative compliance

The FWO data (FWO, 2014, tables 3, 5 and 7, at pp. 16, 17 and 20 respectively) show that there were almost 12.5 million interactions with the agency by members of the public in 2013–14 (up from just under 11 million in 2012–13), and further that:

- increasingly, people make contact with the FWO via its website rather than through emails/other written contact or by telephone;
- the main telephone queries received by the FWO relate to wages, followed by other conditions of employment and dismissal;
- heavy use is made of the FWO's wide array of online tools, particularly the Pay-Check Plus calculator for modern award pay rates (usage of this tool increased by around 27 per cent in 2013–14).

(ii) Investigation of claims

The FWO's process for dealing with individual employment complaints involves three steps (FWO, 2014, p. 27):

- *assessment*: establishing the background to the complaint (this will most likely lead to dispute resolution, but more serious claims could result in FWO enforcement activity);
- *dispute resolution*: enabling the parties to discuss and develop a solution to the workplace problem, usually over the phone with an accredited FWO mediator;
- *pursuit of unresolved claims*: these may go through the FWO small claims process, or if more serious will be referred to a fair work inspector for consideration of enforcement options.

According to the FWO's data (FWO, 2014, pp. 26, 27, 32, including figure 5 and tables 10 and 12):

- The FWO finalized 25,650 complaints in 2013–14, most of which related to non-payment or underpayment of wages, and other employment conditions.
- Most complaints (62 per cent) were resolved through the FWO's dispute resolution processes, with another 17 per cent finalized following assessment and 21 per cent through compliance/enforcement activity.

⁷¹ “Key factors for success or limitations” in respect of the FWO are discussed in section 2.5 below.

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- Overall, this resulted in the recovery of more than AUD24 million in back payments for workers.
- Of all the complaints received, 94 per cent were finalized within 90 days (many even more quickly through increased use of the FWO's dispute resolution services) (FWO, 2014, p. 32).

(iii) Enforcement activity

Where compliance with workplace laws is not achieved through the FWO's preventative or dispute settlement processes, the agency determines the type of enforcement approach that is appropriate, given:

- the nature and seriousness of the breach;
- the size of the business and any previous non-compliance on its part;
- obtaining the best outcome for the parties involved and the wider community; and
- the deterrence effect of a particular action and whether it will promote broader compliance (FWO, 2014, pp. 37–38; see also FWO 2012, 2013).

The main alternatives to enforcement litigation – compliance notices and enforceable undertakings – were used by the FWO in a considerable number of cases in 2013–14. An enforceable undertaking is a written commitment entered into by an employer to rectify any breaches, in preference to facing court proceedings. A compliance notice requires an employer to correct a breach of workplace laws or to challenge the notice in court.

While the FWO entered into fewer enforceable undertakings (eight) than it issued compliance notices (65), the undertakings resulted in the recovery of over AUD3 million in underpayments in 2013–14 – almost five times the amount recovered in 2012–13. Most of these cases related to wages and conditions breaches (FWO, 2014, pp. 38–40, including tables 23–27).

Court proceedings were initiated by the FWO in 37 cases in 2013–14 (about 25 per cent down on the previous two years). These resulted in 39 decisions issued by the courts, which in turn saw the imposition of over AUD3 million in penalties for breaches of workplace law and the recovery of almost AUD1.6 million in underpayments. Again, most of these cases involved wages and conditions breaches, or failure to comply with compliance notices.⁷²

Contexts

The FWO provides the following data on the individuals who initiated complaints in 2013–14, and the industries in which they worked:

⁷² Some more recent FWO successes in court proceedings are reported in “Errant employers slugged \$600K in FWO summer blitz”, *Workplace Express*, 3 Feb. 2015.

- of the 24,103 complaints received, 45% related to the specific industry sectors of accommodation and food services (12%), construction (10%), retail trade (9%), administrative and support services (7%) and manufacturing (7%);
- over half (58%) of the complaints came from males. Of these, 41% were aged 31 to 50 years and 47% related to the construction (18%), accommodation and food services (10%), manufacturing (10%) and transport, postal and warehousing industries (9%);
- 42% of complaints were from females, of whom 37% were aged 21–30 years and 51% worked in accommodation, 18% in food services, 12% in retail, 11% in health care and social assistance and 10% in “other services” including hair and beauty. (FWO, 2014, p. 26)

FWO data also show that complaints predominantly come from workers in the most populous states (New South Wales, Victoria, Queensland), although in 2013–14 a disproportionately high number of small claims (up to AUD20,000) originated in Victoria (FWO, 2014, tables 10 and 13 at pp. 26 and 29).

The FWO focuses particular compliance activities on vulnerable workers at greater risk of exploitation, including:

- young employees (AUD2.3 million was recovered for 1,355 young workers in 2013–14, mainly in the accommodation, food services and construction industries); and
- overseas workers/visa holders (AUD1.1 million was recovered for 659 overseas workers in 2013–14) (FWO, 2014, pp. 29–30, including tables 14 and 15).

As well as claims relating to employees’ wages and entitlements under the FW Act, awards and agreements, the FWO handles complaints of discrimination based on the general protections in Part 3-1 of the FW Act. In 2013–14, the most common such complaints investigated were based on pregnancy (47 per cent, up from 28 per cent the previous year); disability (20 per cent); and family/carer’s responsibilities (10 per cent) (FWO, 2014, table 17, p. 31).

The FWO also runs campaigns to help employers and employees better understand their workplace rights and obligations, especially in industries where the risk of non-compliance is judged to be high and the proportion of vulnerable workers is large. These campaigns integrate education activities and compliance audits, and in 2013–14 were focused on the cleaning services, children’s services and hospitality (particularly restaurants, cafés and take-away food outlets) sectors. The FWO completed 4,567 campaign audits in 2013–14, leading to recovery of over AUD4 million for 7,541 employees (FWO, 2014, table 18, p. 33).

Increasingly, the FWO seeks to encourage businesses to enter into partnerships whereby they make a formal and public commitment to take active steps to ensure compliance with workplace laws. These partnerships are known as “proactive compliance deeds”, explained further by the FWO as follows:

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In 2013–14, we entered into seven proactive compliance deeds with major proprietary limited brands including Bread Top, Hays Specialist Recruitment, Australia Fast Foods (trading as Chicken Treat), McDonald’s Australia, United Trolley Collections, Compass Group (Australia) and La Porchetta Franchising.

Proactive compliance deeds are tailored to individual businesses and their circumstances. Common features include:

- implementing systems to ensure ongoing compliance
- self-auditing of wages and record-keeping
- committing to self-resolve any disputes that arise within a set number of days and reporting these matters to the FWO
- training managers and franchisees in workplace law. (FWO, 2014, p. 35)

Australian Human Rights Commission

Performance criteria and contexts

The AHRC’s role encompasses the promotion of human rights and EEO in Australia, including the resolution of complaints under federal anti-discrimination laws. Its performance in this area is considered below. Unless otherwise stated, all data are taken from the AHRC’s 2012–13 annual report (AHRC, 2013). In that period, the AHRC:

- assisted over 17,000 people and organizations through the provision of information about the law and complaint processes, problem-solving and referrals to other services;
- received 2,177 complaints of discrimination or human rights breaches;
- finalized 2,500 complaints;
- conducted 1,650 conciliations with a 65 per cent success rate (1,079 complaints successfully resolved); this was in line with the average figure for the previous five years (AHRC, 2013, pp. 8, 44, 64).

The breakdown of AHRC complaints by relevant legislation for 2012–13, and over the preceding five-year period, shows that most complaints (37 per cent) relate to alleged disability under the DDA, followed by race discrimination under the RDA (23 per cent); sex discrimination under the SDA (19 per cent); discrimination on various grounds (e.g. religion, political opinion, criminal record, etc.) under the AHRC Act (14 per cent); and age discrimination under the ADA (7 per cent) (AHRC, 2013, p. 132).

It is important to note that these data relate to *all* complaints of discrimination lodged with the AHRC (e.g. discrimination in the provision of goods and services, accommodation, etc.), not only those specifically relating to discrimination in employment. The proportion of complaints to the AHRC in 2012–13 in each category that related to employment discrimination was as follows:

- racial discrimination complaints (under the RDA): 25 per cent;
- sex discrimination complaints (SDA): 83 per cent;
- disability discrimination complaints (DDA): 33 per cent;
- age discrimination complaints (ADA): 57.5 per cent;
- AHRC Act complaints: 38 per cent (AHRC, 2013, pp. 134, 138, 141, 145, 148).

Data from the AHRC and its predecessor (the Human Rights and Equal Opportunity Commission), analysed by Van Gramberg et al., showed an 84 per cent increase in the total number of employment-related discrimination complaints under federal laws between 2004–05 and 2010–11 (Van Gramberg et al., 2014, pp. 425, 438–439).

The AHRC dealt with 45 per cent of the complaints it received in 2012–13 by conciliation, and terminated or declined a further 33 per cent; the remaining 22 per cent of complaints were withdrawn by the complainant, or discontinued by the agency on being satisfied that the complainant did not wish to proceed (AHRC, 2013, p. 129). Of the complaints dealt with through conciliation, 65 per cent were successfully resolved by this means (reflecting a conciliation success rate of 64–69 per cent over the previous five years) (AHRC, 2013, p. 131).

AHRC data on the timeliness of complaint resolution indicate that, against a target of 80 per cent of complaints to be finalized within 12 months of receipt, 95 per cent were resolved within that time in 2012–13, and that the average time from lodgement to finalization was 4.6 months (AHRC, 2013, p. 64).

Unsurprisingly, higher numbers of AHRC complaints are lodged in the more populous states (around 75 per cent of complainants in 2012–13 were from New South Wales, Victoria and Queensland). Just over one-fifth (22 per cent) of complainants were identified as overseas-born (although the actual proportion is likely to be higher, given that 49 per cent were classified as “unknown/unspecified” on this criterion); and 8 per cent of complainants were Aboriginal or Torres Strait Islanders (AHRC, 2013, pp. 131, 133).

2.5. Complementarity between dispute resolution institutions

As can be seen from the preceding sections of this chapter, the main federal dispute resolution bodies for individual employment claims each have fairly clearly delineated areas of responsibility. However, unavoidably, there is some overlap in the functions of a number of these tribunals/agencies, and in the types of claims that employees may be able to initiate under the various federal statutes.

Avoiding multiple claims

Certain types of individual employee complaints could be brought under one of a number of applicable statutes, or even under different provisions within the same legislation. Various statutory provisions apply to prevent employees from pursuing multiple claims simultaneously (or “double-dipping”), for example:

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- The FW Act prevents more than one claim being initiated by an employee in relation to his/her dismissal;⁷³ therefore an employee must choose to pursue either an unfair dismissal claim, or a general protections claim, or a complaint under federal, state or territory anti-discrimination legislation.
- An employee cannot pursue a non-dismissal-related general protections claim (e.g. alleged adverse action in the form of discipline or differential treatment on proscribed grounds) in a court, at the same time as pursuing an anti-discrimination claim based on the same alleged conduct.⁷⁴
- While employees are generally free to choose whether to pursue an anti-discrimination claim under applicable federal, state or territory legislation, once a decision is made to pursue a claim under one of those laws it is not possible to pursue simultaneous proceedings under another (Stewart, 2015, p. 293).

On the other hand:

- There is no prohibition on an employee pursuing an unfair dismissal or general protections claim in the FWC at the same time as a complaint relating to underpayment of wages or other minimum entitlements through the FWO.
- An application for an anti-bullying order under Part 6-4B of the FW Act may be pursued at the same time as action under applicable WHS legislation in relation to the alleged bullying.⁷⁵

Which “fair work” institution has responsibility or jurisdiction?

The 2012 review of the FW Act identified a considerable degree of confusion among workplace relations parties, stakeholders and the broader community arising from the similar names of Fair Work Australia (as the FWC was then known), the FWO and the Fair Work Divisions of the federal courts. This had resulted in problems such as the lodgement of an unfair dismissal claim with the FWO rather than the tribunal, as a result of which the applicant’s case was ruled out of time. The review panel therefore recommended that the words “Fair Work” be removed from the tribunal’s name (Australian Government, 2012, pp. 249–251).

The tribunal’s name was changed to FWC from 1 January 2013, but given the retention of “Fair Work” in the title the scope for confusion has not been entirely eradi-

⁷³ FW Act, secs 725–733: for discussion of case law on these provisions, see Rees, Rice and Allen, 2014, p. 798. The constraint on initiating another proceeding is lifted once the original claim is withdrawn, or fails for want of jurisdiction. However, a settlement of the original claim will invariably involve agreement on the part of the applicant not to pursue any other claim in relation to their employment (other than claims based on statutory workers’ compensation rights).

⁷⁴ FW Act, sec. 734.

⁷⁵ FW Act, sec. 789FH.

cated, particularly in respect of distinguishing between the tribunal and the FWO. The Productivity Commission, in its recent review of the FW Act, expressed an initial intention to reconsider this issue, pointing out: “Sometimes it can be hard for people to know which [institution] to turn to, as it can depend on the type of dispute at hand, or the nature of the remedy sought.”⁷⁶ However, the Productivity Commission’s draft report did not really address the nomenclature issue, focusing instead on reforms to address aspects of the FWC’s approach to certain areas of its jurisdiction and the manner in which its members are appointed (Productivity Commission, 2015a, Ch. 3).⁷⁷

There is also considerable overlap between the FWC and FWO in the area of providing education and advice about the FW Act and the federal system of workplace regulation. This duplication may have been exacerbated by the 2013 amendment to the FW Act (mentioned earlier in this chapter) clarifying that the FWC’s functions include the promotion of cooperative and productive workplace relations and preventing disputes.⁷⁸ Similarly, the FWO’s statutory role includes promoting “harmonious, productive and cooperative workplace relations.”⁷⁹ The expansion of the FWC’s role in these areas arises from another recommendation of the 2012 review panel, namely that both the tribunal and the Ombudsman develop an enhanced focus on fostering workplace productivity (Australian Government, 2012, p. 84).

While discussion of the implementation and implications of this change is beyond the scope of this chapter (see Stewart et al., 2014, pp. 269–280), to the extent that this new role of the FWC could involve preventing individual employment disputes, there is a risk that further overlap and duplication of FWO activities will develop. A potential solution would be to delineate more clearly the educative and dispute prevention functions of the two bodies, along the following lines:

- The FWO could provide general advice and information to employers, employees and unions about their employment rights and responsibilities (in addition to its main focus on compliance and enforcement).
- The FWC could undertake direct, hands-on engagement with industrial relations parties with the aim of improving employment relationships and preventing disputes (in addition to its existing dispute settlement functions).⁸⁰

Further examples of cooperation and complementarity between the federal institutions responsible for resolving individual employment claims are provided below.

⁷⁶ Productivity Commission, 2015c, p. 1. The Commission noted also the role of another “fair work” institution: Fair Work Building and Construction, the specialist regulator for the construction industry.

⁷⁷ See further section 2.7 below.

⁷⁸ FW Act, sec. 576(2)(aa).

⁷⁹ FW Act, sec. 682(1)(a).

⁸⁰ The FWC has already commenced undertaking these types of projects as part of its “Future Directions” engagement strategy, mainly by assisting parties involved in collective bargaining to adopt interest-based and collaborative negotiation techniques: see e.g. Bray and Macneil, 2015.

Labour inspectorate cooperation with other institutions

Informal arrangements exist between the FWO and FWC to ensure cross-referral of claims to the appropriate body, including regular meetings between officials of the two institutions (covering referral practices and information to be provided in response to queries from the public).⁸¹

Other forms of collaboration include the FWO's key role in identifying common problem areas in the operation of modern awards, to assist the FWC's four-yearly review of modern awards in 2014–15 (FWO, 2014, p. 23). The areas identified (e.g. penalty rates, award interaction with the NES) feature significantly in award non-compliance and therefore in underpayment claims being lodged with the FWO.

The FWO engages in continuous collaboration with several other federal bodies, including the AHRC (e.g. joint work on the AHRC's recent national review of the prevalence, nature and consequences of workplace discrimination on the basis of pregnancy and return to work from parental leave) (FWO, 2014, p. 23).

Recognizing the vulnerability of particular groups of workers, the FWO also works with trade unions and organizations such as “migrant resource networks, ethnic business groups, community legal centres, training providers, and others as critical contact points for both awareness-raising and whistleblowing” about breaches of minimum employment rights (Hardy, 2014, pp. 249, 261–262).

FWO dispute resolution functions

The FWO, although primarily a labour inspectorate, undertakes “assisted voluntary resolution” (AVR) and/or mediation of individual employment claims within its areas of jurisdiction (primarily, claims for underpayment of wages, leave entitlements and other employment conditions).⁸² These alternative dispute resolution methods have formed part of a broader shift in the agency's approach in recent years, in which the exercise of its “enforcement functions and powers have been downplayed, while [the FWO's] role in promoting voluntary resolution through advice, education and mediation has been accentuated” (Hardy, 2014, p. 258).

The AVR process is undertaken by fair work inspectors, and is an option made available to complainants upon lodgement of their complaint with the agency. AVR involves the inspector contacting the employee and employer separately by phone to discuss the complaint, and seeking to enable all parties to become better informed about the issues and possible solutions – but without the FWO undertaking underpayment calculations or proposing a resolution (Hardy, 2014, p. 263).

Complaints not resolved through AVR can be escalated to the Compliance Branch for investigation, but are more commonly referred to mediation. Mediations are conducted by accredited FWO mediators, in accordance with the agency's Medi-

⁸¹ Information provided to the author by the General Manager of the FWC.

⁸² The FWO's AVR/mediation processes are explained further below, and are not to be confused with the conciliation functions performed by the FWC in respect of individual employment claims within its jurisdiction (e.g. unfair dismissals, applications for anti-bullying orders, etc.).

ation Charter, with the aim of helping the parties to reach an agreed resolution of the complaint framed by the entitlements that are lawfully owed to the employee (Hardy, 2014, p. 264).

The data provided earlier in this chapter showed that almost two-thirds of complaints to the FWO are resolved through these dispute resolution processes. While this suggests a high level of efficiency and effectiveness, some questions have been raised in Hardy's research, including whether:

- through AVR, mediation and “self-help” processes, the FWO is meeting its goals of empowering employees, enhancing access to justice and improving compliance with workplace laws;
- it is “possible for the FWO to maintain neutrality and independence and still deliver fair outcomes, particularly where the dispute involves potential contraventions of basic legal rights and relates to those who otherwise lack agency and representation”;
- in “privatizing individual disputes”, the FWO can deliver the “collective benefits” which traditionally arose from trade union enforcement of minimum employment standards (Hardy, 2014, p. 265, and see further 264–273; also Landau et al., 2014).

There may also be a valid concern about the dilution of the primary role of fair work inspectors through their involvement in alternative approaches to complaint resolution. Hardy expresses this concern as follows:

While it is true that informal dispute resolution processes, such as conciliation and mediation, can be quick, inexpensive, flexible, and responsive, they also carry some particular risks For example, in a bid to meet time-based KPIs [key performance indicators], FWO staff conducting AVR and/or mediation may be inclined to seek a quick settlement rather than a fair solution which may require calculation of entitlements – a lengthy and time-consuming process (Hardy, 2014, p. 268).

In addition to the data already presented in this chapter, a comprehensive recent study of the FWO's operations confirmed that the agency played a pivotal role in the enforcement of employment standards in Australia over the period 2006–12. The increased use of litigation (from pre-2006 levels), and the FWO's high success rate in these cases, have been critical to its increased visibility as an active and effective regulator (Howe, Hardy and Cooney, 2014). Further, the FWO's role has become increasingly significant given the decline of union representation as the traditional bulwark against mistreatment of employees by employers (Howe, Hardy and Cooney, 2014; see also Landau et al., 2014). The study recommended several improvements that could be made to the FWO's enforcement approach, primarily increasing the level of enforcement action against corporate officers, HR managers and others involved as accessories to breaches of minimum standards (Howe, Hardy and Cooney, 2014).

2.6. Other trends and developments in individual labour disputes

Fair Work Commission

As indicated earlier in this chapter, implementation of the FWC's engagement strategy since 2012 has seen the adoption of a wide range of initiatives to improve the tribunal's operations and access to its services. The Commission's President, Justice Ross, explained the rationale for the engagement strategy in his Introduction to "Future Directions", as follows:

The [FWC] has endured by successfully adapting to changes in its legislative environment and because it provides an independent, competent and professional dispute resolution service.

But past performance does not guarantee future success. Even successful institutions have a tendency to decline unless they continue to innovate.

This document – "Future Directions" – sets out the 25 new initiatives we intend to implement over the next 12 months. These initiatives are directed at improving our performance and the quality of the service we provide. The initiatives are grouped thematically:

- Promoting Fairness and Improving Access;
- Efficiency and Innovation;
- Accountability; and
- Productivity and Engaging with Industry. (Fair Work Australia, 2012, p. 1)

A second phase of the strategy was initiated in 2014 (FWC, 2014d). The most relevant initiatives for present purposes are those in the first three categories above.

Promoting fairness and improving access

The initiatives in this area have responded to the considerable increase in individual rights claims coming before the tribunal, and have included:

- improving the information provided to self-represented parties (employees and employers) in unfair dismissal and general protections cases;
- providing a "virtual tour" of the tribunal online, and simplifying the FWC's forms and processes;
- publishing a "fair hearings practice note" and "benchbooks" to assist parties involved in unfair dismissal, general protections and anti-bullying cases;⁸³
- facilitating access to pro bono legal services. (Fair Work Australia, 2012, pp. 2–4; FWC, 2014a, pp. 105–107)

⁸³ See also <https://www.fwc.gov.au/about-us/resources/fact-sheets-guides> and <http://benchbooks.fwc.gov.au/benchbooks/> [accessed 5 Mar. 2016].

The following three projects, implemented by the FWC to improve access to justice for unrepresented litigants, were independently reviewed by the Centre for Innovative Justice (CIJ) at RMIT University:

- a three-day cooling off period for unrepresented parties following the conciliation of unfair dismissal claims, giving these parties time to seek advice before committing to a settlement outcome;
- a pilot programme for the provision of independent legal advice to self-represented applicants in general protections matters through the Employment Law Centre of Western Australia (this resulted in 76 per cent of these claimants amending or withdrawing their claims);
- engagement with providers of pro bono legal services (including commercial law firms) to extend the availability of legal advice to self-represented parties in jurisdictional objections to unfair dismissal claims.

Overall, the CIJ's reports showed that through these pilot programmes the FWC has taken important steps to improve the capacity of unrepresented parties to assert their rights in unfair dismissal and general protections cases under the FW Act (CIJ, 2013a, b, c).

Efficiency and innovation

The FWC's initiatives in this area have included:

- the introduction of timeliness benchmarks for issuing decisions and the handling of certain types of cases (see data reported earlier in this chapter);
- enabling applications to the tribunal to be lodged online;
- sending alerts by text message (SMS) to participants in unfair dismissal conciliations, to increase attendance rates (FWC, 2014a, pp. 108–109).

Increasing accountability

The main initiative in this area has been the introduction, in July 2012, of a member code of conduct (updated on 1 March 2013).⁸⁴ The code outlines the required standards of behaviour of FWC members, including impartiality; the avoidance of conflicts of interest; independence; and integrity. The code also provides a process for the handling of complaints in relation to members' conduct. Eight such complaints were notified in 2013–14, along with 20 complaints about unfair dismissal conciliations, 12 complaints about matter outcomes and two regarding timeliness of FWC processes (FWC, 2014a, table 36, p. 88).

⁸⁴ See <https://www.fwc.gov.au/documents/documents/resources/MemberCodeConduct.pdf> [accessed 6 Mar. 2016]. See also FWC, 2014a, p. 110, indicating that the FWC would over the following two years have its performance evaluated against the International Framework for Tribunal Excellence: <http://coat.gov.au/publications/frameworks/list.html> [accessed 14 Feb. 2015].

Fair Work Ombudsman

The FWO's shift in overall direction, away from harder-edged enforcement and towards proactive compliance initiatives, has been mentioned several times already in this chapter. To explain further, since early 2013 the FWO's past practice of detailed investigation of all workplace complaints received has been superseded by a "strategic enforcement" model in which efforts are made to resolve issues between the parties at the workplace level (Hardy, 2014, p. 260). In addition to the use of AVR to process and resolve many complaints, the new strategic enforcement approach has seen increased emphasis on the educative and advisory aspects of the FWO's role (Hardy, 2014, p. 261), e.g. through the online tools, proactive education campaigns and outreach programmes discussed above.

2.7. Conclusion

The then President of the Australian Industrial Relations Commission wrote in 2008 that: "As the custodians of community notions of fairness, industrial tribunals have a significant and important role to play in both redressing injustice and promoting harmony" (Giudice, 2008, p. 243). That reputation – the notion of the "industrial umpire" – is strongly entrenched in the Australian psyche. It is reflected in the development of a network of federal, state and territory tribunals and agencies with complementary roles in the resolution of disputes over a wide range of individual employment rights. These institutions generally enjoy strong public respect, largely owing to their independence, impartiality and efficiency.

The assessment of the Australian dispute settlement framework arrived at by the present author in 2012 remains apposite today:

Overall the Fair Work system, with [the FWC] at its core, meets international standards of best practice for the resolution of disputes over individual employment rights and disputes over interests. The creation of [the FWC] can be seen as the latest chapter in the story of the survival of independent, state-sponsored workplace conflict resolution in Australia. (Forsyth, 2012, p. 489; see also pp. 486–489)

The FWC has done much in the last few years to improve its responsiveness to users and to assist the increasing numbers of unrepresented parties coming before it in individual rights cases.

The FWO has undergone a fundamental shift since 2013, adopting a strategic enforcement model with a firm emphasis on resolving disputes such as underpayment claims at the workplace level. However, the FWO does still undertake harder-edged enforcement as well (especially in cases involving vulnerable workers).

The AHRC is noticeably slower at resolving complaints than the other bodies examined in this chapter. On the other hand, it is arguably a testament to the overall speed of individual claim resolution in Australia that the AHRC's timeframes compare quite well with those of some dispute resolution agencies in other countries.

Looking ahead, the recent Productivity Commission review of Australia's workplace relations system has included recommendations for change to institutional arrangements – particularly the role and powers of the FWC. The chief focus of this inquiry was upon the FWC's minimum wage-setting and collective bargaining functions (Productivity Commission, 2015d, e; 2015a, Chs 8, 15). The Commission's draft report also included recommendations on several aspects of the FWC's jurisdiction examined in this chapter, including:

- unfair dismissal: the Productivity Commission recommended that the FWC be given discretion to deal with more unfair dismissal claims “on the papers” rather than in conciliation conferences, and proposed an increase in lodgement fees for these claims (Productivity Commission, 2015a, Ch. 5);
- general protections: it was recommended that a cap be imposed on the compensation available in general protections claims, and that discovery processes for these claims be reduced in scope (Productivity Commission, 2015a, Ch. 6).

The Productivity Commission also explored the performance, resourcing and effectiveness of the FWC and FWO (2015c, pp. 2–3). In its draft report, the Commission found that: “The FWO is undertaking its education, compliance and enforcement activities in an effective and innovative manner. It is essential to the credibility of any future systemic reforms that sufficient resourcing is provided for the FWO” (2015a, p. 129). In relation to the FWC, the Productivity Commission's findings were less positive:

Elements of the Fair Work Commission's (FWC's) conciliation activity are also often well regarded. However, the FWC's emphasis on legal precedent rather than analysed impact, and a continued attachment to historically anomalous decisions is restricting its development as an effective institution. Inconsistencies in cases of individual disputes have also been identified. (2015a, p. 129)

The Productivity Commission therefore recommended that the FWC be split into a research and analysis-based “Minimum Standards Division”, to set the minimum wage and oversee the system of modern awards, and a “Tribunal Division”, to hear and determine cases relating to unfair dismissal, general protections, workplace bullying and collective labour relations issues (2015a, Ch. 3). It also recommended that in future, members of the FWC be appointed for fixed, five-year terms (rather than until the current statutory retirement age of 65); and that appointees be drawn from a wider range of backgrounds through a merit-based process (rather than mostly being appointed from employer, union and government ranks, as is presently the case) (2015a, Ch. 3).

Most of these proposals were also included in the Productivity Commission's final report, released in November 2015 (with the major difference that the proposal to split FWC functions into a Minimum Standards and a Tribunal Division became a proposal to establish a new body called the Workplace Standards Commission to operate alongside the FWC) (Productivity Commission, 2015f). However, the Coalition

Government of Prime Minister Malcolm Turnbull did not seek to implement dramatic changes to Australia's workplace relations framework in the lead-up to the federal election, and it does not seem, as yet, that the re-elected Coalition Government is inclined to do so. Overall, then, the individual employment dispute resolution processes which have long served the Australian community well are likely to remain in place for the foreseeable future.

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3. Canada

Stéphanie Bernstein

3.1. Introduction

In Canada, “individual labour disputes” are not defined by law, but include disputes concerning allegations of non-compliance with minimum employment standards (relating to matters such as wages, hours of work, holidays, termination notice and pay, access to different types of maternity, parental, family and illness leave etc.); of reprisals for exercising labour rights under various statutes; of discrimination and harassment in the workplace; and of wrongful termination of employment. They also include instances of alleged non-compliance with these individual rights under collective bargaining agreements: in such cases the term “grievance” is used.

Canada has a federal system, although institutions, mechanisms and processes for preventing and resolving individual labour disputes are similar across the different jurisdictions.¹ Canadian labour and employment legislation is characterized by a high level of fragmentation, in particular for employees not represented by a union. This chapter does not provide an exhaustive explanation of the recourses and remedies available to non-unionized workers; however, it can be said that dispute resolution mechanisms are much more unified for unionized employees. Under Canadian labour law, unions have a duty to represent their members in disputes with employers. If the dispute cannot be resolved, it can be brought before a grievance arbitrator who has the power to interpret and apply not only the collective bargaining agreement, but also specific statutes dealing with workplace issues (e.g. employment standards legislation, or human rights legislation for discrimination issues).

In the absence of a union, employees must generally fend for themselves, and this entails confronting an often confusing mix of laws, government agencies and decision-making bodies (Bernstein, 2008). Separate laws concern different issues, resulting in the possibility of having to treat with several different agencies and decision-making bodies, even if the dispute seemingly arises from a single situation within an employment relationship. For instance, an injured worker may have to deal with one agency

¹ The Quebec model described here does, however, differ in some respects from the models in other provinces and territories and the federal model. It should also be noted that Quebec is the only civil law jurisdiction in Canada while all the others are common law jurisdictions.

regarding workers' compensation and an allegation of illegal dismissal due to the injury, but will have to deal with another if he or she has not received all sums otherwise owed by the employer (wages, vacation pay, severance pay, etc.). The focus here is on individual dispute resolution in the case of employees who have limited individual or collective bargaining power.

Constitutional rules governing the division of powers in Canada provide that the legislative power in the area of labour, and of social policy more broadly, belongs to the provinces and territories, subject to the federal legislative power to govern labour in undertakings or businesses whose activities fall under federal jurisdiction, and subject to federal legislative jurisdiction in the area of unemployment insurance.² Provincial and federal legislative powers with respect to labour law are therefore mutually exclusive. Approximately 90 per cent of the Canadian labour force is governed by provincial labour laws (Arthurs, 2006, p. 8). Besides the federal public administration, workplaces subject to federal labour jurisdiction include: international and interprovincial rail, road, air and maritime transportation; radio and television broadcasting, including cablevision; postal service; telecommunications; banking; grain elevators and feed and seed mills; nuclear facilities; federal Crown corporations; and Aboriginal governments and social services. This chapter examines some of the institutions and mechanisms for the prevention and resolution of individual labour disputes in the two most populous Canadian provinces, Quebec and Ontario, and in workplaces subject to federal jurisdiction.³

The first part of this chapter presents a snapshot of the labour force, in order to contextualize individual dispute prevention and resolution in Canada. We then look at the legal frameworks of individual labour dispute prevention and resolution mechanisms with respect to minimum employment standards in the three jurisdictions; prevention and proactive enforcement of these standards; and the particular case of recourse for wrongful dismissal. Next, an example from Quebec of a sectoral mechanism for dispute resolution, the decree system, is explained; this is followed by short discussions of grievance arbitration for unionized employees, and of the absence of

² The Constitution recognizes the exclusive legislative powers of the provinces regarding property and civil rights and matters of a merely local or private nature (Constitution Act 1867, 30 & 31 Victoria, Ch. 3 (UK) sec. 92, paras 13 and 16), while the powers of the federal Parliament are limited to certain enterprises and undertakings (secs 91 and 92, para. 10) and to the field of unemployment insurance (sec. 91, para. 2A). There are thus 14 jurisdictions responsible for labour and employment law in Canada: ten provinces (Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island, Quebec and Saskatchewan), three territories (Northwest Territories, Nunavut and Yukon) and the federal jurisdiction.

³ It should be noted that no interviews or surveys were conducted for this research to validate our interpretation and understanding of the legislation and government documentation. See a recent article discussing two case studies on employment standards enforcement in Quebec (Gesualdi-Fecteau and Vallée, 2016), as well as the website of a multidisciplinary research project funded by the Canadian Social Sciences and Humanities Research Council on employment standards in Ontario that was ongoing at the time of writing entitled "Closing the employment standards enforcement gap: A research initiative on improving protections for people in precarious jobs": <http://closeesgap.ca/> [accessed 3 May 2016].

formally regulated workplace dispute mechanisms in the jurisdictions studied. Civil recourses and private arbitration are then briefly examined. We then look at the performance of these mechanisms and processes and the extent of complementarity and interaction among them. The chapter concludes with a look at some current trends and developments in the resolution of individual labour disputes.

3.2. The Canadian labour force: A snapshot

According to the 2011 National Household Survey (Statistics Canada, 2013)⁴, around 18 million people aged 15 years and over were in the Canadian labour force that year, with a participation rate of 61 per cent (75 per cent for the population aged 25–64 years) and an unemployment rate of approximately 8 per cent. The retail trade sector ranked first, representing 11.5 per cent of employment, followed by the health care and social assistance sector (11.4 per cent), the manufacturing sector (9.2 per cent), the education sector (7.5 per cent) and public administration (7.3 per cent). Women represented 48 per cent of the employed labour force, their most common occupations being retail salesperson (4.7 per cent of all employed women) and administrative assistant (4 per cent). Men's most common occupations were retail salesperson (3.3 per cent of all employed men) and truck driver (2.9 per cent).

Not only do the vast majority of Canadian employees work in the service sector, but 70 per cent work for small and medium-sized businesses (up to 99 employees), and over a third in businesses with fewer than 20 employees (Industry Canada, 2013, tables 4 and 5). It should, however be noted that in federal labour jurisdiction workplaces, 90 per cent of employees work for companies with 100 or more employees (HRSDC, 2010).⁵ This is in sharp contrast to the countrywide statistics for Canada, which indicate that only 30 per cent of employees work for companies with 100 or more employees. Although 80 per cent of enterprises under federal jurisdiction have fewer than 20 employees, the total number of employees in these companies is thus relatively small.

The public administration sector and the broader public sector (education, health, etc.) at the federal, provincial, territorial and municipal levels show a high rate of unionization in comparison to employees in the private sector. Public employees are governed by a series of different laws according to jurisdiction, to level of government and to subsector within the public service. Grievance arbitration is the main mechanism for individual dispute resolution, except in the case of managers and certain categories of workers who are excluded from collective bargaining agreements and the grievance procedure. These groups of employees are excluded from the scope of this chapter.

The unionization rate is relatively high in Canada (see table 3.1) in comparison to its neighbour, the United States (10.8 per cent), and the average for OECD countries (16.7 per cent) (ISQ, 2014), although it has fallen by 15 per cent for men since the early

⁴ The last five-year national census was conducted in May 2011 and included the National Household Survey.

⁵ The results from a more recent federal jurisdiction workplace survey were not available at the time of writing.

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1980s, while remaining stable for women (Statistics Canada, 2015).⁶ Unionization generally takes place at the firm level, as does collective bargaining. Once a union has been certified for a group of workers, it has a monopoly on the representation of the employees included in its bargaining unit. The difference in unionization rates between the private and public sectors in Canada is noteworthy, with the public sector showing a high rate of union density, as mentioned above. In the statistics presented in table 3.1, the public sector includes not only federal and provincial public administrations (the public service strictly defined), but also the public education, health and social service sectors.

Table 3.1. Unionization rates in Canada, 2014

Jurisdiction	Sector	Unionization (%)
Quebec	Total	39.7
	Private sector	25.2
	Public sector	81.4
Ontario	Total	27.4
	Private sector	14.6
	Public sector	70.5
Canada	Total	30.9
	Private sector	17.0
	Public sector	74.4

Source: Labrosse, 2015 (data from Statistics Canada, 2015, table CANSIM 282-0078, agricultural sector excluded).

Union presence also varies widely in Canada by province, with Quebec having the highest rate and Ontario the second lowest among all the provinces. Rates also vary considerably by industry, being relatively high in the Canadian education, public administration, public utilities and health sectors, and very low in retail trade (Uppal, 2011). Union density also varies with size of firm or organization. In 2011, firms with fewer than 20 employees had a unionization rate of 14.5 per cent, those with 20–99 employees had a rate of 32.3 per cent, while those with 100–500 employees and more than 500 employees had rates respectively of 42.8 per cent and 56 per cent (Uppal, 2011).

The unionization rates shown in table 3.1 are not calculated with reference to whether the employees concerned are subject to provincial or federal legislation; they therefore refer to employees covered by both federal and provincial laws. It should, however, be noted that a relatively large percentage – 41 per cent (56 per cent if the banking

⁶ The reasons for the decline in the unionization rate for men include a shift from employment in sectors with high unionization rates, such as construction and manufacturing, to employment in sectors with low rates, such as retail and professional services, as well as changes within industries and occupations. The unionization rates for women can be explained by their strong presence in sectors such as health care, education and public administration.

sector, which represents 27 per cent of workers in federal workplaces, is excluded) – of employees under federal jurisdiction (outside the federal public administration) are covered by collective bargaining agreements (HSDRC, 2010). Large companies (more than 100 employees) show a high unionization rate (45 per cent), particularly in postal services and pipelines (84 per cent), rail transport (78 per cent) and air transport (66 per cent); in the banking sector, however, it is negligible (1 per cent).

This outline of the Canadian workforce sets the context for the following discussion of individual dispute prevention and resolution mechanisms. While the unionization rate in Canada is relatively high, a breakdown of union presence shows it to be quite high in public administration and in the broader public service, but very low in the private service sector. This lack of voice in the workplace makes the existence of prevention and resolution mechanisms that do not rely on union presence essential for individual employees. A very large percentage of employees in Canada, outside the public sector, also work for small to medium-sized firms. The literature shows that there is a positive correlation between smaller firm size and labour law violations, in particular employment standards violations (see e.g. Bernhardt, Spiller and Theodore, 2013).⁷ Non-standard employment, an indicator of precariousness (Cranford and Vosko, 2006), is also linked to non-compliance with minimum employment standards (Dumaine and Perreault, 2014; Vosko, 2013), and is prevalent in Canada: in Quebec, for example, over one-third of workers are part-time permanent or temporary employees, full-time temporary employees or solo self-employed (Cloutier-Villeneuve, 2014, p. 19). All these factors can have an influence on the effectiveness of individual dispute prevention and resolution.

3.3. State intervention in individual labour dispute prevention and resolution mechanisms

Minimum employment standards

The importance of employment standards legislation in providing a minimum floor of protection for employees has been reaffirmed on several occasions by the Supreme Court of Canada.⁸ Over time, the scope of this legislation has been broadened, going far beyond provisions on wages and hours to include, depending on the jurisdiction, the regulation of maternity, parental and family leave; statutory holidays and vacations; individual and group termination notice and pay; protection against reprisals; and other areas. The three jurisdictions studied all exclude, totally or partially (e.g. from overtime pay provisions), limited categories of employees from employment standards legislation, although the number of these exclusions has diminished with successive

⁷ This is also confirmed by a survey carried out by the Quebec Commission des normes du travail: CNT, 2011.

⁸ See e.g. *Machtiger v. HOJ Industries Ltd*, [1992] 1 SCR 986 (Supreme Court of Canada); *Syndicat de la fonction publique du Québec v. Québec (Attorney General)*, 2010 SCC 28 (Supreme Court of Canada). Case law cited in this chapter can be consulted online at www.canlii.org.

reforms and total exemptions of employees are relatively few.⁹ In Quebec, protection against unjust dismissal after two years of continuous service with the right to reinstatement provides a modicum of job security under the Labour Standards Act, and special recourse exists in the case of psychological harassment. Although there is no statutory protection against unjust dismissal in Ontario in the Employment Standards Act, other provisions afford specific protection, absent in Quebec legislation, for particular groups of workers, such as those who work for temporary employment agencies. Both provinces have substantially revised their legislation in the past ten or so years.

The 2008 federal workplace survey showed that only 6 per cent of employees in Canada were covered by Part III of the Canada Labour Code (CLC), the legislation guaranteeing rights and remedies with respect to minimum employment standards for workers (outside the public administration) without union representation under federal jurisdiction (HRSDC, 2010). The federal legislation also provides job protection in the case of unjust dismissal after one year of continuous service with the right to reinstatement. The Code has not been revised in any substantial way since its entry into force in 1965, even though there have been insistent calls for its modernization. In 2005, the Commission for the Review of Federal Labour Standards undertook wide-ranging research and public consultations with the goal of modernizing Canada's labour standards, and more specifically Part III of the CLC. In 2006, the Commission released its report, entitled *Fairness at work: Federal labour standards for the 21st century* (Arthurs, 2006); this document, known as the Arthurs Report, contained a series of recommendations which have, for the most part, not been implemented.

Quebec

Up to January 2016, the Quebec Labour Standards Act (QLSA) was administered and applied by the Commission des normes du travail (CNT), a government agency separate from the ministry responsible for labour and financed by employer contributions based on a percentage of the employer's payroll.¹⁰ In June 2015, important changes were made to the structure of the agencies responsible for labour administration in Quebec. Legislation was adopted to join three agencies to create a single agency mandated to administer four important workplace-related statutes: on employment standards (the Labour Standards Act), workplace health and safety, workers' compensation, and pay

⁹ For exclusions under the Ontario Employment Standards Act, Statutes Ontario 2000 (SO), Ch. 41 (OES0041), see sec. 3 and Ontario Regulation 285/01 Exemptions, Special Rules and Establishment of Minimum Wage; also Ministry of Labour, "Industries or jobs with exemptions or special rules", available at: <http://www.labour.gov.on.ca/english/es/tools/srt/index.php> [accessed 11 Mar. 2016]. For Quebec, see in particular Labour Standards Act, Compilation of Quebec Laws and Regulations (CQLR), c N-1.1 (QLSA), secs 3 and 54; Regulation Respecting Labour Standards, CQLR, c N-1.1, r 3; and CNT 2015, pp. 21–31. For federal jurisdiction workplaces, see the Canada Labour Code (Part III), Revised Statutes of Canada (RSC), 1985, Ch. L-2 (CLC Part III), sec. 167. All Canadian provincial, territorial and federal laws and regulations are available online at www.canlii.org.

¹⁰ QLSA, secs 6, 8, 39.0.1–39.0.5.

equity.¹¹ The new agency, the Commission des normes, de l'équité, de la santé et de la sécurité du travail (CNESST), began functioning in January 2016 and has replaced the CNT.

The new legislative provisions are short on details as to how the new agency will operate with respect to the distribution of resources for the application of each statute and as to the services provided to workers and employers to fulfil the legislated mandates of the agencies being replaced, since these mandates remain essentially unchanged with the modifications. In employment standards matters, the CNESST continues to have the same legislative mandate as the CNT: to inform employees and employers of their rights and obligations under the Act, as well as to disseminate information on employment standards to the population at large; to supervise the application of labour standards and make recommendations to the minister responsible for the Act with respect to these standards; to receive complaints from employees, investigate complaints and claim monies on their behalf, and represent them before the appropriate decision-making body; and to facilitate the reaching of agreements between employees and employers.¹²

During the consultation process on the Bill, concerns were expressed by several workers' advocacy organizations over the potential impacts of the changes regarding the effective application of employment standards legislation. In particular, they questioned the objective of amalgamating these organizations for primarily budgetary reasons without having examined in detail the possibility that the creation of the new agency might have the effect of curtailing or eliminating certain services and administrative initiatives to improve the exercise of workers' rights.¹³

The QLSA provides for recourse for employees in the case of four types of individual employment dispute: monetary and administrative complaints, reprisals by the employer, psychological harassment, and unjust dismissal of employees with two or more years of continuous service.¹⁴ Employees who are represented by a union must, with some limited exceptions, use the recourses provided by their collective bargaining agreements (see section 3.5 below).

¹¹ An Act to group the Commission de l'équité salariale, the Commission des normes du travail and the Commission de la santé et de la sécurité du travail and to establish the Administrative Labour Tribunal, Statutes of Québec 2015, Ch. 15 (consolidated version: An Act to establish the Administrative Labour Tribunal, CQLR c T-15.1).

¹² QLSA, secs 5, 98–121, 123–126.1.

¹³ See e.g. *Journal des débats de la Commission de l'économie et du travail. Version préliminaire*, 41st Legislature, 1st Session, 14 May 2015 (available at: <http://www.assnat.qc.ca/fr/travaux-parlementaires/commissions/cet-41-1/journal-debats/CET-150514.html> [accessed 11 Mar. 2016]); Au bas de l'échelle, 2015.

¹⁴ An additional provision introduced into the QLSA in 2002 provided recourse for employees who considered that their employee status should be maintained when an employer made changes converting them into "independent contractors" when in fact they were not (sec. 86.1). This legislative attempt to curb disguised employment relationships has been a singular failure from the employee's perspective. The handful of decisions rendered under this provision since its entry into force have essentially reaffirmed the right of employers to organize their workforces as they see fit.

Monetary and administrative complaints

In 2010, the CNT (now the CNESST) carried out a telephone survey of 4,003 workers (CNT, 2011) to determine whether employers were violating the law with respect to a series of employment standards relating to payment (minimum wage, gratuities, overtime, pay slips, vacation pay, remuneration during training), statutory holidays, probation periods, meal breaks and meetings outside normal working hours.¹⁵ Fifty-eight per cent of respondents replied that they had been the victims of at least one violation of the Act. The highest number of violations related to vacation pay (47 per cent), overtime compensation (37 per cent) and non-payment of wages when required to be available to work during a meal break (28 per cent). Seventeen per cent of respondents replied that they had been the victims of two or more violations, and 11 per cent of three or more violations. While the number of violations of the Act appears to be relatively high, in 2013–14 only an estimated 17,000 complaints were filed (CNT, 2014, p. 48). Violations are in general found to be more prevalent in certain forms of non-standard employment (temporary and permanent part-time work and full-time temporary work) (Dumaine and Perreault, 2014).

Monetary complaints and administrative complaints (e.g. violations with respect to pay slips) must be filed using the CNESST's website or by telephone within one year of a violation of the law.¹⁶ They can be filed by the employee or by a "non-profit organization dedicated to the defense of employees' rights". This latter possibility allows for an intermediary to deal with the CNESST. There are, however, no statistics available on the number of complaints filed through such organizations. Complaints are confidential, unless employees consent to their names being revealed to their employers. The CNESST has an obligation to investigate a complaint, but can refuse to continue an investigation if it determines that the complaint is frivolous, made in bad faith or unfounded. A request to review a refusal can be made in writing; the number of refusals to pursue an investigation is relatively low (approximately 1,000 in 2013–14) and the vast majority (about 75 per cent) of such decisions are maintained (CNT, 2014, p. 54). An investigator has broad powers and is entitled to enter any workplace (including private dwellings¹⁷) at a reasonable hour, to request and examine any relevant documents, and to interview employers and workers.

The Act does not provide for mediation between an employer and a worker in the case of monetary and administrative complaints. However, the majority of complaints

¹⁵ The workers were surveyed from a random sample of 49,317 telephone numbers drawn from a population of close to 1.3 million non-unionized employees aged 15 years and over covered only by the QLSA (i.e. not unionized or covered by another law). The results were analysed taking into account regional differences, sex, age and industrial sector.

¹⁶ See QLSA, secs 98–121, concerning the filing of complaints, investigation of complaints, review of refusals to pursue a complaint and the role of the CNESST in claiming monies due.

¹⁷ *Comité paritaire de l'industrie de la chemise v. Potash*, [1994] 2 SCR 406 (Supreme Court of Canada). The court decided that the social objectives of the legislation (in this case the Act Respecting Collective Agreement Decrees – see section 3.4 below) were such that inspection of a private dwelling in an employment context does not constitute unreasonable search or seizure under the Constitution or infringe privacy rights.

(70 per cent) are settled without the intervention of the CNT's legal affairs department and do not go to court. Also, about 20 per cent of complaints are withdrawn by employees (CNT, 2014, p. 101). In total, 81 per cent of files are closed without the intervention of legal affairs (CNT, 2014, p. 48). The legal affairs department becomes involved when the investigator has established a claim against an employer and the employer refuses to pay the amount owing, in part or in whole. Complaints that are resolved without the participation of legal affairs are settled or closed for other reasons within an average of 51 days (2013–14: CNT, 2014, p. 101). Once legal affairs has become involved, the amount of time taken either to reach an out-of-court settlement or to get a judgment is considerably longer (563 days in 2012–13 and 939 days in 2013–14: CNT, 2014, p. 48). It should be noted that, contrary to the procedures in the two other jurisdictions, monetary claims under the Act go directly before the civil courts. Once legal affairs is involved, another 43 per cent of claims are settled out of court (CNT, 2014, p. 101).¹⁸

These statistics, drawn from the CNT's 2013–14 report, merely quantify the number of complaints filed and closed, and do not provide any information on the quality of settlements. Since the minimum employment standards contained in the Act are matters of "public order" (or mandatory public policy),¹⁹ the amounts obtained should represent what is owing according to the Act, but sufficient information is not available on the stage of the investigator's inquiry at which complaints are settled, on the degree of evidence obtained to establish the claim, and on the content of the settlement, to enable us to confirm that this is the case. Also, most employees file claims when they are no longer working for the employer concerned (see e.g. Gesualdi-Fecteau and Vallée, 2016, p. 373). This is also true in Ontario (Gellatly et al., 2011, p. 92).

Recourse against employer reprisals

The QLSA provides recourse against reprisals and illegal practices carried out by employers for a number of reasons, including exercise of a right under the Act (26 per cent of complaints in 2013–14: CNT, 2014, p. 103), providing information to the CNESST, or testifying, during an inquiry (4 per cent), pregnancy (6 per cent) and absence due to illness (38 per cent).²⁰ Reprisals can take the form of dismissal, suspension or any other type of retaliation. Employees must file a written complaint within 45 days of the reprisal. Once the complaint is determined by the CNESST to be admissible (filed within the time limit, constitutes a reprisal as defined by the Act, etc.), the employee is offered the services of a mediator to try and settle the complaint; there is

¹⁸ Some of these claims are settled at the same time as complaints for prohibited practices, psychological harassment or unjust dismissal.

¹⁹ QLSA, sec. 93. The term "public order" refers to public interest legal provisions that are mandatory and cannot be contracted out of (e.g. a work contract cannot legally stipulate that an employee renounces payment for statutory holidays).

²⁰ For a complete list see QLSA, secs 122 and 122.1. It should be noted that reprisals in the case of pregnancy or illness may equally fall under the purview of human rights legislation in Quebec and complaints could also be filed with the Quebec Commission des droits de la personne et des droits de la jeunesse.

no inquiry by an investigator as to the validity of the case. The employee may choose to refuse this service.

Mediators are employees of the CNESST, have been specifically trained and are bound by a code of ethics.²¹ This code of ethics defines mediation as “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”, and the role of the mediator as “to help the parties (the employee and the employer) to reach an agreement within the framework of the Act respecting labour standards and its regulations”. In particular, the mediator must:

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 decisions²² 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.²³

The mediation process in Canada is confidential, and a mediator cannot be compelled to testify about the exchanges during mediation except to confirm that an agreement has or has not been reached.²⁴ The parties can be represented by a lawyer during mediation, but at their own expense. If a settlement is reached by the parties, it has the same effect as a judgment²⁵ and the agreement will most often provide that it is strictly confidential.

If a settlement is not reached, the worker can request that the complaint be referred to the Administrative Labour Tribunal (ALT) (before January 2016, the Commission des relations du travail (CRT)), a specialized labour tribunal.²⁶ At this stage, mediation (known as “pre-hearing conciliation”) is again offered to try to settle the complaint. This mediation service is free – as it is at the CNESST – and the medi-

²¹ CNT, “Rules of ethics: Mediation” (available at: http://www.cnt.gouv.qc.ca/fileadmin/pdf/publications/c_0200a.pdf [accessed 11 Mar. 2016]).

²² The mediator does not make recommendations to the parties, per se, but helps the parties “find avenues that will lead to a settlement”: CNT, “Mediation: A free service to help you rapidly settle a dispute” (available at: http://www.cnt.gouv.qc.ca/fileadmin/pdf/publications/c_0108a.pdf [accessed 11 Mar. 2016]).

²³ CNT, “Rules of ethics: Mediation”.

²⁴ *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35 (Supreme Court of Canada).

²⁵ Quebec Civil Code, CQLR c C-1991, sec. 2633.

²⁶ If a complaint has been judged inadmissible by the CNESST and a request for review of the decision denied, the complaint can be referred directly to the ALT by the complainant. In this case, he or she will not have access to the free services of a CNESST lawyer.

ators are specially trained labour relations officers in the employ of the ALT. Normally, the employee will be represented, without charge, by a lawyer from the CNESST's legal affairs department. If no settlement is reached, the case will be heard by an administrative judge at the ALT and the complainant will be represented by a lawyer from the CNESST. The onus of proving that the reprisal did not arise from one of the prohibited grounds in the Act rests on the employer. The hearings are public and the proceedings are oral. Administrative judges are not bound by the general civil rules of evidence and can hear any evidence they determine to be necessary to reach a decision (CRT, 2010). In the case of recourse for reprisals, the ALT can order only reinstatement and back pay, which is much more limited redress than the remedies available in the cases of psychological harassment and unjust dismissal (see below). The judge's decision can be reviewed or revoked by another judge from the ALT, but the grounds for doing so are strictly limited.²⁷

The legislative changes that came into effect in January 2016 have abolished the CRT and joined it with the tribunal that hears cases under workers' compensation and health and safety legislation, the Commission des lésions professionnelles.²⁸ The new tribunal, the ALT, has four sections, one of which deals with labour relations, including employment standards. It is still too early to tell whether the creation of this new tribunal will substantially change the way in which pre-decisional conciliation and adjudication are organized.

In 2013–14, the CNT (now the CNESST) closed 3,600 complaints without referral to the CRT (now the ALT), and 1,177 files were closed after being referred. Of the files closed without referral, 19 per cent of complaints were withdrawn (for reasons that are not publicly available), 23 per cent were determined to be inadmissible, 53 per cent were settled, and 5 per cent were closed and referred to the CRT by the complainant. Of the cases referred to the CRT and represented by the CNT, 73 per cent were settled before the hearing, 12 per cent were withdrawn by the complainant (reasons not available), 5 per cent were decided in favour of the employer, and 2 per cent were decided in favour of the complainant (CNT, 2014, p. 104). Of the 4,777 files closed in 2013–14 by the CNT, only 82 actually reached the adjudication stage. Files that were not referred to the CRT were closed (settled or otherwise) within an average of 57 days, while those that were referred were closed after an average of 494 days without adjudication and 619 days with adjudication. The length of proceedings is no doubt a motivating factor to settle out of court.

Recourse in the case of psychological harassment

Since 2004, the Act affirms the principle that all employees have the right to a work environment free from psychological harassment and imposes an obligation on the

²⁷ Quebec Labour Code, CQLR c C-27, sec. 127.

²⁸ An Act to group the Commission de l'équité salariale, the Commission des normes du travail and the Commission de la santé et de la sécurité du travail and to establish the Administrative Labour Tribunal, LQ 2015, Ch. 15, secs 1ff.

employer to prevent such harassment and to put a stop to it when they are aware of it.²⁹ It further states that recourse is available to employees who claim to have been victims of psychological harassment.³⁰ While such recourse has existed since the early 1980s through the Quebec Commission des droits de la personne et droits de la jeunesse in cases of discriminatory harassment on the basis of grounds enumerated in the Quebec Charter of Rights and Freedoms (race, colour, sex, pregnancy, sexual orientation, civil status, age, religion, political convictions, language, ethnic or national origin, social condition, handicap),³¹ there was previously no specific remedy for “non-discriminatory” harassment. The provisions in the QLSA apply to both discriminatory and non-discriminatory harassment, and do not require that an employee must have a specified period of continuous service to be able to exercise his or her rights (this is also true for the provisions concerning reprisals explained above).

A complaint must be filed with the CNESST within 90 days of the last manifestation of the harassment. Unlike the procedure for recourse in the case of reprisals (see above) or unjust dismissal (see below), in cases of psychological harassment an inquiry is undertaken by a specially trained investigator.³² As with recourse for reprisals, mediation by a trained mediator (who is not the investigator assigned to the case) is offered to the parties and is available at any time during the inquiry. The objective of the investigation is to determine whether or not the complaint is well founded and whether the CNESST will continue its intervention, and ultimately to initiate the process of referring the case to the ALT if this is the wish of the worker. The investigator also has the role of identifying possibilities for an agreement between the employer and the employee, and of providing tools to the employer to promote the prevention of harassment. If the investigator decides to close the file, the employee can request that the decision be reviewed. If the decision remains unchanged the investigator can, with the consent of the worker, refer the complaint to the ALT. If the complaint continues its course, it follows the same procedure as a complaint in the case of reprisals.

The employee will have to prove the unwanted and repetitive nature of the vexatious behaviour, that this behaviour affects his or her dignity or integrity, and that this creates a harmful work environment for him or her. This burden of proof is quite onerous for the employee, and hearings tend to be lengthy and protracted (Cox, 2010, pp. 72, 83). If it has been determined by an administrative judge that there has been harassment and that the employer has failed in his or her obligation to prevent it or make it cease, a series of remedies is available. These include, among others: reinstate-

²⁹ QLSA, secs 81.19 and 81.20.

³⁰ QLSA, secs 123.6–123.16. QLSA, sec. 81.18: “For the purposes of this Act, ‘psychological harassment’ means any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures, that affects an employee’s dignity or psychological or physical integrity and that results in a harmful work environment for the employee. A single serious incidence of such behaviour that has a lasting harmful effect on an employee may also constitute psychological harassment.”

³¹ CQLR, Ch. C-12, secs 10, 10.1, 49, 74ff.

³² CNT, *Investigation of psychological harassment in the workplace: Rules and ethics*. Available at: http://www.cnt.gouv.qc.ca/fileadmin/pdf/publications/c_0288a.pdf [accessed 7 Mar. 2016].

ment, back pay or compensation in lieu of reinstatement if employment has been terminated; an order that the employer take reasonable measures to make the harassment cease; awarding of moral and punitive damages; an order for the employer to pay for the employee's psychological support; and an order to modify the employee's disciplinary file.

In 2013–14, 2,935 complaints of psychological harassment were received at the CNT, 2,736 of which were not referred to the CRT (CNT, 2014, p. 107). Fifty-two per cent were determined to be inadmissible or unfounded, or not to meet the definition of “psychological harassment”; 25 per cent were withdrawn by the complainant; and just 16 per cent were settled, a much lower percentage than for other recourses. The complaints that were not referred to the CRT by the CNT were closed in an average of 54 days, while those that were referred in 652 days. Of the files that were referred to the CRT by the CNT (199 files), 96.5 per cent were closed without a hearing (78 per cent were settled out of court and the others closed for other reasons) so that only a handful ran the full course to adjudication.³³

Ontario

The Ontario Employment Standards Act (OESA) is administered by the Director of Employment Standards of the provincial Ministry of Labour, and is not a separate agency as is the case with the Quebec CNESST. The Act covers a wide range of standards relating to wages, hours of work, holiday, different forms of leave, and notice and severance pay requirements upon individual and group termination of employment. Although it does not provide for a specific recourse in the case of unjust dismissal or psychological harassment,³⁴ it does provide for remedies in the case of reprisals for claiming a right under the Act.

Monetary and administrative complaints

Employees covered by the Act can file complaints – through the Internet, by mail or in person – for monetary and administrative violations within two years of the violation.³⁵ Complaints must be filed using the designated form, otherwise they are deemed not to have been filed. Complaints will not, furthermore, be assigned to an employment standards officer unless the complainants have demonstrated and confirmed in writing that they have taken steps to inform their employers that they believe the Act has been

³³ This does not include the cases that were referred to the CRT directly by the complainant after the case was closed by the CNT.

³⁴ Employers do, however, have an obligation to prevent workplace violence and harassment under separate health and safety legislation: Occupational Health and Safety Act, Revised Statutes of Ontario 1990, Ch. O.1, secs 32.0.1–32.0.7.

³⁵ OESA, secs 96–111. The Act was amended in November 2014 by SO 2014, Ch. 10, Sch. 2, and important changes were introduced. Since most of the changes came into force in early 2015, we refer here only to the amended Act. For example, before the amendments, employees could claim only for violations having taken place in the last six months, and monetary claims were limited to 10,000 Canadian dollars (CAD).

contravened.³⁶ To this end, the Ministry of Labour provides a “self-help kit” (Ministry of Labour, 2014a). There are exceptions to this rule for certain situations and types of claim: for example, it does not apply if the employee’s workplace has closed down, the employee is a live-in caregiver, the employee has language difficulties, and/or the claim involves not money but other issues in the workplace. There is, however, no right to appeal if an officer refuses to investigate a complaint because the complainant has not demonstrated that they have attempted to resolve the dispute with the employer (Gellatly et al., 2011, p. 93). While third-party complaints are not contemplated in the law, the Minister of Labour’s website states that: “All information provided anonymously by employees and third parties ... about possible violations is passed to the appropriate Ministry staff for review and for possible proactive activity.”³⁷

If the complaint is not resolved between the parties, it will be investigated by an employment standards officer, who may request a meeting with the parties. A settlement may then be reached, which is the case in 80 per cent of claims (Vosko et al., 2011, p. 17); although there is no requirement for the parties to attempt to reach a settlement at this stage,³⁸ it is worth noting that legislative changes in 2010 expanded the mandate of employment standards officers to attempt to reach settlements,³⁹ thereby promoting their role as both “mediator” (without a publicly defined mandate) and investigator for the same complaint. In any case, once a complaint has been filed, the terms of any settlement reached between an employee and an employer without the aid of an employment standards officer must be communicated to the officer.⁴⁰

If the employment standards officer finds that the employer has not complied with the Act and the employer refuses to pay what is owed, the officer can issue a payment order against the employer, which can then be enforced as if it were an order or a judgment of a court of law.⁴¹ The employer can appeal against the order and must do so within 30 days before the Ontario Labour Relations Board, a specialized labour tribunal that hears cases under a long list of workplace-related statutes.⁴² The officer can also require an employer to post relevant information in the workplace concerning the Act and/or the report of the officer’s findings regarding violations. The officer can issue compliance orders, for example if, during the inspection, he or she discovers that the employer is contravening provisions of the Act not related to the payment of wages, such as the obligation to post an information sheet in the workplace containing the main provisions of the Act. Officers can also issue “notices of contravention”, also known as “tickets” (about CAD300 in each case), to employers who contravene the

³⁶ Open for Business Act 2010, SO 2010, Ch. 16, Sch. 9 (sec. 96.1 of the OESA). Such an obligation also exists in some other provinces, for example in British Columbia and Alberta.

³⁷ Ministry of Labour, “Employment standards claims” (available at: http://www.labour.gov.on.ca/english/arwork/workplacerrights_fs.php [accessed 3 May 2016]).

³⁸ OESA, sec. 101.1.

³⁹ Open for Business Act 2010, SO 2010 Ch. 16, Sch. 9 (sec. 101.1 of the OESA). For a critical perspective on these changes, see Gellatly et al., 2011.

⁴⁰ OESA, sec. 112.

⁴¹ OESA, secs 95 and 126.

⁴² OESA, sec. 116.

Act, or can instigate a penal prosecution. In 2013–14, 14,656 complaints were investigated: the top five complaints concerned payment of wages, vacation pay, termination pay, payment of public holidays and overtime pay (Ministry of Labour, 2014b).

Recourse against employer reprisals

Employers are prohibited from dismissing or otherwise penalizing or threatening to penalize employees for a number of reasons under the Act, including: asking questions about the Act or asking an employer to comply with the Act; exercising a right under the Act; filing a complaint or participating in a complaint process as a witness or otherwise; and taking, planning on taking or becoming eligible for maternity, parental or other family leave.⁴³ If an employer does penalize an employee for one of these reasons, an employment standards officer can order the employer to reinstate the employee and pay him or her compensation for losses incurred and, in some cases, damages (see Neuman and Sack, 2014, ch. 13). The onus of proving that reprisals were not taken rests on the employer.

Appeals

Employees can appeal against the decision of an employment standards officer not to issue a payment order or against the amount claimed. Until the late 1990s, employment standards cases were heard by the specialist Employment Standards Tribunal, whose jurisdiction has since been transferred to the Ontario Labour Relations Board. As mentioned above, cases are also taken to the Board if the employer refuses to comply with or contests an employment standards officer's order, including in relation to reprisals. In 2013–14, 81 per cent of cases (relating to reprisals and appeals against payment orders) were settled before hearing: this percentage surpassed the Board's projected target of 75 per cent (Ontario Labour Relations Board, 2014a, pp. 22, 36). Workers who present employment standards cases are very often unrepresented, as are many employers, and, given the difficulties in navigating the hearing process, the Board tries to encourage settlement during the hearing or even before a hearing takes place with the aid of its labour relations officers, who act as mediators.⁴⁴ Mediators generally have legal training or higher degrees in industrial relations, and there is a trend towards a further professionalization of mediation practices at the Board (Shilton and Banks, 2014, p. 12). The Board's Rules of Procedure also permit recourse to expedited proceedings or "consultations" in employment standards cases (Ontario Labour Relations Board, 2014b, rule 41).⁴⁵ This means that, when warranted, the Board can decide to adjudicate a case on the basis of the documents presented by the parties without a hearing, i.e. without the calling of witnesses or their cross-examination.

⁴³ OESA, sec. 74.

⁴⁴ OESA, sec. 120; see Shilton and Banks, 2014, p. 13.

⁴⁵ The courts have held that this procedure does not breach rules of natural justice or procedural fairness: *International Brotherhood of Electrical Workers Local 1739 v. International Brotherhood of Electrical Workers*, 2007 CanLII 65617 (Superior Court).

Federal jurisdiction workplaces

Part III of the CLC, which covers employment standards (wages, hours, holidays, maternity, parental and family leave, employer obligations upon individual and group employment termination, etc.) is enforced by the Labour Program of Employment and Social Development Canada,⁴⁶ the Government ministry responsible for labour and employment.

Monetary and administrative complaints

A written complaint can be filed within six months of the violation.⁴⁷ Depending on the nature of the complaint, an “early resolution officer” can send a self-help kit to the employee to assist him or her in settling the complaint with the employer. At the request of the employee, a complaint can be kept confidential, although there is no mechanism for third-party complaints.⁴⁸ The officer then contacts the complainant within six weeks to see if the matter has been resolved. If it has not, the file will be transferred to an inspector, who investigates the complaint and asks the employer in writing to correct a monetary or non-monetary violation of the Code within a specific period of time. If the employer does not comply, a payment order can be issued against the employer or the directors of the corporation (in some cases, an order can be issued against a third party who is indebted to the non-compliant employer and the monies recovered will then be paid to the worker). The payment order can be filed with the Federal Court to render it enforceable as a judgment of the court. Either the complainant or the employer can appeal against an inspector’s decision, and the Minister can appoint a referee to hear the appeal.

In 2012–13, the Labour Program’s performance report stated that 78 per cent (89 per cent in 2013–14) of monies found to be owed for complaints under the Code were recovered through alternative dispute resolution techniques (71 per cent of the total monies owed), voluntary compliance and payment orders (ESDC, 2013, pp. 54–55; 2014, pp. 81–82). There are no publicly available data detailing the types of claims involved.

Recourse against employer reprisals

The Code prohibits reprisals (dismissal, threat of dismissal or any other discriminatory measures) in cases where a person (whether a complainant or another employee) has given information or testified during an inspection, inquiry or hearing, or has exercised a right under the Code (e.g. taking maternity, parental or family leave, or claiming amounts owing). The employer can be required to pay a fine ranging from a couple of hundred dollars to CAD100,000. The employer of a person who has been the victim of a dismissal stemming from reprisals can be ordered in penal proceedings to pay the

⁴⁶ Previously Human Resources Skills Development Canada.

⁴⁷ See CLC Part III, secs 248–261 on complaints and application of the Code; also ESDC (Labour Program), “Complaints handling – Part III of the Canada Labour Code and the Fair Wages and Hours Act – OPD 700-10”, 15 July 2002 (this resource is no longer available online).

⁴⁸ CLC Part III, sec. 260. See Arthurs, 2006, ch. 9.

amounts due to the employee, to reinstate him or her, and to pay compensation for loss of employment.⁴⁹ There are, however, no recent statistics available on employer prosecutions. The Arthurs Report states that:

There are many difficulties with these provisions: criminal court judges are seldom knowledgeable about employment standards; standards of proof are higher in criminal proceedings than in administrative proceedings; judges used to hearing cases involving bodily harm or theft of property are notoriously reluctant to convict or severely punish white-collar offenders; the fines provided are derisory; and the monetary relief for workers is ungenerous. But these difficulties are all overshadowed by a more fundamental one: no prosecutions at all have been brought since 1987 ...; nor is one likely to be brought soon, given present arrangements. (Arthurs, 2006, p. 187)

While the report does not recommend eliminating this type of recourse, it does suggest adapting it to the objectives of the Code (e.g. by attenuating the onus of proof) and designing more appropriate procedures for employees who have been victims of reprisals, more in keeping with provisions in other jurisdictions and under Part I of the Code governing unionization and collective bargaining concerning unfair labour practices (Arthurs, 2006, pp. 219–220).

Prevention and proactive enforcement of minimum employment standards

The best way of resolving individual employment disputes is to prevent them. As noted above, all of the jurisdictions studied have established procedures for complaints when an employer contravenes employment standards legislation, as well as mechanisms to deal with reprisals; the implementation and efficiency of these procedures and mechanisms vary according to jurisdiction. These reactive means of enforcement have their limits. In the first place, complaints represent an extremely small proportion of instances of employer non-compliance with the legislation. Complaint-driven enforcement also puts the burden on the employee to ensure regulatory compliance. To be effective, voluntary compliance as a route to preventing individual employment disputes must be accompanied by strong complaint mechanisms affording adequate redress for employees and hefty penalties for non-compliant employers (Weil, 2007). Voluntary compliance also requires information programmes for employers, employees and the general public on employment rights. It is essential that reactive enforcement be accompanied by proactive enforcement, in particular in the form of audits of employers to verify compliance. For example, in Quebec the CNT's (CNESST's) 2014–18 prevention programme (CNT, 2013) proposes a three-level approach: the first level is based on extensive dissemination of information on employment standards, the second on proactive compliance interventions with employers and rapid resolution of complaints without legal intervention, and the third on civil and penal recourses against employers.

⁴⁹ CLC Part III, secs 256–261.

Both Quebec and Ontario have developed a number of plain language information tools, disseminated for the most part through their respective Internet sites; the federal Labour Program's information documents are less well developed.⁵⁰ The Ontario Ministry of Labour has made a particular effort in translating its main information documents, which are available in almost 30 languages. The Quebec CNESST and the federal Labour Program have restricted their information to English and French, although in Quebec some information is available in Spanish, with a view to reaching migrant agricultural workers from Mexico and Central America. In Ontario and Quebec there are also targeted public information campaigns (e.g. aimed at young workers, or on specific standards such as those relating to public holidays). In Ontario, employers are required to post a summary of employment standards in all workplaces and to give all employees a copy of this document, while in Quebec this is not automatically obligatory although the CNESST can require it.⁵¹ Many workers' advocacy groups also play an important role in disseminating information on employment standards to employees.⁵² Ontario recently introduced the option for an employment standards officer to require that an employer conduct a self-audit and report the findings to the officer, who can then intervene if there are violations of the law to ensure compliance.⁵³

Both Ontario and Quebec have developed targeted proactive inspection programmes in sectors where the potential for violations is high (e.g. retail, agriculture, restaurants and hotels) and for specific categories of workers (e.g. young workers, interns, seasonal and temporary agency workers); these aim to inform employers of their obligations and to act upon violations found during the inspections (Ministry of Labour, 2014c; CNT, 2013).⁵⁴ Under federal jurisdiction, the information available does not suggest that proactive inspection is a priority, although the Arthurs Report did recommend its use (Arthurs, 2006, p. 192). Proactive inspection is a deterrence measure (a necessary measure to encourage voluntary compliance), along with fines and prosecutions for non-compliance. Both Ontario and Quebec prosecute in cases of non-compliance, although such penal prosecutions are relatively rare and the fines collected are quite modest (Ministry of Labour, 2014d; CNT, 2014, p. 44). Nevertheless, while the level of fines may not be very high, both jurisdictions "name and shame" employers on their websites when judgments of non-compliance are rendered for certain types of contraventions.

⁵⁰ See the jurisdictions' respective websites: <http://www.labour.gov.on.ca/english/es/> [accessed 11 Mar. 2016]; <http://www.cnt.gouv.qc.ca/> [accessed 11 Mar. 2016]; http://www.esdc.gc.ca/en/jobs/workplace/employment_standards/labour/index.page [accessed 3 May 2016].

⁵¹ OESA, sec. 2; QLSA, sec. 39(15).

⁵² See e.g. the websites of the Workers' Action Centre in Toronto (<http://www.workersactioncentre.org/> [accessed 11 Mar. 2016]) and of Au bas de l'échelle (<http://www.aubas-delechelle.ca/> [accessed 11 Mar. 2016]) and the Immigrant Workers' Center (<http://iwc-cti.org/> [accessed 11 Mar. 2016]) in Montreal.

⁵³ OESA, sec. 91.1.

⁵⁴ Ontario has targeted sectors including retail, temporary agency work, fast-food restaurants and farms. The website provides details on the number of inspections, etc. In Quebec, the sectors that have been targeted include retail, restaurants, hotels and agriculture. See e.g. CNT, 2014, p. 42.

Wrongful dismissal

Quebec

Under the QLSA recourse is available in cases of dismissal made without just and sufficient cause after two years of continuous service.⁵⁵ As with recourse in the event of reprisals (see above), a complaint must be filed within 45 days, and the same procedure is followed (mediation by the CNESST; free representation by a lawyer from the CNESST during pre-hearing conciliation and at the hearing). At the hearing, the onus of proving that the cause of termination was just rests with the employer. The administrative judge has broad remedial powers: reinstatement, back pay and any other remedy he or she “believes fair and reasonable, taking into account all the circumstances of the matter”. As with the recourses for reprisals and psychological harassment, the ALT’s decisions are final and are not open to appeal.⁵⁶

In 2013–14, 4,899 files were closed by the CNT, of which 1,238 were referred to the CRT (CNT, 2014, p. 106).⁵⁷ Of the cases that were not referred to the CRT, 61 per cent were settled, 19 per cent were determined to be inadmissible (e.g. insufficient continuous service, complaint filed after the deadline, etc.) and 15 per cent were withdrawn. Of the cases that were referred to the CRT by the CNT, 76 per cent were settled. Only 65 cases made it to adjudication, and just 24 were adjudicated in favour of the employee.⁵⁸ The average length of time to closure was 65 days for files that were not referred to the CRT, 529 days for those that were referred but did not go to hearing and 762 days for those that were heard by the CRT. Conscious of the long delays, the CRT (now the ALT), which hears cases under 39 labour-related laws, has prioritized accelerating the resolution of cases referred under the QLSA (CRT, 2014, p. 32).

Federal jurisdiction workplaces

In contrast to Quebec’s Labour Standards Act, Ontario and federal legislation both provide qualifying employees with severance pay, based on years of service, in cases of termination of employment without cause.⁵⁹ In Ontario, however, a worker who sues his or her employer for wrongful dismissal in the civil court cannot claim severance pay under the Employment Standards Act. While there is no statutory recourse for wrongful dismissal with the right to reinstatement in Ontario, Part III of the CLC provides recourse for unjust dismissal after 12 months of continuous service.⁶⁰ The complaint must be filed in writing within 90 days, after which an inspector will be assigned to

⁵⁵ QLSA, secs 124–131.

⁵⁶ QLSA, sec. 130. Judicial review in the Superior Court is possible in very limited circumstances.

⁵⁷ The other files were closed for other reasons.

⁵⁸ This number does not represent the total number of decisions rendered by the CRT for this recourse for this period.

⁵⁹ OESA, secs 63ff (one of the requirements is that the employee have five years of service) and 98; CLC Part III, sec. 235 (12 months of service is required).

⁶⁰ CLC Part III, secs 240–246. See HRSDC, 1999 (these directives are no longer available online).

the case to determine the admissibility of the complaint. If the inspector determines that the complaint is inadmissible, the complainant can request that another ministry representative review the decision. If the complaint is admissible, the inspector then communicates with the employer to obtain, in writing, the reasons for the dismissal. He or she then may contact the parties to gather other necessary evidence before using alternative dispute resolution techniques to attempt to settle the complaint.⁶¹ Neither the Code nor the operational policy directives indicate whether mediation is mandatory, but the 2013–14 departmental performance report indicates that a certain percentage of complainants decide not to participate in the “voluntary complaint settlement process” (the terms “mediation” and “conciliation” are not used in the federal Government’s documents with respect to individual dispute resolution, being reserved for dispute resolution in unionized settings) (ESDC, 2014, p. 82). In 2013–14, 73 per cent of 1,100 unjust dismissal complaints were settled (ESDC, 2014, p. 82). No information is available as to the content of the settlements.

If no settlement is reached, the inspector must then file a report with the Labour Program directorate (the “Minister”), who can then name an adjudicator. The adjudicators are not chosen by the parties but from a list compiled with the participation of the Federal Mediation and Conciliation Service, which, besides its many functions in relation to unionized workplaces, coordinates the appointment of arbitrators in unjust dismissal cases brought by non-unionized workers under the CLC. The adjudicator’s fees and disbursements are paid for by the Ministry, although the parties must pay for their own legal representation. The adjudicator has the power to reinstate the employee, to order the employer to pay compensation for lost wages without reinstating the employee, or to render any other equitable decision to remedy the consequences of the dismissal, including ordering that the employee’s personnel file be modified; the adjudicator’s decision is not open to appeal.⁶²

3.4. Sectoral dispute resolution mechanisms: The example of the Quebec decree system

The Act Respecting Collective Agreement Decrees (ACAD)⁶³ was adopted in the 1930s in Quebec to extend certain norms relating to wage costs (rates of pay, paid holidays etc.) to non-unionized workers in the same sector on a geographical basis.⁶⁴ The

⁶¹ CLC Part III, sec. 241(2).

⁶² CLC Part III, sec. 243. A recent Federal Court of Appeal decision determined that the CLC Part III does not allow an employer to dismiss an employee only “for cause”. This is contrary to a long-held interpretation of the provision on unjust dismissal that requires an employer to demonstrate that an employee *has* been dismissed for cause if he or she has one year of continuous service. See *Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17. Permission was granted by the Supreme Court of Canada to hear this case to clarify the interpretation of the statute.

⁶³ CQLR, Ch. D-2 (ACAD). On the Quebec decree system, see Bernier, 1993; Bergeron and Veilleux, 1996; Jalette, 2006.

⁶⁴ Decrees can also cover other subjects, such as skills development in a given sector or the establishment of benefit programmes such as collective insurance for all workers in the sector.

purpose of this legislation, which is peculiar to Quebec, is to curb unfair competition between unionized and non-unionized firms, while at the same time providing better working conditions for employees who do not have the benefit of the better terms that can be negotiated through a collective bargaining agreement. This extension of collective bargaining agreements is done by decree, an instrument which has the status of a regulation (i.e. it is adopted by the executive and not the legislature) and is of public order. This system requires a strong union presence in the sector concerned, and ideally a functioning employers' sectoral association. The two parties can ask the Government to adopt a decree, the terms of which are negotiated by the parties.⁶⁵ Once a decree is adopted, a parity committee is formed of union and employer representatives and is charged with applying the decree for the sector in a given geographical area (some decrees cover the entire province).⁶⁶ The operation costs of the committee are financed by employer and employee contributions, calculated as a percentage of wages. There are no workplace parity committees: non-unionized employees must contact the committee's offices in the event of a violation of the decree (e.g. if the wage rate being paid by the employer is not the one determined in the decree).

The committee's inspectors, who have intimate knowledge of the sector, have broad inspection powers and can claim monies owed to the employee in the year preceding the claim on their behalf before the civil courts at no cost to the employee (unionized employees in the sector must exercise their rights through their union). If a non-unionized employee is the victim of reprisals for claiming a right under the decree, he or she can file a complaint within 45 days and the parity committee will represent the employee, at no cost, before the ALT.⁶⁷ The remedies available are reinstatement, back pay and punitive damages (three months' wages) if the employee has been unlawfully dismissed. Apart from recourse for reprisals arising from the claiming of a right under the decree, unlike most collective bargaining agreements the decrees do not address the question of job security. Non-unionized employees, however, have recourse under the QLSA (or human rights legislation) in cases of unjust dismissal, and also in cases of psychological harassment.

In the first years after the passage of the Act, decrees were prevalent in the manufacturing sector (clothing, furniture, etc.), but these decrees have been in steady decline since competition in this sector is no longer confined to the province's territory, but is now international: local workers today are in competition with workers in countries where wages are much lower.⁶⁸ From a high in 1959 of 120 decrees covering 33,000 employers and 250,000 employees, the number has declined to the point where in 2010 there were only 16 decrees left, covering 8,839 employers and 75,478 employees.⁶⁹

⁶⁵ ACAD, secs 2–8.

⁶⁶ ACAD, secs 16–25.

⁶⁷ ACAD, secs 30.1 and 31.

⁶⁸ On the history and the decline of the decree system, see Rouillard, 2011; Vallée and Charest, 2001.

⁶⁹ Ministère du travail, "Évolution du nombre de décrets, d'employeurs et de salariés assujettis 1935–2010" (available at: https://www.travail.gouv.qc.ca/fileadmin/fichiers/Documents/decrets_cc/evolution.pdf [accessed 11 Mar. 2016]).

