Revue de droit comparé du travail et de la sécurité sociale

4 | 2017
English Electronic Edition

Redundancy and Judicial Power: Between Inaction and Creative Boldness

Rochelle Le Roux and Allison Fiorentino

Electronic version

URL: <https://journals.openedition.org/rdctss/2283>

DOI: 10.4000/rdctss.2283

ISSN: 2262-9815

Publisher

Centre de droit comparé du travail et de la sécurité sociale

Printed version

Date of publication: 1 December 2017

Number of pages: 126-137

ISSN: 2117-4350

Electronic reference

Rochelle Le Roux and Allison Fiorentino, "Redundancy and Judicial Power: Between Inaction and Creative Boldness", *Revue de droit comparé du travail et de la sécurité sociale* [Online], 4 | 2017, Online since 01 November 2021, connection on 04 December 2021. URL: <http://journals.openedition.org/rdctss/2283> ; DOI: <https://doi.org/10.4000/rdctss.2283>

Revue de droit comparé du travail et de la sécurité sociale est mise à disposition selon les termes de la Licence Creative Commons Attribution - Pas d'Utilisation Commerciale - Pas de Modification 4.0 International.

REDUNDANCY AND JUDICIAL POWER: BETWEEN INACTION AND CREATIVE BOLDNESS

ROCHELLE LE ROUX

Professor at the Faculty of Law, University of Cape Town (UCT)
Director of the Institute of Development and Labour Law

ALLISON FIORENTINO

Lecturer in Private law, University of Clermont Auvergne, Centre Michel de l'Hospital

The purpose of this review is to develop an understanding of comparative laws and practices in respect of redundancy law. In this regard the focus will be on international instruments (primarily Recommendation 119 of 1963 and 166 of 1982 and Convention 158 of the International Labour Organisation (ILO) and the European Union's Directive on Collective Redundancies (Council Directive 98/59/ EC of 20 July 1998) and the position in several domestic jurisdictions

The term 'redundancy' appears to be the most common term used to describe dismissals based on the operational requirements of the employer. However, the practice is by no means universal and in some jurisdictions, redundancy is regarded as merely one of many operational reasons that would justify a dismissal. In some jurisdictions, for instance South Africa, the term 'retrenchment' is preferred, at least colloquially, as short hand to all dismissals relating to the operational requirements of the employer. These terms are used interchangeably in this review.

In Austria, the law itself does not use a specific word for the dismissal on economic grounds. However in case of dismissal for operational reasons or other business needs, the court may examine whether dismissal was actually necessary or whether it would have been possible to transfer the worker to another post¹. If the tribunal decided that the measure was not necessary, the dismissal can be deemed "unfair". In this respect, a comparison can be made with Canadian law. There are no legal provisions governing the economic reasons for dismissal but in Canada, federal legislation and two provincial labor (Quebec and Nova Scotia) laws include an employment protection remedy allowing an employee with a

¹ OCDE, Austria, Regulations in force on 1 January 2013, <https://www.oecd.org/els/emp/Austria.pdf>

certain length of service to challenge an “unjust” dismissal. This legal protection can be used as a mean to control afterwards the grounds of dismissal. Redundant employees have used these laws to constrain the employer in courts to demonstrate that the economic reasons put forward are the real cause of the employee’s termination of employment. Similarly under federal law, the employer can be required to provide an economic justification for the dismissal and a reasonable explanation of the choice of dismissed employees. If the employer fails to produce this proof the dismissal will be deemed unfair².

In some countries the dismissal for economic motive is acknowledged but defined in extremely brief words. For example in Hungary, the dismissal is possible for a reason “in connection with the employer’s operations”³. More extreme is the example of Uruguay. A law⁴, only states that dismissed employees are entitled to a severance payment. However in studying parliamentary debates, one author, Plá Rodriguez, stressed that this was a legislative measure to avoid mass lay-offs due to the economic situation of the time. However, neither the legislator nor the case law has never legally defined redundancy or created a specific obligation to be borne by the employer in the event of dismissal for economic reasons. Only part of the doctrine militates for the recognition of an economic motto⁵.

