

INTERNATIONAL LABOUR ORGANIZATION  
International Labour Standards Department

## **Termination of employment instruments**

**Background paper for the Tripartite Meeting of Experts to  
Examine the Termination of Employment Convention,  
1982 (No. 158), and the Termination of Employment  
Recommendation, 1982 (No. 166)**

Geneva, 18–21 April 2011



INTERNATIONAL LABOUR OFFICE GENEVA

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## Part I. Introduction

1. Following the discussion in the Committee on Legal Issues and International Labour Standards,<sup>1</sup> the Governing Body approved, at its 306th Session (November 2009), the holding of a meeting of a tripartite group of experts (hereinafter “Meeting of Experts”) to examine the Termination of Employment Convention, 1982 (No. 158), and the Termination of Employment Recommendation, 1982 (No. 166) (hereinafter the Convention, the Recommendation or the instruments), as well as the funding of the Meeting,<sup>2</sup> on the basis of a proposed composition of six Government, six Employer and six Worker experts. The Meeting was scheduled to be held from 18 to 21 April 2011.
2. The purpose of the Meeting of Experts is to examine the Convention and Recommendation, to identify obstacles to ratification and implementation and other relevant current trends in law and practice. On the basis of the outcome of the Meeting, the Office will prepare proposals to the Governing Body for its consideration.<sup>3</sup>
3. The purpose of this paper is to provide background elements for the deliberations of the Meeting of Experts. The paper is divided into five parts, including this introduction and concluding with proposed points for discussion by the Meeting of Experts.
4. A rich body of information and analysis exists specifically relevant to deliberations of the Meeting of Experts on account of the fact that the Governing Body, its committees or working parties, have examined these instruments since 1984. In particular, the following documents are available for consideration by the Meeting of Experts:
  - The General Survey prepared in 1995 by the Committee of Experts on the Application of Conventions and Recommendations (hereinafter “CEACR”) entitled “Protection against unjustified dismissal” (1995) (hereinafter “1995 General Survey”). The 1995 General Survey discussed national practice in the light of the requirements of the Convention and the guidance of the Recommendation in eight chapters.<sup>4</sup>
  - A short survey prepared by the Office for the tripartite Working Party on Policy regarding the Revision of Standards and published in March 2001 (hereinafter referred to as “2001 survey”).<sup>5</sup> The 2001 survey has two sections. The first outlines the main provisions of Convention No. 158, providing a brief overview of its legal context and tracing its origins. It contains also a detailed examination of the obstacles and difficulties encountered that might prevent or delay ratification of the Convention or that might point to the need for its revision. The examination was made on the

<sup>1</sup> GB.306/10/2(Rev.)

<sup>2</sup> GB.306/PFA/9 and GB.306/9/1(Rev.).

<sup>3</sup> GB.309/21.

<sup>4</sup> The 1995 General Survey was discussed by the tripartite groups in the Committee on the Application of Standards at the 82nd Session of the International Labour Conference (1995), and reported in the *Record of Proceedings*, International Labour Conference, 82nd Session (1995), Report of the Committee on the Application of Standards, pp. 24/28 et seq. and 27/6 et seq.

<sup>5</sup> GB.280/LILS/WP/PRS/2/2.

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basis of consultations with member States that took place in 1997 and on the basis of additional information on legislation concerning termination of employment in 59 member States.<sup>6</sup> The 2001 survey suggested that the matter of obstacles and difficulties was complex in so far as a review of the legislation of 59 selected countries suggested positive prospects for ratifications, despite several of the countries involved having reported obstacles and difficulties. The second section of the 2001 survey is an examination of the debate on labour flexibility and Convention No. 158, based on a study carried out by an external expert at the request of the Office. It had as a particular focus the experience in four countries: *Australia*, New Zealand, United Kingdom and the United States. The situation of civil law countries is also considered, represented by developments in Germany and *France*. Concluding remarks are presented for both sections,<sup>7</sup> in addition to an overall conclusion for the document.<sup>8</sup>

- A Note on Convention No. 158 and Recommendation No. 166 concerning termination of employment was prepared by the Office for the tripartite consultations that took place in November 2008 and reviewed in March 2009 (hereinafter “2009 Note”).<sup>9</sup> The 2009 Note is presented in four parts. Parts I and II provide an overview of the content and operation of the instruments and the findings of a review of national legislation in 56 countries. Part III gives examples of the Convention’s influence on national case law. Part IV presents an economic perspective of termination of employment, briefly reviewing economic theory and the impact of employment protection legislation, and empirical evidence.<sup>10</sup>