Only two decrees in the manufacturing sector have survived. About half of the workers covered by decrees today are in the building maintenance and private security (security guards) sectors. The remaining decrees are thus concentrated in the private service sector, where it is more difficult to outsource jobs internationally: besides building cleaning and private security, there are also decrees in the automobile services, local trucking and hairdressing sectors.⁷⁰

Arguably, one of the disadvantages of the system is that there has to be a strong union presence in a given sector for the negotiation of a decree, the logic being to eliminate unfair competition between unionized and non-unionized employees in that sector, which is in the employers' interest as well as that of employees. Nevertheless, the decree system is interesting because it regulates working conditions on a sectoral/geographical basis, and can reach those in precarious employment in very small firms (e.g. hair salons or auto repair shops) and throughout the subcontracting chain where the same work is being performed (e.g. building maintenance), including those who work alone away from their employers' premises (e.g. security guards and building cleaners). Decrees thus offer a way of countering the deterioration of working conditions in the service sector through domestic outsourcing. Decrees can also apply to "artisans" and solo self-employed workers, depending on the terms agreed by the parties and according to the practices in a given sector.⁷¹ In 2015, a bill was proposed to modify the ACAD, notably by proposing changes to procedures to amend decrees and to the functioning of parity committees, and the repeal of the last remaining decree in the hair salon sector.⁷²

3.5. A word about grievance arbitration in unionized workplaces

Unionized employees who have individual complaints against their employer (e.g. contesting disciplinary measures, including dismissal, psychological or discriminatory harassment, remuneration or scheduling issues, etc.) may file grievances with their union, who must represent them in dealings with the employer. The procedure and the conditions for filing grievances are set out in the collective bargaining agreement, but are regulated in general terms by labour relations legislation.⁷³ The parties to the collective bargaining agreement decide on how the arbitrators will be selected. Ministries of

⁷⁰ Ministère du travail, "Liste des décrets selon les deux grandes divisions sectorielles" (available at: https://www.travail.gouv.qc.ca/fileadmin/fichiers/Documents/decrets_cc/Listedec.pdf [accessed 11 Mar. 2016]).

⁷¹ ACAD, sec. 1, under the definition of "employee".

⁷² Bill No. 53, An Act to update the Act respecting collective agreement decrees mainly to facilitate its application and enhance the transparency and accountability of parity committees, National Assembly, 41st Legislature, 1st Session, 2015 (available at: <http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-53-41-1.html> [accessed 11 Mar. 2016]). As of March 2016, no legislative amendments had been adopted.

⁷³ Ontario: Labour Relations Act, 1995, SO 1995, Ch. 1, Sch. A, sec. 48; Quebec: Labour Code, secs 100ff; federal: CLC Part I, secs 56ff. On grievance arbitration in Canada, see e.g. Carter et al., 2002; Coutu et al., 2013.

labour maintain rosters of qualified labour arbitrators, and arbitrators in both Ontario and Quebec are grouped in professional associations.⁷⁴ The parties – the union and the employer – pay the arbitrator’s fees and disbursements as determined by the collective bargaining agreement, and the employee is represented by the union and does not have to incur costs for legal representation. Unions have a duty of fair representation and unionized employees have means of redress if the union fails in this duty.⁷⁵ The union is not, however, obliged in all cases to proceed with a grievance as long as it acts fairly, impartially and in good faith when deciding whether or not to proceed.⁷⁶

With some limited exceptions, arbitrators have exclusive jurisdiction over such disputes, and their awards are binding and not subject to appeal. They also have the power to interpret and apply human rights legislation and other employment-related statutes, even in the event of conflict between the legislation and the terms of the collective bargaining agreement.⁷⁷ Their remedial powers are broad, subject to the specific provisions of any particular collective bargaining agreement, and include the power to order reinstatement, which is the standard remedy in the case of dismissal unless there are mitigating factors that make reinstatement undesirable.

Although initially intended to provide speedy and efficient resolution of disputes, there is some concern that grievance arbitration has over the years become less efficient, hampered by delays, costs to the parties related to the length of hearings (e.g. arbitrators’ and lawyers’ fees, and disbursements) and to the often complex evidence presented (e.g. expert witness reports and testimonies), questions relating to arbitrators’ institutional independence and the expansion of jurisdiction to include issues arising from statutes (e.g. human rights legislation) outside the collective bargaining agreement (see e.g. Bernier, 2012; Notebaert, 2008; Charney, 2010). For example, Ministry of Labour statistics for Quebec on the 1,021 arbitrators’ decisions rendered in 2011–12 indicate that the average time from hearing to decision was 57 days, but the lapse of time between the naming of the arbitrator and the decision was on average 449 days (Ministère du travail, 2012). Evidence suggests that the majority of cases did not, however, go to adjudication. In a Quebec Ministry of Labour study of all the decisions rendered and settlements facilitated by arbitrators – a total of 11,088 cases referred to arbitration, the majority dealing with dismissals and disciplinary measures – between 2007 and 2010, 61 per cent of cases were settled before adjudication (Ministère du travail, 2010).

⁷⁴ The Quebec Labour Code, the Ontario Labour Relations Act (OLRA) and the CLC Part I (the section on unionization and collective bargaining) all contain provisions on the designation and powers of arbitrators. See also the websites of the Conférence des arbitres (<http://www.conference-des-arbitres.qc.ca/> [accessed 11 Mar. 2016]) and the Ontario Labour–Management Arbitrators’ Association (<http://www.labourarbitrators.org/> [accessed 11 Mar. 2016]).

⁷⁵ OLRA, secs 74 and 99(1); QLC, secs 47.2 and 47.3; federal: CLC Part I, secs 37 and 97.

⁷⁶ See e.g. *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, local 50057*, [1990] 1 SCR 1298 (Supreme Court of Canada).

⁷⁷ OLRA, sec. 48(12)(j); Quebec Labour Code, sec. 100.12(a); federal: CLC Part I, sec. 60(a.1).

3.6. Workplace dispute mechanisms

There is no requirement in the jurisdictions studied for the establishment of workplace dispute mechanisms or joint committees or forms of work councils in non-unionized workplaces to discuss or resolve work-related problems, be they individual or collective. The one exception is in the field of occupational health and safety, where, according to firm size and/or sector, the jurisdictions studied require enterprises to establish joint health and safety committees whose mandates may vary according to the legislation.⁷⁸ The literature indicates that these committees appear to be more effective in unionized firms (see e.g. Yassi et al., 2013).

Since the introduction of the obligation in Quebec for employers to prevent and stop harassment in the workplace, there has been a growth of internal procedures, with or without employee participation, to deal with complaints before they reach the CNESST or another forum, such as grievance arbitration or the Quebec Commission des droits de la personne et des droits de la jeunesse (human rights commission).⁷⁹ The CNESST has developed an information kit for employers to help them develop a policy on harassment and mechanisms for resolving internal disputes.⁸⁰ Two 2010 studies by the CNT (CNESST) of small, medium and large firms, however, showed that the vast majority of employers had established no procedures (CNT, 2010a, b).⁸¹ The main reason for not establishing procedures was that employers perceived that there had not yet been any incidents of psychological harassment at these firms.

Employee voice in the workplace and open dialogue with employers are important means of reducing and resolving individual employment disputes. Unionization has demonstrated this. In non-unionized workplaces, particularly where there are employees in situations of greater vulnerability (migrant workers and recent immigrants, precarious “non-standard” employees such as part-time temporary workers, etc.), the promotion of greater workplace dialogue is more problematic.

One of the recommendations of a 2012 report by the Law Commission of Ontario on vulnerable workers and precarious work was that “the Ministry of Labour explore, through stakeholder consultations, the concept of utilizing the principles of work councils in non-unionized workplaces with high concentrations of vulnerable workers” (Law Commission of Ontario, 2012, pp. 66–68). It was suggested that such joint employer–employee work councils could engage in discussions on employment standards in the workplace, including potentially resolving disputes, thereby reducing

⁷⁸ Occupational Health and Safety Act, RSO 1990, Ch. O.1, secs 9ff.; An Act Respecting Occupational Health and Safety, CQLR, Ch. S-2.1, secs 68ff.; CLC Part II (section of the Code pertaining to occupational health and safety), secs 135ff.

⁷⁹ Under the Quebec Charter of Human Rights and Freedoms, CQLR, Ch. C-12, secs 10 (prohibited grounds of discrimination), 10.1 (prohibition of discriminatory harassment based on enumerated grounds of discrimination) and 16.

⁸⁰ CNT, “Trousse d’information sur le harcèlement psychologique au travail” (available at: <http://www.cnt.gouv.qc.ca/centre-de-documentation/trousses-dinformation/trousse-dinformation-sur-le-harcèlement-psychologique/index.html> [accessed 11 Mar. 2016]).

⁸¹ See, however, the analysis by Nesrallah (2013) of the mechanisms put in place in the federal public service.

workers' isolation and providing them with representation. This proposal was met with caution by some workers' advocates.

In non-unionized workplaces, such councils risk transferring responsibility for enforcing the ESA [Employment Standards Act] to workers who have least power to do so. Such councils would not have the same economic imperative on the employer that Health and Safety committees have due to [workers' compensation insurance] premiums and Health and Safety Act enforcement and penalties. Councils in non-unionized workplaces would need to confer power on worker members to enforce minimum standards given the power imbalances that the ESA seeks to remedy. Further, they would require externally provided ESA training, allow an employee complaints procedure with the Ministry of Labour where reprisals or violations of the Council mandate takes place. (Workers' Action Centre and Parkdale Community Legal Services, 2012)

There is nevertheless a growing literature on the development and implementation of workplace dispute mechanisms in numerous countries, including in Canada, particularly from a management perspective.⁸²

3.7. Civil recourses

Individual employment disputes can be brought before civil courts, although normally a suit brought before these courts precludes the possibility of claiming statutory rights that could be claimed through a government agency responsible, for example, for applying employment standards legislation. Employees in Ontario, where there is no general statutory recourse for wrongful dismissal, may therefore opt to bring forward suits based on their employment contracts.⁸³ In the case of workplaces under Quebec and federal jurisdiction, employees who do not qualify for recourse against wrongful dismissal (see above) may resort to ordinary courts by virtue of the law of employment contracts under common law or the Quebec Civil Code.⁸⁴ Depending on the circumstances of employment and of its termination, severance pay and damages can be sought.

Civil suits can be costly and normally require the services of a lawyer, which puts them out of the reach of a large number of employees who do not have the necessary means. In addition, early pre-trial mediation of civil cases, in the presence of a mediator from private practice chosen by the parties, is mandatory in several large metropolitan

⁸² See e.g. various relevant chapters in Gollan et al., 2015; Roche, Teague and Colvin, 2014; Taras and Kaufman, 2006; Coates, Furlong and Downie, 1997.

⁸³ It should be noted that in Canada there is no requirement for employment contracts to be written: they can be verbal or even tacit. There are some very limited exceptions, such as the contracts between temporary migrant caregivers (domestic workers) and their employers.

⁸⁴ Quebec Civil Code, sec. 2091.

centres in Ontario.⁸⁵ The costs of this have to be borne by the parties; the fees of accredited mediators on the Government's roster are currently set at CAD600 for an initial three-hour session, while mediators not on the roster can charge higher fees.⁸⁶ Changes made in 2015 to Quebec's Code of Civil Procedure have also generalized recourse to mediation in civil suits, in keeping with the new philosophy of the Code, which prioritizes alternative dispute resolution over trials. Although mediation is not mandatory, "[p]arties must consider private prevention and resolution processes before referring their dispute to the courts", which includes but is not restricted to mediation.⁸⁷ Mediators are chosen by the parties; they must be accredited by the Minister of Justice, and their fees and disbursements are paid by the parties.⁸⁸ It is still too early to evaluate the impact of these changes to the Code in employment matters. Since the mediation provisions are of a general nature, with the exception of family mediation the Code does not specify that mediators must be specialized in the subject matter of the dispute.

Another alternative is the Small Claims Court.⁸⁹ In both Ontario and Quebec, the upper limit on the amount that can be claimed in a suit in the Small Claims Court has risen dramatically in recent years: in Ontario, from CAD 10,000 to CAD25,000 (as of 2009), and in Quebec, from CAD7,000 to CAD15,000 (as of 2015). For low-wage earners, the Small Claims Court represents an alternative to the ordinary courts that is both speedier and less costly, since the court costs that can be awarded are limited. In the case of Quebec, claimants and defendants can only very exceptionally be represented by a lawyer; in Ontario, legal representation is allowed. The legislation in Ontario provides for settlement conferences before a judge in all cases; these are designed to facilitate discovery and organize an eventual trial, and at this stage an attempt will be made to settle the case before trial. In Quebec, the parties can participate in a voluntary mediation process, at no cost, with a certified mediator (a lawyer or notary).

3.8. Private arbitration

Pre-hire private arbitration clauses in employment contracts that block employees' recourse to civil courts and administrative tribunals are a growing phenomenon in

⁸⁵ Rules of Civil Procedure, Revised Regulations of Ontario (RRO) 1990, Reg. 194, Rule 24.1 (last amendment: O. Reg. 259/14); Winkler, 2007. See also Ministry of the Attorney General, "Mandatory Mediation Program", Toronto. Mediators under this programme are bound by a "Code of Conduct" available on the Ministry of the Attorney General's website: <http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/codeofconduct.asp> [accessed 11 Mar. 2016].

⁸⁶ Ontario Regulation 43/05 (Mediators' Fees) (Rules of Civil Procedure, Rule 75.1). See also the Ministry of the Attorney General's website concerning the mandatory mediation programme at <https://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/notice.php> [accessed 4 May 2016].

⁸⁷ An Act to Establish the New Code of Civil Procedure, SQ 2014, Ch. 1, sec. 1; see also Preliminary Provision and secs 2–7 and 536ff.

⁸⁸ An Act to Establish the New Code of Civil Procedure, secs 605ff.

⁸⁹ Ontario Regulation 258/98, Rules of the Small Claims Court (last amendment: O. Reg. 171/14); An Act to Establish the New Code of Civil Procedure, secs 536ff.

North America (see e.g. Colvin, 2014; Alexandrowicz, 2002). Included in the terms of employment, these written clauses generally define private arbitration as the only vehicle for resolving disputes, and prevent employees from claiming rights before ordinary or specialized courts. Such clauses have been criticized in the United States as a means of limiting non-unionized employees' rights in individual employment disputes, on both procedural (e.g. choice of forum) and substantive (e.g. limitations on what can be claimed) levels (Weil, 2004). The phenomenon is, however, much less prevalent in Canada⁹⁰ than in the United States, although most jurisdictions have legislation on private arbitration in civil matters.⁹¹

In Canada, such clauses do not appear to preclude employees' claiming their statutory rights in another forum,⁹² and would generally be applicable only in dismissal suits when there is no statutory recourse for wrongful dismissal; or, if statutory recourse exists (e.g. in Quebec and workplaces under federal jurisdiction), the arbitration clause must be equivalent to the recourse provided for by law, with respect most notably to the remedies available. In a recent case before the Quebec Court of Appeal,⁹³ it was decided that a private arbitration clause could not be applied in an unjust dismissal case, since the clause required that the parties pay the arbitrator's fees and that the complainant pay her own legal fees: under the QLSA, the services of the tribunal and the lawyer are free. For the arbitration clause to be valid, the recourse provided would have to have been equivalent to that provided by statute and to have ensured that the complainant had effective access to the process without being penalized financially or otherwise. Since each province has its own legislation on private arbitration and on labour and employment, it cannot be concluded that the Quebec Court of Appeal's reasoning would apply elsewhere. There is a paucity of case law concerning the scope and validity of private arbitration clauses in employment matters in the different Canadian jurisdictions.

3.9. Performance of individual labour dispute prevention and resolution mechanisms and processes

A historical reliance on complaint-driven enforcement and voluntary compliance with minimum employment standards has not reduced violations, particularly for more precarious workers who are less likely to file complaints. In addition, an individual complaints-based approach is costly for labour administrations. Evidence in Ontario and

⁹⁰ To our knowledge, no in-depth studies have been done on the use of such clauses in employment contracts in Canada.

⁹¹ Ontario: Arbitration Act, 1991, SO 1991, Ch. 17; Quebec: An Act to Establish the New Code of Civil Procedure, secs 620ff.

⁹² See e.g. OESA, sec. 3(5) concerning the waiving of rights. The Ontario Court of Appeal has however refused to determine whether private arbitration is the appropriate forum to decide statutory rights: *Huras v. Primerica Financial Services Ltd.*, 2001 CanLII 17321 (On. CA), para. 20.

⁹³ *Université McGill v. Ong*, 2014 QCCA 458 (Court of Appeal). See also *Syndicat de la fonction publique du Québec v. Québec (Attorney General)*, 2010 SCC 28 (Supreme Court of Canada) on the issue of equivalent recourses.

Quebec of a more proactive approach to inspections in sectors known for high rates of violations is a step towards more effectively securing compliance by employers and avoiding disputes in the cases of vulnerable workers and recalcitrant employers.

In the two common law jurisdictions studied, Ontario and the federal jurisdiction, the process by which labour inspectors issue payment orders that can be enforced, where the onus is on the employer to contest the order, merits further study of its effectiveness. In Ontario, these appeals go before a specialized labour tribunal; under federal jurisdiction, they are heard by a referee named by the Government. This system has advantages over that adopted in Quebec where, if the employer refuses to pay, the complaint has to be filed as a suit in civil court by the CNESST, which has to prove each element of the claim according to ordinary rules of evidence. However, it should be noted in this context that the vast majority of claims are settled out of court. One of the advantages for employers of settling out of court is no doubt the routine inclusion in settlement agreements of confidentiality and no-admission-of-fault clauses. While tribunal and court decisions are made public, these agreements are not, and the latter require employees formally to agree not to divulge their content to, for example, their colleagues or ex-colleagues or the media. Once a court or a tribunal determines that there has been a contravention of the law and orders monies to be paid, often several years after the complaint has been filed, the employer will also be required to pay interest at rates fixed by the Government on top of the amounts owing, and may have to pay disbursements, collection fees and administrative penalties as well.⁹⁴ If the complaint is well founded, therefore, it would appear to be in the employer's interest to settle out of court.

As we have seen, most wrongful dismissal cases, including those where dismissal is used as a form of reprisal, do not reach the adjudication stage and are also settled out of court. Reinstatement (except for civil recourses: see section 3.7 above) is the usual remedy, unless there are demonstrated circumstances that make reinstatement undesirable. The possibility of reinstatement increases employees' bargaining power during settlement negotiations (i.e. often an employer does not want the employee to come back to the workplace and would rather pay additional compensation than reinstate).

When reinstatement is negotiated or ordered by the tribunal, in theory the employee regains a job that was unjustly lost and a wrong is righted. Despite the numerous provisions guaranteeing reinstatement as a remedy, there is a notable paucity of information on the number of dismissed employees who actually do go back to their jobs. While a tribunal (or a labour inspector under federal jurisdiction, or an employment standards officer in Ontario in the case of dismissals following reprisals) may order reinstatement, there appear to be no publicly available administrative data on what happens after reinstatement is ordered. Also, given the extremely small number of decisions rendered concerning dismissals, and the normally long time delays between the filing of a complaint and a decision, case law is in any event no indicator of the frequency of reinstatement. Since mediated settlements are confidential, there is no way of

⁹⁴ See e.g. QLSA, sec. 114; OESA, secs 119(12), 122(6).

knowing if it has been agreed that the employee will be reinstated. Anecdotal evidence suggests – in Quebec at least⁹⁵ – that the vast majority of non-unionized employees do not regain their jobs. Since in the case of reprisals the remedies are reinstatement and back pay (contrary to wrongful dismissal cases, where other remedies can be awarded), this raises the question of whether the “punishment” for reprisals is sufficient.

Employees may not even get back pay in the event of a favourable decision concerning their complaint, since Canadian labour law imposes on the employee the obligation to mitigate damages. This means that they will have to demonstrate at the hearing that they have made a reasonable effort to find other employment.⁹⁶ If they have earned income from employment elsewhere, it will be deducted from their back pay. Also, if they have received unemployment insurance benefits or welfare payments to ensure their economic security, they will have to repay these sums for the period covered by the back pay. For a low-wage earner, once he or she has deducted employment income and/or unemployment insurance benefits (a maximum of CAD524 a week in 2015⁹⁷), the amount actually received may represent next to nothing.

While it is in the parties’ interest to settle a dismissal complaint to the satisfaction of each, thereby resolving the complaint in a timely fashion and at lesser cost than a hearing (for the parties and for the administration of justice generally), the very high rate of settlement can also have negative effects on the evolution of case law. For example, when a new provision governing dismissals or reprisals comes into force, years may pass before its interpretation allows for some certainty as to the possible outcome of a hearing, leaving the guidelines in a mediation process unclear. Also, the case law does not evolve to take into account new realities in the workplace and the labour market (e.g. precarious non-standard employment).

In wrongful dismissal cases and recourses for reprisals that end up before an adjudicator, the question of legal representation is fundamental. While some employees have the knowledge and resources to represent themselves, or the means to pay a lawyer (legal aid is generally not available), most do not. In Quebec, the CNESST normally represents complainants without cost at the pre-hearing conciliation and at the hearing (it does not, however, represent the complainant during “in-house” mediation at the CNESST). There are alternative initiatives, such as the government-funded Human Rights Legal Support Centre in Ontario,⁹⁸ which provides legal representation at no cost before the Ontario Human Rights Tribunal in employment discrimination matters brought under the Ontario Human Rights Code.⁹⁹

⁹⁵ Information obtained from the workers’ advocacy group Au bas de l’échelle, Montreal, Dec. 2014.

⁹⁶ This obligation does not apply for amounts claimed as moral or punitive damages in wrongful dismissal cases. See *Evans v. Teamsters Local Union No. 31* [2008] 1 SCR 661, 2008 SCC 20 (Supreme Court of Canada) (obligation to mitigate) and *Wallace v. United Grain Growers Ltd.*, [1997] 3 SCR 701 (Supreme Court of Canada) (punitive damages).

⁹⁷ Service Canada, “Employment insurance regular benefits” (available at: <http://www.servicecanada.gc.ca/eng/ei/types/regular.shtml#eligible> [accessed 11 Mar. 2016]).

⁹⁸ See: <http://www.hrlsc.on.ca/en/home> [accessed 11 Mar. 2016].

⁹⁹ RSO 1990, Ch. H.19.

Alternative dispute resolution

Alternative dispute resolution (ADR) – in the forms of mediation/conciliation (the terms are now usually used fairly interchangeably) and arbitration – has historically been synonymous with labour relations in Canada (Veilleux and Trudeau, 2011). With the development of statutory law in individual employment disputes and ADR in civil cases, its scope has broadened considerably, and it has been institutionalized through legislation. The trend towards “participatory justice” (also known as “consensus-based justice”) in civil law has permeated the administration of justice in Canada, with the objectives of arriving at timely and satisfactory resolution of disputes, limiting the adversarial nature of the justice system and reducing costs in the administration of justice (see most notably Law Commission of Canada, 2003).

It is, however, very difficult to evaluate the performance of these mechanisms. Most complaints are settled. The administrative data provided on the settlement of different types of complaints are purely quantitative. In some of the administrative statistics, there is no indication whether the complaints were settled through a formal mediation process or informally between the parties, with or without the presence of a labour inspector. In most cases, the settlement is not validated by a court or other decision-making body as being made in accordance with standards of public order and with relevant case law. In order to evaluate the effectiveness of mediation, qualitative analysis of the settlements, by both decision-making and administrative bodies, needs to be carried out. If the parties are represented by legal counsel, there are more guarantees as to the quality of the settlement, but legal representation is not always possible. Given the confidential nature of settlements, it is also very difficult for studies to be conducted – that is, the agreements can only be studied if they are available, which is not always the case.

While there are guarantees as to the confidentiality of mediation processes, measures to guarantee the impartiality of mediators are not a given. In Ontario and under federal jurisdiction, the labour inspector has the role of enforcing compliance, but can also act as mediator with the same parties. The process has been more formalized at Quebec’s CNESST, where mediators in cases of reprisals, dismissals without just cause and psychological harassment do not intervene in the inspection of monetary complaints. They are also bound by a code of ethics which is publicized and explained to the parties.

Mediation should also be voluntary. The advent of mandatory mediation in civil cases in Ontario, including wrongful dismissal cases, for example, raises some important questions.

Mandatory mediation programs turn a public dispute private at the behest of the public system. Since the parties are usually responsible for paying the cost, these programs offload the cost of dispute resolution onto the parties, not because they have chosen to try mediation, but because they are required to do so. Offering mediation as one of several non-adjudicative processes may well be a benefit to both the parties, who may reach a better decision together than the one imposed on them by the court, and the

court system, which can use its resources for cases which require litigation for whatever reason. Requiring it gives priority not to the parties' determination of their own dispute, as is claimed, but to the goal of efficient use of scarce judicial resources. There is nothing wrong with courts requiring parties to submit their dispute to rules and process designed to enhance efficient use of public resources; this is an inherent part of the courts' jurisdiction and of the litigation system. The problem arises when particular forms of dispute resolution are subverted as part of that process, since this risks diminishing, in the long run, the value of those processes. (Hughes, 2001, pp. 201–202)¹⁰⁰

The move towards a certain privatization of the resolution of individual employment disputes through mediation paid for by the parties in civil cases and through pre-hire private arbitration clauses, described above, distances many employees from an accessible recourse and can have the effect of turning the clock back in respect of the guarantee of certain employee rights, particularly those relating to job security.

3.10. Complementarity/interactions between different institutions, mechanisms and processes

As mentioned at the beginning of this chapter, Canadian labour law is characterized by its fragmentation. Depending on the jurisdiction, several government agencies can be called upon by a non-unionized employee to resolve a dispute with an employer. For example, under federal jurisdiction, employees can file complaints for unjust dismissal under the CLC; but, if they claim to be victims of discrimination under the Canadian Human Rights Act on the basis of an enumerated ground,¹⁰¹ they can also file a complaint with the Canadian Human Rights Commission. The practice of the Human Rights Commission is to refuse complaints that are already before another body. While the multiplication of recourses for an employee is desirable neither for the employee nor for the employer, the legislative objectives and evidentiary requirements of each of these laws are different. The Arthurs Report recommended that the government agencies responsible for each of the laws, as well as the Canadian Human Rights Tribunal, which adjudicates cases, adopt a protocol to inform complainants of the disadvantages and advantages of each of the recourses, to exchange information gathered during the inquiry processes before trial, and thereby to ensure that the complainant

¹⁰⁰ See, however, the overall positive evaluation of the mandatory mediation programme two years after its establishment in 2001: Hann et al., 2001. It should be noted that this report covers all types of civil cases, only a minority of which are employment cases, and does not address the issue of power imbalances specific to the employment relationship, or that of workers' capacity to pay lawyers and mediators at the outset. To our knowledge, there has been no comprehensive evaluation of the programme since.

¹⁰¹ Canadian Human Rights Act, RSC, 1985, Ch. H-6.

makes a conscious and informed decision regarding which recourse, if any, is most suitable (Arthurs, 2006, p. 98).

Generally, government agencies responsible for the enforcement of work-related standards function in isolation, each having its particular jurisdiction and ways of operating. It has been proposed that information should be shared by workplace regulatory agencies, in particular in order to facilitate identification of high-risk workplaces and intervention to remedy legislative violations (Dutil and Saunders, 2005, p. 17). In the case of Quebec, it is still too soon to determine the positive or negative effects on access to justice for individual labour disputes of the grouping together of three agencies into the CNESST, and of two specialized tribunals into the ALT.

3.11. Concluding thoughts: Trends and developments in individual labour disputes

Mechanisms and institutions for the prevention and resolution of individual labour disputes are highly formalized in Canada and, outside unionized workplaces and the decree system in Quebec, fall essentially within the State's purview. While there are internal dispute resolution mechanisms in some workplaces, there is very little information available on how they work and what voice non-unionized employees have. Existing grounds for disputes are already quite extensive, whether under employment standards legislation or human rights legislation. Additional grounds for individual dispute resolution are also gaining legislative recognition – for example, psychological harassment in Quebec – and all of the jurisdictions discussed in this chapter have introduced some form of protection for whistleblowers, particularly for public servants.¹⁰²

The focus on preventing disputes has shifted somewhat in recent years to take into account the situation of employees in vulnerable situations. Besides targeted proactive inspections in sectors more prone to violations in Ontario and Quebec, there has been an increasing awareness of the obstacles encountered by people in precarious employment in exercising their work-related rights (see e.g. Law Commission of Ontario, 2012; Bernier, Vallée and Jobin, 2003). There have, however, been few policy initiatives for precarious workers, particularly those in “non-standard” employment. In 2003, the Quebec Government initiated a broad consultation on the legislative protection of “non-standard” workers and a committee of experts produced a voluminous report with a comprehensive series of recommendations (Bernier, Vallée and Jobin, 2003), which to date have not given rise to policy changes. The Arthurs Report, released in 2006, also presented a series of recommendations concerning “vulnerable workers”, none of which have led to changes to the CLC Part III or to government policy (Arthurs, 2006, Ch. 10). In 2015, the Ontario Government launched a consultation process on the “changing workplace”, which included questions surrounding

¹⁰² See e.g. Dugas, 2013; Public Service of Ontario Act, 2006, SO 2006, Ch. 35, Sch. A, secs 108ff.

precarious employment and compliance issues (Ministry of Labour, 2015); the final report is due in the summer of 2016.¹⁰³

There have been some recent legislative changes in Ontario targeting employees working for temporary help agencies.¹⁰⁴ These changes take better account, for example, of the fact that in this context disputes arise not only with the agency as the employer, but also with client firms. The changes clearly state that both the agency and the client firm are liable for monies owing to the employees, and give employment standards officers the power to target client firms in investigations of complaints.¹⁰⁵ More attention is also being paid in Ontario to migrant and immigrant workers' needs in the prevention and resolution of disputes, in the form of more recourses against abuses.¹⁰⁶ In Quebec, a programme of targeted inspections of farms where migrant workers were likely to be found was in place from 2008 to 2013. This had the effect of informing very isolated employees and their employers of their respective rights and obligations under the QLSA.¹⁰⁷ At the same time, focusing on certain categories of workers deemed to be vulnerable and on the most egregious violators of the law may take attention – and resources – away from ensuring prevention and compliance in other circumstances and lead to a failure to take into account changes in employer practices in a rapidly changing labour market, thereby undermining the legislation's original objectives (see e.g. Gellatly et al., 2011).

The trend towards self-enforcement in the form of “self-help kits” fails to take into account the imbalance of power between employees and employers, and puts a heavy burden on workers who may not know the law or their rights, and may have limitations in language and literacy that make it difficult to present their claims to their employers. Essentially, the worker is playing a role that labour inspectors should normally play. This trend also does not take into account the fact that the vast majority of workers who file claims are no longer employed when they do so. This is a reflection of the difficulties encountered by workers in claiming their rights when they are still employed and of the important gaps in prevention activity.

The statistics presented throughout this chapter show the great extent to which disputes are settled out of court and the low rate of adjudication. They also reveal that specialized tribunals are increasingly incapable of rendering decisions in a timely fashion, and have in consequence instituted mediation processes, as have employment standards enforcement agencies. In Ontario and under federal jurisdiction, it might

¹⁰³ See the Changing Workplaces Review website at: <http://www.labour.gov.on.ca/english/about/workplace/> [accessed 4 May 2016].

¹⁰⁴ Employment Standards Amendment Act (Temporary Help Agencies) 2009, SO 2009, Ch. 9, and SO 2014, Ch. 10, Sch. 2, secs 5, 10 (4) (Bill 18, Stronger Workplaces for a Stronger Economy Act, 2014).

¹⁰⁵ OESA, secs 74.1ff.

¹⁰⁶ See e.g. the Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others), 2009, SO 2009, Ch. 32.

¹⁰⁷ CNT, “Projet d'intervention auprès des travailleurs agricoles étrangers. Bilan d'une première expérience” (available at: http://www.cnt.gouv.qc.ca/fileadmin/pdf/enquetes-et-recherches/Sommaire_du_bilan_d_intervention_aupres_des_travailleurs_migrants.pdf [accessed 11 Mar. 2016]).

be said that the role of employment standards officers has changed: they are no longer essentially the “guardians” of the law, making judgments on the basis of a full investigation of the facts, but have become “impartial” actors, attempting to bring the parties together despite the unequal power relationship between them (see e.g. Gellatly et al., 2011, pp. 95, 96). At the same time, the decision to pursue a complaint or not rests in the officer’s hands, thereby potentially undermining his or her role in ensuring that minimum statutory rights are enforced through inspection and recourse to coercive measures to ensure employer compliance.

One of the principal issues in relation to the resolution of individual labour disputes is the evaluation of the effectiveness of the various mediation processes in ensuring that the objectives of labour legislation are met. The trend in Canada is undoubtedly towards more, rather than less, mediation and out-of-court settlement of all forms of complaints and grievances, particularly in rights-based disputes where workers are no longer employed and that arise from statutory rights and obligations. These processes need to be evaluated not only quantitatively, with respect to settlement rates (although this is an important measure for estimating and lowering the costs of the administration of justice), but qualitatively as well (Latreille and Saundry, 2014, pp. 196–197). There also should be the assurance that mediation processes respect guidelines and a code of ethics, to guarantee their impartiality and confidentiality, and to ensure that legislative objectives are not being undermined.

In addition, the trend towards the privatization of civil recourses (e.g. mandatory mediation in Ontario and, to a lesser extent, private arbitration clauses) demands careful analysis and evaluation of its eventual impacts on effective dispute resolution for non-unionized employees. Finally, the individualization of dispute resolution under the purview of the State, with the onus of ensuring employer compliance bearing on workers and a “settlement above all” approach, will inevitably have the greatest negative impact on the most precarious non-unionized workers, that is, those with the least bargaining power.

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4. France

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4.1. Introduction

In France, there is a clear legal distinction between the private and public sectors, each of which is governed by its own regulations, courts and resolution procedures.¹ The labour law applicable to the private sector is codified in the Labour Code (Code du travail: C. trav.). This legislation, including that regarding the prevention and resolution of individual disputes, is the same for all paid employees, regardless of their employment contracts, the regulations applicable to them in their particular workplaces or the nature of their work within the company (though certain provisions vary with the size of the firm). In the public sector, various legal texts and dispute prevention or settlement mechanisms are applicable under different sets of staff regulations. The legal status of civil servants is governed by Law No. 83-634 of 13 July 1983 relating to the rights and duties of civil servants.

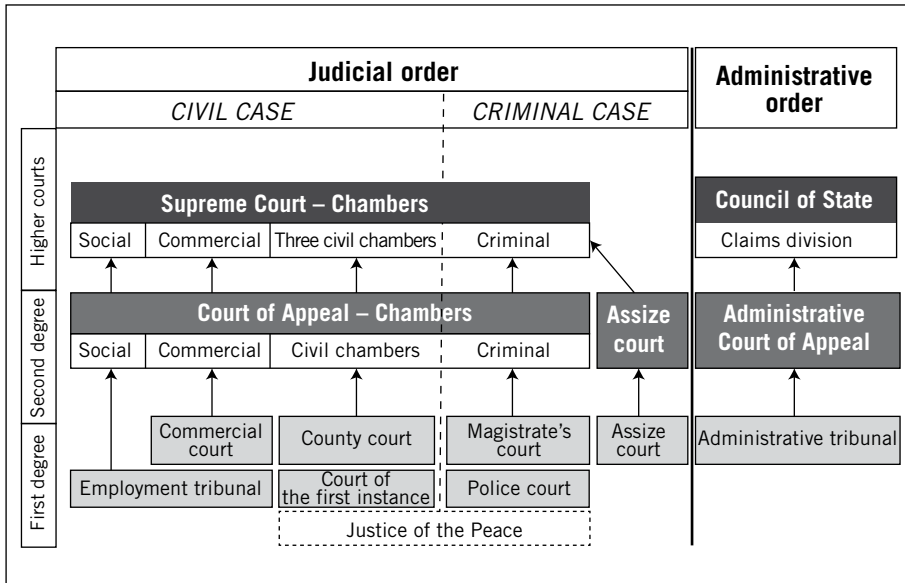
The division between private and public sectors is reflected in the organizational structure of the French legal system (see figure 4.1), within which the private sector is subject to judicial orders and the public sector to administrative orders.²

There are no statistical or analytical studies on individual labour disputes in the public sector in France. Regarding disputes in the private sector, the research conducted by Evelyne Serverin (Guilloneau and Serverin, 2013) provides some data. In 2012, 175,714 cases were brought to the employment tribunals. Of these, 96.3 per cent of cases were initiated by “ordinary” employees (not staff representatives), eight out of ten cases in order to challenge the termination of their employment contracts. Other grounds include requests for cancellation of a disciplinary sanction (0.2 per cent); requests for delivery of documents (1 per cent); and requests for the payment

¹ For that reason, each of the issues addressed in this chapter will be discussed separately in the context of the private and public sectors.

² According to Ministry of Justice figures for 2015, within the judicial order there are 210 conciliation boards, 307 police courts and courts of first instance, 164 county courts, 36 courts of appeal and one Supreme Court; and within the administrative order, 42 administrative tribunals, eight courts of appeal and one Council of State.

Figure 4.1. National judicial organization of France



Source: Ministère de la justice (<http://www.justice.gouv.fr/organisation-de-la-justice-10031/lordre-judiciaire-10033> / [12 Mar. 2016])

of wage claims (0.4 per cent).³ More than 80 per cent of applications are introduced in substantive proceedings and 20 per cent in interlocutory proceedings.⁴ A mere 0.5 per cent of cases are initiated by employers. Most claimants (61 per cent) are male, and the average age is 43.5 years. The proportion of claimants under 30 years of age has steadily declined, while the share of complainants aged 50 and over increased from 21 per cent to 29 per cent between 2004 and 2012 (Serverin, 2013). Complainants are increasingly often being advised or represented (91 per cent in 2012, rising from 84 per cent in 2004). These figures concern substantive proceedings; the proportion has also risen for interlocutory proceedings, from 48 per cent to 57 per cent (Serverin, 2013). Applicants rarely have the benefit of legal aid (10 per cent for substantive proceedings and 7 per cent for interlocutory proceedings), though this figure has increased slightly since 2004.

None of the key terms used in this chapter in discussing the prevention and resolution of individual labour disputes – conflict, dispute, disagreement, claim, complaint – are legally defined in the relevant French legislation. The notion of a conflict (individual or collective) is distinct from that of a dispute (individual or collective). A *conflict* is a situation in which there is opposition between the employer and an employee (individual) or several employees (collective), without the matter necessarily being

³ All figures refer to 2012.

⁴ Interlocutory proceedings are used in instances where an urgent decision is required and where there is no important legal issue at stake (e.g. where the employer is alleged to have breached the fundamental rights of an employee).

brought before a judge or labour inspector. An individual *dispute* (or disagreement) is a matter subject to the jurisdiction of an employment tribunal,⁵ even if it is the result of a labour conflict (for example, a strike). Nevertheless, the concepts are often used interchangeably. An individual *claim* is made on the authority of one of the institutions representing a company's employees, which may be the staff representatives,⁶ a specialist entity (Ombudsman) or a non-judicial supervisory body working on behalf of an international organization (e.g. the United Nations) to verify the interpretation of an international legal text (e.g. the International Covenant on Economic, Social and Cultural Rights: ICESCR). The term (individual) *complaint* is used in criminal cases, that is, when the breach of a rule of law is subject to criminal penalties and the staff member or employee can refer the disagreement to the criminal courts ("filing a complaint").⁷

The analysis in this chapter is divided into four sections. Section 4.2 focuses on judicial dispute resolution. Section 4.3 discusses alternative dispute resolution methods, specifically conciliation, mediation and arbitration. Section 4.4 focuses on a specialized dispute resolution institution, the Défenseur des droits (Ombudsman). Section 4.5 considers other means for the prevention of disputes, mainly at the workplace level. Section 4.6 offers brief concluding comments.

4.2. The judicial authorities

The resolution of individual disputes in the private sector

Operation

In France, there is an institution specifically and primarily competent to handle individual labour disputes: the employment tribunal (ET) (Conseil de prud'hommes).⁸ Disputes over training, performance or breach of work contracts fall within the purview of the ET. The ET also guarantees the protection of individual fundamental rights and liberties, such as the principle of non-discrimination, the right to strike, the right to the respect of privacy and the right to freedom of expression. (Other courts may occasionally be required to deal with such disputes.)⁹

Each ET is composed of equal numbers of employers' and employees' representatives.¹⁰ These lay judges are elected by direct suffrage,¹¹ by employers and employees respectively, and serve for a period of five years.¹² If the lay judges are equally divided,

⁵ C. trav., art. L. 1411-1.

⁶ C. trav., art. L. 2313-1.

⁷ Code pénal (Criminal Code), art. 113-8.

⁸ C. trav., art. L. 1411-1–L. 1411-3.

⁹ C. trav., art. L. 1411-4.

¹⁰ C. trav., art. L. 1421-1.

¹¹ As a result of Law No. 2014-1528 of 18 Dec. 2014 on the appointment of counsellors for the conciliation boards, this mode of election will be reformed, by order, before 18 June 2016. In the future, the appointment of counsellors will reflect the electoral weight of the trade union organizations of employees and of the professional organizations of employers.

¹² C. trav., art. L. 1442-3.

and if the parties so request or if warranted by the nature of the dispute, a professional judge from the county court makes the final decision. Appeals are submitted to the labour chambers of the appeal courts, staffed by professional judges. The appeal court's decisions may be made on points of law before the labour chambers of the Supreme Court (Cour de cassation). The ET has jurisdiction in all individual labour disputes, regardless of the employee's profession or the sums at issue. Any jurisdiction clauses (in, for example, an employment contract or a collective agreement concluded with trade unions) claiming to grant such power to any other judge are considered void.¹³ An "individual labour dispute" is taken to mean any dispute regarding the legal classification, formation, implementation or termination of an employment contract.

In the event of such a dispute, the ET will first try to reconcile the parties;¹⁴ if this effort fails, the ET adjudicates. Exceptions aside,¹⁵ the parties must bring their case before the ET's Conciliation and Guidance Board (CGB) (Bureau de conciliation et d'orientation), which seeks to reconcile the parties, informs each party of their rights, and ensures that any reconciliation respects the rights of both parties. The CGB is made up of two counsellors, one each from the employers and the employees.¹⁶ The counsellors are given legal and practical training, including in the techniques of conciliation, to enable them to carry out their task. This training is provided by trade unions or employer organizations and by the labour institutes.¹⁷ The counsellors fulfil the functions of conciliation and judgment; they alternate in holding the chair, and the chair takes no priority in conciliation, which is pursued in a collegial manner. The CGB also handles ancillary tasks related to preparing cases for trial,¹⁸ and orders any interim measures that may apply (e.g. provision for payment of sums due to employees).¹⁹ If conciliation fails, the case is adjudicated by the trial board, i.e. the full tribunal.²⁰ An urgent applications bench also permits the hearing of urgent requests, for example, in cases where subsistence is at issue or where there is a serious risk to the health of the employee.

ET proceedings fall into two regulatory categories: those under the Civil Procedure Code and those under the Labour Code.²¹ Among the special rules set out under the Labour Code, the following should be mentioned:

- **Orality:** ET proceedings are held orally.²² The parties may choose to present their arguments orally or in writing, or in a combination of the two.

¹³ C. trav., art. L. 1411-4.

¹⁴ C. trav., art. L. 1411-1.

¹⁵ An exhaustive list of these exceptions is given in the Labour Code. Examples include the redefinition of a fixed-term contract as a contract of indefinite length, or when the company is subject to bankruptcy proceedings

¹⁶ C. trav., arts L. 1423-13 and R. 1454-7.

¹⁷ These may be either public institutes linked to a university or private institutes linked to a trade union and specializing in the training of lay judges.

¹⁸ C. trav., art. R. 1454-1.

¹⁹ C. trav., art. R. 1454-14.

²⁰ C. trav., art. R. 1454-17).

²¹ C. trav., art. R.1451-1.

²² C. trav., art. R. 1453-3.

- Mandatory personal appearance: the parties are required to appear in person; they may be advised, but not represented.²³
- Completeness of proceedings: all individual disputes arising from the same employment contract must be submitted in a single case before the ET or, if necessary, during the appeal stage at the latest.²⁴ The rule prohibits parties, after proceedings for a first dispute have been held, from bringing any new actions seeking to resolve disputes arising from the same contract of employment.

Other judicial courts may also hear individual labour disputes. For example, the county courts, composed of professional judges, ruling either in full court session or with a single presiding judge, may judge disputes over additional compensation to be paid to employee inventors,²⁵ and fixed or variable corporate profit-sharing bonuses.²⁶ The courts of first instance, which are also composed of professional judges, may hear cases involving certain specific individual employment relationships, such as those between sailors and shipowners, or disputes between interns and their supervisors with a value of less than €10,000.

Exceptionally, the commercial courts may hear individual claims, particularly when court-ordered insolvency proceedings are opened. Administrative courts may occasionally hear cases, usually concerning the termination of the employment contracts of protected employees – that is, employees with a mandate to serve as staff or union representatives. Such contracts can only be terminated by an administrative authorization issued by the labour inspector, which may be appealed before the administrative court judge. This also applies to collective dismissals for economic reasons (“mass layoffs”). When a company intends to order the dismissal of at least ten employees in one 30-day period, the employer is required to negotiate an agreement with the unions with the aim, in particular, of establishing an employment protection plan. If no agreement can be reached, the employer must adopt an employment protection plan unilaterally. The agreed or unilaterally adopted plan must be checked or certified, respectively, by the labour administration.²⁷ These administrative decisions too may be appealed before the administrative court judge.

Assessment

Lay judges’ participation in ET proceedings has the advantage of allowing disputes to be resolved by people with a detailed knowledge of the professional environments, working methods and various constraints involved. The ETs have exclusive jurisdiction over individual labour disputes and thus are able to amass relevant expertise. As specialized courts, these tribunals guarantee reliability in respect of labour regulations

²³ C. trav., art. R. 1453-1.

²⁴ C. trav., art. R. 1452-6.

²⁵ Code de la propriété intellectuelle, art. L. 615-21.

²⁶ C. trav., art. R. 3326-1.

²⁷ C. trav., art. L. 1233-57-1.

that may be quite complex. However, such specialization unfortunately cannot always compensate for the inadequacies of the legal training provided to lay judges: just over one week of training per year.²⁸ Not being legal professionals, they are sometimes criticized for partiality and lack of legal expertise. Statistics show that about one in five cases end up deadlocked, and slightly more than half of all decisions end up being appealed (Lacabarats, 2014). Also, the ETs can take an extremely long time to deliver a ruling. Repeated condemnations of France by the European Court of Human Rights have often been attributed to such difficulties, related to the equal representation of employees and employers on the ETs.

The requirement for conciliation before the ET has also given rise to strong criticism, primarily on the grounds of ineffectiveness: conciliation succeeds in only one case out of ten, on average (Guillonau and Serverin, 2013). The development of alternative means of dispute resolution partly explains the weakness of these results, as only cases where it has not been possible to reach agreement come before the ET, and there is little chance that the CGB will succeed after others have failed. The failure of this mandatory pre-trial conciliation results in an automatic extension of ET proceedings.

The ET's specific procedural rules have also been subject to criticism. The oral nature of the proceedings, which had the merit of making the ETs more accessible, may now sometimes appear anachronistic owing to the parties' increasingly common recourse to lawyers. It sometimes poses difficulties in view of the adversarial principle, which requires that ET judges allow the opposing party time to examine and respond to arguments presented orally. The requirement to appear in person, which is essentially connected to the ET's task of achieving conciliation, is useful only on the assumption that such an outcome is attainable. The provision for each party to appear alone before the ET judge has been strongly criticized for being likely to require additional work on the part of the judges to handle poorly organized claims presented by lay persons, and to reduce the chances of a successful action. The principle of completeness of proceedings has also been severely criticized. Although it has the virtue of preventing the accumulation of several claims in successive trials, it means that even the slightest matter brought before the ET ends up involving multiple claims, and may prove inequitable when parties who had not been informed of the proceedings are then prevented from entering their claims.

The intervention of a professional judge to deliver a casting vote in deadlocked cases may be fairly criticized, first since professional judges receive only very basic training in labour law, and second because this intervention requires the entirety of the case to be re-examined owing to this judge's not having been present during the preliminary debates. Criticism has thus been directed at both the poor quality of the rulings pronounced and the artificial extension of the duration of proceedings.

Evelyne Serverin's research into ETs has cast light on their numerous weak points, in terms of the length of time taken to resolve cases,²⁹ the imbalance in

²⁸ C. trav., art. L. 1442-1.

²⁹ In 2012, a ruling on the merits of a case took an average of 15 months.

geographical coverage,³⁰ the high proportion of disputes over employment contract termination (80 per cent of the total volume), the ineffectiveness of efforts to achieve conciliation (only 10 per cent success), and the limited access to ETs for younger workers (29 per cent of petitioners were over 50 years of age, and 16 per cent were aged 20–30),³¹ for reasons including a lack of information, job insecurity, low professional seniority resulting in low levels of entitlement to compensation, the cost of being represented by a lawyer, and low levels of legal assistance.

The labour inspectorate cannot interfere in the settlement of individual disputes, over which the ETs have exclusive jurisdiction.³² Except for institutionalized cooperation with the Ombudsman (*Défenseur des droits*) over discrimination cases – which has proved to be effective – ET judges rarely interact with external institutions, including the labour administration and specialized government agencies such as the National Commission on Information Technology and Freedom (*Commission nationale de l’informatique et des libertés*) and the National Agency for the Improvement of Working Conditions (*Agence nationale pour l’amélioration des conditions de travail*). This relative isolation, which is attributable to the French legal tradition of strict separation between the judicial and administrative orders, prevents the pooling of information, knowledge and resources that could strengthen workers’ access to social justice. Criticism of the fragmentation of contested proceedings among the ordinary courts is only partly justified. The fact that the administrative courts have jurisdiction is exceptional, but can foster a general sense of complexity. It is perhaps the action of the administrative courts that causes the most difficulty: because of the separation of the judicial and administrative orders, the ET cannot decide on issues handled by administrative judges, and this can give rise to situations in which administrative judges and ET judges take conflicting positions on identical topics.

Future developments and reforms

The issue of individual labour disputes has recently been examined by the public authorities, generating a range of public reports. Special mention should be made of the report prepared by Alain Lacabarats, which was submitted to the Government in July 2014 (Lacabarats, 2014). Proposals for legislative modifications were reflected in changes made in 2014–15.³³

³⁰ ETs in major centres are overloaded, while those in areas of low population density are underused.

³¹ To our knowledge, no statistical study has been undertaken on access to the ET for other categories of vulnerable workers.

³² The labour inspectorate and labour administration are now incorporated within DIRECCTE (*Directions régionales des entreprises, de la concurrence, de la consommation, du travail et de l’emploi*), the French state network acting as a channel for the services of the ministries of labour, employment, professional development and social dialogue, and economy, finance and industry, in each region.

³³ Law No. 2014-1528, 18 Dec. 2014; Law No. 2015-990, 6 Aug. 2015.

In the first place, this report proposed improving the competence of both ET judges and professional judges by expanding their access to digital resources, with a particular focus on the training of judges. The initial and continuing training of elected judges would be made mandatory, and would be provided in part by the National School for the Judiciary, which trains professional judges in France, enabling professional judges to benefit from increased training in labour law.

The report then addressed the rights and obligations of ET judges, aiming to eradicate the suspicion of bias that still hangs over their work. It recommended that ET judges be subject not only to the same rights and obligations as professional judges, but also to the same ethical rules. Disciplinary procedures similar to those for professional judges would have to be established.

The report further underlined the need for reform in the ETs' conciliation practice. It recommended the replacement of the existing board by a new CGB,³⁴ whose duties in terms of preparing cases and granting interlocutory measures would be reinforced, so that it could refer a dispute to the trial board in plenary session (four counsellors), in a limited session (two counsellors) or in a voting session (four counsellors and a judge with a casting vote). Provision for the conciliatory function would be improved, with better compensation for the time judges spend preparing for conciliation.³⁵ The powers of the CGB would also be broadened to include alternative dispute settlement options other than conciliation, such as judicial mediation, which would require a greater involvement of conciliation counsellors in finding an amicable settlement.

The report further envisaged the integration of the ETs' operating rules into the Civil Procedure Code and the Code of Judicial Organization, with the aim of simplifying the rules of procedure, resolving redundancies and contradictions, and improving access. It also suggested that the map of ET jurisdictions be revised in order to better reflect the distribution of population and employment centres, and that ET staffing levels be adjusted to better fit the numbers of decisions these tribunals have to produce. It further recommended that the distribution of powers between ET judges and administrative judges be revised where conflicts exist – for example, in cases regarding the dismissal of protected employees, examination of the clauses of bylaws, or examination of the procedures for the appointment or election of employee representatives.

Finally, the report proposed that a set of guiding principles for ET procedures be developed. This would involve requirements for representation and for the filing of

³⁴ This was one of the measures enacted by Law No. 2015-990 of 6 Aug. 2015; see further below, p. 111.

³⁵ Remuneration of conciliation counsellors for their various tasks (preparation of dossiers, hearings in the conciliation phase, hearings of the judgment etc.) is made on a lump-sum basis by application of Decree No. 2008-560 of 16 June 2008 on the remuneration of conciliation counsellors. Such lump-sum remuneration is often considered by the conciliation counsellors to be far too low.

appeals in writing³⁶ adjustments to the principle of the completeness of proceedings, and a reworking of the conditions for bringing cases before the ETs.

Law No. 2014-1528 of 18 December 2014, relating to the designation of lay judges, authorized the Government to issue an order within 18 months to reform the terms of appointment to ETs in such a way as to make appointment dependent upon the electoral weight of both employees' and employers' organizations. This would replace election to ETs by direct suffrage with appointment handled by the most representative employees' and employers' organisations. ET elections seem to have long suffered a lack of legitimacy due to the very low participation rate of employees in these elections. This low voter turnout is partly attributable to the complexity of the poll (each tribunal is composed of five different sections, representing different professional sectors, with, therefore, five elections for employees and five for employers); the location of the election, which is held outside the workplace; and the limited distribution of information about the elections. Other factors that affect the voting rate are that the employer is responsible for registering employees on the list of voters, and that candidates are often unknown to the voters, being chosen by unions and employers' organizations on political grounds rather than on the basis of their experience or competence. The reform proposed in the Lacabarats Report could improve both the quality and the legitimacy of lay ET judges.

As noted above, Law No. 2015-990 of 6 August 2015, on growth, business and equal economic opportunities, brought about certain changes to the CGB in order to increase its conciliation work and enable more frequent recourse to a judge who can deliver a casting vote when requested by the parties or when it is warranted by the complexity of the dispute. The law also reasserted the principles of independence and impartiality of the conciliation counsellors and instigated tougher sanctions when they are not observed. It further created a protected status for trade union representatives who can assist or represent an employee or an employer before the ET. These representatives are not lawyers but volunteer trade union activists who in most cases are current or former conciliation counsellors and as such have acquired significant experience in labour law.

The resolution of individual disputes in the public sector

Operation

The courts of the administrative order (administrative tribunals, administrative courts of appeal, Council of State) have jurisdiction to hear disputes between tenured or non-tenured public officials and their employers. However, litigation pitting public sector workers against their employers sometimes cannot be settled before the administrative courts, either because the legislature has so decided, or because in the absence of any explicit provision in law the judge believes that the ordinary courts have jurisdiction, thus adding somewhat to the complexity of the matter. Administrative judges,

³⁶ In accordance with the principle of personal appearance, while assistance may be given to the parties before the ET, representation may be authorized only if proof is provided of a legitimate ground for absence (illness, death of a relative, etc.).

unlike those who sit on the ETs, are professionals, recruited by competitive examination, and are entitled to exercise these functions on external assignment or secondment from another public service position, which may not be judicial. The fundamental idea behind the administrative courts is that those who judge the administration must be familiar with it, and that its action must be guided by the general interest.

The historical evolution of the administrative branch of justice has resulted in a singular division of powers between the Council of State (CS), the administrative courts of appeal (ACAs) and the administrative courts (ACs). Under the Code of Administrative Justice (Code de justice administrative: CJA), the ACs have jurisdiction to pronounce rulings in the first instance in disputes concerning most public officials.³⁷ The competent courts are those of the administrative district to which the official was assigned on the date of the decision being challenged (in proceedings to set aside an administrative decision). Nevertheless, the CS has jurisdiction in the first and last instance to hear disputes concerning the recruitment and discipline of public officials appointed by decree of the President of the Republic on the basis of article 13 of the Constitution of 1958 (including chancellors, prefects, ambassadors, councillors of state and university professors, among others). This jurisdiction was significantly reduced by the decree of 22 February 2010.³⁸

The ACAs are appeal courts, but the CS has exclusive jurisdiction to hear appeals regarding the legality of orders promulgated in emergency rulings for the protection of fundamental freedoms.³⁹ In particular, subsequent to the decree of 24 June 2003,⁴⁰ the ACAs' jurisdiction to hear appeals has been confined to those regarding entry into public service, discipline, and departure from public service. These cases apart, the ACs have jurisdiction in the first and final instance and via a single judge. Abundant litigation has been pursued, moreover, to clarify the rather vague notion of entry into service, and thus to render it comparable to other regulation-governed situations officials may encounter during their careers (for example, under the current arrangements a challenge to a refusal to admit a temporary public servant would constitute an entry-into-service dispute). The CS also has the exclusive right to set aside the judgments of lower administrative courts, and on such occasion, acting in the interest of the proper administration of justice, may decide the case on its merits. The administrative courts are relatively accessible: any public official may submit a challenge to an individual decision regarding their career, for example appealing on grounds of *ultra vires*, provided that the appellant has been prejudiced by the decision (e.g. through denial of promotion, disciplinary sanctions, grading/evaluation etc.).

Regarding challenges to elements of a financial nature (salaries or bonuses), there are two possible approaches: *ultra vires* and full remedy actions. Given the additional costs attached to representation by counsel, which is obligatory in a full remedy action, many prefer to pursue the *ultra vires* approach. This involves the public official peti-

³⁷ CJA, art. R. 312-12.

³⁸ CJA, art. R. 311-1.

³⁹ CJA, art. R. 321-1.

⁴⁰ CJA, art. R. 811-1.

tioning the court to set aside the unfavourable (implicit or explicit) decision that has denied them a financial advantage, by asserting the illegality of the decision, and in their preliminary claim seeking payment of a fixed amount from the administration to enable them to begin preparations for litigation properly. They are then exempt from the requirement set down in the CJA that they hire a lawyer to defend their interests.⁴¹ Appeals before ACAs without legal representation are permitted for these categories of workers only in appeals on grounds of *ultra vires* (requests to set aside a decision) and not in full remedy actions.⁴² It is important to indicate the type of appeal at hand (in this case, proceedings to set aside a judgment). An official filing a full remedy action (claiming administrative liability) is not exempt from the obligation to be represented by a lawyer. It should be added that public officials may be advised by representatives of trade unions, except for those in military services who are not permitted to belong to unions, though they may be members of professional organizations.

With a view to relieving the burden on the administrative courts (labour disputes constituting the second largest source of administrative litigation), Law No. 2000-597 of 30 June 2000 established the requirement that a prior administrative appeal (PAA) (*recours administratif préalable obligatoire*) must be entered before any litigation in respect of individual decisions concerning officials subject to the general regulations for military personnel or to the general regulations for public servants. The law exempts from this requirement decisions concerning recruitment (the content of which notion is determined during the course of judicial appeals) and those concerning disciplinary proceedings. If the applicant fails to comply with the requirement to file a PAA, their judicial appeal will be found inadmissible and declined. It should be emphasized that the PAA defines the scope of the proceedings: the applicant cannot raise any points other than those put forth in the PAA, with the exception of those involving questions of public policy. This rule also applies if the applicant appeals the judicial decision reached in the court of first instance. This demonstrates a strong tendency to bring these appeals under the court's jurisdiction, a tendency that would be strengthened further by the commencement of adversarial proceedings.

An official may request in their PAA an intervention by an appointed third party, who will study the appeal independently and impartially and suggest a solution to the administrative authority to which the matter is initially referred. This third party's role is solely consultative, involving neither mediation nor arbitration. The administration is required to consult the third party; this prolongs the process by two to four months. The administration is also required to communicate the opinion of the third party to the civil servant who filed the appeal, but is free to observe or to ignore the opinion; neither the public employer nor the employee is bound by that opinion. The administration always has the last word in the consultative phase. Nevertheless, if the opinion inclines in favour of the civil servant, this may encourage the administration to relax its position from that taken in the preliminary consultative phase. As a last resort, the judge determines whether the disputed decision is legal. The appointed third party is

⁴¹ CJA, art. R. 431-3.

⁴² CJA, art. R. 811-7.

chosen by the official from a list of those offered by the administration, selected on the basis of their experience in settling disputes and their independence vis-à-vis the applicant and the administration. Union representatives or members of labour inspection bodies,⁴³ for instance, can serve in this capacity. Such third parties enjoy a great degree of liberty. They may request additional information from the official and from the administration, while ensuring they respect the equality of the parties (though the legal texts do not establish any principle of *audi alteram partem*). They then issue an opinion reiterating the factual elements and elaborating on the legal elements that led them to arrive at a favourable or unfavourable opinion.

Finally, alongside the classic channels for dispute settlement in court, in 2000 the legislature introduced revised procedures for emergency relief (interim applications). Two of these procedures have the potential to play a role in the resolution of disputes in the medium or even short term. The first is a motion for summary suspension,⁴⁴ which allows the applicant to obtain from the judge a suspension of enforcement on an administrative decision or certain of its effects, when justified by an emergency situation and when grounds exist at the interlocutory stage for serious doubt as to the legality of the decision. Whether or not a situation qualifies as an emergency is determined in the light of the seriousness of the prejudice that may be caused if the decision is enforced (for example, a measure terminating a position or implementing a transfer which would cause the geographical separation of a family). A judge may act *ex officio* to order any measure necessary to safeguard fundamental freedoms under a serious and manifestly illegal threat of infringement by any legal person under public or private law entrusted with duties in the public service.⁴⁵ In such a case, the judge must issue a decision within 48 hours. To date, the administrative courts have ruled that fundamental freedoms have included, for example, the freedom of conscience, the right to strike, the right to respect for private life and a normal family life, the independence of university professors and the right to freedom from harassment.

Evaluation

Unlike the ETs, the administrative courts have not been accused of inadequacy, ineffectiveness or partisanship, for reasons related to the professional status of judges. The abolition of the right to appeal to the ACAs against judgments regarding certain individual administrative decisions shows the concern to reduce the burden on the administrative courts arising from conflicts that do not raise substantive legal issues and that can be very easily resolved. It is not surprising that, with few exceptions, these types of disputes are now dealt with through the PAA requirement.

An assessment of the outcomes of these PAAs remains to be undertaken. It is only too clear that the Government has been dragging its feet on the matter. As noted above, the legal basis for requiring PAAs was set down in 2000; however, at that stage it

⁴³ As a general rule, labour inspectors intervene only in private companies, not in the public administration.

⁴⁴ CJA, art. L. 521-1.

⁴⁵ CJA, art. L. 521-2.

did not apply to all civil servants, and it was not until a new law was passed in 2011 that the process was revived, with the intention of extending the mechanism to cover other civil servants. Although the legislature set down the principle that an annual parliamentary report would be required assessing the outcomes of the experiment with PAAs in the civil service, no action has been taken to meet this requirement, even though the experiment ended in the autumn of 2014. The intensity of review by the judge in the context of appeals to set aside an administrative decision varies depending on the matter at hand, and over recent years has tended to increase. In the case of litigation regarding recruitment the judges always confine themselves to limited review, attributing to the jury a sovereign power to assess the respective merits of the candidates. By contrast, in litigation regarding disciplinary decisions, the courts recently ceased auditing for manifest errors of disciplinary action, and instead imposed strict review of the proportionality of punishment to the crime, a principle that serves as an additional guarantee to the benefit of public officials. The judges significantly reduced the breadth of the category of non-prejudicial measures, thus paving the way for the judicial settlement of disputes, which were previously always settled informally, the outcome being determined solely by the balance of power between the parties. While the onus of proof in principle rests with the plaintiff, there is no system of legal proof in such cases. Proof is free in administrative law, and only the judges are in a position to appreciate the pertinence of the elements laid before them. However, a specific regime, in common with the private sector, was instigated in respect of allegations of psychological or sexual harassment, where a claim made by the civil servant or employee was assumed valid until demonstrated otherwise, laying the onus of proving the absence of harassment upon the employer. Finally, while the law provides the option for the presiding judge in the relevant court to organize a conciliation hearing,⁴⁶ free of charge but subject to a case having previously been filed, if the parties are agreed, it is rarely used.

Future developments

An assessment of the effectiveness of the PAAs in the public service context must be performed using appropriate statistical tools. In addition to identifying the number of appeals found admissible by type of dispute (remuneration, grading/evaluation, etc.) and in relation to the responses of the appointed third party and the issuer of the initial decision, an analysis of the following would be useful:

- the administration's choice of appointed third parties (administrative origins, positions held), so as to attempt to determine the links between the public employer and these individuals;
- the public officials' choice of appointed third parties, including whether they chose a third party at all, and whether those who did were statistically more successful in their claims.

Once an assessment of the effectiveness of PAAs has been conducted, the question will arise whether they should be made generally applicable and adapted for the different

⁴⁶ CJA, art. L. 211-4.

areas of the civil service. It will then be necessary to consider whether to maintain other channels of appeal, which might become redundant and give rise to unnecessarily long delays in resolving conflicts; for example, in cases where training has been refused, in the context of the individual right to receive training the law requires – before any PAA or possible challenge in court – that the appeal be screened by the Joint Administrative Commission.

Conclusion

The French system for resolving individual labour disputes offers many advantages. Social justice is accessible to all workers, in both the private and public sectors. The legal proceedings involved have the markers of a functional judicial system characterized by frequent collegiality, the right of parties to be assisted and represented by a lawyer, the right to review by a higher court, the right to emergency procedures, and respect for the rights of defence and of due process. However, there are certain negative points common to both orders of courts, and others more specific to each of the sectors.

In general, the labour courts in both orders are overburdened by the large number of appeals and cases are unevenly distributed across the large employment and population centres. As a result, judgment delays are often automatically extended, particularly in the private sector. The division of litigation among various courts makes for a sense of complexity. Complexity and long duration of proceedings both hinder access to social justice.

Mandatory pre-litigation procedures in both court orders remain imperfect. The inefficient process of conciliation through the ETs was reformed by Law No. 2015-990 of 6 August 2015. However, this law made no amendment to conciliation through the administrative courts. The pros and cons of the PAA, whose aim is to reduce the burden on the administrative courts, have not been subject to a proper evaluation. The risk of bias has not been fully overcome, though a few quick and minor reforms would be enough to curb it.

Collaboration between the two orders of courts themselves, and with other agencies with authority in individual labour relations, remains rare, even though the pooling of resources and expertise could improve the functioning of these institutions.

There are also more specific problems related to the proceedings of individual labour disputes in the private sector, including the equi-representational and elective nature of the ET, the training of ET judges, and the specific rules of procedure reserved for litigation.

Individual labour disputes in the public sector do not seem conducive to alternative dispute settlement methods, which could help unburden the courts, but would run counter to the characteristic unilateralism of public authority. The problem is partly addressed through the administrative joint committees (AJCs; see section 4.5 below).

4.3. Conciliation, mediation and arbitration

Conciliation/mediation, arbitration and settlements are restricted almost exclusively to the private sector. Only one mediation system exists in the public sector.

Mediation

Practical circumstances

Non-judicial mediation

The Labour Code provides the option of using mediation in order to avoid individual labour disputes in the following situations: psychological harassment,⁴⁷ apprenticeship contracts,⁴⁸ and cross-border employment contracts (where one of the parties is based in France and the other in a different EU Member State).⁴⁹ The use of mediation is compulsory in settling disputes arising from the execution of an employment contract concerning a salaried notary⁵⁰ or a bailiff.⁵¹ With these exceptions, parties to an employment contract may choose to submit their case to a mediator, but the process is not mandatory. There is no legal distinction between conciliation and mediation, and the two terms can be used as synonyms to denote a process where a third party intervenes in and attempts to solve a dispute without recourse to any judicial decision. Certain sector-specific collective bargaining agreements include their own conciliation and arbitration procedures; however, such arrangements are extremely rare.

In the public sector, the guiding legal principle is to avoid direct mediation between civil servants and the administration.⁵² There is an exception in the national education and higher education sectors. The jurisdiction of the Mediator for National Education (MNE) (*Médiateur de l'éducation nationale*) stems from the fact that the law in this area is broader,⁵³ reaching beyond claims concerning the public service of national education and teaching in its relations with users to include those concerning the working of the sector in its relations with its users and staff. When it receives a claim from a member of staff, the MNE can inform or advise the person concerned. It may then refer the claim to the department concerned, and may also provide explanations for the decision made by the administration, when legitimate. When the MNE considers the department dysfunctional (for reasons such as delay, erroneous application of regulations or wrong interpretation of legal texts), it will support the staff member's claim by intervening on his or her behalf at departmental level. The mediator also intervenes in favour of the member of staff when a decision, albeit legally founded, results in an unfair situation. The MNE can also attempt to reconcile the parties in conflict. The 2014 MNE report (MNE, 2014) indicates that the effect was positive for those calling upon its services in 84 per cent of the cases handled. The number of claims brought by members of staff totalled 3,470 in 2014, having never previously exceeded 2,800 since 2000. Of that total of 3,470 cases lodged in 2014, the highest proportion (25 per cent) concerned transfers and postings, followed by financial issues (22 per cent), the

⁴⁷ C. trav., art. L.1152-6.

⁴⁸ C. trav., arts L. 6222-39ff.

⁴⁹ C. trav., art. R. 1471-1.

⁵⁰ Decree No. 93-82, 15 Jan. 1993, arts 14–16.

⁵¹ Law No. 2010-1609, 23 Dec. 2010, art. 17.

⁵² Law No. 73-6, 3 Jan. 1973, art. 8.

⁵³ Education Code, art. L. 23-10-1.

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career ladder (18 per cent), work organization and professional relations (14 per cent), pensions and retirement (6 per cent), recruitment including supply teachers and tenure (6 per cent), other miscellaneous questions (5 per cent) and social protection (4 per cent).

Union representatives can play a role akin to that of a mediator in assisting civil servants in individual labour disputes.

Judicial mediation

Judicial mediation is derived from a procedure now enshrined in law.⁵⁴ During a court hearing, the judge can propose mediation to the parties. If both parties agree, the judge nominates a mediator, establishes the duration of the mediation, and sets a new date for the hearing.⁵⁵ Mediation can be entrusted to an individual or to a corporate body. An individual appointed as mediator must meet certain conditions as to his/her independence and moral standing.⁵⁶ In practice, those appointed tend to be former magistrates, lawyers or others who are familiar with the business world.

Judges can call upon mediators' associations, including the National Association of Mediators (NAM), the Association of European Mediators (AEM), the Network of Corporate Mediators (NCM), the Institute of Experts in Arbitration and Mediation (IEAM) and the Parisian Centre for Mediation and Arbitration (PCMA). Payment for mediators is made either by lump sum⁵⁷ or according to an hourly rate,⁵⁸ fixed with reference to the difficulty of the case and/or the means of the parties.⁵⁹ Furthermore, if one of the parties obtains legal assistance, the State will pay the share of that party.⁶⁰

The duration of mediation is limited to three months, with a possible extension for a further three-month period, upon the mediator's request.⁶¹ The mediator is bound by an obligation of confidentiality, and declarations made to the mediator can neither be produced nor referred to later on in the procedure, or in any other context, without the consent of both parties.⁶² After the mediation process, the mediator informs the judge in writing whether the parties have managed to find a solution to their dispute.⁶³ If the parties fail to reach an agreement, the case will run its course and the judge will

⁵⁴ Code de procédure civile (CPC), art. 131-1ff.

⁵⁵ CPC, art. 131-6.

⁵⁶ CPC, art. 131-4, 131-5.

⁵⁷ Between €500 and €700 for the Grenoble court of appeal, €1,000 for the conciliation board of Bobigny.

⁵⁸ Between €110 and €150 an hour.

⁵⁹ Law No. 95-125, 8 Feb. 1995, art. 22, provides that: "The parties freely determine how the costs of the mediation are to be divided between them. Failing agreement, such costs shall be split equally unless the judge considers that such a division is unfair in the light of the economic circumstances of the parties."

⁶⁰ *Newsletter of the Supreme Court, special issue No. 4*, on mediation, 2006. Available at: http://www.courdecassation.fr/publications_26/bulletin_information_cour_cassation_27/hors_serie_2074/mediation_8925.html [accessed 15 Mar. 2016].

⁶¹ CPC, art. 131-3.

⁶² CPC, art. 131-14.

⁶³ CPC, art. 131-11.

hear the arguments of both sides. If an agreement is reached, the parties must drop their claims and request that the judge validate the agreement,⁶⁴ so that it becomes legally enforceable.

Evaluation

Non-judicial mediation

There are no official figures on the use of mediation. The system is not closely regulated by the legal authorities, and there are very few studies. There is no demand from the unions, legal experts or employees for the extension and better regulation of this form of conflict resolution. Nor is the jurisprudence particularly conducive to such an expansion. Even in the potential mediation situations identified in the applicable legal texts, with just one exception, neither party is obliged to pursue mediation before resorting to court proceedings. Any mediation clauses in employment contracts or collective bargaining agreements do not constitute obligations.⁶⁵ The Supreme Court has ruled that such clauses do not prevent either party from taking the case directly to the ET.

Employees' perceptions about the use of mediation within private companies are mixed, arising from a lack of trust in the impartiality of the mediator and a fear of potential repercussions for claimants' careers. In a survey of mediation procedures introduced in two companies, IBM and SFR, 79 per cent of those questioned at SFR and 51 per cent of those surveyed at IBM said that they had a good opinion of the mediation procedure. Generally, the employees considered that such a procedure strengthened justice within the company (97 per cent at SFR and 71 per cent at IBM). One weakness identified was that not all the employees were informed of the existence of mediation. Even those who were informed of the option (61 per cent of employees at SFR and 63 per cent at IBM) were not always inclined to use it. Of a total of 130 people surveyed at SFR, only 18 had used the process (around 14 per cent), while 25 out of a total of 203 people surveyed had used mediation at IBM (12 per cent). The results imply a lack of confidence among employees in the mediation procedure. At IBM, the employees had doubts about the impartiality of the mediator (62 per cent) and were afraid that turning to the mediation procedure would hinder their careers (73 per cent). At SFR, the employees were more confident: only 28 per cent of those surveyed had doubts about the impartiality of the mediator and 38 per cent were afraid that the procedure might harm their careers (Le Flanchec et al., 2009). In both cases, the mediators were appointed from within the company. Mediation was free of charge, but the mediators were, by virtue of their position, close to management.

Judicial mediation

The experience of jurisdictions that have used judicial mediation has been broadly positive. For example, the court of appeal in Grenoble introduced a judicial mediation process from 1996 to 2003: the courts requested mediation for 1,000 cases, of which 75–80 per cent were settled. The Paris court of appeal ordered 280 mediations in 2010,

⁶⁴ CPC, art. 131-12.

⁶⁵ Cour de cassation, chambre sociale (Cass. soc.), 5 Dec. 2012, No. 11-20.004.

of which around 55 per cent resulted in an agreement (Roy, 2010). The ETs conducted a similar experiment, but the judges' reactions in the courts of first instance were less decisive (Hunter-Falck, 2013). In Bobigny, judicial mediation has been used since February 2011, in response to a backlog of 1,825 cases. Of a total of 28 cases, only two led to the appointment of a mediator. In Quimper, more than 15 per cent of the cases brought between September 2010 and December 2011 were referred to mediation, of which 65 per cent were successfully settled.

Such positive results in some jurisdictions confirm the advantages (at least in theory) of judicial mediation in labour disputes. Mediation brings in a third party bound by a confidentiality agreement. Declarations and reactions made during mediation therefore cannot be used in subsequent legal proceedings or in the context of another dispute. Mediation is a more flexible procedure than conciliation. There is no obligation to engage in direct confrontation; the mediator may choose to consult one party without the other being present, whether or not a legal adviser is present. The time spent on mediation is longer than the few minutes that are spent in a conciliation hearing. According to the PCMA, 48 per cent of cases mediated recorded a total consultation time of between ten and 30 hours. Mediation is less costly for both parties than a long trial. Mediators may be remunerated on a fixed-price basis or at an hourly rate. This is a win-win situation. The courts are less saturated, and avoiding a trial serves the interests of both parties. The mediation process does not exclude lawyers; indeed, the Supreme Court strongly recommends including lawyers in the mediation procedure, and the available statistics also demonstrate the advantage of having lawyers present during the mediation procedure. At the court of appeal in Grenoble, mediators who involved lawyers in the mediation procedure achieved an agreement rate of 70 per cent, whereas for those who excluded lawyers from proceedings the corresponding rate was closer to 30 per cent.

However, there are also disadvantages related to mediation, primarily practical ones such as arranging hearings and finding mediators. It is thus preferable that resort to mediation should come from the magistrates themselves, and that they should be convinced of the usefulness of mediation. It has been proved that when the magistrates responsible for initiating a policy of mediation move on to another jurisdiction, the procedure generally does not survive their departure (Vert, 2011). This serves to illustrate the tenuous standing of the mediation procedure. Some labour inspectorates have established a form of partnership with mediation bodies: thus the Finistère branch of DIRECCTE⁶⁶ established a procedure in 2012 aiming to transfer certain selected cases to a mediation body.

The labour administration intervenes only very informally in individual labour disputes. It may become aware of the existence of an individual conflict in one of two ways: either because an employee has approached a watchdog service or because a labour inspector was informed of the existence of a conflict in the course of a visit to the company. As the role of the labour administration is not to undertake mediation or

⁶⁶ On DIRECCTE, see n. 32 above.

conciliation, labour inspectors cannot assume the role of mediator/conciliator in any formal sense. They can, however, engage in some kind of exchange with the employer – who, being well aware that the labour inspector is not a mediator, may accept a certain degree of intervention that in some way helps to defuse an individual conflict.

Individual labour disputes often concern a breach of the employment contract, but vary widely according to personal or economic circumstances. Some labour administrations use statistical tools to determine the most frequent causes of such disputes.

Arbitration

Arbitration is governed by articles 1442ff of the CPC. However, article L. 1411-4 of the Labour Code stipulates that ETs have sole authority to hear disputes relating to matters of employment law, and that any convention to the contrary will be considered null. As a result, parties bound by an employment contract are not entitled to call in an arbitrator if a dispute should arise between them, nor may they insert an arbitration clause into that contract. There are three exceptions where arbitration is possible: cases involving international employment contracts, journalists and salaried lawyers.⁶⁷

The future of arbitration in France does not look bright, even though there are some legal theories in its favour. The law (and particularly the existing jurisprudence) remains strongly opposed to this tool. Furthermore, the cost of arbitration is likely to be considered prohibitive by most employees. According to the scale published by the French Arbitration Association, the minimum fee charged by the Court of Arbitration currently stands at €6,000, with an additional €1,500 in administrative charges.

Settlement

Settlement is an option under current employment law.⁶⁸ By signing a settlement, employees waive their right to contest certain acts or omissions on the employer's part, more often than not relating to the termination of an employment contract. In return, the employer undertakes to make certain concessions to the employee. Such settlements are subject to certain conditions which determine their validity. First, there must be evidence of real, reciprocal concessions. The employer cannot simply pay the sums already owed to the employee; there must be a supplementary payment.⁶⁹ Second, the settlement must relate to a pre-existing dispute. Employees cannot sign settlements by which they waive in advance their right to contest certain actions.⁷⁰

Conclusion

There are currently no draft bills or projected laws which would alter the status quo in respect of conciliation, mediation, arbitration or settlements in either the private or the public sector. In the private sector, judicial mediation appears to have a future provided

⁶⁷ There is no arbitration in the French public sector, with the sole exceptions of the Ombudsman and the MNE. The Labour Code does not apply in the French public sector.

⁶⁸ Code civil, art. 2044.

⁶⁹ Cass. soc., 5 Apr. 2005, No. 04-44.626.

⁷⁰ Cass. soc., 15 July 1998, No. 96-40.878.

that magistrates take the initiative to implement this procedure within their respective jurisdictions. At the time of writing there is no general consensus on this subject, and it does not seem advisable to impose a policy of mediation without first ensuring that magistrates have received adequate training in such matters. In the public sector, the introduction of mediators would undoubtedly be very useful.

4.4. Specialized institutions: The Ombudsman

Institutions specializing in the prevention and resolution of individual labour conflicts are rare and recent additions to the French legal landscape. One major institution is the Ombudsman, who handles cases from both the private and public sectors.⁷¹

Practical circumstances

The Ombudsman, created by the framework law of 29 March 2011, is an independent authority, one of whose responsibilities – inherited from the now-defunct Authority for Equality and the Fight Against Discrimination (Haute autorité de lutte contre les discriminations et pour l'égalité: HALDE), in existence from 2004 to 2011 – is to handle claims involving employment discrimination in the public and private sector. In addition to cases where the parties in dispute call upon the agency themselves, the Ombudsman may be called in directly and free of charge by any natural (salaried employees or civil servants) or legal person, including associations concerned with the actions of public or private figures. Referral of a dispute to the Ombudsman does not affect the statutes of limitation applicable to civil, administrative or penal cases, nor the deadlines applicable to administrative appeals or litigation. The primary role of the Ombudsman, whose specialism is facilitating access to justice, is to examine, redirect and transfer to other partners the applications it receives. It also deals with individual claims, either by finding an amicable resolution (informal agreement, civil, administrative or penal settlement, formal mediation process or equitable agreement) or by presenting its observations to the relevant judicial authorities (these may take the form of findings, reports to the public prosecutor or observations). Nobody has the right to ignore the Ombudsman's demands. The agency has all the standard legal means at its disposal (demanding explanations, documents etc.) along with a number of more official options (hearings or site inspections, where necessary in the presence of a judge).

Evaluation

Recourse to the Ombudsman, being free of charge, available through local branches, relatively informal and with different referral options, is accessible to all claimants. The

⁷¹ Also worth noting is the MNE. Established by Decree No. 98-1082 of 1 Dec. 1998, the MNE (and associated education authority mediators) have the power to hear claims relating to the public education service, particularly with regard to employee relations.

Ombudsman is an open authority, capable of coordinating and processing claims very rapidly, and equipped with a broad and efficient range of operational tools. It also plays a facilitating role, helping parties to identify the quickest, most suitable and most practical solution in their circumstances. It is an authority whose multifaceted nature (at once investigator, lawyer, witness, plaintiff, prosecutor and judge) allows for a response which is tailored to the precise circumstances of the case at hand. The number of claims against discrimination has been increasing since 2010 (when it stood at 3,055), a trend attributable to a greater coverage of the country by the relevant delegates and to the implementation of a uniform system for first point of contact. On the other hand, there has been a drop in the proportion of claims relating to employment, both public and private (76.3 per cent in 2010 compared to 60 per cent in 2014). Nevertheless, two-thirds of the dossiers involving discrimination concern employment. These dossiers are lodged by members of the economically active population either with or without a job (83.9 per cent; 67 per cent in employment, 16.9 per cent seeking employment). Of these, 61.3 per cent are aged between 25 and 49, 25.1 per cent are aged between 50 and 59 and 55.4 per cent are women. There are more cases involving employment in the private sector than in the public sector (*Défenseur des droits*, 2014, pp. 28ff).