Other countries are far stricter in their definition of redundancy even though they do not use the precise word “redundancy” but they enumerate valid causes for dismissal, among them, some are economic. It is the case in Bulgaria. The Bulgarian Labour Code strictly defines the causes of dismissal. Among those valid reasons, several of them can be regarded as economic. The dismissal is possible:

1. upon closure of the enterprise;
2. upon closure of part of the enterprise or downsizing of personnel;
3. upon reduction in the volume of work;
4. upon idling for more than 15 working days⁶

It is also the case in Estonia. The economic motives are strictly defined by the law and one article authorizes: “extraordinary cancellation of employment contract by employer for economic reasons”.⁷ According to it: An employer may extraordinarily cancel an employment contract if the continuance of the employment relationship on the agreed conditions becomes impossible due to a decrease in the work volume or reorganization of work or other cessation of work (lay-off).

2 See the article of professors Isabelle MARTIN et Guylaine VALLÉE.

3 Article 66 of the labour code. An English translation is available at the address: http://www.1x1forditoidroda.hu/Act_I_of_2012_on_the_Labor_Code.pdf

4 Law No. 10489 of June 6, 1944.

5 See the article of professor H. BARRETTO GHIONE.

6 Art. 321(1) of the labour code. An English translation is available at the address: https://webcache.googleusercontent.com/search?q=cache:XrZRMj7BJ4MJ:https://www.mlsp.government.bg/ckfinder/userfiles/files/TPOOUT/EN_TPOOUT%253DNORMATIVE%2520DOCUMENTS/Labour_Code.doc+&cd=5&hl=fr&ct=clnk&gl=fr&client=firefox-b

See also: V. KIROV, *Managing Restructuring in Bulgaria. Innovation and learning after the financial crisis*, IRENE Policy Paper N°4/2014, <http://responsible-restructuring.eu/wp-content/uploads/2014/10/Irene-Policy-paper-No-4-Bulgaria-copy.pdf>

7 Article 89 of the Employment Contracts Act (Töölepingu seadus). An English translation is available at the address: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/505052017002/consolidate>

Lay-off is also extraordinary cancellation of an employment contract:

- 1) upon cessation of the activities of employer;
- 2) upon declaration of bankruptcy of employer or termination of bankruptcy proceedings, without declaring bankruptcy, by abatement.

The case law plays sometimes a very important role. Indeed, sometimes it completes the legal definition of redundancy. For example in France a dismissal amounts to a redundancy⁸ if the termination of the employee's position (or the employee's refusal of the modification of his/her contract) is triggered:

- either by economic difficulties
- or by technological changes
- or by the reorganisation of the company in order to save its competitiveness
- or by the closure of the company

The two last economic causes were created by the judge. They have been the result of a constant jurisprudence for more than twenty years (for the reorganisation) and at least fifteen years (for the closure)⁹.

In 2016, a law¹⁰ amended the legal definition of redundancy and those two last economic causes (reorganization and closure of the company) were inserted in the labour code.

It is also the case in Hungary, where the judge decided that the "operational reason" includes restructuring, layoff and liquidation of a unit (plant, site)¹¹.

Redundancy law was originally developed in the context of growing economies and taking regard of the need for employers to be innovative and responsive to competition. It was not regarded as a means of ensuring the short-term survival of the employer's business and the assumption was that it would be easy for redundant employees to find alternative employment which is no longer a borne out by reality. It was further developed with a clear mindset that employers are best placed to decide how to run their businesses and that the ability of third parties to interfere with an employer's decision to reduce its workforce should be limited. This is best illustrated by Recommendation 119 (since superseded by Recommendation 166) that provides that any power that a neutral body such as a court may have to decide a claim that a redundancy dismissal amounts to an unjustifiable termination 'should not be construed as implying that the neutral body should be empowered to intervene in the determination of the size of the work force of the undertaking, establishment or service'.¹² This sentiment is again confirmed in paragraph 12 that emphasises that the avoidance or minimisation of workforce reductions should not 'prejudice the efficient operation of the undertaking, establishment or service. A similar notion is expressed by article 19 of Recommendation 166. In this regard Convention 158 in article 9(3) provides

8 Article L. 1233-3 of the French labour code.

9 A. SAURET, « La loi Travail élargit la définition du motif économique de licenciement », *Gazette du Palais* 2017, n° 10, p.66. See also the article of S. RANC on French law.