5. Additionally, the CEACR prepared a General Survey in 1974 on the Termination of Employment Recommendation, 1963 (No. 119) (hereinafter “1974 General Survey”), the Office prepared a *Digest of Employment Termination Legislation* in 2000, and currently maintains an employment protection legislation database (hereinafter “EPLex”)<sup>11</sup> – all of which have been drawn upon in preparing this paper.<sup>12</sup>

6. This background paper aims to update the situation described in these earlier documents by reviewing the current situation, particularly in light of the ILO’s constituents’ stated positions on the status of the instruments. In addition, ten countries have been selected for

<sup>6</sup> GB.280/LILS/WP/PRS/2/2, para. 7.

<sup>7</sup> Conclusions regarding obstacles and difficulties encountered, paras 46–50; concluding remarks on labour flexibility, paras 87–93.

<sup>8</sup> The 2001 survey was discussed by the tripartite groups in the Governing Body’s Working Party on Policy regarding the Revision of Standards as part of its work reported in GB.208/LILS/5, paras 57–65.

<sup>9</sup> [www.ilo.org/global/standards/information-resources-and-publications/publications/WCMS\\_103555/lang--en/index.htm](http://www.ilo.org/global/standards/information-resources-and-publications/publications/WCMS_103555/lang--en/index.htm) (accessed 9 Jan. 2011).

<sup>10</sup> The 2009 Note was discussed by the tripartite groups in consultations held on 15 November 2008; a brief overview of these discussions is found in GB.304/LILS/4, para. 69 et seq.

<sup>11</sup> [www.ilo.org/dyn/terminate/termmain.home](http://www.ilo.org/dyn/terminate/termmain.home) (accessed 8 Jan. 2011).

<sup>12</sup> The 1974 General Survey was discussed by the tripartite groups in the Committee on the Application of Standards at the 59th Session of the International Labour Conference (1974), reported in the *Record of Proceedings*, International Labour Conference, 59th Session (1974), Report of the Committee on the Application of Standards, p. 527 et seq.



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in-depth study and presentation in this document. They are: *Australia*, *Chile*, *Gabon*, *Jordan*, *Singapore*, *South Africa*, *Spain*, *Switzerland*, *Bolivarian Republic of Venezuela* and *Yemen*.

7. A brief historical background to the Meeting of Experts is given in the next section.

## **A. Historical review of the termination of employment instruments**

8. The ILO first began examining the question of international standards on termination of contracts of employment more than 60 years ago, when in 1950 the Conference adopted a resolution asking that a report on national law and practice on the matter be prepared and considered. Following a number of studies carried out on the subject, the Conference adopted in 1963 the autonomous Termination of Employment Recommendation (No. 119). The 1963 Recommendation established the framework of elements seen today in Convention No. 158 and Recommendation No. 166, including standards applicable to cases involving reduction of the workforce.

9. The CEACR in its 1974 General Survey observed:

Although the Recommendation is essentially intended to provide protection of the worker's security of employment, it also embodies an attempt to balance the several interests involved: that of the worker in job security, since loss of his job may mean loss of his and his family's livelihood; that of the employer in retaining authority over matters affecting the efficient operation of the undertaking; that of the community in maintaining peaceful labour relations and avoiding unnecessary dislocations due either to unemployment or unproductive economic units.<sup>13</sup>

10. In 1974, the Conference Committee on the Application of Standards (hereinafter "CCAS"), when considering the General Survey, acknowledged that Recommendation No. 119 had played an important role in encouraging protection against unjustified termination of employment. The Worker members urged that a new instrument in the form of a Convention would clarify and improve the provisions of Recommendation No. 119 and "bring out the links between termination of employment and other problems". A considerable number of Government members also supported the adoption of a Convention "because it would involve obligations and be subject to supervisory procedures". The Employer members considered that it was unrealistic to suppose that a Convention as such would lead to greater progress, but agreed that Recommendation No. 119 might be re-examined and perhaps revised. The Committee concluded that the issue should be put before the Conference in order to draw up another suitable instrument taking into consideration new developments since the adoption of the Recommendation No. 119.<sup>14</sup>

<sup>13</sup> ILO: General Survey of 1974 on the reports related to the Termination of Employment Recommendation, 1963 (No. 119), para. 3.