The Ombudsman is represented throughout France and its overseas territories by 397 delegates who staff offices at 542 reception points in a wide range of neighbourhood structures as close as possible to the population (justice and law councils, local government offices, municipal buildings, points of access to rights, etc.).⁷² These delegates are all volunteers, selected and appointed by the Ombudsman, who have been given training for their task, are remunerated on a lump-sum basis and who regularly take part in collegial work meetings. Their mission is to listen, give information, guide people to a suitable institution or mechanism, achieve an amicable settlement or undertake legal proceedings. In addition, the central office of the Ombudsman has a team of nearly 250 specialists working for the defence of rights, for access to rights and for the coordination of the network of delegates across the country. Access to the Ombudsman is totally free of charge. There is no legal stipulation concerning the time taken to process a case, but the absence of formalities for the lodging of a complaint means that a solution is inevitably found more quickly than through a lawsuit.

These qualities notwithstanding, the Ombudsman does not enjoy the same level of popularity as its predecessor, as is clear from the referral statistics: in 2014 the Ombudsman received 4,535 claims, compared with the 12,467 received by the HALDE in 2010. This discrepancy can be attributed to a combination of three main factors. It took the Ombudsman almost two years to organize the merger of the previously existing agencies which it absorbed; this merger, and the generic name of the new agency, have served to decrease the visibility of the Ombudsman expertise in the fight against discrimination; and the Ombudsman choice of publicity strategy regarding its actions does not give top priority to the fight against discrimination.

⁷² It is worth remembering that there are 210 ETs in France and 42 administrative tribunals.

Nevertheless, the facts that the Ombudsman has particular expertise in the field of discrimination, and that it is obliged to submit an annual self-assessment report on recent activities and future projects, give rise to two factors which suggest its potential to offer a comprehensive, integrated, efficient policy for the prevention of individual conflicts arising from discrimination in the workplace. First, its accumulation of considerable expertise regarding the nature, context and outward signs of discrimination in the workplace can be put to use in identifying such incidents and implementing an appropriate public policy of corrective or awareness-raising actions. Second, it has the capacity to invoke the laws on individual rights and freedoms, reducing the likelihood of complaints being withdrawn or renounced by providing sensitive, professional assistance with the preparation of the documents required for a legal action (for example, by affording priority to the practice of proving discrimination by hearing evidence from the accused). Ultimately, this agency offers a reparative, resilient, comprehensive vision of justice.

Future developments

The Ombudsman has all the necessary means at its disposal, and yet does not currently appear to have the will or ambition to make full use of them. The agency seems to have no intention of adopting a proactive approach, much less innovating with large-scale projects of the sort undertaken by its predecessor, such as the campaign against multiple discriminations launched in 2011.

4.5. Other institutions, mechanisms and workplace processes

Other institutions, mechanisms and workplace processes in the private sector

Practical circumstances

In the private sector, various institutions and processes may be invoked, and most bodies organizing and representing employees contribute, each in its own way and through a variety of mechanisms, to the prevention and resolution of individual labour disputes within companies, helping to avoid the risk of reprisals against the employees involved. Certain rights may also be bestowed upon employees. These institutions and processes can be divided into five categories:

Trade unions

Unions play a role in the prevention and/or resolution of individual labour disputes in two ways. First, one of the primary purposes of unions is to defend the *individual* rights and interests of employees.⁷³ It is possible to create a union branch within a company regardless of the number of employees that company has.⁷⁴ However, an employee can only be designated as a union representative in companies with more than 50 employ-

⁷³ C. trav., art. L. 2131-1.

⁷⁴ C. trav., art. L. 2142-1.

ees,⁷⁵ or more than 11 if the union representative is an employee representative (see below).⁷⁶ In practice, over 50 per cent of companies and establishments with more than 50 employees have union representatives. These union representatives encourage internal resolution of disputes. Moreover, the majority of individual disputes that go before ETs come from small companies, without formal union structures. Furthermore, the unions are authorized, in certain cases and subject to certain conditions, to defend the individual interests of employees in legal proceedings, in their name and on their behalf (direct representation), though the dispute remains individual, taking into account the vulnerability of certain categories of employees and/or the protection of fundamental human rights. Nowadays, the unions may intervene as direct representatives of employees falling into one of a dozen different categories.

Employee representatives

Employee representatives are responsible for presenting employers with all individual employee complaints regarding wages and the application of the Labour Code and of the collective agreements applying within the company. They must also pass on to the labour inspectorate all complaints and observations relating to the application of the legal provisions which they are responsible for monitoring.⁷⁷ Employees always retain the right to present their complaints directly to their employer.⁷⁸ The formalities governing the presentation of complaints to the employer by employee representatives are enshrined in law.⁷⁹

Support provided to employees during preliminary meetings concerning disciplinary sanctions or dismissals

Since the introduction of Law No. 73-680 of 13 July 1973, employers have been required to conduct an *inter partes* consultation procedure before any decisions regarding dismissals. The structure of this procedure is always the same: summons to attend a preliminary meeting, followed by notification of the employer's final decision. Since a reform in 1982,⁸⁰ a similar procedure has been introduced for disciplinary sanctions. Disciplinary and dismissal procedures thus follow the same format: the employee must be informed of the reasons for the decision being envisaged, and then taken, by the employer concerning his/her fate; the employee has the right to be accompanied during the compulsory interview which must be held before any decision is taken by the employer.⁸¹

⁷⁵ C. trav., arts L. 2143-3, L. 2142-1-1.

⁷⁶ C. trav., art. L. 2143-6.

⁷⁷ C. trav., art. L. 2313-1.

⁷⁸ C. trav., art. L. 2313-10.

⁷⁹ C. trav., arts L. 2315-8ff.

⁸⁰ Law No. 82-689, 4 Aug. 1982.

⁸¹ C. trav., arts L. 1232-4, L. 1332-2.

The “right to notify” of elected employee representatives

Within companies, two categories of elected employee representatives may contribute to dispute prevention and resolution by means of their “right to notify”: general employee representatives (see above) and members of the health, safety and working conditions committee (Comité d’hygiène, de sécurité et des conditions de travail: CHSCT).⁸²

Law No. 92-1446 of 31 December 1992 concerning the rights and freedoms of employees in the workplace establishes this “right to notify” in order to protect the interests of French workers. Its application is entrusted to the employee representatives,⁸³ who apply it in cases where there is deemed to be an unjustified infringement of employees’ rights, physical or mental health, or individual freedoms within the company. If the employer is found to be at fault, or if there is a difference of opinion regarding the extent of the infringement, the matter may be referred to the adjudication panel of the ET, either by the employee concerned or by the employee’s elected representative if the employee, notified in writing, does not object. The adjudication panel then issues an interim (emergency) ruling. The law provides for such rulings in several areas. As well as “emergency rulings for the protection of fundamental freedoms” and for the protection of the physical and mental health of employees (through “emergency rulings on health”, other circumstances which can be considered to justify the intervention of employee representatives include cases of sexual or psychological harassment (“emergency rulings on harassment”), or any instances of discrimination observed in matters of recruitment, remuneration, training, reclassification, posting, classification, job definition, professional promotion, transferral, contract renewal, sanctions or dismissals (“emergency rulings on discrimination”). The panel may impose all necessary measures required to put an immediate end to the infringement of employees’ rights, liberties or well-being, and the ruling may be accompanied by a penalty charge.

Since the introduction of Law No. 82-1097 of 23 December 1982, the CHSCT also has a “right to notify”.⁸⁴ If, for example through the intermediary of an employee, a representative sitting on the CHSCT is made aware of the existence of a source of serious and imminent danger, the representative immediately notifies the employer in writing.⁸⁵ The employer must then launch an immediate inquiry together with the employee representative who sounded the alarm, and take all necessary measures to eliminate this danger. If there is a difference of opinion as to the extent of the danger, or the best way to deal with it, an emergency meeting of the CHSCT is called, and the employer must notify the labour inspectorate. In the absence of a majority agreement between the CHSCT and the employer regarding the measures to be adopted, the labour inspectorate is immediately called in; it may decide to refer the matter to the president of the appropriate court of first instance, who may in turn order the temporary closure of the workshop or site, or even the halting of works and the seizure of

⁸² All companies employing over 50 people must have a CHSCT.

⁸³ C. trav., art. L. 2313-2.

⁸⁴ C. trav., art. L. 4131-2.

⁸⁵ C. trav., art. D. 4132-1.

machinery or materials. If an accident occurs in a situation where the CHSCT has already invoked its right to notify, the employer will be deemed guilty of an inexcusable dereliction of duty and the employee involved in the accident will receive additional compensation.⁸⁶

Employees' right to notify and to withhold labour

The law of 23 December 1982 also provides employees with a right to notify and to withhold their labour, which may have an impact on individual labour disputes. In applying this right, workers should immediately alert employers to any circumstances in the workplace which they have reason to believe may constitute a serious and immediate danger to their life or health.⁸⁷ Employees also have the right to withhold their labour when they have reason to believe that there is a serious and immediate danger to their life or health. The application of this right is, however, subject to two conditions: the employee must have reasonable grounds to fear for his/her health or safety, and the withholding of labour by the employee in question must not in turn create a situation of serious and imminent danger for others. If the risk should materialize and a workplace accident should occur, it is the victim of the accident who shall benefit from the recognition of an inexcusable dereliction of duty.⁸⁸

Evaluation

It seems clear that the involvement of trade unions helps resolve disputes “upstream”, thereby avoiding the need to put the matter before the courts. No statistics on the use of this route are available, but there is some empirical evidence. A lack of union presence in many workplaces is an issue. In 2005, only 56 per cent of French employees reported that one or more unions were present in their workplace. Almost half of all workers do not have access to union support. The direct representation service offered by the unions suffers from the same problem of limited union coverage. However, the records of labour disputes reveal that this representation option is used by the unions, most notably in favour of vulnerable workers.

Preliminary interviews ahead of dismissals or disciplinary sanctions remain a central feature of the dismissal process, which was designed to be conducive to conciliation, and to avoid summary decisions by employers which can often have very serious consequences for the employee in question – namely unemployment. Nevertheless, in the absence of pertinent statistical resources, it is not possible to state with any certainty that these arrangements, particularly in cases where the employee is accompanied during the interview, serve to avoid sanctions or dismissals.

Future developments

The best option in respect of these mechanisms would be to expand the presence of union representatives, but there are various obstacles to this, including the existence of

⁸⁶ C. trav., art. L. 4131-4.

⁸⁷ C. trav., art. L. 4131-1.

⁸⁸ C. trav., art. L. 4131-4.

the 50-employee minimum for the designation of union representatives within a company; the precarious nature of much employment; and the risk of retaliatory measures from employers. The option of direct intervention by unions in representing employees should be protected and developed; at present it is available only to employees in around ten categories. The option also requires some fine-tuning, as the legislation remains inconsistent, particularly on the matter of who has the right to intervene. The right to elect employee representatives should be extended to all companies, and not just those with more than ten employees. The removal of this threshold, however, is not currently up for discussion. The use of the “right to notify” by the CHSCT is becoming more common within companies, though this mechanism is still relatively poorly understood by employee representatives owing to insufficient training. It is important to note that union-affiliated employee representatives have access to better training resources than their non-union counterparts. With regard to employees’ right to withhold their labour in dangerous situations, two major obstacles need to be removed: a lack of workers’ awareness of this right and the risk of disciplinary sanctions. In the event that the employee’s decision to withhold their labour does not satisfy the conditions stipulated by the law, the employer has full right to exercise the available disciplinary powers. Employees are not always willing to take this risk. Nonetheless, it is important that this right should survive and thrive. Finally, the right to be accompanied during preliminary disciplinary or dismissal interviews, originally introduced in 1973, clearly encourages a genuine two-way debate and, to a lesser extent, helps to prevent individual disputes. Such interviews must be conducted while the worker involved is still employed, and thus represent an indispensable tool for preventing and resolving individual conflicts in the private sector. There remains, however, room for improvement to the regulations governing such cases.

Other mechanisms in the public sector

Practical circumstances

In the public sector, decisions taken by the administrative authorities regarding the careers of employees (postings, appraisals, promotions, remuneration, statutory positions, rights and obligations, disciplinary matters) are a major source of individual labour disputes. The administrative authorities are bound by a corpus of legal texts (the Constitution, general statutory provisions, specific statutes applicable to certain categories of civil servants or their employment conditions). In order to prevent conflicts relating to individual labour contracts, these texts set out the terms under which employees must be consulted, via the appropriate channels, before the employer takes any decision. While all cases must be referred to these official channels, their authority is limited to issuing an opinion, with a few exceptions, which the public sector employer may or may not choose to take into account.

The two official dispute resolution channels are the administrative joint committees (AJCs) (commissions administratives paritaires) for the three major families of civil servants (State, local government and hospitals) and the consultative joint committees (commissions consultatives paritaires) for those employed by the State and its public institutions but without permanent civil servant status; similar structures

do not yet exist for local government employees (although they are to be introduced) or in public hospitals. The majority of important decisions concerning the careers of civil servants are thus taken after consultation with the relevant employee representatives. For State civil servants, the committees must be consulted before any decisions are taken regarding individual matters such as refusal of permanent civil servant status, promotion to the next rank or category, detachments, assignments, transferral to a cohort of employees on detachment and reintegration into the employee's original department, maternity/paternity leave, dismissal for professional incompetence, and disciplinary sanctions above a certain level of seriousness. In such cases the AJC serves as a disciplinary committee.

The detailed procedures are clearly defined throughout the civil service, where the prevailing principle is that, for the most serious sanctions, the decision issued by the AJC in its capacity as disciplinary committee, and with respect for both parties' right to defend their positions, allows the employee representatives to enter into a dialogue with the representatives of the administration in order to determine the choice of sanction which will ultimately be imposed by the disciplinary authorities. There are certain specific conditions governing the disciplinary rights of local authority public servants, covering among other things the role of the disciplinary appeals committee. Its judgments are binding upon the disciplinary authorities, who are not entitled to impose sanctions heavier than those approved by the appeals committee without submitting a legal demand to the competent administrative court to have the judgment overruled.

The committees may also be called upon by individual civil servants affected by decisions such as the refusal of a request to work part-time, individual disputes relating to the conditions of part-time employment, or refusals of authorized absences for the purposes of preparing for a public competitive examination or to undertake further training. Civil servants may also call in the AJC in matters relating to professional reviews, grading or evaluations.

Finally, the committees may be called in by their presidents, or by written request signed by at least half of all employee representatives, to intervene in all matters falling within their purview and in all individual cases involving specific employees. The AJCs in local government bodies and hospitals exercise similar responsibilities.

The result is that no individual employment matter liable to give rise to a labour dispute involving a public employee should, in principle, fall outside the purview of the parity-based approach and the AJC mechanism.

Furthermore, and as in the private sector, individual labour disputes in the public sector frequently result from employees' health problems which they believe are attributable to their working conditions. The agreement reached on 20 November 2009 between the public sector unions and employers in this regard was the prelude to a more wide-ranging reform aiming to improve the protection of health and safety at work and, by extension, to prevent individual labour disputes. It imposes certain obligations on employers, while including plans to involve civil servants more closely in the prevention of professional risks through the intermediation of the CHSCTs, contributing to the protection of physical and mental health and safety at work across all central and local government bodies and hospitals employing more than 50 people.

Resolving individual labour disputes: A comparative overview

Various other mechanisms have been put in place to reduce risks to the health of civil servants and public sector employees, and by extension to prevent the labour disputes to which such risks might give rise between victims and employers. As the public sector is lagging behind the private sector in such matters, the public authorities decided on the following steps to reinforce the existing mechanisms:

- provision of professional training to public sector employees with regard to health and safety;
- the imposition on each employer of an obligation to produce a “specific professional risk assessment document”, allowing for the prevention of psychosocial risks and situations liable to cause musculoskeletal damage;
- the publication, detailed in an agreement signed in 2013, of a specific “psychosocial risk assessment and prevention strategy” by all public sector employers by the end of 2015.

By April 2016, the first two of these measures had been implemented; the third had not. Further measures may be taken in order to avoid the materialization of certain risks judged to pose imminent threats to the health of public employees. These include the right to withhold labour, allowing a public employee to withdraw from a professional situation when they have reason to believe that this situation poses a serious and imminent danger to their life or well-being, or in cases where the protection systems in place are defective. In principle, this right cannot be invoked without the prior or simultaneous triggering of the alarm procedure, which consists of the employee alerting his/her head of department to the existence of a serious and imminent danger, either directly or through a member of the CHSCT. The employee representatives on the CHSCT may also trigger the alarm procedure on their own initiative.

The mechanism of functional protection was introduced by article 11 of Law No. 83-634 of 13 July 1983, which states that “the public authority is required to protect civil servants against all threats, violence, assaults, insults, defamation or affronts to which they may be exposed in the performance of their duties, and to compensate them, where relevant, for the damage caused”. Most notably, victims may request that their employers take the necessary measures (suspension or disciplinary sanctions for the employee(s) at fault, reorganization of the department, etc.) to put an end to episodes of harassment. By acceding to this request and taking the necessary measures, public employers – who are required to provide protection in cases where there is evidence of harassment – can limit the risk of being held responsible and taken to the appropriate administrative court by the victim.

Evaluation

There are no statistical studies which evaluate the efficiency of mechanisms for resolving individual conflicts concerning the careers of civil servants and other public officials without resort to litigation. However, it is possible to suggest that social dialogue has a positive impact. When implemented by the employer, the advisory ruling of the disciplinary committee can lend considerable credibility to any sanctions taken and dissuade employees, who will already have had the opportunity to present their argu-

ment before a third party, from taking the matter to the administrative courts. Conversely, a decision by the employer to ignore the advice of the disciplinary committee and issue a more severe sanction may spur the employee in question to put the matter before a judge. However, it appears that employers rarely choose to defy the disciplinary committee in this manner.

With regard to health matters, the situation is rendered more complex by the large number of parties involved, who are not always easily spurred into action. As for the preventive mechanisms in place, they invite two general remarks:

- The right to withhold labour is a tool which remains difficult or dangerous for public sector employees to invoke, as an unsubstantiated claim would leave them exposed to salary deductions for unjustified absence and disciplinary sanctions. This option can thus only be considered as an exceptional instrument for dealing with risks encountered by employees in the course of their duties.
- The functional protection mechanism is not sufficient on its own. In cases of harassment, in particular, it needs to be supplemented by actions to protect the victim from any potential retaliatory measures,⁸⁹ similar to those in place for cases of psychological harassment.⁹⁰

Future developments

In matters related to career management, it seems clear that the simple existence of consultation mechanisms is not sufficient to defuse all potential conflicts between public officials and their employers, often for largely structural reasons. This is particularly true in cases of professional advancement, where promoting one employee may mean implicitly refusing the promotion requested by another.

Furthermore, the intervention of advisory bodies should be backed up by a clarification of the decision-making criteria and a policy of more regular dialogue between the heads of departments and those employees in their charge. One good example is associated with the assessment of the professional performance of civil servants, a regular source of individual disputes. The system of grading civil servants, which existed until the 2000s and frequently gave rise to complaints to their AJCs, has been replaced by an evaluation process which has recently been updated to include the right to an individual interview. Since employees' professional assessments are now conducted in the form of an exchange with the head of department, and based on evaluation criteria which are clearly understood by both parties, these assessments are more widely accepted.

Institutions and mechanisms for preventing disputes over employees' health have been introduced too recently for any meaningful suggestions for their improvement to be made. For the time being, the priority remains to ensure that these mechanisms are fully accepted and used by all parties, particularly by public sector employers.

⁸⁹ Law No. 83-634, 13 July 1983, art. 6 ter.

⁹⁰ Law No. 83-634, 13 July 1983, art. 6 quinquies.

Conclusion

In both the public and the private sectors, mechanisms for avoiding individual disputes are integrated into the working environment. Aside from certain mechanisms designed to allow for a rapid response to emergency situations, particularly in health-related matters, these preventative institutions are put in place primarily to represent employees' interests. Union representation and intervention provide opportunities for dialogue in a less formal framework. When invoked before any decision is taken by the employer, these mechanisms can help to prevent a potential dispute from erupting into open conflict that results in a court case.

In the public sector such consultations are institutionalized through the AJCs, bodies endowed with extensive legal powers to which all cases must be referred before any decision is taken which might lead to a dispute. Moreover, these institutions can help to place the consultation process outside the direct context of the employer–employee relationship, increasing its neutrality and boosting the chances of reaching a compromise solution. For example, the disciplinary committees within regional public authorities, called to rule upon sanctions that employers intend to impose upon their employees, thus incorporate equal numbers of union representatives and representatives of local public sector employers (e.g. mayors of neighbouring towns), and are chaired by an administrative magistrate.

In the private sector, the mechanisms for preventing individual disputes operate within the company in question. These mechanisms are of central importance, particularly since the decision to terminate employees' contracts is a unilateral decision taken by the employer, with no obligation to consult any administrative or judicial authority; between 750,000 and 850,000 dismissals take place every year, and cases of reconciliation remain rare. Unlike the public sector, where the illegal termination of an employment relationship may result in the employer's being obliged by the courts to reinstate the employee who was unfairly dismissed, private sector employees who have been made redundant are highly unlikely to get their jobs back, even if their dismissal is shown to be unjustified. Only in cases where employees' fundamental human rights have been seriously violated (discriminatory dismissals) can judges order their reintegration into the company. This makes the prevention or resolution of individual labour disputes within companies, before the employee in question has been dismissed, all the more crucial.

In both cases, the efficacy of the labour conflict prevention mechanisms derives from the fact that they intervene before a dispute reaches the courts. This efficacy is, however, heavily dependent on the motivation of those involved, on the existence and quality of union representation, and on the presence of a legal framework which provides for the training of all parties and enables intervention early enough to prevent conflicts from deteriorating (particularly in matters relating to health at work).

4.6. General conclusion

This assessment of the French system for the prevention and resolution of individual labour disputes has highlighted its various strengths and weaknesses.

Strengths

The strengths are mainly to be found in private companies' and public administrations' internal deliberative bodies and mechanisms, and in the mechanisms for judicial resolution. In the workplace, workers have recourse to a variety of interrelated and complementary employee representative bodies, whose effectiveness and scope arise from their proximity, accessibility and ability to act at any time, especially well before the occurrence of irreversible events such as dismissals or accidents. Workers and their representatives also have special rights to handle serious and emergency situations, especially with regard to health and safety. As for the bodies and mechanisms of judicial settlement, they generally are accessible, operate properly, and are founded on principles that are favourable to workers, such as collegiality, public aid and physical proximity, at least as regards the employment tribunals, as well as on the right of defence, the right to due process, and emergency procedures.

There is also a specialized institution, the Ombudsman, with responsibility for resolving conflicts over discriminatory practices. This interacts fairly effectively with the judicial bodies, and has two essential duties concerning citizens' relationship with the law: examining and redirecting cases, and providing support for the disclosure of evidence. This is the only example of effective and efficient interaction with judges in the French system.

Weaknesses

The weaknesses of the French system are twofold. The first is the structural absence (in the public sector) and the failure (in the private sector) of alternative dispute resolution methods, with only a few very localized exceptions that have been met with the near-total indifference that is rather deeply rooted in France. Second, for the past few years the system has been going through difficulties that have undermined the two strengths outlined above. Those difficulties that relate to litigation have been well identified and made the subject of various reports and reforms to address, for example, the geographical maldistribution of court sites, the overburdening of courts, the length of procedures, dysfunction in pre-litigation proceedings, lack of collaboration between competent bodies and insufficient training of judges. However, those difficulties affecting workplace mechanisms – apart from the issue of workforce thresholds, which a legislative intervention would suffice to correct – are far more intractable, being based on economic and sociological factors beyond the reach of political or legislative action, notably job insecurity, the crisis of unionism, the fragility of mechanisms related to the level of commitment among appointed employee representatives, and the quality of their training and their protection.

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5. Germany

Bernd Waas

5.1. Legal framework

Definition of individual rights disputes

A useful starting point for the definition of what constitutes an “individual rights dispute” is the *Arbeitsgerichtsgesetz* (Labour Courts Act: LCA).¹ Sections 2 to 3 of this Act contain provisions on the jurisdiction of the labour courts. According to these provisions, labour courts have jurisdiction over both collective and individual rights disputes. In relation to the latter, point (3) of section 2(1) of the LCA is particularly important. It provides that the labour courts shall have jurisdiction over “civil law disputes between employees and employers (a) arising from the employment relationship; (b) concerning the existence or non-existence of an employment relationship; (c) arising from negotiations to conclude an employment relationship and the consequences of such; (d) arising in tort if the tortious conduct is connected with the employment relationship; (e) concerning employment documents”. Thus the disputes must arise from an employment relationship that exists between the parties or that previously existed between them or that they intended to establish.² As section 5(1) of the LCA specifies that apprentices are to be regarded as employees for the purposes of the Act, an employment relationship thus also includes an apprenticeship for these purposes.

Rights arising from the employment relationship are all rights resulting from the employment contract itself and from the regulatory framework (legislation, collective

¹ *Arbeitsgerichtsgesetz*, as promulgated on 2 July 1979 (*Bundesgesetzblatt* I, p. 853), most recently amended by art. 2 of the *Tarifautonomie-stärkungsgesetz* (Act to strengthen the autonomy of the social partners) of 11 Aug. 2014 (*Bundesgesetzblatt* I, p. 1348). (Page numbers in references to the *Bundesgesetzblatt* refer to the print edition.)

² This also applies to vulnerable workers (e.g. low-wage, non-standard, non-unionized, migrant and domestic workers). Persons who are outside the employment relationship must in principle lodge their claims with the civil court. However, according to the LCA, sec. 5(1), sentence (1), the labour courts are also a valid recourse for persons who, because of their economic dependency, must be regarded as being similar to employees (*arbeitnehmerähnliche Personen*).

agreements³ and workplace agreements⁴) that governs the employment relationship. These include rights to wages or to paid leave and, in addition, to rights rooted in other aspects of the employment relationship, such as the right to damages for breach of contractual obligations.

It should be noted that, according to case law, an individual dispute for these purposes may also exist where the right at issue is derived from the Betriebsverfassungsgesetz (Works Constitution Act: WCA).⁵ This means that a dispute concerning the existence of an employee's right to wages for the period of attendance at a workplace meeting called by the works council must be regarded as an individual rights dispute (and must be decided by the labour court according to the standard procedure known as the *Urteilsverfahren*) even though the right is derived, ultimately, from section 44(1) of the WCA. (For disputes concerning the existence and activities of works councils and similar worker representation bodies as such, a different procedure, known as the *Beschlussverfahren*, generally applies.⁶)

Principal legislative instruments

In Germany, employment law disputes are resolved primarily by internal (in other words, workplace) conciliation and arbitration mechanisms and through labour court proceedings. The core legal instrument governing the resolution of (individual) employment law disputes is the LCA. As regards internal grievance procedures, for present purposes the most important legislative instrument is the WCA. Section 130 of the WCA provides, however, that the Act applies only to establishments and undertakings operated by a party established under private law. Consequently, the relevant legislation for employment in the public service is either the Bundespersonalvertretungsgesetz (Federal Staff Councils Act)⁷ (for federal employment) or the staff council legislation of the *Länder* (for employment in the service of a *Land*). Whether in a particular situation the WCA or the law on staff councils will apply depends exclusively on the legal form of the body concerned (i.e. whether it is established under private law or public law).

³ Agreements between employers or employer confederations, on the one hand, and trade unions, on the other hand (see Tarifvertragsgesetz (Collective Agreements Act: CAA) 1969, sec. 2(1)).

⁴ Agreements between the employer and the works council: see Betriebsverfassungsgesetz (Works Constitution Act: WCA) 2001, sec. 77(1).

⁵ Betriebsverfassungsgesetz, adopted 25 Sep. 2001 (*Bundesgesetzblatt I*, p. 2518), most recently amended by art. 3(4) of the Gesetz zur Umsetzung des Seearbeitsübereinkommens 2006 der Internationalen Arbeitsorganisation (Act to implement the ILO Maritime Work Convention 2006) of 20 April 2013 (*Bundesgesetzblatt I*, p. 868).

⁶ Bundesarbeitsgericht (Federal Labour Court), 1 Oct. 1974, Case 1 AZR 394/73.

⁷ Bundespersonalvertretungsgesetz of 15 Mar. 1974 (*Bundesgesetzblatt I*, p. 693), most recently amended by art. 3(2) of the Gesetz zur Familienpflegezeit und zum flexibleren Eintritt in den Ruhestand für Beamtinnen und Beamte des Bundes (Act on leave to care for family members and on flexible retirement arrangements for federal civil servants) of 3 July 2013 (*Bundesgesetzblatt I*, p. 1978).

5.2. Institutions, mechanisms and procedures

For present purposes, the most important institutions and procedures are as follows.

- mediation;
- internal grievance procedures, involving, where relevant, a worker representation body (i.e. works council or staff council) and a conciliation procedure;
- external (non-judicial) arbitration procedures;
- arbitration tribunal proceedings; and
- labour court proceedings.

Labour courts

The Federal Republic of Germany has a system of comprehensive legal protection. The basis for this protection is the rule of law principle set out in article 20(3) of the Grundgesetz (Basic Law), the German Constitution. The rule of law principle imposes a duty on the State to guarantee the provision of justice, in other words, to ensure that legal protection is offered through the offices of an independent judiciary. This notion of legal protection not only permits the enforcement of individual rights but also allows for the law itself to be enforced. In relation to employment rights disputes, section 48(1) of the LCA in conjunction with sections 17 to 17b of the Gerichtsverfassungsgesetz (Courts Act) provides for a separate system of courts.⁸

The labour courts have historical roots stretching back as far as the seventeenth century. A separate system of labour courts was first established in Germany by the Labour Courts Act 1926. Many of the rules introduced by that Act are, in substance, still in force today.

Jurisdiction of the labour courts

As outlined above, the labour courts have a wide jurisdiction in relation to individual disputes.⁹ In the legal disputes between employer and employee specified in point (3) of section 2(1) of the LCA, the labour courts have exclusive jurisdiction.¹⁰ Legal disputes not specified in section 2(1) of the LCA can also be brought before the labour courts. According to section 2(3) of the LCA, this applies where (i) there is a legal or direct economic connection between the right claimed and an existing dispute pending or a claim being concurrently lodged of the kind specified in section 2(1) of the LCA and (ii) no other court has exclusive jurisdiction.

⁸ Federal Labour Court, 26 Mar. 1992, Case 2 AZR 443/91.

⁹ No qualifying period of service is required before employees can access the courts.

¹⁰ Exclusive jurisdiction means that the jurisdiction of other courts, including the civil courts, is excluded and cannot be established by agreement between the parties. The parties, in other words, cannot agree between themselves to take the case to another court, but must present it to the labour court.

In determining the disputes over which labour courts have exclusive jurisdiction, a particularly important provision is point (3)(b) of section 2(1) of the LCA, which provides for jurisdiction over disputes “concerning the existence or non-existence of an employment relationship”. This provision covers all disputes in which it must be determined whether an employment relationship exists, continues to exist or previously existed between the parties. In other words, this provision includes all disputes concerning the effectiveness of a dismissal or an agreement to terminate the employment relationship by mutual consent.¹¹ Disputes concerning the classification of a relationship as an employment relationship and the content of such a relationship are also included.

Labour courts have jurisdiction in a further series of cases. Point (9) of section 2(1) of the LCA is particularly interesting in that it provides for the labour courts to have exclusive jurisdiction in disputes between employees that result from common employment and arise in tort to the extent that the tortious conduct is connected with the employment relationship. This provision extends the jurisdiction of labour courts, primarily for reasons of expediency, to claims that are so closely connected to the employment relationship that they are for the most part determined by that relationship. In addition, this rule takes account of the fact that, ultimately, the employment relationship is the starting point for the dispute.

Special rules apply in relation to employment with the established churches (and the bodies they control). The right of religious societies to regulate their own affairs¹² includes the power to administer the rules they have established. In an individual case this may mean that access to the public courts is excluded. However, by reason of the State’s duty to ensure the provision of justice,¹³ the public courts have a general responsibility to adjudicate claims where these are to be determined in accordance with the law of the State (Prütting, 2013a, sec. II, para. 2). Nonetheless, in terms of substance, the established churches enjoy a certain degree of freedom in determining the duties of loyalty owed by their employees and, as a result, the public courts have only limited powers of review in relation to the infringement of such duties.¹⁴

Structure of the labour court system

The German labour court system has three levels. At first instance, disputes are usually heard by the labour courts.¹⁵ The *Landesarbeitsgerichte* (higher labour courts) operate as courts of second instance and are thus appellate courts. They hear appeals (of fact and law) against judgments of the labour courts.¹⁶ The *Bundesarbeitsgericht* (Federal

¹¹ The Kündigungsschutzgesetz 1969 (Dismissal Protection Act), sec. 1(1), specifies that a dismissal that is unlawful under the Act shall be regarded as “legally ineffective”.

¹² Guaranteed by the Basic Law, art. 140, in conjunction with the Weimar Constitution of 1919, art. 137(3).

¹³ Basic Law, arts 20(3) and 2(2).

¹⁴ On this issue, see the recent decision of the Bundesverfassungsgericht (Federal Constitutional Court) of 22 Oct. 2014, Case 2 BvR 661/12.

¹⁵ LCA, sec. 8(1).

¹⁶ LCA, sec. 8(2).

Labour Court) in Erfurt sits as court of third and final instance in employment disputes, hearing appeals on points of law against judgments of the higher labour courts.¹⁷

Special features of labour court proceedings

The procedure governing labour court proceedings is equivalent in many respects to that governing proceedings before the ordinary courts. Section 46(2) of the LCA provides that for first-instance disputes under the standard procedure the rules of the Zivilprozessordnung (Civil Procedure Code) on local court proceedings will apply,¹⁸ subject to any necessary modifications. Notwithstanding this general similarity, both the composition and the procedure of labour courts exhibit certain special features.¹⁹

Composition of the courts

Throughout the labour court system, the courts are composed of a combination of career and lay judges. The LCA specifies that each chamber of the labour court, and each chamber of the higher labour court, shall sit in the formation of a presiding judge, who must be a career judge, together with a lay member drawn from the ranks of employees and a lay member drawn from the ranks of employers;²⁰ and that each chamber of the Federal Labour Court shall sit in the formation of a presiding judge together with two fellow career judges, a lay member drawn from the ranks of employees and a lay member drawn from the ranks of employers.²¹

The lay members are drawn, in the words of the Act, from “amongst the ranks of employees and employers”. In practice, this means that they are appointed on the basis of nominations submitted by trade unions and employer confederations.²² Different conditions apply depending on the level of the court. For appointment as a lay member of a labour court, the employer or employee must be aged 25 or over and live or work in the judicial district of the court.²³ For appointment as a lay member of the Federal Labour Court, the requirements are more demanding. Section 43(3) of the LCA specifies that lay members must be aged 35 and over and have “particular knowledge and experience of labour law and working life”. In addition, they should have five years’ experience as a lay member of a labour court and have worked as an employee or acted as an employer for a considerable period in Germany.

Throughout the labour court system, lay members are entitled to exercise full judicial office. In principle, they have the same rights and powers as a career judge.

¹⁷ LCA, sec. 8(3).

¹⁸ Civil Procedure Code, secs 495ff, in conjunction with secs 253ff and secs 1ff.

¹⁹ For an overview, see Prütting, 2013b, para. 158.

²⁰ LCA, secs 16(2) and 35(2).

²¹ LCA, sec. 41(2).

²² In relation to the labour courts, see LCA, sec. 20(2).

²³ LCA, sec. 21(1).

Representation

Another special feature of the system is the fact that in proceedings before a labour court the parties do not have to be represented. This means that each party can present their own case. However, if a party wishes to be represented before a labour court, they can choose to be represented not only by a lawyer,²⁴ but also by a representative of a trade union or an employer confederation.²⁵

Conciliation hearing

A hearing before the labour court always begins with a conciliation hearing.²⁶ This is a special procedural step in first-instance labour court proceedings and has two main purposes. First, the parties are encouraged, with the court's assistance, to reach an amicable settlement. This can take the form of a withdrawal of the action, declarations by all parties that no adjudication is necessary or the conclusion of a compromise agreement. Second, the conciliation hearing is intended to clarify the issues for the main hearing if the parties are unable to reach an amicable settlement.

The presiding judge may order the parties to appear in person at the conciliation hearing.²⁷ At this hearing, the judge must examine the entire dispute between the parties having regard to all the circumstances of the individual case.²⁸ To clarify the facts of the case, the judge may take any measures that can be carried out immediately,²⁹ for example, requiring a party to submit certain documents. However, the formal taking of evidence is prohibited.³⁰ With the parties' consent, the presiding judge can set a date for a continuation of the conciliation hearing, which should be held as soon as possible.³¹ For the conciliation hearing and any continuation hearing, the presiding judge can refer the parties to a specific judge appointed as a conciliator and not entitled to determine the case.³² The conciliator may use any method of dispute resolution including mediation.³³

Power of the presiding judge to act alone

As the labour court system includes lay members at all levels, the LCA grants the presiding judge (always a career judge) considerable powers to act alone. For example, the

²⁴ LCA, sec. 11(2), sentence (1).

²⁵ LCA, sec. 11(2), point (4). The parties can authorize the organizations as such to act on their behalf. It is not necessary to specify a particular individual.

²⁶ LCA, sec. 54(1).

²⁷ LCA, sec. 54(1), sentence (1).

²⁸ LCA, sec. 54(1), sentence (2).

²⁹ LCA, sec. 54(1), sentence (3).

³⁰ This follows from LCA, sec. 58(1), which provides that evidence must be taken "before the chamber" that is to say in the presence of the lay members.

³¹ LCA, sec. 54(1), sentence (5). For many years, the existence of the conciliation hearing constituted a major difference in comparison with ordinary civil procedure. However, since the 2011 reforms to civil procedure, this too now provides for a conciliation hearing (Civil Procedure Code, sec. 278(2)). Thus the procedures are now very similar.

³² LCA, sec. 54(6), sentence (1).

³³ LCA, sec. 54(6), sentence (2).

presiding judge acting alone has the power to issue orders and directions not arising from a hearing.³⁴ This allows decisions of this kind to be taken, in the interests of the efficient administration of justice, without involving the full court. Serious delays would result if lay members had to be involved in every decision. In addition, the presiding judge acts alone at the conciliation hearing.³⁵ If no agreement is reached at the conciliation hearing and the main hearing follows immediately, the presiding judge will determine the case alone if both parties request a ruling and if proceedings are at a stage at which a ruling can be issued that ends the case.³⁶

Accelerated procedure

The importance of an accelerated procedure in labour court matters is emphasized in the legislation. Section 9(1) of the LCA specifies that “the procedure shall be accelerated in all instances”. In addition, certain time limits are much shorter than the corresponding time limits in civil proceedings. For example, in labour court proceedings, a party has only one week in which to challenge a judgment in default,³⁷ whereas in proceedings before the ordinary courts the corresponding period is two weeks.³⁸

Costs

In relation to costs, too, there are important differences from the rules of civil procedure. The LCA establishes a different regime for the calculation and the allocation of costs.³⁹ In order to assist employees, the court fees charged in standard proceedings before the labour court are considerably lower than in proceedings before the ordinary courts.⁴⁰ There is no requirement to pay court fees in advance.⁴¹ As regards the reimbursement of costs, section 12a(1) of the LCA provides that in first-instance standard proceedings the successful party is not entitled to compensation for their time or for reimbursement of the costs of legal representation. This provision reduces the risk in relation to costs at first instance. Its objective is to ensure that employees are not discouraged from bringing proceedings on financial grounds. Conversely, it places a considerable burden on the successful party, as they are not entitled to full reimbursement of their costs. This may make success in the action seem rather hollow, especially when the action’s value for cost purposes is particularly high. In practical terms, however, the impact of this rule is mitigated, as trade unions and employer confederations often provide legal protection and representation free of charge to their members.

³⁴ LCA, sec. 53(1).

³⁵ LCA, sec. 54(1).

³⁶ LCA, sec. 55(3).

³⁷ LCA, sec. 59, sentence (1).

³⁸ Civil Procedure Code, sec. 339(1). See also LCA, sec. 61a(1), which provides that disputes concerning the existence, non-existence or termination of the employment relationship must be dealt with as a matter of priority.

³⁹ LCA, secs 12 and 12a, respectively.

⁴⁰ See *Gerichtskostengesetz 2014* (Judicial Costs Act), Annex 1 to sec. 3(2), Part 8.

⁴¹ *Judicial Costs Act*, sec. 11.

Arbitration tribunals

From the point of view of constitutional law, recourse to private arbitration tribunals is protected in the same way as freedom of contract (see Stober, 1979; Maunz, 2014, art. 101 Basic Law, para. 22). This means that alongside the system of justice delivered through the public courts an equivalent private justice system also exists. The legislative framework governing arbitration tribunals is set out in sections 1025–1066 of the Civil Procedure Code. According to those provisions, arbitration tribunals have full authority to rule in favour of, or to deny, a party's claim (see e.g. Münch, 2013, preliminary remarks to sec. 1025ff, para. 2). Thus they substitute for the public courts, which are limited to ensuring that minimum standards are upheld, and consequently can intervene only in a few exceptional cases.⁴²

However, in practice the LCA allows little room for arbitration to operate as a genuine system of private justice. This is because section 4 in conjunction with sections 101–110 of the Act specify that where legislation confers exclusive jurisdiction on the labour courts this jurisdiction may be excluded by agreement in only two cases.⁴³ This rule is exhaustive.⁴⁴

The first possibility concerns section 101(1) of the LCA, which specifies that an arbitration tribunal may determine civil law disputes arising from collective agreements or disputes between the parties concerning the existence or non-existence of a collective agreement. This rule applies only to collective rights disputes.

The second possibility is the only one that concerns individual rights disputes. Section 101(2) of the LCA specifies that in the case of an employment relationship governed by a collective agreement, the parties to the collective agreement may in that agreement expressly exclude the jurisdiction of the labour courts in civil law disputes arising out of the employment relationship and specify instead that such matters are to be determined by an arbitration tribunal. This applies only where the collective agreement relates primarily to stage artists, workers in the film industry or artists. In other words, the jurisdiction of the labour courts in the case of individual rights disputes may be excluded (and replaced with an arbitration tribunal) only on the basis of a collective agreement and only in respect of a limited number of occupations. This rule applies above all to actors, opera singers, choral singers, stage directors and other stage-related staff having an artistic function.⁴⁵

⁴² See Civil Procedure Code, sec. 1026. Sec. 1059(2) of the Civil Procedure Code specifies the (few) cases in which an arbitral award may be set aside.

⁴³ Where the labour courts have jurisdiction *alongside* other courts (i.e. use of the labour courts is optional), sec. 4 of the LCA does not apply.

⁴⁴ Federal Labour Court, 6 Aug. 1997, Case 7 AZR 156/96. However, sec. 4 of the LCA does not apply to arbitration (or other extra-judicial) proceedings that are simply of a *preliminary* nature. Preliminary procedures of that kind, which generally may be provided for in the employment contract, do not affect the exclusive jurisdiction of the labour courts as they do not bind the courts in any way. Such agreements do not exclude the jurisdiction of the labour courts, and so are regarded as lawful. See Prütting, 2013c, para. 10 with further references.

⁴⁵ See Federal Labour Court, 28 Jan. 2009, Case 4 AZR 987/07.

It is no longer possible to provide for an arbitration tribunal to determine disputes in relation to ships' captains and crew members. These groups were removed from the scope of section 101(2) of the LCA with effect from 1 August 2013.⁴⁶

Pursuant to section 101(2) of the LCA, a valid arbitration agreement can be concluded only by bodies with the capacity to conclude collective agreements,⁴⁷ and only in relation to employees who are bound by the collective agreement. According to section 3(1) of the Tarifvertragsgesetz (Collective Agreements Act: CAA), this requires the employee to be a member of the trade union that concluded the underlying collective agreement. An employee is also deemed bound by the collective agreement if the agreement is declared universally applicable.⁴⁸ However, according to the majority of experts (see Germelmann, 2013a, para. 24), a mere reference to the collective agreement in the employment contract does not suffice.

On the other hand, the parties to the employment contract can provide as a matter of contract that the arbitration agreement applies. Section 101(2) of the LCA expressly allows parties not bound by an arbitration agreement to provide for its application. An issue of considerable importance is whether, at an individual level, the parties to an employment contract can lawfully contract out of an arbitration regime established by collective agreement. Section 4(3) of the CAA specifies that an agreement to derogate from a collective agreement is permitted only "where the collective agreement allows for this or it contains an amendment of the terms in favour of the employee". Thus, the underlying question is whether an agreement to derogate from (or contract out of) an arbitration regime can be regarded as favourable to the employee. This has not been clarified by the highest courts. Certain writers argue that recourse to the system of public courts cannot be regarded as generally more favourable for the employee than recourse to an arbitration tribunal. They stress that one reason for permitting the establishment of arbitration regimes is the fact that the parties to the collective agreement are likely to have a greater understanding of the factual aspects of the matter at issue than the public courts (Germelmann, 2013a, para. 25 and further references).

An arbitration procedure, to the extent that sections 4 and 101–110 of the LCA permit such a procedure,⁴⁹ does not form part of the labour court procedure. Instead, the arbitration procedure replaces the operation of the public courts. The arbitration

⁴⁶ Gesetz zur Umsetzung des Seearbeitsübereinkommens 2006 der Internationalen Arbeitsorganisation (Act to implement the 2006 ILO Maritime Labour Convention), art. 3 (*Bundesgesetzblatt* I, p. 868).

⁴⁷ The courts have imposed strict requirements on trade unions as regards their capacity to conclude collective agreements. See Waas, 2012.

⁴⁸ CAA, sec. 5(4).

⁴⁹ Note that the LCA, sec. 110, permits an action to be brought before the public courts in certain cases to have an arbitral award set aside. On this see Federal Labour Court, 16 Dec. 2010, Case 6 AZR 487/09. According to the court, it is precisely because sec. 110 of the LCA allows for judicial control by the public courts that the discretion afforded to arbitration tribunals is regarded as compatible with the constitutional guarantee of effective judicial protection.

award has the same effect between the parties as a judgment of the labour court that has become final.⁵⁰

Where the employment relationship involves a foreign element, the extent to which arbitration is permitted will depend on the parties' choice of law, as this, as a rule, also determines the procedural law chosen.⁵¹ Where the parties have chosen German employment law, the arbitration agreement will be ineffective unless one of the exceptions specified in the legislation applies. On the other hand, where the parties have chosen the foreign law, the arbitration agreement will be valid if the foreign (procedural) law provides for such agreement (see Germelmann, 2013b, para. 6).

The almost blanket exclusion of arbitration tribunals in disputes involving labour law is based on the notion that the substantive provisions of labour law should be enforced in all cases with the assistance of the public courts. This procedural support for the substantive rules contributes to greater legal certainty and ensures, much more than private arbitration tribunals could, a uniform application of the law (see e.g. Waas, 2014, para. 2). Moreover, in their award practice, arbitration tribunals are unable to contribute to the development of the law, which is identified, moreover, as an express task of the Federal Labour Court.⁵² Further, private arbitration tribunals are not bound to the same extent by procedural rules as public courts. Finally, the limitation on arbitration tribunals in the area of labour law can also be justified by considerations of fundamental rights, in particular the principle that each case shall be heard by the lawful judge in that matter.⁵³ Against this, any greater understanding of the factual background that a private arbitrator may have weighs less heavily (see e.g. Germelmann, 2013b, para. 1).

Extra-judicial conciliation and arbitration procedures

There are many possibilities in labour law for alternative (extra-judicial) dispute resolution (see Prütting, 2013b, para. 95).

Disputes arising from an apprenticeship

Particular mention must be made of the possibility for arbitration as a means of resolving disputes arising from apprenticeships. To this end, the first sentence of section 111(2) of the LCA provides that arbitration committees composed of equal numbers of employers and employees may be established to resolve disputes between apprentices and their employers arising out of an existing apprenticeship. Case law has established (not without some criticism) that this rule also applies to disputes concerning the

⁵⁰ LCA, sec. 108(4).

⁵¹ Federal Labour Court, 4 Oct. 1974, Case 5 AZR 550/73.

⁵² LCA, sec. 45(4).

⁵³ See Basic Law, art. 101(1), which provides that "no one may be removed from the jurisdiction of their lawful judge".

termination of the apprenticeship, in other words, also in relation to the validity of a dismissal by the employer.⁵⁴

The LCA specifies that the parties must be heard by the arbitration committee;⁵⁵ that if the decision issued by that committee is not accepted within a week by both parties, an action may be brought before the competent labour court within two weeks of the committee's decision;⁵⁶ and further that the committee's hearing must have taken place before any court action can be lodged.⁵⁷ The requirement to bring the dispute before the arbitration committee prior to commencing legal action arises, above all, out of respect for the special relationship of trust between apprentice and employer. To maintain this relationship, where possible, any disputes arising should be resolved before committees whose members are drawn equally from the ranks of employers and employees. The aim of this provision is to avoid a situation where the parties to the contract of apprenticeship end up as opposing parties before the court.⁵⁸ However, the scheme established by section 111(2) of the LCA is viewed critically by many.⁵⁹ Doubts exist as to its compatibility with the Constitution, and some have called for the provision's repeal (see e.g. Prütting, 2013d, para. 11).

The Federal Labour Court has held the provision to be compatible with the Constitution. In reaching that finding, it examined the criticism that section 111(2) of the LCA contravenes the second sentence of article 101(2) of the Basic Law, which states that no one "may be removed from the jurisdiction of their lawful judge". According to the Federal Labour Court, that provision is not infringed because section 111(2) of the LCA does not prevent an apprentice from having recourse to the labour court following the decision of the arbitration committee.⁶⁰

Nonetheless, there remain many commentators who consider the scheme established by section 111(2) of the LCA incompatible with the Constitution. This position is supported with reference to the interpretation of the Federal Constitutional Court according to which the Basic Law requires "all individuals to be given, as far as is possible, equal access to the courts".⁶¹ That notion of equal access to the courts is difficult to reconcile with the fact that the establishment of arbitration committees is voluntary.

⁵⁴ Federal Labour Court, 18 Sep. 1975, Case 2 AZR 602/74. Commentators disagree on whether, in the case of a dispute concerning the effectiveness of an apprentice's dismissal, the complaint must be lodged with the arbitration committee within the period specified in the Dismissal Protection Act, sec. 13(1), sentence (2). According to the decision of the Federal Labour Court of 13 April 1989 in Case 2 AZR 441/88, the Dismissal Protection Act, sec. 13(1), sentence (2) does not apply in this case. Instead, the court should apply the general principles governing the circumstances in which an action is deemed out of time.

⁵⁵ LCA, sec. 111(2), sentence (2).

⁵⁶ LCA, sec. 111(2), sentence (3). The applicant must be informed officially of this two-week deadline (sec. 111(2) in conjunction with sec. 9(5)).

⁵⁷ LCA, sec. 111(2), sentence (5).

⁵⁸ Federal Labour Court, 18 Sep. 1975, Case 2 AZR 602/74.

⁵⁹ See e.g. Prütting, 2013d, para. 6, which refers to "the remainder of a system of extra-judicial arbitration".

⁶⁰ Federal Labour Court, 18 Oct. 1961, Case 1 AZR 437/60.

⁶¹ See e.g. Federal Constitutional Court, 11 Feb. 1987, Case 1 BvR 475/85.

As the coverage of arbitration committees is only partial, some apprentices can have recourse directly to the labour court, whereas others must first pursue a preliminary procedure. Moreover, individuals required to take the arbitration committee route are excluded automatically from taking further steps and thus from bringing proceedings before a court if they fail to act within the two-week period specified in the third sentence of section 111(2) of the LCA.

Consequently, for those required to take the arbitration committee route, section 111(2) of the LCA establishes considerably more onerous requirements for access to the court. In the view of the critics, it is unacceptable from a constitutional law point of view that, in relation to the same legal issues, different procedures and enforcement mechanisms should apply (see, in this vein, Prütting, 2013d, para. 71).

Disputes concerning employee inventions

The Arbeitnehmererfindungsgesetz (Employee Inventions Act: EIA)⁶² provides in sections 28–36 for a separate conciliation procedure to deal with disputes concerning entitlements arising under the Act. Section 28 of the EIA provides that disputes between employers and employees that arise out of the Act's provisions may be referred at any time to the Schiedsstelle (Arbitration Board). This body is competent to hear disputes not only in the case of private sector employees but also for public service employees (including civil servants and soldiers) (Schwab, 2014, sec. 336, para. 4). The Arbitration Board comprises a legally qualified chairperson, appointed by the Federal Minister for Justice, and two further members appointed on a case-by-case basis by the President of the Deutsches Patent- und Markenamt (German Patent and Trade Mark Office) with particular experience in the relevant area of technology.⁶³ The Arbitration Board is not a decision-making body; its function is simply to provide conciliation, with the aim of assisting the parties to reach an amicable settlement.⁶⁴ To this end, the Arbitration Board must present the parties with a settlement proposal.⁶⁵

As a general rule, all disputes arising out of the EIA must be referred to the Arbitration Board established at the German Patent and Trade Mark Office.⁶⁶ In practice, this means that the conciliation procedure is a necessary step before legal proceedings may be brought. This is made clear in section 37(1) of the EIA, which provides that rights and legal relationships governed by the Act can be asserted by way of an action before the courts only where the matter was first referred to the Arbitration Board.⁶⁷ Section 39(1) of the EIA provides for the exclusive jurisdiction of the patent courts in

⁶² Gesetz über Arbeitnehmererfindungen of 25 July 1957 (*Bundesgesetzblatt I*, p. 756), most recently amended by art. 7 of the Gesetz zur Vereinfachung und Modernisierung des Patentrechts (Act to simplify and modernize the law on patents) of 31 July 2009 (*Bundesgesetzblatt I*, p. 2521).

⁶³ EIA, sec. 30(1)–(3).

⁶⁴ EIA, sec. 28.

⁶⁵ EIA, sec. 34(2).

⁶⁶ EIA, sec. 29(1).

⁶⁷ There are certain exceptions to this rule. See EIA, sec. 37(2).

disputes concerning employee inventions, except in actions for the payment of agreed or established remuneration, in which the labour courts have jurisdiction.⁶⁸

There are good practical reasons for the existence of the Arbitration Board conciliation procedure in disputes relating to employee inventions. In particular, this preliminary procedure helps to preserve the confidentiality of inventions (Schwab, 2014, sec. 336, para. 1). Around 70 per cent of the settlement proposals presented by the Arbitration Board are accepted by the parties (Schwab, 2014, sec. 336, para. 3).

Internal grievance procedures

German law makes some provision for grievance procedures. As well as a general procedure, specific procedures exist that must be followed in specific cases or by specific groups of employees.

General grievance procedure

Sections 81–86a of the WCA set out the rules governing the employee's right to raise a grievance and to participate in the governance of the workplace. The aim of this scheme is to give an individual employee, in particular in relation to day-to-day working conditions, a personal right to raise a grievance and to participate in the workplace.

In the present context, attention will be focused on the right to raise a grievance. Section 84(1) of the WCA⁶⁹ establishes the right of every employee to raise a grievance with the relevant workplace body where they consider themselves treated less favourably (i.e. discriminated against), unfairly treated or otherwise disadvantaged by the employer or other employees.⁷⁰ It is the individual's own perspective that counts (Uhl and Polloczek, 2008). However, employees can raise a grievance only in relation to their own disadvantage. They must be personally affected. A grievance in which an employee seeks to raise a complaint on behalf of other employees is not covered by section 84(1) of the WCA.⁷¹ Section 84(3) of the WCA specifies that an employee may

⁶⁸ EIA, sec. 39(2).

⁶⁹ The Federal Staff Councils Act, sec. 68, point (3), establishes a comparable right for federal employees. See Gesetz über Sprecherausschüsse der leitenden Angestellten (Sprecherausschussgesetz), 20 Dec. 1988, *Bundesgesetzblatt I*, p. 2132, most recently amended by art. 222 of the Neunte ZuständigkeitsanpassungsVO, 31 Oct. 2006, *Bundesgesetzblatt I*, p. 2407. For employees of *Länder* bodies, similar rights apply under the relevant *Land* legislation. Civil servants, too, have a right to raise a grievance. For federal civil servants the right is set out in the Bundesbeamtengesetz (Federal Civil Servants Act), sec. 125. For civil servants in the service of the *Länder*, the right is set out in the relevant *Land* legislation, e.g. the Bayerisches Beamtengesetz (Bavarian Civil Servants Act), art. 7.

⁷⁰ For temporary agency workers, the Arbeitnehmerüberlassungsgesetz (Temporary Work Act), sec. 14(2), in conjunction with the WCA, sec. 84, establishes a right to raise a grievance with the client undertaking where the employee considers himself to have been unfairly treated or otherwise disadvantaged by the client undertaking or by employees of such undertaking. See Gesetz zur Regelung der Arbeitnehmerüberlassung (Arbeitnehmerüberlassungsgesetz) in the version of the announcement of 3 Feb. 1995, *Bundesgesetzblatt I*, p. 158, most recently amended by art. 7 of the Tarifautonomiestärkungsgesetz of 11 Aug. 2014, *Bundesgesetzblatt I*, p. 1348.

⁷¹ See expressly on this point Federal Labour Court, 22 Nov. 2005, Case 1 ABR 50/04.

not be disadvantaged by reason of raising a grievance. This also includes a prohibition on dismissal by reason of raising the grievance (Wiese and Franzen, 2014a, para. 35).

A right to raise a grievance pre-dates the provisions of the WCA. The courts derived this right originally from the implied terms of the employment contract, more specifically, from the employer's duty of care (Thüsing, 2014a, para. 1). As this duty requires the employer to have regard to the employee's moral rights and well-being, the employer must at least hear an employee's grievance when the latter considers that he or she has been treated unfairly or otherwise disadvantaged (see Wiese and Franzen, 2014b, para. 16). Given this history, it is clear that the right to have a voice and to participate in the workplace (and thus also the right to raise a grievance) does not really belong in the law on collective representation, as this is a right enjoyed by every employee within the framework of the employment relationship, irrespective of the presence of a works council.⁷² Consequently, the individual rights set out in sections 81–84 of the WCA can be exercised by employees even in establishments without a works council. This point is of considerable practical importance as recent studies have shown that “only” 43 per cent of private sector workers in western Germany and 35 per cent of private sector workers in eastern Germany are employed in establishments with a works council (see Ellguth and Kohaut, 2014).

The legislation sets out two different routes for the grievance procedure. An employee can choose which to pursue. The employee can raise the grievance directly with the relevant workplace body. For this purpose, the employee can call on a member of the works council for assistance or mediation.⁷³ The employee can also authorize a member of the works council to act on their behalf (see Wiese and Franzen, 2014a, para. 22). The employer must inform the employee how the grievance will be handled and, if it is considered justified, remedy the grievance.⁷⁴ In the alternative, the employee can choose to take the grievance to the works council. The works council is required to hear employee complaints and, if it considers them justified, must act to ensure that these are remedied by the employer.

⁷² In Germany, a dual-channel model of workers' representation exists. On the one hand, the interests of workers are represented by trade unions; on the other, they are represented by works councils. A works council is a separate legal organ. Its legitimacy stems from a democratic election held among all the workers who belong to the establishment. The law protects the independence of works councils by provisions that prevent the employer from interfering with their work. Works councils enjoy far-reaching legal rights against the employer, who is also obliged to bear the costs. Moreover, works councils are capable of entering into so-called works agreements with the employer. However, works councils may not call a strike as a means of giving effect to the interests of staff.

⁷³ WCA, sec. 84(1). For executive employees, the *Sprecherausschussgesetz* 1988 (Representation Committee Act), sec. 26(1), lays down comparable rules. The provision reads: “In pursuing their concerns with their employer, executive employees may call on a member of the representation committee for assistance and mediation.”

⁷⁴ WCA, sec. 84(2).

If the works council and employer disagree as to whether the grievance is justified, the works council may have recourse to the conciliation committee.⁷⁵ The decision of the conciliation committee takes the place of an agreement between the employer and the works council.⁷⁶ However, this does not apply where the grievance relates to a legal entitlement.⁷⁷ This restriction can be explained by the public policy requirement (based on the rule of law) that legal disputes between employer and employee be heard by the public courts.⁷⁸ The employer must inform the works council how the grievance is being dealt with.⁷⁹ The employer must also inform the employee how the grievance will be handled and, if it is considered justified, remedy the grievance.⁸⁰ A collective agreement or workplace agreement may provide rules to supplement the grievance procedure.⁸¹ However, in practice, these are very rare (Thüsing, 2014b, para. 1).

An important feature of the grievance system is the option of involving the works council. The employee may seek assistance from the works council following an unsuccessful individual grievance procedure, but may also raise the grievance directly with the works council without having first to submit the grievance to the employer or to the relevant workplace body. Another important feature is the option of recourse to the conciliation committee if the employer and works council cannot agree on whether the grievance is justified. According to the parliamentary materials, this is to ensure, in the interests of resolving the difference of opinion, that the grievance is given an additional third party review.⁸² The conciliation committee comprises equal numbers of members nominated by, respectively, the employer and the works council, sitting with an impartial chairperson, agreed between the parties.⁸³

As section 85(2) of the WCA specifies that the decision of the conciliation committee takes the place of an agreement between the employer and works council, in this connection the process takes the form of compulsory arbitration. If the conciliation committee determines that the grievance is justified, the employer must remedy that grievance.⁸⁴ Although a few commentators query whether the powers of the conciliation committee in grievance proceedings are compatible with the Constitution,

⁷⁵ WCA, sec. 85(2), sentence (1). Pursuant to WCA, sec. 76(1), conciliation committees are competent only to “settle differences of opinion between the employer and the works council, central works council or group works council”. In other words, they are not competent to conciliate in disputes with individuals.

⁷⁶ WCA, sec. 85(2), sentence (2).

⁷⁷ WCA, sec. 85(2), sentence (3). Where legal entitlements are at stake, the conciliation committee may act only on the basis of an agreement between the parties (WCA, sec. 76(6)). Where it acts on that basis, this does not preclude recourse to the courts (WCA, sec. 76(7)).

⁷⁸ See Bundestags-Drucksache [Parliamentary printed paper] VI/1786, 29 Jan. 1971, p. 48.

⁷⁹ WCA, sec. 85(3), sentence (1).

⁸⁰ WCA, sec. 85(3), sentence (1), in conjunction with WCA, sec. 84(2).

⁸¹ WCA, sec. 86.

⁸² See Bundestags-Drucksache [Parliamentary printed paper] VI/1786, p. 48.

⁸³ WCA, sec. 76(2). If the parties cannot agree on a chairperson, the labour court must appoint a chairperson (WCA, sec. 76(2)). In practice, career judges working in the labour court system are generally appointed as chairpersons. See Kreuzt, 2014, para. 60.

⁸⁴ WCA, sec. 85(3), in conjunction with sec. 84(2).

the majority do not share these concerns (see e.g. Thüsing, 2014c, para. 33 and further references). Crucially, the legislation expressly denies the conciliation committee any competence to reach a finding in disputes relating to a legal entitlement.⁸⁵

Grievance procedure in discrimination cases

Anti-discrimination legislation establishes a specific right for employees to raise a grievance in discrimination cases. The first sentence of section 13(1) of the Allgemeines Gleichbehandlungsgesetz 2006 (General Act on Equal Treatment: GAET) specifies that workers – this includes, pursuant to section 6(1) of the Act, employees, apprentices and quasi-employees (literally “employee-like persons”)⁸⁶ – have the right “to raise a grievance with the competent body in the establishment or the undertaking if in connection with their employment relationship they consider themselves to have been treated less favourably by their employer, manager, a fellow worker or a third party on one of the grounds specified in the Act”.⁸⁷ According to the second sentence of that provision, the employer must examine the grievance and communicate its assessment to the complainant. It is for the employer to determine the “competent body” for these purposes. The employer is also free to determine its composition, with the legislation making no provision in this regard. Moreover, the works council has no right of co-determination⁸⁸ in relation to the introduction and design of the grievance procedure.⁸⁹

Section 13(2) of the GAET specifies that an individual’s right to raise a grievance does not affect the existing rights of collective representation bodies. This provision refers in particular to the rights of employees to raise grievances using the works council route specified in sections 84 and 85 of the WCA.⁹⁰ The underlying idea is that the works council should remain a point of contact for grievances, including those relating to discrimination at work. The question whether the works council itself, assuming its willingness to take on such a role, could be designated the competent body for the purposes of section 13(1) of the GAET, has not yet been clarified by the courts (see Schlachter, 2015, para. 3).

A further feature of anti-discrimination law is the possibility provided for in section 23 of the GAET for anti-discrimination associations to provide support for persons who consider themselves the victims of discrimination.⁹¹ Subject to the conditions set out in section 23(2) of the GAET, associations of that kind may provide legal

⁸⁵ WCA, sec. 85(2), sentence (3). This includes, for instance, disputes involving secondary duties that arise from the employment relationship.

⁸⁶ For a definition of this concept see CAA, sec. 12a. In essence, it is based on the notion of economic dependency.

⁸⁷ See in this connection also GAET, sec. 16(1), which specifies that workers may not be treated less favourably by reason of exercising their legal rights.

⁸⁸ Specified in WCA, sec. 78(1), point (1).

⁸⁹ Federal Labour Court, 21 July 2009, Case 1 ABR 42/08.

⁹⁰ Or, where applicable, in the Federal Staff Councils Act, sec. 68, point (3).

⁹¹ GAET, sec. 23, implements the provisions of several EU directives, in particular Directive 2000/43/EC, art. 7(2).

assistance in court proceedings, and under the conditions set out in section 23(3) of the Act they may provide legal advice. In addition, pursuant to section 27(1) of the GAET, workers who consider themselves the victims of discrimination may seek assistance from the Federal Anti-Discrimination Agency. Section 27(2) of the GAET sets out the agency's tasks in relation to the settlement of individual disputes.⁹²

Grievances in the area of occupational safety and health

A specific right of workers to raise a grievance concerning matters of occupational safety is established by section 17(2) of the Arbeitsschutzgesetz 1996 (Occupational Safety and Health Act: OSHA).⁹³ However, in general, a grievance may only be raised “externally” with the relevant occupational safety and health authority if the employer fails to remedy the worker’s grievance raised internally as specified in section 17(2) of the OSHA (Aligbe, 2014).⁹⁴

Grievances of maritime workers

A further instance of a specific right to raise a grievance is laid down in section 128(1) of the Seearbeitsgesetz 2013 (Maritime Work Act). This provides that the grievance of a crew member should be raised first of all with their immediate superior on board the vessel. Section 128(7) of the Act specifies that the employers’ liability insurance association (*Berufsgenossenschaft*) must ensure that the grievances of crew members may be raised at any time, and that these will be investigated and where possible remedied.

Mediation

Mediation in the context of court proceedings (court-facilitated mediation)

In 2012, a new section 54a was inserted into the LCA governing mediation in labour court proceedings. This provision implements, in the context of labour law, Directive 2008/52/EC of the European Parliament and Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. However, the principle of mediation in labour court proceedings is not new. The conciliation hearing has always been an integral part of labour court procedure.⁹⁵ In addition, section 57(2) of the LCA specifies that at all stages of the proceedings the court should seek to encourage an

⁹² The wording is as follows: “The Federal Anti-Discrimination Agency shall give independent assistance to persons addressing themselves to the Agency in accordance with subsection 1 in asserting their rights to protection against discrimination. Such assistance may, among other things, involve 1. providing information concerning claims and possible legal action based on legal provisions providing protection against discrimination; 2. arranging for advice to be provided by another authority; 3. endeavouring to achieve an amicable settlement between the parties.”

⁹³ Gesetz über die Durchführung von Maßnahmen des Arbeitsschutzes zur Verbesserung der Sicherheit und des Gesundheitsschutzes der Beschäftigten bei der Arbeit of 7 August 1996 (*Bundesgesetzblatt* I, p. 1246), most recently amended by art. 8 of the BUK-Neuorganisationsgesetz (Act to reorganize federal accident insurance institutions) of 19 Oct. 2013 (*Bundesgesetzblatt* I, p. 3836).

⁹⁴ This issue is discussed in more detail in section 5.4 below.

⁹⁵ LCA, sec. 54.

amicable settlement between the parties.⁹⁶ This principle of conciliation and amicable settlement has been supplemented in recent years by the notion of court-facilitated mediation.

Section 54a(1) of the LCA specifies that the court may propose mediation or another form of alternative dispute resolution to the parties.⁹⁷ Hence this form of mediation is said to be court-facilitated. The policy aim underlying this linking of mediation with matters under contestation before the court is to strengthen the possibilities for consensual dispute resolution notwithstanding the ongoing proceedings. Nonetheless, the timing of this opportunity to propose mediation is particularly striking. The court's proposal comes at the stage when proceedings are already under way and thus at a time when, by their actions, the parties have indicated that, in principle, they seek a judicial determination of the matter. However, the court may not put pressure on the parties to accept the mediation proposal; nor may it, in any circumstances, require the parties to undertake mediation. In accordance with the essential character of mediation, this must take place on a voluntary and consensual basis (Prütting, 2013a, para. 7).

Where, on a proposal from the court, the parties agree to mediation or a different form of alternative dispute resolution, the court must order the proceedings to be stayed.⁹⁸ On application by a party, the court must set a date for the hearing in the case.⁹⁹ After three months the court must lift the stay and resume the proceedings unless the parties indicate unanimously that mediation or another form of alternative dispute resolution is still being pursued.¹⁰⁰

As noted above, section 54(6) of the LCA also makes provision for a matter to be referred to a judge acting as conciliator.¹⁰¹ The two procedures – a proposal of mediation in accordance with section 54a of the LCA and the procedure before a judge acting as conciliator in accordance with section 54(6) of the Act – co-exist in equality. One procedure does not take priority over the other. That means that the court is free to decide whether to choose one of these procedures and, if so, which one. In practice, the court usually sets out both possibilities to the parties and explains how the procedures work.

⁹⁶ In practice, the parties often manage to reach an amicable settlement even if the first attempts to reach a compromise are unsuccessful. In many cases, new facts and insights emerge such that the party that originally was unwilling to compromise agrees ultimately to settle the case by a compromise agreement. This is the assessment of Dendorfer and Ponschab, 2012, para. 118.

⁹⁷ According to section 1(1) of the Mediation Act 2012 (Mediationsgesetz), mediation is defined as a confidential and structured procedure in which the parties voluntarily and autonomously try to reach an amicable resolution of their dispute with the support of one or more mediators.

⁹⁸ LCA, sec. 54a(2), sentence (1).

⁹⁹ LCA, sec. 54a(2), sentence (2).

¹⁰⁰ LCA, sec. 54a(2), sentence (3).

¹⁰¹ The fact that pursuant to that provision these judges “may use all methods of conflict resolution including mediation” does not make them court mediators. Instead, they remain judges who exercise judicial authority when carrying out conciliation activities and who may suggest to the parties possibilities for a compromise.

Section 54a(1) of the LCA provides expressly only for extra-judicial forms of mediation (or other alternative dispute resolution procedures). Internal mediation services of the courts, trialled in numerous pilot projects between 2002 and 2013, have been discontinued.¹⁰² Although some have deplored this step (see e.g. Fritz and Schroeder, 2014; Groth, 2014, p. 210), others have welcomed it (see e.g. Prütting, 2013e, para. 17).¹⁰³

As the legislation did not provide for court-facilitated mediation until 2012, reliable data on its practical impact are not yet available. The general consensus among commentators is that the new provisions are unlikely to result in a greater uptake of mediation in labour law proceedings (see e.g. Groth, 2014, pp. 211ff and further references).

External mediation

As noted above, the parties to an individual labour dispute may have recourse to various forms of dispute resolution (offered by conciliation and arbitration bodies). This opportunity continues to apply even after proceedings have been commenced before the court. Hence, independently of the possibilities provided for in sections 54(6) and 54a of the LCA, the parties may choose to pursue an alternative form of dispute resolution. One such option is extra-judicial mediation. Following the decision to discontinue the internal mediation services of the courts, external providers can now operate in this market free from any competition from the courts.¹⁰⁴

Thus provision of mediation services is a matter for the private sector.¹⁰⁵ By definition, in the pre-litigation phase there is no competition from the courts, as only private providers can offer conflict management services. However, the situation changes once one of the parties to the dispute lodges a claim with the court. This triggers the possibility of the matter coming before a judge acting as conciliator, who, in the words of section 54(6) of the LCA, “may use any method of dispute resolution including mediation”. However, at this stage, too, the parties may choose to use a private mediator; or, pursuant to section 54a of the LCA, the court may propose this form of mediation to the parties. In addition, prior to any dispute being lodged with the court, the parties may by agreement provide for a suitable private conflict management mechanism (see Fritz and Schroeder, 2014, p. 1915). At the same time, however, it is not clear that the employer’s right to direct and issue instructions extends in the case of conflict to

¹⁰² The Mediation Act, sec. 9, establishes a transitional regime in this regard.

¹⁰³ Prütting writes: “The value and significance of the public court system result in particular from its adjudication function, as a replacement for self-help. The judiciary have fostered a culture of debate that is both public and oral. Court decisions are published and discussed. These factors all contribute to the upkeep and development of the law. Moreover, it results in legal clarity and legal certainty and provides an orientation for individuals. From this perspective, a system of internal court-based mediation is an aberration.”

¹⁰⁴ Concerns were indeed raised that internal court-based mediation services could be unlawful from a competition law perspective. On this point, see e.g. Groth, 2014, pp. 183ff.

¹⁰⁵ Mediation is subject to the Mediation Act 2012.

requiring the employee to take part in the mediation procedure.¹⁰⁶ In practice, the role of private mediation in labour law remains very limited.

5.3. Evaluation

As noted above, mandatory extra-judicial conciliation and arbitration applies in only a very few cases (for apprentices and in relation to employee inventions); and, more generally, the legislation leaves very little room for arbitration tribunals to operate in the area of labour law. As mediation is essentially only of importance in the context of labour court proceedings (court-facilitated mediation), the following evaluation of the institutions, mechanisms and procedures is therefore limited to internal grievance procedures and labour court proceedings.

Internal grievance procedures

Grievance rights

Section 84 of the WCA establishes a general right of employees to raise a grievance. This is supplemented by specific rights to raise a grievance, such as the right specified in section 13 of the GAET. In this connection, the criticism is sometimes made that the duplication of this right in different legislative instruments carries with it a risk of divergent interpretations by the courts, not necessarily justified by the different legislative purposes (see Oetker, 2008, p. 270).

There appear to be no empirical studies investigating the importance of grievance rights. However, the existence of numerous court decisions relating, for example, to the formation of a conciliation committee in response to a grievance raised by an employee clearly suggests that the right to raise a grievance is of considerable practical importance. The legislation does not specify any conditions that must be satisfied before a grievance may be raised, and the range of issues that may be raised by means of a grievance pursuant to section 84 of the WCA is very wide. The only restriction is that there must be some connection to the employment relationship. Consequently, it is of no significance for these purposes whether the disadvantage results from the conduct of the employer or that of fellow employees. Of particular note are instances in which the grievance is directed against the behaviour of managerial employees. In this connection, the source of the employee's right is particularly important. It derives from the employer's duty to protect the employee's moral rights and well-being. The legislation specifies that employees may not be subjected to any detriment as a result of raising a grievance. The opportunity to involve the works council (in establishments where this exists) further strengthens the right to raise a grievance. The absence of empirical studies makes it difficult to state with any certainty to what extent pursuit of grievance procedures reduces the burden on labour courts. However, the number of disputes that are resolved internally by means of a grievance procedure is likely to be considerable.

¹⁰⁶ See Dendorfer and Ponschab, 2012, paras 2–3. They argue that, in any event, an employer must accept an employee's refusal to participate in a mediation procedure.

*Internal conciliation procedures***Significance of the conciliation committee**

An important element of the grievance procedure is the right of the works council to take the matter to the conciliation committee if the works council and employer cannot agree on whether the grievance is justified. Although the involvement of the conciliation committee means, in principle, that the dispute is resolved by compulsory arbitration, importantly, this does not apply where the dispute relates to a legal entitlement of the employee. Disputes of that kind cannot be subject to binding arbitration.

Compulsory conciliation: Policy considerations

Following German reunification in 1990, a scheme of conciliation committees for labour law was introduced in the territory of the former German Democratic Republic (GDR). These conciliation committees constituted a separate dispute resolution mechanism for individual employment rights disputes. The mechanism was created to facilitate the development of a separate labour court system in the former GDR and to ensure a certain degree of legal protection as the labour law legislation of the Federal Republic of Germany was extended to the territory of the former GDR (see e.g. GERMANN, 2013a, para. 6; KISS, 1990, p. 835). Above all, however, given the number of labour law disputes anticipated at the time, the purpose of the scheme was to reduce the burden on a court system that was not yet (fully) functioning.¹⁰⁷ The crucial feature of this scheme was the requirement for the conciliation committee procedure to be exhausted before any proceedings could be brought before the competent court. The conciliation committee scheme was built on the GDR tradition of “disputes boards” (*Konfliktkommissionen*), within a system of extra-judicial conflict resolution in the workplace.¹⁰⁸

Section 5(1) of the Gesetz über die Errichtung und das Verfahren der Schiedsstellen für Arbeitsrecht (Act on the Establishment and Procedure of Conciliation Committees for Labour Law: AEPCCLL) of 29 June 1990 required conciliation committees to be created in establishments with more than 50 employees. In smaller establishments, the creation of a conciliation committee was voluntary. The conciliation committee consisted of a chairperson and two assessors.¹⁰⁹ The assessors and their deputies were nominated in equal numbers by the employer and the works council. Only individuals employed at that establishment could be nominated.¹¹⁰ The conciliation committee procedure took priority over proceedings before the court. Pursuant to section 2(1) of the Act, proceedings could be brought before the competent court only after exhaustion of the conciliation committee procedure.

The work of the disputes boards in the former GDR has been commended by various commentators. For example, it is credited with ensuring that the number of actions brought before the labour courts remained low and is said often to have resulted

¹⁰⁷ See Bundestags-Drucksache [Parliamentary printed paper] 12/1483, 6 Nov. 1991, p. 3.

¹⁰⁸ On the whole system, see THAU, 1992; FISCHER, 2000; BERG, 2000.

¹⁰⁹ AEPCCLL, sec. 6(1).

¹¹⁰ AEPCCLL, sec. 6(2).

in outcomes acceptable to the parties (see Schwedes, 1994, pp. 150–151; Linsenmaier, 2004, p. 407). The activities of the conciliation committees were also received positively in some quarters (see Schwedes, 1994, pp. 153–154 and further references). Certain writers even went so far as to suggest that such conciliation committees as an “internal first instance” could be extended to the whole of Germany (see Rieble, 1991, p. 842).¹¹¹ Some argued that the conciliation committees, as a preliminary mechanism prior to redress through the labour courts, could assume an important position and take on permanently their originally intended function of reducing the burden on the labour courts.¹¹² In that connection, it was argued that the conciliation committees were in a position to investigate the facts in a manner that involved less time and lower costs (Schuck, 1992, p. 320). However, hardly had the scheme come into force when in 1991 the 53rd Conference of the Presidents of the Higher Labour Courts called for the removal of this conciliation committee requirement “in the interests of legal certainty” (cited in Rieble, 1991, p. 841). Later the same year, the scheme was promptly repealed without any particular consideration of the benefits and disadvantages of a (compulsory) internal conciliation procedure.¹¹³

Labour court proceedings

Guarantee of judicial protection

It is not simply by chance that the parties in labour law disputes can have recourse to the courts to enforce their rights; this is required under the Constitution. Article 19(4) of the Basic Law guarantees recourse to the courts to challenge acts of public authority. However, the constitutional guarantee of recourse to the courts is not limited to acts of public authority but is framed comprehensively. This is because, in addition to the specific right to challenge acts of public authority, the Constitution also guarantees legal protection within the framework of a general right of access to justice, as noted earlier in this chapter. This general right of access to justice is derived from the principle of the rule of law in conjunction with fundamental rights, in particular the right established in article 2(1) of the Basic Law. The guarantee of effective legal protection is an essential element of a State governed by the rule of law. This guarantee encompasses access to the courts, a formal procedure to examine the rights asserted and a binding judicial decision.¹¹⁴ The part of the State responsible for delivering this right of access to justice is primarily the system of civil and labour courts, which is competent in relation to private law disputes (see Bethge, 2014, para. 275).

¹¹¹ See also Wank, 1990, who argued that “consideration should be given to putting the positive experiences with the disputes boards ... to good use” (p. 49).

¹¹² See e.g. Schuck, 1992, who argued for a model in which, following the conciliation committee procedure, it would not be necessary to hold a conciliation hearing before the labour court judge (p. 319).

¹¹³ See, however, Bundestags-Drucksache [Parliamentary printed paper] 12/1483, p. 3, 6 Nov. 1991, which stated: “It appears doubtful that the ... burden on the courts was reduced. However, specific studies have not been carried out.”

¹¹⁴ Federal Constitutional Court, 30 Apr. 2003, Case 1 PBvU 1/02.

Independence of the labour court system

In 2003, plans were mooted by the ministers of justice of the *Länder* to dissolve the independent system of labour courts and to transfer the responsibility for labour law disputes to the ordinary courts. This would have required a constitutional amendment as the labour court system is expressly listed in article 95 of the Basic Law as an independent jurisdiction with the same standing as the other specialist jurisdictions. At the time, the plan was justified on the basis that ending the separate system of labour courts would yield considerable cost savings. However, the ministers' plans, revived in 2011 by some of the *Länder*, met with almost universal disapproval among professional commentators. It was pointed out, for example, that in the labour court system at both first and second instance the court comprises only one career judge (with the other positions filled by lay members) and that, consequently, the number of judicial posts is limited (Aust-Dodenhoff, 2004, p. 24). Trade union authors emphasized the high level of acceptance enjoyed by labour court decisions. In their view, the particular dependency of employees inherent in the employment relationship justifies a separate labour court system. Moreover, a highly specialized judiciary is thought necessary to deal competently with judge-made law, which is common in this area, and other special legal sources such as collective agreements and workplace agreements. Finally, it was pointed out that the procedural rules of the labour court system are specifically tailored to the particular characteristics of employment relations (see Nielebock, 2004, p. 28).