10 L. n° 2016-1088, 8 août 2016, relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels

11 See the article of Professor Tamás GYULAVÁRI on Hungary.

12 Article 5.2 Recommendation 119.

the extent to which the neutral body can decide whether the stated operational reasons can justify termination of employment should be regulated by domestic regulation. Although the review of domestic jurisprudence suggests a high autonomy of courts when interrogating the procedural fairness, it appears that courts are by and large avoiding interrogating the validity of the decision to reduce the workforce. This is best illustrated by the contribution on the position in Hungary where legislation seems to provide some scope for the courts to interrogate the reason for dismissal; nonetheless they have chosen to follow a very 'soft' approach to evaluating the substantive reasons for redundancy since it is regarded as falling within the realm of the employer. The contribution on the position in South Africa suggests that it is an outlier as the South African courts follow a more intrusive approach.

Another example of the intrusion by courts in the employer's decision to dismiss can be found in the French law. Even though the French judge recognized the employer as the sole judge of economic choice¹³, it created a lot of rules concerning the economic motives that make redundancies more difficult. For example, the French judge ruled that the economic difficulties must be real: consequently, it is unlawful, according to settled case-law since 1999, to eliminate jobs based solely on profitability.

Other example: the level of appreciation for economic difficulties and competitiveness requirements when the enterprise belongs to a group. Examples are indeed numerous where a group is flourishing but where jobs are eliminated in a subsidiary, a trade, a product line, a department, a geographical area, etc. The case-law, in a famous Videocolor judgment of 1995,¹⁴ recognized that the framework for assessing the economic ground may be that of the group's business sector. The big problem for some employers whose company belongs to a group is that they cannot give information about it because the group refuses to communicate.

Moreover, as a result of the highly publicized closures of French sites of international groups, specific approaches have been developed in the event of closure of the company. According to the JFH judgments of 18 January 2011¹⁵ and Goodyear of 1 February 2011,¹⁶ the employer cannot raise an "economic reason" if the cessation of activity results from "strategic choices decided at group level without economic difficulties in the sector of activity of the group".

This will to make the redundancy not easy can also be found in the Spanish case law. The law 3/2012 of July 6, 2012 on urgent measures to reform the labour market changed the definition of the economic grounds for dismissal supplementing it. It is a will of the

legislator to limit the power of interpretation of the judge¹⁷. Until the 2012 labour market

13 It is a quite old decision in which the Court of cassation decided that it is not for the judge to review the appropriateness of the employer's economic decisions. Cass. Soc. 8 December 2000, n° 97-44.219.

14 Cass. soc., 5 April 1995, n° 93-42.690.

15 Cass. Soc. 18 January 2011, n° 09-42451.

16 Cass. Soc. 1 February 2011, n°10-30.045 ; 10-30.046 ; 10-30.047 ; 10-30.048.

17 On these developments, see A. Guaman Hernandez et O. Leclerc, « Se réformer pour mieux s'adapter ? Le droit du travail espagnol face à la crise économique », *Droit ouvrier*, n°763, 2012,

reform, the doctrine and jurisprudence felt that the use of serious measures, such as dismissals for reasons related to the company, was possible only in the absence of less harmful alternatives for the workers concerned, such as the substantial change in working conditions, geographic mobility or the suspension of the contract. With the law of July 6, 2012, the legislator clearly wanted to reduce the margin of discretion of the judges. Somehow, he attempted to deprive them of jurisdiction which is vested in a State of law, including by having an extensive definition of the cause for a dismissal. By eliminating any real requirement of motivation of the finality of the decision, the legislature intended to release the employer from the obligation to indicate the reality and the seriousness of the cause of the dismissal.¹⁸

