Tenth Meeting of European Labour Court Judges

Stockholm, 2 September 2002

LABOUR COURT LAY JUDGES

Norwegian Report

By Prof. Stein EVJU
Norwegian School of Management BI
Past President of the Labour Court

[Item numbering below refers to the numbering of questions in the Questionnaire.]

0 Prefatory observations

As a prefatory note, it must be recalled that jurisdiction in labour and employment law disputes in Norway is divided between the Labour Court and the general courts.

The *Labour Court*'s jurisdiction is confined to disputes pertaining to collective agreements and industrial action. Accordingly, the Court handles cases concerning the interpretation and validity of collective agreements, questions of breach of collective agreements and of the (statutory or contractual) "peace obligation", and claims for damages resulting from such breaches. The Court has jurisdiction pursuant to two Acts: the Labour Disputes Act, 1927 (LDA; superseding the largely similar first LDA of 1915); and the Public Service Labour Disputes Act, 1958 (PSLDA). The PSLDA applies to the state civil service sector, essentially; the LDA covers the rest of the labour market, including other parts of the public sector.

Within its domain, the Labour Court has exclusive jurisdiction. And its decisions are final; they are not on appeal to any other court. Also, all predominantly the Labour Court in practice acts at the same time as a court of first *and* final instance. A system of Local Labour Courts exists, since 1937 (however not under the PSLDA). The Local Labour Court is the ordinary Municipal Court acting in a special capacity. The Local Labour Courts have jurisdiction in disputes concerning independent collective agreements of a local or regional character only. However, with the highly centralised collective agreement system prevailing in Norway, very few cases are brought before the Local Labour Courts, on average less than three per year for the country as a whole since 1937. Appeals are to the *Labour Court*; they are even more unusual – on average less than one per year.

The *general court system* essentially is three-tiered and has global jurisdiction in all areas of law (private/civil, public/administrative, criminal), with the mere

exception of those cases that are under the jurisdiction of the Labour Court. Hence, all forms of individual employment law (including employment contracts) disputes fall to the general courts.

The ordinary courts of first instance are the *Municipal Courts*, some 90 for the country as a whole, their number being reduced to 66 in a current restructuring process. Each Municipal Court is organised with a President and one or more judges, except in some rural areas where the Court may have only one professional judge.

The Courts of Appeal, six in all, each consist of a President and a number of judges; the number of judges differs between the courts ranging from eight to about 40.

The Supreme Court is composed of the Chief Justice and, currently, 18 Justices. Ordinarily, the Supreme Court sits with two senates of five Justices and the Supreme Court Appeals Committee with three members. All of the Justices rotate between senates and the Appeals Committee according to a rotation plan set up by the Court itself. Exceptionally, the Supreme Court in Plenary with all 19 Justices sitting may hear a case.

1 The *Labour Court* has a tripartite composition, of three professional judges and four lay members (in common usage also referred to as judges).

In the *Supreme Court*, there are no lay assessors.

2 The *Local Labour Courts* also have a tripartite composition, sitting with one professional (Municipal Court) judge and two lay assessors, one workers' and one employers' representative, chosen by the judge among persons nominated by the parties to the case concerned.

As regards the *general courts of first and second instance*, in matters of private law – and hence also, at the outset, employment law – when hearing a case, the Municipal Court is composed of one judge who may be joined by two lay assessors. In the Courts of Appeal three judges who may be joined by two or four lay assessors hear the individual case. Those lay assessors are chosen for the individual case by drawing of lots from panels established for this purpose through elections, held every fourth year by the local (city or county) council, from among all persons in the municipality qualified to vote in general elections.

However, a somewhat different regime applies in "dismissal disputes", which represent by far the greater part of individual employment law disputes.

The term "dismissal disputes" is used here to denote in a simplified way a specific category of individual employment rights disputes, which are subject to certain special rules of procedure pursuant to provisions of the 1977 Worker Protection and Working Environment Act (WEA). Under sec. 61 WEA the disputes concerned are those "regarding whether an employment relationship exists or on compensation in connection with termination of an employment relationship". This encompasses suits where it is alleged that an employment relationship exists, which is subject to dismissal protection under the Act, including disputes on whether a contract for a fixed term is lawful under the Act's restrictions on such contracts; disputes on whether dismissal (with notice, or instant) by the employer is justified, and claims for compensation for unjustified dismissal.

When hearing a "dismissal dispute" the Municipal Court as a rule shall sit with two lay assessors; the Court of Appeal shall sit with four lay assessors. The lay assessors for dismissal disputes are drawn from a different panel than for other civil, including labour, cases. For "dismissal disputes" a special panel of qualified lay assessors for each court district is appointed by the regional "County Governors" (on authority delegated from the Ministry of Labour and Government Administration), in part upon nomination by main trade unions' and employers' confederations, the LO and the NHO. In the individual case the lay assessors are designated, by the Court upon proposals by the parties to the dispute, from among the panel members.

3 No initiatives to alter the composition of the Labour Court have surfaced since 1927, when the Court's "neutral middle" was expanded from one (since the Court's inception in 1915) to three professional judges.

Nor are there any plans to alter the composition of the other courts in the field sketched out above.

4 (a) In the *Labour Court*, any and all decisions are by the full court, i.e., by a full panel of all seven members.

In the *general courts* of first and second instance, interim decisions – including decisions in "dismissal disputes" on the applicant's right to remain in his/her job during proceedings – are by the professional judge(s) only. – Otherwise, in "dismissal disputes" the court *may* sit without lay assessors if both parties and the court itself agree that lay assessors are not requisite.

(b) When sitting, lay judges in all cases are required to adjudicate on all questions of fact and of law.