Statistics of the labour court system

In 2014, a total of 381,965 actions were lodged with the labour courts. In 368,223 cases the action was brought by an employee, trade union or works council.¹¹⁵ Dismissal was the subject matter of the action in 201,354 cases. Only 28,762 cases proceeded to a final judgment by the court. In contrast, the action was settled by way of a compromise (either in court or by out-of-court settlement) in 236,689 cases. In disputes relating to the continued existence of a legal relationship, primarily actions contesting the lawfulness of a dismissal, the time taken to deal with the action was as follows: 62,825 actions were dealt with within one month, 90,342 actions were dealt with in one to three months, 38,729 in three to six months and 21,461 in six to 12 months. Only in 3,306 cases did the action take more than 12 months to reach a resolution.¹¹⁶

Access to the labour courts

Procedural rules make it easy to access the labour courts. In particular, the rules on the calculation and allocation of costs outlined above facilitate access to the court, as do the rules on representation (no requirement to be represented). The provisions on the right to raise a grievance internally do not prevent an employee from having recourse to the courts. The grievance procedure does not constitute an extra-judicial preliminary

¹¹⁵ Only 1 in 50 actions was brought by an employer. See Prütting, 2013b, para. 244.

¹¹⁶ See the labour court statistics for 2014: http://www.bmas.de/SharedDocs/Downloads/DE/PDF-Statistiken/Ergebnisse-Statistik--Arbeitsgerichtsbarkeit-2014.pdf?__blob=publicationFile&v=2 [accessed 22 Apr. 2016].

procedure.¹¹⁷ An employee is not required to raise the grievance first with the competent workplace body or to involve the works council, but can lodge an action directly before the labour court (see e.g. Thüsing, 2014b, para. 16).

Principle of conciliation

The existence of the compulsory conciliation hearing demonstrates very clearly that the labour court procedure is characterized by the objective of achieving, as far as possible, an amicable settlement between the parties. The figures above show that this objective is achieved in the majority of cases. For this reason, the conciliation aspect of the labour court procedure is generally well received by commentators (see e.g. Francken, 2006).¹¹⁸ However, there are also critics, who argue that in many cases the parties are almost coerced by the judges into accepting a settlement (see e.g. Rieble, 2012).

Independence of the judiciary

The independence of the persons appointed to adjudicate in disputes is a crucial factor in ensuring that the “correct” decision is reached and that those decisions are accepted by the parties. Article 97(1) of the Basic Law, section 1 of the Gerichtsverfassungsgesetz 1975 (Courts Constitution Act) and section 25 of the Deutsches Richtergesetz 1972 (German Judiciary Act) provide that judges shall be independent. This means that in the interpretation and application of legal provisions judges are not bound by any instructions and are required to adjudicate independently within the framework of the law (i.e. they are independent with regard to the subject matter of the case).¹¹⁹ This applies not only to career judges but also to the lay judges in the labour court system. The lay judges – just like their career judge colleagues – are public, independent and neutral judges. They are appointed for a particular term and their appointment cannot be revoked. They are not bound by any directions. Section 26(1) of the LCA establishes a particular protection for lay judges. According to that provision, no one shall be restricted in the acceptance or exercise of the office of lay judge or treated less favourably as a result of the acceptance or exercise of such office.¹²⁰ The provision applies generally to all. However, in particular, it is directed towards the group (employers or employees) to which the lay judge belongs.

¹¹⁷ In this regard the courts have emphasized that an employee’s right to take legal action cannot be curtailed by the works council’s rights of co-determination. See e.g. Federal Labour Court, 6 Sep. 2007, Case 2 AZR 715/06.

¹¹⁸ He writes: “The system of dispute resolution in first-instance labour court proceedings is well implemented” (p. 1105).

¹¹⁹ The personal independence of the judiciary is further supported by the Basic Law, art. 97(2), which establishes the principle that judges generally cannot be involuntarily retired or transferred. However, this institutional anchoring of judicial independence is limited to judges who are “appointed permanently to full judicial positions”, and so does not apply in the case of lay judges.

¹²⁰ Infringements of this provision are punishable with a maximum of one year’s imprisonment or a fine (LCA, sec. 26(2)).

Involvement of lay judges

At every instance of the labour court system, the courts include lay members drawn from the ranks of employers and employees. The practice that labour courts are formed of two lay members together with a presiding career judge has a long tradition. It can be traced back to the *Gewerbegerichtsgesetz* (Trade Courts Act) of 1890, and the principle has been retained ever since (Prütting, 2013f, para. 1). Lay judges combine expert knowledge and practical experience. Their participation ensures that the career judges must explain their reasoning, thereby reducing the risk of an approach that is one-sided. Empirical research suggests that where lay judges are involved a greater rationality and legitimacy can be observed (Höland, 2010). Although the involvement of lay persons in decisions relating sometimes to exceptionally complex legal matters is not without its difficulties, the benefits are thought to outweigh the disadvantages (see e.g. Prütting, 2013g, para. 18 and further references).

Accelerated procedure

As explained above, the labour court procedure is structured in such a way as to ensure that disputes are quickly resolved. For years, the time taken to resolve a case brought before the labour courts has been the shortest of all the jurisdictions. The relative brevity of proceedings results primarily from the fact that the majority of labour court cases end with a compromise agreement between the parties.

However, these figures cannot disguise the fact that labour court actions – particularly when, following the first instance proceedings, the matter is subject to an appeal on the facts or a further appeal on a point of law – sometimes continue for considerable periods, often many years, before they are finally resolved.¹²¹ This is particularly unfortunate in the case of unfair dismissal proceedings: if, at the end of the process, the final court holds that the dismissal was unlawful and hence ineffective, in principle the employer is required, in accordance with section 615 of the *Bürgerliches Gesetzbuch* (Civil Code), to pay wages for the entire intervening period. This constitutes a considerable economic risk for the employer (on this point, see e.g. Boecken and Topf, 2004).

5.4. Role of the occupational safety and health authorities

General issues

Germany has numerous occupational safety and health authorities. The most important federal authorities are the *Bundesministerium für Arbeit und Soziales* (Federal Ministry of Labour and Social Affairs) and the *Bundesanstalt für Arbeitsschutz und Arbeitsmedizin* (Federal Institute for Occupational Safety and Health). In practical

¹²¹ For this reason, the Federal Labour Court has developed an employee's right, subject to the satisfaction of certain conditions, to continued employment during the period in which their dismissal action is being heard by the courts. See Federal Labour Court (Grand Chamber), 27 Feb. 1985, Case GS 1/84.

terms, occupational safety and health is dealt with primarily at the level of the *Länder*. The bodies responsible for occupational safety and health differ. In some *Länder*, these are the Staatlichen Ämter für Arbeitsschutz (Public Agencies for Occupational Safety and Health) and in others the Gewerbeaufsichtsämter (Trade Supervision Boards). The occupational safety and health authorities are organized such that a single authority is responsible for each local area. That authority supervises all establishments in that area in all industrial sectors. The accident insurance institutions are also responsible for ensuring that occupational safety and health measures are implemented.¹²² The substantive law of occupational safety and health is set out primarily in the OSHA.

For present purposes, we will focus on section 17 of the OSHA. The first two sentences of section 17(2) of the Act read: “If on the basis of specific facts workers consider that the measures taken and the means employed by their employer are inadequate for the purposes of ensuring safety and health at work and if in response to grievances raised by workers in that regard the employer does not remedy the situation, they shall be entitled to communicate the matter to the competent authority. Workers may not be placed at a disadvantage for taking such action.” In this connection, workers may have rights derived from their employer’s contractual obligations; they may also have rights derived from their employer’s public law duties. Workers can require their employers to comply with the occupational safety and health provisions (laws, regulations and occupational safety rules adopted pursuant to authority given by the statutory accident insurance institutions) on the basis of the employer’s contractual duty to ensure the worker’s bodily integrity (see Butz, 2011, para. 3). In other words, the employer is required as a matter of contract to comply with the obligations set out in laws, regulations and accident prevention regulations: that is to say, the occupational safety and health rules produce a dual effect.¹²³

Grievance rights

Right to raise a grievance internally

Section 81(3) of the WCA provides a specific right to raise an internal grievance. According to that provision, in establishments in which there is no works council, the employer must hear the employees’ views on all matters which may affect the employees’ safety and health. As this right to be heard is intended to compensate for the absence of collective rights of participation in an establishment without a works council, an individual employee may, in reliance on this provision, also raise grievances and put forward suggestions on all matters of general occupational safety and health relevant to the establishment and its workforce. There is no requirement for the employee to be personally affected or for the grievance or suggestion to be specifically connected to a particular job (see Butz, 2011, para. 28).

Right to raise a grievance externally

In addition, as noted above, section 17(2) of the OSHA provides for a right to raise a grievance with an external body. If an establishment has a works council (or the cor-

¹²² Sozialgesetzbuch (Social Security Code), Book VIII, sec. 17(1).

¹²³ See Federal Labour Court, 12 Aug. 2008, Case 9 AZR 1117/06.

responding institution in public sector employment), it will generally suffice for the employee to notify the issue to this institution. Then, in exercise of its official duty to supervise the application of protective legislation, the works council must ensure that the issue is resolved¹²⁴ and, where necessary, can notify the matter to the competent occupational safety and health authority.¹²⁵ Where there is no works council, the situation is more difficult. For that reason, the legislation grants employees an extensive right to raise a grievance externally, thus activating the specialist supervisory authority with enforcement powers. However, the courts have placed certain limits on this right: specifically, an employee risks dismissal by their employer for breach of the duty of mutual trust and confidence if, without previously warning the employer, they lodge a complaint with the competent supervisory authority. This line of case law has been criticized by certain commentators.¹²⁶ However, repeated efforts to establish legislative protection for whistleblowers have hitherto not met with any success.¹²⁷

In addition to the formal right to raise a grievance specified in section 17(2) of the OSHA, there is also the option of making a complaint by way of the right of petition specified in article 17 of the Basic Law. This allows anyone – outside the scope of any formal appeal or judicial proceedings – to lodge a complaint with a public body. Complaints of this kind are not subject to any time limits or formal requirements. They do not produce any suspensory effects, nor are they considered as satisfying the time limits for formal appeals. An individual making such a complaint incurs no costs, and has no right to a substantive decision, but can require that the competent body accepts the complaint and examines it objectively. A complaint of this kind made to the superior authority may be used in the area of occupational safety and health. For example, an employee might register a complaint with an authority asking it to ensure that the subordinate occupational safety and health authority takes action against their employer.¹²⁸

5.5. Recent developments

In recent years, discussion of employees' rights to raise grievances has often arisen in connection with proposed rules to protect whistleblowers. It has been pointed out that rules of this kind also allow employees to report irregularities and to complain

¹²⁴ The works council has supervisory rights of its own in the area of occupational safety and health. See WCA, sec. 89, and the staff council legislation of the *Länder*.

¹²⁵ The Act no longer specifies expressly that an external authority may be notified only if no agreement can be reached in the workplace. However, the majority of commentators take the view, having regard, among other things, for the principle by which employer and works council shall work together in the spirit of mutual trust (WCA, sec. 2(1)), that the works council must at least first attempt to persuade the employer to remedy the situation before contacting an external body. See e.g. Annuß, 2014, para. 19.

¹²⁶ See Butz, 2011, paras 13ff, and Greiner, 2012, paras 8ff, and further references to academic literature and case law in both.

¹²⁷ See, most recently, Bundestags-Drucksache [Parliamentary printed paper] 18/3039, 4 Nov. 2014.

¹²⁸ This example is taken from Kunz, 2011, para. 176.

about co-workers and line managers. The right to raise a grievance is also significant in the context of harassment cases (Hille, 2003). Finally, the right to raise a grievance is relevant in the area of anti-discrimination law. There appear to be practical problems, however. Workers are often unaware of the bodies to whom they can address their grievances; and, even when equipped with this knowledge, they are frequently reluctant to turn to such bodies.¹²⁹

5.6. Broader context and issues for further analysis

Broader context

Resolution of labour law disputes needs to be seen in a broader legal context. One of the most important factors in this regard in the German system is the works council's right of co-determination, which provides a framework for many aspects of dispute resolution. For example, employees can require the works council to take action to assist in resolving disputes. In addition, the protective systems resulting from the rights and prerogatives of the works council are relevant in the resolution of individual disputes. The works council does not simply represent collective interests (of the workforce as a whole); rather, its rights of co-determination – especially in relation to staff matters – also protect the individual employee.¹³⁰ Consequently, the works council must be consulted, for example, before every dismissal and not simply in the case of collective redundancies.¹³¹ Employees have the right not to be subjected to any detriment as a result of raising a grievance. They also benefit from the fact that the WCA, in a whole series of provisions, ensures the works council's independence from the employer.¹³²

Another important aspect of the broader German context is the system of social partnership. This is reflected in the labour court system through the involvement of lay judges drawn from the ranks of employers and employees. These lay members are appointed on the basis of nominations submitted by trade unions and employer confederations. These organizations are thus incorporated within the court-based system of dispute resolution. Their participation strengthens the legitimacy of labour court decisions and the acceptance of those decisions by the parties, and thus ultimately contributes to dispute resolution itself.

Issues for further analysis

Further attention should be given to the question whether a system of compulsory conciliation in the workplace would make it easier and quicker for employees to enforce their rights and at the same time reduce the burden on the labour courts. The system

¹²⁹ See Bundestags-Drucksache [Parliamentary printed paper] 17/14400, 13 Aug. 2013, p. 300.

¹³⁰ In this regard, the WCA, sec. 75(2), specifies that employer and works council “shall safeguard and promote the free development of the personality of the employees working in the establishment”.

¹³¹ WCA, sec. 102(1).

¹³² The WCA, sec. 78, specifies that members of the works council “may not be prejudiced or favoured by reason of their office”.

of conciliation committees for labour law, which operated briefly in the early 1990s, could serve as a model.

As regards the labour courts themselves, it is worth considering whether these could be adapted, in accordance with trends in the United States, to become “multi-door courthouses” – in other words, “one-stop shops” that bring together all kinds of conventional and alternative dispute resolution procedures.¹³³

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¹³³ See e.g. Francken, 2006; also Francken, 2007, where he writes : “The advantage lies in centralising the different possibilities for dispute resolution within an individual courthouse” (p. 1794). See also Groth, 2014, p. 214.

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6. Japan

Ryuichi Yamakawa

6.1. Introduction and background

This chapter explains and evaluates the existing mechanisms for the resolution and prevention of individual labour disputes in Japan.¹ Section 6.2 of the chapter briefly describes the current mechanisms for the resolution and prevention of labour disputes in Japan. Section 6.3 evaluates the functioning of these mechanisms, while section 6.4 draws attention to several elements that should be taken into consideration in refining the system for resolving individual labour disputes.

Before describing the Japanese mechanisms for the resolution and prevention of individual labour disputes, a short explanation on the definition of “individual labour disputes” is in order.²

In Japan, as in many other countries, labour disputes are classified as either “individual” or “collective” disputes. “Individual” disputes are disputes between an individual employee and his/her employer,³ while typical “collective” disputes are disputes between a trade union and an employer. The distinction sometimes becomes blurred. For example, in a case of whether or not an employee is dismissed because of his/her union membership, the dispute is “collective” if the union files an unfair practice complaint in respect of the dismissal, since one of the parties is the trade union. However, if the dismissed employee files a complaint against the employer, the dispute may be classified as an individual dispute because it is between an individual employee and an employer. Such disputes can be handled using the mechanisms for individual labour disputes or those for collective labour disputes, depending on the choice of the plaintiff.

¹ This chapter is one of the products of the research project “A comprehensive study on measures for implementing labour laws”, supported by JSPS KAKENHI (Grant-in-Aid for Scientific Research (Scientific Research B)), Project No. 26285015.

² The legislative instruments related to the subject of this chapter are listed in the appendix.

³ Although the distinction between employee and independent contractor is often disputed in Japan, the determination of whether or not the worker is an employee is a matter of substantive law. If a party to the dispute is classified as an “employee” or “worker” (the meaning of these terms may vary depending on the statute concerned), he/she is basically entitled to use the dispute resolution procedures described below. Also, if the dispute includes disagreement over whether one of the parties to the dispute is an “employee”, this issue may be determined by the dispute resolution systems described below. On the situation under Japanese law with respect to the employee/independent contractor distinction, see Yamakawa, 2001.

Labour disputes are also divided into “rights” and “interests” disputes. The term “rights disputes” refers to disputes that can be resolved through the determination of the parties’ legal rights and obligations (e.g. a case in which a worker claims dismissal without just cause), whereas “interests disputes” can only be resolved through the agreement of the parties (e.g. a case in which collective bargaining comes to an impasse after a trade union demands a wage increase for its workers which the employer refuses to meet). Collective interests disputes can be handled through the dispute adjustment measures of the labour relations commissions. On the other hand, most mechanisms for the resolution of individual labour disputes usually handle only rights disputes.

6.2. Major mechanisms for resolution and prevention of individual labour disputes in Japan

Overview

Japan has both judicial and administrative systems in place in the Government to resolve labour disputes (see generally Yamakawa, 2013). In the judicial system, ordinary courts have jurisdiction over labour disputes in general, as long as they are “rights disputes”. Although Japan does not have a special “labour court”, there is a special “labour tribunal” procedure in addition to the ordinary civil procedure and temporary relief procedure. This labour tribunal procedure, which was established by the Labour Tribunal Act⁴ in 2004, is available only for individual labour disputes.

Japan also has special administrative systems with regard to the resolution of labour disputes. Formerly, the labour relations commissions, independent administrative agencies established by the Labour Union Act in 1945, comprised the only administrative system for labour dispute resolution, and their jurisdiction was limited to collective labour disputes. In 2001, however, the Act on Promoting the Resolution of Individual Labour-Related Disputes (Individual Labour-Related Disputes Act)⁵ established the “System for Promoting Resolution of Individual Labour Disputes”. This system is provided by the national Government, and is available at the prefectural labour bureaus, which are administered by the Ministry of Health, Labour and Welfare (MHLW), in each prefecture in Japan. Unlike the labour relations commissions, which have adjudicatory functions regarding unfair labour practices under the Labour Union Act,⁶ this system provides only adjustment measures, such as conciliation by the dispute adjustment commissions, and administrative guidance/recommendations by the directors of prefectural labour bureaus. This system handles almost all individual labour disputes, including those relating to dismissals and changes to working

⁴ <http://www.japaneselawtranslation.go.jp/law/detail/?id=2180&vm=04&re=01> [accessed 18 Mar. 2016].

⁵ <http://www.japaneselawtranslation.go.jp/law/detail/?id=118&vm=04&re=01> [accessed 18 Mar. 2016].

⁶ <http://www.japaneselawtranslation.go.jp/law/detail/?id=17&vm=04&re=01> [accessed 18 Mar. 2016].

conditions, with the exception that conciliation is not available for disputes regarding recruitment and hiring.

This system does not cover disputes regarding employment discrimination under the Act on Securing Equal Opportunity and Treatment between Men and Women in Employment (Equal Employment Opportunity Act)⁷ and the Act on Promoting the Employment of Persons with Disabilities (Disability Employment Promotion Act)⁸ (provisions regarding prohibition of discrimination and duty of reasonable accommodation took effect on 1 April 2016), or certain disputes under the Act on Improvement of Employment Management for Part-Time Workers (Part-Time Work Act)⁹ and the Act on Childcare Leave, Caregiver Leave, and Other Measures for the Welfare of Workers Caring for Children or Other Family Members (Child and Family Care Leave Act).¹⁰ Systems for resolving these types of dispute are provided under the respective statutes.

Most local labour relations commissions now handle individual labour disputes mainly through conciliation. Since these commissions are agencies established by the local government (prefecture), they are local administrative systems, whereas the System for Promoting Resolution of Individual Labour Disputes is a national system established by the national Government. In addition to conciliation, most prefectures provide consulting services regarding individual labour disputes, through specific offices of the local government or the labour relations commissions themselves.

These administrative dispute resolution mechanisms do not apply to most national and local government employees, for whom resolution of individual labour disputes is provided under special statutes regulating the status and working conditions of public servants. In the case of national public servants, the National Personnel Agency provides procedures for the resolution of individual disputes under the National Public Service Act.¹¹ The usual mechanism for adjudication in matters such as dismissal of national public servants is the Board of Equity, administered by the National Personnel Agency. Systems are also available for requesting appropriate measures regarding working conditions and for consultation on grievances.

Cases regarding the violation of certain statutes such as the Labour Standards Act¹² are handled by the labour inspection system. Although it is also administered by the MHLW, the labour inspection system does not resolve disputes between private parties: its functions are those of administrative inspection and criminal prosecution.

⁷ <http://www.japaneselawtranslation.go.jp/law/detail/?id=60&vm=04&re=01> [accessed 18 Mar. 2016].

⁸ No English translation of this text is currently available.

⁹ <http://www.japaneselawtranslation.go.jp/law/detail/?id=2033&vm=04&re=01> [accessed 18 Mar. 2016].

¹⁰ <http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&cyo=Child+and+Family+Care+Leave&cx=0&cy=0&ia=03&ky=&page=1> [accessed 18 Mar. 2016].

¹¹ <http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&cyo=National+Public+Service+Act&cx=39&cy=6&ia=03&ky=&page=1> [accessed 18 Mar. 2016].

¹² <http://www.jil.go.jp/english/laws/documents/l.standards2012.pdf> [accessed 18 Mar. 2016].

Figure 6.1. Overview of labour dispute resolution systems in Japan

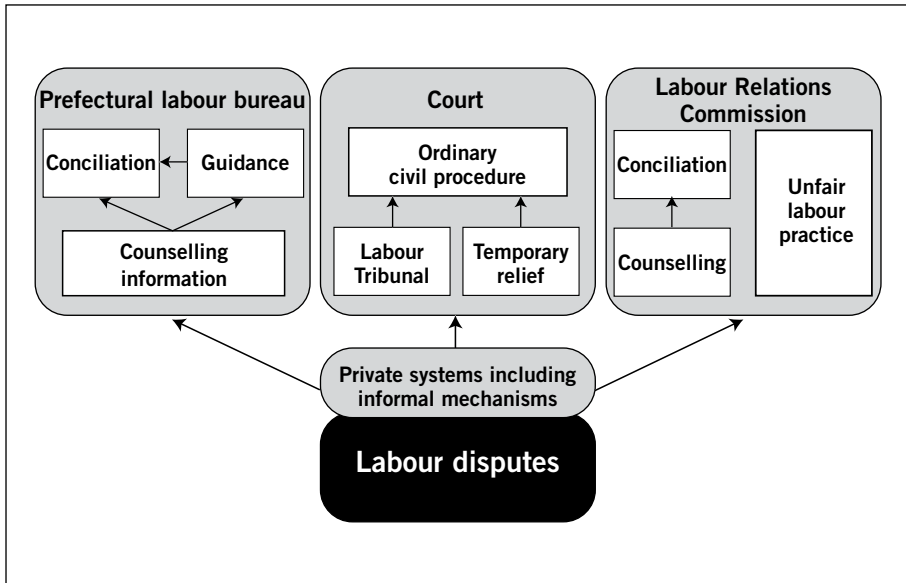


Figure 6.1 illustrates the overall structure of labour dispute resolution systems in Japan.

Finally, it may be noted that private businesses that provide services for labour dispute resolution have not fully developed in Japan, except for practising lawyers. Although collective bargaining agreements sometimes contain clauses that provide for grievance procedures, they rarely include arbitration procedures. Moreover, the Arbitration Act¹³ provides that a mandatory arbitration agreement regarding individual labour disputes that is concluded between an individual employee and his/her employer before any disputes arise shall be void for the time being.¹⁴

Traditionally, however, Japanese companies have developed informal mechanisms through which labour disputes can be prevented. Here, the term “mechanism” includes systems and other practices that are designed to resolve or prevent labour disputes. For example, the joint consultation system between employers and enterprise-based unions in Japan plays an important role in preventing disputes in unionized workplaces, because unions and employers can discuss potential workplace conflicts and prevent them from developing into disputes. Moreover, middle managers in Japan act as a “buffer” between top-level management and rank-and-file workers to prevent workplace conflicts and dissatisfactions from developing into disputes. A worker who is dissatisfied with his/her working conditions, or who has other problems in the work-

¹³ <http://www.japaneselawtranslation.go.jp/law/detail/?printID=&id=2155&re=&vm=02> [accessed 18 Mar. 2016].

¹⁴ The Arbitration Act is among the Japanese statutes that contain provision for future reconsideration and amendment.

place, often discusses the problem with his/her supervisor. The supervisor, in turn, listens to the worker, and when possible, takes measures to resolve the issue.

Japanese employment practices, in particular long-term employment and seniority-based wages, also function to deter labour disputes. This is because workers tend to avoid causing dissent and attracting negative attention from their employers even when they are dissatisfied with their current situation; as long as there is the prospect of better working conditions and different positions in the long run, they generally persevere in return for such future prospects.

However, these informal dispute prevention mechanisms appear to have weakened in recent years, for reasons such as the decline of union density (discussed in section 6.4 below). Such changes in the role of informal dispute prevention mechanisms form the background to the creation of new systems for the resolution of individual labour disputes.

Major judicial systems

Ordinary civil procedure

The ordinary civil procedure is a formal procedure involving a trial conducted in open court leading to a final judgment rendered by the court on the basis of substantive legal rulings and the rules on the burden of proof.¹⁵ Rules governing the ordinary civil procedure are provided under the Code of Civil Procedure.¹⁶ Representation by qualified legal personnel is not required under the Code. Judgments are usually published, and can be enforced through mandatory measures when they become final and if they are not voluntarily obeyed by the defendants. This procedure in the first instance is available at all main offices and branch offices of the district courts. It is possible to appeal a judgment in the first instance to the appellate courts, and then to the Supreme Court in certain limited cases.

In Japan, ordinary courts with general jurisdiction are entrusted with resolving labour disputes in the same way as other civil disputes. Because Japan does not have a jury system or a system in which lay persons participate in civil cases in general, it is professional judges who hear and determine the cases. Judges in ordinary courts do not usually have special expertise in labour and employment matters. It is worth noting, however, that in several large district courts, such as those of Tokyo and Osaka, there are special divisions that handle only labour and employment cases.

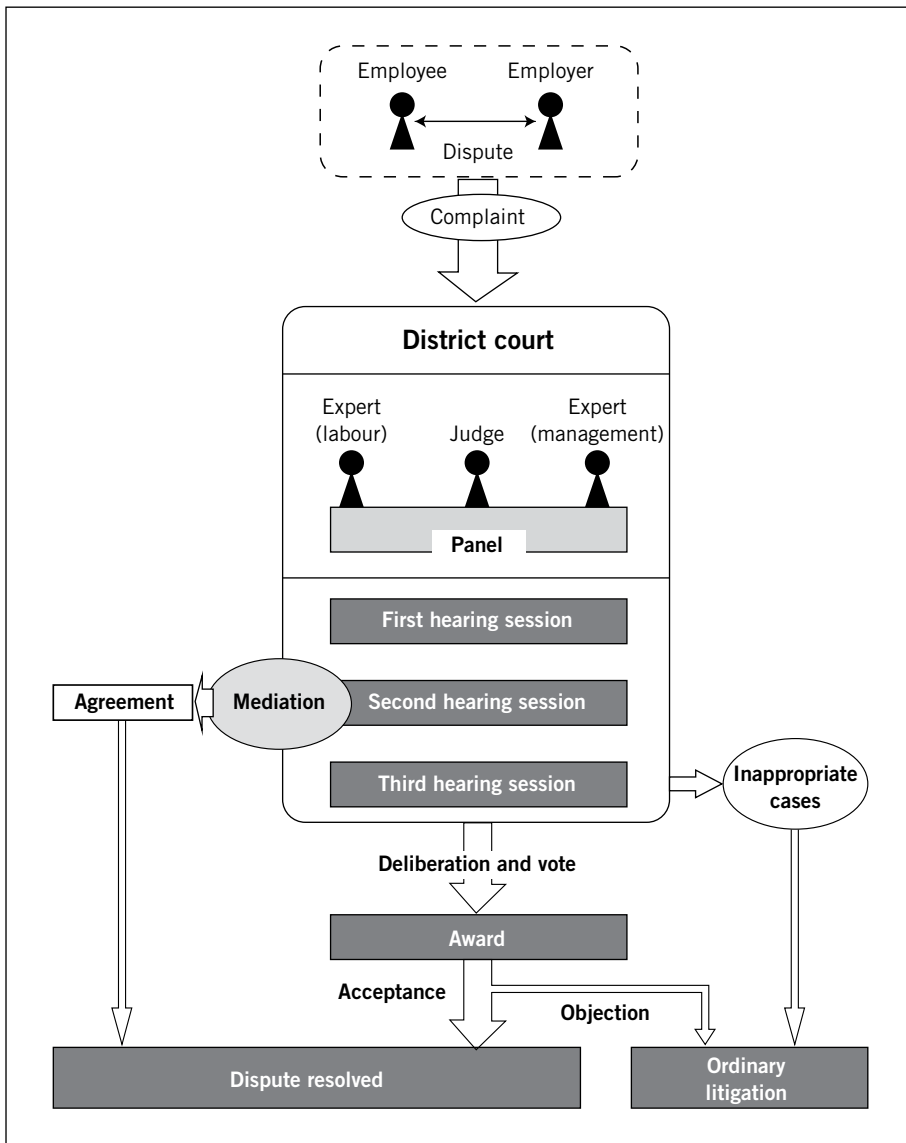
Labour tribunal procedure

In 2004, the Labour Tribunal Act established a new judicial labour tribunal system for resolving individual labour disputes (figure 6.2). This legislation was introduced in response to the increasing number of individual labour disputes and the growing need

¹⁵ In Japan, workers are usually entitled to make use of the dispute resolution procedures with no limitation from the viewpoint of qualifying period, apart from legal rules that contents of substantive rights may vary depending on the length of employment of workers or statute of limitations.

¹⁶ [http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&yo=&ia=03&kn\[\]=%E3%81%BF&x=13&y=16&ky=&page=9](http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&yo=&ia=03&kn[]=%E3%81%BF&x=13&y=16&ky=&page=9) [accessed 23 Apr. 2016].

Figure 6.2. The labour tribunal system



for more efficient resolution of such disputes (see generally Sugeno, 2004). The establishment of the labour tribunal system was facilitated by the cooperation of interested parties such as national trade union organizations, employers’ associations, expert lawyers representing labour and management, and prominent judges.

The Labour Tribunal Act does not establish specialized labour courts. Instead, district courts appoint members to the labour tribunal panel and delegate the courts’ authority to the panel when a petition under the Act is filed regarding an individual

labour dispute. The panel consists of one professional judge and two part-time lay members who have experience and expertise in labour and employment relations, one from management and the other from labour.

In practice, the appointment of the part-time lay members of the labour tribunal is based on the recommendation of major employers' associations and trade unions. No registration or roster system has been adopted for these appointments. The lay members are required to have expertise and experience in employment management or labour relations, for example, long experience of human resource management or service as a union official. Indeed, many lay members are former or current managers in human resource departments of private corporations and former or current officials of large enterprise unions and their national, regional or industrial confederations. At 1 April 2015 there were 1,475 lay members, 737 on the employer side and 738 on the labour side (Sugeno et al., 2015, table 6). The term of appointment is two years, and the recommendation for appointment is made for each term. In addition, as a condition of recommendation for their appointment, the lay members are required by the trade unions and employers' associations, respectively, to undergo training in the basics of labour and employment law and of dispute resolution systems.

When a plaintiff files a complaint through the labour tribunal procedure with the district court that has jurisdiction over the case, the court appoints a three-member panel. There is no need for the plaintiff to obtain the consent of the defendant to file a complaint. Also, the plaintiff can choose the ordinary civil procedure instead of the labour tribunal procedure; however, there is no requirement to go through the ordinary civil procedure before having recourse to the labour tribunal. Although legal representation is not required, both parties usually hire lawyers to represent them, since considerable legal skills are necessary to cope with the speedy procedure.

The panel is required under the Act to complete the procedure within three hearing sessions. In typical cases, the first hearing day usually consists of a summary presentation of the parties' positions, clarification of issues, submission of documentary evidence and a brief hearing of testimony.¹⁷ On the second hearing day, the panel typically engages in mediation and proposes an agreement for voluntary resolution, in addition to hearing additional testimony. Then, on the third and final hearing day, the panel continues to mediate the dispute and asks the parties to decide whether or not they will accept the proposed agreement. If mediation is unsuccessful, the panel closes the procedure and renders an award.

¹⁷ This hearing is informal compared to the trial in ordinary civil procedure. For example, cross-examination does not take place in most cases. The allocation of burden of proof is essentially the same as in the ordinary civil procedure. However, since the contents of the awards are flexibly determined by the labour tribunal panel, the panel can, to a certain extent, depart from legal outcomes governed by substantive laws including burden of proof. For example, if the panel finds that a dismissal in dispute is not necessarily based on a reasonable cause but is not convinced that it is an abuse of the employer's right (requirement under art. 16 of the Labour Contract Act), it can render an award that provides for partial monetary relief as opposed to the full relief of reinstatement and back pay.

The panel has flexibility to determine the contents of the award, as long as the award is consistent with the parties' legal rights and duties and takes into account the progression of the procedure, including the parties' attitudes to the resolution of their dispute (for example, indications of willingness to settle). The award is binding and enforceable unless one of the parties files an objection.¹⁸ If either party files an objection, the award loses its effect, and the case is automatically referred to a civil court and treated as ordinary civil litigation.¹⁹

Thus the labour tribunal system provides a fast judicial procedure to resolve individual labour disputes through mediation and flexible adjudication, presided over by professional judges and labour and employment experts. If the parties are dissatisfied with the award, they can proceed to the ordinary civil procedure. Since the panel is required to render an award based on the parties' legal rights and duties, the procedure has an adjudicatory nature: even if the dispute is resolved through mediation, the panel indicates to the parties its impression of the merits of the case in recommending its proposals for the resolution of the dispute (see e.g. Shiraishi, 2011).

On the other hand, the award automatically loses its effect if one of the parties objects, and there is no requirement to state any reason for such objection. In this respect the labour tribunal system has some of the characteristics of a dispute adjustment mechanism based on the parties' intentions. In sum, then, the labour tribunal system embodies a unique mixture of adjudication and adjustment.

Temporary relief procedure

The procedure for temporary relief is a special judicial procedure to enable provisional orders to be issued in cases where a plaintiff does not have sufficient time to obtain a final judgment through the ordinary civil procedure, but needs to obtain temporary relief in order to avoid serious detriment. As in the ordinary civil procedure, legal representation is not required. Typically, a worker who considers that he/she has been dismissed unlawfully and who as a result of the dismissal has no income, files a request for a temporary relief for lost wages. The temporary relief procedure is conducted with relative informality under the Civil Provisional Remedies Act.²⁰ For example, the burden of proof is not as heavy as in the case of the ordinary civil procedure. On the other hand, proof of the necessity for temporary relief is required. Also, even if the court issues an order, the respondent can request that the plaintiff file a complaint under ordinary civil procedure.

¹⁸ Parties who reject the labour tribunal panel's mediation proposal sometimes accept the award without filing an objection. Although the reasons for such reactions have not been fully analysed, it appears that parties may feel more comfortable in accepting an award as a determination by the judiciary than in accepting a mediation proposal presented as a compromise.

¹⁹ This litigation is separate from the previous labour tribunal procedure, since the record of the labour tribunal procedure is not automatically forwarded to the subsequent ordinary civil procedure.

²⁰ [http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&yo=&ia=03&kn\[\]=%E3%81%BF&x=13&y=16&ky=&page=11](http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&yo=&ia=03&kn[]=%E3%81%BF&x=13&y=16&ky=&page=11) [accessed 23 Apr. 2016].

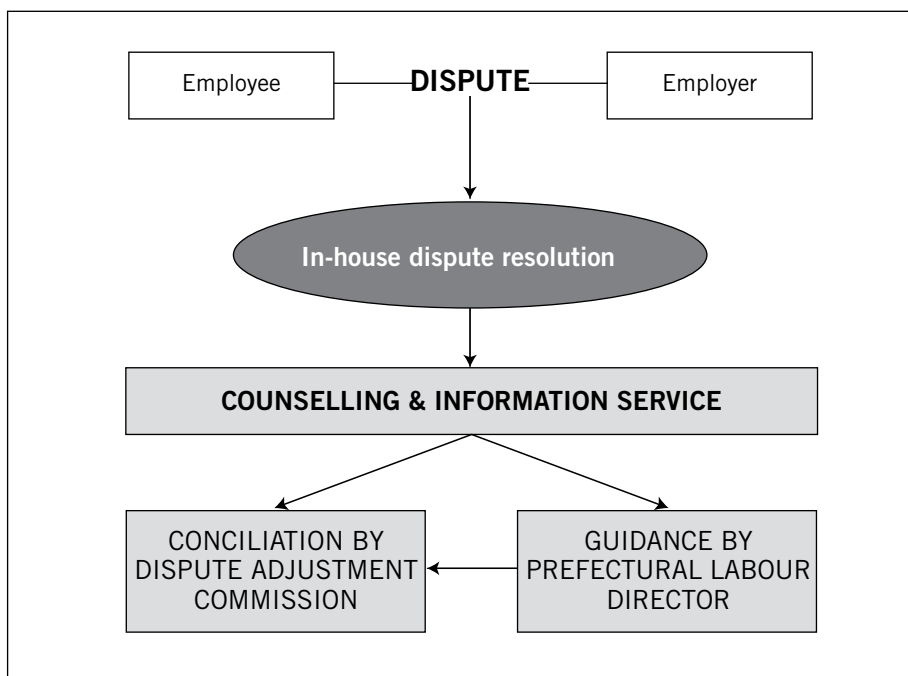
Major administrative systems

Administrative systems for promoting resolution of individual labour disputes at prefectural labour bureaus

Against the background of an increase in individual labour disputes, the Individual Labour-Related Disputes Act was enacted in 2001. This Act created a new administrative system for alternative dispute resolution, namely the System for Promoting Resolution of Individual Labour Disputes, to support voluntary resolution of individual labour disputes. This system, which is run by the national Government and administered at prefecture level, has three major components: (1) a comprehensive counselling and information service provided by the prefectural labour bureau; (2) administrative guidance provided by the prefectural labour director; and (3) conciliation provided by the dispute adjustment commission (figure 6.3).

The prefectural labour bureau provides workers with counselling and information on all subjects regarding labour disputes at the “comprehensive labour consultation corner”, a “one-stop” service. This service is aimed at early prevention and resolution of individual labour disputes, since some disputes arise unnecessarily through the lack of sufficient information and/or understanding of the labour laws. For example, an employer who has a question regarding the contents of a certain employment regulation can ask the local labour bureau for relevant information.

Figure 6.3. System for resolution of individual labour disputes at prefectural labour bureaus



Resolving individual labour disputes: A comparative overview

In addition, however, parties to actual individual labour disputes may wish to consult the bureau about, for example, options regarding the procedure for resolving their disputes and/or the relevant legal rules. If it is found that another agency, such as the labour inspection office or the labour relations commission, has jurisdiction over the dispute, then the bureau provides information on filing charges or complaints with that agency, although it does not automatically refer the cases to the relevant system. This information service is provided not only by officials of local labour bureaus but also by experienced consultants employed by the bureaus, who may be, for example, retired human resource managers.²¹

In cases where one or both of the parties request assistance from the prefectural labour director in resolving an individual labour dispute, the director may provide administrative guidance or recommendations to the parties. For example, if it is found that the dismissal of an employee is an unlawful abuse of the employer's right to discharge under article 16 of the Labour Contract Act,²² the director may advise the employer to withdraw or at least reconsider the dismissal. This guidance does not have mandatory force; the director merely recommends voluntary resolution of disputes. Also, this administrative guidance does not cover disputes regarding the Labour Standards Act or other administrative statutes over which the labour inspection offices have jurisdiction. In this respect, this administrative guidance is different from that issued by labour inspectors to secure compliance with the public labour laws, such as the Labour Standards Act. The guidance offered by the prefectural labour director relates only to statutes that have the nature of private law, such as the Labour Contract Act,²³ the Act on the Succession of Labour Contracts upon Company Split²⁴ and case law under the Civil Code.

The Individual Labour-Related Disputes Act also established a dispute adjustment commission in each prefecture for the conciliation of individual labour disputes, except for those regarding recruitment and hiring. Each commission is composed of neutral experts on labour and employment laws. For most disputes, a three-member panel from the dispute adjustment commission facilitates conciliation between the parties. Conciliation is a process in which the panel hears the parties' contentions and helps them to reach an agreement to settle the case. For certain disputes, such as those under the Equal Employment Opportunity Act, the commission conducts mediation rather than conciliation. Members of the dispute adjustment commissions are appointed by the Minister of Health, Labour and Welfare from among "persons who have expertise".²⁵ In contrast to

²¹ The public officials of local labour bureaus who provide counselling and information service include, but are not confined to, those qualified as labour inspectors. Officials of other departments of the MHLW also provide these services.

²² <http://www.japaneselawtranslation.go.jp/law/detail/?id=1992&vm=04&re=01> [accessed 18 Mar. 2016].

²³ <http://www.japaneselawtranslation.go.jp/law/detail/?id=1992&vm=04&re=01> [accessed 23 Apr. 2016].

²⁴ <http://www.japaneselawtranslation.go.jp/law/detail/?id=110&vm=04&re=01> [accessed 23 Apr. 2016].

²⁵ Individual Labour-Related Disputes Act, art. 7, para. 2. Under the statute, there is no requirement for specific qualifications or training.

the labour relations commissions and the labour tribunals, the dispute adjustment commissions are composed only of members representing the public interest. In practice, the members are often appointed from among labour law scholars and practising lawyers, in particular those specializing in social security law, although the statutory requirement for the appointment is merely expertise in labour law.

In a case where one or both of the parties to an individual labour dispute (except for a dispute regarding the recruitment and hiring of workers) files a petition for conciliation, the prefectural labour director shall refer the dispute to the dispute adjustment commission for conciliation, if the director determines that conciliation is necessary. The chairperson of the commission appoints a three-member panel, and the panel conducts conciliation between the disputing parties, clarifying issues regarding the contentions of both parties and endeavouring to obtain their agreement. In addition to hearing the opinions of the disputing parties, the panel may, if necessary, hear the opinions of other relevant persons, request the submission of written opinions, prepare a draft agreement with the unanimous approval of all panel members, and present the draft to the disputing parties. In practice, the actual conciliation is undertaken by one commission member rather than the whole three-member panel.

This procedure is completely voluntary on both sides, since the respondent is not obliged to participate in the procedure. Therefore, the commission does not conduct conciliation if the other party is not willing to appear before it.²⁶ Also, if the commission finds that there is no prospect of resolving the dispute through mutual agreement, it closes the conciliation procedure.

As noted above, the administrative procedure for mediation rather than conciliation is provided in disputes concerning discrimination: specifically, regarding disputes under the Equal Employment Opportunity Act, the Disability Employment Promotion Act (which prohibits employment discrimination because of disabilities, and requires reasonable accommodations), the Part-Time Work Act, and the Child and Family Care Leave Act. However, these dispute resolution systems are similar to the System for Promoting Resolution of Individual Labour Disputes. Although mediation under these statutes is conducted by the dispute adjustment commissions, with mediators appointed from among the membership of the commissions, the process is somewhat formal in that the commissions make proposals for dispute resolution and recommend these to the disputing parties. Formerly, the consent of both parties was required for the commencement of the mediation procedure under the Equal Employment Opportunity Act. However, since this requirement acted as an obstacle to the functioning of this procedure, it was abolished in 1997.

Local labour relations commissions and local government

The labour relations commissions in Japan did not originally have jurisdiction over individual labour cases. However, the Individual Labour-Related Disputes Act included a requirement that local governments promote the resolution of individual

²⁶ On the other hand, once an agreement is reached between the parties, that agreement is enforceable in court and is usually respected by the parties.

labour disputes. As a result, most local labour relations commissions are now engaged in conciliation of such disputes. One of the special features of this conciliation is the tripartite composition of the commission membership, and their expertise in labour and employment relations, designed to promote a voluntary resolution acceptable to all parties.

On the basis of the mandate provided by the Individual Labour-Related Disputes Act, most local governments in Japan now have a role in promoting the voluntary resolution of individual disputes. More specifically, many prefectures have an office for this purpose and provide counselling services regarding individual labour disputes.²⁷ This counselling service is sometimes conducted in conjunction with conciliation by the local labour relations commissions, to which local government staff can, if necessary, refer cases in the same prefecture.

6.3. Analysis and evaluation of systems for resolving individual labour disputes in Japan

Performance of major systems

Judicial systems

The labour tribunal system

The labour tribunal system has performed well since its introduction in 2006. This system currently handles a large number of individual labour disputes: 3,678 complaints were filed through the labour tribunal procedure in 2013, whereas 3,341 labour-related complaints were filed through the ordinary civil procedure, and 449 labour-related cases through the temporary relief procedure (Supreme Court of Japan, 2014, p. 149).

This procedure is fast in comparison with the ordinary civil procedure. In 2013, the average time taken to reach a final disposition under this system was 74.5 days (about two and a half months), while the corresponding time in an ordinary civil procedure in the first instance was 13.1 months. Such fast dispute resolution is largely attributable to the design of the labour tribunal procedure for completion within three hearing sessions and the high proportion (70 per cent in 2013) of disputes that are resolved by agreement between the parties reached through mediation (often by the second hearing session).

In most of the cases that are not resolved through mediation, the tribunals render the awards. About 40 per cent of awards (39.1 per cent in 2013) become final without objection from the parties. Thus, more than 80 per cent of the cases that are filed through the labour tribunal procedure are resolved before moving on to the ordinary civil procedure. The ratio of successful mediation as stated above is notably higher than that for conciliation by the dispute adjustment commissions under the System to Promote Resolution of Individual Labour Disputes, which is successful in about 40 per cent of the cases in which requests for conciliation were made. Several reasons may be

²⁷ This consultation service is provided at the local government offices, and thus differs from the service provided at offices of the national Government under the Individual Labour Disputes Act.

suggested for the high successful mediation ratio. First, the defendants are obligated to appear before the tribunal, while participation in conciliation is voluntary. Apparently more significant, however, is the fact that the tribunal notifies the parties of its evaluation of the case based on the relevant legal rules and the facts of each case. Such evaluation can encourage the parties to accept the mediation proposal before the tribunal renders an award.

So far as the type of dispute is concerned, the labour tribunal procedure is often used by workers contesting termination of employment or claiming unpaid wages and severance allowances. Disputes regarding termination of employment account for about 45 per cent of the cases filed through the labour tribunal procedure, and disputes regarding unpaid wages and severance allowances about 40 per cent. The labour tribunal procedure appears to be well suited to handling these typical individual labour disputes. By contrast, disputes regarding employment discrimination are rarely filed through this procedure. This may be because three hearing sessions are not sufficient for handling employment discrimination cases, which are often time-consuming. Also, workers may wish to proceed with the ordinary civil procedure in these cases in order to assert their public rights through a trial in open court.

With respect to retaining the employment relationship in cases involving termination of employment, disputes filed through the labour tribunal procedure are often resolved in the form of a monetary award or settlement without reinstatement, although there are cases where reinstatement is agreed upon or awarded. It is possible that lawyers representing discharged workers choose the ordinary civil procedure if their clients wish to be reinstated.

The large number of cases filed through the labour tribunal procedure indicates that this system is more readily accessible than the ordinary civil procedure. One of the main reasons for this greater accessibility is the rapidity of the process. An associated factor is that the labour tribunal procedure is less expensive than the ordinary civil procedure; indeed, the cost paid to the court in the former is only half that payable in the latter. However, parties often wish to have legal representation, which entails paying the lawyers' fees. These fees are lower than in the ordinary civil procedure because the labour tribunal procedure takes much less time; even so, compared with the administrative conciliation process, in which workers and employers often engage without attorneys, the labour tribunal procedure can seem relatively costly. These sentiments were expressed by both workers and employers responding to a recent questionnaire survey sent to parties who had used the labour tribunal procedure (Sugeno et al., 2013, p. 36).

With respect to accessibility in terms of location, the labour tribunal procedure is conducted at the main offices of the district courts in each prefecture and at two branch offices in Tokyo and Fukuoka. Since Japan is a relatively small country geographically, this means that the procedure is fairly accessible in terms of distances to be travelled.

With respect to user confidence, the labour tribunal system is generally trusted by both employers and workers. According to the survey mentioned above, users' evaluation of this procedure is favourable in terms of both the process and the results of dispute resolution (Sugeno et al., 2013, pp. 37–46). The judges and lay members of the

panel are also favourably evaluated. It is noteworthy, however, that employers, especially in small companies, give a relatively poor evaluation of the results of dispute resolution, feeling that the reality of their business situation is not sufficiently understood by the tribunals.

There are several possible reasons for the generally high level of trust in this system. One is that it is a judicial system, and the judiciary is highly respected by Japanese people. Another may be the expertise and impartiality of the tribunal, including the lay members.²⁸

The expertise of the panel, especially the part-time lay members who have experience in labour and employment relations, is one of the key features of the labour tribunal system. Although the Labour Tribunal Act itself does not state in detail the required expertise for resolving labour disputes, one important aspect of such expertise is an understanding of the special nature of, and the practices prevalent in, labour and employment relations. The special nature of labour and employment relations refers, among other things, to the development of modern labour and employment relationships in organizations such as corporations, and to the requirement that the interests of the various parties in each organization be balanced in the administration of such relationships. The practices in labour and employment relations refer not only to such mechanisms as systems to determine wages and appraise performance, but also to general customs or norms such as the long-term approach to employment that is traditional in Japan.

Such expertise enables lay members of the labour tribunal panel to identify issues that are important for the resolution of disputes between parties and makes it easier to establish the relevant facts. The expertise of lay members is also useful in recommending and encouraging voluntary resolution of disputes through mediation. Opinions of panel members regarding the contents of recommended agreements, based on their long experience of employment management and labour relations, may be the more persuasive for reflecting an appropriate balance of interests between the disputing parties.

Another contributing factor to such persuasiveness may be the participation of lay members with backgrounds in both labour and management. Such participation by the parties' "colleagues" in the working environment may increase the parties' perception that the proposed agreement for the resolution of disputes is consistent with the norms in that environment, especially if the lay members are perceived to be impartial. The impartiality of both judges and lay members is well established, as illustrated by reports that parties sometimes cannot distinguish which panel members come from a

²⁸ Lay members of the labour tribunal panel are required to be impartial (Labour Tribunal Act, art. 9, para. 1), since they participate in the adjudicatory process. Members of the labour relations commissions representing labour and management, on the other hand, are literally the representatives of these groups under the Trade Union Act, art. 19, para 1; accordingly, unlike the lay members of the labour tribunal panel, they merely submit opinions in the unfair labour practice procedure (Trade Union Act, art. 27-12, para. 2).

labour background and which from management (Nanba et al., 2007, p. 9, remark by Masaru Anzai).

Ordinary civil procedure

Currently, a slightly smaller number of labour disputes are handled through the ordinary civil procedure than through the labour tribunal procedure: 3,341 labour cases, including both individual and collective disputes, were filed through ordinary civil procedure at district courts (the first instance) in 2013, as opposed to 3,678 cases filed through the labour tribunal procedure (Supreme Court of Japan, 2014, pp. 149–151).

The average time taken to resolve a labour dispute (including collective disputes, although there are not many cases of this type) through this procedure is about 12–13 months (13.1 months in 2013), which is more than four times as long as that under the labour tribunal procedure.

Of all the cases filed through the ordinary civil procedure, some 50–60 per cent (51.3 per cent in 2013) are resolved by voluntary settlement. Even taking into consideration other cases that ended up being withdrawn, which may reflect out-of-court settlements, this settlement rate is lower than the rate of successful mediation through the labour tribunal procedure.

With respect to the types of disputes filed through the ordinary civil procedure, the largest category, usually more than 50 per cent, is cases in which workers claim unpaid wages. In 2013, cases of this type amounted to 1,918, representing 57.4 per cent of the total number of 3,341 cases. The second largest category (usually around 30 per cent) is cases where the termination of employment is disputed. In 2013, 926 such cases were filed, representing 27.7 per cent of the total.

In cases disputing termination of employment, courts in the ordinary civil procedure usually render judgment (declaratory relief) prescribing reinstatement when the termination is found to be impermissible. However, it is sometimes difficult in practice for workers to return to their jobs, given the deterioration of their relationships with employers and fellow workers; in such cases, monetary settlements are often made.

Although the ordinary civil procedure is a central and formal procedure for resolving civil disputes in general, it is less accessible than the labour tribunal procedure, mainly because its greater formality makes it more time-consuming, and therefore more expensive. As in the case of the labour tribunal procedure, the parties in an ordinary civil procedure often ask for lawyers to represent them before the court.

Although the cost paid to the court varies depending on the subject of the dispute, the lawyers' fees are likely to increase with the length of time taken to resolve the dispute. In the light of the features of the ordinary civil procedure as outlined above, this procedure is more appropriate for complex cases which are difficult to resolve through the labour tribunal procedure within just three hearing sessions. For example, cases regarding collective dismissal allegedly carried out for economic reasons, and cases regarding unlawful employment discrimination, are usually handled through the ordinary civil procedure. These cases are often complex and need to be determined on the basis of full arguments, evidence and testimony. In addition, the plaintiffs and their legal representatives may feel that in such cases the vindication of public rights must

be achieved in open court and that the judgment must be published so that it may be applied as a norm in society.

Temporary relief procedure

Since the procedure for temporary relief is a special procedure for cases where a plaintiff does not have sufficient time to seek a formal judgment in the ordinary civil procedure, it is not used as often as either the labour tribunal procedure or the ordinary civil procedure. In 2013, the number of cases filed through the temporary relief procedure was 449, as opposed to 3,678 through the labour tribunal procedure and 3,341 through the ordinary civil procedure (Supreme Court of Japan, 2014, p. 150). Of the cases handled by this route in 2013, 59.9 per cent concerned termination of employment and 16 per cent concerned unpaid wages. The small number of cases filed through this procedure may be attributed to its particular purpose in providing temporary relief.

Administrative systems

Conciliation by the dispute adjustment commissions

Administrative conciliation by the dispute adjustment commission under the Individual Labour-Related Disputes Act is a highly accessible option among the various individual dispute resolution systems in Japan, especially in terms of time and cost. A larger number of individual labour disputes are handled by this procedure than by any of the alternatives: prefectural labour bureaus received 5,712 petitions for conciliation in 2013.²⁹

With respect to the types of disputes handled, the largest category in 2013 was dismissal.³⁰ This is similar to the situation regarding the labour tribunal procedure and ordinary civil procedure. However, the second largest category (rising to the largest in 2014) was workplace harassment and bullying, which accounted for 24.3 per cent of the cases filed for administrative conciliation in 2013, not far behind the 26.6 per cent of cases that concerned dismissals. If cases regarding refusal to renew fixed-term employment contracts (9.0 per cent) were included, disputes regarding termination of employment would account for 35.6 per cent.

This conciliation mechanism is a very fast procedure. In 2013, about 50 per cent of the cases filed for conciliation were closed or disposed of within one month, and 42 per cent within two months. Thus this procedure is even faster than the labour tribunal

²⁹ MHLW, “Heisei 25 nendo kobetsu rodu funso kaiketsu seido sikou joukyou” [The situation of the operation of the system for resolving individual labour-related disputes in 2013], press release, 30 May 2014, available at: <http://www.mhlw.go.jp/file/04-Houdouhappyou-10401000-Daijinkanbouchihouka-Chihouka/0000047216.pdf> [accessed 18 Mar. 2016].

³⁰ In 2014, workplace bullying and harassment became the largest category: see MHLW, “Heisei 26 nendo kobetsu rodu funso kaiketsu seido sikou joukyou” [The situation of the operation of the system for resolving individual labour-related disputes in 2014], press release, 12 June 2015, available at: <http://www.mhlw.go.jp/file/04-Houdouhappyou-10401000-Daijinkanbouchihouka-Chihouka/Daijinkanbouchihouka-Chihouka270612.pdf> [accessed 23 Apr. 2016]. For the analysis of cases regarding termination of employment, workplace bullying and harassment, and changes in working conditions handled through conciliation, see Hamaguchi, 2011.

procedure, for which the average disposition time is, as stated above, about two and a half months.

This system is also accessible in terms of cost. Parties do not need to pay to use the conciliation service; and workers do not often ask for lawyers to represent them in this procedure, thereby avoiding the cost of legal fees. With respect to geographical accessibility, this conciliation service is provided at the local labour bureaus located in all prefectures in Japan.

On the other hand, the success ratio, i.e. the percentage of cases resolved by the agreement of the parties, is lower than that of the labour tribunal procedure. While about 70 per cent of cases are resolved through mediation in the labour tribunal procedure, only about 40 per cent of cases (39.1 per cent in 2013) are voluntarily resolved through conciliation by the dispute adjustment commissions.

This lower success ratio is apparently attributable to the refusal of some respondents (usually employers) to participate in this procedure, since the ratio of voluntary resolution is higher in cases where the respondents participate. In contrast, respondents rarely refuse to appear before the labour tribunals. One reason for this difference is that the conciliation procedure lacks a mechanism to compel the participation of respondents, whereas the Labour Tribunal Act includes a provision for sanctions to be applied for absence on hearing days. However, these sanctions have rarely actually been imposed. Another reason for the difference is that the labour tribunal system has the prestige of the judiciary behind it, which induces respondents to appear. This is merely a point of comparison, and in no way implies that the dispute adjustment commissions and their members are not trusted in society.

Another feature of administrative conciliation is that most workers who use this procedure are atypical workers – that is, part-time workers, temporary workers, and those employed under fixed-term contracts. According to the 2013 statistics, 45.6 per cent of the workers who used this procedure fell into this category, which accounted for 36.6 per cent of the labour market in that year. Thus atypical workers use administrative conciliation through the dispute adjustment commissions more often than regular workers. In contrast, the ratio of regular workers is higher in labour tribunal cases (see Sugeno et al., 2013, p. 176). It is also notable that workers employed by small and medium-sized companies often use conciliation through the dispute adjustment commissions, since this procedure is free of charge and legal representation is not necessary.

These observations about the contexts in which administrative conciliation is used indicate that this procedure is attractive to atypical workers who cannot afford to use more costly procedures, and who are involved in disputes in which the sums of money at stake are relatively small, as in the case of workplace harassment and bullying.

In sum, then, while administrative conciliation by the dispute adjustment commission is highly accessible in terms of time and cost, the voluntary nature of this procedure results in a relatively lower rate of resolution by agreement between the parties.

Administrative guidance by prefectural labour directors

Under the System for Promoting Resolution of Individual Labour Disputes, the director of the prefectural labour office may provide, on one party's request, administrative

guidance for the resolution of individual labour disputes. As in the case of conciliation by the dispute adjustment commission, parties are not required to pay for this service. This mechanism has recently seen more frequent use compared to conciliation.³¹ For example, in 2013, 10,024 requests for administrative guidance were filed –nearly twice the number of conciliation cases handled by the dispute adjustment commissions in that year. The administrative guidance procedure is faster than conciliation, with the vast majority of cases (96.4 per cent in 2013) disposed of or closed within one month of the request being made. In most cases, the administrative guidance is followed.

As for the subject matter of cases handled through this procedure, the largest category is cases involving workplace harassment and bullying (19.0 per cent in 2013); the second largest is cases involving dismissals (14.4 per cent in 2013). Taken together with cases involving refusal to renew a fixed-term employment contract (5.8 per cent), the number of cases involving termination of employment is about the same as that for harassment and bullying. As with conciliation through the disputes adjustment commissions, this mechanism is often used by atypical workers, who made up 46.3 per cent of the workers who used this procedure in 2013.

The system of administrative guidance is accessible to workers because it is fast and free. However, this procedure has no mandatory effect on the parties, and unlike conciliation is not designed to promote mutual agreement. Since there are no data available on the extent of voluntary compliance with the administrative guidance, it is difficult to evaluate how effectively this mechanism functions.

Consultation and information service

The administrative consultation and information service offered at the “comprehensive labour consultation corner” under the System to Promote Resolution of Individual Labour Disputes is the most accessible among all the mechanisms available for individual dispute resolution in Japan. Although this service may not be regarded as a dispute resolution mechanism in itself, workers who are dissatisfied with their employment may use it to gain an understanding of their situation from the viewpoint of the legal rules, which may help to avoid disputes arising. Employers who use this service may also prevent or voluntarily resolve disputes with the aid of consultation and information.

The number of requests for consultation and information, including questions on the contents of legal regulations, has recently exceeded one million a year (1,050,042 in 2013).³² The number of consultations regarding actual individual civil labour disputes, excluding matters under the jurisdiction of the labour inspection offices, is around

³¹ MHLW, “Heisei 25 nendo kobetsu rodu funso kaiketsu seido sikou joukyou” [The situation of the operation of the system for resolving individual labour-related disputes in 2013], press release, 30 May 2014, available at: <http://www.mhlw.go.jp/file/04-Houdouhappyou-10401000-Daijinkanbouchihouka-Chihouka/0000047216.pdf> [accessed 18 Mar. 2016].

³² MHLW, “Heisei 25 nendo kobetsu rodu funso kaiketsu seido sikou joukyou” [The situation of the operation of the system for resolving individual labour-related disputes in 2013], press release, 30 May 2014, available at: <http://www.mhlw.go.jp/file/04-Houdouhappyou-10401000-Daijinkanbouchihouka-Chihouka/0000047216.pdf> [accessed 18 Mar. 2016].

250,000 (245,873 in 2013). Such large numbers reflect the accessibility of this mechanism on one hand, and the widespread need for such services on the other.

Currently, the largest category of disputes for which consultation is requested is workplace harassment and bullying, followed by dismissals. In 2013, consultations on workplace harassment and bullying accounted for 19.7 per cent of the total, while consultations on dismissals and refusal to renew fixed-term employment contracts occupied 14.6 per cent and 4.3 per cent, respectively.

Conciliation by the local labour relations commissions

Like conciliation through the dispute adjustment commissions, conciliation through the local labour relations commission is a procedure to assist parties in the voluntary resolution of individual labour disputes. The latter has a slightly higher rate resolution through agreement between the parties: this is usually more than 40 per cent, which is the level generally achieved through conciliation by the dispute adjustment commissions. In 2013, 41.6 per cent of the cases filed with labour relations commissions for conciliation were resolved by agreement between the parties (44.4 per cent in 2012).³³ Reflecting the structure of the labour relations commission as a tripartite agency consisting of members representing public interest, labour and management, conciliation by the many local labour relations commissions is conducted by tripartite panels. It appears that advice and persuasion by commission members representing management is effective in inducing respondent employers to accept the proposed conciliation agreements. Also, even though the conciliation is conducted by a tripartite panel, the time spent on conciliation is fairly brief, averaging 42.8 days in 2013.³⁴

However, the number of cases handled by the local labour relations commissions is still small. Only 348 requests were filed with the commissions for the conciliation of individual disputes in 2013 (Central Labour Relations Commission, 2014, p. 259). It should be noted, however, that some large local labour relations commissions, such as that for the Tokyo metropolitan area, do not provide conciliation services. In addition, it may not be widely known by the public that the local labour relations commissions provide a conciliation service for individual labour disputes.

Summary and evaluation

On the basis of these data about the recent and current performance of the public systems for the resolution of individual labour disputes in Japan, it appears that the three major systems are ordinary civil procedure, labour tribunal procedure, and conciliation by the dispute adjustment commissions. The main performance indicators and characteristics of these three systems are shown in table 6.1. Each has its own strengths and weaknesses, associated with its nature and features. What is important, then, is the choice of the procedure that is most appropriate in each case, depending on

³³ Central Labour Relations Commission, “Kobetsu rodo funso ni kansuru jogen, shido, assen kensu” [The number of consultations and conciliations before the local labour commissions from 2010 to 2013], available at: <http://www.mhlw.go.jp/churoi/assen/toukei/dl/1.pdf> [accessed 18 Mar. 2016].

³⁴ Ibid.

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various factors including the nature of the dispute and the needs of the parties. In view of the availability of multiple tracks, Japan’s current individual dispute resolution systems may be said to have been developed fairly well. Of course, there remains room for improvement: for example, the labour tribunal procedure is still costly in terms of legal fees. Also, there is a need to consider how the success rate for voluntary resolution through administrative conciliation by the dispute adjustment commissions might be improved.

Table 6.1. Comparison of major dispute resolution systems

Dispute resolution system	Type of procedure	No. of cases filed, 2013	Time taken to reach resolution	Proportion of cases resolved voluntarily (%)	Nature of procedure/ resolution	Cost
Ordinary civil procedure	Judicial procedure	3,341	Avg. 13.1 months	51.3	Formal adjudicatory	High
Labour tribunal	Judicial procedure	3,678	Avg. 2.5 months	70.0	Speedy adjudicatory /adjustment	Medium
Conciliation through dispute adjustment commission (prefectural labour bureau)	Administrative procedure	5,712	92% within 2.0 months	39.1	Speedy adjustment	Low

To date, private systems for the resolution of individual labour disputes have not been sufficiently developed in Japan, either within enterprises (e.g. grievance procedures) or outside enterprises (e.g. private arbitration), since, as noted above, Japanese enterprises have developed mechanisms for the prevention of individual labour disputes. However, it appears that such preventative mechanisms have become weaker because of recent socio-economic changes (see section below on “Wider factors regarding dispute resolution and prevention”). Thus there is a need for a new effort to strengthen private mechanisms for dispute prevention and resolution.

Complementarity/interactions among different systems

Overview

As shown above, Japan has multiple systems for individual labour dispute resolution, with both judicial systems (primarily the labour tribunal procedure, ordinary civil procedure and temporary relief procedure) and administrative systems (conciliation by the dispute adjustment commissions and advice from the prefectural labour directors, both of which are provided by the national Government, as well as conciliation by the local labour relations commissions, which is provided by local governments). In prac-

tice, a certain division of roles appears to exist among these systems, although there is no specific legal mandate for such a division. There are also certain interactions within the judicial mechanisms, within the administrative systems, and between the judicial and administrative systems.

Judicial systems

Among the judicial systems, the labour tribunal procedure is becoming the main system for resolving individual labour disputes, while a certain division of roles is appearing. Typical disputes regarding dismissals and unpaid wages are now handled by the labour tribunals, unless the case is too complicated to be resolved within three hearing sessions or the plaintiffs want their disputes to be handled through a formal civil procedure in open court and the judgments to establish rules that will apply in the wider employment world beyond the current case. In cases of the latter kind, such as those involving collective dismissal or employment discrimination, recourse is usually had to the ordinary civil procedure. Meanwhile, temporary relief is requested in those cases where, although the plaintiff needs a formal judgment, an emergency situation exists in which there is not sufficient time to pursue this through the ordinary civil procedure.

Regarding interaction within the judicial systems, cases originally filed through the labour tribunal procedure are moved to the ordinary civil procedure if a party files an objection to an award by the labour tribunal. Likewise, cases originally filed through the temporary relief procedure will move to the ordinary civil procedure when requested by defendants to whom temporary relief orders are issued. Thus, parties to both procedures have the opportunity to have their cases handled under the formal civil procedure.

Administrative systems

The System for the Promotion of Resolution of Individual Labour Disputes handles the largest volume of cases. In recent years, more than 5,000 cases have been filed for conciliation annually by the dispute adjustment commissions, in addition to about 10,000 cases requesting administrative guidance. The administrative consultation and information service, although it is not a procedure for dispute resolution in itself, handles about 250,000 cases each year. Thus this system plays a major role, especially with regard to disputes that are simple and of small monetary value, or disputes involving atypical workers whose wage levels are lower than those of regular workers and who cannot afford to pay legal fees.

Among these administrative dispute resolution systems, workers (and sometimes employers) tend to choose conciliation by the dispute adjustment commission when they need assistance in promoting voluntary dispute resolution. Administrative guidance is apparently chosen when they feel the need for administrative authorities to recommend that the respondent abide by the legal rules regarding civil individual labour disputes, including case law.

There is considerable interaction among these administrative systems. The most important element in fostering this interaction seems to be the consultation and information service. This service is provided not only at the 47 prefectural labour bureaus

but also at more than 300 labour inspection offices throughout Japan, as well as at the branch offices located near some major rail stations in, for example, Tokyo. Staff members of these offices³⁵ introduce the conciliation procedure through the dispute adjustment commissions when they feel that conciliation is appropriate based on the information obtained from consultation. Conciliation also begins in cases where administrative guidance has not resolved a dispute and the officers dealing with the matter consider conciliation appropriate.

Similar interaction also exists in respect of conciliation by the local labour relations commissions in some prefectures. As noted above, administrative consultation is often conducted by local government. At times, conciliation by local labour relations commissions begins after the officers in charge of administrative consultation introduce the conciliation procedure to the parties.

Interaction between administrative and judicial systems

In Japan, there is no systematic interaction between administrative and judicial procedures for individual labour dispute resolution. Administrative procedures and judicial procedures in Japan are independent from each other.

However, information on judicial procedures is sometimes provided to the parties in the course of administrative dispute resolution. For example, in cases where conciliation efforts fail because the parties cannot reach an agreement or the respondent refuses to participate, staff members of the dispute adjustment commission sometimes introduce judicial procedures that can render binding judgments and compel the respondents to appear. Such information may also be provided in the course of providing the administrative consultation and information service. According to the recent survey referred to above, almost half the workers who used the labour tribunal procedure were introduced to it when they went to prefectural labour offices for administrative consultation (Sugeno et al., 2013, p. 29).

Moreover, meetings are held at the prefectural level in which representatives of the prefectural labour bureau, the labour relations commission and the courts participate, in order to exchange information and discuss matters regarding the resolution of individual labour disputes.³⁶ Scholarly articles have pointed out that more formal interaction between administrative and judicial systems should be considered (e.g. Noda, 2013). This is one of the future issues for Japanese dispute resolution systems.

Cooperation with labour inspection system

*The labour inspection system in Japan*³⁷

The Labour Standards Act, which is one of the most fundamental legislative instruments for individual labour protection in Japan, provides for minimum working conditions such as maximum working hours. The Act also established a system of labour inspection. This takes the form of a labour inspection office within each prefectural

³⁵ See n. 21 above.

³⁶ The results of these meetings are not published.

³⁷ On the labour inspection system in Japan, see Sakuraba, 2013.

labour bureau. Currently, there are 321 labour inspection offices in Japan (Labour Standards Bureau, 2015, p. 30). National public servants are appointed in charge of labour inspection; there are currently about 3,000 of these labour inspectors. The labour inspection system has jurisdiction over the enforcement of the Labour Standards Act and other related statutes such as the Industrial Safety and Health Act, the Workers' Compensation Insurance Act and the Minimum Wage Act.³⁸

Labour inspectors have considerable administrative powers, including the authority to inspect workplaces, to demand the production of documents and records, and to question employers and workers. If a labour inspector finds that an employer is in violation of the Labour Standards Act, the inspector usually provides administrative guidance or recommendations. In the case of an administrative recommendation, the employer is required to correct the violation and to report the correction to the inspector. In addition, since the Labour Standards Act and other related statutes include provisions for criminal punishment as a sanction for violation of most obligations under these laws, labour inspectors have the same authority as police officers with respect to arrest, search, seizure and examination of objects. In this sense, the main task of the labour inspectorate is the enforcement of these statutes.

The labour inspection system plays a very important role in ensuring compliance with the Labour Standards Act and other related statutes. In 2013, 140,499 regular inspections were conducted by labour inspectors.³⁹ As a result of these inspections, violations of the relevant statutes were found at 68.0 per cent of inspected workplaces. Such regular inspections are sometimes carried out as a means of proactive enforcement, in that the labour inspection offices target specific industries where compliance is known to be weak. In recent years, for example, targeted inspections have been made with respect to workplaces which had been criticized for abuse of foreign trainees or industrial interns. In addition, 23,408 inspections were conducted in 2013 on the basis of workers' complaints. Violations were found at 74.0 per cent of the workplaces where such complaint-based inspections were conducted. Although specific recent data are not available, about 100,000 administrative recommendations are made every year regarding violations. The number of cases where criminal prosecution is initiated regarding serious violations is much smaller. In 2013, labour inspectors sent 1,043 cases to public prosecutors who have the authority to indict under the Code of Criminal Procedure.

One of the distinct features of the labour inspection system in Japan is that employers are required to correct all violations found in the workplace that could result in criminal sanctions, while dispute resolution based on an individual complaint is tar-

³⁸ Most of these statutes apply to "employees" or "workers". As stated in n. 3 above, it is sometimes disputed whether a certain person is an employee or not. In the context of labour inspection, some administrative circulars include directions regarding the determination of "employee" status. In cases where there is no such direction, labour inspectors make their own determination in the light of case law when they issue administrative recommendations. If labour inspectors or other administrative agencies make determinations that have a mandatory legal effect (e.g. determining whether or not workers' compensation insurance benefits are to be awarded), such determination is subject to judicial review, and the issue of "employee" status is ultimately resolved by the judiciary.

³⁹ For the results of inspections, see Labour Standards Bureau, 2015, pp. 38–43.

geted at the complaining worker. For example, an employer who loses a civil labour case is obliged to implement the contents of the judgment only with respect to the plaintiff; the extension by the employer of similar treatment to other similarly situated workers is voluntary. Also, the labour inspectors and their offices are well known not only to employers but also to workers and citizens in general. A TV drama series featuring labour inspectors was even broadcast in 2013.⁴⁰ Furthermore, labour inspectors also participate in efforts to prevent violation of laws by providing information on the contents of regulations in various ways, including explanation on websites, seminars targeted at employers, etc.

There is not much discussion on whether or not the labour inspection system plays a sufficient role in Japan, nor has systematic research been carried out that could be used as the basis for evaluation. However, in recent years there has been much criticism in the mass media of so-called “black enterprises” – employers who repeatedly violate labour laws and make their employees work in miserable conditions. As a result, calls for more effective and more stringent enforcement through the labour inspection system have become stronger.⁴¹ These include calls for the recruitment of more labour inspectors. In Japan, the number of labour inspectors per 1,000 workers is currently 0.53, compared to 0.93 in the United Kingdom, 0.74 in France and 1.89 in Germany,⁴² although it is important to remember that the functions of labour inspectors vary among countries.

Cooperation between dispute resolution systems and the labour inspection system

The labour inspection system is a mechanism for enforcing the Labour Standards Act and other related statutes mainly through administrative and criminal measures; it is not a system for resolving civil labour disputes. The labour inspectors are not supposed to settle disputes under the Labour Standards Act and other related statutes. In practice, however, the labour inspection system does resolve disputes by requiring employers to correct the violation of certain labour laws, especially when these laws provide workers with private rights.⁴³

⁴⁰ Nihon Terebi (Japan Television), *Dandarin*, available at: <http://www.ntv.co.jp/dandarin/> [accessed 18 Mar. 2016].

⁴¹ Study Group on Labour Issues, Liberal Democratic Party, “Wakamono koyo taisaku ni kansuru teigen” [Proposals on policies regarding youth employment], 23 Apr. 2014, available at: https://www.jimin.jp/news/policy/pdf/pdf169_1.pdf, [accessed 18 Mar. 2016].

⁴² MHLW, “Shogaikoku ni okeru rodo kantokukan no kazu” [The number of labour inspectors in foreign countries], submission to the Working Conditions Division, Labour Policy Council, 28 Oct. 2014, available at: http://www.mhlw.go.jp/file/05-Shingikai-12602000-Seisakutoukatsukan-Sanjikanshitsu_Roudouseisakutantou/0000063060.pdf [accessed 18 Mar. 2016].

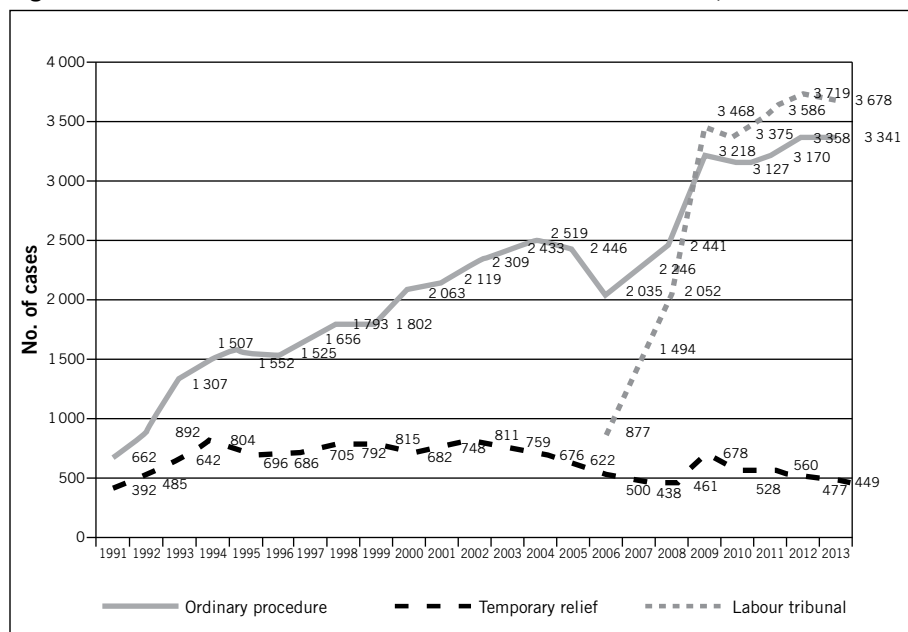
⁴³ In the occupational safety and health field, there are not many statutes that provide workers with individual rights, and the enforcement of these statutes does not necessarily function to resolve individual labour disputes; nevertheless, the enforcement of safety and health regulations contributes to the prevention of individual labour disputes that would certainly arise if the failure to comply with safety and health regulations resulted in actual accidents.

In addition, cooperation exists between the labour inspection system and the dispute resolution mechanisms under the Individual Labour-Related Disputes Act. As described above, the administrative consultation and information service under the Act is provided at the “comprehensive labour consultation corner”, which is located not only at the main prefectural labour offices of the MHLW, but also at the labour inspection offices. If staff members at the “comprehensive labour consultation corner” receive requests for consultation on matters that should be handled by the labour inspectors, they refer such cases to them; and if the labour inspectors receive complaints from workers that should be resolved through civil individual disputes, they introduce the workers to the “comprehensive labour consultation corner”.

Trends and developments in individual labour disputes

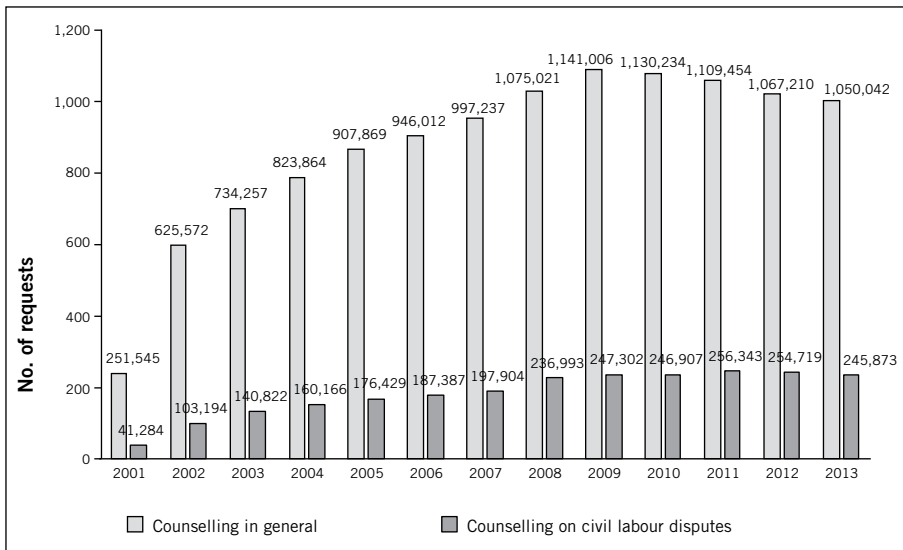
Since the Japanese economic collapse of the early 1990s, the number of individual labour disputes has steadily increased, as is shown in figure 6.4. In 1991, only 1,054 civil cases (662 ordinary procedure cases and 392 temporary relief cases) involving labour disputes were filed in district courts (see Supreme Court of Japan, 1992). Thereafter, the number of disputes increased continuously, and in 2004, when the Labour Tribunal Act was passed into law, the number of such civil cases reached 3,195: 2,519 ordinary procedure cases and 676 temporary relief cases (Supreme Court of Japan, 2005). Most of these cases appeared to be individual labour disputes, judging from the fact that the number of collective labour disputes handled by the labour relations commissions has been dramatically decreasing over the period (see generally Yamakawa, 2012).

Figure 6.4. Numbers of civil labour cases filed with district courts, 1991–2013



Source: Supreme Court of Japan.

Figure 6.5. Number of requests for consultation at prefectural labour bureaus, 2001–13



Source: MHLW

After the Labour Tribunal Act came into effect in 2006, individual labour disputes increased at a faster pace. In 2012, the number of complaints filed with district courts reached 7,554 (3,358 ordinary civil procedure cases, 477 temporary relief cases and 3,719 labour tribunal cases). Although the number has fallen slightly since then, it was still 7,468 in 2013 (3,341 ordinary civil procedure cases, 449 temporary relief cases and 3,678 labour tribunal cases). Thus the numbers of labour cases filed with the courts have more than doubled since the introduction of the labour tribunal system.

The increasing trend is also apparent in the number of disputes for which the administrative consultation and information service is requested. Such a system did not exist at the national level before the Individual Labour-Related Disputes Act became law in 2001. It is therefore difficult to make a comparison with the situation that existed before this Act. However, the rise in individual labour disputes is obvious from the continuous increase after the consultation system took effect.⁴⁴ In 2003, 140,822 requests were made to the prefectural labour bureaus for the administrative consultation and information service regarding individual labour disputes; by 2013, the number of such requests had risen to 245,783 (figure 6.5). The same rising trend is evident in respect of administrative guidance, with the number of requests for such guidance regarding individual labour disputes rising from 4,337 in 2003 to 10,024 in 2013. However, although the number of cases filed for conciliation with the disputes adjustment commissions rose from 5,352 in 2003 to 8,457 in 2010, it then fell to 5,712 in 2013.

⁴⁴ MHLW, “Heisei 25 nendo kobetsu rodo funso kaiketsu seido sikou joukyo” [The situation of the operation of the system for resolving individual labour-related disputes], press release, 12 June, 2015, chart 2, available at: <http://www.mhlw.go.jp/file/04-Houdouhappyou-10401000-Daijinkan-bouchihouka-Chihouka/0000047216.pdf> [accessed 18 Mar. 2016].

With respect to the public sector, there appear to be no available comprehensive statistics on individual labour disputes covering both national and local public servants. In the case of national public servants, about 20 complaints have been filed for the Review of Adverse Actions procedure administered by the Board of Equity.⁴⁵ Although the number of cases is not sufficient to serve as the basis for a statistical analysis, the typical contents of disputes are dismissal and transfer. The number of requests for measures on working conditions has been only about ten a year in recent years. On the other hand, the number of requests for consultation on grievance is relatively large. A total of 866 requests were made in 2013, although the number had fallen somewhat from 1,344 in 2009.

Wider factors regarding dispute resolution and prevention

Factors that may affect the functions of dispute prevention

Factors that affect the performance of mechanisms for the prevention of individual disputes can be analysed from various angles. The imperative of employer compliance with labour and employment laws provides one motivation for the prevention of individual labour disputes. The effective rule of law is important as a matter of course, and this includes awareness of what is required in order to comply with the law⁴⁶ and effective application of the regulations implementing substantive labour and employment laws.