But it seems that the judge refused to bend to the will of the legislature. Indeed, the courts have reintroduced their former jurisprudence and still require that the employer prove the reasonableness of dismissal. Several decisions can be cited¹⁹ but the most emblematic of them seems to be the judgment of the supreme Court of July 17, 2014 (Ar. 5743), according to which should be excluded, as devoid of reasonableness, the decisions of the employer which offer a disconnection between the target and the sacrifices imposed on the workers.²⁰

Recommendation 119 merely referred to a termination due to the reduction of the workforce, but did not address the reasons for such reduction. However, Recommendation 166 and Convention 158 are more specific and indicate that the redundancy provisions apply when there is a reduction of workforce 'for reasons of an economic, technological, structural or similar nature'. This implies that while the employer has autonomy to decide on a reduction of its workforce, such decision cannot be taken for any reason. However, the addition of the phrase 'or similar nature' potentially provides considerable latitude to employers. In this regard an interesting question, discussed in the contribution discussing the position in South Africa, is whether the need to achieve pay equity as required by legislation can be regarded as an operational requirement. Nonetheless, the use of this terminology is not consistent. For instance, in Australia the key issue is whether the employer still requires the job to be done by the employee. As expected, and as is illustrated by the contribution on the position in Australia, the use of this terminology can be equally challenging.

Although since superseded, it is useful to reflect on Recommendation 119 since it introduced many of the notions that are now internationally and domestically regarded as the essence of fair redundancy law such as adequate advance notice, consultation with

pp. 118-123 ; O. Leclerc et A. Guaman Hernandez, « Abécédaire comparé de l'Accord national interprofessionnel du 11 janvier 2013. Vers un lexique commun des réformateurs en Europe ? », *Revue de droit du travail*, n°3, 2013, pp. 204-211 ; A. Guaman Hernandez, « Les pouvoirs du juge social en Espagne : variations, innovations et résistances », *Droit ouvrier*, n°796, 2014, pp. 719-723.

18 J. L. GIL Y GIL, « Espagne, Actualités », *Revue De Droit Comparé Du Travail Et De La Sécurité Sociale* - 2015/2, p. 144

19 Judgments of the supreme Court of 18 February, March 26 and July 17, 2014 (Ar. 3268, 2778 and 5743) and the judgments of the national court of 28 September, 15 October, 21 November and 18 December 2012 (Ar. 2515, 2/2013, 2409/2013 and 1036/2013) or of 4 April and July 4, 2013 (Ar. 1816 and Prov. 235651).

20 See also J. L. GIL Y GIL, "Strengthening the power of dismissal in recent labor reforms in Spain", *Comp. Lab. L. & Pol'y J*, 2014, pp. 413-448

unions, measures to minimise or avoid a reduction of the workforce, 'precise' selection criteria, priority in respect of re-engagement and the payment of income protection such as severance pay. Although it did not provide a precise number, it also acknowledged the possible systemic impact of mass redundancies by providing for the notification to a public authority when a substantial number of employees is to be retrenched. There is no specific reference to this in Recommendation 166, but Article 13(2) of Convention 158 provides that the application of the procedural principles advanced by the Convention in respect of retrenchments may, by domestic laws, be limited to the instances where 'the number of workers whose [retrenchment] is contemplated is at least a specified number or percentage of the workforce'. The EU directive 98/59 is thus an expression of this sentiment. In most of the jurisdictions where special provisions apply in the case of large-scale retrenchments, the central tenet of these provisions focuses on procedural, issues such as nature of the duty to consult and, in particular, the moment at which the duty to consult arises. In the case of South Africa, where the laws are informed by ILO conventions rather than the Directive, the application of the special provisions regarding large-scale retrenchment is dependent on the number of employees employed and the number of employees that the employer contemplates dismissing; the lowest level at which these special provisions apply would be when the employer contemplates dismissing at least ten employees provided that it employs at least 50 employees and for the purpose of the calculation, the number of retrenchment in the preceding year are included. While additional requirements apply in the case of large-scale retrenchment in South Africa, the nature of the obligations do not differ much from the obligations that apply in the case of small-scale retrenchments. For instance, in both cases the meaning of retrenchment is the same and in both cases the employer has an obligation to consult. However, in the case of large-scale retrenchments, very specific time periods are provided for consultation; whereas in the case of small-scale retrenchments, the employer is allowed to make the call when to call off consultation. This position seems to be similar in the UK where a parallel procedure applies in redundancy cases not regarded as part of a collective redundancy, but in this case the procedure has its origin in judicial interpretation rather than statute. The EU directive provides for a similar sliding scale that applies over a certain period and offers two options: either the number of redundancies calculated over a period of 30 days and are