<sup>14</sup> *Record of Proceedings*, International Labour Conference, 59th Session (1974), p. 527, paras 19–21.

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- 11.** Later in 1974, the Governing Body created a tripartite Working Party on International Labour Standards (the “Ventejol Working Party”) and entrusted it with proposing a classification of ILO Conventions and Recommendations, identifying subjects on which further studies or new standards were considered necessary.<sup>15</sup> The Governing Body agreed in 1979 to the Ventejol Working Party’s proposal to place existing standards into three categories:
- instruments the ratification and application of which should be promoted on a priority basis, as they constituted valid targets on a universal basis;
  - instruments the revision of which would be appropriate;
  - and “other existing instruments”, that is Conventions and Recommendations which it was not appropriate to include in any other category, which could include, for example, standards still of value as an intermediary objective for States which were not yet in a position to apply more modern instruments.
- 12.** The Governing Body decided, upon the recommendation of the Ventejol Working Party, that Recommendation No. 119 should be considered both as an instrument to be promoted on a priority basis and as an instrument to be revised with a view to making a binding instrument.<sup>16</sup> These decisions were taken as a result of developments in law and practice reviewed by the CEACR in its 1974 General Survey and the discussions in the CCAS. Thus, five years after consideration of the 1974 General Survey, in November 1979, the Governing Body<sup>17</sup> placed an item on termination of employment at the initiative of the employer on the agenda of the 67th Session (1981) of the International Labour Conference. The Convention and Recommendation were adopted by the Conference at its 68th Session in 1982.
- 13.** In 1984, two years after the instruments were adopted, a second Working Party was established and entrusted among other tasks with reviewing the classification of standards established in 1979, submitting a revised classification and examining future policy regarding the adoption of standards. The Working Party concluded and the Governing Body agreed that the Convention and Recommendation were to be promoted on a priority basis, and were placed in the first category.<sup>18</sup>

<sup>15</sup> Final report of the Working Party on International Labour Standards, *Official Bulletin*, Special Issue, Vol. LXII, 1979, Series A, para. 2.

<sup>16</sup> GB.209/PFA/5/3, Appendix IIB; GB. 209/7/24, para. 29.

<sup>17</sup> Governing Body, 211th Session (Nov. 1979).

<sup>18</sup> See Report of the Working Party on International Labour Standards, *Official Bulletin*, Special Issue, Series A, Vol. LXX, 1987.

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**B. Protection against unjustified dismissal –  
The 1995 General Survey and discussion  
in the Conference Committee on the  
Application of Standards<sup>19</sup>**

14. In 1991, nine years after the instruments were adopted, the Governing Body decided to request ILO member States to send reports on the Convention and Recommendation, to enable the CEACR to prepare a General Survey on them in 1995.<sup>20</sup> The reason given for consideration of these instruments was: “in particular, [to] make it possible to identify the obstacles to the ratification of the Convention”.<sup>21</sup> This was in contrast with the reasons offered for the possible selection of other instruments, including the Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159), and Recommendation (No. 168),<sup>22</sup> and the Nursing Personnel Convention, 1977 (No. 149), and Recommendation (No. 157).<sup>23</sup> Nor were obstacles to ratification given as a reason for considering six other subject areas for future General Surveys.<sup>24</sup>
15. The Convention had been ratified by 24 countries at the time the 1995 General Survey had been completed. The CEACR had information available from 107 member States in the reports supplied under article 19 of the Constitution, in addition to the information available from the article 22 reports received on the Convention.<sup>25</sup>
16. The 1995 General Survey was subjected to an in-depth discussion in 1995 at the CCAS. The Employer members concluded that Convention No. 158 ought to be revised as soon as possible. The Worker members considered that the Convention was “as relevant now as ever before” and noted that the CEACR had identified “no points in need of revision”.<sup>26</sup> Other comments made during the discussions on the 1995 General Survey are referred to periodically below.

<sup>19</sup> This section is taken from GB.268/LILS/WP/PRS/1.

<sup>20</sup> ILO: “Protection against unjustified dismissal”, General Survey on the Termination of Employment Convention, 1982 (No. 158), and Recommendation (No. 166). Report III(4B), International Labour Conference, 82nd Session, Geneva, 1995.

<sup>21</sup> GB.251/SC/3/4, para. 8.

<sup>22</sup> “... a survey on these instruments would make it possible to assess national policies on vocational rehabilitation and the employment of disabled persons at the end of the United Nations Decade of Disabled Persons”, GB.251/SC/3/4, para 5.