The prevention of individual labour disputes may also be motivated by the need for both employers and workers to voluntarily resolve conflicts of interest, which inevitably exist in the workplace, before such conflicts become actual disputes. Formerly, certain mechanisms for dispute prevention in this sense were well developed in Japan, as noted above. In recent years, however, the power of these mechanisms has weakened. This may go some way to explaining the increase in the number of individual labour disputes (figure 6.6) (Yamakawa, 2012, p. 20).

First, the joint consultation system has played a role in preventing disputes in unionized workplaces in Japan, since employers and trade unions often try to identify possible conflicts of interest before the implementation of the employers' policies and minimize them through joint consultation. In recent years, however, union density in Japan has been declining,⁴⁷ and the role of joint consultation has diminished.⁴⁸

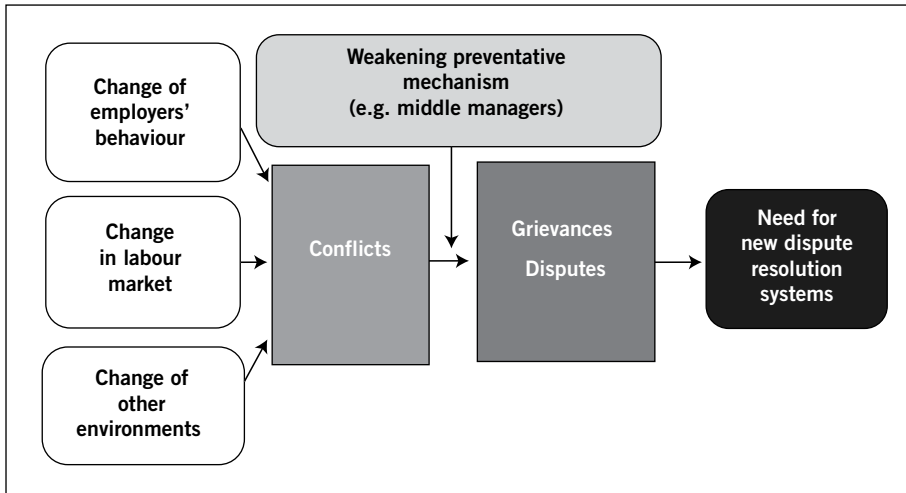
⁴⁵ Regarding national public servants, see National Personnel Agency, *25 nendo nenji bokokusho* [2013 Annual Report], table 7-1, available at: <http://www.jinji.go.jp/hakusho/h25/1-3-07-data-01.html> [accessed 23 Apr. 2016]. This procedure is available for atypical workers in the national public sector, since they essentially have the status of public officials.

⁴⁶ Increasing awareness of labour laws can be achieved in various ways, including education in the basics at school. A study group established by the MHLW pointed out the necessity for such education in 2009: *Kongo no rodo kankei hoseido wo meguru kyoiku no arikata ni kansuru kenkyukai bokokusho* [Report of the Study Group on Labour Law Education in the Future], available at: <http://www.mhlw.go.jp/houdou/2009/02/h0227-8.html> [accessed 18 Mar. 2016].

⁴⁷ In 2014, union density in Japan was 17.7%, whereas in 1975 it was 34.4%. The coverage of the joint consultation system has contracted correspondingly.

⁴⁸ On the other hand, so-called "community unions", which are not enterprise-based, are becoming more active in organizing workers at hitherto unorganized workplaces. The disputes regarding collective bargaining initiated by these unions comprise a large part of the caseload of many labour relations commissions. In 2013, about 75% of unfair labour practice cases filed before the local labour relations commissions were of this kind. See Central Labour Relations Commission, 2014.

Figure 6.6. Background factors contributing to the increase in individual labour disputes



Next, middle managers in Japan have contributed to the prevention of workplace disputes, acting as a “buffer” between top-level management and rank-and-file workers. Although workers still turn to their managers when they have problems in their workplace, it appears that this role of the managers has become less prominent as managers have become busier “playing managers”,⁴⁹ and indeed sometimes become a party to disputes in such matters as evaluation of their subordinates and workplace harassment.

Long-established Japanese employment practices have also functioned to prevent individual labour disputes, with employees generally being prepared to avoid initiating disputes as a quid pro quo for the prospect of long-term employment and seniority-based wages. However, with such typical Japanese employment practices now changing and becoming less dominant, workers may no longer feel that they can expect, nor indeed owe, such reciprocity.

There are other background factors contributing to the increase in the number of individual labour disputes. Fluctuations in the economy, especially in a downturn, make it necessary for employers to take measures that affect workers, including dismissals and changes in working conditions. Changes in the labour market, too, especially the increased proportion of atypical workers, may have contributed to the change in the role of Japanese employment practices in preventing disputes. This is because the traditional Japanese employment practices outlined above apply to regular employees working on the basis of employment contracts without a definite term. Many atypical

⁴⁹ On the phenomenon of “playing managers” and its background, see Nippon Keizai Dantai Rengokai (Japan Business Federation), *Middle manager wo meguru genjokadai to motomerareru taiou* [Present situation of middle managers and required responses], 15 May 2012, available at: <https://www.keidanren.or.jp/policy/2012/032.html> [accessed 18 Mar. 2016].

workers are outside the structure of long-term employment and seniority-based wages, and are easier to lay off in an economic downturn. Atypical workers also tend to be less reluctant to confront their employers, especially when their employment is terminated, which occurs more often to them than to regular employees.

Given this background, there is a need for Japan to rebuild mechanisms for the prevention of workplace disputes, as well as improving mechanisms for dispute resolution. To date, however, there has been little in-depth discussion of this issue. On the one hand, the matter should be analysed from the viewpoint of effective enforcement of and compliance with labour law. For example, it is worth considering measures to raise awareness of regulations under the labour law as well as increasing incentives for employers to comply with the law (see Yamakawa, 2014). On the other hand, the effective prevention of individual labour disputes depends greatly on day-to-day management within enterprises. From this viewpoint, it is important to develop managers' skills for managing workplace conflicts and employees' dissatisfaction.

Factors that may affect the functions of dispute resolution

There are also various contributory background factors affecting the successful resolution of individual labour disputes (see Yamakawa, 2012, pp. 13–16).

To begin with, the effectiveness of dispute resolution mechanisms may be supplemented by various measures. For example, governmental or societal assistance in using dispute resolution mechanisms, as well as notification of the mechanisms, may be useful, especially for ordinary workers who do not have much knowledge of or experience in dispute resolution. In respect of administrative conciliation, such assistance is provided at the “comprehensive labour consultation corner” as a free service under the Individual Labour-Related Disputes Act. On the other hand, public financial assistance has not developed, with the exception of general assistance for judicial procedures aided by the Ministry of Justice.⁵⁰ Notification of and dissemination of information on dispute resolution mechanisms is also important, and government agencies in charge of each mechanism have made an effort in this respect.⁵¹

Another important factor is the guarantee that workers will not be subject to retaliation for using mechanisms for dispute resolution. This is particularly significant in disputes where workers intend to continue in their employment. Several statutes have an explicit provision prohibiting such retaliation, including the Labour Standards Act regarding complaints to labour inspectors.

These points aside, among the most important factors in the success of dispute resolution are the quality and quantity of the people participating in the process.

⁵⁰ The “civil legal aid” system operated by the Japan Judicial Assistance Centre provides financial assistance to help fund legal fees, based on the request of the parties to the civil procedure, if they are faced with financial hardship and have a realistic prospect of winning the case.

⁵¹ For example, information on the consultation service under the Individual Labour-Related Disputes Act is provided at the website of the MHLW, available at: <http://www.mhlw.go.jp/general/seido/chihou/kaiketu/soudan.html> [accessed 18 Mar. 2016]. Such information is also disseminated through brochures distributed at various public places such as public employment offices.

In the first place, there is little need to emphasize the importance of the quality of judges and case lawyers. Regarding the latter, it is also important to secure sufficient supply and accessibility of personnel qualified to handle cases regarding individual labour disputes.

Second, with respect to such mechanisms as the labour tribunal procedure, it is essential that the participating lay members, including those with experience in employment management or labour relations, are able to remain impartial and have the expertise to identify the relevant issues and facts, make proposals for agreements that appropriately adjust the parties' interests, and persuade the parties to accept such proposals. Although training is important as a matter of course, the core background of such expertise is a mature relationship between labour and management. If such a mature relationship exists, both labour and management are accustomed to preventing and resolving individual labour disputes among themselves in a cooperative manner. Those who have considerable experience in such a relationship can make a crucial contribution to effective dispute resolution in public dispute resolution mechanisms.

Still on the subject of the human resources factor, certain skills are also important in the effective resolution of individual labour disputes. These include an understanding of the special features of labour and employment relations, knowledge of the rules applicable under labour and employment laws and procedural laws, and effective persuasion and communication. Lay members who participate in the dispute resolution process are required to possess a basic understanding of labour and employment laws, while candidates for lay membership of the labour tribunals are required to undergo training to obtain a basic understanding of the labour and employment laws and of the process of individual labour dispute resolution (Yamakawa, 2012, p. 159, n. 60).

Finally, as noted above regarding dispute prevention, a commitment to the rule of law is important for the effective resolution of individual labour disputes. As a matter of course, the results of any dispute resolution procedures would be meaningless if they were disregarded by the parties to the disputes and society in general.

6.4. Conclusions

Important elements in mechanisms for resolution of individual labour disputes

From the foregoing analysis of Japan's situation, it appears that there are several important elements in designing an effective mechanism for the resolution of individual labour disputes.

First, given the nature of individual disputes, in which the sums at stake are often small and the workers' resources limited, the accessibility of the dispute resolution mechanism is a key factor. Here, the term "accessibility" can be defined from various angles: the speed of the procedure for handling disputes (as in the case of the labour tribunal system and the System for Promotion of Resolution of Individual Labour Disputes); the financial cost of resolving disputes, including legal fees (especially in the case of the System for Promotion of Resolution of Individual Labour Disputes); the geographical location of the agencies that provide dispute resolution; the complexity

or simplicity of procedures that workers need to understand; workers' and employers' recognition and knowledge of the mechanism as a result of dissemination of information; and so on.⁵²

Second, schemes to promote voluntary resolution of disputes based on reaching agreement between the parties (for example, mediation in the labour tribunal system and conciliation under the System for Promotion of Resolution of Individual Labour Disputes) are useful in respect of individual labour disputes, being both faster and less costly. Resolving disputes in this way also makes it easier to implement any resolution, because agreement on it already exists. It also facilitates the maintenance of a continuous employment relationship.

Third, however, it is necessary to provide for powerful dispute resolution mechanisms (such as the ordinary civil procedure, and its connection with the labour tribunal procedure) for those who wish to use them. By "powerful" is meant that the mechanism has a mandatory element in terms of both participation in the procedure and enforcement of the ultimate resolution; and also that dispute resolution is consonant with the legal rules. This factor applies not only to dispute resolution mechanisms in general, but specifically to those mechanisms that in application to labour disputes have the function of enforcing public order.

Fourth, the people in charge of dispute resolution mechanisms must have the relevant expertise to resolve individual disputes effectively. Such expertise may include an understanding of the reality of employment and labour relations as well as the balancing of interests between workers and employers. Tripartite composition of the dispute resolution organization (as in the case of the labour tribunal procedure and conciliation by local labour relations commissions) can serve this purpose, if industrial relations are sufficiently mature in respect of the prevention and resolution of labour disputes to render adequate human resources available. Relevant expertise also includes the skills for effective dispute resolution, such as knowledge and experience of both labour law and procedural law. A sufficient supply of lawyers who have such expertise is important.

The fifth element is trust in the dispute resolution mechanism among users and society in general. Such trust depends on a number of factors, many of which are also related to the personnel involved. For example, the impartiality of those in charge of adjudication is important in resolving individual disputes in a manner that ensures that the users are satisfied with both the procedure and the results.

It is obvious that just one dispute resolution mechanism cannot satisfy all of these requirements. For example, fast dispute resolution based on the agreement of the parties is not likely to be compatible with "powerful" dispute resolution that can enforce public policies through mandatory means. Thus, the sixth element is the necessity for a multiple-track system of dispute resolution mechanisms, ranging from a simple and fast procedure promoting voluntary dispute resolution to a formal procedure that can compel the parties to accept the conclusions on the basis of legal rules and procedural requirements.

⁵² Some prefectural labour offices also offer information on advisory services for foreign workers.

Finally, assuming that a multiple-track system exists, it is important to establish adequate complementarity and interactions between the various constituent mechanisms. In order for the range of mechanisms to function effectively, each mechanism needs to handle the disputes for which it is best suited. Also, one mechanism may function more effectively in conjunction with another mechanism. As the experience of the labour tribunal system has exemplified, mediation based on the agreement of the parties can be promoted against the background of case evaluation by the labour tribunal and the option of moving to a formal litigation procedure, since the parties may accept a proposal for voluntary dispute resolution to avoid the risk of unfavourable adjudication in the event of their rejecting the proposal.

Complementarity and interaction are important not only among the different dispute resolution mechanisms, but also in the relationship between the dispute resolution mechanisms and the labour inspection system. On the one hand, the resolution of individual labour disputes serves to enforce rules under the labour laws (Yamakawa, 2015, pp. 7–9), which is also the task of the labour inspection system. On the other hand, although the labour inspection system is not a mechanism for resolving disputes among private parties, the correction of violation of labour laws in the course of labour inspection may result in the resolution of disputes.

It is necessary for each country to create the best policy mix taking into consideration the various elements listed above as well as their respective socio-economic situations.

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Appendix

Legislation and related rules regarding resolution of labour disputes

Act on Childcare Leave, Caregiver Leave, and Other Measures for the Welfare of Workers Caring for Children or Other Family Members (Child and Family Care Leave Act), Act No. 76 of 15 May 1991

Act on Improvement of Employment Management for Part-Time Workers (Part-Time Work Act), Act No. 76 of 18 June 1993

Act on Promoting the Employment of Persons with Disabilities (Disability Employment Promotion Act), Act No. 123 of 25 July 1960

Act on Promoting the Resolution of Individual Labour-Related Disputes (Individual Labour-Related Disputes Act), Act No. 112 of 11 July 2001

Enforcement Regulation for the Act on Promoting Resolution of Individual Labour-Related Disputes, Ordinance of the MHLW No. 191 of 19 September 1991

Act on Securing Equal Opportunity and Treatment between Men and Women in Employment (Equal Employment Opportunity Act), Act No. 113 of 1 July 1972

Enforcement Regulation for the Act for Equal Employment Opportunity for Men and Women, Ordinance of the Ministry of Labour No. 2 of 27 January 1981

Arbitration Act, Act No. 138 of 1 August 2003

Civil Provisional Remedies Act, Act No. 91 of 22 December 1989

Rules on Civil Provisional Remedies, Rules of the Supreme Court No. 2 of 16 May 1990

Code of Civil Procedure, Act No. 109 of 26 June 1996

Rules on Civil Procedure, Rules of the Supreme Court No. 2 of 17 December 1996

Industrial Accident Compensation Insurance Act, Act No. 50 of 7 April 1947

Industrial Safety and Health Act, Act No. 113 of 1 July 1972

Labour Relations Adjustment Act, Act No. 25 of 27 September 1946

Labour Standards Act, Act No. 49 of 7 April 1947

Enforcement Regulation for the Labour Standards Law, Ordinance of the MHLW No. 23 of 30 August 1947

Labour Tribunal Act, Act No. 45 of 12 May 2004

Rules on Labour Tribunal, Rules of the Supreme Court No. 2 of 11 January 2005

Labour Union Act, Act No. 174 of 1 June 1949

Rules on Labour Relations Commissions, Rules of the Central Labour Relations Commission No. 1 of 4 August 1949

Local Public Service Act, Act No. 261 of 23 December 1950

National Public Service Act, Act No. 120 of 21 October 1947

7. Spain

*Adoración Guamán Hernández**

7.1. Introduction

An examination of mechanisms for the prevention and resolution of individual labour disputes in Spain must begin by acknowledging three important characteristics of the national context. The first of these is the permanent coexistence of dispute resolution systems developed by law and those developed by collective agreements. The development of alternative dispute resolution (ADR) systems relying on the autonomy and self-regulatory capacity of social partners has a history of two decades, and is mainly focused on the resolution of collective disputes, although mechanisms to deal with individual disputes have increased over time.¹ The second is the division of Spain into 17 autonomous communities, each one of which has a different ADR system. The third is the stipulation in Spanish law that, before taking individual labour disputes to court in search of a solution, parties must first attempt to reach agreement through conciliation or mediation.

Mechanisms for the resolution of individual labour disputes in Spain have been evolving constantly within a general process of modernization in the justice system. On the one hand, the past decade has seen a legal push towards ADR mechanisms, stemming from agreements between different social partners. On the other hand, in the latter part of that decade the General Council of the Judiciary (Consejo General del Poder Judicial: CGPJ) has taken practical steps to promote ADR, in particular through mediation.

The remainder of the chapter after this brief introduction is divided into three sections. Section 7.2 presents an analysis of the existing institutions, mechanisms and processes for individual labour dispute resolution. Section 7.3 examines the performance of these institutions; and section 7.4 contains some conclusions. Two

* This chapter incorporates the opinions of a range of legal experts, including professors of labour law, barristers and solicitors, judges, labour inspectors and other experts in ADR systems.

¹ In this chapter, the expression ADR will be used in preference to “out of court” in respect of proceedings or mechanisms in general. In the latter term, the defining criterion is the institutional involvement of the courts, while in the first it is the method of dispute resolution – that is, any method for settling disputes by means other than litigation.

appendices at the end of the chapter set out, respectively, a list of legislation and collective agreements concerning individual labour dispute resolution mechanisms, and a list of some of the ADR mechanisms in place at regional level.

7.2. Individual labour dispute resolution institutions, mechanisms and processes

The definition of “individual labour disputes” in Spain

The term “individual labour disputes” in the Spanish legal system includes every dispute taking place between an employer and a single employee working for that employer, or a group of workers with similar claims that can be individualized as a consequence of each one’s employment contract. At the origin of the dispute there is a single employment contract, either still in force or terminated, that deals with the recognition of an individual right. Therefore, these types of disputes can affect an employee individually or as part of a group in which each member is affected individually.

A distinction must be made between individual and collective disputes. In a collective labour dispute, one of the parties is a generic group of employees, not considered as a simple plurality or aggregate of individual employees, but rather as a group structured on the basis of a certain homogeneity in their claims. This is not an easy distinction to make, and some authors have repeatedly pointed out that the ideal way to differentiate the two types of dispute is to analyse the request made in the claim. If the question affects a group of employees or even a generic group that can be individually determined and a generic petition is made for the entire group, then the proper method to follow would be that of a collective dispute (Albiol et al., 2013, p. 348). If, on the other hand, individual and specific petitions are made for each of the employees, then the case is one of individual disputes (or “plural disputes”). As case law has established,² in the case of individual or plural disputes, the demand must relate to a specific ruling, such as individual recognition of a legal relationship.

Finally, it should be pointed out that Spanish authors also differentiate between disputes on the basis of their objectives. In this sense, disputes can be divided into those concerning the violation or interpretation of a law, and those arising from differences over the determination of future rights and obligations. In the latter case, the most frequent disputes are those concerning disagreements during collective bargaining negotiations.

Legislation and collective agreements that concern individual labour dispute resolution mechanisms, institutions and procedures

The rules concerning individual labour dispute prevention in Spain may be divided into three categories:

- state-level laws;

² Supreme Court sentence, 25 June 1992, RJ 1992, 4672.

- interprofessional and interconfederal collective agreements;³ and
- laws and regulations pertaining to autonomous communities.

In every autonomous community, the social partners have developed ADR mechanisms through interprofessional agreements at different levels. Those of the three largest communities, Madrid, Catalonia and Andalusia, cover individual disputes but are not the most important ADR systems in terms of scope of application and number of individual disputes solved: these are in Aragon, Cantabria and the Balearic Islands.⁴

Existing institutions, mechanisms and processes for resolving individual labour disputes

The multiple channels for individual labour dispute resolution can be framed within a quadruple classification, depending on the origin of the procedure and the subjects involved in it:

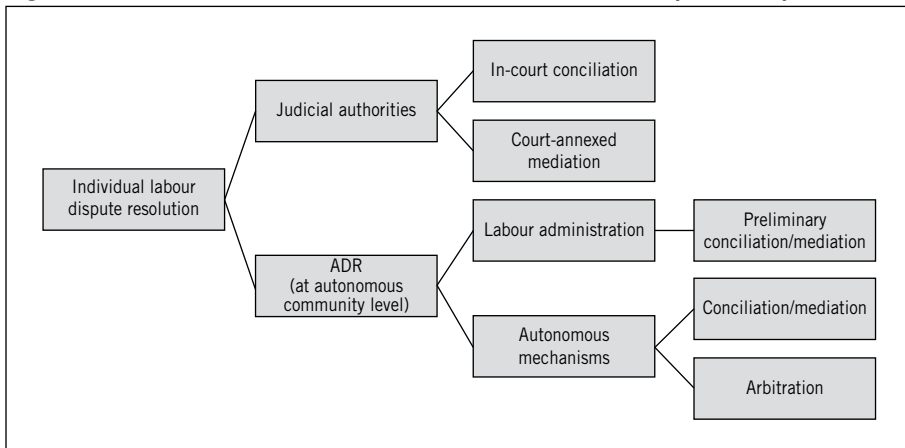
- legal proceedings taking place in a court in which a third public party intervenes (including in-court conciliation);
- ADR under the aegis of the national or autonomous community labour administration, operating as part of the public service;
- ADR under the aegis of an independent body (autonomous mechanism), emerging from collective bargaining and following a procedure established by social partners in interprofessional agreements (*acuerdos interprofesionales*); and
- court-annexed mediation (*mediación intrajudicial*), which can be defined as a voluntary procedure for the resolution of disputes that takes place in relation to judicial proceedings at the request of one or both parties, or by referral of the judge after the claim has been lodged.

For a schematic representation of the various dispute resolution channels, see figure 7.1.

³ *Vide gratia* Law No. 6/1985, 1 July, on the judiciary power (*Ley Orgánica del Poder Judicial*); Law No. 36/2011, 10 Oct., regulating labour procedure (*Ley reguladora de la jurisdicción social*), (arts 63–73); Royal Decree-Law No. 1/1995, 24 Mar. (*Workers' Statute: Estatuto de los Trabajadores*, arts 84 and 91; fifth agreement on autonomous labour dispute resolution (out-of-court system) (*ASAC V*), 7 Feb. 2012 (Quinto acuerdo sobre solución autónoma de disputas laborales (sistema extrajudicial) (*ASAC V*), 7 Feb. 2012), *Boletín Oficial del Estado*, 23 Feb. 2012. *ASAC V* excludes individual disputes, but concedes that they can be covered by procedures established in agreements reached in the different autonomous communities or established in the collective agreements to be enforced. Signatories to the previous agreement on extrajudicial dispute resolution, *ASEC III*, 29 Jan. 2005, formed the Interconfederal Mediation and Arbitrage Service (*Servicio Interconfederal de Mediación y Arbitraje: SIMA*).

⁴ For more detailed data see Appendix II. See further on this subject Gil, 2012; Sempere, 2014; López, 2014; García, 2015.

Figure 7.1. Channels for the resolution of individual labour disputes in Spain



Judicial authorities

Article 2a of the Act on Labour Procedure (Ley reguladora de la Jurisdicción Social: LJS)⁵ establishes that jurisdictional bodies in labour matters shall examine any disputed matters that may arise between employers and workers as a result of an employment contract, except as provided in the Bankruptcy Act,⁶ and in the exercise of all other rights and duties within the field of labour relations.

Examination of the types of processes provided for under the LJS shows that individual work disputes covered within the Spanish legal system are derived from: dismissals and sanctions; complaints to the State about costs incurred during court proceedings; and a wide range of matters relating to working conditions, including determination of holidays, professional classification, geographical mobility, substantial modification of working conditions, contract suspension, reduction of working hours, rights related to the balance of work and family life, the rights of an employee who has been the victim of gender-based violence, and the protection of fundamental rights.

The following subsections provide a list of the judicial organs within Spanish labour jurisdiction that deal with these kinds of individual disputes, the procedures to be followed and the opportunities for judicial appeal.

Labour courts⁷

These are courts composed of a single judge and with a territorial competence spanning an entire Spanish province. They deal with all social judicial processes apart from those assigned to other courts.

⁵ Law No. 36/2011, 10 Oct., regulating labour procedure (Ley 36/2011, de 10 de octubre, reguladora de la jurisdicción social).

⁶ Law No. 22/2003, 9 July on Bankruptcy (Ley 22/2003, de 9 de julio, Concursal).

⁷ LJS, art. 6.

The LJS establishes a standard process for the resolution of all disputes that are not assigned a specific procedure. This standard process, as set out in article 76 and related provisions in the LJS, applies to those seeking recognition of the existence of a labour relationship, to those complaining of an illegal transfer and to those claiming a certain amount of money, as well as in certain other matters. Its key characteristics are the use of oral procedures and, as noted above, the existence of an attempt at conciliation immediately before the beginning of an oral trial.⁸

In relation to the standard procedure, the law has established a series of specific procedural rules for certain types of dispute. The main ones are as follows:

(a) Dismissal

A complaint by an employee against the unilateral termination by the employer of a labour relationship as a result of disciplinary measures must be filed within 20 working days, starting on the day following the one when the dismissal took place. The complaint must be preceded by conciliation (see above). If the employee who has been dismissed is a workers' representative, the Workers' Statute (*Estatuto de los trabajadores: ET*) establishes the need to commence a procedure (*expediente contradictorio*) in which both the worker and the rest of the representatives should be heard.⁹ Once the complaint is filed and admitted, and immediately before trial, the court secretary initiates an attempt at conciliation between the contending parties; if this is unsuccessful, the trial itself will follow immediately.¹⁰

(b) Redundancy

Article 52 of the ET establishes two reasons for redundancy: (1) personal circumstances where there is no fault on the part of the employee; and (2) operational requirements of the enterprise (objective dismissal). The former includes incapacity, lack of adaptation to technical modifications in the workplace and absenteeism, even when justified, if exceeding certain limits. The latter refers to economic, technical, organizational or production factors that negatively affect the economic situation of

⁸ LJS, art. 84.

⁹ Royal Decree-Law No. 1/1995, 24 Mar. (Workers' Statute) (*Real Decreto Legislativo 1/1995, de 24 de marzo (ET)*), arts 55 and 68a.

¹⁰ The court ruling will determine whether the dismissal was fair (if the reason given for it was proven) or unfair (if the cause for dismissal was not proven). The latter ruling would force the employer to choose between two options: either to reinstate the employee, and to pay costs incurred during court proceedings, or to provide the employee with compensation for unfair dismissal equal to 33 days of salary for each year worked up to a limit of 24 months. If the employee being dismissed is a workers' representative, he/she can choose whether to be reinstated or to receive the compensation. Finally, the court can declare the case null and void if the reason for dismissal falls within the types of discrimination established in the Spanish Constitution and in Spanish law, or violates the fundamental rights and public liberties of the worker (LJS, arts 55.5 and 108). The result would be the mandatory reinstatement of the worker, with the award of costs incurred during court proceedings,

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the company. With the reform of RDL 3/2012,¹¹ the definition of these reasons has been greatly amplified, in particular in respect of economic factors. Any loss, or forecast loss, of sales, or steady diminution of the level of normal income or sales (that is, if during three consecutive three-month periods the ordinary income or sales level for each three-month period is lower than that recorded for the same period during the previous year), is now considered valid cause for dismissal.

For this mode of dismissal the same conditions hold as those applying for dismissal on disciplinary grounds, subject to some particular provisions.¹² In cases of redundancy, severance pay amounts to 20 days' wages per year of service with a maximum of 12 months' wages,¹³ whereas in cases of unfair dismissal it is 33 days' wages per year of service up to a limit of 24 months. There is no intervention by workers' representatives in the case of objective dismissal as there would be in a case of collective redundancy.

- (c) Challenges to sanctions, excluding dismissal and including those that affect fundamental rights¹⁴

In these cases, the time limit for filing the complaint is the same as that for dismissal, 20 working days, and the conditions are identical to those in the proceedings for dismissal, including mandatory preliminary conciliation.¹⁵ In her or his ruling, the judge can declare the sanction void, confirm it or revoke it, totally or partially. There is no appeal against the ruling, except in the case of a very serious sanction.

- (d) Controversies over the specification of holidays¹⁶

This procedure applies only to an individual dispute, as one affecting all workers in an undifferentiated manner would be dealt with as a collective dispute.

- (e) Controversies over professional classification¹⁷

This procedure is limited exclusively to the case of an employee performing tasks belonging to a category higher than that stated in their employment contract. In these

¹¹ Royal Decree–Law No. 3/2012, 10 February (Real Decreto–ley 3/2012 de 10 de febrero, de medidas urgentes para la reforma del mercado laboral).

¹² It should be pointed out that the ultimate goal of the 2012 labour law reform was to limit the level of court control over the grounds for dismissal, making it an objective issue and precluding the need for judicial determination of the appropriateness of the measure. However, there are both case law and legal literature questioning the intentions of this law. Using the ILO Termination of Employment Convention, 1982 (No. 158), it has been argued that judges still have the power to assess the appropriateness of a dismissal.

¹³ ET, art. 53(1).

¹⁴ LJS, arts 114 and 115.

¹⁵ LJS, arts 114 and 115.

¹⁶ LJS, arts 114 and 115.

¹⁷ LJS, art. 137.

cases, the LJS states that the file must be copied to the Labour and Social Security Inspectorate, which must then present a report to the judge within 15 days.

- (f) Controversies over geographical mobility, substantial modifications to work conditions, contract suspension and reduction of working hours for economic, technical, organization or production reasons, or other reasons of force majeure

Decisions by employers that modify working conditions¹⁸ are a matter of managerial prerogative, but the affected employee can challenge them in court through a collective or individual dispute.¹⁹ The court has the option of asking for an urgent report from the Labour and Social Security Inspectorate.

- (g) Controversies over the exercise of rights related to the balance of family, work and personal life, and the rights of an employee victim of gender-based violence²⁰

This is the channel for pursuit of claims over the concrete exercise of a right. The lawsuit must be initiated within 20 days of the moment when the employer communicates the disagreement or refusal to the employee exercising this right. It is an urgent procedure and no conciliation or preliminary complaint is required. No appeal is possible against the court ruling, unless the ruling also deals with damage claims grouped together.

The court structure

The labour chambers of the high courts of justice in each autonomous community are collegiate bodies. There is usually just a single chamber for each community, but there may be more. Concerning individual proceedings, they deal with appeals that can be made against labour courts.

At the national level, the fourth chamber of the Supreme Court deals with appeals against sentences by other judicial bodies. Individual disputes reach this chamber through appeal against court rulings by the labour chambers of the high courts of justice on the principle of unification of doctrine (*recurso de unificación de doctrina*).

Conciliation and mediation, including within labour administrations

The resolution of individual labour disputes in the courts is not the only procedure established by the Spanish legislature. As noted in the introduction to this chapter, there are also ADR mechanisms, such as mediation and conciliation, which can be created by the State through laws or by the social partners through collective bargaining

¹⁸ ET, arts 40, 41 and 47.

¹⁹ LJS, art. 138.

²⁰ LJS, arts 139 and 37.

(acuerdos interprofesionales: interprofessional agreements), and can be used either in a pre-court stage or once court proceedings have started.

There is no authoritative definition of either mediation or conciliation, either in the labour laws or in collective agreements. In fact, the LJS regards the two as equivalent (Viqueira, 2013). This undifferentiated use is quite common among a large majority of labour law academics, who have defined conciliation as a legal act through which a transaction of interests between parties is achieved. While some writers have drawn a distinction between the two, they disagree on its basis. For some, the role of the conciliator is to bring the parties closer, creating a climate conducive to consensus in order to solve the dispute, but without making specific proposals to solve the conflict (Mercader, 2008; Tascón, 2009), while on the other hand the mediator proposes solutions that the parties will be free to accept. Along the same lines, Rodríguez (2004) has pointed out that when cross-industry agreements distinguish between conciliation and mediation, they give an active role to the mediator, who makes proposals for settlement, while the conciliator has a more passive role.²¹

Some ADR experts take the opposite approach. Barona claims that a distinction should be made regarding the role of the third party, and that while the mediator has a strong role in highlighting the positions of the two parties, helping them to reach an agreement but never proposing an agreement, the conciliator has a stronger position, which includes proposing terms of settlement.²² The main role of the mediator on this view is to act as a communicator, creating the appropriate environment to allow the parties to express their concerns, draw closer and reach a settlement.

In any event, proposals made in either mediation or conciliation, in contrast with what happens in an arbitration procedure, will not be effective if there is not an explicit willingness on the part of the two sides in conflict to reach an agreement (Mercader, 2008).²³

Administrative mechanisms: Conciliation/mediation and preliminary administrative complaint

In terms of the legal position of conciliation/mediation, the LJS establishes as a preliminary requirement, before the commencement of any specific judicial procedure for dispute resolution, the attempt to reach a preliminary agreement. If the defendant is a private individual or entity, this conciliation will be initiated before the appropriate

²¹ *Vide gratia* ASAC, art. 2.

²² See Barona, 2013; Esplugues, Iglesias and Palao, 2013, along the same lines; and, on labour mediation, García, 2012.

²³ This interpretation follows the ILO's approach as set out in 2007: "While both conciliation and mediation are processes involving the intervention of a neutral third party, the role of a conciliator is to help facilitate communication between the parties, without making any specific proposals for resolving the dispute. On the other hand, in addition to keeping the lines of communication open, a mediator's role may also include proposing terms of settlement, which the parties are free to accept or reject" (ILO, 2007, p. 3).

administrative service or body;²⁴ if the defendant is a public body (the State, an autonomous community, any local or public law entity with its own legal personality), the law prescribes a conciliation procedure entitled “preliminary administrative complaint”.²⁵ Both procedures are mandatory and carry no charges.

(a) Preliminary conciliation/mediation

Prior to filing a complaint in an individual dispute, the plaintiff must activate a procedure involving preliminary conciliation/mediation. The LJS uses the term “conciliation” (conciliación) and the same term will be used here. Article 64 of the LJS exempts from the requirement for preliminary conciliation complaints concerning the date or extent of vacation time, geographical mobility, substantial modification of working conditions, suspension of contract and reduction of working hours for economic, technical, organizational or production reasons or those derived from force majeure, rights related to the balance of family, labour and personal life, those initiated *ex officio*, covering fundamental rights and public liberties, challenging conciliation, mediation and transaction agreements, and also those initiating labour action in protection from gender-based violence.

Conciliation is requested in writing. When the request for conciliation is lodged, the time limit for filing a dismissal claim before a court is suspended pending the conciliation proceedings, or failure thereof.²⁶ Parties may attend the conciliation personally or through representatives.

Attendance at the the conciliation or mediation proceedings, whether through the administrative or autonomous mechanisms (see below), is mandatory for both parties.²⁷ If the defendant does not attend the procedure, the process will be considered as “tried without success [intentado sin efecto]”; and moreover, if the court ruling essentially corresponds with the original claim, the judge will declare the non-attendance as an act of bad faith, and will impose a fine on the defendant.²⁸

If the conciliation ends without agreement having been reached, it will be considered “concluded without settlement [celebrado sin acuerdo]”, and the way will be open for the parties to take the judicial route. In the course of the judicial process, they will not be able to use facts different from those presented during the conciliation proceedings.²⁹ If an agreement is reached, this will be registered in the court records and it will constitute an instrument for the purposes of initiating enforcement action.³⁰ The parties involved or other parties affected may appeal the settlement reached within a time limit of 30 working days before the responsible court or tribunal, through the

²⁴ In Madrid and Valencia this administrative body is called Servicio de Mediación, Arbitraje y Conciliación: SMAC).

²⁵ LJS, arts 63a and 73.

²⁶ LJS, art. 65.1.

²⁷ LJS, art. 66.1.

²⁸ LJS, arts 66.3 and 97.3.

²⁹ LJS, art 80.1(c).

³⁰ LJS, art. 68.1.

standard process.³¹ Where an act has taken place that may invalidate a contract (e.g. bad faith or abuse), parties may bring nullity actions against the conciliation agreement on this basis.³²

The body responsible for conducting the conciliation process may be the administrative body with jurisdiction in this field within an autonomous community, or an autonomous body created through an interprofessional agreement (*acuerdo interprofesional*) or a collective bargaining agreement at State or autonomous community level between the most representative trade unions and employer associations.³³

The first administrative entity created to manage the conciliation process was the Mediation, Arbitrage and Conciliation Institute (*Instituto de Mediación, Arbitraje y Conciliación: IMAC*), launched in 1979. Over the following years, its functions were transferred to the autonomous communities, except for the autonomous cities of Ceuta and Melilla, and the Institute was abolished in 1985. Each community has created its own administrative services to manage these tasks, under various names (mediation, arbitrage and conciliation services; mediation, arbitrage and conciliation units; etc.), usually under the generic label SMAC (*Servicios de Mediación, Arbitraje y Conciliación*). These services are attached to the government of the community.

The person who is in charge of the procedure is called the conciliating lawyer and is a civil servant working for the administration. Conciliating lawyers have no power of control over what the parties agree to, nor have they any competence to confirm or reject the agreement. The conciliating lawyer tries to bring the parties closer to each other. The procedure as set out in article 10 of Royal Decree-Law No. 2756/1979 of 23 November 1979 is a very basic one. The parties, each of whom may be accompanied by a lawyer, will present their respective claims, and the conciliating lawyer will invite them to reach an agreement, even going so far as to suggest fair solutions. Normally, this conciliation process does not take more than 10–15 minutes, and this brevity, together with the excessive workload of the administrative bodies concerned, mean that this procedure is not really adequate for its purpose.

Mechanisms for the autonomous solution of labour disputes are regulated by article 91 of the ET and in general form by article 37 of the Spanish Constitution. The

³¹ LJS, arts 67.1 and 2.

³² For conflicts between co-workers in cooperative companies, a similar conciliation or mediation process is established, under the name “preliminary cooperative process”. Law No. 27/1999, 16 Jul., on cooperative companies, art. 87 (*Ley 27/1999, de 16 de julio, de cooperativas, art 87*).

³³ A State-wide body, the Interconfederal Mediation and Arbitrage Service (*Servicio Interconfederal de Mediación y Arbitraje: SIMA*), was created under the ASEC I agreement in 1996 as a joint foundation in the public sector. It is composed of the most representative business organizations (CEOE, CEPYME) and trade unions (CCOO, UGT) at State level under the aegis of the Ministry of Employment and Social Security, and is publicly funded. SIMA’s main objective is the resolution of collective labour conflicts between employer and employees or their respective representative organizations by means other than litigation, through mediation or arbitrage procedures at a higher level than that of the autonomous community. No individual conflicts are dealt with through SIMA, given that the ASAC explicitly excludes them.

former establishes that collective agreements and interprofessional agreements relating to specific topics adopted by the most representative unions and employers' organizations may establish procedures designed to solve collective controversies derived from the application and interpretation of collective bargaining agreements. The fifth section of this article expressly recognizes that these means will be applicable in controversies of an individual nature, when the parties expressly submit themselves to them. This voluntary character holds with respect to an arbitration procedure or a specific mediation process.

The fifth agreement on autonomous labour dispute resolution (ASAC V) was approved on 7 February 2012, superseding the fourth agreement on extrajudicial dispute resolution (ASEC IV) of 14 March 2009. These interprofessional agreements were the subject of over four years of negotiations between the most representative unions and employers' organizations, and while individual disputes were excluded from their scope of application, article 4.3 of the fifth agreement states that individual conflicts can be submitted to the procedures established in the applicable collective agreements, at autonomous community level.

All autonomous communities have created organs for conciliation, mediation and arbitration, through agreements over ADR for labour conflicts, as negotiated by the most representative organization of employers and employees in each community. All these agreements provide for the creation of a joint commission for their interpretation, application and follow-up, and establish an institution, which may be a public or private foundation, in order to manage services for dispute resolution. In some instances, the agreement provides for the managing agency to be integrated into the autonomous community's public administration or labour relationship council. Whatever the particular structural configuration, all services provided through this body are free of charge.

These agreements are in general designed to apply to collective disputes, and many exclude individual disputes, either expressly or implicitly. Where individual disputes are included, the subject areas covered are limited and generally do not include matters related to dismissals.

These agreements regulate two alternative methods, arbitration and conciliation/mediation, and occasionally establish differentiated mechanisms for conciliation and mediation, though this is unusual. The general principles ruling these procedures include the basic principles of oral hearings (*oralidad*), equality, immediacy, speed, *audi alteram partem* (*contradicción*) and defence. In practice, mediators and conciliators tend to be lawyers, social workers or trade unionists, and in some cases work inspectors, labour relations officials, security or occupational health technicians or members of business associations.³⁴

³⁴ For further information about dispute resolution systems in autonomous communities, see Appendix II.

(b) The preliminary administrative complaint

In order to lodge a claim against a public employer, the obligatory preliminary conciliation or mediation is replaced by the preliminary administrative complaint. The grounds for complaint exempted from this stage are established in a similar fashion to that of the mechanism of conciliation and mediation noted above.³⁵

In-court conciliation before court secretary or judge

If the preliminary conciliation fails, the parties may seek an agreement through a conciliation promoted by the court secretary or judge.³⁶

(a) Conciliation before the court secretary

Once the parties have been summoned and prior to the trial, the court secretary will try to promote an agreement between them. If an agreement is reached, the court secretary will have to ratify it through a decree and will file all judicial proceedings. The secretary will also ratify any agreement reached by the parties on their own before the trial. If the secretary considers that the agreement implies any serious damage to any of the parties involved or to third parties, that it involves a legal fraud or an abuse of rights, or that it is against the public interest, it will not be ratified and the parties will have to submit themselves to trial.³⁷ If a conciliation agreement is reached before the court secretary it will have the same legal force as a judicial conciliation. Where an act is claimed to have invalidated a contract, parties will be able to exercise a nullity action on this basis.

(b) Conciliation before the judge

If the parties do not reach an agreement through conciliation before the court secretary, they may do so through conciliation before the judge; in this case the agreement will need to be approved by the judge.³⁸ In addition, article 85.8 of the LJS provides another opportunity for conciliation at the point where, having presented the evidence, the parties may receive suggestions and assistance from the judge.

Mediation

Mediation in labour matters may be regulated either through mechanisms established by collective bargaining agreements or through legislation. As noted above, ADR mechanisms are much more highly developed in relation to collective labour disputes than with regard to individual disputes. Thus mediation in collective matters is established and regulated under the ET, collective bargaining agreements and specifically ASAC V, whereas mediation in individual labour disputes is still unregulated territory.

³⁵ LJS, art. 69.

³⁶ LJS, art. 82.

³⁷ LJS, art. 84.

³⁸ LJS, art. 84.3.

It has also been noted above, and established in the legal literature, that mediation is based on two fundamental factors: that the decision always rests in the parties' hands; and that the mediator never imposes a solution on them. In addition, in individual labour dispute mediation there are two fundamental points to be taken into account: the principle of inalienability of labour rights and the existence of collective agreements (Torrollo, 1999).

(a) Out-of-court mediation

In 2011, the LJS introduced the term "mediation" into the text of the law, and presented it together with preliminary conciliation as two measures to be used in a similar manner to avoid resort to the judicial process. There is no specific provision in the law for the mediation process in individual disputes.

(b) Court-annexed mediation (*mediación intra-judicial*)

As well as the mechanisms listed above, the LJS introduced the so-called "court-annexed mediation" (article 82.3), by which the writ of summons may allow the dispute to be handled according to mediation procedures established by collective agreements, as stated in article 63 of the law. The parties may jointly decide to submit themselves to such mediation.

The law does not at present elaborate on this mediation procedure, but this lack of regulation does not preclude the possibility of resort to mediation at any stage of the process. As García (2013) points out, the parties are free to resort to mediation at any point, and it is possible to request suspension of court proceedings according to articles 83.1 and 19.4 of the LJS in order to do so.

Legal scholars and members of the judiciary agree that court-annexed mediation is not so much an alternative to the court process as a new opportunity for the courts to act in a way that will enhance, even once litigation has begun, the possibilities of a consensual decision (or at least a compromise between the two opposing positions) being reached by the parties with the help of a third party (García, 2013; Renedo, 2013). It appears that mediation can be proposed at any stage of the proceedings: in the trial, during the appeal or during the execution of the court ruling.

In court-annexed mediation, the judge decides whether mediation is possible but she/he does not perform any mediation function in person; the case is referred to a mediation professional. The judge will decide when examining the claim whether the case can be submitted to court-annexed mediation and will communicate this decision to the parties in writing. At this point the judge will also set a date for the trial in case the parties decide not to accept mediation. The offer of mediation can also be made at any other moment. If the parties do not accept mediation, the trial will continue as usual.

Disputes that have been solved under this process to date have concerned the balance of work and family life, sanctions, substantial modifications to working conditions, vacations, geographical mobility and disciplinary dismissal.

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Mediation may involve as many sessions as the mediator thinks necessary. It can end with a total agreement, a partial agreement, or no agreement. If it ends with a total agreement, the parties may withdraw from the trial process and either present the agreement before the court in order for it to be ratified and incorporated in written form, or have the terms of the agreement encompassed in a conciliation before the court secretary. If no agreement, or only a partial agreement, is reached, parties will be summoned to trial in order to solve what was not agreed upon.

Mediation is now offered by several courts, including those in Bilbao, Barcelona, Burgos and Madrid (García, 2012, 2013; Renedo, 2013). In Madrid, mediation is free of charge and is conducted by duly accredited mediators, independent of the court. The process and the service are controlled by the CGPJ. In Bilbao, the mediation mechanism was developed via a direct and proactive involvement of the presiding judge of the court, during a limited period, and with the cooperation of the labour relationships council of the Basque Country. In this case, mediation was extended to cover, besides the topics noted above, workplace harassment, the infringement of fundamental rights, recognition of rights and economic claims, excluding dismissals (Renedo, 2013).

A summary of the various channels through which conciliation and mediation can be pursued is presented in table 7.1.

Table 7.1. Conciliation and mediation, within labour administrations and through autonomous mechanisms

Preliminary conciliation or mediation			
Private undertaking	Public undertaking	In-court conciliation/mediation	Court-annexed mediation
Administrative mediation, arbitration and conciliation (SMAC)	Preliminary administrative complaint	Conciliation before the court secretary	Conciliation before the judge
ADR mechanisms created by social partners through collective agreements (autonomous mechanisms)			

Arbitration

Parties can also choose to commit themselves to arbitration, by which they submit resolution of the conflict to a third party that will issue an award.³⁹ In contrast to conciliation and mediation, arbitration is not established in law as a means of avoiding a court process, and has only a voluntary character in individual disputes.⁴⁰

³⁹ LJS, art. 65.3.

⁴⁰ ET, art. 91.

Arbitration can be established in an interprofessional agreement and therefore included in an autonomous ADR mechanism (as noted above, the ASAC excludes individual disputes); it can also be included in employment contracts or in collective agreements (Soto, 2003).⁴¹

Autonomous agreements that include arbitration for individual disputes establish a simple procedure of general application, governed by the same principles as in conciliation/mediation, beginning with the choice of an arbitrator jointly by the parties.

When stipulated in the relevant interprofessional agreement, entering into a commitment to arbitration will trigger the suspension of procedural time limits, as in preliminary conciliation/mediation (see above). This suspension will expire the day after the arbitration writ (or, if there is an appeal, the court ruling) comes into effect.⁴²

The list of matters that can be submitted to an arbitration process, and the procedure of arbitration itself, vary among the autonomous communities. The mechanisms established in the three main autonomous communities (Andalusia, Madrid and Catalonia) are fairly similar.⁴³ In all cases, parties must give their explicit consent.

There is no specific training for arbitrators; most of those who perform this role are university professors, labour inspectors or lawyers, while some are non-practising judges or court secretaries, civil administration technicians and a few are physicians, engineers or chemists (Gil y Gil, 2007).

Once arbitration has been conducted through one of the autonomous dispute resolution mechanisms and the parties have accepted it, it becomes enforceable. Generally, unless a special procedure is established for appeals, an appeal against an arbi-

⁴¹ This is not a common occurrence, but the legal literature has pointed out the existence of these clauses, which still obviously require the explicit consent of both parties in a conflict. They are sometimes seen in very specific sectors, such as professional sports. In these cases, the collective bargaining agreement establishes a series of specific guarantees, even when arbitration has to be agreed upon in a job contract (Soto, 2003).

⁴² LJS, art. 65.2.

⁴³ For instance, in the Andalusian Sistema Extrajudicial de Resolución de Conflictos Laborales de Andalucía (SERCLA), the interprofessional agreement sets out a list of matters that can be submitted to arbitration. Arbitration can be initiated directly or after the failure of mediation/conciliation; in either case, both parties have to enter into the arbitration commitment, specifying the matters they will submit to arbitration. The SERCLA will inform the parties of a list of arbitrators from which they will need to choose one together. The chosen arbitrator will conduct as many mediation sessions as necessary and will then issue a writ embodying the resolution. In the Community of Madrid Labour Institute arbitration is established, together with mediation and conciliation, as a recourse for individual conflicts, excepting those that deal with contract termination, disciplinary regime, economic claims or claims for the protection of the right of freedom of union association. The arbitration procedure is regulated in a similar fashion, but with the proposal and appointment of arbitrators, and the role of those unions and business organizations signing the agreement, set out in more detail. The Catalonia Labour Court Regulation does not limit the matters that can be submitted to arbitration. It regulates the procedure in much greater detail, including the possibility that, where mediation/conciliation finishes without agreement, the court may offer the parties a choice between an arbitrator selected from the list of labour arbitrators provided (all appointed by a special commission in SERCLA) and the mediation commission of the court which has acted in the previous conciliation/mediation process.

tration writ can be lodged, on the basis of grounds such as infringement of essential procedural requirements, before the court that was responsible for dealing with the matter, through ordinary proceedings, within 30 working days since the decision was notified.⁴⁴ The LJS establishes that the Salary Guarantee Fund (FOGASA, from its Spanish title) will also be considered a party in arbitration proceedings (article 23).

Specialized institutions dealing with specific subject areas

A remarkable experiment is that of the Local Administration Studies, Mediation and Conciliation Consortium (CEMICAL, for its Catalan acronym), which serves local entities in the province of Barcelona, offering conciliation and mediation services free of charge. The mechanism deals primarily with collective disputes; individual disputes may be included if they do not deal with contract termination, disciplinary regimes or economic claims, and if the agency considers that they can be relevant to the collective process.

Labour laws also assign mediation, conciliation and arbitration functions to the labour inspection service within the context of workplace disputes.⁴⁵ The law explicitly assigns conciliation and mediation functions with respect to conflicts in which they are requested by both parties, and arbitration tasks when requested by one of the parties in workplace disputes. The law stipulates that the function of arbitration, when performed by the labour inspection service, may not be exercised by any individual concurrently with the exercise of the inspection function by the same individual in companies under his or her supervision.

7.3. Performance of individual labour dispute resolution institutions, mechanisms and processes

The central axis of the Spanish model for resolution of individual labour disputes has been, as noted above, the judicial mechanism. Since 2007, and especially since the onset of the economic crisis of 2008, the number of court cases within the labour jurisdiction has increased significantly, rising from 337,364 cases in 2007 to 484,516 in 2009. The number fell slightly between 2009 and 2011 but then rose again, probably owing to the deterioration in the economic crisis and also to the effect of several legal reforms that broadened the labour jurisdiction and increased the number of reasons for dismissal.

Indeed, in 2012 there was a considerable rise in the number of claims for dismissal. As a result, in 2013 the labour jurisdiction was the only area of the Spanish legal system in which the number of court cases was not falling. Quite the contrary: the number of claims overall rose to 469,329, a 1.2 per cent increase from 2012. The number of cases solved by the courts has, however, fallen. The number of judges assigned to the area has also declined. The CGPJ's annual report for 2013 stated that the reduc-

⁴⁴ LJS, art. 65.4.

⁴⁵ Law No. 23/2015, 21 July, Regulating Work and Social Security inspection, art. 1.2 (Ley 23/2015, de 21 de julio, Ordenadora del Sistema de Inspección de Trabajo y Seguridad Social, art. 1.2).

tion in the case resolution rate and the increase in the courts' workload and backlog of cases show a deteriorating situation in the labour jurisdiction.⁴⁶ The higher workload is particularly marked in certain of the autonomous communities, for example in the Balearic Islands, Andalusia and Navarre, where an autonomous individual disputes resolution system has been implemented. The labour jurisdiction, then, along with the rest of the judicial administration, has experienced serious imbalances. This is largely attributable to a ratio of judges per citizen much lower than the European average, representing a structural imbalance within the profession and judicial organization that in turn leads to serious congestion in the system.

On top of this, there is common agreement that mandatory preliminary administrative conciliation has become a mere bureaucratic formality, with limited effectiveness. This process is criticized by lawyers in particular for the limited time given to conciliation and for the lack of a real conciliation process with proper incentives to encourage parties to come to an agreement. There is also some criticism of the conciliation processes before a court secretary or judge, which will be analysed below.

These developments have prompted a reconsideration of ADR mechanisms. Both the legislative assembly and several legal actors (among them the CGPJ and some judges' associations) have made proposals aimed at providing a better response to the social demand for resolution of individual labour disputes. On the one hand, the modifications to conciliation and mediation introduced by the LJS of 2011 were supposed to do this, although, as we will see below, the results are not satisfactory. On the other hand, the implementation of court-annexed mediation in several courts (García, 2013) and the recognition of autonomous mechanisms could be seen as better solutions. The inclusion of individual dispute resolution mechanisms in several interprofessional agreements and their increasing use in a number of autonomous communities is a clear indication of this, although the results have been variable.

ADR mechanisms: The expansion of systems derived from collective bargaining to include individual disputes

The number of individual disputes subject to conciliation and mediation by administrative agencies and by autonomous dispute resolution mechanisms increased in the years 2012 and 2013. In both cases, the rise was particularly sharp in 2012, probably as an effect of the recent labour law reform with the passage into law of the LJS in 2011. The increase in 2013 was smaller and more noticeable in those autonomous community dispute resolution mechanisms derived from interprofessional agreements between the most representative unions and business organizations, rather than in administrative units (see table 7.2).

⁴⁶ <http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Consejo-General-del-Poder-Judicial/Actividad-del-CGPJ/Memorias/Memoria-Anual/Memoria-anual-2014--correspondiente-al-ejercicio-2013-> [accessed 23 Apr. 2016].

Table 7.2. Breakdown of individual labour disputes in Spain, 2012–13, by mechanism of resolution

	Absolute values		Change from the previous year (%)		
	2012	2013	2011	2012	2013
Total number of cases	523 471	551 421	-2.3	8.7	5.3
Solved by administrative conciliation units	488 185	513 406	-2.4	8.8	5.2
Individual conciliations	487 331	512 421	2.4	8.9	5.1
Reaching an agreement	88 850	120 831	-6.5	69.6	36.6
Not reaching an agreement	192 054	188 897	7.3	32.4	-1.6
Abandoned or withdrawn	206 427	202 693	-5.7	-22.1	-1.8
Collective conciliations	806	796	13.6	-44.3	-1.2
Solved by autonomous community dispute resolution mechanism (autonomous mechanisms)	35 286	38 015	-1.8	7.9	7.7
Individual conciliations	29 932	30 405	-2.4	10.2	1.6
Collective conciliations	5 308	7 541	1.5	-4.0	42.1

Source: Spanish Ministry of Employment. Not including data from the autonomous mechanisms TAMIB (Balearic Islands) and ORECLA (Cantabria).

As is clear from table 7.2, conciliations conducted before administrative services are still much more numerous than those taken before autonomous community mechanisms. This can be attributed to the limitations of the latter, including their lack of capacity to handle individual matters. In administrative conciliation, more cases were withdrawn or abandoned than either reached agreement or were closed without agreement. Even so, the fall in the numbers withdrawn or abandoned is remarkable. This has been brought about by the introduction in article 66 of the LJS of penalties for non-attendance at conciliation. Overall, it is clear from both the numbers shown in the table and the opinions of legal professionals that administrative conciliation cannot be considered a successfully functioning mechanism.

On the other hand, autonomous ADR mechanisms have some positive traits that should be highlighted. As noted earlier in this chapter, the ADR systems in the most densely populated autonomous communities are not the most representative in terms either of scope or of the number of individual disputes solved. It is therefore useful, when assessing how these mechanisms work, to focus on the examples of Catalonia and Andalusia, the two largest autonomous communities, whose mechanisms cover individual disputes, even though those form a much smaller percentage of their caseload than collective disputes.⁴⁷ We should also consider Aragon, both because of the number of individual disputes solved here and because in Aragon the autonomous ADR route runs in parallel to the activity of the administration on conciliation and medi-

⁴⁷ We do not analyse the case of the Madrid Labour Institute, owing to the low number of solved individual cases and to the small amount of statistical data the agency provides.

ation matters. Finally we should consider the examples of the Balearic Islands and Cantabria, which, while geographically much smaller, have the competence to deal with all individual disputes and have, in contrast, a much smaller number of collective disputes.

We begin with a general summary of the activity of autonomous community services on dispute resolution, as shown in table 7.3.

As can be observed, the number of individual disputes presented rose between 2012 and 2013 more steeply in administrative resolution mechanism services than in the autonomous community mechanisms in several communities. Overall, however, there is a rise in the number of conflicts dealt with by both types of mechanisms. The number of individual disputes that some autonomous conciliation/mediation services deal with is remarkable: see, for example, the figures for SAMA in Aragon, TAMIB in the Balearic Islands, ORECLA in Cantabria and the TLN in Navarre. In all of these communities the number of collective disputes is very small, which could explain the desire of the social partners to broaden the scope of dispute resolution mechanisms to encompass individual disputes. Conversely, bodies such as SERCLA and the TLC deal with high numbers of collective disputes, much higher than those dealt with by administrative mechanisms,⁴⁸ which, as noted above, make only limited provision for the handling of individual disputes.

Table 7.3. Overview of dispute resolution services in selected autonomous communities, 2012 and 2013

Autonomous community	Name of body	ADR autonomous mechanism				Administrative mediation arbitration and conciliation units			
		Individual disputes		Collective disputes		Individual disputes		Collective disputes	
		2012	2013	2012	2013	2012	2013	2012	2013
Andalusia	SERCLA	374	383	905	1 453	65 880	68 493	0	0
Aragon	SAMA	7 689	8 657	153	164	8 647	8 449	2	1
Balearic Islands	TAMIB	11 391	11 503	52	64	0	0	0	0
Cantabria	ORECLA	5 712	5 052	107	157	0	0	102	0
Catalonia	TLC	134	220	869	1 061	85 673	92 722	193	227
Madrid	Labour Institute	2	9	732	811	100 228	104 965	85	137
Navarre	TLN	3 585	3 542	49	45	3 424	3 525	25	57
La Rioja	TLR	120	957	20	27	3 474	3 380	8	9

Source: Authors' compilation based on data provided by the Ministry of Employment and the autonomous community ADR services.

⁴⁸ In the white paper on mediation in Catalonia, the general rise in mediation cases presented before all mechanisms is attributed to the current economic crisis, which has caused an increase in the number of workplace conflicts concerning dismissals, salary cuts, etc. The rise in the number of mediations brought before the TLC is explained in the white paper by the increasing will of Catalan social partners to include in collective bargaining agreements clauses stipulating recourse to the TLC to settle conflicts. In 2011, 95% of Catalan collective bargaining agreements contained such a clause.

Table 7.4. Outcomes of dispute resolution services in five autonomous communities, 2013

Autonomous community	Individual disputes handled through ADR autonomous mechanisms ¹				Individual disputes handled through administrative conciliation and mediation mechanisms ²					
	Total, no.	Closed, no. (dismissals, %)	Agreement, %	No agreement, %	Abandoned, no.	Total, no.	Closed, no. (dismissals, %)	Agreement, %	No agreement, %	Abandoned, no.
Andalusia	383	264 (69)	38	62	118	68 493	38 535 (56)	32.27	67.62	29 958
Aragon	8 657	7 566 (87)	60	40	1 255	8 449	3 845 (45)	21.84	78.16	4 554
Balearic Islands	11 503	8 197 (71)	57	43	2 732	0	0	0	0	0
Cantabria	5 644	4 286 (76)	43.29	56.81	1 358	0	0	0	0	0
Catalonia										
<i>Conciliation</i>	220	171 (78)	61.4	38.08	45	92 722	57 305 (61)	49	51	35 417
<i>Mediation</i>	4	3	100	0	1					

¹ Data from reports by autonomous conflict resolution systems created in autonomous communities by interprofessional agreements. Data vary according to the degree of comprehensiveness of the respective reports. ² Data extracted from the Ministry of Employment and Social Security's mediation, arbitration and conciliation statistics.

Source: Authors' compilation, based on data provided by the respective autonomous community dispute resolution services and the Ministry of Employment and Social Security.

We turn now to analyse in detail data from SERCLA, SAMA, ORECLA, TAMIB and the Catalonia labour court, as presented in their respective reports for 2013, and compare them with data from administrative services (table 7.4).

In general terms, it is apparent that the percentage of closed cases is considerably higher for autonomous mechanisms than for administrative ones. Moreover, with the closed cases, there is a higher percentage of agreement in the former than in the latter.

Andalusia

Two mechanisms coexist in Andalusia, with a serious imbalance between the numbers of cases handled by, respectively, SERCLA and the administrative authority. The fundamental cause of this imbalance is the fact that both dismissals and economic claims (the former accounting for 31,488 cases in 2013, the latter for 32,677) are excluded from the scope of the autonomous mechanisms. According to the 2013 SERCLA report, most mediations were conducted on those matters which interprofessional agreements had established as requiring conciliation (82 per cent, against just 18 per cent for matters on which conciliation was voluntary). Most claims were specifically related to substantial job modifications (216), followed far behind by conflicts over professional classification (47). The average duration of mediation was of 45 minutes, and each case had on average 1.3 mediation sessions. This indicates that genuine mediation is rare, given the speed of the procedure. So far as the sectoral distribution is concerned, most disputes arose in administrative and auxiliary services, followed by commerce, food services, manufacturing and health care. Women initiated 51.96 per cent of cases, men 48.31 per cent.

Aragon

In Aragon, SAMA deals with individual dismissals. The percentage of effective procedures is particularly high and the number of non-effective procedures is lower than in previous years. According to the SAMA report, the main reasons for this trend are the economic crisis, the serious liquidity problems in businesses and the inability to provide data for some companies that have ceased operating. Both the autonomous and the administrative mechanisms conduct conciliation on cases pertaining to dismissal, and while the former solved 7,066 cases, the latter solved only 577. The SAMA report states that the category of individual cases in which resort to mediation was highest during 2013 was that dealing with dismissals (81.62 per cent, one percentage point higher than in 2012), with the most common outcome being a finding that the dismissal was unfair.

Another trend in Aragon is that of falling compensation, going beyond the reduction included in the labour law reform of 2012. The highest number of agreements is reached in cases concerning substantial modifications of working conditions, while agreement is reached in only 5 per cent of cases concerning workplace harassment (*acoso laboral*) or non-payment of salaries. Legal differences are the main cause of failure to reach an agreement. Women initiated 42.25 per cent of cases, some four and a half percentage points above the proportion for 2012. Only in those procedures concerning substantial modification of job conditions do more cases involve women than men.

Balearic Islands

According to the TAMIB report, labour disputes in the Balearic Islands have been steadily increasing since 2011. During 2013 there was an increase over 2012 in both individual (1 per cent) and especially in collective cases (115 per cent). Individual cases deal essentially with termination of employment and economic claims. On termination of employment, most of the mediations deal with dismissals. The proportion of cases in which mediation leads to agreement is much higher in cases related to dismissal than in those dealing with other matters. Disputes have been focused in the food services, construction, and administrative and auxiliary services sectors.

Navarre

The autonomous mechanism in Navarre covers the resolution of all individual disputes. In this case, the number of conciliations that did not reach an agreement is higher than those that did. According to the ORECLA report, most individual cases (84.23 per cent of all individual files) were related to economic claims and dismissals; with regard to dismissals, a higher percentage than average (more than 48 per cent) failed to reach agreement. In all other categories of dispute, the percentages of cases that did not reach an agreement are higher than those that did, even where the latter proportion is higher than in previous years, owing to the decline in parties not attending the appointments.

Catalonia

The first point to make about the Catalonian autonomous mechanism is that it deals with only a small number of individual disputes, owing to the restriction on the matters that fall within its scope, which excludes dismissals, sanctions and economic claims. Even though the agreement provides for conciliation with regard to economically dependent self-employed workers, no cases in this category were brought in 2013. Economic claims and those dealing with working schedules and vacations stand out most prominently, emphasizing the point that the TLC cannot deal with controversies over dismissals and sanctions, economic claims, or protection of the right to organize. The highest levels of conflict are found in health care and metalwork, well ahead of trading and chemical activities, although these data relate to conflicts in general, not just individual ones. The white paper on mediation in Catalonia points out that the will of the parties plays a strong role in determining the higher or lower percentages of successful mediations, but does not affect the percentage of effective mediations that reach an agreement between parties. Another factor to take into account is the speed with which the parties are summoned by the TLC.

Overall

Combining this analysis with the data presented above, it is possible to state that ADR procedures created by social partners solve, overall, a smaller number of individual disputes than administrative agencies do, as a result of the existing legal limitations. Notwithstanding, the number of individual disputes they are dealing with continues to grow, and this trend is especially significant in those autonomous communities where the number of collective conflicts is low. Moreover, the rate of agreement

is much higher in autonomous communities where administrative mechanisms have been replaced by autonomous ones. Wherever dismissals fall within the scope of the latter mechanisms, the numbers reaching agreement are also higher, even when the amount of compensation obtained is smaller than the equivalent ruled by the courts. According to published data, the average time taken to reach a settlement is clearly shorter than the duration of procedures conducted through the courts.

Court-annexed labour mediation (mediación intrajudicial)

As noted above, the LJS provides for the possibility of resolving cases through mediation without setting out the process in detail. Despite this lack of elaboration, court-annexed labour mediation initiatives have been introduced in several different courts.

The benefits of court-annexed mediation in relation to labour matters have been pointed out both by judges and in the scholarly literature. As García (2013) has noted, in a labour court, mediation can provide the conflicting parties with the satisfaction of being able to talk in a neutral and protected environment; an opportunity to understand the stance, needs and interests of the other; and the chance to re-establish dialogue, preserving workplace peace and enabling the working relationship to survive. Often, the main obstacle to reaching an agreement is the emotional element involved in the disputes. Once emotions have been expressed, the path towards agreement sometimes lies open.

Court-annexed mediation presents itself as an alternative to the process of resolving an individual labour dispute through the standard courtroom procedure. It is more immediate, private, fast, practical, efficient and satisfactory on both a personal and an economic basis as a means of overcoming differences and hostilities: a mechanism that makes it possible to improve the efficiency of the courts and to confine the work of judges to cases where it is really necessary.⁴⁹

There are, however, some limits on the use of mediation. On the one hand, when a dispute is resolved through mediation, the result does not set a precedent that can be taken into account in later individual disputes. On the other hand, when mediation is not successful, there is a risk that one party could use the process to probe the “weaknesses” of the other, emphasizing the imbalance between parties that is inherently present in labour relations. As García (2013) has pointed out, if the mediator does not keep this in mind, the imbalance could become even more pronounced, to the detriment of the employee’s interests. However, this problem can be overcome if the mediator keeps in mind the imbalance and acts in such a way as to compensate for it.

Among the current difficulties in promoting the use of mediation on labour matters, two in particular may be highlighted:

- **Poor regulation:** García (2012) points out that there is no genuine intent to promote the non-judicial systems and, specifically, that there is insufficient legal regulation of this procedure. Occasionally, these difficulties can be overcome with

⁴⁹ See the white paper on mediation in Catalonia (available at: <http://www.llibreblancmediacio.com/> [accessed 24 Apr. 2016]), p. 82, and the references provided there.

“cooperation agreements” that seek to develop pilot programmes. In other circumstances, the case has been met by the adoption of an agreement by the senior judge, the council of judges or the president of the high court of justice.

- Lack of familiarity with the procedure on the part of both the parties to disputes and legal professionals, and the relative prevalence of a conflict culture rather than a consensus-seeking one.

According to statistics provided by the CGPJ, the total number of court files involving mediation in social matters in Spain since its inception has been 616.⁵⁰ Of these, 20 have been resolved, 14 by reaching an agreement and six without agreement. As the text points out, in spite of these low numbers, this initiative has led the way in the implementation of new projects in the labour jurisdiction, a jurisdiction that is currently in crisis, and very much in need of ways of reaching agreement that would bring the interests of parties closer together. This bridging of positions could make the resolution of disputes in the courts much easier, and would thus represent an important advance (García, 2012).

Finally, it is interesting to point out that in the fifth survey on the judicial service in 2010,⁵¹ most of those surveyed favoured court-annexed mediation on labour matters.

Performance of ADR mechanisms in resolving individual labour disputes

Probably the most strongly criticized ADR mechanism is the preliminary administrative conciliation (*conciliación administrativa previa*). An overview of the statistics (table 7.5) provides a useful basis for an evaluation of its performance.

As the table shows, 46 per cent of conciliations related to dismissals, 40.07 per cent to economic claims and 13.23 per cent to other grounds for dispute. Only 36 per cent of the total number of conciliations ended with an agreement, and the proportion is declining. In the early months of 2014, agreements fell by 12.6 per cent in dismissal cases and 53.5 per cent in economic claims.

These numbers present only a partial view of the poor functioning of administrative conciliation. Criticism in the legal literature and among judges has given a much more detailed account of its shortcomings. As Arastey (2013) points out, the mechanism is not performing its conciliation function adequately because it is overloaded and because of the “little attention given to the effectiveness of the intervention in order to achieve the agreement between parties”. The whole process, it seems, is playing a merely formulaic role in order to ratify agreements already reached by the parties that give access to unemployment benefits. Along the same lines, García (2013) has pointed out that administrative conciliation has turned into a perfunctory process, “a bureaucratic

⁵⁰ <http://www.poderjudicial.es/cgpj/es/Temas/Mediacion/Datos-estadisticos/?filtroAnio=2013> [accessed 24 Apr. 2016].

⁵¹ <http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Consejo-General-del-Poder-Judicial/Actividad-del-CGPJ/Memorias/Memoria-Anual/Memoria-anual-2010--correspondiente-al-ejercicio-2009-> [accessed 24 Apr. 2016].

Table 7.5. Summary of outcomes of preliminary administrative conciliation, 2013

	Type of case			
	Conciliations, no. (%)	Dismissals, no. (%)	Economic claims, no. (%)	Others (workplace accidents, seniority, classification), no. (%)
TOTAL	529 067	244 709 (46)	215 693 (40.7)	68 665 (13.23)
Agreement reached	127 013 (36)	105 948 (43.29)	16 368 (7.51)	4 697 (6.8)
Agreed quantity (€ millions)	3 032.12	2 856.17	132.16	43 78
Agreement not reached	194 740 (25)	80 198 (32.77)	79 179 (36.7)	35 363 (51.5)
Attempted without effect, not attended, abandoned, etc.	207 314 (39.1)	58 563 (23.29)	120 146 (55.78)	28 605 (41.65)

Source: Ministry of Employment (2013), available at: <http://www.empleo.gob.es/estadisticas/ANUARIO2013/MAC/index.htm> [accessed 24 Apr. 2016], including data from the autonomous mechanisms TAMIB (Balearic Islands) and ORECLA (Cantabria).

registry of agreements and disagreements, a rubber stamp before attending a court appointment, showing one of the worst faces of the reality of bureaucratization”.

It should also be pointed out that the amounts agreed upon in conciliation during 2014 were significantly lower than those awarded by court rulings in court proceedings on dismissals (on average, €166,257.10 and €203,652.91, respectively)

Existing interactions between mechanisms and processes

The first interaction to be noted is that being promoted between the work of the judge and the use of court-annexed mediation mechanisms. The promotion of mediation once a claim has been presented in court is important in order to bring parties together in the attempt to avoid a court process. In the same way, the promotion of mediation before a claim is presented in court is of similarly great importance for all professionals in potentially avoiding court proceedings.

In court-annexed mediation, courts recommend the use of mediation, and mediation services receive cases that are referred to them by the courts and are therefore *sub judice*, the mediation service being accountable to the court for the quality of its mediation and the service it is providing. It is therefore of particular importance to establish mechanisms for dialogue between courts and mediators.

Cooperation between the labour inspectorate and the justice administration in individual disputes is conducted in the manner described in the first part of this chapter (requesting reports on disputes over professional classification, geographical mobility controversies, substantial modifications of job conditions etc.). Beyond this level of cooperation, established in the labour laws, there is no explicit link in labour matters between the tasks of dispute prevention and resolution by the inspectorate and the rest of the mechanisms discussed in this chapter.

In general, it can be said that there is a need for coordination between the agencies that offer ADR, and for better communication between them and the courts. Moreover, as we have pointed out throughout this chapter, the detailed body of statutory legislation makes the judicial channel the most common mechanism for collective and individual dispute resolution. Moreover, mandatory ADR procedures created by the administrative authorities continue to handle the majority of cases. These two factors, together with the weak functioning of the administrative mechanism and the constraints that slow down the work of the courts, generate a negative dynamic in individual dispute resolution.

Trends and developments in resolution of individual labour disputes

Since the labour law reform of 1994 (Law No. 11/1994 of May), labour laws have explicitly promoted ADR as a means of solving disputes. Trade unions and employers' organizations have also shown an increasing interest in the matter, especially since 1996, when the social partners signed the first agreement on extrajudicial dispute resolution (ASEC). Over the ensuing years, with new agreements being reached at the autonomous community level, the social partners have been showing a strong commitment towards the strengthening of ADR mechanisms, expanding the range of ways to resolve disputes out of court on offer in the different autonomous communities.

For its part, the LJS of 2011 updated ADR processes with the aim of improving their effectiveness. In order to promote the use of ADR, the LJS clarified the mandatory character of conciliation/mediation processes; established new consequences for failing to attend an appointment without cause; slightly expanded the range of disputes to be excluded from mandatory conciliation; and extended the grounds of appeal against an agreement reached either in conciliation or in mediation. Moreover, the law established that the voluntary use of conciliation or mediation would trigger the suspension of time limits for initiating litigation.

All these measures and some minor reforms have led to a quantitative increase in resolved conciliations, as noted above, although this has not been accompanied by an increase in the number of agreements reached. The creation of new channels for court-annexed mediation also faces several difficulties owing to budget constraints and lack of detailed regulation. These budget restrictions, indeed, are affecting the whole of the labour jurisdiction, in which, as noted above, staff numbers are decreasing despite the fact that cases pending resolution are increasing.

On the other hand, a broadening in the scope of ADR systems in autonomous communities is leading to an increase in the number of individual disputes that are effectively mediated or conciliated, with high percentages reaching agreement. This success is attributable to the will of the social partners to create systems through collective bargaining.

7.4. Conclusions

The economic and sovereign debt crisis has had, and continues to have, a particularly strong impact on Spain and its labour market. Spain has lost more jobs, more rapidly, than other European economies – more than 3.7 million between 2008 and 2014. The

economic situation, together with the passage of the labour law reforms in 2012 (Royal Decree–Law No. 3/2012), has contributed to a rise in the number of dismissals, as well as in the number of individual disputes arising from them. The reduction of the compensation paid on dismissal and the expansion of the legitimate reasons for objective dismissal have made it easier for employers to choose to terminate contracts rather than to consider other alternatives, which in turn has increased the number of disputes.

Similarly, the reform of collective bargaining, which has encompassed the promotion of bargaining at company instead of sectoral level, the imposition of limits on the extension of collective bargaining agreements beyond their expiry dates, and the relaxing of constraints on employers modifying workplace conditions established in a collective bargaining agreement,⁵² has destabilized and diminished the role of social dialogue. All of these modifications, as the ILO Committee on Freedom of Association has pointed out,⁵³ have been adopted in disregard of social dialogue and limit the relevance of trade unions.

In Spain, there is a lack of a negotiation culture combined with a historical disposition towards the resolution of disputes in court. There is no doubt that in a working relationship, it is greatly preferable to seek to resolve a dispute out of court, if this is done by appropriate methods. Notwithstanding, the dominance of administrative mechanisms for individual dispute resolution means that in most cases mediation/conciliation is followed only as a mere formality prior to trial.

Moreover, the development of autonomous mechanisms in the different autonomous communities is still fragmentary and disparate. This pronounced unevenness in the focus on promoting conciliation/mediation in labour matters affects the degree of professional involvement and the training of mediators/conciliators, making it difficult for them to devote themselves to labour matters and to receive proper training.

Thus, as several authors have pointed out, reform of the functioning of administrative mediation/conciliation services needs to be undertaken. A key factor is a proper budget allocation that finances professional staff able to develop effective conciliation/mediation procedures. In the context of intra-judicial mediation, this could be a tool with which to dynamize and modernize the labour jurisdiction (Renedo, 2013).

In particular, the social partners can use interprofessional agreements to:

- promote a homogenization of ADR mechanisms in the autonomous communities towards systems that deal with all individual disputes, by recognizing the role autonomous systems have played in individual disputes in the next ASAC, thus establishing a framework; and

⁵² Enterprises can decline to implement the provisions of a collective agreement on economic, technical, organizational or production-related grounds without the consent of the negotiators of the agreement, or even of the representatives of the enterprise's employees, by requiring binding administrative arbitration.

⁵³ Case No. 2947 (Spain), complaint dated 10 May 2012: see http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50001:0::NO::P50001_COMPLAINT_FILE_ID:3063806 [accessed 24 Apr. 2016].

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- promote, through sectoral collective bargaining agreements, the establishment of ADR mechanisms in companies, through action of the joint committees.

Legislative reform could:

- specifically regulate mediation on labour matters, following the example set by civil and business mediation, in particular, recognizing and regulating the status of labour mediators and their training;
- provide support to initiatives such as court-annexed mediation through the necessary resources, and with legal reforms; and
- discuss, together with the social partners, preliminary administrative conciliation, considering the possibility of either abolishing its mandatory character and turning it into a voluntary administrative step that could be requested by one of the parties, or improving the resources allocated to it in order to enable it to become a genuine process of conciliation/mediation.

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Appendix I.

Legislation and collective agreements relating to individual labour dispute resolution mechanisms, institutions, procedures and processes at national level

- Royal Decree–Law No. 2756/1979, 23 November (Real Decreto–ley 2756/1979, de 23 de noviembre), assigning some of the functions of the Mediation, Arbitration and Conciliation Institute.
- Law No. 6/1985, 1 July, on the judiciary power (Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial).
- Royal Legislative Decree No. 1/1995, 24 March (Workers’ Statute) (Real Decreto Legislativo 1/1995, de 24 de marzo (Estatuto de los trabajadores)), arts 84 and 91.
- Law No. 27/1999, 16 Jul., on cooperative companies, art. 87 (Ley 27/1999, de 16 de julio, de cooperativas, art 87).
- Law No. 22/2003, 9 July on Bankruptcy (Ley 22/2003, de 9 de julio, Concursal)
- Law No. 36/2011, 10 October, regulating labour procedure (Ley 36/2011, de 10 de octubre, reguladora de la jurisdicción social: LJS), arts 63–73.
- Fifth agreement on autonomous labour dispute resolution (out-of-court system) (ASAC V), 7 February 2012 (Quinto acuerdo sobre solución autónoma de disputas laborales

(sistema extrajudicial) (ASAC V) 7 de febrero de 2012), *Boletín Oficial del Estado*, 23 November.

Royal Decree–Law No. 3/2012, 10 February (Real Decreto–ley 3/2012 de 10 de febrero, de medidas urgentes para la reforma del mercado laboral).

Law No. 23/2015, 21 July, Regulating Work and Social Security inspection, art. 1.2 (Ley 23/2015, de 21 de julio, Ordenadora del Sistema de Inspección de Trabajo y Seguridad Social, art. 1.2).

Appendix II.

Some ADR mechanisms at regional level created by collective agreements

Andalusia (SERCLA)

The Andalusian ADR labour dispute resolution system was created by the most representative unions and employers' organizations, integrated into the Andalusian Labour Relationship Council (according to the interprofessional agreement to establish an ADR system in Andalusia of 3 April 1996 and the interprovincial agreement of 4 March 2005 establishing a resolution system for specific disputes in SERCLA⁵⁴). It is funded by the Andalusia autonomous community government. As far as individual conflicts are concerned, its coverage is limited to disputes involving professional classification, functional mobility, substantial modifications of work conditions, licences, leave and working time reductions (including those linked to the care of children and other relatives), as well as any salary or economic claims derived directly and immediately from such issues. The relevant regulations state that with respect to these matters, the SERCLA mechanisms may substitute for the mandatory and preliminary stage of administrative conciliation. The regulations provide for conciliation/mediation (no distinction is made between these two) and arbitration. The conciliation/mediation process is conducted by a two-member commission (Conciliation–Mediation Commission). Members are designated by those organizations that signed the SERCLA agreement since they are the most representative. Conciliation/mediation before SERCLA has the same legal status as preliminary administrative conciliation in the LJS.⁵⁵

Aragonese Mediation and Arbitrage Service (SAMA)

This service covers individual disputes as well as those involving economically dependent self-employed workers and their employers. The fourth agreement on ADR of labour conflicts in Aragon is established as an agreement that is to be mandatorily followed by all

⁵⁴ Acuerdo interprofesional para la constitución de un sistema de resolución extrajudicial de conflictos colectivos laborales de Andalucía de 3 de abril de 1996; Acuerdo Interprovincial de 4 de marzo de 2005 por el que se instaura un sistema de solución de determinados conflictos individuales en el seno del SERCLA.

⁵⁵ See <http://www.juntadeandalucia.es/empleo/carl/portal/web/guest/sercla-inicio> [accessed 23 Mar. 2016].

employers' organizations and unions in Aragon, as well as by all companies and staff in any sector of activity. The agreement comprises mediation/conciliation procedures, making no distinction between the two, and arbitration. SAMA can also undertake preventive functions in labour disputes.