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

or, the number of redundancies over a period of 90 days are at least 20, whatever the number of workers normally employed in the establishments in question. In the UK the legislature has chosen to apply the Directive when the employer is proposing to dismiss at least 20 or more employees at one establishment within a period of 90 days or less. The application of this variation is discussed in the contribution addressing the position in the UK.

Other European countries have made different choices concerning the threshold at which the employer must comply with the collective redundancy procedure. However the philosophy of the law is quite the same: below a certain threshold, there is little or no procedural obligation. Beyond this, a more complex procedure must be followed. For example, in France, in contrast to individual dismissal, a dismissal is collective when the

employer plans to dismiss at least two employees for economic reasons. There are two categories of collective layoffs with different schemes:

- «small collective redundancies” where the employer intends to dismiss two to nine employees for economic reasons over the same 30-day period²¹;
- «large collective redundancies”, where the employer intends to dismiss for economic reasons more than nine employees over the same period of 30 days²²

In Austria, employers have procedural obligations when they intend to dismiss:

- five employees in companies with 21-99 employees,
- at least 5% of the workforce in companies with between 100 and 600 employees.
- at least 30 employees in companies with more than 600 employees.
- at least 5 employees aged 50+, irrespective of company size,

within 30 days²³.

In Belgium, an employer needs to plan to dismiss, or make redundant, a minimum of 10 employees within the following 60 days in order to fall within the scope of national legislation²⁴.

More precisely, employers have obligations when they intend to dismiss²⁵:

- 10 workers in companies with between 20 to 99 employees.
- 10% of the workforce in companies with between 100 to 299 employees.
- 30 workers in companies with more than 300 employees.

For other countries, the case law has sometimes decided to set a specific threshold in the absence of legislative provision. One of the best examples is Brazil. There is no legal provision on redundancy. However, the Superior Labour Court decided in 2009 that negotiations among social partners must precede a mass dismissal²⁶. This decision has been reiterated²⁷ but they concern only dismissals of more than 50 employees.

Consultation is the loadstar of procedural fairness. The more difficult question is when consultation should commence. Article 20 of Recommendation 166 provides that ‘when the employer contemplates the introduction of major changes in production, programme, organisation, structure or technology that are likely to entail terminations, the employer should consult the workers’ representatives concerned as early as possible on, inter alia, the introduction of such changes, the effects they are likely to have and the measures for averting or mitigating the adverse effects of such changes’. Article 13 of Convention 158 simply states that consultation should commence when the employer contemplates dismissal ‘for reasons of an economic, technological, structural or similar nature’. Article 2 of the Directive in turn provides that ‘where an employer is contemplating collective redundancies, he shall begin consultations with the workers’ representatives in good time

21 Articles L 1233-8 and following of the Labour code.

22 Articles L 1233-21 and following of the Labour code.

23 Labour Market Promotion Act (Arbeitsmarktförderungsgesetz), art. 45 a

24 Act of 13 February 1998 measures to promote employment (Loi du 13 février 1998 portant des dispositions en faveur de l’emploi), art. 62-70.