<sup>23</sup> “... a sector which is important in quantitative terms and by the place which it occupies in society. The situation of nursing personnel is a subject of broad discussions both in industrialized and in developing countries”, GB.251/SC/3/4, para 7.

<sup>24</sup> GB.251/SC/3/4, para. 6 (freedom of association) and para. 9(a)–(f) (employment policy, employment services/fee-charging employment agencies, wages, minimum age, labour administration, cooperatives).

<sup>25</sup> 1995 General Survey, para. 17.

<sup>26</sup> *Record of Proceedings*, International Labour Conference, 82nd Session (1995), Report 24, p. 24/32, para. 88, and p. 24/36, para. 99.

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**C. The Working Party on Policy regarding the Revision of Standards and discussions in the Governing Body**

17. The Working Party on Policy regarding the Revision of Standards (the “Cartier Group”) started its work in 1995. At that time, it was agreed to take as the point of reference for its review the classification made by the Ventejol Working Party.<sup>27</sup>
18. The Cartier Group first examined the Convention and Recommendation in March 1997.<sup>28</sup> As was usual for the Cartier Group, this examination resulted in a decision to request information from member States on the obstacles and difficulties encountered that might prevent or delay ratification of the Convention or that might point to the need for its revision.
19. In the course of the consultations held with member States in 1997, a total of 51 member States responded to the request for information on obstacles and difficulties that might prevent or delay ratification. One of the ten countries that have ratified since 1997, *Luxembourg*, was in this group.<sup>29</sup>
20. A year later, in March 1998, the Working Party re-examined the Convention in the light of the results of consultations held in 1997.<sup>30</sup> The Working Party did not reach a consensus on recommended future action. In order to explore further the possibilities to arrive at a consensus, the Working Party decided that a “short survey” be carried out.<sup>31</sup> In November 2000 the short survey was presented to the Working Party,<sup>32</sup> which decided to defer its examination to March 2001.<sup>33</sup>
21. The 2001 survey examined in two parts the obstacles and difficulties encountered that might prevent or delay ratification of the Convention or that might point to the need for its revision. The first is the outcome of the 1997 consultations with member States on the Convention. The second is an analysis of the then recently published information on legislation concerning termination of employment in 59 member States.

<sup>27</sup> GB.262/LILS/3, para. 67(1).

<sup>28</sup> GB.268/LILS/WP/PRS/1. The relevant selection is reproduced in the Appendix II of the 2001 survey.

<sup>29</sup> Three countries in this group – *Australia*, *Finland* and *Latvia* – had already ratified the Convention.

<sup>30</sup> GB.271/LILS/WP/PRS/2, paras 49–59. The relevant paragraphs are reproduced in the Appendix II of the 2001 survey.

<sup>31</sup> The Governing Body had used the short survey methodology previously in respect of the Holidays with Pay Convention (Revised), 1970 (No. 132), and Paid Educational Leave Convention, 1974 (No. 140). Conclusions were reached in respect of these instruments; GB.283/LILS/WP/PRS/1/1, para. 71.

<sup>32</sup> GB.279/LILS/WP/PRS/1/3.

<sup>33</sup> GB.280/LILSWP/PRS/2/2. The March 2001 document was the same as the document submitted in November 2000 subject only to minor factual corrections.

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22. The Working Party in March 2001 was not able to reach a conclusion regarding the Convention and Recommendation.<sup>34</sup>
23. In March 2007, the Office proposed to the Governing Body to re-examine the status of the instruments at the earliest possible juncture.<sup>35</sup> The matter was discussed in the LILS Committee, but no decision was taken.<sup>36</sup>
24. In accordance with a decision taken at the 300th Session of the Governing Body, held in November 2007, on the recommendation of the LILS Committee, tripartite consultations were held on Saturday, 15 November 2008, on the status of the instruments during the 303rd Session. The Workers' and Employers' groups requested the inclusion of Convention No. 158 in the process of the General Survey of 2010 on employment standards.<sup>37</sup> However the decision taken at the LILS meeting on Friday, 14 November 2008, concerning the six employment instruments selected for the General Survey was not modified at that Governing Body session (303rd Session).
25. In March 2009, the Governing Body invited the Office to organize a meeting of a tripartite working group of experts to examine the instruments.<sup>38</sup>
26. In the 2009 Global Jobs Pact adopted by the Conference on 19 June 2009, "the termination of employment"<sup>39</sup> instruments were included among the international labour Conventions and Recommendations in addition to the fundamental Conventions that are relevant for strengthening international labour standards, particularly useful in times of crisis. The HIV and AIDS Recommendation adopted in June 2010 has also made reference to Convention No. 158.<sup>40</sup>
27. The Convention is currently ratified and in force for 35 member States listed in Appendix I.