Mediation/conciliation in individual disputes, when dealing with an issue that must be submitted to conciliation, as established by article 63 of the LJS, is mandatory when requested by one of the parties. Mediation/conciliation can also be used in matters where it is not mandatory, if both parties agree. The mediation/conciliation procedure states that the mediating agency will offer proposed solutions to both parties and, in the event of an agreement not being reached, will offer them the option of submitting themselves to the arbitration procedure. The effects of mediation will be the same as those established in the LJS for preliminary administrative conciliation.⁵⁶

Balearic Islands Arbitrage and Mediation Court (TAMIB)

TAMIB was founded by the second interprofessional agreement on the renewal and strengthening of the TAMIB.⁵⁷ It deals with the resolution of individual disputes, including cases of termination of employment and discipline. It also deals with conflicts involving economically dependent self-employed workers. TAMIB acts as a mediation and conciliation agency under article 63 of the LJS. Its founding agreement uses the term “conciliation–mediation”, and enables a third conciliating party to make settlement proposals to the parties concerned. Any agreement will be enforceable between intervening parties without the need to ratify them before a judge.⁵⁸

Catalonia Labour Court (Tribunal Laboral de Catalunya: TLC)

The TLC was founded by the most representative unions and business organizations. It has adopted the form of a private foundation, funded by the Labour Department of the Catalan Autonomous Government.⁵⁹ According to its internal statutes, the court acts as a conciliation–mediation agency under article 63 of the LJS. It deals with individual disputes, excluding from its scope conflicts over dismissals and sanctions, economic claims and freedom of association. For a matter to come before the court, the consent of both parties is required. This consent will be understood as expressed when one of the parties requests the court to act and the other party attends the appointment with the court. Consent to jurisdiction will be assumed when a collective bargaining agreement includes a clause stipulating submission to the conciliation process. According to the rules established by the

⁵⁶ See <http://www.fundacionsama.com/conozcanos/index.htm> [accessed 23 Mar. 2016].

⁵⁷ “Fundación de arbitraje y mediación de las Islas Baleares. II Acuerdo Interprofesional sobre renovación y potenciación del ‘Tribunal de Arbitraje y Mediación de las Illes Balears’”, *Official Newsletter of the Government of the Balearic Islands*, 3 Feb. 2005.

⁵⁸ See <http://www.tamib.es/> [accessed 23 Mar. 2016].

⁵⁹ Regulation on the workings of the Labour Court of Catalonia (*Official Newsletter of the Government of Catalonia*, 15 Sep. 1999), modified by the Interprofessional Agreement of Catalonia, 2011–2014 (*Official Newsletter of the Government of Catalonia*, 18 July 2013) (Tribunal Laboral de Catalunya. Reglamento de funcionamiento del Tribunal Laboral de Catalunya (*DO Generalitat Catalunya* de 15 de septiembre 1999), modificado por el Acuerdo interprofesional de Catalunya, 2011–2014 (*DO Generalitat Catalunya* de 18 de julio de 2013)).

Resolving individual labour disputes: A comparative overview

agreement that ratified the statutes, a two-member commission acts in the conciliation of individual disputes. One of its members will be appointed by the business organizations and the other by the unions. The commission can, during the process of conciliation, propose an agreement to the parties. Conciliation/mediation before the court will have the same effect as administrative conciliation established in the LJS.

Community of Madrid Labour Institute

This body was founded by the most representative unions and business organizations in the form of a foundation under the authority of the Community of Madrid, with public funding. According to its statutes, the Labour Institute acts as the conciliation and mediation agency for the purposes of the LJS, as well as acting in those disputes that are attributed to it. It deals with a limited range of individual disputes, excluding those related to the termination of contracts, disciplinary regimes, economic claims and freedom of association. In order for the institute's mechanisms to come into play, it is necessary that a collective bargaining agreement that regulates the employment relationship in question explicitly makes reference to it, or that both parties explicitly agree to submit themselves to it. The institute is composed of 24 members appointed by the organizations that signed the founding agreement. No distinction is made between conciliation and mediation.

8. Sweden

Jenny Julén Votinius

8.1. Background and legal framework

Introduction

Swedish labour law has developed in close relation to the national industrial relations model. This is a model characterized by powerful social partners who sign nationwide collective agreements; a high degree of unionization; and virtually no state intervention in the negotiation or application of collective agreements.

Swedish labour law is extensive, detailed and universal in scope. Normally, the same legislation applies to all employees irrespective of labour market sector, position and duration of employment contract. With the exception of wages, most areas of labour law are statutorily regulated. The comprehensive body of labour law legislation covers areas such as employment protection, workplace health and safety, non-discrimination, working time, co-determination, freedom of association, collective bargaining and collective action. A characteristic feature of Swedish labour law is that most of the legislation is “semi-compelling” in the sense that deviations from otherwise mandatory rules may be specified through collective bargaining. As a result, collective agreements hold a significant position as a legal source in Swedish labour law, regulating the majority of employees’ terms and conditions of employment. A collective agreement is defined by law as “an agreement in writing between an organization of employers or an employer and an organization of employees about conditions of employment or otherwise about the relationship between employers and employees”.¹

The highly refined interaction between statutory law and collective agreements illustrates the significant role of Swedish labour market actors in the development of labour relations. The cornerstones of the industrial relations system are self-regulation, cooperation between social partners and autonomous collective bargaining. An overwhelming proportion of the workforce are members of a union, and almost all employees

¹ Co-determination Act (1976:580), sec. 23.

in the country are employed in workplaces covered by collective agreements.² The Swedish system of employee representation is a so-called *single-channel* system (cf. Biagi and Tiraboschi, 2010; Rose, 2009, pp. 49ff). That is, the employees are represented by their unions alone, and there are essentially no parallel forms of representation through systems within the company, such as works councils. The Swedish trade unions thus represent their members both in their capacity as parties in collective agreements and on location in the workplace, inter alia as representatives in legal disputes (see Weiss, 2004; Bamber, Lansbury and Wailes, 1998).

The design of the system for resolution of labour market disputes must be understood as a backdrop to the social partners' strong position. Whereas continental models of dispute resolution give primacy to the individual judicial process, and the British model emphasizes the industrial relations process, the Nordic model to which the Swedish system belongs builds strongly on the primacy of the collective judicial process (Malmberg, 2009). Grievance negotiations between the employer and the trade union of which the employee is a member have a key function. The court of highest instance with regard to labour disputes is the Swedish Labour Court, the majority of whose members are appointed by the labour market organizations (trade unions and employers' organizations). Court proceedings are almost always preceded by grievance negotiations between the employer and the trade union and, effectively, the negotiation procedure functions as a hearing of first instance in most labour disputes. In cases where the employee is not represented by a trade union, the matter has to be brought before a local district court in the first instance (as it must also in the less common situation that the employer is not bound by a collective agreement, although these disputes must be subject to grievance negotiations with the trade union before court action is brought). The core mechanisms in the system for individual labour disputes are thus grievance negotiations and judicial review in the Swedish Labour Court, and occasionally also in the local district court. In addition, the system includes the settlement of negotiations initiated by the Equality Ombudsman, which may arise in discrimination cases only, and arbitration, the use of which is limited to a very small number of disputes. By contrast, the activities of the labour inspectorate lie outside the area of individual labour disputes, and thus outside the scope of this chapter.³

² Approximately 90% of Swedish employees are covered by a collective agreement (Swedish National Mediation Office, 2015, p. 36). About 70% of all employees are members of a union, but employers bound by a collective agreement are obliged to apply the collective agreement in respect of all employees, regardless of union membership. This obligation stems from the collective agreement, and thus only the union can require the employer to comply with it. Non-unionized employees cannot demand to be covered by the collective agreement.

³ At workplace level, the social partners are closely involved in health and safety matters, both on safety committees and through the appointment of safety delegates. In the event of a disagreement about the application of statutory law on health and safety, the trade union may file a report to the labour inspectorate, but can never bring an action against the employer. The enforcement of the legal provisions on health and safety is the responsibility of the labour inspectorate alone, and all cases in this area are ruled upon by the administrative courts.

The chapter is structured as follows. In the remainder of section 8.1 the different mechanisms are introduced and situated in the context of Swedish labour law and industrial relations. Section 8.2 describes in more detail the design and scope of the various mechanisms, and how they relate to other mechanisms. Section 8.3 evaluates the efficiency of the various mechanisms, in terms of accessibility, cost, time, and their contribution to the prevention and resolution of individual labour disputes. This section also highlights the respective strengths and weaknesses of the different mechanisms in relation to certain kinds of disputes, and in relation to certain categories in the labour market. Section 8.4 concludes the investigation and discusses the findings.

The concept and legal framework of individual labour disputes

The concept of labour disputes is defined in the Labour Disputes Act 1974:371 as covering “disputes concerning collective agreements and other disputes relating to the relationship between employers and employees”.⁴ The reference to the relationship between employers and employees means that all disputes that originate in an employment relationship qualify as individual labour disputes. Likewise, disputes arising from a previous employment relationship – such as disputes over redundancy payments, the preferential right to re-employment for an employee who has been made redundant, or pension rights agreed upon in the employment contract – also constitute labour disputes. Although labour disputes normally involve the application only of labour legislation, they may also concern the application of legislation stemming from other fields of law, such as contract law and tort law.⁵ It is thus the employment relationship that is the decisive factor in the definition of a labour dispute. In addition, disputes as to whether or not an employment relationship exists are categorized as labour disputes.⁶

The guiding principle, then, is that a labour dispute must be founded in an *existing or previous employment relationship*. However, in certain cases an individual labour dispute may also occur between an employer and a person who is not, and never has been, employed by the employer. Thus, disputes between temporary agency workers and user undertakings concerning the application of legislation on temporary agency work are considered to be labour disputes.⁷ The same applies for discrimination cases, where the concept of labour dispute covers not only disputes between employers and employees, and between temporary agency workers and user undertakings, but also disputes between employers and jobseekers; persons inquiring about or applying for work; and persons applying for or carrying out a traineeship.⁸ Disputes between employers and jobseekers are furthermore considered to be labour disputes in cases concerning the prohibition on unfavourable treatment on the grounds of parental leave.⁹

⁴ Labour Disputes Act (1974:371), sec. 1.

⁵ Swedish Labour Court judgment, *Judgments of the Swedish Labour Court (Arbetsdomstolens Domar: AD)* 1978 No. 83.

⁶ Government Bill Prop. 1974 No. 77, p. 138; Swedish Labour Court judgment, AD 1977 No. 205.

⁷ Temporary Agency Work Act (2012:854), sec. 17.

⁸ Discrimination Act (2008:567), ch. 6, sec. 1.

⁹ Parental Leave Act (1995:584), secs 16 and 23.

To sum up: in Sweden, the concept of individual labour disputes covers all disputes between employers and employees or previous employees. In certain cases it also covers disputes between user undertakings and temporary agency workers, as well as disputes between employers and trainees or persons at various stages of a jobseeking process. The definition of labour disputes applies equally in private and public employment.

Central legislative sources in the area of dispute resolution are the Labour Disputes Act (1974:371), which is the legislative instrument regulating judicial review of labour disputes, the provisions on civil disputes in the Code of Judicial Procedure (1942:740) and the Co-determination Act (1976:580), which sets out the legal framework for trade union negotiations; this applies unless the collective agreement stipulates a different procedure. In addition, the Discrimination Act (2008:567) is an important source of law regarding the competence of the Equality Ombudsman to represent claimants in discrimination cases. Finally, the Arbitration Act (1999:116) applies for the review of the small number of cases that are ruled upon by arbitration boards.

Institutions, mechanisms and processes: An overview

The Swedish system for resolution of individual labour disputes is fairly uncomplicated. The Swedish Labour Court is the court of final instance in all disputes except for those adjudicated by arbitrators. Depending on the nature of the dispute, proceedings in the Swedish Labour Court are always preceded by grievance negotiations between the employer and the trade union at local and – when necessary – central level, proceedings in the district court, or settlement negotiations initiated by the Equality Ombudsman.

Virtually all labour legislation contains provisions on limitation periods for disputes, and these are generally short. For example, as regards disputes about breaches of collective agreement, grievance negotiations must be initiated by the trade union within four months of the alleged breach. After the termination of the negotiations there is a three-month maximum period within which action must be brought before the Swedish Labour Court.¹⁰ In dismissal cases, a claim for invalidity must be announced to the employer within two weeks of the notice of dismissal, by the trade union or – for the non-unionized employee – by the employee him- or herself. Court action must be brought within a further two weeks or, if the case is negotiated by the trade union, within two weeks from the end of the negotiations.¹¹

The short limitation periods reflect a legislative intention that disputes in the field of labour law be resolved promptly. In certain cases, there are also statutory requirements that the hearings shall be conducted expeditiously. Such provisions, intended

¹⁰ Co-determination Act (1976:580), secs 54–55.

¹¹ Regarding claims for damages in dismissal cases, the limitation period is somewhat longer: a claim must be submitted to the employer within four months from the notice of dismissal (Employment Protection Act, (1982:80), secs 40 and 41).

to speed up the court process itself, apply *inter alia* in cases of invalidity of dismissal, discrimination, and the protection of union representatives.¹²

The system rests on an important distinction between disputes that involve the participation of a trade union and those that do not. Trade unions have the right to represent their members in legal disputes, and can bring action even without the explicit consent of the union member. The same applies for employers' organizations. This is because although it is the particular case that is of primary relevance for the individual employee, in more general terms the interpretation and application of labour law are regarded as a collective interest.

In individual labour disputes where the employee is represented by the trade union, the first step in the resolution process is a grievance negotiation between the trade union and the employer or the employers' organization on the issue in contention. The negotiation must be conducted in accordance with the provisions of the Co-determination Act and/or with the rules on negotiation laid down in a collective agreement between the parties. The completion of negotiations is a procedural requirement; according to the Labour Disputes Act, the dispute cannot be brought before the court until the negotiations are finished. In practice, grievance negotiations between the employer and the trade union are clearly the dominant mechanism for the prevention and resolution of individual labour disputes. In the vast majority of labour disputes – estimated at more than 90 per cent and perhaps as much as 98 per cent of cases – a settlement is reached through this mechanism, thus avoiding a trial in the Swedish Labour Court. If the parties fail to settle the dispute in negotiations, action can be brought directly before the Swedish Labour Court, provided that the employer has signed a collective agreement. This is normally the case, given that, as noted above, around 90 per cent of Swedish employees are covered by a collective agreement. In these cases the Labour Court is the court of first instance and indeed the only one. In the less common event that the employer is not bound by a collective agreement, action must instead be brought before the local district court (except for disputes regarding freedom of association, which can always be brought by the trade union directly before the Swedish Labour Court, irrespective of whether or not a collective agreement applies in the workplace). The ruling of the local district court can be appealed to the Swedish Labour Court, provided that leave to appeal has been granted. The rulings of the Swedish Labour Court cannot be appealed.

In the rare case that an employer wants to bring action against an employee who is not a union member, and who performs work covered by a collective agreement by which the employer is bound, action shall be brought directly before the Labour Court (Eklund 2005, p. 98).¹³ In all other disputes where the employee is not represented by a trade union – because the employee is not a member of a trade union, or because the

¹² Employment Protection Act (1982:80), secs 40 and 41; Discrimination Act (2008:567), ch. 6, sec. 8; Trade Union Representatives (Status in the Workplace) Act (1974:358), sec. 6. Cf. Swedish Government Report SOU 2010:44 on special rules for certain types of cases presented before court, p. 201.

¹³ Labour Disputes Act (1973:371) ch.2, sec. 1.

trade union considers the claim to be unfounded and therefore refuses to represent its member – action must be brought in the local district court as the court of first instance with the possibility to appeal to the Swedish Labour Court.¹⁴ Access to support in legal disputes is considered one of the main benefits of trade union membership. Subject to a general rule of thumb only to engage in disputes that have arisen after the employee became a member, some trade unions provide legal support for new members from the beginning of their membership; others apply a waiting period of (normally) three months. An employee who is not represented by a trade union cannot make a dispute subject to grievance negotiations, as the right to negotiate belongs exclusively to labour market organizations and employers. A special procedure applies in disputes regarding dismissal for personal reasons, where the employee always has the right to consultations with the employer. These consultations, which can be conducted with or without the representation of a trade union, replace the ordinary grievance negotiations.¹⁵ In disputes on discrimination and unfavourable treatment on the grounds of parental leave, a claimant may instead request to be represented by the Equality Ombudsman, which is the national supervisory authority for the Discrimination Act. As regards employees who are trade union members, the Equality Ombudsman can act only if the trade union refrains from exercising its right to represent the union member in the dispute concerned. Before taking action, the Ombudsman must verify that this is the case.¹⁶ If the Equality Ombudsman accepts a request to represent the claimant, the authority must try to reach a settlement between the parties by which the employer pays financial compensation and, ideally, also admits discrimination.¹⁷ If the settlement negotiations fail, the case can be brought directly before the Swedish Labour Court, where the Equality Ombudsman has legal standing when representing a claimant.¹⁸ The Equality Ombudsman and its activities are considered in detail below.

Within certain limits, arbitration clauses are permitted both in private employment contracts and in collective agreements. Arbitration is a single-instance proceeding and the final ruling cannot be appealed on the substantive ground. As will be described in more detail below, in practice the occurrence of arbitration clauses is very limited. As regards individual employment contracts, arbitration clauses are common

¹⁴ The trial follows the Code of Judicial Procedure (1942:740).

¹⁵ Employment Protection Act (1982:80), sec. 30.

¹⁶ Discrimination Act (2008:567), ch. 6, sec. 2.

¹⁷ According to the Discrimination Act (2008:567), ch. 4, sec. 1, the Equality Ombudsman should first seek voluntary compliance with the law. There is no formal requirement that the action before the court should be preceded by settlement negotiations, but in its capacity as a governmental authority, the Equality Ombudsman must handle the all cases objectively and thoroughly. In practice, this means that deliberations or negotiations are standard routine in cases of alleged discrimination: cf. Government Bill Prop. 2007/08:95, p. 431.

¹⁸ In addition to the Equality Ombudsman, non-profit organizations also have legal standing when representing a claimant before the court in cases of discrimination. In these cases, an action must be brought before the district court in the first instance, because non-profit organizations cannot bring a case directly before the Swedish Labour Court. To date, no case regarding discrimination in working life has ever been brought by a non-profit organization.

in relation to chief executive officers (CEOs) and very unusual for other employees. There are also some collective agreements that contain arbitration clauses, mainly in the banking sector and for care assistants. These collective agreements refer disputes to an arbitration board set up by the parties (that is, the trade union and the employer, or the non-unionized employee and the employer). The labour market organizations also have a number of permanent, jointly established arbitration boards that deal specifically with disputes on certain matters, such as occupational insurance. The review is free of charge for unionized employees, while non-unionized employees must normally bear the cost themselves. If a dispute is not brought to court, but instead is referred to one or several arbitrators for resolution, the proceedings are to be conducted under the Arbitration Act. Generally, the parties and the arbitrators are free to tailor the arbitration proceedings to meet the conditions of the specific case. However, there is a basic requirement that the arbitration board must handle the dispute in an impartial, practical and speedy manner.¹⁹ Any person who possesses full legal capacity in regard to his or her actions and property may act as an arbitrator.²⁰ An arbitrator shall be impartial, and a party may request that an arbitrator shall be discharged on the ground of any circumstance which may diminish confidence in the arbitrator's impartiality.²¹

Table 8.1 presents a schematic illustration of the mechanisms for dispute resolution. As regards the description of the different steps in the resolution processes, the numbered steps in **bold** type in the table indicate negotiation, whereas those in plain type indicate contentious proceedings before court or arbitrators.

8.2. Institutions, mechanisms and processes: A closer look

Grievance negotiations between the trade union and the employer

Background

The requirement in the Labour Disputes Act that the trade union and the employer or the employers' organization must have completed grievance negotiations before bringing an action before the court acknowledges and upholds the hallmark of Swedish industrial relations: namely, the social partners' firmly established tradition of joint efforts to resolve conflicts and disagreements independently without interference from the Government. Within this tradition, negotiations have always been the resolution mechanism of choice.

The subject of grievance negotiations, and the negotiating parties

In a legal dispute, the subject of negotiation is an infringement or an interpretation of a legal provision, a collective agreement or an employment contract. No other limit is

¹⁹ Arbitration Act (1999:116), sec. 22.

²⁰ Arbitration Act (1999:116), sec. 7.

²¹ Arbitration Act (1999:116), sec. 8.

Table 8.1. Summary of the mechanisms for resolution of individual labour disputes in Sweden

TYPE OF LABOUR DISPUTE	POSSIBLE CLAIMANTS	THE DIFFERENT STEPS IN THE DISPUTE RESOLUTION PROCESS			
		1. Negotiations with local trade union	2. Negotiations with central trade union	3. District Court	4. SWEDISH LABOUR COURT, FINAL INSTANCE
The employer has a collective agreement and the employee is represented by a trade union ...and all cases on freedom of association	Trade union representing the employee Employer Employer's organization representing the employer	1. Negotiations with local trade union	2. Negotiations with central trade union	3. SWEDISH LABOUR COURT, FINAL INSTANCE	
The employer does <i>not</i> have a collective agreement and the employee is represented by a trade union ...except cases on freedom of association	Trade union representing the employee	1. Negotiations with local trade union	2. Negotiations with central trade union	3. District Court	4. SWEDISH LABOUR COURT, FINAL INSTANCE
The employee is <i>not</i> a trade union member, but performs work covered by the collective agreement to which the employer is bound	Employer Employer's organization representing the employer	1. SWEDISH LABOUR COURT, FINAL INSTANCE			
The employer does <i>not</i> have a collective agreement	Employer	1. District Court	LEAVE TO APPEAL	2. SWEDISH LABOUR COURT, FINAL INSTANCE	
The employee is not represented by trade union	Individual employee	1. SWEDISH LABOUR COURT, FINAL INSTANCE			
Discrimination or unfavourable treatment in connection with parental leave	Equality ombudsman representing the employee	1. SWEDISH LABOUR COURT, FINAL INSTANCE			
Matters covered by an arbitration clause	Individual employee Trade union representing the employee Employer Employer's organization representing the employer	1. ARBITRATORS, FINAL INSTANCE			

placed on the scope of negotiations between the trade union and the employer; every trade union which has, or has had, a member in the workplace is entitled by law to negotiate with the employer on *any matter* relating to the relationship between the employer and that member. The employer has an equivalent right to negotiate with the trade union.²²

The right to participate in grievance negotiations covers labour market organizations and individual employers, but does not apply to individual employees. In disputes regarding dismissal for personal reasons, a special procedure applies. Here, the ordinary grievance negotiations are replaced by consultations with the employer, in which the employee always has the right to participate, with or without the representation of a trade union.²³ Notice of dismissal must not be given until the consultations have been concluded. This consultation procedure applies only in dismissal disputes.

Grievance negotiations are initiated at the local level, in the workplace, where one or more employees are often representatives of the established trade union. These representatives have been elected by the employees in the workplace who are members of the established union, but are formally appointed by the union. By and large, the right to represent the employees in the workplace belongs primarily to the trade union in relation to which the employer is bound by a collective agreement. However, every trade union having a member who is, or has been, employed in the workplace enjoys a right to negotiate with the employer on issues concerning the relationship between the employer and that particular member of the union.²⁴ This right of so-called general negotiation is intended to open the way for trade union initiatives aimed at ensuring that collective agreements are put in place. Of more immediate relevance to the theme of this chapter is that the right to negotiate allows the union to represent its member in a dispute on legal issues.

Many disputes on legal matters are resolved at an early stage – through grievance negotiations in the workplace – in local negotiations. In legal disputes, it is not unusual for representatives of the industry-wide organization to become involved in negotiations at local level. In many cases, legal disputes involve complicated considerations on points of law and also interpretations of the collective agreement. In such situations it is common to opt for so-called “reinforced local negotiations”, where a representative from the industry-wide organization takes part in the local negotiations to support the workplace representatives. If the conflict cannot be settled at the workplace level, another round of negotiations must take place. In these so-called *central negotiations*, the employer meets with representatives from the industry-wide organization. In cases where the workplace has no elected representatives, and in those where the employee is a member of a union to which the employer is not bound by a collective agreement, the employee is also represented by the industry-wide organization at the local level.

²² Co-determination Act (1976:580), sec. 10.

²³ Employment Protection Act (1982:80), sec. 30.

²⁴ The employer has an equivalent right to negotiate with the employees' organization: Co-determination Act (1976:580), sec. 10.

The grievance negotiation process

Most collective agreements contain a specific part with provisions on the relations between the contracting parties. This part of the agreement, called the negotiation procedure, contains detailed instructions about the order in which the parties shall conduct negotiations and the bodies to which the dispute will be passed on if the negotiation ends in disagreement. In the absence of a collectively bargained negotiation procedure, the parties must adhere to the provisions on collective bargaining and negotiations laid down in the Co-determination Act.

The statutory provisions on collective bargaining and negotiations promote promptness, communication and cooperativeness. Negotiations are normally to be held no later than two weeks after the demand for negotiations has been put forward, and they are to be conducted expeditiously. Both the employer and the trade union representative must appear at negotiation meetings, state their respective positions on the issue and the reasons for it, and put forward reasoned proposals for how the matter to which the negotiations relate shall be resolved. There is also an obligation to examine objectively and consider the other party's position. There is no requirement that the parties must agree.

In this context, the statutory provisions on the trade union's preferential right of interpretation should be mentioned. In certain matters, a trade union involved in a dispute with the employer is entitled to request that the view it represents should prevail over the employer's opinion until the dispute is finally resolved. In individual labour disputes on legal matters, this preferential right of interpretation applies to disputes over the interpretation of legislative provisions, collective agreements and employment agreements concerning pay or other remuneration, and on the interpretation of provisions concerning a member's duty to perform work.²⁵ The union's preferential right of interpretation is of greatest practical importance in determining the obligation to work. In a dispute regarding a union member's duty to perform work under the collective agreement by which the employer and the trade union are bound, the organization's position shall apply until such time as the dispute has been finally adjudicated. If the employer considers that extraordinary reasons exist against postponement of the disputed work, the employer – notwithstanding the union's priority right of interpretation – may require that the work be performed according to his interpretation in the dispute. The employee is then obliged to perform the work.²⁶

A party who considers that the duty to negotiate has been fulfilled may withdraw from the grievance negotiations by giving the other party notice in writing. If the local negotiations end in disagreement, either of the parties may request central negotiations, where the employee is represented by delegates from the industry-wide

²⁵ Co-determination Act (1976:580), secs 33–34.

²⁶ Such an obligation will not arise, however, if the employer's interpretation in the dispute is incorrect and the employer realizes or should have realized this, or where the work involves danger to life or health, or where there are similar obstacles.

organization and the employer may be represented by an employer organization. Unless the collectively bargained negotiation procedure states otherwise, the parties must have concluded grievance negotiations at both local and central level before the dispute is brought before the court. As will be discussed later in this chapter, most individual labour disputes are resolved in grievance negotiations, normally resulting in an agreement whereby the employee is financially compensated by the employer. In dismissal cases, it is also fairly common for the agreement to include access to some kind of professional support, at the employer's expense, to help the employee to continue a career elsewhere.

In the limited number of cases that are not resolved through the grievance negotiation, procedure, the dispute can be brought to court by the trade union or by the employer. Most disputes can be brought directly before the Swedish Labour Court after grievance negotiations. If the employer is not bound by a collective agreement, however, the case must first be brought to the local district court. This also applies for cases that are brought by an individual employee who is not represented by a trade union. The adjudication of individual labour disputes follows essentially the same court procedure in the Swedish Labour Court and in the local district courts, that is, the general court procedure for civil disputes. The main difference between labour disputes and other civil disputes lies in the jurisdiction of the courts, not in the procedure itself. The next two sections go into detail about the resolution of individual labour disputes through judicial review. General aspects of the process, common to the proceedings in the Swedish Labour Court and in the District Court, are examined and presented in the first section below, on the Labour Court; the following section focuses on aspects specific to review in the local district courts.

Judicial review in the Swedish Labour Court

Background of the Swedish Labour Court

The Swedish Labour Court was established by the Collective Agreements Act (1928:253), the precursor of the current Co-determination Act, with the aim of setting the legal framework for trade union cooperation.²⁷ The Collective Agreements Act imposed a rule known as the peace obligation, which still applies. The peace obligation prohibits the parties to a collective agreement from taking industrial action against each other, not only in disputes of interest but also in legal disputes. In order to safeguard a peaceful means for the parties to resolve disagreements in legal disputes, the same law established the Swedish Labour Court and gave it jurisdiction as the court of sole instance in matters of interpretation and application of collective agreements. All labour disputes that concerned matters outside the application of collective agreements were still to be settled in district courts, with right of appeal to the Court of Appeal.

Subsequently, it became clear that the division of jurisdiction between the Swedish Labour Court and the public courts was giving rise to a somewhat fragmented and ambiguous case law in the area of labour law. In 1974 the Labour Disputes Act

²⁷ The Act on Mediation in Industrial Disputes was introduced as early as 1906: see Lundh, 2006.

was adopted, which among other things changed the allocation of disputes between the Swedish Labour Court and the public courts in order to promote a more coherent development of jurisprudence.²⁸ Through this act, the Swedish Labour Court was given exclusive jurisdiction over virtually all labour disputes in the organized labour market, and also became appellate court to the district court in disputes between non-unionized parties. With some subsequent adjustments, this order still prevails.

Jurisdiction and grounds for individual disputes

In terms of the grounds for the dispute, the jurisdiction of the Swedish Labour Court covers most matters that may arise in an individual labour dispute. However, there are a few exceptions. Thus, cases regarding bankruptcy and company restructuring are excluded from the court's jurisdiction, as are cases concerning damages for criminal injuries where the action is brought in conjunction with the prosecution of the offence. These cases are to be brought before the district court and appealed to the Court of Appeal. Furthermore, the Swedish Labour Court may not rule in cases concerning compensation for industrial injuries. As will be explained below, these cases are instead decided through a collectively agreed arbitration procedure. Finally, cases regarding public employment are ruled upon by the Swedish Labour Court, with three exceptions: cases on employment decisions, cases on the obligation of permanent judges to perform duties, and cases on matters governed by statute or other enactment according to which a decision in the matter may be appealed to the Government, an administrative court or an administrative authority.²⁹

Cases referred to the Swedish Labour Court are divided into two categories: cases that are heard directly by the court as first and only instance, and cases that are heard on appeal against decisions from the district court. The two categories are referred to in the Swedish Labour Court's internal classification system as A-cases and B-cases, respectively. Not all B-cases reach the Swedish Labour Court, because leave to appeal is required.

To qualify as an A-case, that is, to be referred directly to the Swedish Labour Court, the dispute must meet two conditions, relating respectively to the identity of the claimant and to the subject of the dispute. Thus, the action must be brought by an employers' organization, an employees' organization or an employer who has entered into a collective agreement on an individual basis. Thus, an individual employee cannot bring a dispute directly to the Swedish Labour Court. Second, the case must concern a dispute arising from a collective agreement, a dispute relating to the Co-determination Act (which regulates freedom of association and right to negotiation), a dispute between parties who are bound by a collective agreement, or a dispute relating to

²⁸ Government Bill Prop. 1974 No. 77. Labour Disputes Act (1974:371).

²⁹ Labour Disputes Act (1974:371), ch. 1, sec. 2. Cases concerning employment decisions in public employment are handled by the Governmental Board of Appeal, a public authority whose decisions cannot be appealed.

a workplace where work covered by a collective agreement by which the employer is bound.³⁰ A-cases also include disputes brought by the Equality Ombudsman.

All labour disputes that fail to meet any of the two abovementioned conditions belong to the second category, the B-cases, which are brought to the Swedish Labour Court on appeal from the district court. This category consists of disputes in which the employee is not represented by a trade union – either because the employee is not a member of a union, or because the trade union has deemed the claim unfounded and thus has refused to provide legal support – and disputes where the action is brought by or against an employer who is not bound by a collective agreement.³¹

Procedural requirements

In those cases where the Swedish Labour Court is the court of first and only instance – the A-cases – the parties, that is, the trade union and the employers' organization or employer, must have completed grievance negotiations on the issue in dispute before an action is brought before the court.³² The negotiations must have been conducted under the provisions set out in the Co-determination Act – which applies to trade unions, employers' organizations and employers, but not to individual employees – or according to a collective agreement. It is important to emphasize that the negotiations must be fully completed before the action is brought. Normally, this means that negotiations must have taken place at both local (workplace) and central (industrial) level. Unfinished grievance negotiations constitute a procedural impediment to be considered by the Swedish Labour Court following a preliminary objection of inadmissibility from a party.³³ The court may, on its own initiative, also refer a dispute back to negotiation, but that rarely happens.³⁴ If negotiations have been made impossible owing to circumstances over which the plaintiff has no control – most often because the counterparty has refused to negotiate – the claim may nevertheless be considered by the court.

If the Swedish Labour Court finds that the matter of the dispute falls within the scope of an arbitration clause, the court shall refer the parties to arbitration. Therefore, unless the court finds that the arbitration clause can be deemed unreasonable and thus null and void, the existence of such a clause constitutes a procedural impediment.³⁵ (Arbitration in labour disputes is considered later in this section of the chapter.)

In the B-cases, where the Swedish Labour Court rules in the second and final instance on appeal from the district court, leave to appeal is a procedural requirement.³⁶ Leave to appeal shall be granted in cases where there seems to be reason to question the

³⁰ Labour Disputes Act (1974:371), ch. 2, sec. 1.

³¹ In *collective* labour disputes, the parties may always choose to bring a case to the district court in the first instance, but this happens very rarely: Labour Disputes Act (1974:371), ch. 2, sec. 2.

³² Labour Disputes Act (1974:371), ch. 4, sec. 7.

³³ Government Bill Prop. 1974 No. 77 pp. 175 and 259.

³⁴ There is fairly comprehensive case law on this subject, stemming from the 1970s and the early 1980s: see Fahlbeck, 2008.

³⁵ Government Bill Prop. 1975/76 No. 81, p. 114; Swedish Labour Court judgments, AD 1987 No. 65 and 1998 No. 103.

³⁶ Labour Disputes Act (1974:371), ch. 4, sec. 13.4.

accuracy of the judgment of the district court, or if the case involves setting a precedent in the interpretation of the law.³⁷

Just like trials in the public courts, proceedings in the Swedish Labour Court follow the Swedish Code of Judicial Procedure and are subject to the procedural requirements that follow from these standard court procedures as regards the competence of the court in terms of location, the competence of the parties to engage in legal proceedings, the justiciability of the dispute – that is, the absence of *litispendens* (a case pending on the same matter) or *res judicata* – and the following of correct procedure in initiating the action.³⁸

Involvement of the social partners

The importance of industrial relations and the autonomy of the social partners is strongly reflected in the Swedish system for the prevention and resolution of individual labour disputes. The system features a considerable involvement of the social partners, and the very starting point in the dispute resolution model is that the parties shall make comprehensive efforts to solve the dispute through grievance negotiations. Moreover, if the parties have agreed upon a process for the resolution of legal disputes in a collective agreement, the negotiations preceding a judicial review must follow that process. Only in the rare cases where there is no collective agreement on negotiations in legal disputes shall the negotiations be conducted according to the statutory Co-determination Act (1976:580) (see section on grievance negotiations above).

The involvement of the social partners is not limited to the grievance negotiations preceding a judicial review. They also play a fundamental and decisive role in the work of the Swedish Labour Court, as the court is a joint body in which the majority of members are representatives of the social partners. The Swedish Labour Court has a total of 25 members: eight professional judges, who serve as chairpersons (four) and vice-chairpersons (four); three neutral individuals with specialized knowledge of the labour market (these individuals, who normally have a background in Government or in another authority in the area of working life, do not have to be qualified judges); and 14 representatives of the social partners.³⁹

In cases involving a possible change in the application of a fundamental legal principle or in a previously adopted interpretation of the law, the Swedish Labour Court may order the case or part of the case to be determined in a plenary session where all members of the court participate in the decision.⁴⁰ However, in most cases the court convenes with seven members: two professional judges (chairperson and vice-chairperson), one neutral expert on the labour market, and two members representing the interests of the employer and the employee, respectively. In less complicated cases, the court may sit with just three members: one professional judge (the chairperson) along with one representative each from the trade union and from the employers' organization.

³⁷ Government Bill Prop. 2007/08 No. 72, p. 13.

³⁸ Code of Judicial Procedure (1942:740).

³⁹ Labour Disputes Act (1974:371), ch. 3, secs 1–3.

⁴⁰ Labour Disputes Act (1974:371), ch. 3, sec. 9.

In all these settings, the representatives of the social partners are in the majority. For reasons that will be discussed below in the section on the role of the Equality Ombudsman, a particular composition applies in discrimination cases.⁴¹

The proceedings in the Labour Court

The labour market organizations have the right to represent their members before the Swedish Labour Court, and such an organization may bring an action on behalf of a union member, regardless of whether or not the member wants to bring action. Conversely, when an action is brought against a member or former member of an organization, the claimant must also bring action against the organization. When a case is brought before the Swedish Labour Court in the first instance, the employee must always be represented by a trade union or, in cases of discrimination and unfavourable treatment due to parental leave, by the Equality Ombudsman. In both these cases, the legal representation is provided free of charge. If the employee decides to bring action without the support of a trade union or the Equality Ombudsman, the legal costs can be very high. These cases are discussed in the next section.

To institute proceedings before the Swedish Labour Court, an application in writing must be made for a summons against the other party. Hearings in the Swedish Labour Court are free of charge. After an examination of the application, the court issues a summons requiring the defendant to answer the claim, and orders the respondent to comment orally or in writing on the content of the defendant's answer. In order that the issues in dispute be spelt out there is a pre-hearing procedure, which normally includes both written communication and one or several oral pre-hearing meetings supervised by the chairperson. During the pre-hearing, the chairperson must examine the possibilities for a settlement between the parties and, if appropriate, actively work to help them reach an amicable settlement.⁴² There is no mandatory settlement procedure in the Swedish dispute resolution system. However, to the appropriate extent considering the nature of the case and other circumstances, the court must actively work to persuade the parties to reach an amicable settlement in the preparatory stage. This requirement, which applies for all civil disputes, and is not specific to the field of labour law, can be fulfilled through settlement negotiations under the auspices of the court; alternatively, if both parties so wish, it can be fulfilled through mediation sessions involving a special mediator. Whereas settlement negotiations are free of charge, the parties normally have to pay for mediation. The mediator, who is appointed by the court, has both legal expertise and experience in various forms of dispute resolution, and has normally undergone training in mediation as well. It is very unusual for a special mediator to be appointed by the court in individual labour disputes. Settlement negotiations under the auspices of the court, on the other hand, are very common. In

⁴¹ Discrimination Act (2008:567), ch. 6, sec. 1; ch. 3, sec. 6a. In these cases, the Swedish Labour Court is normally composed of five members: two professional judges, one expert on the labour market, and one member representing the interests of the employer and the employee, respectively, which means that the social partners' representatives are *not* in the majority.

⁴² Code of Judicial Procedure (1942:740), ch. 42, sec. 17.

about one-third of the cases that come before the Swedish Labour Court, the dispute is resolved through settlement negotiations under the auspices of the court in the preparatory stage.⁴³ A settlement can be confirmed by the court, but this confirmation is not mandatory.

The main hearing is oral, and usually the parties are summoned to appear in person. If the parties want the case to be decided without a main hearing, the court may accommodate such a request. In the main hearing, witnesses are heard and evidence is presented before the court. There is no general restriction on what is admissible as evidence, and the court is free to select and value the evidence on which it bases its judgment.⁴⁴ The Swedish Labour Court applies standard court procedures, and may pass judgment only on that which has been presented by the parties in the main hearing.⁴⁵ As in other civil cases, the plaintiff in labour disputes is normally charged with the burden of proof. Exceptions are made for certain matters, such as discrimination, violation of freedom of association, and less favourable treatment due to parental leave. Here, the burden of proof is reversed: the employee must only establish facts from which it may be *presumed* that there has been a violation, at which point the burden of proof moves to the employer to provide an adequate explanation for the treatment concerned.

The members of the Swedish Labour Court normally play quite an active role in the proceedings, asking questions and helping the parties to clarify their legal arguments and/or their presentation of the facts in the case. Decisions of the Swedish Labour Court are made public on the day of delivery.

Individual labour disputes on first-instance examination in the district court

Background

The Swedish Labour Court has described itself as a kind of appellate court in relation to the grievance negotiation procedure.⁴⁶ The first-instance proceedings in the district court must be understood in this context; these proceedings normally take the place of grievance negotiations as an instrument to prepare the case for the Labour Court. The individual labour disputes that are brought before the district court are in most cases *not* preceded by grievance negotiations involving a trade union; the great majority of these disputes are brought by individual employees, and individual employees do not have the right to negotiate collectively.⁴⁷

⁴³ *Lag & Avtal*, 2014, No. 1.

⁴⁴ Free admission and free evaluation of evidence is the fundamental principle governing the law of evidence: see Wong, 2013, p. 771.

⁴⁵ Code of Judicial Procedure (1942:740).

⁴⁶ See e.g. Swedish Labour Court judgment, AD 1980 No. 76.

⁴⁷ A case brought by a trade union against an employer who is not bound by a collective agreement must be preceded by grievance negotiations: Labour Disputes Act (1974:371), ch. 5, sec. 1.

Jurisdiction and grounds for individual disputes

The requirement to initiate an action in the district court applies to disputes between non-unionized parties. The majority of such cases concern disputes where an employee brings an individual claim without being represented by a trade union – either because the employee is not a member of a trade union, or because the union believes that the claim is wrongful and therefore refuses to represent the union member. Individual employees may bring an action to the district court for a breach of the employment contract, as well as for a violation of statutory labour law. Common matters for individual labour disputes are discrimination, dismissal and wages.⁴⁸ The district court is also the court of first instance in disputes where action is brought by or against an employer who is not bound by a collective agreement.⁴⁹ In both these cases, the Swedish Labour Court is the appellate court.

Trade unions provide legal support to members free of charge. If the trade union does not represent the employee in the district court, the cost of the proceeding is borne by the employee. Self-representation is allowed in all Swedish courts and there is thus no formal requirement to be represented by a lawyer in a labour dispute. Nevertheless, employees who are not represented by a trade union normally choose to hire a lawyer.⁵⁰

When a lawsuit is filed with the district court, an application fee must be paid; this currently stands at €280.⁵¹ There are no other fees to be paid to the court, but if the dispute is lost, the employee must pay the litigation costs (that is, the lawyer's fee) for the winning side in addition to the employee's own litigation costs. An employee who wants to bring an individual claim can apply for means-tested financial legal aid, but such financial aid is only granted to persons who have a very low income (not more than about €2,200 per month) and who do not have assets of value.⁵² In addition, the financial legal aid does not cover all the costs incurred in connection with litigation; normally it covers only part of the cost of hiring the employee's own lawyer (recipients of financial legal aid are exempt from the application fee to the court).⁵³ Thus, at least part of the cost of engaging a lawyer

⁴⁸ These matters are the most common subjects of disputes in the Labour Court, along with disputes on the Co-determination Act (1976:580) and on breach of collective agreement: see Swedish Labour Court, 2014. There is no reason to believe that other matters dominate in disputes brought before the district courts.

⁴⁹ This does not apply when a trade union brings an action regarding freedom of association; such cases are always to be initiated in the Swedish Labour Court.

⁵⁰ There is no official statistical information available as regards the proportions of district court cases in which the employee represents him- or herself, and in which the employee is represented by a lawyer. For this chapter, information on the matter has been provided by district court judges.

⁵¹ Ordinance on Fees at the Public Courts (1987:452), Appendix: Fees, applicable from 1 Jan. 2016. For disputes involving less than €2,200, the application fee is reduced to €90.

⁵² Assets include real estate, life insurance (with some exceptions), marketable securities, cash and account balances exceeding €2,500, and receivables: Act on Assets in the Calculation of Certain Benefits (2009:1053), sec. 4.

⁵³ Legal Aid Act (1996:1619).

must always be borne by the employee. More importantly, the legal aid does not cover the other party's litigation costs in the event that the employee loses the dispute.⁵⁴

Procedural requirements and the process before the district court

Whereas the Swedish Labour Court is a joint body, in which a majority of the members are appointed and mandated by central labour market organizations, the district courts are traditional courts, which lack special knowledge of the particularities of the labour market, and also lack special competence in the field of labour law. Many district courts do not have much experience in handling labour disputes, as most labour disputes are brought directly to the Swedish Labour Court.

Notwithstanding these important differences, the court procedure is essentially the same in the district courts as in the Swedish Labour Court. The proceedings follow the standard court procedures laid down in the Swedish Code of Judicial Procedure, where the general procedural requirements concern the competence of the court in terms of location, the competence of the parties to engage in legal proceedings, the justiciability of the dispute (that is, the absence of *litispendens* or *res judicata*), and the following of correct procedure in initiating the action.⁵⁵ As with cases brought before the Swedish Labour Court, in individual labour disputes where the action is brought by a trade union – that is, when the action is brought on behalf of a trade union member against an employer who is not bound by a collective agreement – there is a requirement that the parties must have concluded grievance negotiations before the dispute is brought to the district court.

The process before the district court starts with an application for a summons, and includes a preparatory process and a main hearing. The preparatory process aims to clarify the positions of the parties and facilitate a rapid resolution of the dispute. It involves written communication and one or more meetings before the judge. The chairperson must inquire whether the parties are willing to try to reach a peaceful settlement. Settlement negotiations are not mandatory, but if the parties are interested in trying, the chairperson must work for such a solution. Frequently, the preparatory process ends up in a peaceful settlement. Sometimes the district court can determine the case on the basis of the documents presented, without an oral hearing, but usually the dispute proceeds to a main hearing. Civil actions are heard by either one or three legally qualified judges, depending on the amount of money involved in the case.

As described in this and the two preceding sections, in most individual labour disputes the employee is represented by the trade union, both in grievance negotiations and, if necessary, in court proceedings. For these employees, the trade union bears all the costs associated with the dispute. Employees who are not members of a trade union must, in the event of a dispute, bring an individual action, usually with the help of a lawyer, and always at their own expense. However, in cases regarding discrimination, both unionized and non-unionized employees have access to another route to dispute resolution: through legal support provided by the Equality Ombudsman.

⁵⁴ When the parties reach an amicable settlement in court, each normally bears its own litigation costs.

⁵⁵ Code of Judicial Procedure (1942:740).

Information, guidance and legal representation by the Equality Ombudsman

The Equality Ombudsman: Background, responsibilities and competence

In disputes concerning discrimination and unfavourable treatment in connection with parental leave, free legal support is provided by the Equality Ombudsman – a national authority which employs about 100 people assigned to promote equal opportunities, inform about and work against discrimination, and represent individuals in discrimination cases. The Ombudsman's field of responsibility covers many areas of society, but the authority was initially established to safeguard equal opportunities in the labour market. In many respects it takes a proactive role: for instance, it informs and instructs employers in their obligations to conduct recurrent pay policy analysis and to establish mandatory action plans for equal wages in the workplace. The Ombudsman also initiates spot-checks of employers' mandatory action plans for equal wages and strategies to promote gender equality at work.⁵⁶ Besides these proactive measures, the Equality Ombudsman offers support to individuals in discrimination cases, where it provides information services and guidance, and also has the competence to represent individuals in settlement negotiations and before the court. Both unionized and non-unionized workers may seek the support of the Equality Ombudsman, which is free of charge. However, because trade unions always have the right to bring actions in labour disputes on behalf of their employees, for trade union members the Ombudsman can act only if the trade union has made clear that it will refrain from representing its member in the dispute.⁵⁷

The process at the Equality Ombudsman

When a person files a complaint to the Equality Ombudsman on a matter that seems to constitute discrimination, the authority may choose to start an investigation. It will do so through written and oral communication with the employer and the employee, and its investigation, which aims to establish whether the allegation of discrimination is justified, must be conducted according to the principles of objectivity and efficiency, resulting in a thorough and impartial inquiry into the circumstances of the alleged discrimination.

If the inquiry suggests that the discrimination claim is valid, the Ombudsman will initiate settlement negotiations with the employer or, if the employment relationship has ended, with the former employer. The authority is tasked with seeking redress for the employee; thus, the employer is normally asked not only to pay a certain amount of money in the settlement, but also to admit to discrimination. Many employers refuse to do this. The case may then be settled on purely economic grounds, without an acknowledgement from the employer that the employee has been the subject of discrimination. In other cases, the employer's refusal to acknowledge discrimination may result in the failure of the settlement negotiations. Provided that the employee agrees,

⁵⁶ Discrimination Act (2008:567), ch. 3, secs 11–13.

⁵⁷ Discrimination Act (2008:567), ch. 6, sec. 2.

such a case can be brought to the Swedish Labour Court, if the Equality Ombudsman deems that the case is important enough from a general point of view (a possible, but unusual, alternative is that the case is simply closed). The general principle is that a case should be made subject to a court trial only if doing so could contribute to a significant legal development: for example, if the dispute concerns a field where discrimination often occurs, if many people have been discriminated against in the specific case, if there is a risk that it will happen again, if the reported employer is a public authority or a large company, if the discriminatory act constitutes a serious violation, or if case law in the matter is lacking.

When representing an employee, the Equality Ombudsman has its own legal standing and can bring action directly to the Swedish Labour Court just like a trade union which represents its members. Before the court, the Equality Ombudsman is the counterparty to the employer who is accused of discrimination. As no union is a party to the proceedings, it has been asserted that a potential risk exists of a negative bias towards the employee from the trade union representatives on the bench.⁵⁸ This risk is considered to be particularly high in cases regarding discriminatory effects of collective agreements, such as wage discrimination, because the social partners can be expected to have a general common interest in defending collectively agreed provisions. In order to eliminate this risk of potential bias, the Swedish Labour Court normally has a particular composition in discrimination cases. The usual seven-member setting – two professional judges, one neutral expert on the labour market, two members representing the interests of the employer and two representing the interests of the employee – is reduced by one member on the employer side and one member from on employee side. Thus, in these specific cases only, the representatives of the social partners are not in the majority in the court.

Arbitration in individual labour disputes

Background: Permissibility and coverage of arbitration clauses

Irrespective of whether the process to resolve an individual labour dispute is initiated in the usual way through grievance negotiations, or in the less common ways of bringing an action before the local district court or entering into settlement negotiations instigated by the Equality Ombudsman, the final stage is always the same: the dispute may ultimately be subject to a ruling in the Swedish Labour Court.⁵⁹ The only exception, where the Swedish Labour Court is *not* the court of last resort, are the very few disputes that are ruled upon in arbitration. A final decision of arbitrators is normally binding and cannot be appealed in the usual way. It should be emphasized that arbitration is only rarely used in individual labour disputes. In practice, arbitration clauses are almost exclusively found in a limited number of specific cases: in employment contracts for CEOs (or similarly prominent positions), in collective agreements within the

⁵⁸ Swedish Government Bill Prop. 2008/9:4.

⁵⁹ Leave to appeal is required to challenge a judgment of the district court in the Swedish Labour Court.

banking sector, in collective agreements for personal care assistants, and in collective agreements regarding occupational insurance.

An agreement on arbitration may be made concluded for a specific, existing, dispute, but it is more common that the employment contract contains an arbitration clause aimed at future disputes. There are also collective agreements that include arbitration clauses. According to general principles of Swedish labour law, the collective agreement is considered an expression of established custom and practice at the workplace, and therefore is also applicable to employees in the workplace who are not members of the signatory trade union.⁶⁰ Thus, collectively agreed arbitration clauses are binding not only for the members of the trade union that has signed the collective agreement, but normally also for the other employees in the workplace.⁶¹

In most areas, arbitration is a permitted alternative to judicial review in individual labour disputes. The only general exception is discrimination cases, where there is a prohibition on arbitration clauses that have been concluded prior to the dispute, and that deny the parties the possibility to appeal the arbitral award.⁶² In other disputes, an arbitration clause is normally valid provided that it is not deemed unreasonable, which is very unusual. In the case law of the Swedish Labour Court, the reasonableness of an arbitration clause has been based on overall assessment of the employee's financial situation, whether the employee holds a particularly prominent position or a position of trust, and the circumstances at the conclusion of the employment agreement including the arbitration clause.⁶³ Generally, arbitration clauses are considered to be burdensome for the employee, because of the costs involved with arbitration and because – owing to the short limitation periods that apply in the area of labour law – the failure to observe an arbitration clause can easily lead to loss of rights for the employee. Therefore, there is a requirement that an arbitration clause must be sufficiently clear in order to be considered part of the employment contract, both in its drafting and in how the clause is presented to the employee. For example, the Swedish Labour Court has rejected arbitration clauses introduced in documents that are separate from the employment contract – in a unilateral employer regulation or, in cases regarding non-unionized employees, in a collective agreement – and are not specifically referred to in the employment contract.⁶⁴ By contrast, the mere fact that the employee is economically weaker than the employer is not in itself sufficient to render an arbitration clause unreasonable in an employment relationship. The Swedish Labour Court has made very clear that, as regards arbitration, the employee does not have to be in an economically weaker position than the employer; an employee can always choose to be a member of a trade union and thereby have access to legal support.⁶⁵

⁶⁰ Swedish Labour Court judgment, AD 1977 No. 48.

⁶¹ Swedish Labour Court judgments, AD 1994 No. 28 and AD 2002 No. 137.

⁶² Labour Disputes Act (1974:371), ch. 1, sec. 3.

⁶³ Swedish Labour Court judgments, AD 1991 no. 3, AD 1995 No. 135 and AD 2005 no. 79.

⁶⁴ Swedish Labour Court judgments, AD 1993 No. 141, AD 2002 No. 137.

⁶⁵ Swedish Labour Court judgments, AD 1978 No. 83, AD 1987 No. 165 and AD 1995 No. 34.

Arbitration practices in labour law

In individual employment contracts, arbitration clauses typically appear in the contracts of employees holding prominent positions, mainly CEOs. For other categories of employees, it is very unusual for an individual employment contract to stipulate that future disputes shall be made subject to arbitration.

The legal framework for arbitration is set out in the Arbitration Act. Any impartial person who possesses full legal capacity in regard to his or her actions and property can act as an arbitrator.⁶⁶ Unless otherwise agreed between the parties, the arbitration board shall consist of three arbitrators: each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third.⁶⁷ In contrast to court practice, the process and outcome of arbitration are not made public. The leading forum for arbitration in Sweden is the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), established in 1917.⁶⁸ In 2013, out of a total of 203 disputes that were registered with the Institute, ten cases were labour disputes.⁶⁹ In the following paragraphs, the procedure and costs of arbitration at the SCC will be described to illustrate how arbitration serves as a mechanism for dispute resolution in labour law.

Arbitration proceedings are initiated when the SCC receives a request for arbitration, which also entails that the claimant has appointed its arbitrator and has paid the registration fee. The request for arbitration is the equivalent to filing a suit with the public court. The SCC then asks the respondent to submit an answer to the request, including counterclaims and contact information for the appointed arbitrator, and then calculates the advance costs, which are to be split equally between the parties unless otherwise stated in the arbitration agreement. Once the advance costs have been paid, the case is referred to the arbitrators. Normally, the proceedings involve an oral hearing. The arbitrators must deliver their final award within six months. For simple disputes, there is the alternative of expedited arbitration. This is a faster procedure where the final award must be delivered within three months; it involves one arbitrator only, the parties may submit a limited number of petitions, shorter deadlines are applied and the costs are somewhat lower. In expedited arbitration and in ordinary arbitration where the parties have agreed on having only one arbitrator, the arbitrator may be appointed jointly by the parties or by the SCC. The SCC appoints arbitrators on the basis of their legal competence, their experience of arbitration, and their ability to direct the proceedings and to contribute constructively in the deliberations. According to the SCC's internal and unpublished statistics, of the arbitrators appointed by the SCC in 2008, 67 per cent were lawyers, 28 per cent were professional judges (practising or retired) and 4 per cent were law professors.⁷⁰

⁶⁶ Arbitration Act (1999:116), sec. 7.

⁶⁷ Arbitration Act (1999:116), secs 12–15.

⁶⁸ In Sweden, there are 11 chambers of commerce; these are private bodies to which around 10,000 companies are affiliated.

⁶⁹ Statistics available on the SCC website: <http://sccinstitute.com/statistics/> [accessed 25 Mar. 2016].

⁷⁰ L. Bergman, in *Dagens Juridik*, 25 Mar. 2010, available at: <http://www.dagensjuridik.se/2010/03/vem-blir-skiljeman> [accessed 25 Apr. 2016]. Linn Bergman is a former deputy secretary-general of the SCC and was responsible for the 2009 SCC user survey.

The costs of arbitration are determined on the basis of the amounts in dispute, and can thus often be anticipated. The costs for a dispute worth €50,000 are €9,200 for expedited arbitration, slightly less than €11,000 if one arbitrator is appointed, and almost double that if three arbitrators are involved. Disputes over lower amounts are rarely referred to arbitration, as the costs are so high in relation to the sums at issue: for example, if the dispute is worth €10,000, the costs are €7,500 for expedited arbitration and in other cases where one arbitrator is appointed and €14,000 if three arbitrators are involved.⁷¹ The lawyers' fees are additional to the cost of the arbitration itself (Gellner and Sydolf, 2005, p. 53). Financial legal aid may be granted in arbitration, but this assistance covers only some of the party's own legal costs; the counterparty's legal costs and the arbitrators' costs are not covered.⁷²

The general rule in arbitration is that the losing party bears both the costs of the proceedings and the winning party's legal costs. In employment relations, the employer sometimes undertakes to pay all or most of the costs of the arbitration, regardless of the outcome of the dispute.⁷³ If this is not the case, the arbitration procedure can be very expensive for the employee.

As regards collective agreements, arbitration is the established instrument of dispute resolution in certain areas. In the banking sector, which is characterized by a high level of secrecy, court trials have not been considered a viable means for resolving legal disputes and the collective agreement at industry level maintains the long-standing tradition of referring disputes to arbitration. Normally, the costs of arbitration are split evenly between the parties.⁷⁴ Similarly, the collective agreement for care assistants stipulates that individual labour disputes shall be referred to arbitration. Both in the banking sector and in care assistance, the parties have jointly established arbitration boards, where arbitration is free of charge for any employee who is a member of the trade union. In the banking sector, normally, an employee who is not a trade union member must bear the cost of arbitration, should he or she lose the dispute. In respect of care assistants, the employer bears all the costs of arbitration for non-unionized employees.⁷⁵

The second area where arbitration clauses apply as a result of a collective agreement is occupational insurance. On both the private and the public sides of the labour market, the social partners have established jointly owned insurance companies which administer and manage the occupational insurance schemes agreed upon in the collective agreements. Almost all Swedish employees are covered by collective agreements and thus also by occupational insurance. All disputes that may arise in relation to the employer's application and interpretation of the collective agreement as regards occupational insurance are to be adjudicated by arbitrators, after the conclusion of grievance negotiations. In the public

⁷¹ A cost calculator is provided on the SCC website: <http://sccinstitute.com/dispute-resolution/calculator/> [accessed 25 Mar. 2016].

⁷² Legal Aid Act (1996:1619). Cf. Fahlbeck, 1974, p. 312.

⁷³ Cf. Swedish Labour Court judgment, AD 2005 No. 59.

⁷⁴ Cf. Swedish Labour Court judgments, AD 1994 No. 28, AD 2002 No. 72 and AD 2002 No. 137.

⁷⁵ Swedish Labour Court judgment, AD 2005 No. 79.

sector, the arbitration board is a public authority regulated by law, with the sole task of ruling on certain compensations related to occupational injuries (and injuries in education).⁷⁶ The arbitration board is composed of a chairperson and two members – one representing the State as employer, and the second appointed by the Government on recommendation from the trade union federations covering public employees. The private sector also has a permanent arbitration board for these matters, the Labour Market Insurance Board. When ruling on a dispute, the board is composed of a chairperson who is a judge with specific experience in labour market issues, along with six other members appointed by the Confederation of Swedish Enterprise, the Swedish trade union confederation (LO) and the Swedish Federation of Salaried Employees in Industry and Services (PTK).⁷⁷

8.3. Performance of institutions, mechanisms and processes

Introduction

The Swedish system for resolution of individual labour disputes is coherent and fairly uncomplicated, and includes significant involvement of the social partners. Grievance negotiations on different levels are an important component in the dispute resolution model, and representatives of the social partners are in the majority in the Swedish Labour Court. As described in section 8.1 above, the Swedish Labour Court has jurisdiction in all individual labour disputes, either as the court of first and only instance or on appeal from a district court. The only exceptions are those disputes that must be submitted to arbitration, normally according to a collective agreement, and in rare cases owing to the presence of an arbitration clause in an individual employment agreement. In this context, the Equality Ombudsman is an exceptional element in the system, as the only supervisory authority that has capacity to bring action before the Swedish Labour Court.

In this section of the chapter, the three main mechanisms for individual dispute resolution – grievance negotiations, judicial review in the Swedish Labour Court, and first-instance examination in the local district court – will be presented and analysed, in terms of their efficiency and on the basis of two parameters. First, information on public opinion about the mechanism and assessments of its accessibility as a means for dispute resolution are used to illustrate the mechanism's role and position in the system. Second, statistical information on the proportion of disputes resolved through each route demonstrates how and to what extent the mechanism actually works to prevent and resolve labour disputes.

Grievance negotiations: Function and impact within the dispute resolution system

Grievance negotiations: Credibility and accessibility

In the most recent nationwide Swedish survey on the level of public trust in various social institutions, the trade unions were ranked in the middle, well above the Euro-

⁷⁶ Regulation (2007:830) with instruction for the arbitration board in some security issues.

⁷⁷ The chair and the deputy chair of the Labour Market Insurance Board are currently one chair and one former chair of the Labour Court.

pean Commission, Swedish political parties and the Church of Sweden, but below the universities, the national health-care system and Sweden's central bank, Riksbanken. It is notable that in every year since 2008 the level of trust in trade unions has steadily increased (Oscarsson and Bergström, 2014, p. 8).

Around 70 per cent of Swedish employees are trade union members, although union density varies greatly with respect to age, form of employment and labour market sector. Among those in the labour market aged 16–24 years, only 37 per cent are members of a trade union, while in the age group 45–64 years 77 per cent are unionized. The difference between employees with fixed-term employment contracts and contracts of indefinite duration is almost equally striking: among blue-collar workers, just 41 per cent of those on fixed-term contracts are union members, as opposed to 73 per cent of those on indefinite contracts, and among white-collar workers the corresponding figures are 56 per cent and 79 per cent. As regards labour market sectors, the manufacturing industry, public administration, and the health and care sectors display the highest union densities, at 79–83 per cent for both white- and blue-collar workers. Lower levels of unionization are found in the hospitality industry, where 40 per cent of white-collar workers and only 29 per cent of blue-collar workers are members of a union. Other sectors with low union density (below 50 per cent) include the retail and hotel sectors, and agriculture, forestry and fishing. Country of birth is yet another factor that affects unionization: 74 per cent of blue-collar workers born in a Nordic country are trade union members, in comparison to 57 per cent of those born in another country. Within this latter group, union density varies depending on length of residence in Sweden: among those who have lived more than nine years in Sweden, union density is 73 per cent, compared to 44 per cent among those who have zero to nine years of residence (LO, 2015). A very few trade unions have extended their services beyond the regular labour market, and welcome undocumented immigrants as members.⁷⁸ In addition, since 2008 trade unions within the federations LO, TCO and SACO have been running the Union Centre for Undocumented Migrant Workers, set up to advise, counsel and support undocumented and asylum-seeking people in the Swedish labour market. Despite trade union support, however, the possibilities for undocumented workers to make use of labour rights are very limited, because of the imminent risk of deportation.

Given the strong position of the trade unions in the labour market and the generally high unionization rates, grievance negotiations comprise a highly accessible mechanism for dispute resolution for the majority of employees in Sweden. Nonetheless, because individual employees do not enjoy a right to negotiation, and trade union representation is available for trade union members only, a prerequisite for grievance negotiations is that the employee is represented by a trade union. For someone who wants to become a trade union member, the membership process is uncomplicated and speedy. However, the trade unions normally provide representation and legal support only in disputes that have arisen after the employee has become a member, and some trade unions apply a three-month waiting period after joining before the employee becomes eligible for legal support.

⁷⁸ These are the Swedish Building Maintenance Workers' Union, the Swedish Hotel and Restaurant Workers' Union, the Swedish Food Workers' Union and the Syndicalist union.

Grievance negotiations: Accomplished resolutions

It is very difficult to estimate the numbers of disputes that are resolved through grievance negotiations, as no records are kept of these disputes. However, the 2012 Government report on termination and dismissal includes a very well-informed estimate, based on a comprehensive collection of documentation amassed by the social partners. According to the analysis made in the course of the governmental inquiry, out of all legal disputes that are subject to collective bargaining, less than 10 per cent, and possibly as little as 1 or 2 per cent, are brought before the courts.⁷⁹ This means that more than 90 per cent – and maybe as many as 98 per cent – of all legal disputes involving the vast majority of workers who are members of a union are resolved through grievance negotiation. Clearly, then, this is a highly effective instrument for resolving disputes and avoiding recourse to the courts.

The Swedish Labour Court: Function and impact within the dispute resolution system

The Swedish Labour Court: Credibility and accessibility

Research in political science has shown that the Swedish Labour Court is one of the most trusted authorities in the country (Öberg and Svensson, 2002, p. 451). Given the high level of unionization among the workforce and the almost total coverage offered by collective agreements, the court's significant role in the industrial relations system probably contributes greatly to its legitimacy.⁸⁰ The judgments of the Swedish Labour Court are enforceable through the auspices of public bodies. There is a high level of compliance with settlement agreements reached in the Swedish Labour Court, and with the court's rulings. Enforcement of and compliance with these resolutions are not considered problematic. The Swedish Labour Court aims at delivering a ruling within eight months of a case being brought to the court, although in practice, the average throughput time is somewhat longer than this at 12 months (Swedish Labour Court, 2015). The court has limited power to prevent delays caused by the parties themselves (Swedish Labour Court, 2015). The rulings of the Swedish Labour Court cannot be appealed.

Hearings in the Swedish Labour Court are free of charge. In most cases, the losing party is obliged to pay the legal costs (lawyers' fees) of the winning side in addition to its own costs, although the court can order each of the parties to pay its own costs if the losing party had reasonable cause to bring the dispute to trial. For unionized employees, all costs in relation to the dispute are borne by the trade union. Between 2003 and 2013 the costs of litigation in the Labour Court increased significantly – indeed, according to a recent survey they have more than doubled; this is attributed mainly to the increasing tendency of both parties to dispute every detail stated by the other party.⁸¹ As a result, the cases become more comprehensive, and thus more expensive. The legal costs vary considerably, depending on the number of lawyers involved

⁷⁹ Swedish Government Report SOU 2012:62 on disputes concerning dismissals.

⁸⁰ The Swedish Labour Court can therefore justifiably be considered the glue that holds together the entire organizational structure: see Sigeman, 2004, pp. 561–572.

⁸¹ Örneborg, E. 2013. "Det kostar mer att förlora i AD", in *Lag & Avtal*, No 11, p. 20.

and the complexity of the case. Nevertheless, they are usually significant, and for an employee who is not member of a trade union and who brings an action on appeal from the district court, they can be a heavy burden. The means-tested public financial legal aid covers only a limited part of the costs, as noted above (proportion of the cost of the party's own legal representation, but never the counterparty's costs).⁸² In the appeal cases in 2014 and 2015 where the Swedish Labour Court decided that the losing party should bear the other party's legal costs, the costs of the winning party varied from around €300 in the least costly case to around €170,000 in the most costly.⁸³ In the remaining cases, the costs were between €3,800 and €55,000.⁸⁴ In the majority of cases, the losing party was the employer.⁸⁵

An inquiry into the case law of the Swedish Labour Court shows that few cases involve employees on fixed-term contracts. Between 1989 and 1999, the number of fixed-term contracts in the Swedish labour market doubled. However, this increase was not reflected in the caseload of the Swedish Labour Court, where the proportion of disputes brought by employees on fixed-term contracts remained at the same low level as previously. This discrepancy can be explained in part by the fact that a comparatively greater proportion of employees on fixed-term employment contracts are non-unionized and thus have limited access to both legal support and the Labour Court. However, for those employees on fixed-term contracts who are trade union members (41 per cent of blue-collar workers and 56 per cent of white-collar workers), the form of employment can itself prove to be a disincentive to pursue labour disputes. It is generally more difficult for a person with a weak connection to the labour market to enter into a dispute with the employer; and the weaker the connection, the more difficult it becomes, as the employee always runs the risk of being denied a prolonged or renewed employment contract.

The Swedish Labour Court: Accomplished resolutions

The number of cases filed with the Swedish Labour Court is steady at around 400 a year. Significantly more cases are brought directly before the court (A-cases) than on appeal (B-cases): of the approximate total of 400, about 250 are A-cases and 150 B-cases (see table 8.2). Slightly less than half of all B-cases are given leave to appeal, and only around 10 per cent actually result in a main hearing; the rest are settled during the pre-hearing procedure or withdrawn by the parties. Overall, many cases filed with the Swedish Labour Court are closed in the early stages, either through withdrawal by the parties or as a result of amicable settlements reached during the pre-hearing stage

⁸² Act on Financial Aid in Legal Disputes (1996:1691).

⁸³ Swedish Labour Court judgments, AD 2015 No. 3 and AD 2015 No. 57.

⁸⁴ In some, but not all cases, the sum awarded also included the counterparty's costs for the proceedings in the local district court.

⁸⁵ The employer lost in the following Swedish Labour Court judgments: AD 2012 No. 2, AD 2014 No. 3, AD 2014 No. 12, AD 2014 No. 20, AD 2015 No. 3, AD 2015 No. 8 and AD 2015 No. 9, but not in AD 2014 No. 16 and AD 2014 No. 89.

Table 8.2. Cases filed and resolved in the Swedish Labour Court, 2012–14

Cases filed, adjudicated and closed	2012	2013	2014
A-cases filed with the Swedish Labour Court	237	255	251
B-cases filed with the Swedish Labour Court	147	152	152
Total	384	407	403
No. of cases adjudicated	91	94	91
Closed A-cases (incl adjudicated cases)	224	239	262
Closed B-cases (incl adjudicated cases)	144	137	164
Total	368	376	426

Source: Swedish Labour Court, 2015.

Table 8.3. Cases brought before the Swedish Labour Court, by type and subject, 2012–14

Type and subject of case	2012	2013	2014
A-cases			
Employment Protection Act	40	38	34
Interpretation of collective agreement	15	10	20
Wage disputes	14	13	11
Co-determination Act	16	24	22
Discrimination Act	5	4	4
B-cases			
Employment Protection Act	38	31	25
Procedural matters	12	23	33
Act on Financial Legal Aid	10	9	7
Wage disputes	14	19	20
Interpretation of employment contract	1	1	1
Discrimination Act	2	3	1
Annual Leave Act	2	0	0

Source: Swedish Labour Court, 2015.

under the auspices of the court. There is no official statistical information available on settlement rates in the Swedish Labour Court, but it has been estimated that about one-third of cases are resolved through settlement in the preparatory stage.⁸⁶

In 2014, the Swedish Labour Court delivered a ruling in 91 cases.

By far the most common subject of a dispute in the Swedish Labour Court is termination of employment under the Employment Protection Act. Table 8.3 shows the distribution of disputes according to the subject indicated by the claimant.

⁸⁶ Norrby, A. 2014. "Fyra av tio stämningar avser avsked", in *Lag & Arbet*, No. 1, p. 8..

Table 8.4. Average lengths of time from termination of employment/dismissal to judgment on merits and final resolution of dispute, 2005–10 (months)

Type of dispute	Judgment on merits		Ratified settlement	
	Mean	Median	Mean	Median
Cases referred to the Labour Court after negotiations (A-cases)	18	17	16	16
Cases referred to the Labour Court on appeal from district court (B-cases)	36	35	37	43
Cases in the district court in first instance	25	21	15	12

Source: Swedish Government Report SOU 2012:62 on disputes concerning dismissal.

The local district courts: Function and impact on the dispute resolution system

The district courts: Credibility and accessibility

There is no available research on the level of public trust in the district courts in particular. However, in general, the courts in Sweden enjoy a very high level of trust (Holmberg and Weibull, 2011, p. 46).

In Sweden, there are 48 district courts across the country. Between 2005 and 2010, these district courts handled and closed approximately 3,800 labour disputes. In most labour disputes that are handled by the district courts, action has been brought by an individual employee who is not represented by a trade union. For the employee, the financial risk associated with taking labour disputes to the district court is considerable. As noted above, in addition to paying the €280 application fee and the cost of a lawyer, the employee risks becoming liable for the employer's litigation costs. The statutory means-tested financial legal aid does not cover the counterparty's litigation costs in the event that the employee loses the dispute. For the individual employee, this is an important incentive to accept a settlement before the court delivers a final ruling on the case, even if the settlement is less advantageous.⁸⁷

There is no accessible information on the duration of labour disputes in the district courts. In the statistics of the Swedish National Courts Administration, labour disputes are not specified as a discrete category. Moreover, the duration of cases generally varies across the 48 different district courts. However, in 2012 a Government report published the results of an inquiry into disputes relating to the provisions on termination of employment and dismissal set out in the Employment Protection Act. The results of that report provide an indication of the duration of labour disputes in the different courts (see table 8.4).

The district courts: Accomplished resolutions

The 2012 Government report on disputes relating to termination of employment and dismissals shows that three-quarters of the disputes on these matters that were brought before a district court were closed very early in the process. The report states that it

⁸⁷ No data are available for average rates in settlements reached before the final ruling.

is most likely that in the majority of these cases, the action was withdrawn because the parties reached an amicable settlement outside court. In the remaining cases, the district courts ratified a settlement between the parties after the judge's conciliation in the pre-hearing stage in approximately 70 per cent of cases, and delivered a judgment in 30 per cent of cases. By way of comparison, during the same period, the Swedish Labour Court ratified an in-court settlement in 10 per cent of termination and dismissal disputes, while 90 per cent were closed by a judgment. The Government report does not speculate about the reasons for this difference in outcomes between the district courts and the Swedish Labour Court. The explanation may be partly related to the financial risk connected with the loss of a case in the district court, which may make the employee more prone to accept a settlement. Another important difference, of course, is that many of the labour disputes brought before the district courts are initiated by an individual employee, and thus have not been made subject to previous grievance negotiations. In contrast, in the disputes that are brought directly before the Swedish Labour Court the parties have already made serious but unsuccessful efforts to solve their differences within the framework of grievance negotiations.

8.4. Concluding remarks

The Swedish system for resolution of individual labour disputes features a high level of integration between different mechanisms. The grievance negotiation procedure, and the option of referring the negotiated matter to the specialized Labour Court, are easily accessible and highly effective methods of dispute resolution. The initial negotiations benefit from the established relationship between the negotiating parties, the employer and the local trade union already having an ongoing workplace dialogue on controversial issues and being accustomed to reaching agreement together. Grievance negotiations between the trade union and the employer before a case is brought before the Swedish Labour Court have the twofold benefit of providing ample opportunities for the parties to solve the dispute in a peaceful way, while ensuring that the matter will be thoroughly prepared if the dispute does eventually reach the court. For non-unionized employees, examination before the local district court replaces grievance negotiations as a preparatory first-instance mechanism in relation to a possible appeal in the Swedish Labour Court. The capacity of the supervisory authority for prevention of discrimination, the Equality Ombudsman, to pursue disputes on working-life discrimination in the Swedish Labour Court also reflects the integrated character of the dispute resolution system, although the role of the Ombudsman is not entirely unproblematic. Given the profound involvement of the social partners in the dispute resolution system, the cases on discrimination brought by the Equality Ombudsman constitute an exception and almost an anomaly. It is important to raise awareness about these distinctive characteristics of the disputes brought by the Ombudsman, and to discuss whether and how they could have a negative impact on the performance of the dispute resolution system. Nevertheless, the high level of coordination within the system enhances the performance of the individual mechanisms, and promotes predictable and coherent application and interpretation of labour law. When one single court rules

as the final instance on all disputes in working life, there is less risk of inconsistent and fragmented case law.

In contrast to the integration that characterizes the relationships of the separate mechanisms within the system, a clear division can be seen in terms of accessibility to and manageability of the mechanisms – a division between unionized and non-unionized employees. An estimated 90–98 per cent of all disputes are resolved in the early stage of grievance negotiations, and only a very few disputes are brought to court. This mechanism, which downplays the element of conflict in disputes in favour of a consensus-based approach, is fast and cost-effective. However, these positive effects apply only to trade union members. Non-unionized employees are virtually cut off from the core mechanisms of the system; they lack free legal support, and the financial legal aid that might be granted covers only part of the costs. Without the support of a trade union, the employee must bring the dispute before the local district court, and perhaps later on appeal before the Swedish Labour Court as well (with the exception of discrimination cases, where the Equality Ombudsman provides support free of charge). The financial risk related to bringing an individual claim against an employer should not be underestimated; the process can become very expensive. The level of unionization differs significantly between different groups in the labour market, as does the degree of access to means for dispute resolution. In this respect, young employees, employees with fixed-term employment contracts, and employees born outside the Nordic countries are particularly exposed, as unionization levels are notably lower within these groups. There are also important differences between different labour market sectors: here the hospitality sector stands out, with a unionization rate of just 29 per cent among blue-collar workers, but the share of trade union members is also comparatively low within the retail, agriculture, forestry and fishing industries.

The significant discrepancy in access to dispute resolution between unionized and non-unionized employees is a clear deficit in the Swedish system. In recent years, the number of lawsuits brought by individuals to the district courts has increased considerably.⁸⁸ Meanwhile, the declining unionization rate threatens to undermine the very system, because the most important mechanisms for dispute resolution require the involvement of the social partners. In practice, such a deterioration is unlikely, with national union density across all sectors remaining stable at around 70 per cent. Nevertheless, the situation is different within those labour market sectors where unionization rates are very low, by Swedish standards. The core mechanisms of the labour dispute system – grievance negotiations and trade union representation before the Swedish Labour Court – require the participation of a trade union. The close relationship between labour law and industrial relations in Sweden is not only a crucial element of the judicial process; it is the very backbone of the accessible and efficient system for individual dispute resolution in Sweden – and it is also the weakest link in that system.

⁸⁸ This trend has been confirmed by several labour market actors: see Torp, E. 2011. "Allt mer öde i AD", in *Lag & Arbet*, No. 12, p. 26.

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9. United Kingdom

Benjamin Jones and Jeremias Prassl

9.1. Introduction

In the United Kingdom, individual labour law has developed since the Second World War alongside the erosion of trade union freedom of action (collective *laissez-faire*). Since the Thatcher administrations of the 1980s, industrial justice has come largely to replace the traditional systems of collective bargaining that underlay labour relations up to the 1970s. This shift to individualized industrial justice has seen the creation of a relatively highly developed tribunal jurisdiction in relation to both collective and individual labour disputes. Recent reforms, however, have sought to reduce the influence of the tribunals and place an increasing emphasis on a substantive shared infrastructure for conciliation and mediation in respect of both collective and individual issues. These reforms have had a significant inhibiting effect on the pursuit of individual remedies, particularly in the field of unfair dismissals (an area which had already been subject to increasing judicial and statutory limitations).¹ They have also served to reduce the presence of tripartite expertise in legal proceedings emerging from individual labour disputes.

In this chapter, we outline the frameworks, institutions and processes in place to deal with individual labour disputes; review the principal strengths and weaknesses of existing judicial, mediative and conciliatory systems of resolution, and analyse the challenges facing these systems; and consider the various bodies with partial jurisdictions of potential relevance in particular forms of dispute.

9.2. Background: Mapping the UK individual dispute resolution space

This chapter focuses on United Kingdom employment law, which raises two important preliminary questions of terminology. First, while there are generally considerable differences between the different legal systems found within the United Kingdom,

¹ Following the exclusionary rule in *Johnson v. Unisys Ltd* [2003] 1 AC 518 (HL), discussed below.

in particular between the law of England and Wales and the law of Scotland, large parts of employment or labour law are an important exception to this rule, in so far as they apply across Great Britain.² Indeed, employment tribunals (ETs) and employment appeal tribunals (EATs) are frequently cited as key examples of the “unitary” aspects of the United Kingdom’s constitutional structure (see Bradley and Ewing, 2011, p. 40).

A second point relates to the distinction between “employment” law on the one hand, and “labour” law on the other. While in many jurisdictions these labels connote a distinction (broadly speaking) between the subject’s individual and collective dimensions, respectively, no such distinction has traditionally been drawn in UK law or academic discussion. For present purposes, therefore, the two terms will be used interchangeably.

In the United Kingdom, individual labour disputes are referred to by a range of labels but are most commonly and formally referred to as “individual employment disputes” or “employee grievances”. These signifiers can indicate, but are not restricted to, a range of formal causes of action in relation to actual or perceived breach of common law (including breach of the employment contract), failure to comply with statutory requirements or failure to comply with applicable European Union (EU) law. The terms might also be used in relation to complaints arising from failures to comply with industry standards, public sector guidelines or other best practice requirements. Other substantive disagreements might also give rise to a grievance or individual employment dispute.

These grievances are primarily handled through a combination of formal legal and less formal mediative processes. These will typically include some combination of complaint through an internal grievance procedure operated by the employer, publicly funded conciliation provided by the Advisory, Conciliation and Arbitration Service (ACAS), proceedings before the specialist employment tribunal system, and/or proceedings brought directly in the civil court system. In this section of the chapter, we describe the primary constitutive elements underpinning each of these systems. We first outline the relevant contributions of the several legal frameworks operating in the United Kingdom as they pertain to individual labour disputes. We then move on to elaborate further the jurisdictional scope, operational limits and functional capacities of the various institutions, mechanisms and processes for dispute resolution, and the role of the private sector in this area, before considering the efficacy of the system in section 9.3.

Applicable legal frameworks

Under the multiple legal frameworks that apply in the United Kingdom (EU law, domestic statute, common law and equity), the following enactments, jurisprudence and/or policy measures are the most significant elements shaping individual dispute resolution systems and processes.

² Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A), sec. 301(1).

EU measures

While not all EU legal measures are directly effective in individual disputes before UK courts or tribunals,³ EU law is highly relevant to individual dispute resolution in the United Kingdom. Measures affording protection to workers can be found across the three tiers of EU law. Labour law is explicitly stated to be within the EU's competence under article 3 of the Treaty on European Union (TEU), which states that: "The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide." Article 5(2) further states that: "The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies."⁴ In addition to various measures interacting with the key free movement protections for workers, self-employed persons and those seeking work, the EU treaties also outline a range of substantive areas for EU action.

Pursuant to article 153 of the TEU,⁵ EU labour law measures exist in relation to a range of issues bearing on employment (relevant to both individual and collective protection of workers). Those pertaining to individual disputes revolve around setting minimum standards in relation to ensuring suitable working conditions, maintaining health and safety standards, and tackling discrimination. The Treaty on the Functioning of the European Union⁶ (TFEU) elaborates upon this and provides for the EU to promote gender equality,⁷ social and physical protection,⁸ and the tackling of discrimination based on sex, race, ethnic origin, religion, belief, disability, age or sexual orientation.⁹

A final (potentially) important source of EU law is the Charter of Fundamental Rights. In what began as an individual claim for the (allegedly unlawful) deduction of wages following a transfer of an undertaking, in *Alemo-Herron v. Parkwood Leisure Ltd*,¹⁰ the Court of Justice of the European Union (CJEU) evaluated the domestic implementation of the Acquired Rights Directive,¹¹ and found that its worker-protec-

³ For a famous (in-)direct use of EU law, see *R (ex parte Equal Opportunities Commission) v. Secretary of State for Employment* [1994] UKHL 2. In the 1990s, temporal thresholds limited the availability of unfair dismissal protection (as well as a range of other employment law rights): an employee had to show a minimum number of hours (16, or eight in the case of those employed for longer than five years) worked in each week in addition to the continuity requirement. Given the disparate impact of this measure on female workers, the weekly hours threshold was successfully challenged before the House of Lords as indirect discrimination under (what was then) European Community law.