25 Sectorial collective agreements might set lower thresholds than specified here.

26 Superior Labour Court decision TST-RODC-30900-12.2009.5.15.0000

27 Superior Labour Court decision TST-RO-173-02.2011.5.15.0000

with a view to reaching an agreement²⁸. Determining the exact moment to commence with consultation has proven problematic, but it is clear that it must commence at a point early enough for interventions emerging from the consultations to still change the course of events. However, this is easier said than determined and the contribution covering the position in the UK illustrates the difficulty with determining the meaning of 'contemplation' and the complications experienced where a domestic jurisdiction does not follow the exact wording of the directive.

The question can be asked what is the ultimate aim of the consultation in this context? The contribution on the UK illustrates that while consensus is an ideal, the final decision on whether to dismiss because of redundancy lies with the employer and that consultation is not the same as negotiations in the context of collective bargaining. This is also usefully explained in the contribution on the position in Australia where courts have cautioned that consultation does not imply a right to veto.

While consensus is not always possible, the sentiment expressed in all the international instruments suggest that consultation should nonetheless focus on means to avoid or minimise dismissals and to mitigate the adverse effects of the dismissals. This includes seeking alternative employment within the operations of the employer. The contribution on the position in South Africa illustrates the need to explore the latter and the consequences should the employer disregard obvious alternative positions within its operation. This contribution (South Africa) further illustrates the close connection between substance and procedure in the case of redundancy dismissals. While almost all the international instruments and domestic legislations apparently emphasise procedural requirements, the ultimate aim of all these requirements is to ensure that no dismissal that could have been avoided, takes place.

Even if the national legislation is mute about the duty to consult and try to avoid the redundancy, the case law imposes on the employer such duties. A quite unique example can be found in Japanese law²⁹. Japan is "known for its lifetime or long-term employment practice," which provides employees with a high degree of employment security. However the legislator has not enacted laws to protect the employee's job. On the opposite, this dismissal is possible without a valid cause as long as the employer pays a small indemnity. In the 70's, during the economic recession, the case law decided to protect employees' job by using an article in the civil code that prohibits abuse of right. Using that mere article,

the Japanese judge considers that a redundancy should be declared void as abusive if the employer dismiss for an economic reason without a proper consultation with trade unions and without trying to find alternatives.

28 For the CJUE, this is a very important point as illustrated in its decision Case C-188/03 *Junk v Kühnel* [2005] ECR I-885.

29 See the article of Professor Toshiharu SUZUKI and also T. ARAKI, "A comparative analysis: corporate governance and labor and employment relations in Japan", *Comp. Lab. L. & Pol'y J*, 2000, pp. 67-95; "A comparative analysis of security, flexibility, and decentralized industrial relations in Japan", *Comp. Lab. L. & Pol'y J*, 2007, pp. 444-454; D. KETTLER, C. T. TACKNEY, "Light from a dead sun: the Japanese lifetime employment system and Weimar labor law", *Comp. Lab. L. & Pol'y J*, 1997, pp. 1-41; M. H. KIM, "All or nothing: the employment security laws of japan and the United States", *B.U. Int'l L.J.*, 2016, pp. 415-451.

REDUNDANCY AND JUDICIAL POWER

Sometimes the law goes further and encourages or even obliges the employer to conclude a social plan to limit the effects of the collective dismissal. For example in Austria,³⁰ if planned changes in business operation (such as merger, change of the purpose of the organization, planned collective dismissals...) bring about negative consequences for all or a considerable number of employees in companies continuously employing at least 20 staff members, a social plan can be agreed to avoid, reduce or remove the negative consequences for the employees.

This social plan is not mandatory. The social plan is part of a works agreement (*Betriebsvereinbarung*) between employer and works council. However if the parties fail to agree on a social plan, the works council may refer the case to a public mediation and arbitration board. The decision of the board is binding and has to be implemented.