(c) By virtue of their number, lay members may outvote the professional judge(s). That has never occurred in the Labour Court. It is known to have happened, very exceptionally, in Municipal Courts (but not in Courts of Appeal).

5 No requirements of particular expertise apply to lay judges, nor, for that matter, to professional judges (with the exception implicit in the rules on appointment dealt with under 6, below). It is a basic tenet of the general court system in Norway that judges should be "generalists" and thus able to deal with all kinds of legal issues.

6 As regards the *Labour Court*, the four lay judges are appointed from among persons nominated by the major organisations of workers and employers; any employers' association with at least 100 members and 10 000 employees, and any trade union with at least 10 000 members, may each nominate two members with substitutes. Ever since 1915, the permanent lay judges have been appointed upon nomination by the largest confederations, LO and NHO; some substitute members are appointed from among nominees of other organisations. – For cases falling under the PSLDA a separate panel of lay judges is appointed, upon nomination by the Ministry in charge of state employer affairs and by the recognised federations of civil servants' trade unions. – No judge may be an official or member of the board of any trade union or employers' association. – The professional judges – the President, the Vice President and one additional member – are not subject to nomination by the labour market parties but, tacitly, they are supposed to possess expertise in the field of collective labour law.

As concerns the *general courts*, see in 2, above. It is inherent in the rules on appointment that lay assessors for "dismissal disputes", representing management and labour, have experience and expertise in work and employment relations.

7 On the appointment and selection of lay judges, *see* 2 and 6, above.

8 At the outset, and until now, all judges in the *Labour Court*, lay judges thus included, are appointed for a period of three years. Terms are renewable. During a three year term, a judge may be removed only if (s)he takes up an

office or position that is a bar to serving on the Court (see in 6, above). At the end of a term, as a matter of law reappointment is an open matter. In practice, however, judges are reappointed subject only to their willingness to accept another term, and to age.

As regards the President and the Vice President of the Labour Court – who are (the only) full time judges in the Court – a significant amendment has now been enacted, on the basis of a Bill (Ot.prp. nr. 46 (2001-2002)), which included a proposal to amend the relevant rules (of the LDA) so that the President and Vice President shall have tenure, i.e., be appointed "for life". The amendment Act was promulgated on 28 June 2002 (No. 58), and is due to enter into force on 1 January 2003. No changes were proposed or enacted with regard to lay judges.

Lay assessors to the general courts are elected (appointed) for a period of four years (cf. in 2, above). Terms are renewable. The above similarly applies as concerns lay assessors for "dismissal disputes". As for lay assessors elected by the local council, on the other hand, it is wholly a matter of the four-yearly election procedure.

9 Lay judges are given no particular training. Apart from previous professional experience, learning is by doing. This holds true for all of the courts.

10 Statistics, official or unofficial, on the incidence of dissenting opinions are not available for any of the courts.

On an experience based estimate, over the last 20 years the dissent rate in *Labour Court* decision is between 15 and 20 percent, the majority of dissents being by two lay judges – occasionally one – some times joined by one of the professional judges. More exceptionally, one professional judge files a dissenting opinion alone.

In the absence of any kind of hard data, estimating the incidence of dissents in general court decisions (first and second instance) is a perilous task. From fairly extensive reading of such decisions, in particular in dismissal disputes, over a number of years, I would estimate, however, that the dissent rate stands slightly higher than it does for Labour Court decisions.

With a view to the *Labour Court*, it can safely be stated that lay members conceive of their role as judges and not as "party representatives" and act accordingly. Lay members are appointed as judges – or "members" –

similarly as are the professional judges, to sit not for parties to the dispute in question but as “permanent” members for the duration of their term, and generally they fully recognise and adhere to presumptions of independence and impartiality that are implied.

As for the general courts, again an assessment is more of a difficult task. Based on observations and occasional comments from judges, one might venture the opinion that among lay assessors there is some variation, between persons and personalities, as to how they see their role and perform their function. However, the predominant impression is that they see and act their role as independent members of the court.

11 From the point of view of (my assessment and experience from) the Labour Court, definitely there are advantages to sitting with lay members; *see* 12, below. – Based on observations and comments from general court judges over the years, it may fairly be stated that the prevailing opinion among them is similar.

12 Within the Norwegian court system, the very existence of the specialised institution the Labour Court is hardly conceivable without the inclusion of lay judges among its members. The need of integrating practical experience and expertise in the field of industrial relations into a Court vested with the task of adjudicating collective labour rights disputes is one of the Court’s *raisons d’être* at the very outset (the other main consideration being that of swift dispute resolution). It is still instrumental to the Court’s functioning, I would say in two regards. Lay members bring to the Court knowledge and awareness of the history and practice of collective agreements and bargaining relationships above and beyond that of the professional judges. No less important, the participation of lay judges drawn from the ranks of trade unions and employers’ associations is instrumental to the trust and confidence with which the Labour Court is viewed by the labour market parties, be that at the national, sectoral or local level – and without which it is difficult to conceive of an equally expedient machinery for the administration of justice in the field of collective labour relations as it prevails in Norway.

As for the general courts, recalling the reservations made above, one may still venture the assessment that by and large, the participation of lay assessors is regarded as beneficial to the administration of justice within the field of individual employment law. Generally, the presence on the court of someone

from “their” side is considered important by the parties to the dispute and enhances their trust in the judicial system. And notwithstanding the odd occurrence of partisan behaviour, the value of the practical experience and insight of lay assessors is often referred to by professional judges as important to decision-making and, even more often, as most important to assisting, during hearings, in persuading the parties to reaching a friendly settlement.