⁴ Consolidated Version of the Treaty on European Union 2010 OJ C83/01.

⁵ *Ibid.*

⁶ Consolidated Version of the Treaty on the Functioning of the European Union 2008 OJ C115/47 (TFEU).

⁷ TFEU, art. 8.

⁸ TFEU, art. 9.

⁹ TFEU, art. 10.

¹⁰ Case C-426/11 *Alemo-Herron v. Parkwood Leisure Ltd* (2013) ECR-I 00000. See Prassl, 2013a.

¹¹ Council Directive (EC) 23/2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L82/16; domestic implementation measure: the Transfer of Undertaking (Protection of Employment) Regulations 2006 (TUPE), Statutory Instrument (SI) 2006/246.

tive stance was inconsistent with article 16 of the Charter of Fundamental Rights, on the employer's freedom to conduct a business.

Elaborating upon these directly effective measures, the EU has passed a range of directives providing for protections that the Member States must implement. (The measures providing for domestic implementation are detailed below.) These include the Working Time Directive,¹² the Equality Framework Directive,¹³ the Equal Treatment Directive,¹⁴ the Part-Time Work and Fixed-Term Work Directives,¹⁵ the Health and Safety Framework and Minimum Workplace Safety Directives,¹⁶ the Race Equality Directive¹⁷ and, more recently, the Temporary Agency Work Directive.¹⁸

Domestic legislation

Both in implementing these EU legal measures, and in developing the longer-running domestic strand of labour law, domestic legislation provides the primary basis for resolving individual labour disputes. While the scope of protections is in line with European norms, the United Kingdom was a relative latecomer to key areas of protection. Legislative protection against race discrimination was passed in 1965,¹⁹ against gender discrimination in 1975,²⁰ and against disability discrimination in 1995.²¹ Protection against unfair dismissal was introduced in 1971.²² The key primary legislation codifying these protections is now contained in the Employment Rights Act 1996 and the Equality Act 2010, which codify and streamline many of the previous enactments. A table summarizing the rights possessed by different groups of workers and employees is set out in Appendix I.

These two pieces of primary legislation are supplemented by important, but narrower, primary legislation including the National Minimum Wage Act 1998 and the Pensions Act 2008. The Human Rights Act 1998 (in particular the right under article 8 to private and family life), and the Data Protection Act 1998 (in particular section 13 in instances of misuse of personnel data) are also of some general relevance and application, though there is no specific labour rights content in either instrument. The Work and Families Act 2006 provides regulation of paid maternity and paternity leave, along with the right to return to work, and enhanced rights in relation to flexible working.

The statutory regulation of collective labour disputes is relevant only to a limited degree, in so far as it modifies the jurisdiction of ETs to hear claims for unfair dismissal. Subject to limited exceptions, section 237 of the Trade Union and Labour Relations

¹² 2003/88/EC.

¹³ 2000/78/EC.

¹⁴ 2006/54/EC.

¹⁵ 97/81/EC and 99/70/EC.

¹⁶ 89/391/EC and 89/654/EC.

¹⁷ 2000/48/EC.

¹⁸ 2008/104/EC.

¹⁹ Race Relations Act 1965.

²⁰ Sex Discrimination Act 1975.

²¹ Disability Discrimination Act 1995.

²² Industrial Relations Act 1971. On the distinction between the (common law) notion of wrongful dismissal and the (statutory) notion of unfair dismissal, see further below.

(Consolidation) Act (TULR(C)A) 1992 stipulates that: “An employee has no right to complain of unfair dismissal if at the time of dismissal he was taking part in an unofficial strike or other unofficial industrial action.”²³ This can be particularly difficult in situations where a trade union is forced to repudiate a strike or other form of industrial action, thus leaving its members without recourse to ETs in case of dismissal.²⁴

Finally, it is important to note that in recent years labour market reform has taken place through a series of piecemeal adjustments, intermittently modifying the picture set out above. One such reform is particularly important for present purposes: the introduction of the so-called “employee-shareholder” status in 2013.²⁵ Enacted through the insertion by the Growth and Infrastructure Act 2013 of a new section 205A into the Employment Rights Act 1996, the new status came into force by order of the Secretary of State for Business, Innovation and Skills on 1 September 2013;²⁶ an extensive set of guidance notes was published online on the same day.²⁷

The status is conferred when an individual employee and a company agree that the former is to be an employee shareholder. In consideration of this agreement, the individual is to receive shares with a value, on the day of allotment, of no less than £2,000.²⁸ In return, employee shareholders do not enjoy recourse to key individual employment law rights under the Employment Rights Act 1996,²⁹ including notably the right not to be unfairly dismissed,³⁰ and the right to statutory redundancy pay.³¹

In addition to these primary legislative instruments, some labour law, in particular legislation implementing EU measures, is contained in secondary legislation, initiated by ministerial action and passed without full parliamentary scrutiny. The most important instances of this, in terms of practical application, are the Working Time Regulations 1998,³² the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000,³³ the Flexible Working (Procedural Requirements) Regulations 2002,³⁴ the Flexible Working (Eligibility, Complaints and Remedies) Regulations

²³ See also Trade Union and Labour Relations (Consolidation) Act (TULR(C)A) 1992, sec. 20.

²⁴ For a discussion of one of the most high-profile recent incidents of this, see Barnard, 2009.

²⁵ See further Prassl, 2013b.

²⁶ Growth and Infrastructure Act 2013, sec. 35(1). As originally announced in HM Treasury, 2013, para. 1.133.

²⁷ Department of Business, Innovation and Skills (DBIS), available at: <https://www.gov.uk/employee-shareholders> [accessed 29 Mar. 2016].

²⁸ Employment Rights Act (ERA) 1996, secs 205A(1)(a) and (b). The Secretary of State may by order increase this amount (sec. 205A(11)).

²⁹ ERA 1996, sec. 205A(2) (a)–(d). Note the exception in sec. 205A(8).

³⁰ This is limited to “ordinary” unfair dismissal protection under ERA 1996, sec. 94: employee shareholders remain protected against dismissals for automatically unfair reasons (for example, being a trade unionist (ERA 1996, sec. 103) or whistleblowing (ERA 1996, sec. 103A) and termination of employment in contravention of the Equality Act (EA) 2010).

³¹ ERA 1996, sec. 135.

³² SI 1998/1833.

³³ SI 2000/1551.

³⁴ SI 2002/3207.

2002³⁵ and the Maternity and Parental Leave etc. Regulations 1999.³⁶ An important consolidation instrument in the area of minimum wage protection came into effect as the National Minimum Wage Regulations 2015,³⁷ consolidating 28 previous statutory instruments in this field.

In terms of procedural regulation of individual labour litigation, the Employment Rights (Dispute Resolution) Act 1998 inaugurated the present system of ETs, developed out of the industrial tribunals that had performed the function since 1971. The procedural rules governing the employment tribunals are contained in secondary statutory instruments that are regularly updated³⁸ by the Secretary of State, in exercise of the powers conferred on him or her by sections 7(1), (3)(j) and 41(4) of the Employment Tribunals Act 1996. The version of the primary tribunal rules in force at the date of writing is the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.³⁹ The EATs are similarly governed by the Employment Appeal Tribunal Rules 1993.⁴⁰ The Employment Act 2008 is also notable for having introduced into the TULR(C)A 1992⁴¹ an important power for ETs to award additional damages in individual disputes where there have been failures to follow best practice procedures in handling workplace grievances and/or disciplinary issues.

A list of domestic legislation relevant to the conduct of individual employment disputes is included in Appendix II.

Statutory reform and codes produced by non-governmental public bodies

The procedures considered by the ETs are those formulated by ACAS, one of the two main non-departmental, Crown, public bodies that is relevant to individual labour disputes. ACAS has existed under various names since the end of the nineteenth century. Its power to issue such procedures is contained in section 199 of the TULR(C)A. Of the five ACAS codes of practice currently in force, four apply to a greater or lesser extent to individual disputes (code 1 on disciplinary and grievance procedures, code 3 on time off for trade union duties and activities, code 4 relating to grievance procedures, and code 5 on handling requests for flexible working).⁴² These regulations primarily grow out of ACAS's primary role as a mediator of large-scale collective disputes. Notwith-

³⁵ SI 2002/3236.

³⁶ SI 1999/3312.

³⁷ SI 2015/621.

³⁸ The rules were updated three times in 2014 by the the Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2014, SI 2014/271; the Employment Tribunals (Constitution and Rules of Procedure) (Amendment) (No. 2) Regulations 2014, SI 2014/611; and the Employment Tribunals (Constitution and Rules of Procedure) (Amendment) (No. 3) Regulations 2014, SI 2014/787.

³⁹ SI 2013/1237.

⁴⁰ SI 1993/2854.

⁴¹ Which is otherwise primarily an instrument concerned with collective issues rather than individual disputes.

⁴² All the codes are available at: <http://www.acas.org.uk/index.aspx?articleid=1878> [accessed 29 Mar. 2016]

standing this, however, recent statutory developments have sought to reduce the number of individual disputes that are brought to litigation, and the attendant burden on central funds, by developing the role of ACAS in relation to individual labour disputes (without increasing the funding available to ACAS to take on these additional roles).

The first major piece of legislation in this regard was the Employment Act 2002, which sought to promote dispute resolution through internal workplace procedures. While key measures, including the introduction of a mandatory statutory dismissal procedure, have since been repealed,⁴³ the Act created a power to postpone proceedings to enable conciliation. Building upon this, the 2013 Enterprise and Regulatory Reform Act introduced a system of compulsory conciliation that must now be explored by potential claimants prior to the issue of ET proceedings. The 2013 Act is also notable for its measures to curb court claims in individual disputes based on unsafe workplace conditions. Most notable is the Act's replacement of a default strict liability standard in claims under health and safety regulations with a negligence criterion, almost entirely removing any special protection for workers in relation to workplace safety.

The other non-departmental public body with an important remit in connection with employment disputes is the Equality and Human Rights Commission (EHRC), created under the Equality Act 2006.⁴⁴ Like ACAS, the EHRC has the power to produce guidance and codes of best practice for, among others, employers and employees (though breach of them does not attract a penalty). In addition to research and publication work to promote equality and raise awareness of human rights law, the EHRC also supports strategic litigation, advising on and funding cases which are not fundable under public legal aid schemes, such as ET claims, and intervening in cases such as the recent judicial review applications brought against the ET fee regime.⁴⁵

Unfair dismissal: Legislative framework and common law jurisprudence

Decisions of the EATs, the High Court, the Court of Appeal and the Supreme Court all create binding precedent. The volume of employment case law is so large and so rapidly developing that it is beyond the scope of this chapter to offer a significant survey. Nevertheless, one of the most important distinctions in individual employment law should briefly be set out, namely, that between the two overlapping, and potentially competing, systems or layers of regulatory norms that govern termination of the employment relationship:⁴⁶ common law, and statute. In the former system, breach of the contract of employment may lead to a claim for *wrongful dismissal*, whereas the statutory provisions linked to section 94 of the Employment Rights Act 1996 have shaped the regime of *unfair dismissal*.

⁴³ Owing to the considerable escalation and juridification of workplace disputes caused: see Gibbons, 2007.

⁴⁴ It should be noted that Northern Ireland has its own separate Equality Commission and a distinct Human Rights Commission, both created under the 1998 Good Friday Agreement.

⁴⁵ *R (ex parte Unison) v. The Lord Chancellor* [2015] EWCA Civ 395.

⁴⁶ See generally Collins, 1992.

The primary regulation of dismissal in the United Kingdom can be found in the statutory system of unfair dismissal, as opposed to the contractual system of wrongful dismissal, the latter having been seriously hampered in its development since the House of Lords' decision in *Johnson v. Unisys*.⁴⁷ As protection from unfair dismissal is limited to the core group of workers, employees,⁴⁸ and applies (in the vast majority of cases) only after an extended period of service, a large number of individuals are excluded from the scope of the provisions. There are several categories of reasons for a dismissal: broadly speaking, these may be divided into "ordinary" unfair dismissal (where a potentially fair substantive reason is scrutinized by the tribunal in relation to a "band of reasonable responses"⁴⁹) and "automatic" unfair dismissal (where the ground for dismissal falls within a protected category).

According to leading commentators, this statutory system is thus already "heavily weighted against the employee, in particular because the tribunal is not allowed to find a dismissal unfair simply because it considers it so to be" (Ewing and Hendy, 2012). Nevertheless, the coalition Government introduced several key changes after taking office in 2010.⁵⁰ The first was a rise in the time threshold before an employee can avail him- or herself of "ordinary" unfair dismissal protection, as announced in George Osborne's speech at the Conservative Party conference in October 2011,⁵¹ and written into law not long thereafter through the Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012.⁵² A second change of direct relevance for present purposes is in the remedial dimension of the law of unfair dismissal: recent reforms have lowered the statutory limit, or cap, on damages awarded to successful claimants. Section 15 of the Enterprise and Regulatory Reform Act 2013 gave the Secretary of State the power to amend section 124 of the Employment Rights Act 1996, which sets out the statutory limits on compensatory awards. The relevant changes were introduced soon thereafter, with limitations laid down in the Unfair Dismissal (Variation of the Limit of Compensatory Award) Order 2013: employees' awards are now limited to the lower of £74,200 or 52 weeks' salary.⁵³ This cap is significant, in so far as it is nearly impossible to outflank by recourse to the common law;⁵⁴ its

⁴⁷ *Johnson v. Unisys Ltd* (see n. 1 above). See more recently also *Edwards v. Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58.

⁴⁸ As defined in ERA 1996, sec. 230(1): "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment".

⁴⁹ *Iceland Frozen Foods Ltd v. Jones* [1983] ICR 17.

⁵⁰ For a full overview, see Ewing and Hendy, 2012.

⁵¹ <http://www.telegraph.co.uk/news/politics/georgeosborne/8804027/Conservative-Party-Conference-2011-George-Osborne-speech-in-full.html> [accessed 29 Mar. 2016]. The same speech was used to introduce some of the key changes discussed in the subsequent section. See also <http://www.eurofound.europa.eu/eiro/2011/10/articles/uk1110019i.htm> [accessed 29 Mar. 2016].

⁵² SI 2012/989.

⁵³ SI 2013/1949. See also the ACAS information at <http://www.acas.org.uk/index.aspx?articleid=4074> [accessed 29 Mar. 2016].

⁵⁴ *Johnson v. Unisys* (see n. 1 above); *Edwards v. Chesterfield Royal Hospital NHS Foundation Trust* (see n. 49 above).

employer-protective effect, on the other hand, is difficult to see, given that in practice the median unfair dismissal award is a sum just in excess of £4,500.⁵⁵

By lifting the qualification threshold to two years and capping damages thus, the coalition Government made unfair dismissal protection available to even fewer employees, and sent out a strong signal that claimants, even if successful, are severely limited in what they can hope to achieve. The reforms should furthermore not be seen in isolation: as Hugh Collins has famously remarked, “this tail wags the whole dog of the employment relation” (Collins, 1992, p. 270).

The reforms also constitute a watershed in so far as “the right not to be unfairly dismissed seems to have been thought to be too well entrenched to invite a frontal assault” (Davies and Freedland, 2007, p. 200). They must, finally, be evaluated in the context of the reforms to ET proceedings, to which we shall shortly turn – in particular, the introduction of a compulsory role for ACAS.⁵⁶

Institutions, mechanisms and processes

Within the United Kingdom, the key systems for resolution of individual labour disputes are internal company procedures, statutory ACAS conciliation, ET proceedings, civil court proceedings (in the County Court or High Court) and a range of alternative dispute resolution (ADR) mechanisms – most commonly arbitration, mediation and negotiation. The relevant State apparatus is set out in figure 9.1. Many disputes will involve a combination of the above and, as already indicated, all ET proceedings now follow on from the compulsory involvement of an ACAS conciliator.

In addition to the primary facilitative mode of ACAS and the adjudicative role of the ETs, each institution also offers a secondary, optional, service of the opposite type. For ACAS this takes the form of a binding arbitration scheme (with one scheme for Scotland and a separate scheme for England and Wales).⁵⁷ This scheme is available only to employees making claims for unfair dismissal or for breaches of the legislation on flexible working, and so is of significantly narrower application than ACAS’s conciliation services. On the ET side, suitable claimants will be offered the option of undertaking early judicial mediation (this is discussed further in the evaluation section below).

Another puzzling overlap in the UK system exists between the respective employment law jurisdictions of the ET and court systems. While the ETs are the primary venue for labour disputes, their jurisdiction is based on statute rather than being embedded in the Constitution. While judicial authority has served to enhance the separation between the two by limiting the courts’ discretion to interfere with matters within the ETs’ statutory remit,⁵⁸ there remains an important distinction between the

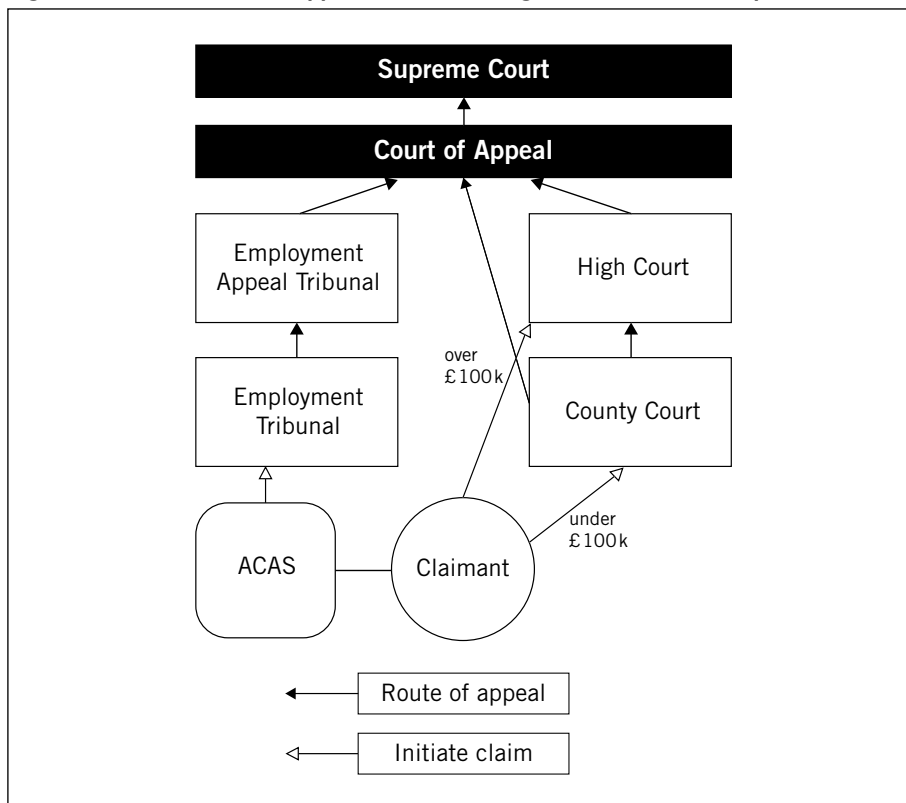
⁵⁵ Ewing and Hendy, 2012, p. 117, drawing on statistics produced by the Ministry of Justice.

⁵⁶ See <http://www.acas.org.uk/index.aspx?articleid=1342> [accessed 29 Mar. 2016].

⁵⁷ The power to create such schemes was inserted as TULR(C)A 1992, sec. 2012A, by the Employment Rights (Dispute Resolution) Act 1998, sec. 7, and was brought into force on 1 Aug. 1998 by the Employment Rights (Dispute Resolution) Act 1998 (Commencement No. 1 and Transitional and Saving Provisions) Order 1998.

⁵⁸ See n. 54 above.

Figure 9.1. The UK State apparatus for resolving individual labour disputes



statutory cause of action of unfair dismissal and the contractual cause of wrongful dismissal.

This peculiarity is rooted in the decision in 1971 not to afford the (then) industrial tribunals a full contractual interpretative role. While the jurisdiction of the civil courts in this area was eroded over the years, as it became clear that the ETs would have to engage in legal inquiry into the construction of agreements, it has never been fully usurped. The Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994 finally gave the ET a more complete contractual jurisdiction, but only for sums up to £25,000. Problematically, this sum has not been updated for inflation in the two decades since the order was introduced.

Tables 9.1–9.4 on the following pages set out the key factors of the various relevant different institutions, grouped together by type. It should be noted that other institutions, such as arbitral bodies, indirectly relevant ombudsmen (e.g. the Information Commissioner) and other quasi-public bodies (such as the Gangmasters Licensing Authority and the Temporary Agency Workers Inspection Authority) also operate in this field; but as they are of only marginal relevance to present purposes, they are treated as beyond the scope of this chapter.

Table 9.1. Judicial institutions

Key factors	ET/EAT	Civil courts
<i>Mechanism type</i>	Adjudicative	Adjudicative
<i>Involvement of bipartite/tripartite partners</i>	Tripartite panels are increasingly being phased out but notably remain in discrimination cases where the panel will include a member with a trade union background and a member with an employer background	Trade unions support litigation by members
<i>Jurisdiction in individual labour disputes</i>	Unfair dismissal, discrimination, contractual breaches worth under £25,000, minimum wage claims, unlawful wage deductions, failure to provide proper documentation, disputes regarding payments arising out of insolvency	Breach of contract (up to and including wrongful dismissal), tortious actions, health and safety breaches
<i>Procedural requirements</i>	Three-month limitation period (discretion for extension); must hold an ACAS conciliation certificate; payment of issue fee (unless in financial hardship)	Six-year limitation period (for most contractual and tortious claims); must pay issue fee
<i>Party consent required to initiate</i>	Only employee's consent required	Only one party's consent required
<i>Mechanism and process</i>	Applications on paper, active case management, formal disclosure, adversarial hearing with witnesses, binding judgment	Applications on paper, active case management, formal disclosure, adversarial hearing with witnesses, binding judgment
<i>Force of decision</i>	ET decisions binding on parties; EAT decisions binding on parties and binding as precedent in future proceedings	County Court judgments binding on parties; senior court judgments binding in future proceedings

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Table 9.2. Conciliation and ADR mechanisms

Key factors	ACAS	ET judicial mediation	Private ADR providers (e.g. CEDR¹)
<i>Mechanism type</i>	Facilitative/adjudicative	Facilitative	Facilitative/adjudicative
<i>Involvement of bipartite/tripartite partners</i>	Trade unions can represent workers in interactions with ACAS	None	Unusual
<i>Jurisdiction in individual labour disputes</i>	Any form of dispute during or following employment	Any dispute otherwise covered by ET	Any form of dispute during or following employment
<i>Procedural requirements</i>	No procedural requirements; free of charge; conciliation can be initiated by employer or employee	Suitable cases identified from those validly submitted to ET; fee payable	No procedural requirements but process at parties' expense
<i>Party consent required to initiate</i>	Only one party's consent required to initiate conciliation but not functional without both; both parties required for arbitration	Both parties' consent required	Both parties' consent required
<i>Mechanism and process</i>	Conciliator communicates with parties by phone	In-person hearing with ET judge, formal disclosure, non-adversarial	Dependent on form of ADR undertaken and largely or wholly within discretion of parties
<i>Involvement of labour administration</i>	Possible	N/A	Unusual
<i>Use of judicial authority</i>	No direct recourse to judicial authority but often context of underlying legal dispute	Settlement through ACAS procedure	Potential for reference to judicial authority but procedure need not be legally structured
<i>Force of decision</i>	"COT3" ² settlement agreements approved by ACAS binding in contract /enforceable as if terms contained in a court order		Settlement agreements binding on parties in contract

¹ Centre for Effective Dispute Resolution. ² COT3 agreements are distinct from any other form of settlement agreement reached between parties in that they do not have to satisfy various statutory prerequisites that are otherwise required to contract out of a cause of action justiciable by the ET (e.g. Equality Act 2010, sec. 144; Employment Rights Act 1996, sec. 203). They are also special in that they are enforceable in the same way as a tribunal judgment, without having to bring separate proceedings (per Employment Tribunals Act 1996, sec. 19A).

Table 9.3. Specialized institutions

Key factors	HMRC¹	EHRC²	HSE³
<i>Mechanism type</i>	Investigative	Prospective	Investigative
<i>Involvement of bipartite/ tripartite partners</i>	None	Tripartite organizations can be involved in development of guidelines	Union representatives may be consulted in a workplace during investigation
<i>Jurisdiction in individual labour disputes</i>	Minimum wage claims	Discrimination and fundamental rights issues	Workplace conditions, health and safety
<i>Procedural requirements</i>	Whistleblowing service made available to workers who are not being paid minimum wage	Employees can approach the EHRC to seek advice and financial support for litigation (only granted in rare circumstances)	No procedural requirements. HSE actively investigates workplace conditions following whistleblower reports or serious workplace accidents
<i>Party consent required to initiate</i>	Neither, though unusual to arise without employee complaint	N/A	Neither party's consent required
<i>Mechanism and process</i>	Questions/auditing of employer	EHRC only acts occasionally to support employees in their claims by other means, e.g. funding litigation	On-site investigations, assessment of processes and working conditions
<i>Use of judicial authority</i>	Application of relevant tax law	N/A	Application of relevant case law
<i>Force of decision</i>	A successful investigation will lead to court proceedings	Investigations may lead to court proceedings or support of tribunal proceedings	Improvement notices and prohibition notices binding on employer

¹ Her Majesty's Revenue and Customs.

² Equality and Human Rights Commission.

³ Health and Safety Executive.

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Table 9.4. Other processes and authorities

Key factors	Police	Pensions Ombudsman	Government Equalities Office (Dept of Education)
<i>Mechanism type</i>	Investigative	Adjudicative	Prospective
<i>Involvement of bipartite/ tripartite partners</i>	N/A	N/A	Employer and employee organizations involved in development of future policy initiatives
<i>Jurisdiction in individual labour disputes</i>	Criminal acts (violence, abuse, harassment, fraud, etc.)	Disputes arising regarding pension schemes	Discrimination
<i>Procedural requirements</i>	No procedural requirements; police will actively investigate complaints	No procedural requirements; Ombudsman will consider complaints raised, usually in writing	N/A
<i>Party consent required to initiate</i>	Neither party's consent required	No proceedings without complaint	N/A
<i>Mechanism and process</i>	Dependent on nature of complaint. If criminal offence has been committed and reasonable prospects of prosecution, then criminal proceedings commenced by Criminal Prosecution Service	Paper-based	N/A
<i>Use of judicial authority</i>	Awareness of and operation within terms of existing judicial precedent	Application of relevant case law	N/A
<i>Force of decision</i>	Typical criminal sanctions	Determinations binding on pension scheme operator	N/A

Role of private sector suppliers

Private sector suppliers of services relevant to resolution of individual labour disputes are principally involved in representing parties in litigation, conciliation and ADR processes; some are also involved in hosting or operating ADR processes. Depending on the precise activity in question, private sector suppliers in this area are principally individual barristers in private practice, firms of solicitors (including both small and large international law firms), Citizens Advice (formerly the Citizens Advice Bureau, and still widely known as the CAB),⁵⁹ other advice charities, volunteer lawyers and law students attached to pro bono clinics, trade unions, non-lawyer employment dispute consultants, individual mediators, arbitrators and non-ACAS conciliators, commercial ADR providers, and non-profit ADR providers. We outline here in turn the usual role of each of these; a full overview of their detailed functions is, however, beyond the scope of the present chapter.

Barristers are regularly involved in individual employment disputes, both in litigation and in an advisory role. Owing to the costs involved in hiring specialist legal assistance, the absence of legal aid to bring tribunal proceedings, and the standard position that, absent vexatious behaviour, cost orders are unavailable in the ET, barristers are more typically found representing high net worth claimants and employers in that context. Their presence in cases brought to the civil courts is far more common as the standard court rules on costs (the losing party pays) apply, and the formality of procedure makes it more difficult for a litigant in person to effectively argue their case. Barristers are also frequently employed to provide preliminary opinions on the strength of claims before issue, even if they are not subsequently briefed to represent the claimant in court or tribunal. Barristers will also conduct settlement negotiations and deal with ACAS on behalf of claimants.

Less expensive, and much more commonly employed, are the services of solicitors. Mid-value claims are regularly assessed by solicitors, who will prepare the claimant's case and advise on the strength of the claim. Owing to the lack of standing rules in the ETs, solicitors may also present a claimant's case in the tribunal, though in complex cases it is likely that a barrister will be recommended if the claimant can afford it. (Some solicitor-advocates also have standing to present in the civil courts.) Employers will invariably use a solicitor in most cases, and large employers regularly involved in litigation will typically have in-house qualified employment lawyers or external solicitors. In the absence of a barrister, the solicitor will take part in the negotiations with ACAS on behalf of the party.

For the many claimants unable to afford a solicitor, the principal source of advice is Citizens Advice (CAB), a charity running a nationwide chain of clinics that provide advice in a broad range of areas from debt problems and relationship issues through to tax advice and assistance in employment disputes. The CAB does not provide representation services, but will contact an employer on an individual's behalf, advise on potential legal proceedings, and help claimants complete claim forms and draft all of the key documents required for the conduct of tribunal proceedings (including par-

⁵⁹ <http://www.citizensadvice.org.uk/> [accessed 29 Mar. 2016].

ticulars of claim, disclosure list, schedule of loss and witness statement). CAB branches often have relationships with local pro bono legal clinics and will seek representation for their customers through these connections. Other local charities and support groups perform a similar role, and offer similar guidance, on a smaller scale.

The main pro bono clinics dealing with employment law are operated in part by practising lawyers and in part by law students (particularly postgraduate trainee barristers and solicitors). A leading example of such charities is the Free Representation Unit (FRU).⁶⁰ Based in London (and more recently also at Nottingham Law School), the FRU provides claimants in employment (and social security) tribunals with volunteer representation. The vast majority of FRU volunteers are drawn from the legal student community, though some are also in the early stages of their practising careers. The FRU, like most such charities, operates primarily at the local or, at most, regional level in terms of coverage; but in those areas that are covered, there is typically an excess in supply of volunteers, meaning that any case that is put forward by a CAB or other advice charity is typically then represented. The volunteer representative will perform the same role as a barrister, advising the client, preparing the case, seeking settlement where appropriate and presenting the case before the tribunal. They will also perform some of the functions of a solicitor, most notably drafting witness statements. For more complex cases, and those on appeal, volunteer qualified lawyers will often be brought in. If a case is appealed to the Court of Appeal then this is a necessary substitution, as qualifying lawyers do not have standing in that court. While the services of volunteers are of crucial importance to individual claimants, the fact that many are not qualified lawyers therefore remains a serious limiting factor. The Bar Pro Bono Unit is an exception in this regard, as its members enjoy the rights of audience required to take employment cases through the courts at all levels.⁶¹

For trade union members, the early assessment of the viability of an individual dispute will typically be undertaken by a union representative. Whereas the private providers discussed so far will typically (though not invariably) be engaged only once a dismissal has occurred, union representatives will typically have been involved from earlier on in the internal disciplinary processes (union members having a statutory right to have a union representative present during such processes).⁶² If a case is suitable for tribunal or court proceedings, a union will typically provide some level of support in preparing the claim and funding for professional legal assistance.

For those without union support or the resources to hire professional legal assistance and not, for whatever reason, interested in seeking assistance from charitable sources, the final significant group of private sector suppliers in the individual dispute space comprises employment dispute consultants. Given the potentially lucrative nature of some settlements, the lack of rules on standing for legal representation and the limited exposure to costs, a small industry has developed of non-lawyers providing advice and representation in tribunal proceedings. These consultants aggressively

⁶⁰ <http://www.thefru.org.uk> [accessed 29 Mar. 2016].

⁶¹ <http://www.barprobono.org.uk> [accessed 29 Mar. 2016].

⁶² Employment Relations Act 1999, sec. 10.

advertise their services, which are typically cheaper than those of a professional solicitor, and have taken a significant share of the market despite the unpredictable quality of their representation. Such consultants cannot conduct civil court litigation.

Finally, there is a range of individual and commercial ADR providers supporting the provision of non-ACAS ADR services. These typically fall into three categories: individuals in private practice, non-profit ADR providers and commercial ADR providers (the last of these being particularly relevant for arbitration). Given the statutory standing of ACAS, these providers are not commonly employed in the vast majority of disputes. In high-value cases involving sensitive commercial issues, however, the confidentiality afforded by such an alternative to public court or tribunal proceedings is particularly attractive.

9.3. Analysis: Effectiveness, politics and challenges

UK employment law has been subject to such a multiplicity of changes, initiatives and reforms over recent years that presenting a coherent picture of its current pertinent features is a challenging task. This challenge is exacerbated by the piecemeal fashion in which many of the reforms have been enacted, through executive orders and statutory provisions brought into force individually. The landscape is, furthermore, still subject to change. It appears that we currently stand at the mid-point in an era of substantial reform, and there is not yet a clear plan or picture of what is still to come.⁶³

Performance

In this section we will assess the performance of the main individual dispute prevention and resolution processes: the ET system, the court system, ET judicial mediation and conciliation through ACAS. Considering current political sentiment, we shall also outline the limitations that are currently being faced by the primary tribunal system under austerity-led justice policies. We move from the most to the least commonly used mechanisms, beginning with ACAS.

ACAS

As a well-established, well-respected provider of a free, phone-based service that is also a formal precursor to further proceedings, ACAS – specifically, its early conciliation service – is now the first port of call for employment disputes once they have escalated beyond internal commercial grievance or dispute-handling mechanisms. As such, ACAS early conciliation is now also the most commonly used of any of the dispute-handling mechanisms discussed here, receiving around 6,000–7,000 referrals each month (ACAS, 2014). It is attractive to claimants in being designed to be very simple and also to insulate the claimant from their current or former employer. ACAS conciliators deal with both sides of a conflict individually and conduct negotiations via shuttle diplomacy, carrying offers and concessions between the parties and reframing them to encourage settlement. The amount of time spent on an individual case

⁶³ For a first complete attempt to profile the landscape see Hepple, 2013.

varies, but there is no limit to the period over which assistance will be made available, and conciliators are responsive to contact by the parties when they are ready to negotiate. The strict time limit for instituting proceedings before an ET is extended by the conciliation period, defined flexibly as the time between the claimant's contact with ACAS and the receipt of the conciliation certificate.⁶⁴

ACAS is well known for its role in mediating major collective disputes and possesses a trusted brand for expertise and neutrality in dispute resolution.⁶⁵ Its processes do not require legal understanding and while they rely on the cooperation of the parties to the dispute, early conciliation was rejected in under 10 per cent of cases during its first six months in operation (the only period for which statistics are available so far). Notifications came predominantly from employees (36,162 notifications), although employers can also initiate conciliation processes (1,242 such occasions were recorded). Of the total number of cases handled, 18 per cent resulted in formal settlement through the issue of a COT3 statutory agreement (enforceable as if made in a tribunal order). A further 58 per cent of disputes referred to conciliation did not proceed to a tribunal claim,⁶⁶ leaving only 24 per cent that progressed to formal tribunal proceedings.⁶⁷

Employment tribunals

The ETs are the primary adjudicative dispute resolution mechanism for the majority of individual labour disputes. They are fairly accessible geographically, with 28 venues across the country in major urban centres. The procedure for issuing claims is based on a questionnaire-style form that can be submitted to the tribunal by email or in hard copy. The costs of cases are fixed and in some instances zero. Since 2001, ETs have enjoyed significant case management powers, designed to ensure the effective and timely resolution of claims brought before them.⁶⁸ Before discussing the qualities of the primary adjudicative function of the ET in detail, we shall briefly touch upon the ET's emerging, secondary, mediative mechanism.

Judicial mediation by the ET was introduced in a pilot scheme in 2006 and is now available in all tribunals in any claim that is otherwise referable to the ET. Mediations are conducted by trained ET judges. Suitable cases are identified on the issue of proceedings and mediation is offered to the parties during a preliminary hearing by telephone as an alternative to an adjudicative hearing. The criteria applied are that the case must be listed (scheduled to last) for three or more days, that it will involve at

⁶⁴ ERA 1996, sec. 207B (as amended by the Enterprise and Regulatory Reform Act (ERRA) 2013).

⁶⁵ ACAS's role in the collective sphere extends to collective conciliation, arbitration and mediation, depending on the dispute and/or the parties' preferences. The detailed differences distinguishing the three options are explained at <http://www.acas.org.uk/index.aspx?articleid=2012> [accessed 29 Mar. 2016].

⁶⁶ For a wide range of reasons, including for example an individual claimant's having received legal advice to that effect, an inability to afford payment of fees or to comply with other procedural requirements, or settlement.

⁶⁷ <http://www.acas.org.uk/index.aspx?articleid=2012> [accessed 29 Mar. 2016].

⁶⁸ For a detailed analysis, see Meeran, 2006.

Table 9.5. Claim statistics in the ET and EAT

Fiscal year	ET claims			EAT appeals	
	Total	Single claims	Multiple claims		
2007/08	189 303	n.a.	n.a.	1 841	
2008/09	151 028	62 370	88 658	1 794	
2009/10	236 103	71 280	164 823	1 963	
2010/11	218 096	60 591	157 505	2 048	
2011/12	186 331	59 247	127 084	2 172	
2012/13	191 541	54 704	136 837	2 296	
2013/14	105 803	34 219	71 584	1 663	n.a.

least one complex evidential or legal point (most typically discrimination), and that no insolvency is involved. There will usually only be a single complainant, with no concurrent proceedings in the matter in any other jurisdiction. Cases that fulfil these criteria represent only a limited portion of all claims made but, while uptake has been slow and judicial mediation is not yet a commonplace mechanism, where used it has proved fairly effective, leading to settlement on the day of mediation in around 65 per cent of cases.⁶⁹ Detailed statistics have not been made publicly available. One significant advantage for employees in the mediation option is that the fee for mediation (£600) is payable by the respondent rather than by the individual claimant.

As regards their primary judicial function, ETs have a range of discrete jurisdictions created under statutory provisions.⁷⁰ They have become less accessible since the introduction on 29 July 2013 of issue fees and hearing fees. Whereas the ET had previously been free to access, claimants now have to pay £250 to issue unfair dismissal or discrimination proceedings (£160 for some simpler claims, for example in wage disputes and redundancy payment disputes) and then a further £950 (£230 for the simpler claims) to secure a hearing date if the claim has still not been settled by that point. For recently dismissed workers this can be a substantial disincentive, and while fee remission is available for claimants in receipt of certain benefits or with very low incomes, the effect on claim volume has been significant, particularly once considered in combination with the additional reforms to compel ACAS conciliation.⁷¹

Table 9.5 indicates the total number of claims brought in the ETs in each complete fiscal year (6 April to 5 April) in the UK since 2008. The data are further divided between claims based on a single ground and those based on multiple grounds. The right-hand column indicates the number of ET decisions that were further appealed to the EAT.

⁶⁹ <http://www.justice.gov.uk/downloads/tribunals/employment/judicial-mediation/judicial-mediation.pdf> [accessed 29 Mar. 2016].

⁷⁰ These are listed in full in Appendix III.

⁷¹ The introduction of fees is discussed in greater detail in the next section on “Complementarity”.

Table 9.6. Duration of cases in ETs, 2012/13–2014: Cumulative % by age of case at clearance

Fiscal year	25 per cent (lower quartile)	50 per cent point (median)	75 per cent (upper quartile)	Mean length
Q2 2014	39 weeks or less	1–2 years or less	5 years or over	167 weeks
2013/14	25 weeks or less	2 years or less	5 years or less	135 weeks
2012/13	16 weeks or less	31 weeks or less	3 years or less	80 weeks
<i>Difference</i>	<i>9 weeks longer</i>	<i>21 weeks longer</i>	<i>2 years longer</i>	<i>55 weeks longer</i>

While the reduction in caseload might have been expected to reduce the time to disposal for claims which are issued, the median length of a case has in fact crept up since the introduction of fees and compulsory early conciliation. One might speculate that this is probably because the body of cases that do now proceed to ET has been filtered in a manner that removes the less serious, less meritorious or less contested claims (or that the system is being abused by employers who strategically waste claimants’ time and resources in bad faith). Table 9.6, based on the official statistics,⁷² shows the time taken to clear 25 per cent, 50 per cent and 75 per cent of cases cumulatively in the most recent two complete tax years, and most recent quarter, for which data are available. These times are for single-issue and multiple-issue proceedings combined. For single-issue proceedings the times are considerably shorter but continue to creep up (the average disposal time for a single claim is 27 weeks).

While substantial delays occur in a large number of more complex claims, the ET still offers a significant advantage over the majority of other dispute resolution mechanisms in providing final resolution by a specialist judge with expert knowledge of the area of law. While the procedure and hearing format retain much of the formality of the court system the standard rules of evidence do not apply, making it possible for litigants in person to bring their claims without the assistance of specialist legal assistance. This often means that there is inequality between an employer represented by a solicitor (and often a barrister, too) and an employee presenting their own case. ET judges are, however, well trained in minimizing the potentially distorting effect on outcomes of such power differentials, although given the lack of experience of most claimants many tribunal judges have to supplement cross-examination of witnesses heavily while lacking the full factual knowledge necessary to make that cross-examination most effective.

Notwithstanding these limitations, the ETs are perceived as being fair and impartial in the same way as the main court system and enjoy a high level of trust among

⁷² Full statistics are available from <https://www.gov.uk/government/collections/tribunals-statistics> [accessed 29 Mar. 2016].

Table 9.7. Enforcement outcomes and prevalence of enforcement action

Award outcome	No.	Enforcement action required	
		No	Yes
Paid in full	583	496	87
Paid in part	190	136	54
Not yet paid	424	303	121

Source: DBIS, *Payment of Tribunal Awards – 2013*, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253558/bis-13-1270-enforcement-of-tribunal-awards.pdf.

litigants (DBIS, 2014, p. 213). In a government survey of tribunal users, 77 per cent of the 1,988 claimants surveyed felt that it had been worthwhile bringing a claim in the ET against their employer or former employer. Among those unsuccessful at tribunal the proportion professing satisfaction was still 65 per cent; even for those whose claims were dismissed or disposed of as disclosing no case, the figure was 57 per cent. Interestingly, 88 per cent of those who settled through ACAS before the claim reached the tribunal felt it had been worthwhile initiating tribunal proceedings. The similarity in perception is further reinforced by the fact that tribunal orders and judgments have equivalent force to an order of the civil courts. Failure to abide by the terms of a tribunal judgment will typically lead to enforcement proceedings in the same manner as for a court order, and thus any remedy awarded in tribunal is fairly likely to be received by the claimant.

In a 2013 government study that followed up 1,197 awards ordered by the ETs, almost exactly half of respondents reported that their awards had been paid in full and a further 16 per cent had had their awards partially paid (payment by instalments being available for larger awards). That said, about half of all claimants never receive full payment, and a third receive no compensation at all (see table 9.7). Given the number of hurdles claimants have to clear before obtaining a decision in their favour (in terms of both meeting the substantive requirements of the employment protection legislation in question and following the multi-stage procedure of conciliation and hearing), the fact that a significant proportion of workers are left unable to enforce their claims against (former) employers is particularly troubling. In order to tackle this problem, one of the last Acts passed under the coalition Government, the Small Business, Enterprise and Employment Act 2015, made provision for financial penalties in the event of employers' failure to pay sums ordered by ETs or due as a result of related settlements.⁷³ It remains to be seen whether these provisions will have any significant impact, however – not least because of the uncertain deterrent effect of further penalties on employers who have already failed to comply with a tribunal order or settlement.

⁷³ Small Business, Enterprise and Employment Act 2015, sec. 150, inserting a new sec. 37A into the Employment Tribunals Act (ETA) 1996.

Another factor making the tribunal an effective option for claimants, notwithstanding the court costs of bringing proceedings, is the costs regime. In the main courts system costs typically follow the event, and unsuccessful claimants are liable to find themselves with the bill for their employers' legal costs. In the ET costs orders can be made but are extremely rare (less than 0.5 per cent of cases result in a legal costs or preparation costs order). Such an order will only be made against a party deemed to have acted vexatiously or wholly unreasonably. For claimants, this means that so long as their claim has some reasonable prospect of success and is conducted without undue delay or failure to follow tribunal deadlines, they will not be burdened with any further expense.⁷⁴

In conclusion, the ET remains the primary forum for dispatching most non-trivial individual labour disputes, including the majority of dismissal cases and most of the more complex and intractable claims that cannot be resolved by facilitative conciliatory processes. While it is no longer the first point of call for claimants, and many simpler and less valuable claims are no longer pursued, the ET provides a moderate-cost option to many claimants and a low-cost option to those on very low incomes. While the upfront charges are significant, additional costs are low unless specialist legal assistance is sought. For marginalized groups and minorities, the availability of tribunal-appointed interpreters without charge to the claimant is also a significant benefit. As such, although its reach has been somewhat reduced by the current administration, the ET remains a trusted, high-quality and effective option, with active case management leading to relatively swift determinations, a low appeal rate, and high degrees of compliance with its orders and awards. Furthermore, the ET's growing new mediation capacity appears to be further cementing its role as a multi-modal specialist body capable of dealing most effectively and efficiently with a broad range of claims: the tribunal's conciliation process, bringing both parties together in the presence of a judge, might in many instances be more conducive to the swift resolution of a claim than the back-and-forth remote approach relied upon by ACAS.

The ET is, however, subject to a number of important restrictions, and in these areas the civil court system comes to the fore.

Courts

Despite the creation of the specialist ET system and the statutory tort of unfair dismissal (which can only be assessed in the ETs), the civil courts' inherent jurisdiction over contractual disputes has left them with a continuing role in employment dispute resolution. The civil court system is far less commonly employed than the ET system, not just because the ETs are more user-friendly in their procedure but also because civil proceedings before the courts carry full liability for costs if the claim fails. However, the civil courts have three important advantages over the ETs for certain claims.

⁷⁴ Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, secs 74–84.

The first area in which the civil courts come into their own is where employment is continuing. The ETs' limited and exhaustively specified jurisdictions relate predominantly to dismissal-based disputes (see Appendix III). The civil courts, on the other hand, will hear claims irrespective of whether employment has ended or is continuing. Where employment has been terminated, access to the courts is substantially limited by the Supreme Court's decision in *Johnson*.⁷⁵ This authority, developed in the subsequent Supreme Court ruling in *Edwards*,⁷⁶ seeks to prevent "forum shopping" by litigants to circumvent the statutory unfair dismissal regime by preventing the recovery of damages in a contractual claim arising out of the manner of dismissal.

The second kind of claim in which the civil courts are to be preferred is where there is a large sum due under terms of contract. The maximum award in the ET for breach of contract is £25,000. For claims involving large sums due for breach of contract or due under contract (most commonly unpaid bonuses),⁷⁷ or in pursuance of any enactment pertaining to performance of the contract, the civil courts offer the only route to seek full recovery. The High Court has the capacity to make orders for any sum.

The third context in which the civil courts are important is where limitation has expired for a tribunal claim. Employment disputes in the ET have a tight three-month limitation period. By contrast, the civil courts observe the standard contractual limitation period of six years.⁷⁸

The lack of protection against liability for costs can also create a fourth context where the courts are to be preferred: namely, where a claim is strong, success is likely, and the claimant wants to obtain legal assistance without being liable for their own costs. This can be particularly advantageous in cases where the remedy, rather than liability, is the primary contested issue.

For a claim in which one or more of the above advantages applies, the civil courts provide an attractive alternative to the ET. Such claims are more likely to be heard in the High Court than the County Court, and thus geographical accessibility will vary widely, depending on the claimant's location. The cost of bringing proceedings is higher than bringing a tribunal claim, and most claimants will require specialist representation (though it is not obligatory). The time taken by court proceedings will also vary depending on the complexity of the claim and the case track to which it is allocated. It is hard to know how many claims of this kind are processed and what their outcomes are, as summary statistics based on cause of action are not publicly available, if indeed they are kept at all.

The court system in the United Kingdom is very well trusted and enforcement of judgments is simple, with significant sanctions for non-compliance. Use of the courts is, however, a serious engagement and the complexity of the processes, while not substantially

⁷⁵ *Johnson v. Unisys Ltd* (see n. 1 above).

⁷⁶ *Edwards v. Chesterfield Royal Hospital NHS Foundation Trust* (see n. 47 above). See also *Botham v. Ministry of Defence* [2011] UKSC 58, [2012] 2 AC 22.

⁷⁷ See, most recently, *Geys v. Société Générale* [2012] UKSC 63; [2013] ICR 117.

⁷⁸ Limitation Act 1980, sec. 5.

different from those of the tribunals, makes it a less inviting proposition for the majority of claimants. As such, its use tends to be restricted to higher-salary workers.

Complementarity

As noted above, the traditional UK approach to adjudication in matters of employment law, in place since 1964, tasks the specialized employment (formerly industrial) tribunals with the resolution of the majority of claims.⁷⁹ The basic idea behind their specialized jurisdiction is the provision of an easily accessible and inexpensive system for the resolution of workplace disputes (RCTUEA, 1968, ch. 10). They are thus different from the mainstream “common law” courts – in particular, by having lay members from both employer and employee sides to assist the presiding judge: “The Industrial Tribunal is an industrial jury which brings to its task a knowledge of industrial relations both from the view point of the employer and the employee ... in a field where conventions and practices are of the greatest importance.”⁸⁰

In a 2011 consultation document, the Government set out its plans to “achieve more early resolution of workplace disputes so that parties can resolve their own problems ... without having to go to an employment tribunal” and “ensure that, where parties do need to come to an employment tribunal, the process is as swift, user-friendly and effective as possible” (DBIS and HMTS, 2011). These changes were soon brought into force, following a familiar pattern: Part II of the Enterprise and Regulatory Reform Act 2013 set up the relevant statutory footing, subsequently to be fleshed out in a series of statutory instruments.⁸¹ Three such changes are particularly salient for present purposes.⁸²

The first is the introduction of fees for tribunal users. Since the coming into force of the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 in the summer of 2013, claimants have been expected to pay up to £250 plus £950 to issue a claim and have it heard at first instance.⁸³ Appeals are even more expensive, costing £400 for the notice to appeal and £1,200 for the hearing before an EAT.⁸⁴ Taking these costs together with the claimant’s representation cost,⁸⁵ and the potential of cost orders against unsuccessful claimants, “there is clear potential for the entirety of costs consideration to create a ‘chilling-effect’ dissuading those who may have claims to make” (Mangan, 2013, p. 415).

A second important reform concerned the composition of employment tribunals hearing particular claims, in particular those for allegedly unfair dismissal. Recent

⁷⁹ For a fuller introduction, see Collins, Ewing and McColgan, 2012, pp. 28ff.

⁸⁰ *Williams v. Compair Maxam Ltd* [1982] ICR 156 (EAT) (Browne-Wilkinson J).

⁸¹ Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, SI 2013/1237.

⁸² For a complete overview, see Mangan, 2013. The official Government position was first set out in DBIS, 2011. A later House of Commons Library Research Note also sets out helpful detail: Parker, 2012.

⁸³ SI 2013/1893, Part II.

⁸⁴ SI 2013/1893, Part III.

⁸⁵ Though, as noted above, volunteer representation services such as the FRU exist.

reforms have de facto abolished the presence of an “industrial jury” in relation to a broad range of claims⁸⁶ (including, most significantly, unfair dismissal: see Hepple, 2013, p. 212) by making it possible to hear these claims without the presence of lay members drawn from either side unless the presiding judge decides to the contrary.⁸⁷ The Government’s guidance notes accompanying the change suggest that “it considers that this change would help the tribunals manage its caseload [*sic*] in the most efficient manner”.⁸⁸

The third significant change in the present context stipulates compulsory ACAS involvement in the ET proceedings.⁸⁹ A modified section 18A of the Employment Tribunals Act 1996 specifies that workers’ claims must first undergo a period of early conciliation at ACAS before they can be submitted to ET. As David Mangan notes, this is particularly problematic given the service’s persistent funding crisis, and the fact that the reform seeks to target claimants by imposing upon ACAS a filtering role that “will entail putting the realities of claims success to the individuals” (Mangan, 2013, pp. 413–414).

The final set of concerns, though perhaps the least immediately obvious, could turn out to have the most problematic impact in the longer run. The effect of seemingly small-scale reforms, such as the changes to employment tribunal composition discussed above, could have grave unintended consequences – notably in respect of the law of unfair dismissal. As Corby and Latreille (2012a, b) have noted, there is a significant danger that the ETs are beginning to resemble traditional common law courts ever more closely. Hepple explains the problem behind this:

Tripartism in specialist labour courts arrived relatively late in Britain (1964) and was particularly significant because of the long-standing perception of the common law courts as being hostile to the interests of workers. This led scholars like Kahn-Freund and Wedderburn to argue that it was essential to secure the autonomy of labour law from the general law and to entrust adjudication of disputes to specialist labour courts with judges who understand industrial custom and practice.⁹⁰

With judges increasingly sitting by themselves, the disappearance of industrial expertise will soon be felt in employment law cases across the board – and will perhaps have the strongest impact in the field of unfair dismissal law, given the “band of reasonable [employer] responses” test.⁹¹ This test already shows significant deference to employers’ decisions, and given the lack of an “industrial jury”, that deference is only likely to increase.⁹²

⁸⁶ See the heavily amended and extended ETA 1996, sec. 4.

⁸⁷ ETA 1996 (Tribunal Composition) Order 2012, SI 2012/988. This reform came into force in April 2012. For EATs, see ERA 2013, sec. 12.

⁸⁸ Explanatory note to ETA 1996 (Tribunal Composition) Order 2012 [7.5].

⁸⁹ ERA 2013, sec.7.

⁹⁰ Hepple, 2013, p. 212 (citations omitted).

⁹¹ *Iceland Frozen Foods Ltd v. Jones* [1983] ICR 17.

⁹² *R (ex parte Prolife Alliance) v. British Broadcasting Corporation* [2003] UKHL 23 (*per* L Hoffman).

The impact of the changes thus compounds itself: even once an employee has been employed long enough to qualify for statutory unfair dismissal protection, has managed to pay to issue their claim, has been through the ACAS procedure and has arrived at a hearing (upon payment of a further fee), they will now be faced with a judicial system less well equipped to subject the employer's termination decision to comprehensive and fully informed scrutiny.

Cooperation with the labour inspectorate

Although the United Kingdom was the first country to appoint labour inspectors, in 1833 (ILO, 2010, p. 8), it does not today have a labour inspection service as such, provision being made instead for a patchwork of different agencies – including Her Majesty's Revenue and Customs (HMRC), the Health and Safety Executive, the Employment Agency Standards Inspectorate and the Gangmasters Licensing Authority.⁹³ The operation of the latter two agencies is limited to a comparatively narrow field of economic activity, discussed further below.

In terms of individual dispute resolution, perhaps the best example for present purposes is HMRC's enforcement of the provisions laid down in the National Minimum Wage Act 1998. The minimum wage is enforceable by the individual worker as part of their contractual employment relationship, with an additional level of enforcement through HMRC inspectors.⁹⁴ Indeed, the machinery set out in the Act appears to be rather effective, up to and including a power for enforcement officers to sue on behalf of workers in case of non-compliance.⁹⁵ However, the reality of enforcement is very different: an official government press release of January 2015 “named and shamed” a grand total of 37 employers, in addition to 55 employers who had already been named and fined since October 2013.⁹⁶ Despite “the importance the government places on compliance and enforcement”,⁹⁷ and even with an increase in funding of £3 million, announced the same day, with HMRC's enforcement budget no greater than £12.2 million the vast majority of minimum wage payment violations will continue to go undetected.

Indeed, even those labour relationships with the most potential for abuse, such as temporary agency work, are only very lightly regulated.⁹⁸ In the domestic context, agencies were first regulated by the Employment Agencies Act 1973⁹⁹ under somewhat different terminology. The Act drew a distinction between “employment agencies” (businesses that find employment for workers or search for workers on behalf of com-

⁹³ See, for the ILO's overview: http://www.ilo.org/labadmin/info/WCMS_112675/lang-en/index.htm [accessed 29 Mar. 2016].

⁹⁴ National Minimum Wage Act 1998, secs 17ff.

⁹⁵ National Minimum Wage Act 1998, sec. 20.

⁹⁶ <https://www.gov.uk/government/news/government-names-and-shames-37-national-minimum-wage-offenders> [accessed 29 Mar. 2016].

⁹⁷ *Ibid.*

⁹⁸ On the regulation of fragmented employment in English law, see Prassl, 2015, ch. 2.

⁹⁹ This was at the same time as most other European countries; the Federal Republic of Germany, for example, adopted the *Arbeitnehmerüberlassungsgesetz* in 1972.

panies) and “employment businesses” (enterprises that supply workers to end users). The latter are, however, today commonly understood to be employment agencies. The legislation set certain minimum standards, for example respecting payments by workers and accuracy of advertisements, and crucially, made provisions for a mandatory licensing regime. The latter was, however, revoked in 1994.¹⁰⁰

A partial licensing system was reintroduced in 2004 by the Gangmasters (Licensing) Act (section 7), though limited in its application by a sector-specific focus on areas such as agriculture and food processing (section 3). Today, the UK remains one of only five EU countries that do not require a licence to operate a temporary work agency (Wynn, 2009, p. 69).

The overall weakness of the combined domestic and European regulatory efforts is compounded by a glaring lack of enforcement, primarily owing to a lack of significant numbers of inspectors and the division of responsibilities between overlapping bodies such as the Employment Agencies Standards Inspectorate and the Gangmasters Licensing Authority (McGaughey, 2010, p. 812). The Employment Act 2008 brought some improvements in this regard,¹⁰¹ but commentators continue to note a “disturbing picture of variations in enforcement activity across the UK recruitment industry” (Wynn, 2009, p. 72) as a result of weak enforcement mechanisms (EHRC, 2010, p. 31). It is not surprising, then, that Eugenia Markova and Sonia McKay conclude that “in practice it is possible for agencies to open for business without having to meet any regulatory standards” (Markova and McKay, 2008, p. 8). Despite individual examples to the contrary, high levels of non-compliance are reflected in qualitative studies across the board (Aziz et al., 2008, p. 127).

Trends and surrounding factors¹⁰²

Political discussion in the United Kingdom, at least from the Conservative Party which has led the Government since 2010, has often tended to characterize individual employment law disputes as one of the factors that exacerbated the country’s deep recession following the financial crisis of 2009. A “Red Tape Challenge” mounted at the highest level of government,¹⁰³ for example, was very explicitly designed to tackle employment law envisaged as a burden on business, in particular small- and medium-sized employers. This strategy of linking employment law reforms to budgetary deficits is difficult to explain: could a direct causal link be identified? As Simon Deakin has noted, it is very hard to make any such link (Deakin, 2012, p. 251). Indeed, as Aristeia Koukiadaki and Lefteris Kretsos have argued (2012), “since excessive labour law regulation was not responsible for the crisis ... deregulation will do nothing to alleviate it, and is most likely making matters worse” (see Deakin, 2012, p. 252).

¹⁰⁰ Deregulation and Contracting Out Act 1994.

¹⁰¹ e.g. sec. 16, increasing inspection powers for the Employment Agencies Standards Inspectorate.

¹⁰² Aspects of this section (and earlier evaluations) draw on Prassl, 2014.

¹⁰³ See the Cabinet Office’s website at <http://www.redtapechallenge.cabinetoffice.gov.uk/home/index/> [accessed 29 Mar. 2016].

This statement leads on to two very important points. First, the reforms are highly unlikely to lead to GDP growth, or to remedy existing budget deficits in other ways, as leading commentators have repeatedly confirmed. David Mangan, for example, has criticized the notion of “(vexatious) claims as a hindrance to economic growth” (Mangan, 2013, pp. 417–418), often presented as a justification for recent reforms to unfair dismissal laws and tribunal structures, even though it is very difficult, if not impossible, to find concrete evidence on point. The same is true, secondly, for the oft-mooted creation of jobs as a result of labour market deregulation. While the “thesis that the right not to be unfairly dismissed is a cause of unemployment [might have] attained mythical status” (Ewing and Hendy, 2012, p. 115 n. 3), the OECD has repeatedly noted that the UK is already “one of the most lightly-regulated labour markets in the world”;¹⁰⁴ it is therefore hard to see how deregulation through the dismantling of what little protection remains could serve to improve employment.

Indeed, even in the area where recent reforms have created a direct source of government income (ET fees), the revenue is expected to cover only a third of tribunals’ costs.¹⁰⁵ In the absence of tangible budgetary gains, the question thus arises what other potential motivations there may be for the trends observed. The protection of employers and the creation of jobs more broadly have frequently been alluded to as a major concern of the Government.¹⁰⁶

9.4. Conclusions

While some recent studies do confirm certain concerns and fears about excessive employment law “burdens” (Jordan et al., 2003), a recent study of employment law reforms commissioned by the Confederation of British Industry (CBI) suggests that it is change as such, rather than individual norms, that is the greatest cause of concern: even minor legislative developments could lead to additional compliance burdens and an increased risk of tribunal claims as a result of the ensuing complexity (CBI and HN, 2012, p. 35).¹⁰⁷ It is therefore unsurprising that respondents to a recent government consultation noted that “there [was already] a sense among business associations and employers that employment statuses are too complex and numerous in the current system. ... any new employment status would be likely to confuse matters for employers” (DBIS, 2012, p. 8).

Fears specifically linked to vexatious claims in employment tribunals are furthermore objectively unfounded. Looking at the relevant statistics, Keith Ewing and John Hendy point out that in practice there is very little for employers to worry about. This can

¹⁰⁴ Jo Swinson MP, foreword to *Employment law 2013: Progress on reform* (DBIS, March 2013), as cited by Hepple, 2013, p. 204.

¹⁰⁵ Employment Tribunal and Employment Appeal Tribunal Fees stakeholder factsheet, available at: <http://www.equalityadvisoryservice.com/ci/fattach/get/4247/1374242423/redirect/1/session/L2F2LzEvdGltZS8xNDU5NzE3NjI5L3NpZC9nWmwqNjdObQ==/filename/ET%20Fees%20Factsheet.pdf> [accessed 25 Apr. 2016].

¹⁰⁶ A concern Bob Hepple (2013) traces back to the 1980s, citing e.g. DTI, 1985.

¹⁰⁷ In the specific context of the Agency Workers Regulations 2011.

be illustrated, for example, by the fact that the unfair dismissal reforms set out above will remove only a handful of comparatively low-value claims every year, a result in no proportion to their significant chilling effect on workers: “to remove the right to unfair dismissal protection from some three million workers in order to deny entitlement of just over 100 of them to compensation of what [in] most cases is likely to be around £4,500 must surely be considered disproportionate” (Ewing and Hendy, 2012, p. 118).

The changes will also have no genuine effect on unemployment levels. Indeed, as Simon Deakin has noted, laws on unfair dismissal “encourage workers to make a more serious commitment to the firm”, and provide the latter with a “strong incentive to treat the skills of their workers as a resource to be developed, rather than an asset to be disposed of at will” (Deakin, 2013). Regulation of dismissal has furthermore been shown to have “a consistently positive and significant impact on innovation” (Acharya, Baghai and Subramanian, 2010, p. 23), and is thus in fact an important driver of economic growth. Ewing and Hendy are thus entirely correct in their conclusion that “if it is genuinely the case that employers are concerned about unfair dismissal law as a barrier to recruitment, Messrs Osborne and Cable would have been better advised to distribute copies of the [employment tribunal success] statistics to would-be claimants rather than to change the law” (Ewing and Hendy, 2012, p. 119).

In terms of possible actions, finally, it is difficult to pin down any particularly prominent violations, given the multi-faceted nature of changes, and their highly interdependent impact on the resolution of individual employment disputes. Indeed, the UK Government has been very careful throughout recent reforms to ensure compliance with international norms, notably also including EU law.¹⁰⁸ This is not to suggest that the interplay of the various developments surveyed in this chapter will not in due course turn out to be highly problematic as regards the violation of basic standards of labour rights protection. Statistics released in mid-2014 suggested a 71 per cent drop in claims brought before ETs in comparison with the same period 12 months earlier.¹⁰⁹ That said, it is still too early to draw definite empirical conclusions. As a result, we recommend that the ILO attempt to encourage the UK Government to ensure that the combined impact of the various reforms is captured at a sufficient level of statistical detail. This information will not only be important in shaping the future direction of labour law policy-making; it will also have a direct bearing on a range of legal questions, from broad access to justice concerns, to specific claims surrounding the (in-)direct discriminatory effects of recent measures on particularly disadvantaged groups.

¹⁰⁸ See e.g. M. Carss-Frisk and I. Steel, joint opinion (EHRC, 2012), available at: http://www.equalityhumanrights.com/sites/default/files/documents/briefings/employee_owners_opinion_-_19_12_12_-_mcfis.pdf [accessed 29 Mar. 2016].

¹⁰⁹ <https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-april-to-june-2014> [accessed 29 Mar. 2016].

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Appendix I. Employment rights by worker type

Right to:	Conventional employee	Employee shareholder ¹	Worker ²	Self-employed
Minimum wage	✓	✓	✓	
Protection from unlawful deductions from wages	✓	✓	✓	
Paid annual leave	✓	✓	✓	
Maternity, paternity, adoption leave and pay	✓	✓		
Part-time status (no less favourable treatment)	✓	✓	✓	
Fixed-term status (no less favourable treatment)	✓	✓		
Rest breaks	✓	✓	✓	
Request flexible working	✓			
Request time to train (if over 250 employees)	✓			
Protection from discrimination	✓	✓	✓	✓
Minimum notice periods	✓	✓		
Collective redundancy consultation	✓	✓		
Statutory redundancy pay	✓			
Protection from unfair dismissal (after two years' employment)	✓			
Protection from unfair dismissal (automatically unfair reasons)	✓	✓		
Transfer of undertakings protection of employment	✓	✓		

¹ Employee shareholders are a new employment status (since September 2013) wherein an employee is contracted under terms where they forgo certain rights in return for shares in the employer company worth no less than £2,000. ² The definition of “worker” in UK law covers agency workers, contractors, freelancers and others in similar working relationships.

Source: adapted from official government consultation on the problems and regulatory options surrounding “zero-hours” employment contracts. See DBIS, 2013.

Appendix II. Key domestic legislation

- AWR 2010:** Agency Workers Regulations 2010
- CBRSWT 2008:** Cross-Border Railway Services (Working Time) Regulations 2008
- CCBM 2007:** Companies (Cross-Border Mergers) Regulations 2007
- CEC 1975:** Colleges of Education (Compensation) Regulations 1975
- COMAH 1999:** Control of Major Accident Hazards Regulations 1999
- DCOA 1994:** Deregulation and Contracting Out Act 1994
- DRC 1999:** Disability Rights Commission Act 1999
- EA 2006:** Equality Act 2006
- EA 2010:** Equality Act 2010
- ECS 2006:** European Cooperative Society (Involvement of Employees) Regulations 2006
- EOTS 2009:** Ecclesiastical Offices (Terms of Service) Regulations 2009
- EPLL 2009:** European Public Limited Liability Company (Employee Involvement) (Great Britain): Regulations 2009
- ERA 1996:** Employment Rights Act 1996
- EReIA 1999:** Employment Relations Act 1999
- ESTPR 2010:** Employee Study & Training (Procedural Requirements) Regulations 2010
- ETA 1996:** Employment (Industrial) Tribunals Act 1996
- FTE 2002:** Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002
- FWVT 2004:** Fishing Vessels (Working Time: Sea-fishermen) Regulations 2004
- FWR 2002:** Flexible Working (Procedural Requirements) Regulations 2002 and Flexible Working: (Eligibility, Complaints and Remedies) Regulations 2002
- HSCE 1996:** Health and Safety (Consultation with Employees) Regulations 1996
- HSWA 1974:** Health and Safety at Work Act 1974
- ICER 2004:** Information and Consultation of Employees Regulations 2004
- MPL 1999:** Maternity and Parental Leave Regulations 1999
- MPL 2002:** Maternity and Parental Leave (Amendment) Regulations 2002
- MSWTIW 2003:** Merchant Shipping (Working Time: Inland Waterways) Regulations 2003
- NESE 1994:** Notification of Existing Substances (Enforcement) Regulations 1994
- NMWA 1998:** National Minimum Wage Act 1998
- OPPSR 2006:** Occupational & Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006
- PAL 2002:** Paternity and Adoption Leave Regulations 2002
- PIDA 1998:** Public Interest Disclosure Act 1998
- PTW 2000:** Part Time Worker (Prevention of Less Favourable Treatment) Regulations 2000

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SRSC 1977: Safety Representatives and Safety Committees Regulations 1977

SSPA 1975: Social Security Pensions Act 1975

STA 1994: Sunday Trading Act 1994

TCA 2002: Tax Credits Act 2002

TICER 1999: Transnational Information and Consultation of Employees Regulations 1999

TULR(C)A 1992: Trade Union and Labour Relations (Consolidation) Act 1992

TUPE 2006: Transfer of Undertakings (Protection of Employment) Regulations 1981 & 2006

WTR 1998: Working Time Regulations 1998

RT (WT) 2005: Road Transport (Working Time) Regulations 2005

Appendix III. Full jurisdiction of ETs, with legislative basis

Descriptor	Originating Legislation
Suffer a detriment and/or dismissal resulting from a failure to allow an employee to be accompanied or to accompany a fellow employee at a disciplinary/grievance hearing	EReIA 1999, secs 11–12; ERA 1996, secs 48,111
Application for a declaration that the inclusion of discriminatory terms/rules within certain agreements or rules causes the aforesaid to be invalid	EA 2010, secs 120, 146 (1)
Application by an employee, their representative or trade union for a protective award as a result of an employer's failure to consult over a redundancy situation	TULR(C)A 1992, sec. 189
Suffered less favourable treatment and/or dismissal as an agency worker, than a directly recruited employee	AWR 2010, secs 16-18
Claim of an employee for breach of contract of employment Employer's counter-claim	Employment Tribunals Extension of Jurisdiction Order 1994; ETA 1996, sec. 3

Appendix III.

Descriptor	Originating Legislation
Failure of the employer to consult with an employee representative or trade union about a proposed contracting out of a pension scheme	SSPA 1975, sec. 31(5)(e); Occupational Pensions Schemes (Contracting-out) Regulations 1996; Occupational Pensions Schemes (Disclosure of Information) Regulations 1996
Application or complaint by the EHRC in respect of discriminatory advertisements or instructions or pressure to discriminate (including preliminary action before a claim to the county court)	EA 2006, sec. 54
Suffered a detriment, discrimination, including indirect discrimination, harassment or victimization or discrimination based on association or perception on grounds of age	EA 2010, secs 13, 14, 19, 26, 27, 120
Suffered a detriment, discrimination, including indirect discrimination, and discrimination based on association or perception, harassment, victimization and/or dismissal on grounds of disability or failure of employer to make reasonable adjustments	EA 2010, secs 13, 14, 15, 19, 20, 21, 26, 27, 120, Sch. 8.
Suffered a detriment and/or dismissal resulting from requiring time off for other (non-work but not health and safety) duties, study, training or seeking work	ERA 1996, secs 46, 47, 48, 102–103, 105, 108–109, 111
Suffered a detriment, discrimination, including indirect discrimination, discrimination based on association or perception, harassment or victimization on grounds of religion or belief	EA 2010, secs 13, 14, 19, 26, 27, 120.
Suffered a detriment, discrimination, including indirect discrimination, discrimination based on association or perception, harassment or victimization on grounds of sexual orientation	EA 2010, secs 13, 14, 19, 26, 27, 120.
Application by the Secretary of State for Business, Innovation and Skills to prohibit a person from running an employment agency	Employment Agencies Act 1973, secs 3A, 3C

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Appendix III.

Descriptor	Originating Legislation
Failure to provide equal pay for equal value work	EA 2010, secs 64, 120, 127, 128
Failure by transferor to notify employee liability information to the transferee Failure of the employer to consult with an employee representative or trade union about a proposed transfer	TUPE 2006, regs 12, 15(1)
Suffer a detriment and/or dismissal for claiming under the flexible working regulations or be subject to a breach of procedure	ERA 1996, secs 47E, 80F–80I, 104C; FWR 2002
Application by an employee that an employer has failed to pay a protective award as ordered by a tribunal	TULR(C)A 1992, sec. 192
Failure to pay remuneration while suspended from work for health and safety reasons while pregnant or on maternity leave Ending supply of or failure to pay agency worker on maternity grounds	ERA 1996, secs 67–68, 68B, 68C, 70, 70A
Reference to determine what should be included in a written statement of terms and conditions and any subsequent changes to those terms	ERA 1996, sec. 11(1)
Suffered less favourable treatment and/or dismissal as a fixed-term employee than a full-time employee or, on becoming permanent, failed to receive a written statement of confirmation from employer	FTE 2002, regs 7–9; ERA 1996, sec. 105
Failure to allow time off or pay for trade union activities or duties, learning representative duties, for public duties or antenatal care	TULR(C)A 1992, secs 168–170; ERA 1996, secs 51, 57

Appendix III.

Descriptor	Originating Legislation
Failure to provide a guarantee payment	ERA 1996, sec. 34
Failure to pay remuneration while suspended for medical reasons	ERA 1996, secs 64, 70(1)
Failure to allow time off to seek work during a redundancy situation	ERA 1996, sec. 54
Failure of an employer to comply with an award by a tribunal following a finding that the employer had previously failed to consult about a proposed transfer of an undertaking	TUPE 2006, reg. 15(10)
Failure to allow or to pay for time off for antenatal care, care of dependants, pension scheme trustee duties, employee representative duties, young person studying/training, public duties and European Works Council duties	ERA 1996, secs 51, 54, 57, 57B, 60, 63, 63C, 68, 68C; TICER 1999, reg. 27; ICER 2004, reg. 29
Reference to determine the particulars that should be included in a written pay statement or an adequate pay statement	ERA 1996, sec. 11(2)
Failure to provide a written statement of reasons for dismissal or the contents of the statement are disputed	ERA 1996, sec. 93
Appeal against an enforcement, improvement or prohibition notice imposed by the HSE, the Office of Rail Regulation or environmental health inspector, or by the Environment Agency	NESE 1994, reg. 6; HSWA 1974, sec. 24(2); COMAH 1999, sec. 18

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Appendix III.

Descriptor	Originating Legislation
Failure to pay for or allow time off to carry out safety representative duties or undertake training	HSWA 1974, secs 48, 80; SRSC 1977, reg. 11; HSCE 1996, Sch. 2
Suffer a detriment, dismissal or redundancy for health and safety reasons	ERA 1996, secs 44, 48, 100, 105, 108–109, 111
Application for interim relief	ERA 1996, sec. 128; TULR(C)A 1992, secs 161–167
Failure by the Secretary of State to make an insolvency payment in lieu of wages and/or redundancy	ERA 1996, sec. 188
Appeal against the levy assessment of an industrial training board	Relevant industrial training levy order – either Construction or Engineering Construction Board
Loss of office as a result of the reorganization of a statutory body	Miscellaneous statutes
Suffer a detriment and/or dismissal on grounds of pregnancy, child birth or maternity	EA 2010, secs 18, 120
Appeal against an enforcement or penalty notice issued by HMRC	NMWA 1998, secs 19, 22

Appendix III.

Descriptor	Originating Legislation
Suffer a detriment and/or dismissal related to failure to pay the minimum wage or allow access to records	ERA 1996, secs 104A, 105, 108–109, 111; NMWA 1998, sec. 11
Appeal against an unlawful act on a notice issued by EHRC	EA 2006, sec. 21
Failure of the employer to comply with a certificate of exemption or to deduct funds from employee's pay in order to contribute to a trade union political fund	TULR(C)A 1992, sec. 68A
Failure of the employer to prevent unauthorized or excessive deductions in the form of union subscriptions	TULR(C)A 1992, sec. 68
Failure of the Secretary of State to pay unpaid contributions to a pension scheme following an application for payment to be made	Pensions Schemes Act 1993, sec. 126
Suffered a detriment and/or dismissal due to exercising rights under the Public Interest Disclosure Act 1998	ERA 1996, secs 47B, 48, 103A, 105, 108–109, 111
Suffer a detriment and/or dismissal due to requesting or taking paternity or adoption leave or time off to assist a dependant	ERA 1996, secs 47C, 48, 57A, 80; MPL 1999, reg. 19; PAL 2002, sec. 28
Suffer less favourable treatment and/or dismissal as a result of being a part-time employee by comparison to a full-time employee	PTW 2000, reg. 8; ERA 1996, sec. 105

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Appendix III.

Descriptor	Originating Legislation
Failure to pay a redundancy payment	ERA 1996, secs 163, 177
Failure of the Secretary of State to pay a redundancy payment following an application to the National Insurance fund	ERA 1996, sec. 170
Suffered a detriment, discrimination, including indirect discrimination, discrimination based on association or perception, harassment or victimization on grounds of race or ethnic origin	EA 2010, secs 13, 14, 19, 26, 27, 120
Appeal against an improvement notice imposed by a VOSA/DVLA inspector	RT (WT) 2005, Sch. 2 paras 3, 5, 6
Suffer a detriment and/or dismissal for refusing to work on a Sunday	ERA 1996, secs 44, 48, 101, 105, 108–109, 111
Suffered a detriment or discrimination, including indirect discrimination, discrimination based on association or perception, harassment or victimization on grounds of sex, marriage and civil partnership or gender reassignment	EA 2010, secs 13, 14, 16, 19, 26, 27, 120
Suffered less favourable treatment and/or dismissal as a temporary employee than a full-time employee	FTE 2002
Right not to be unjustifiably disciplined by a trade union and/or suffer discrimination in obtaining employment due to membership or non-membership of a trade union; or refused employment or suffered a detriment for a reason related to a blacklist	TULR(C)A 1992, secs 66, 137, 139; ERA 1999 (Blacklist) Regs 2010

Appendix III.

Descriptor	Originating Legislation
Suffer a detriment and/or dismissal relating to being, not being or proposing to become a trade union member; right not to be excluded or expelled from union	TULR(C)A 1992, secs 145A–145C, 146–147, 152–160, 174; ERA 1996, Part X
Failure of the employer to consult or report about training in relation to a bargaining unit; suffer detriment on grounds related to recognition of a trade union for collective bargaining	TULR(C)A 1992, secs 70C, Sch. A1 paras 156–157
Suffer discrimination in obtaining the services of an employment agency due to membership or non-membership of a trade union; or refused employment agency services or suffered a detriment for a reason related to a blacklist	TULR(C)A 1992, secs 138 and 139; ERA 1999 (Blacklist) Regs 2010
Suffered a detriment and/or dismissal due to exercising rights under the Tax Credits Act 2002	ERA 1996, secs 47D, 48, 104B, 105, 108–109, 111
Unfair dismissal after exercising or claiming a statutory right	ERA 1996, secs 104, 105, 108–109, 111
Unfair dismissal on grounds of capability, conduct or some other general reason including the result of a transfer of an undertaking	ERA 1996, sec. 111
Unfair dismissal in connection to a lockout, strike or other industrial action	TULR(C)A 1992, secs 237–239; ERA 1996, sec. 105
Failure of employer to pay or unauthorized deductions have been made	ERA 1996, sec. 23

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Appendix III.

Descriptor	Originating Legislation
Appeal by a person who has been served with an improvement or prohibition notice under the Working Time Regulations 1998	WTR 1998, Sch. 3, para. 6
Failure to limit weekly or night working time, or to ensure rest breaks	WTR 1998, regs 10, 12–17; ERA 1996, secs 45A, 48, 101A, 105, 108–109, 111; WTR 1998, reg. 30; MSWTIW 2003, reg. 18; FVWT 2004, reg. 19; CBRSWT 2008, reg. 17
Complaint by a worker that employer has failed to allow them to take or to pay them for statutory annual leave entitlement	WTR 1998, reg. 30
Suffer a detriment and/or dismissal for requesting time to train Failure of employer to follow correct procedures/ reject request based on incorrect facts	ERA 1996, secs. 63D–63I

10. United States

*Aaron Halegua**

10.1. Introduction

Over the last half-century, the United States has developed an increasingly complex web of mechanisms for resolving individual labour and employment disputes. During this period, the percentage of the private sector workforce represented by unions, protected by the “just cause” provisions established by a collective bargaining agreement, and using private labour arbitration to enforce these protections, has dipped significantly. The vast majority of workers are now “at-will” employees. But, as unionization declined, an increasing number of statutory rights were granted to workers, such as guarantees of minimum labour standards or prohibitions on discrimination, and these have been the source of a large number of legal disputes. These statutes often exist at multiple levels – federal, state and local – and many establish a new administrative mechanism to enforce the rights they create. Aggrieved workers can often also enforce these rights directly in the federal or state courts. In part owing to the high volume and costs of litigation, employers are increasingly establishing private mechanisms within the workplace to resolve disputes, such as mediation programmes, and requiring workers to pursue any still unresolved claims through private employment arbitration.

This chapter seeks to unpack this complicated institutional structure by describing how its components function and interrelate, with a particular focus on some of the more uniquely American aspects of the system. An initial attempt will also be made at evaluating the performance of these various mechanisms in resolving disputes. To this end, the chapter will be guided by the “efficiency”, “equity” and “voice” framework developed by Budd and Colvin (2008, pp. 460–466), while also adding an “access” dimension.

The chapter proceeds in three sections. Section 10.2 sets out the background, discussing the general labour and employment law landscape of the United States, the

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changing nature of employment relations, and the specific laws and institutions that will be covered here. Section 10.3 analyses and evaluates the performance of the various dispute resolution mechanisms – administrative agencies, the courts and private dispute resolution mechanisms – and how alternative dispute resolution (ADR) is being used in conjunction with each of these. Section 10.4 summarizes and offers some concluding reflections on the analysis that precedes it.

10.2. Background

Context and recent trends

Employment at will

The default rule governing employer–employee relations in the United States, which now covers the vast majority of private sector workers, is “employment at will”. Under this principle, employers are free to terminate employment for a good reason, a bad reason or no reason at all; similarly, employees are free to end an employment relationship without providing a reason. This backdrop is essential to understanding the limited types of legally actionable employment claims that may arise and the mechanisms for dealing with them. While there was a period when it seemed that some state courts were willing to chip away at employment at will, there is little evidence of the continuation of any such efforts. Today employment at will remains firmly in place in the United States.

There are, however, a few important exceptions to the employment-at-will rule. The first arises where a contractual agreement modifies the obligations of employers and employees. The most common example is where a union has negotiated a “collective bargaining agreement” (CBA), essentially a collective contract, that includes a “just cause” provision – meaning the employer may discipline or dismiss an employee only where good cause exists. Individual employees who are not union members may also have contractual restrictions on or attached to the termination of their employment, such as guaranteed severance. But such terms are generally limited to higher-level executives who have the leverage to negotiate the terms of their employment.