In France, if the companies have at least 50 employees and intend to make at least 10 redundancies for economic reasons over the same 30-day period, employers are compelled to respect a plan named *Plan de sauvegarde de l'emploi* or PSE.

The purpose of a PSE is to define and implement a set of means and measures to avoid as far as possible redundancies, which should only be decided as a last resort.

The employer can establish the PSE in two ways:

- Or negotiate with the representative trade unions a majority collective agreement;
- Or unilaterally fix the content of the PSE and the procedures for consulting the representative bodies of the staff.

Article 14 of Convention 158 provides that 'when the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, he shall notify, in accordance with national law and practice, the competent authority thereof as early as possible, giving relevant information, including a written statement of the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out.' A similar requirement is found in article 3 of the Directive. The notion that a public authority be notified of an impending retrenchment does not seem to be widely applied. The best expression of this requirement is in the Netherlands where an administrative authority first need to establish whether the requirements of the laws have been met and that jobs are truly redundant and that a transition to other jobs at the same employer is not possible. In most of the other jurisdictions, the administrative oversight provided in the case of the Netherlands is not replicated and this function is achieved through the pre-dismissal consultation obligations and the courts.

However, in France too the administration authority plays an important role during the dismissal procedure. For redundancies of 2 to 9 employees, the administrative authority is only informed of the dismissals. On the other hand, when the employer plans to dismiss at least 10 employees and the company employs at least 50 employees, the role of the administration is much more active. For example, the administration may submit any proposal to supplement or modify the plan for safeguarding employment (PSE). If the administration refuses to validate the PSE the dismissals pronounced are void³¹.

30 Arbeitsverfassungsgesetz (Labour Constitution Act) art. 109.

31 Article L. 1233-39 of the labour code.

In Greece the situation is even harsher toward the employer. Indeed, the Greek Law N° 1387/1983 provides that the Minister of Labor may refuse to authorize some or all of the projected redundancies. The legislation further provides that the Minister should take into account the situation, in combination with labour market conditions, the situation of the undertaking and the interests of the national economy. If no authorization is given, there will be no redundancy measures.

Until 2012, it was also the case in Spain; collective dismissal was under administrative authorization. Since the law of June 6th 2012, administration can only make non-bindings recommendations³².

A distinction must be made between severance pay and compensation paid for a dismissal based on redundancy affected in an unfair or unlawful manner. For instance, the contributions addressing the positions in South Africa, Australia and the Netherlands, illustrate that while severance pay is due upon retrenchment, compensation can become due if the employer acted in a reprehensible or unfair manner. Both Convention 158 and the EU Directive require that a severance benefit be paid, but neither provides any guidance on the purpose of severance pay. The Directive simply provides that the parties must consult on 'the method for calculating any redundancy payments other than those arising out of national legislation and/or practice'.³³ Convention 158 provides as follows:

'A worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to -

- (a) a severance allowance or other separation benefits, the amount of which shall be based inter alia on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions; or
- (b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or
- (c) a combination of such allowance and benefits.'³⁴

The article is not a model of clarity and seems to speak to all forms of termination and not only dismissals and further seems to suggest that an employee should always, upon termination of employment, either be paid severance pay or be entitled to a form of social security payment. In other words, both are not required. Most of the contributions suggest that a severance benefit is regarded as transitory and paid in order to assist the employee until new employment is found and is provided for in most laws, the glaring exception being the United States where severance pay is dependent on a private agreement. The contribution on the position in Australia provides an excellent example of how the

32 Law 3/2012 of 6 June on urgent measures to reform the labour market, Art. 18.3. However European observers have concluded that this was not necessarily to the benefit of employers. Indeed, the real cost of a dismissal is more uncertain in the absence of administrative authority. Moreover, the employees who contest their dismissal are more likely to succeed in courts that declare the proceedings, and subsequent dismissals void. European Monitoring Centre on Change, "Spain: Public authorities information and consultation on dismissals", May 2017; <https://www.eurofound.europa.eu/observatories/emcc/erm/legislation/spain-public-authorities-information-and-consultation-on-dismissals>

33 Article 2(3)(vi) Directive 98/59.

34 Article 12 Convention 158.

combined influence of international law, jurisprudential activism and, eventually, legislation stepped in to ensure the payment of severance pay in the case of redundancy.