The second large exception to employers’ freedom in their treatment and dismissal of employees originates in federal, state and local statutes. The primary such limit is found in prohibitions on employers engaging in discrimination based on protected characteristics, such as race, gender, age, disability or union membership, or discriminating against workers who engage in “concerted activity” to improve their terms or conditions of work. Generally, the statutes that prohibit discrimination on these bases also make it illegal for employers to retaliate against individuals who complain about illegal discrimination. In addition, there are statutes and regulations at all levels that establish certain minimum labour standards, such as rules on minimum wages, working hours and overtime, and health and safety standards. These laws too generally prohibit employers from retaliating against employees who complain about violations of the rights guaranteed in these statutes. Finally, although this falls outside the scope of the present chapter, it should be noted that civil servants and other public sector employees enjoy certain employment protections that private sector employees do not.

The changing employment landscape

In recent decades, several significant changes to the nature of the economy and workforce have had direct impacts on the landscape of labour dispute resolution. One major trend is the steady decline since the 1950s in the percentage of workers, particularly in the private sector, who are represented by a labour union. Whereas nearly one-third of the workforce was once unionized, by 2012 only 11.3 per cent of the total workforce and 6.6 per cent of the private sector workforce was unionized and enjoyed the corresponding “just cause” protections (Weil, 2014, p. 254). Moreover, employers generally fight very hard to oppose any attempt by unrepresented workers to form a union.

While employers seek to evade the costs and obligations that unionization would bring, they are also fighting to avoid the costs imposed by the increasing statutory protections that apply even to non-unionized workers. Specifically, employers are engaging in a wide variety of practices to escape establishing formal employment relationships with workers and thus also the corresponding legal obligations and risks. For instance, where an employment relationship exists, an employer must pay certain payroll, social security and unemployment taxes; must purchase workers’ compensation insurance; may be required to provide health care; can be sued for discrimination; must pay overtime in certain situations; and may need to offer certain medical or sick leave. Thus, the incentives to avoid establishing these relationships are substantial. One method of achieving this has been for companies to treat workers as “independent contractors” instead of company “employees”. By “misclassifying” these individuals as essentially self-employed, the company avoids the aforementioned obligations and risks, generally to the detriment of the worker. The public and Government also lose out on significant tax revenue as a result of such misclassification.

While “misclassification” seeks to make workers into nobody’s employees, large companies have also been finding ways to make more and more individuals somebody else’s employees. David Weil has used the term “fissuring” to describe this trend of employers engaging in subcontracting, franchising and outsourcing arrangements to avoid establishing direct employment relationships (Weil, 2014). As an illustration, a 500-person financial company (Company A), instead of hiring additional employees to clean its offices, may choose to pay a cleaning company (Company B) to provide this service. In turn, the cleaning company might then subcontract the work to Company C, which is essentially one man with a car, some cleaning supplies and the two or three people he hires to perform the work alongside him. If these cleaners were employed by Company A they would be eligible for certain benefits and protections that Company C, owing to its small size, is not obliged to provide. These smaller, less-capitalized employers are also less likely to comply even with those regulations that do apply to them; and, if they get caught, they are better able to evade the enforcement of any judgment against them. The same logic applies in the franchising model: the workers flipping hamburgers are not employees of the international corporation whose name appears on the restaurant, but employees of a small company that may own and operate just one or two outlets.¹

¹ David Weil (2014) provides numerous, detailed examples of how employers are using these various arrangements to evade their legal responsibilities. Cynthia Estlund (2008) also discusses this “contracting-out” phenomenon and employers’ economic motivations for it.

Another common technique is for companies to contract with a staffing agency, which provides the company with “contract workers” or “temporary workers” while remaining the sole legal employer of these workers. In August 2014, over 2.87 million workers were employed through temporary agencies (NLRB, 2015). In response to these trends, worker advocates are seeking to use the “joint employment” doctrine to hold the larger companies and franchisors liable for any illegal behaviour. They have had some initial successes and there is likely to be more litigation of such issues in the future.²

Terminology and scope

It is important to note at the outset that the terms “labour law” and “employment law” have distinct meanings in the United States. The former refers to the field of collective labour relations or what is termed “industrial relations” in some jurisdictions – essentially issues concerning unions and their relationships with employers. This includes union elections and recognition issues as well as the rules governing strikes, lockouts and collective bargaining. Accordingly, the term “labour disputes” generally refers to disputes concerning these issues. Once there is a CBA in place between a union and employer, disputes concerning the interpretation or violation of that collective contract are usually called “grievances”. Disputes concerning the discipline or termination of a union member allegedly in violation of the CBA are often termed “individual grievances”. Basically, all other laws governing work and the workplace comprise the field of “employment law”, and all corresponding disputes are termed “employment disputes”.

To keep this chapter with a manageable compass, not all dispute resolution institutions available to all workers are covered. First, this study is limited to private sector employees, who comprise about 84 per cent of the total workforce in the United States. Second, like other chapters in this book, this one does not address collective labour disputes, such as those relating to union recognition or collective bargaining. Third, given the large number of laws governing various aspects of the employment relationship and with the potential to give rise to disputes, this chapter focuses on some of the more common types of claims and the corresponding mechanisms for processing them. Specifically, this chapter examines: discrimination against individuals for engaging in “concerted activity” protected by federal labour law; individual grievances by unionized employees alleging unfair treatment; claims of illegal discrimination; claims of

² The joint employment doctrine acknowledges that more than one entity can be the legal employer of a worker and thus liable for violations of labour or employment rights. The precise test of whether an entity is an employer varies under different statutes, but generally turns on the extent to which the entity in question exercises control over the worker. In a recent, controversial decision (*Browning-Ferris Indus. of California, Inc.*, 362 NLRB No. 186 (27 Aug. 2015)), the NLRB restated its standard for what constitutes “control”: it is not limited to actual control exercised over workers, but also includes control exercised “indirectly” through an intermediary, or the fact that a company has reserved the authority to exercise control. Courts have also showed some openness towards considering franchisors as joint employers under the wage-and-hour laws (Blum and Pfitsch, 2014; *Cano v. DPNY, Inc.*, 287 FRD 251 (SDNY 2012)).

illegal wage-and-hour practices; and claims of retaliation for complaining about discrimination or wage-and-hour violations. Finally, given the plethora of employment laws and administrative mechanisms in the various states and even cities, this study confines itself to examining the federal and New York State systems.

Legislation and dispute resolution mechanisms

Labour law and related mechanisms

The primary labour law statute in the United States is the federal National Labor Relations Act 1935 (NLRA). There are also similar statutes that govern specific industries, such as the railroads. A good portion of the NLRA addresses collective disputes concerning traditional industrial relations subjects that fall outside the scope of this chapter. However, there are parts of the Act that do give rise to individual disputes. In particular, section 7 of the NLRA gives employees the right to “engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection”, and section 8(a)(1) makes it an “unfair labor practice” (or “ULP”) for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7”. These provisions protect workers from retaliation not only for activities that are overtly union-related, but also for other forms of concerted activity, such as complaints to employers about working terms and conditions (including wages or discrimination), or the act of filing a complaint with an agency or court concerning these issues.³ No private right of action exists for violations of the NLRA. All alleged violations must be filed as a “charge” with the National Labor Relations Board (NLRB), a federal agency. Many states, including New York, have comparable legislation for entities that might not be covered under the federal law.

Where a union and employer have concluded a CBA, there is generally a “labour arbitration” mechanism in place – which involves private arbitration by a neutral individual agreed to by both union and employer – to process alleged violations of the CBA. This mechanism may be used for both general disputes between the union and employer and individual grievances concerning the alleged discipline or dismissal of a specific worker without “just cause”. It is important to note that the right to challenge such an employer action belongs to the union; the worker is generally not a party to the CBA and thus lacks the authority to initiate a grievance.⁴ Arbitrators’ decisions can only be appealed on a very limited set of grounds, such as a violation of due process; challenging the decision on the merits is extremely difficult.

³ As Benjamin Sachs (2008) has analysed, such claims of retaliation for protesting illegal workplace conditions can often be brought under either the anti-retaliation provisions of employment law or the NLRA, sec. 7.

⁴ Under the NLRA, the union member can file a “duty of fair representation” claim with the NLRB to challenge the union’s handling of their case, but such claims are outside the scope of this chapter.

Anti-discrimination law and related mechanisms

Title VII of the Civil Rights Act 1964 was the first major federal statute to prohibit discrimination specifically in the employment setting.⁵ Specifically, Title VII forbids employers from making discriminatory employment decisions on the basis of race, colour, religion, national origin or sex. Since then, numerous other statutes have been enacted to prohibit discrimination on other bases, such as pregnancy, age and disability.⁶ In addition to prohibiting discrimination, all or almost all of these statutes also prohibit retaliation based on filing a complaint of discrimination pursuant to the given statute.

The Equal Employment Opportunity Commission (EEOC), a federal government agency, is responsible for enforcing Title VII and most of the other federal anti-discrimination statutes.⁷ Individuals alleging illegal discrimination or retaliation are generally required first to file a complaint with the EEOC before they can go to court. The EEOC has also developed a wide body of regulations, guidance and memoranda of understanding that interpret these statutes and set forth its enforcement policies.

Federal law poses no bar to states issuing additional anti-discrimination protections, procedures and remedies, and many states have enacted such laws. New York State has passed its own law prohibiting discrimination in employment, the New York State Human Rights Law 1945 (NYSHRL),⁸ and established a state agency to enforce it, the New York State Division of Human Rights (NYSDHR). New York City too has its own legislation, the New York City Human Rights Law, and body for enforcing it, the New York City Commission on Human Rights.

While there is certainly some overlap in the coverage of the federal, state and local statutory schemes, they also differ in some important ways. For instance, Title VII applies only to employers with at least 15 employees, whereas the NYSHRL applies to any employer with over four employees. The state and city laws explicitly prohibit discrimination based on sexual orientation, criminal background and other categories not specified in Title VII. Claims under Title VII must first be filed with the EEOC and this must be done within 180 days (or 300 days in New York). However, claims under the state or city law may be brought to the relevant agency within one year of the discrimination, or alternatively the complainant can entirely bypass the agency and file in court at any time within three years of the alleged discriminatory act. Moreover, the remedies available under the various statutes differ, including the funding of lawyers'

⁵ Employees may also bring claims for racial discrimination pursuant to 42 USC, sec. 1981, which was originally passed as part of the Civil Rights Act 1866 and prohibits discrimination based on race in the formation of contracts. Unlike claims under Title VII, such claims are not subject to a minimum threshold for employer size, are filed directly in court and may hold individuals liable.

⁶ These statutes include the Pregnancy Discrimination Act 1978; the Age Discrimination in Employment Act 1967; the Americans with Disabilities Act 1990; and the Family Medical Leave Act 1993.

⁷ In addition to Title VII, the EEOC website (www.eeoc.gov) lists seven other statutory provisions prohibiting discrimination that the agency is responsible for enforcing.

⁸ NY Executive Law, art. 15.

fees for successful plaintiffs. Accordingly, while these various schemes make “forum shopping” possible for sophisticated claimants and lawyers, they may also create great confusion for less sophisticated individuals.

It is important to appreciate the particular significance of these anti-discrimination protections in an at-will employment system. A discrimination claim is usually the only legal claim available to a non-union employee who feels mistreated by their employer. The result is that employees, lacking any other option, may try to label many forms of unfair treatment as illegal discrimination. Although the precise extent of this phenomenon is contested, undoubtedly there are some legally frivolous claims brought against employers – such as where a supervisor may have grossly mistreated an employee but there is no evidence that it was motivated by race, sex or another impermissible reason. Staff at administrative agencies enforcing discrimination statutes often offer this explanation for the seemingly low number of complaints deemed to be meritorious.

Wage-and-hour law and related mechanisms

At the federal level, the Fair Labor Standards Act 1938 (FLSA) is the primary piece of wage-and-hour legislation, setting a minimum wage and overtime standards, establishing record-keeping requirements and prohibiting retaliation for complaining about violations of the statute.⁹ At the state level, the New York State Labor Law 1921 (NYLL) regulates similar areas. In addition to claims for unpaid wages or underpayment of wages, “misclassification” disputes are also generally brought under these statutes. This is because these claims assert that the employer incorrectly classified the workers as independent contractors and thus failed to pay them the overtime premiums to which they are entitled as employees. In another variation of such claims, the employer incorrectly classifies an employee as performing a job that makes him “exempt” from the overtime requirements, such as being in an “executive” or “administrative” position. These various types of misclassification claims have been one of the largest sources of wage-and-hour cases in recent years.

The US Department of Labor (USDOL), and specifically its Wage and Hour Division (WHD), is charged with enforcing the FLSA. Similarly, the Division of Labor Standards in the New York State Department of Labor (NYSDOL) is responsible for enforcing the wage-and-hour provisions of the NYLL and related implementing regulations. Both USDOL and NYSDOL may investigate an employer’s compliance either in response to a complaint or on their own initiative. Under either federal or state law, workers are also free to file claims directly in court. Both federal and state laws also authorize various forms of injunctive relief, including the reinstatement of retaliation victims.

As with discrimination, there are important differences between the various wage-and-hour statutes, including the actual minimum wage (the New York minimum

⁹ There are also federal wage-and-hour statutes specifically addressing migrant workers (the Migrant and Seasonal Agricultural Workers Protection Act 1983) and dealing with work on government-funded projects or work for the federal Government (such as the Davis–Bacon Act 1931 and the McNamara–O’Hara Service Contract Act 1965).

wage is higher than the federally mandated one), statute of limitations (six years under the NYLL and two or three years under the FLSA) and, until recent legislative amendments, the “liquidated damages” available upon proving a violation.¹⁰

Courts

Many of the rights granted under the abovementioned statutes may be enforced through the federal and/or state courts. Both the federal and New York court systems have a set of procedural rules which will have an impact on the manner in which these claims are processed – including the time needed to resolve the case, the requirements for a plaintiff to initiate a case, evidentiary rules, and rules governing class or collective actions. The most relevant such rules in the federal system are the Federal Rules of Civil Procedure and Federal Rules of Evidence. In the federal system, individual courts or even judges may also have their own individual rules governing certain deadlines or the discovery of evidence. In the New York State courts, these issues are governed by the New York Civil Practice Law and Rules.

As both federal and state law are common law systems, the case law established by appellate federal and state courts is a critical source of law. In addition to clarifying the substantive law, the case law also shapes important procedural matters, including but not limited to exceptions to statute of limitations requirements and evidentiary burden-shifting schemes. Often the best way to access and understand the case law on an issue is through the “restatement” for that particular area of law, which essentially synthesizes the case law and sets out the pertinent principles or rules of law.

10.3. Analysis and evaluation of mechanisms

This section analyses the following types of dispute resolution institutions: administrative agencies responsible for discrimination and retaliation claims; administrative agencies (or the inspectorate) responsible for wage-and-hour claims; the courts; and private dispute resolution mechanisms, including labour arbitration pursuant to CBAs, internal mechanisms in non-union workplaces and mandatory employment arbitration. The ways in which ADR is being used in conjunction with each of these mechanisms is also considered.

In evaluating and comparing this diverse set of institutions, it is useful to adopt a common set of questions. Budd and Colvin have developed a framework that they argue can be applied to a wide variety of labour dispute resolution processes, including

¹⁰ Under the FLSA, when it is determined that an employer has underpaid an employee, the employee is entitled to an additional amount of liquidated damages in an amount equal to the underpayment, unless the employer can demonstrate the underpayment was made in “good faith” (19 USC, sec. 260). Previously, the NYLL entitled employees to an additional payment of liquidated damages in the amount of 25% of any underpayment where the employee could prove the violation was “willful”; but a 2010 legislative amendment then made the state law provision basically identical to the FLSA one (NYLL, sec. 198).

court litigation, labour arbitration and employers' internal mechanisms. Their model has three dimensions: efficiency; equity; and voice. Efficiency means the "effective use of scarce resources" and relates to the mechanism's cost, speed and promotion of productive employment. Equity is defined as "fairness and justice" and is characterized by unbiased decision-making, effective remedies, consistency, reliance on evidence, opportunities for appeal and protections against reprisal. Voice is the worker's "ability to participate and affect decision-making" in the process. Voice is characterized by established procedures for hearings, representation by advocates and the use of experts, opportunities for input into the design and operation of a dispute resolution system, and participation in determining the outcome (Budd and Colvin, 2008, pp. 460–466). These dimensions will be used as a rough guide for the analysis and evaluation of the various mechanisms that follow. This chapter also includes (or at least makes more explicit) an additional element of particular relevance: access. This dimension is concerned with how readily workers can take advantage of a particular mechanism.

Administrative agencies handling discrimination claims

NLRB: Agency with exclusive jurisdiction

As noted above, workers who are discriminated or retaliated against for engaging in concerted activity are not provided with a private right of action by the NLRA; only the NLRB may prosecute such claims. Nonetheless, the victim of discrimination or virtually any other individual or entity can file a charge alleging a ULP to prompt an investigation. The charge form need not even include the employee's name, and the content describing the alleged violation can be very simple. Charges can even be filed online. An NLRB agent will then perform an investigation into the alleged violation, which will probably include contacting the employer and taking affidavits from workers.

If the NLRB, through its General Counsel, finds sufficient evidence to support the charge, efforts are made to settle the claim. If there is no settlement, the General Counsel issues a "complaint" against the employer and takes on the role of the representative of the charging party. A hearing then occurs before an administrative law judge (ALJ), whose decision can be appealed to the Board itself in Washington, DC, and afterwards to the federal Court of Appeals and Supreme Court of the United States. If, however, the General Counsel does not issue a complaint, the case is over; there is no appeal from the decision not to proceed.

The NLRB performs relatively well in terms of access and efficiency, decently in terms of equity, but less well on voice. The lack of any filing fees, or the need for a lawyer, and most Board offices' commitment to providing translation services make the NLRB process quite accessible. The absolutely minimal requirements to file a charge, and the broad range of individuals or entities that may file it, also increases access. Allowing parties other than the discriminatee to file a charge may also help to prevent retaliation in some cases. To this end, the NLRB also has a useful practice of keeping confidential the identity of witnesses or employees who cooperate in its investigation or provide affidavits until it absolutely must be revealed. One shortcoming in terms of access is that undocumented workers who experience discrimination may not be awarded back

pay under the NLRA.¹¹ This severely restricts the usefulness of this mechanism for a significant group of vulnerable workers.

In terms of equity, the NLRB may only assess “make-whole” remedies, such as reinstatement and back pay, and “informational remedies”, such as requiring the employer to post a notice promising not to violate the law. The NLRB may also seek injunctive relief from a federal court (a “10(j) injunction”) to compel an employer to take (or stop) a certain action – for instance, to stop engaging in certain coercive behaviour or to reinstate an employee. The NLRB reports that the agency obtained 2,729 offers of reinstatement, of which 1,999 were accepted, and recovered US\$109.7 million in back pay for workers in 2013.¹² Even in cases where reinstatement does not occur, the threat that an employer will need to reinstate an employee can translate into a greater willingness to pay damages. Nonetheless, many argue that the absence of liquidated or punitive damages, or compensatory damages beyond back pay and benefits, means that employers are not deterred from violating the NLRA. Further, the limited monetary damages available may also cause some employees to shy away from the NLRB. For instance, if a worker sued for retaliation in court pursuant to the FLSA, he would be entitled to back pay and an additional 100 per cent of that amount in liquidated damages, as well as costs and lawyers’ fees. For this reason, when the alleged retaliation is illegal under both the NLRA and the FLSA, some advocates will choose to file the charge in federal court, or perhaps file at the NLRB and later bring a case in court to obtain the extra damages. Looking at the whole dispute resolution system together, this is obviously not the most efficient use of resources.

Turning to efficiency, the NLRB is generally quite successful at resolving a large number of the disputes filed there and doing so in a reasonable time. Although the promptness of proceedings depends somewhat on the leadership and investigators in the particular office, the NLRB often starts its investigation shortly after a charge is filed and therefore may issue a complaint fairly quickly. This allows the Board to show the employer that it is committed to pursuing the case and that there is likely to be a remedy at the end, which can help to induce settlement. Indeed, in fiscal year (FY) 2014, the highest percentages of ULP charges were withdrawn (36.4 per cent), resolved through settlement or adjustments (36.2 per cent) or dismissed (25.3 per cent); only a small remainder (2.1 per cent) were adjudicated and resulted in orders by the Board.¹³ As shown in table 10.1, though, the percentage of cases resolved through settlement has fallen somewhat over the last decade. In the cases that are not settled, if the employer chooses to run the full length of the process, resolving a claim may take a very long time and not necessarily be faster than litigation in court. But this did not happen often:

¹¹ *Hoffman Plastic Compounds Inc. v. NLRB*, 122 SCt 1275 (2002) (holding that individuals not legally authorized to work in the United States may not be awarded back pay under the NLRA).

¹² NLRB, *Reinstatement offers*, available at: www.nlr.gov/news-outreach/graphs-data/remedies/reinstatement-offers [accessed 19 Apr. 2016].

¹³ NLRB, *Disposition of unfair labor practice charges in FY14*, available at: www.nlr.gov/news-outreach/graphs-data/charges-and-complaints/disposition-unfair-labor-practice-charges [accessed 19 Apr. 2016].

Table 10.1. Filing of ULP charges with NLRB and outcomes, 2004–14

Fiscal year	ULP charges brought (no.)	Settlements		Complaints issued	
		No.	%	No.	%
2004	26 890	10 632	39.5	1 840	6.8
2005	24 720	9 722	39.3	1 373	5.5
2006	23 091	8 848	38.3	1 272	5.5
2007	22 331	8 149	36.4	1 099	4.9
2008	22 497	8 379	37.2	1 108	4.9
2009	22 943	7 767	33.8	1 166	5.0
2010	23 523	7 696	32.7	1 243	5.2
2011	22 177	6 246	28.1	1 342	6.0
2012	21 629	6 742	31.1	1 314	6.0
2013	21 394	6 573	30.7	1 272	5.9
2014	20 415	6 504	31.8	1 216	5.9

Source: NLRB, *Charges and complaints*, available at: www.nlr.gov/news-outreach/graphs-data/charges-and-complaints/charges-and-complaints [accessed 19 Apr. 2016].

between 2003 and 2013, the annual number of cases appealed to the federal courts ranged from 16 to 79. The NLRB website does not offer statistics about the extent to which back pay awarded by the Board is actually paid by the employer, but this has been a problem in many cases handled by the NLRB and other administrative agencies.

The NLRB, like many agencies, does not score particularly well on worker voice. The Board investigates all charges itself and complaints are brought in its own name. While some Board agents may seek input from workers or their advocates, and workers may need to testify at an evidentiary hearing, workers do not exercise any control over the process – including how the charge is investigated, what discovery is obtained, or what strategy will be employed at the hearing. Even decisions about settlement technically belong to the Board, not the workers. Similarly, if an employer fails to comply with an order to pay back pay or take some other action, only the Board may seek enforcement of that order.

NYSDHR: Agency process as alternative to court

In pursuing discrimination claims under the NYSHRL, complainants may file either with the NYSDHR or in court. However, once they file with the agency, they may no longer bring the claim in court. After the NYSDHR receives a complaint, the agency will investigate the allegation of discrimination through written inquiries, field visits, investigatory conferences and other methods. The agency will then determine whether or not there is probable cause to believe a discriminatory act has occurred. If probable

cause is found, a public hearing before an ALJ will be scheduled in which an agency lawyer or representative will present the case. A recommended order is prepared and sent to the parties for comment; then the NYSDHR commissioner either dismisses the complaint or issues a finding of discrimination, in which case injunctive relief (to cease and desist the discrimination or take other action), damages and/or back pay may be ordered. If there is no finding of probable cause, the complaint is dismissed. The employee may appeal that dismissal to a state court within 60 days. Similarly, an employer may appeal the commissioner's finding of discrimination and the related order to a state court within 60 days.

The NYSDHR provides a good illustration of how the same agency, under the same legal regime, can operate with radically different levels of efficiency. The NYSHRL directs (but does not legally mandate) that case investigations are to be completed within 180 days of the filing of the complaint and hearings are to be concluded within 465 days of the filing of the complaint. Yet an audit of the agency's performance on cases filed between 1999 and 2004 revealed that 73 per cent of the closed cases took more than 180 days to investigate and those that went to a hearing took over six years to resolve on average (Hevesi, 2006, p. 4). At the end of FY 2010/11, roughly 55 per cent of cases under investigation were still more than 181 days old, 31 per cent of cases that went to a hearing were over two years old, and the median time taken to process a case was 287 days.¹⁴ However, the NYSDHR reported in November 2014 that the backlog of 2,188 "aged cases" that existed in spring 2012 had since been eliminated (NYSDHR, 2014). For FY 2014/15, over 86 per cent of investigations were completed within 180 days, over 69 per cent of hearings were completed within 465 days, and less than 8 per cent of hearing cases were over two years old.¹⁵

The agency's success in reducing its backlog and processing cases faster is attributed primarily to better organization and efficiency, more resources for increased staffing and overtime hours, and an emphasis on mediation and settlement. This increase in efficiency does not appear to be the result of simply dismissing more cases. Statistics on case dispositions from 2008 to 2015 are fairly consistent: during the investigation stage, the NYSDHR either dismissed a claim or issued a "no probable cause" finding in roughly three-quarters of cases, settled between 11 and 15 per cent of cases, and issued a probable cause finding in 8–13 per cent of cases.¹⁶ There was, however, a substantial rise in the number of settlements at the hearing stage: 61 per cent of the cases concluded at this stage in FY 2009/10 were resolved through settlements, and this proportion increased to 70 per cent for FY 2010/11 and 72 per cent for FY 2014/15.¹⁷

The phenomenon of significant fluctuation in agency resources under different government administrations is also well illustrated by the New York City counterpart

¹⁴ NYSDHR, *Annual Report FY 2010–2011*.

¹⁵ NYSDHR, *Annual Report FY 2014–2015*. While these statistics encompass the variety of discrimination claims handled by the NYSDHR, generally over 80 per cent of the NYSDHR's cases each year involve employment discrimination (NYSDHR, *Annual Reports*, various years).

¹⁶ NYSDHR, *Annual Reports*, various years.

¹⁷ NYSDHR, *Annual Reports*, various years.

of the NYSDHR – the New York City Commission on Human Rights. In the past two decades, this agency’s payroll went from a high of 152 City-funded employees down to just 11, a drop of more than 90 per cent. Yet in February 2015 the City Council announced plans to increase the Commission’s funding by US\$5 million (Legal Services NYC, 2015). These huge variations in resource and staffing levels inevitably have a significant impact on the agency’s ability to tackle discrimination.

EEOC: Agency process as a prerequisite to action in court

Most discrimination claims under federal statutes must first be filed with an administrative agency, the EEOC, before they may be filed in federal court. Upon the filing of a charge, an investigator is appointed and the employer notified. Some cases are deemed to lack merit and dismissed almost immediately. For the rest, many EEOC offices will invite the parties to take part in a voluntary mediation process. The idea is to mediate the claim early before the parties have invested significant time or resources. (The EEOC mediation programme is analysed in the next subsection.) If the case is not successfully mediated, an investigation will take place in which both parties will be asked to provide information relating to the claim. The EEOC reports that the investigation process takes on average nearly ten months.¹⁸ Upon completion, the EEOC will determine whether or not there is “reasonable cause” to believe illegal discrimination occurred. If there is not, the charge is dismissed and the employee is notified that they have 90 days to file a claim in federal court. No “reasonable cause” is found in the vast majority of cases. For instance, the EEOC resolved nearly 64,000 charges filed under Title VII in 2015, with 67 per cent resulting in a “no reasonable cause” determination and an additional 16 per cent being withdrawn by the complainant (without receiving any relief) or closed by the agency for administrative reasons.¹⁹

Where the EEOC determines that “reasonable cause” exists, it may choose to litigate the alleged violation against the employer in federal court. However, before doing so, the EEOC is statutorily required to “endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion”.²⁰ Therefore, both parties will be notified of the determination and the parties will be invited to “conciliation” – a voluntary process resembling mediation. The EEOC reported that its conciliation success rate in FY 2014 was 38 per cent (James, 2015). Where conciliation is unsuccessful, the EEOC’s limited resources restrict the number of such cases that it can then litigate. In FY 2014, the agency received over

¹⁸ EEOC, *What you can expect after you file a charge*, available at: www.eeoc.gov/employees/process.cfm [accessed 19 Apr. 2016].

¹⁹ EEOC, *Title VII of the Civil Rights Act of 1964 charges*, available at: www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm [accessed 19 Apr. 2016].

²⁰ 42 USC, sec. 2000e–5(b). The Supreme Court recently clarified that this requires the EEOC to inform the employer about the specific allegation, which it typically does in a letter announcing its “reasonable cause” determination, and to “try to engage the employer in some form of discussion (whether written or oral), so as to give the employer an opportunity to remedy the allegedly discriminatory practice” (*Match Mining, LLC v. Equal Employment Opportunity Commission*, 135 SCt 1645 (2015)).

88,000 charges (under all statutes) but filed only 133 lawsuits in federal court (EEOC, 2014, pp. 26–27). If the EEOC will not litigate the case, the employee is issued a “notice of right to sue” – commonly called a “right to sue letter” – and may bring a lawsuit in federal court within 90 days.

In evaluating the EEOC on the dimension of access, one shortcoming is that Title VII simply does not cover certain employers (those with under 15 employees) or types of discrimination claims. Another issue is that while the mediation programme is quite successful in resolving charges (see below), very few of those that are not resolved and get investigated actually result in a “reasonable cause” finding by the EEOC, let alone prosecution by the agency. The agency reports that only 16.5 per cent of Title VII charges filed in 2015 resulted in a “merit resolution”, meaning the charging party obtained a favourable outcome.²¹ Therefore, given the long time it takes for a claim to be investigated by the EEOC and the low likelihood of it being pursued by the agency, unless the employer is likely to accept voluntary mediation and resolve the case, some see filing at the EEOC as a time-consuming obstacle in their path to federal court. One good EEOC practice is that the agency will generally provide a “right to sue” letter to an employee who requests it, even if the charge was filed less than 180 days earlier. This helps reduce the time claimants must wait before they can start litigation. In practice, however, most claimants who file at the EEOC will not continue on to court. Sherwyn, Estreicher and Heise reported that “even though there are anywhere from 75,000 to 150,000 discrimination cases filed under federal statutes with the EEOC each year, of the EEOC cases terminated in 2003, only 14,877 resulted in any court action” (2005, pp. 1585–1586). That is probably because, while filing an EEOC claim is fairly easy, proceeding in court without counsel is hard (as described below) and finding a lawyer, especially for low-wage claimants, is often difficult. Thus, for many claimants, the EEOC or the comparable state agency may be their only recourse.

EEOC mediation programme

The EEOC programme for mediating disputes prior to conducting an investigation (as opposed to conciliation after a finding of “reasonable cause”) has been quite successful. The EEOC reported that in FY 2014, 10,221 (11.5 per cent) of the 88,778 charges filed with the agency went to mediation; of the mediated cases, 7,846 cases (76.8 per cent) were successfully resolved; and US\$144.6 million in monetary benefits was obtained for complainants (EEOC, 2014, p. 26). Moreover, 96.4 per cent of participants in the programme reported their confidence in it (EEOC, 2014, p. 26). A much earlier study revealed that over 90 per cent of both complainants and employers who used the mediation system said they would use it again (McDermott et al., 2000).

Several factors seem to contribute to this high rate of success. First, only complaints that the EEOC determines may have some merit will be sent to mediation; the others are weeded out. Second, the process is voluntary, and thus mediation occurs only

²¹ EEOC, *Title VII of the Civil Rights Act of 1964 charges*, available at: www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm [accessed 19 Apr. 2016].

when the employer agrees to participate. According to staff in the EEOC's New York City office, while charging parties accept mediation around 90 per cent of the time, employers agree to mediation in only 25 per cent of cases.²² Third, some defence lawyers report that the EEOC investigation itself can be quite unpredictable and costly to a company, thus making settlement more attractive (Maleske, 2015). Moreover, even if the investigation does not result in a reasonable cause finding, the fact that the plaintiff can still take the case to court also provides incentives for employers to resolve cases through settlement.

An academic study of the EEOC's mediation programme by McDermott and Ervin found that the perceived fairness of the process – which, as noted above, remains high – correlates positively with settlement (McDermott and Ervin, 2005, p. 59). Interestingly, they also found that the presence of a representative (for example, a lawyer) for the charging party reduces the chance of the dispute actually being settled in mediation (McDermott and Ervin, 2005, p. 59). Of course, this does not necessarily mean that including lawyers is a bad thing. For instance, it may be that some complainants without lawyers are being pressured into accepting settlements below the actual value of their case.

In sum, the EEOC's voluntary mediation of meritorious cases has been an efficient means of resolving disputes. Mediation also generally ranks high on the voice dimension, as the worker can participate as actively in the process as he/she chooses and makes all settlement decisions. The high proportion of actual users that expressed a willingness to use the process again also suggests the process is quite equitable. On the other hand, it is worth at least noting that many criticize mediation (in any context) because the process, even if it results in a settlement, never addresses the power imbalances that exist in negotiations between employers and employees.

Administrative agencies (inspectorate) handling wage-and-hour claims

Both the federal and state wage-and-hour schemes involve an administrative agency, or inspectorate, responsible for enforcing the relevant statute – namely, USDOL and NYSDOL. In neither case is there any requirement that complaints first be filed here; workers can go straight to court. However, these agencies are generally more accessible to workers than the courts. Filing with these agencies is free, and the worker need not have a lawyer and need not be very involved in the investigation or handling of the claim.

The federal and state agencies function similarly. Either in response to a complaint or on its own initiative, the agency may investigate the wage-and-hour practices of the employer. In New York, investigators are authorized to enter a place of business and inspect its wage-and-hour records, can require employers to submit written statements and reports about the wages paid and hours worked by employees, and can ques-

²² Emails on file with the author.

tion employees on these topics (Meyer and Greenleaf, 2011, p. 95). Federal investigators have similar powers. If a violation is discovered, the employer is generally informed of this fact and the amount to be paid. In the state system, if the employer contests the finding or the amount, the employer may appeal NYSDOL's determination to an ALJ. If a hearing takes place, the agency provides its own staff or lawyer to defend the agency's determination. If unsatisfied with that decision, the employer may appeal to the civil court for review on a limited set of grounds. In the federal system, if the employer will not voluntarily comply with the orders resulting from the investigation, the case is passed to USDOL's lawyers, who then bring an action in the federal district court against the employer. The plaintiff in these actions is the agency, not the worker. USDOL may also seek certain forms of injunctive relief, including the seizure of "hot goods" produced in violation of the FLSA and the reinstatement of retaliation victims.

Although these processes are easy to initiate, there are still challenges in getting workers to do so. As David Weil notes, writing in 2014 about USDOL, "[n]ot only are complaint rates low, but they have declined substantially over the past decade ... even in the face of worsening conditions" (Weil, 2014, p. 248). Aside from the fact that many low-wage workers are unaware of their rights, even those who are aware remain largely unwilling to file a complaint from fear of retaliation by their employers. This is particularly true of undocumented workers, who fear not only the economic harm of a retaliatory act, but also potential immigration consequences as a result of coming forward (Halegua, 2016).

The inspectorates have sought to combat this problem. For instance, like the NLRB, these agencies permit a third party to file a complaint so that it need not be the aggrieved workers themselves. Both agencies also seek to work in tandem with community groups or worker centres that are more easily accessible to and are more trusted by low-wage workers, particularly immigrants, to encourage wage theft victims to come forward. The agencies also make their own outreach efforts, including in foreign languages. However, there are never sufficient resources to do this adequately. More recently, NYSDOL has made combating retaliation a top priority, promising to prioritize investigation and seek quick resolution of claims in these cases. Another important aspect of the inspectorates' practice is that even in response to a complaint by a single worker, the investigation will generally cover the entire workplace. This is both an efficient use of resources and helpful in keeping the complainant's identity confidential.

The inspectorates' ability to initiate their own investigations allows them to engage in strategic enforcement, such as targeting industries where violations are rampant or performing those investigations that will have the largest impact in an industry or community. Several years back, NYSDOL reported that about 20 per cent of its investigations were of this nature (Meyer and Greenleaf, 2011, p. 95). The author lacks more recent statistics, but NYSDOL has been more proactive when conducting certain targeted campaigns. For instance, in 2015, after a *New York Times* exposé revealed widespread exploitation in the nail salon industry, NYSDOL performed a "sweep" of 395 New York City salons, citing 85 per cent of stores for failing to maintain adequate payroll records and 40 per cent for underpaying employees (Barker and Buettner, 2016). USDOL reports that from 2009 to 2014, the number of investiga-

Table 10.2. USDOL statistics on WHD enforcement work, FY 2010–15

	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015
Complaints registered	31 824	27 112	25 420	25 628	22 557	21 902
Cases concluded	26 486	33 295	34 139	33 146	29 483	27 914
Average days to resolve complaint	142	177	145	110	116	125
No. of employees receiving back wages	209 814	275 472	308 846	269 250	270 570	240 340
Back wages paid (US\$ 100 million)	1.76	2.25	2.81	2.50	2.41	2.47

Source: USDOL, *Fiscal year statistics for WHD*, available at: www.dol.gov/whd/statistics/statstables.htm#lowwage [accessed 19 Apr. 2016].

tions it proactively initiated rose from 35 per cent to 43 per cent, and the violation rate discovered in these cases climbed from 65 per cent to 78 per cent (Weil, 2015).

The effectiveness of these agencies in investigating wage claims and obtaining money for workers, though criticized by some worker advocates, is substantial. For low-wage industries, USDOL statistics show some improvement on this front in recent years: whereas the WHD recovered US\$57.5 million in back wages for 76,900 workers in FY 2008, it recovered US\$79.3 million for 102,000 workers in FY 2015. That represents an increase of more than 32 per cent in back wages paid and an increase of more than 29 per cent in the number of workers benefiting.²³ At least part of the explanation for these increases is the fact that the WHD hired over 300 new investigators in the last five years (Weber, 2014). Statistics from USDOL's website concerning enforcement work by WHD for all statutes under its purview from FY 2010 to FY 2015 are presented in table 10.2.

The most consistent criticism of these agencies, and indeed of most agencies, is the slowness of the process. In schemes where filing with the agency does not foreclose going to court, a critical issue is how filing with the agency affects the statute of limitations for filing a lawsuit.²⁴ Filing with USDOL, for instance, does not “stop the clock” on the FLSA's already short statute of limitations of two or three years.²⁵ Accordingly, even if USDOL ultimately brought a lawsuit on behalf of a complainant,

²³ USDOL, *Working for a fair day's pay*, available at: www.dol.gov/whd/statistics/ [accessed 19 Apr. 2016].

²⁴ For wage-and-hour claims, one can sue only for the wages not paid within the statute of limitations period, not over the whole period of employment.

²⁵ The statute of limitations is three years in cases where the employer's violations are deemed to be willful.

Resolving individual labour disputes: A comparative overview

any time spent during the investigation would be essentially lost. This fact discourages workers from making use of this free administrative process and encourages employers to delay the process once it begins. While USDOL reduced the time it takes to resolve complaints from 177 days in 2011 to 125 days in 2015 (it was as low as 110 days in 2013), as seen in table 10.2, losing over three months' worth of wages is still significant.

NYSDOL also struggles to resolve cases in a timely manner. An audit revealed that as of August 2013, 75 per cent of wage theft cases had been open for more than one year since the initial claim was received by NYSDOL (NYSOSC, 2014, p. 1). NYSDOL has since made some progress in shortening investigations: in FY 2013/14, 67 per cent of new investigations were closed within six months (NYSOSC, 2014, pp. 14–15). But this apparent improvement is at least partially attributable to the agency's decision to investigate only the most recent three years of any claim, not the full six, a decision which many worker advocates have criticized. Unlike the federal law, though, the filing of a complaint with NYSDOL "stops the clock" in respect of the statute of limitations on a worker's claims under state law, and so the investigation time is not "lost" by the worker.

Another difficult area for NYSDOL, and other such agencies, is actually collecting the back wages and fines that it assesses against employers. Many employers find ways to frustrate the enforcement of any order or judgment against them. For instance, employers may keep assets in someone else's name, transfer assets when an investigation or litigation against them commences, or declare bankruptcy to stall collection efforts. Generally, the longer the dispute resolution process takes, the more opportunities an employer has to engage in such practices. Some employers will thus object to and appeal any determination against them while hiding their assets; others virtually ignore the case against them and focus on making themselves judgment-proof. Further, NYSDOL has limited resources to expend on seeking out employers' assets or collecting the monies found to be due to workers. Table 10.3 shows the proportions of assessed damages that NYSDOL could not recover from 2005 to 2009. Several New York legal aid organizations discovered that over US\$101 million in wages determined by NYSDOL

Table 10.3. Monies assessed and unrecovered by NYSDOL, 2005–09

	Total assessed (US\$)	Unrecovered	
		US\$	%
2005	13 637 494	3 243 105	23
2006	16 964 600	9 991 027	58
2007	23 939 717	10 801 874	45
2008	26 589 033	7 204 915	27
2009	45 608 966	25 338 643	55

Source: Meyer and Greenleaf, 2011, p. 144.

to be owed by employers during the decade from 2003 to 2013 went unpaid (UJC, LAS and NCLEJ, 2015, p. 5).

The potential for these administrative processes to drag on for years and the difficulty of actually collecting money demonstrate the importance of resolving such cases early. Both agencies make an effort to do so. USDOL reports engaging in “conciliation” in smaller cases where a formal investigation has not been conducted as well as attempting “settlement” after a formal investigation is complete. NYSDOL also seeks to resolve cases through conciliation, and states that it is increasingly using this method to help resolve cases quickly. Generally, after notice of the violation is sent to the employer, NYSDOL may schedule an informal case resolution conference if the employer requests this. A “compliance officer” from NYSDOL serves as a neutral in the session with the employer and the case investigator. Additional attempts to resolve the case may be made as it proceeds. NYSDOL has also recently announced the creation of a mediation unit to review complaints after they are filed and identify those cases that appear ripe for settlement. Neither USDOL nor NYSDOL has reported using third-party neutrals from outside the agency to aid in this process. There do not appear to be public statistics on the number of cases resolved through these methods.

In sum, like all mechanisms, these agencies enforcing wage-and-hour laws have both strengths and weaknesses. The fact that neither a lawyer nor any money is required to initiate the process makes it more accessible, although outreach can always be more effective. Fear of retaliation remains an obstacle, but complainants have a better chance of remaining anonymous through this process than when filing a lawsuit. The complainant also need not invest much time or effort in the proceedings, and the complainant’s co-workers may see violations remedied without taking any action themselves. On the other hand, while the agency may provide the employee with opportunities to express an opinion on how the case is resolved, control over the process and decisions about settlement ultimately belong to the agency – thus limiting voice. The particular determinations, calculations or deals made by the agency may be more or less helpful to different workers. These agencies do identify violations and order payments relatively quickly. But if an employer contests this determination and exhausts its appeal rights, the process is not necessarily any faster than litigation in court.

Courts

While far fewer employment disputes are filed in the federal courts than with administrative agencies, the number of such court cases (over 22,000 in 2013) has grown significantly since the recording of these data began in 1977 (under 7,000).²⁶ However, official court data show that employment discrimination claims and wage-and-hour claims have had very different trajectories over this period; while the number of wage-and-hour claims has exploded over the past decade, the number of discrimination

²⁶ The growth in the number of employment cases in federal court between 1990 (8,422) and 2010 (22,478) also outpaced the growth in the size of the civilian labour force in this period from 125 million in 1990 to 153 million in 2010 (Lee and Mather, 2008, p. 4; Bureau of Labor Statistics, available at: www.bls.gov/data/ [accessed 30 Mar. 2016]).

claims has dropped considerably since 1997 (Eigen, Rich and Alexander, 2016).²⁷ Nonetheless, court litigation still plays a significant role in shaping the dispute resolution landscape for each of these types of claim.

Jurisdiction and process

As a preliminary matter, federal courts are courts of “limited jurisdiction”. They may hear only two types of claims: (1) those pursuant to a federal statute, and (2) those where the plaintiff and defendant are from different states (which is slightly less common in employment disputes) and the amount in controversy exceeds a certain sum. However, once the court accepts a claim, courts have a large degree of discretion to also hear any other claims that share a common set of facts. Thus, for instance, if someone brings a discrimination claim in federal court under Title VII, the court will probably also accept the claims of discrimination under state or city law. Similarly, if one’s wage and discrimination claims stem from the same period of employment and involve common facts, a court may decide to allow those claims to be pursued in a single case.

Cases are initially filed in a district court – the trial-level court in the federal system. If the case is not settled and a decision is issued, the losing party may appeal to the appropriate Court of Appeals, which must consider the appeal. Thereafter, the losing party may appeal to the Supreme Court, which has discretion as to which cases it will consider and, in practice, hears only a small fraction of the matters appealed to it.

State courts, by contrast, are courts of “general jurisdiction”, meaning they will hear claims under local, state or federal statutes. In New York City, claims are directed to different state courts depending on the amount in dispute: the small claims court for those of US\$5,000 and under, the civil court (US\$25,000 and under) and the supreme court for higher amounts. (In New York State, the “supreme court” is the trial court and the Court of Appeals is the highest court.) As a general rule, as one goes higher in the chain, the complexity of the procedures involved and the time taken to resolve a case both increase.

Neither the federal nor the New York State court system has any specialized labour courts. A federal judge’s caseload is likely to include a full range of criminal and civil cases. State courts are sometimes more specialized, but a judge handling civil cases is still likely to deal with a wide range of matters. This system naturally lacks some of the efficiencies of specialized labour courts in which the judges are intimately familiar with labour and employment issues.

Performance and evaluation

Litigation in the United States is often characterized as a “high risk, high reward” system: that is, it is not easy to sue or prevail in court, but the awards to successful plain-

²⁷ The number of discrimination claims began to climb after passage of the Civil Rights Act 1991 and peaked in 1997, with 23,392 cases filed in that year. By 2013, though, this number had dropped by over 30% to just 15,108 cases. By contrast, the number of FLSA cases (wage-and-hour suits) climbed at a slow rate from 634 in 1977 to 1,786 in 2000, but then increased dramatically, reaching 7,226 cases in 2013 – nearly five times the number in 1997 (1,490) (Eigen, Rich and Alexander, 2016).

tiffs are often far larger than those in other forums. Court litigation performs relatively well on measures like fairness and justice owing to the thorough nature of the process – including extensive fact discovery and trials according to strict rules of evidence. The fact that virtually everything that happens in court, and all of the court’s decisions, are entirely transparent also helps disputants to see the process as fair. Court litigation scores highly in terms of voice because the employee maintains control over the process. Decisions about how to conduct discovery, trial and settlement ultimately belong to the plaintiff.

In terms of outcomes, some studies have compared employment discrimination cases litigated in court with those handled through private employment arbitration (described in more detail below). In an experiment in which actual labour arbitrators, employment arbitrators (selected from the roster of the American Arbitration Association) and jurors evaluated various hypothetical employment discrimination scenarios, labour arbitrators and jurors were more likely to rule in favour of the employee than were employment arbitrators (Klaas, Mahony and Wheeler, 2006, pp. 88–90).²⁸ Looking at actual cases, Colvin found that the employee win rate was higher in trials in federal courts (36.4 per cent) and in state courts (59 per cent) than in private employment arbitration (21.4 per cent) (Colvin, 2012, p. 470). Moreover, in the cases that plaintiffs win, the median award is higher in court than in arbitration: US\$150,500 in federal court, US\$296,991 in California state courts and US\$36,500 in employment arbitration (Colvin, 2012, p. 470). This is not to suggest that prevailing in court in discrimination cases is easy. Federal judges report that their colleagues have grown less supportive of employment discrimination claims and more focused on finding ways to dismiss them (Bennett, 2012–13, p. 686; Gertner, 2012). Many such claims will be dismissed “as a matter of law” at the motion to dismiss or summary judgment stage – essentially a determination by the judge that no reasonable juror could find in favour of the plaintiff – and thus will never be heard by a jury. Indeed, the difficulty of prevailing on discrimination claims in court, which usually requires proving the intent and thus mental state of the employer, is one key reason why plaintiffs’ lawyers now prefer bringing “comparatively more winnable” wage-and-hour actions that “are based on simpler legal inquiries” (Eigen, Rich and Alexander, 2016). However, as the number of wage-and-hour cases rises, there is some initial evidence that these cases, like discrimination cases, will come to be seen as “nuisance type claims” (Eigen, Rich and Alexander, 2016). Unfortunately, at present, less empirical research has been done on how wage-and-hour claims fare in the courts and other forums.

The weaknesses of the courts as a dispute resolution mechanism include the barriers to entry, the complexity of the processes and the length of the process. Unlike administrative agencies, most courts have filing fees – the current filing fee in

²⁸ Generally, in court trials, it is the jury that makes factual findings relating to liability, such as whether discrimination occurred, and relating to damages, such as the appropriate compensation for a plaintiff’s emotional distress. The judge oversees the trial process and decides any questions of law. The plaintiff can waive his right to a jury trial, in which case the judge both decides questions of law and serves as the finder of fact.

federal court is US\$350. While the amounts are not high, and the fee may sometimes be waived (if one is familiar enough with the procedures to find out how to achieve this), they may still be significant enough to deter a low-wage worker who has not been paid or has lost his or her job. Court procedures, particularly in federal court and higher-level state courts, are also complicated and therefore lengthy. One study found that state and federal employment discrimination cases generally took around two years to reach adjudication (Budd and Colvin, 2008, p. 473). Another study determined that the average time from the filing of a court complaint until trial was 709 days in federal court and 818 days in state court (Colvin, 2012, p. 470). One very important caveat to the above statistics, however, is that very few cases actually go to trial; virtually all of them will be dismissed or settled before that point. For instance, federal district court statistics show that for no category of employment cases did more than 3.1 per cent of the cases terminated between March 2014 and March 2015 go to trial.²⁹ A study focusing on federal court wage-and-hour claims filed between 2000 and 2011 shows that over 80 per cent of cases were resolved through settlement and under 2 per cent went to trial (Alexander, n.d.).³⁰ Moreover, many cases never make it to court because the threat of litigation alone is enough to compel the employer to reach a settlement.

Legal representation

The court process is difficult for most employees to navigate without legal representation. While some parts of the United States, New York among them, have a sizeable pool of lawyers who will represent employees, representation is not always easy to find for workers. Many underpaid or dismissed workers cannot afford to pay a private lawyer on a per-hour basis for the work needed to litigate their case. Lawyers will take some discrimination and wage cases on a contingency basis, but only if the evidence is strong. Moreover, some argue that for employees earning under US\$60,000 per year, it often does not make economic sense for a lawyer to handle their discrimination cases (St Antoine, 2008, p. 791). One estimate is that only 5 per cent of employees alleging discrimination and seeking a private lawyer are able to obtain counsel (St Antoine, 2008, p. 790). Not surprisingly, it is managers or professionals, rather than lower-level workers, who file most discrimination claims in court (Dunlop Commission, 1994, p. 50).

Workers with wage claims, even small ones, may fare slightly better. These claims are generally more straightforward to prove, particularly as the employer bears the burden of maintaining and producing accurate time and pay records. Moreover, liquidated damages equal to 100 per cent of the underpayment are available to successful plaintiffs in most cases. Indeed, some lawyers in New York City – mostly in small firms or sole practice – are willing to litigate a case in which the underpayment is only US\$5,000 or

²⁹ United States Courts, *Table C-4—U.S. District Courts—Civil federal judicial caseload statistics (Mar. 31, 2015)*, available at: www.uscourts.gov/statistics/table/c-4/federal-judicial-caseload-statistics/2015/03/31 [accessed 19 Apr. 2016].

³⁰ Charlotte Alexander has collected 55,014 federal court cases that involve FLSA claims and randomly selected a sample of 1,010 to study. This work has not yet been published, but Alexander shared her initial results with the author.

so, and perhaps willing to attempt to negotiate a resolution of claims worth even less (Halegua, 2016). One factor that could prevent a lawyer from taking such a case is a perception that collection will be difficult. And it is low-wage workers – who are often employed by smaller, more informal enterprises – who face the greatest risk of being unable to enforce any judgment they receive. A 2015 report identified court judgments in 62 New York cases, involving 284 low-wage workers and over US\$25 million, where employers had not made the payments due (UJC, LAS and NCLEJ, 2015, p. 4).

The potential for “fee shifting” in most discrimination and wage-and-hour cases also provides some encouragement for lawyers to take cases with small damages. The default rule in the United States is that each party bears its own legal fees and costs. But for most federal workplace discrimination claims, and both federal and state wage-and-hour claims, a successful plaintiff is to be awarded a reasonable amount in legal fees, based on prevailing hourly rates and the time reasonably expended by the lawyer.³¹ Therefore, even if the plaintiff is entitled to only a small damages award, lawyers can still be fairly compensated for their litigation work. Indeed, there are several examples of cases in which the lawyers’ fees award has exceeded the damages.

There are also some alternatives to private legal representation. Legal aid offices, which are generally funded by a combination of government and private funds, provide legal advice and sometimes representation. Unions may sometimes pay for or provide their own lawyers to represent workers in certain cases, particularly when the litigation is somehow connected to an organizing campaign. In addition, worker centres are becoming increasingly common – one study counts 214 such centres nationwide (Milkman, 2014, p. 2). Janice Fine describes worker centres as “the inverse of prototypical American unions” as “[t]hey are non-bureaucratic, grass-roots organizations with small budgets, loose membership structures, [and] improvisational cultures and strategies” (Fine, 2007, p. 341). These centres generally seek to organize and empower workers through a variety of means, one of which may be litigation (Halegua, 2016). But even in the few cities where legal aid offices and worker centres are relatively numerous, a large number of workers still are never able to obtain legal representation.

Aggregate litigation

Another solution to the representation problem is the use of collective mechanisms that allow multiple workers to litigate their claims together in a single case. There are at least three procedures for bringing “collective claims” or “aggregate litigation” in the courts. The first and most basic is “joinder”, in which the claims of multiple plaintiffs that raise similar factual and legal questions are simply joined together in a single case. Each claim is still technically separate and must be individually proven with its own

³¹ While fee-shifting provisions in civil rights and employment statutes are generally “one way”, a prevailing employer in a Title VII case can also be awarded legal fees where the plaintiff’s claim is “frivolous, unreasonable, or without foundation” (*Christiansburg Garment Co. v. EEOC*, 98 SCt 694, 700 (1978)). But these claims by employers, which if routinely granted could discourage plaintiffs from bringing discrimination claims, are generally disfavoured by the courts and rarely granted.

evidence. Nonetheless, consolidating these claims into one case does achieve certain efficiencies.

The next two mechanisms – “opt-out” class actions and “opt-in” collective actions – involve formal representation structures. In the former, a court may certify the existence of a “class” of plaintiffs if it determines that the questions common to the class predominate over the individualized inquiries, thus making the class action format superior.³² All individuals who meet the class criteria are automatically included in the class and their claims adjudicated through the litigation, unless they choose to “opt out”. The class is represented by one or more plaintiffs serving as “class representatives” and the lawyers for the class. This procedure can be used for NYLL claims as well as federal, state or local discrimination claims. Instead of class actions, the FLSA permits only “collective actions”, in which employees must affirmatively “opt in” to the case. The legal standard and procedure for the establishment of the collective group is similar to that in a class action – namely, the plaintiffs must all be “similarly situated” but need not be “identical”. The outcome of the case is binding only on those individuals who chose to opt in.

These procedures essentially allow for economies of scale in litigation. There are many instances in which it does not make economic sense for a worker or a lawyer to litigate the claim of a single employee, but it *is* worthwhile to litigate that claim on behalf of several dozen or several hundred employees. For example, this may be true in cases where women throughout a company are paid less than their male counterparts but only by a small amount, or where factory workers are not paid for the few minutes they spend each day taking their protective uniforms on and off. This ability to pool resources also makes litigation possible in complex cases that might entail significant costs, such as retaining expert witnesses. Another advantage to the workers is that they are unlikely to be required to participate actively in the case, for example by appearing for depositions, negotiating settlements or appearing at trial; the lawyers and class representatives generally handle these matters. The lower level of involvement by workers in these cases may also limit the likelihood of retaliation by an employer, particularly in an “opt-out” class action, where the worker is included in the case without taking any affirmative step. For these reasons, class and collective actions are very important tools for vindicating employees’ rights, particularly among low-wage workers.

Settlement conferences and ADR

As noted above, only a fraction of cases filed in federal and state courts will actually proceed to a trial. While judges dismiss some claims prior to trial, in the remainder the parties generally reach a settlement. The courts may facilitate settlement through a variety of methods with differing degrees of formality. At the informal level, the judge may hold a settlement conference to try to resolve the case. Practice differs as to whether this process is mandatory, whether the parties or only attorneys must appear

³² *Comcast Corp. v. Behrend*, 133 SCt 1426 (2013).

at the conference, at what stage in the litigation the conference occurs, and whether the judge administering the case will also conduct the settlement conference.

The federal district court for the Southern District of New York has instituted a mandatory mediation programme for all employment discrimination claims. Even if the parties have previously tried mediation, for example at the EEOC, they are required to participate in at least one mediation session. The reaching of an agreement, of course, is voluntary. Mediators are generally lawyers or professional mediators who volunteer their time. Judges refer cases to the programme shortly after they are filed, and a session is scheduled within 30 days, or 60 days if the party is unrepresented so that counsel for the purpose of mediation can be appointed. The mediators have all received training on both mediation techniques and employment discrimination law. For each year from 2011 to 2014, the percentage of successful outcomes (full or partial settlement) in represented cases was less than that in cases in which counsel was appointed; specifically, these percentages were 42 per cent and 66 per cent in 2011, 38 per cent and 54 per cent in 2012, 45 per cent and 52 per cent in 2013 and 50 per cent and 65 per cent in 2014 (Price, 2014).

In the state court system, a variety of mediation and neutral evaluation programmes are available at courthouses at different levels and locations. There also exist “small claims courts”, whose procedures are more akin to employment arbitration than court litigation in some ways: cases are heard not long after they are filed; the hearing may last only a few minutes; there is little to no discovery; and it is less necessary to have a lawyer. In fact, in New York City the small claims courts actually use private lawyers to serve as “arbitrators” to decide many of these cases. However, the judges or volunteer lawyers who handle claims in these courts do not necessarily have much experience in employment law. This may result in these cases being decided according to contract law principles instead of under the employment laws, which contain certain burden-shifting rules and other provisions that favour workers. Further, decisions by these arbitrators may not be appealed. Therefore, while providing a quick means of dispute resolution, small claims arbitration may not be a wise choice for many employment claims. However, it may make sense in some instances, such as those involving genuine independent contractors whose claims do not rely on employment laws and who do not have recourse to the federal or state inspectorates.

The significance of courts in shaping the dispute resolution landscape

It must be noted that even though only a relatively small number of the employment claims made each year are resolved in the courts, the role of litigation in the larger dispute resolution system is still enormously important. In many ways, litigation provides the background that shapes how all other mechanisms are designed, operated and assessed. Employers’ fear of litigation – with its high costs and potentially high jury awards – is what causes them to invest in internal mechanisms, use mediation and promote private employment arbitration (Eigen, Rich and Alexander, 2016). Employers will also evaluate administrative agency outcomes or settlement offers in comparison to the likely outcome in litigation. This is why settlement negotiations are said to occur “in the shadow of the law”. Accordingly, any significant change in the court process or its outcomes is also likely to cause shifts in other mechanisms. For example, if workers

claiming discrimination find it increasingly difficult to prevail in court, employers may become less willing to settle claims while they are still at the EEOC.

Internal and private mechanisms

Having examined the public dispute resolution mechanisms of administrative agencies and courts, we turn now to examine private dispute resolution mechanisms, specifically: labour arbitration pursuant to a CBA; internal mechanisms being used by non-unionized employers; and mandatory employment arbitration.

Labour grievance arbitration and dispute resolution in unionized workplaces

Collective agreements between unions and employers generally establish a system of private arbitration in which grievances are referred to a neutral decision-maker agreed to by both parties. For a long time, labour grievance arbitration has been celebrated as the “gold standard” of dispute resolution (Budd and Colvin, 2008, p. 466). The most commonly arbitrated issues are discipline, pay and conditions, and work assignments (Lewin, 2014, p. 118). However, the relevance of this institution has declined as the number of unionized workplaces has shrunk. Furthermore, employers and unions have sought to reduce the temporal and financial costs of labour arbitration by simplifying the process and introducing other processes to resolve disputes prior to arbitration.

Of the various forms of private mechanisms, labour arbitration is the most similar to court litigation. And, as with litigation, the fairness and equity of the process have to be set against its relatively high cost and low speed. In labour arbitration, formal rules of evidence generally apply and lawyers are often involved on both sides (Budd and Colvin, 2008, p. 466). One study reports that getting a decision might take up to a year, and the cost can be roughly US\$10,000 per hearing (Budd and Colvin, 2008, p. 466). There is also evidence of significant retaliation against workers who file grievances in the one to three years after participating in the labour arbitration process (Lewin, 2014, p. 126).

In their search to reduce the time and money taken up by resolving grievances, unionized employers have generally adopted one of two approaches. The first is trying to resolve cases before they get to arbitration. In fact, according to one study, 12 cases are now settled before even engaging the formal grievance process for every one that enters it (Lewin, 2014, p. 117). Grievance processes themselves now also generally consist of multiple steps prior to arbitration. For instance, some firms have introduced grievance mediation by third parties as a precursor to arbitration (Lewin, 2014, p. 121; Budd and Colvin, 2008, p. 468). Though somewhat dated, a 1988 study of one employer’s four-step process showed that almost all disputes were settled prior to arbitration: 60 per cent at the first step (usually a meeting with a manager), 30 per cent at the second step (meeting between a higher manager and a union representative), 7 per cent at the third step (decision by a more senior manager) and only 3 per cent through arbitration (Lewin, 2014, pp. 118–119).

The second approach is to simplify the arbitration process itself. Adoption of a process known as “expedited arbitration”, not surprisingly, was found to reduce the

duration of the process by 40–50 per cent (Lewin, 2014, p. 121). “Expedited arbitration reduces costs and fosters faster resolution of grievances by avoiding written briefs; transcripts; perhaps lawyers; and detailed, written decisions” (Budd and Colvin, 2008, p. 468). Data seem to be lacking on how expedited arbitration compares with normal labour arbitration on other measures, such as win rates or participant satisfaction.

In short, labour arbitration, although a private mechanism, shares many similarities with court litigation: it performs well on voice and equity but involves considerable costs, time and complexity. But, as with litigation, the threat of these high costs encourages the parties to settle. Accordingly, if labour arbitration is to be part of a grievance process, it would seem preferable to also provide disputants with faster, more informal methods for resolving individual grievances prior to initiating labour arbitration.

Internal mechanisms for private employers

Private, non-unionized employers have increasingly instituted their own internal dispute resolution procedures. Colvin reports that a majority of non-union workplaces have “some type of standard, systematic procedure ... through which an employee’s grievance can be raised and resolved” (Colvin, 2014, pp. 169–170). Estlund argues that the primary motivations for such systems are employers’ desires to avoid unionization and the costs of litigation (Estlund, 2014, p. 55). The basic strategy is that proactively offering some form of due process to workers will remove their incentive to form a union. Employers also hope that actually resolving complaints internally will mean less litigation. In addition, while such systems are not legally required, employers who create them may benefit from limits on certain forms of liability in harassment and discrimination cases.³³ Aside from such considerations, employers may also establish such systems in order to increase productivity and prevent conflicts from disrupting the workplace (Colvin, 2012, p. 260).

These dispute resolution mechanisms come in diverse forms and varying degrees of complexity. As Colvin notes, in its most basic version, a company may simply designate a manager to whom grievances should be brought. Others may create a panel of managers to hear grievances, establish management appeal procedures or introduce an ombudsman. In recent years, the complexity of such systems has grown, with some involving third parties, such as mediators and arbitrators. Some have also developed peer review panels in which co-workers of the employee hear and decide cases (Colvin, 2013, p. 264; Colvin, 2014, pp. 170–173).

There are an increasing number of mediation providers, who can be engaged at various stages throughout the dispute resolution process. Two of the better-known providers of these services are JAMS³⁴ and the American Arbitration Association (AAA),³⁵ both of which also provide arbitration services. These organizations do not deal exclusively with employment disputes, but have individual arbitrators, mediators and other

³³ *Burlington Industries, Inc. v. Ellerth*, 118 SCt 2257 (1998); *Faragher v. City of Boca Raton*, 118 SCt 2275 (1998).

³⁴ www.jamsadr.com [accessed 30 Mar. 2016].

³⁵ www.adr.org [accessed 30 Mar. 2016].

neutrals who specialize in this area. In addition to mediation and arbitration, they also offer other similar processes, such as early neutral evaluation. With the decline of unionization and the growth of employer-designed mechanisms, these private, third-party providers are becoming increasingly important players in the employment dispute resolution landscape.

In terms of efficiency, the general perception is that these internal or private processes are faster and less costly than alternatives such as litigation. As for equity, in those mechanisms that involve a decision being made about the dispute, Colvin reports that workers' win rates are actually quite similar whether the decision-maker is a high-level executive within the company (such as the vice-president of human resources or the chief executive officer) or someone outside the company (such as an employment arbitrator) (Colvin, 2014, p. 179). However, workers filed more grievances – in other words, used these processes more – when the decision-maker was a non-managerial employee, such as a panel of peers or outside arbitrator (Colvin, 2014, p. 180).

The degree of voice achieved depends on the specific procedures used. Some interesting research has been done on how the general work environment in an enterprise can influence the number of disputes that arise in the first place. For instance, Colvin has found that companies with “high involvement work systems” – including high levels of training, and employee participation in workplace operations and decision-making (for example, through working in teams) – experienced less workplace conflict and lower grievance rates (Colvin, 2014, p. 180).

There is much support for the use of mediation as part of a dispute resolution system. There is far less agreement about how a mediation programme should be designed. For instance, in their review of the research on workplace mediation, Latreille and Saundry note that some studies find, despite the frequent emphasis on the voluntary character of mediation as one of its virtues, that voluntary and mandatory mediation actually achieve the same level of success in resolving cases (Latreille and Saundry, 2014, p. 193). Opinions are also divided on the value of representation in the process: some findings show it makes parties feel the process is more fair, but others argue that participation by representatives increases formality, which is antithetical to the whole process (Latreille and Saundry, 2014, p. 193). When mediation should occur is also an unresolved matter – too early, and the parties may not be ready to settle; too late, and the parties' positions may have hardened, making settlement more difficult (Latreille and Saundry, 2014, pp. 197–198).

Mandatory employment arbitration

The use of private employment arbitration by non-unionized employers has been growing for several decades now and the practice remains highly controversial (Silver-Greenberg and Gebeloff, 2015a). It must be noted at the outset that private employment arbitration is not monolithic; a variety of forms exist. The form that is most prevalent and most contentious, and on which this section primarily focuses, is “mandatory arbitration”. This is where employees are forced to consent to an arbitration policy when they accept an offer of employment, usually either by signing a contract to this effect or by agreeing to the policies set out in an employee handbook. The agreement gener-

ally requires that the employee resolve any and all future claims against the employer, including any statutory claims for discrimination or otherwise, through private arbitration that is final and binding. This means the claimant may not concurrently or subsequently bring an action in another forum, and the decision may only be appealed to a court on very limited grounds. Thus, “mandatory arbitration” is to be distinguished from cases in which executives engage in negotiations with an employer over an individually tailored employment contract that may ultimately contain an arbitration provision, and from a situation in which a union voluntarily agrees to process disputes through a system of labour arbitration that it has a say in designing. It is also significantly different from instances in which a dispute has already arisen and the employee voluntarily agrees to resolve it through arbitration.

Some 15 years after the introduction of employment arbitration agreements, Colvin and others estimate that roughly a quarter of non-unionized workers are covered by these agreements (Colvin, 2012, p. 469; Fair Arbitration Now, 2015). These agreements may be most prevalent in states such as California, New York and Texas, presumably owing, at least in part, to the perceived threat of litigation in those states (Colvin, 2015). But employers nationwide, from national chains to storefront shops to families hiring domestic workers, are requiring employees to sign these agreements (Silver-Greenberg and Gebeloff, 2015a, b). Proponents of employment arbitration often stress its efficiency and accessibility: the procedure is simple; there are no procedural barriers to entry; legal representation is not required; the process is fast; cases get decided on their merits instead of being dismissed on summary judgment; and the process can be less adversarial than protracted litigation. Sherwyn, Estreicher and Heise also stress that employment arbitration is frequently only the final stage in a multi-step process designed to settle disputes amicably through mechanisms such as mediation, and that these systems should be evaluated as a whole (2005, pp. 1565–1566).

The critics of mandatory arbitration, some of whom call it “justice lite”, object to the institution on many grounds, primarily focusing on the involuntariness of the agreement and due process concerns about the procedure. More specifically, Sherwyn, Estreicher and Heise identified four common arguments against employment arbitration: it “(1) does not allow for the development of the law; (2) is private and does not provide for public accountability; (3) is unfair to employees because it can be expensive, limit damages, reduce the statute of limitations, alter the burden of proof, allow for untrained arbitrators to decide cases, limit discovery, and is biased in favor of employers; and (4) is the product of contracts of adhesion and unequal bargaining power” (2005, p. 1563). Another major criticism, discussed further below, is that many arbitration agreements also prohibit employees from bringing a class or collective action. A recent, multi-part investigative report by the *New York Times*, which examined 25,000 arbitration decisions from 2010 to 2014 in 35 states, found support for many of these criticisms and provides compelling anecdotes illustrating them (Silver-Greenberg and Gebeloff, 2015a, b).³⁶

³⁶ The cases studied did not solely concern employment disputes. Mandatory arbitration clauses are being used in many contexts and are particularly prevalent in consumer contracts.

In terms of the legal challenges to employment arbitration, the Supreme Court has upheld the validity of these mandatory contracts so long as certain due process requirements are met.³⁷ Specifically, these agreements may not “prevent the ‘effective vindication’ of a federal statutory right”.³⁸ The Supreme Court explained that this standard “would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would *perhaps* cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.”³⁹ Thus, simply eliminating a statutory claim is forbidden, and several federal appellate courts have invalidated agreement provisions that eliminate a specific remedy, such as punitive damages.⁴⁰ Beyond that, the precise bounds of the due process requirements for arbitration are less than clear. In practice, except in extreme cases, the federal courts have been reluctant to invalidate arbitration agreements on due process grounds, generally pointing to the “liberal federal policy favoring arbitration agreements”.⁴¹

As for the functioning of employment arbitration, there are now a few empirical studies evaluating its performance (Klaas, Mahony and Wheeler, 2006; Colvin, 2008, 2011; Silver-Greenberg and Gebeloff, 2015a, b). In terms of the efficiency of employment arbitration, proponents and critics seem to agree that it is on average faster than litigation (Budd and Colvin, 2008, p. 473; Colvin, 2012, p. 470). Arbitration has also been found to cost less than litigation, at least for employers. Estreicher notes that defending an employment case in court through trial often costs the employer US\$200,000 or more, whereas the average cost of an employment arbitration is US\$20,000 (Estreicher, 2002, p. 16). Colvin’s study of 3,945 employment discrimination cases handled by the AAA found that the mean arbitration fee was US\$6,340 per case, and US\$11,070 for cases that resulted in a decision; and pursuant to AAA rules for employment cases, the employer paid all of these fees (except a small filing fee) in 97 per cent of cases (Colvin, 2011, p. 9).

Studies have compared win rates and the size of damage awards in employment arbitration with those achieved through litigation, although some question the usefulness of this comparison given that so few court cases actually go to trial. As discussed above, Colvin found that employees obtain higher win rates and larger damages awards in court (Colvin, 2011, p. 7; 2012, p. 470), and the experiment by Klaas, Mahony and Wheeler revealed that employment arbitrators were less likely than jurors to find in favour of plaintiffs in discrimination cases (2006, pp. 88–90).⁴² That inquiry

³⁷ *Gilmer v. Interstate/Johnson Lane*, 111 SCt 1647 (1991); *Circuit City v. Adams*, 121 SCt 1302 (2001).

³⁸ *Am. Exp. Co. v. Italian Colors Rest.*, 133 SCt 2304, 2310 (2013) (citations omitted).

³⁹ *Am. Exp. Co. v. Italian Colors Rest.*, 133 SCt at 2310–11 (emphasis added).

⁴⁰ *Booker v. Robert Half Int’l, Inc.*, 413 F3d 77, 83, 85 (DC Cir. 2005); *Ingle v. Circuit City Stores, Inc.*, 328 F3d 1165 (9th Cir. 2003).

⁴¹ *Gilmer*, 111 SCt at 1651 (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 103 SCt 927, 941 (1983)).

⁴² This disparity in damages awards may be partly attributable to the fact that court litigation takes longer, since back pay – a key component of most discrimination awards – is a function of the time between the illegal termination and the issuance of the award.

also found labour arbitrators to be more heavily influenced than employment arbitrators by the presence of mitigating factors favouring the employee (Klaas, Mahony and Wheeler, 2006, p. 89). But other studies disagree. For instance, St Antoine found that the success rate of workers in mandatory employment arbitration was comparable to, and sometimes even higher than, that of union-represented employees in labour arbitration (2008, pp. 795, 811).

Critics attack the equity of employment arbitration on many grounds. One commonly made point is that since employers generally pay for the arbitration, and are repeat players in the system, arbitrators will be biased in their favour in order to be chosen in future cases. The *New York Times* investigation referenced above offers some evidence of this phenomenon, including: interviews with over three dozen arbitrators who described feeling beholden to the company that had appointed them; the arbitrator who awarded US\$1.7 million to a plaintiff and was never chosen to hear an employment case thereafter; and an arbitrator who handled 40 cases involving the same management law firm (Silver-Greenberg and Gebeloff, 2015b). Several academic studies also report finding evidence of this “repeat player bias” (Klaas, Mahony and Wheeler, 2006, p. 88; Colvin, 2011, pp. 11–16, 2012, pp. 470–471). Specifically, Colvin’s analysis of AAA awards found that where the same employer and arbitrator had appeared together more than once in the data set, the employee win rate and award amount were both lower than in other cases to a statistically significant degree (Colvin, 2011, p. 14). Moreover, the *New York Times* reports finding cases in which arbitrators “twisted or outright disregarded the law” in order to find for the employer (Silver-Greenberg and Gebeloff, 2015a). These equity concerns make the extremely limited scope of court review of arbitration decisions even more troubling. Proponents of arbitration generally doubt that any such bias exists and have questioned the methodologies claiming to have detected bias.

There are also concerns that employee arbitration may not be as accessible as its proponents suggest. One problem is that mandatory arbitration agreements often force employees to waive their right to bring a class or collective action, and the Supreme Court recently upheld the legal validity of such waivers. In *Italian Colors*, the plaintiffs sought to invalidate the class action waiver in an arbitration agreement on the grounds that it stymied the “effective vindication” of their statutory rights. They argued that it was not economically feasible for a single plaintiff to litigate an anti-trust claim on his own because the costs of litigation (particularly, hiring an expert witness) exceeded the potential recovery for any single plaintiff. But the Supreme Court, in a controversial 5–3 decision, disagreed: “the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy”.⁴³ Despite widespread criticism of this holding, lower courts have – albeit some of them begrudgingly – interpreted the *Italian Colors* decision to mean that class or collective action waivers in employment arbitration agreements are also legally permissible (Silver-Greenberg and Gebeloff, 2015a). The result of banning class actions has generally not been that plaintiffs file individual arbitration claims instead; rather,

⁴³ *Am. Exp. Co. v. Italian Colors Rest.*, 133 SCt at 2311 (emphasis in original).

“[o]nce blocked from going to court as a group, most people dropped their claims entirely” (Silver-Greenberg and Gebeloff, 2015a). One reason for this may be the difficulty plaintiffs have finding lawyers. While arbitration’s proponents stress its informality and accessibility, Colvin’s analysis of AAA cases shows that only 24.9 per cent of plaintiffs actually proceeded to arbitration without a lawyer (Colvin, 2011, p. 16). Thus, as plaintiffs’ lawyers grow increasingly sceptical about the chances of achieving a positive result in arbitration (Silver-Greenberg and Gebeloff, 2015a), finding a lawyer will become harder and plaintiffs may thus be even more likely to simply forgo pursuing their claims.

In sum, a cheaper, faster, less formal alternative to litigation could theoretically be beneficial to some employees. That said, although some individual plaintiffs may have achieved positive results in employment arbitration (Silver-Greenberg and Gebeloff, 2015b), the system of mandatory arbitration, as it exists today, raises very serious concerns in respect of fairness, equity and access. Further, the movement against mandatory arbitration may be gaining some steam (Silver-Greenberg and Corkery, 2015). The prominent *New York Times* series and subsequent editorial by that paper opposing forced arbitration focused significant attention on the issue. In response to concerns about the expansion and conduct of mandatory arbitration, as well as the Supreme Court’s seeming unwillingness to police this field in any meaningful way, some members of Congress have introduced legislation – the Arbitration Fairness Act 2015 – to ban mandatory arbitration in the consumer, employment, anti-trust and civil rights contexts. The legislation would still permit workers to select arbitration *after* a dispute has arisen. The sponsors of the Bill argue that if employment arbitration provides all the benefits that its proponents suggest, then at least some workers should voluntarily choose this route after having had a chance to analyse and weigh the various dispute resolution options. Reforming mandatory arbitration through legislation is not expected to be easy, however, as business interests are likely to oppose such efforts (Silver-Greenberg and Corkery, 2015). The Arbitration Fairness Act 2015 was introduced in both chambers of Congress in April 2015, but as yet has not been passed by either.

10.4. Conclusion

The above discussion reveals the complex, fractured and evolving nature of the individual labour dispute resolution system in the United States. This level of complexity has itself become a significant feature of the system, with important implications. For one thing, it creates a level of inefficiency, as multiple dispute resolution mechanisms may be dealing with the same dispute or aspects of the same dispute. For instance, if a female worker is fired for complaining about improper overtime payments to her work team, it is possible that the NLRB, federal or state inspectorate, EEOC and court could all be simultaneously handling aspects of the dispute. While the existence of multiple access points may benefit workers in some ways, the existence of this wide web of mechanisms with varying jurisdictions can also cause confusion. Further, it increases the importance of having a lawyer, who will be better able to “forum shop” – or at least navigate – among these institutions.

Most of the statutory rights held by employees can be enforced through complaints to an administrative agency. These agencies often control the investigation and dispute resolution process with limited input from the worker, but this may benefit workers who cannot find a lawyer or lack the time to be more actively involved. On closer inspection, there are some important distinctions between these agencies in respect of their rules and procedures, their role in the larger dispute resolution scheme, and their performance. At least part of this variability is attributable to political decisions, including the level of resources and funding allocated to any given agency.

The courts are a crucial piece of the dispute resolution landscape in the United States. Workers face some significant barriers in accessing courts, such as finding a lawyer, but fee-shifting provisions and class litigation mechanisms play some role in mitigating access difficulties. Jury trials are known for being lengthy and costly, but for producing large awards for those employees who win their cases. Accordingly, this process ranks low in terms of efficiency, but performs well on equity and voice. The impact of court litigation, however, spreads far beyond the disputes actually resolved through this means. For employers, the threat of litigation is a key factor in their decision to institute private, less costly and less risky dispute resolution mechanisms. Employees and their advocates also evaluate the performance of administrative agencies, employment arbitration and other mechanisms by how they compare to litigation.

The prevalence of various forms of ADR in the United States has been increasing for some time, and the field of employment disputes is no exception. Public dispute resolution institutions are increasingly making use of ADR processes: the public agencies and courts examined here all use at least some form of conciliation or settlement process to resolve cases. Some institutions have taken this trend further. In the discrimination context, both the EEOC and at least one federal district court have instituted more formal mediation programmes, one voluntary and one mandatory, and by this means have been able to resolve a significant number of disputes without going through the entire investigatory or litigation process.

The use of internal and private dispute resolution mechanisms is growing, but changing in form. The private schemes negotiated between unions and employers that culminate in labour arbitration by a mutually selected neutral are unlikely to play a large role as unionization rates remain low. Meanwhile, in an effort to avoid the costs of unionization, lost productivity or litigation, and particularly class action suits, non-unionized employers are increasingly setting up internal dispute resolution mechanisms. These schemes come in a variety of forms and degrees of complexity, and thus with differing levels of efficiency, equity and voice. But they increasingly culminate in, or sometimes solely consist of, mandatory employment arbitration. The means by which these mandatory arbitration clauses are imposed and how the arbitrations are conducted raise very serious fairness concerns. There is already some evidence that lawyers and plaintiffs, unable to proceed in court, will forgo pursuing a claim rather than attempt arbitration. The Supreme Court's approval of mandatory class and collective action waivers will also deny aggrieved employees a very useful means of redress. If employees' ability to access courts and juries is increasingly curtailed, this could have significant implications for the entire dispute resolution landscape. Accordingly,

it is important to pay attention to the future of mandatory employment arbitration, as whether it is permitted to expand unabated or is restricted through legislation or otherwise will have important system-wide implications.

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- Equal Employment Opportunity Commission: www.eeoc.gov.
- National Labor Relations Board: www.nlrb.gov.
- New York State Courts ADR programmes: www.nycourts.gov/ip/adr/index.shtml.
- New York State Department of Labor: www.labor.ny.gov.
- New York State Division of Human Rights: www.dhr.ny.gov.
- United States Department of Labor: www.dol.gov.
- United States Courts: www.uscourts.gov.

RESOLVING INDIVIDUAL LABOUR DISPUTES

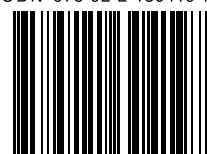
A comparative overview

The number of individual disputes arising from workers' day-to-day grievances or complaints continues to grow in many parts of the world. The nature and causes of disputes become ever more complex and diverse – as do the processes and mechanisms for preventing and resolving them.

The chapters in this book cover individual labour dispute settlement systems in Australia, Canada, France, Germany, Japan, Spain, Sweden, the United Kingdom and the United States. The authors are scholars and/or practitioners with expertise in their home jurisdictions and extensive comparative experience. Each chapter examines and assesses the institutions and mechanisms for settlement of individual labour disputes, including the procedures and powers available, the interaction of these institutions and mechanisms with other labour market institutions (e.g. collective bargaining and labour inspection) and the broader system for resolution of legal disputes (e.g. courts of general jurisdiction, specialist commissions and tribunals). The authors explore the sources of individual labour disputes, the means available to prevent them and the efficiency of the existing institutional architecture in their respective jurisdictions.

A useful tool for scholars and researchers, this comprehensive reference on the design and operation of individual labour dispute settlement systems around the world is of particular interest to those involved in the policy and practice of settling individual labour disputes, whether complainant, respondent, conciliator, judge or policy-maker.

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