However, in other countries, in addition to unemployment benefits, redundant employees may ask a special payment. For example, in Belgium workers affected by the collective dismissal are entitled to a special severance pay. The amount of this allowance is equal to half the difference between the net wage and the amount of unemployment benefits the worker receives with a maximum of € 3.273,00 (1st June 2016).³⁵

In Bulgaria, there is normally no general entitlement to a severance payment. There are 3 exceptions, one of which related to redundancy.³⁶ According to article 222 (1) of the labour code, the employee made redundant shall be entitled to compensation from the employer. It shall amount to the worker's gross labour remuneration for the period of unemployment but not more than one month. A compensation for a longer period may be provided for by a collective agreement or by the employment contract. If the employee finds another job less paid during the "indemnity period", the worker shall be entitled to the difference.

In France, the amount of the termination indemnity is the same, regardless of the reason for the dismissal (personal or economic). Any French employee who is dismissed may obtain an indemnity if he has one year's service and has not committed serious misconduct. The amount of compensation is:

- 1 / 5th of a months salary per year of service;
- plus 2 / 15th of a month per year of seniority beyond 10 years³⁷.

When a redundancy dismissal becomes inevitable, the selection of the employees for dismissal becomes an important question and should form part of the consultation agenda. In this regard employers are often torn between loyalty for long serving employees and the need to retain skills often associated with younger members of staff. In addition, it needs to ensure that the selection criteria do not fall foul of discrimination laws. Article 23 of Recommendation 166 reflects some of this tension and provides that 'the selection by the employer of workers whose employment is to be terminated for reasons of an economic, technological, structural or similar nature should be made according to criteria, established wherever possible in advance, which give due weight both to the interests of the undertaking, establishment or service and to the interests of the workers'.³⁸

Internationally, the preferred means of selection is founded in the last-in-first-out (LIFO) principle. However, this has the inherent risk that an employer may lose certain skills at the expense of experience and it further carries the risk of an allegation of unfair discrimination. While age is the obvious basis for a claim of discrimination when LIFO is applied, the

35 C.C.T. n° 10 du 8 mai 1973, conclue au sein du Conseil National du Travail, relative aux licenciements collectives.

36 The two other exceptions relate to the dismissal due to an illness of an employee of at least 5 years of service and to the termination after the employee has acquired the right to a pension.

37 Article R. 1234-2 of the labour code.

38 The European Directive does not explicitly address these issues. However, Article 5 makes it clear that Member States are free "to apply or to introduce laws, regulations or administrative provisions which are more favourable to workers or to promote or to allow the application of collective agreements more favourable to workers".

contribution on the position in Australia, illustrates how this has resulted in a successful claim based sex discrimination. The contribution on the position in the Netherlands provides an interesting discussion of the Dutch variation of the standard LIFO principle, the so called '*afspiegelsbeginself*' in which targeted employees are divided into age groups and then selected based on the application of LIFO within that age group. Quite interestingly this system could be compared to the one applied in Belgian. In Belgian law, companies must spread redundancies proportionally with regards to the age of their employees in order to maintain a balanced age pyramid in the workplace. A deviation of 10% is accepted for redundancies spread across the different age categories (i.e. younger than 30; 30-50; 50 and older). Employees in key roles in the company may also be excluded.

The above discussion illustrates a diverse domestic understanding and application of international instruments and that some jurisdictions are still completely disregarding the principles embedded in these instruments. The following jurisdictions are discussed in more detail below: Australia and Japan (representing the Asia-Pacific region), South Africa (for the African continent), France, the United Kingdom and the Netherlands (for Western Europe), Hungary (Eastern Europe), Canada and the United States (for North America) and Uruguay (for South America).