#### **D. Other considerations**

28. The discussions concerning the Convention and Recommendation have also given rise to questions concerning their effects on labour markets and employment outcomes. The Employers' group has expressed the view that these possible effects include hampering the creation of new jobs because employers face termination costs and creating incentives for maintaining job incumbents in their positions, thereby blocking new entrants to the labour

<sup>34</sup> GB.280/12/2, para. 5. The Worker members' statement in this respect is found in paragraph 6 and that of the Employer members in paragraph 7.

<sup>35</sup> GB.298/LILS/4, para. 9.

<sup>36</sup> GB.298/9(Rev.).

<sup>37</sup> GB.304/9/2, para. 9.

<sup>38</sup> GB.304/PV, para. 210(iii).

<sup>39</sup> Paragraph 14 of the Global Jobs Pact.

<sup>40</sup> Paragraph 11 of Recommendation No. 200 states that "[r]eal or perceived HIV status should not be a cause for termination of employment. Temporary absence from work because of illness or caregiving duties related to HIV or AIDS should be treated in the same way as absences for other health reasons, taking into account the Termination of Employment Convention, 1982 (No. 158)".

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market.<sup>41</sup> The Workers' group has expressed the view that these effects include stabilizing employment in the case of short-term economic pressures and creating incentives for the development and use of human resources within the enterprise.

29. The evaluation of employment protection legislation for its effects on employment, employer behaviour, productivity and competitiveness has been researched and debated for decades.<sup>42</sup> Several high profile debates have included controversy in the scoring of the employing workers indicator (EWI) – which comprises among other elements the strictness of employment protection legislation – in the World Bank's *Doing Business* report.<sup>43</sup> As a result of consultations with the ILO, the EWI was revised and a policy instruction given that World Bank staff should suspend the use of the EWI as a basis of policy advice.<sup>44</sup> The Organisation for Economic Co-operation and Development (OECD) indexes the stringency of employment protection legislation in its indicators of employment protection, which quantifies legal provisions affecting individual and collective dismissals as well as the regulation of temporary forms of employment.<sup>45</sup> These difficulties to produce indicators reflect some of the obstacles that are at the basis of any research linking employment protection legislation to its effects on employment.<sup>46</sup>
30. A paper entitled "Combining flexibility and security for decent work" was discussed by the Governing Body's Committee on Employment and Social Policy in November 2009.<sup>47</sup> The paper focused on an alternative to the debate on the pros and cons of labour market flexibility, that is, a more moderate policy agenda developed in Europe under the flexicurity paradigm. When the representative of the Director-General summarized the discussion held during the Governing Body, he indicated that, firstly, there was no consensus on the concept of flexicurity, including its definition, on the Office's research agenda concerning the concept of flexicurity, and on the promotion of the concept in developing countries. Secondly, Europe was an exception as the Office already had an ongoing research agenda regarding flexicurity, and the European Commission and

<sup>41</sup> "An excessively rigid protection against dismissal would give rise to certain preventive action because it impaired the ability and willingness of enterprises to recruit new workers ...", Employer Vice-Chairperson, para. 80, CCAS, General Survey discussion in 1995. "... [P]rotection against dismissal which goes beyond the simple prohibition of arbitrary dismissals would complicate the capacity of enterprise to adapt to operational or general economic changes. These complications could result from delays due to certain mandatory procedures prior to dismissals. Furthermore, protection against dismissal increases operating costs for enterprise and the national economy in general. In the context of globalization and of increasing competition, flexibility and speed of adaptation were vital to the survival of enterprises. This flexibility for entry was not possible if the priority of personnel policy was to protect currently employed workers".

<sup>42</sup> For an overview of the debate, see 2009 Note, Part IV: "Termination of employment: An economic perspective".

<sup>43</sup> See, for example, B. Arrunada: "Pitfalls to avoid when measuring institutions: Is doing business damaging business?", in *Journal of Comparative Economics*, 2007, Vol. 35, pp. 729–747.

<sup>44</sup> See "Employing workers' methodology", *Doing Business*, World Bank Group, at [www.doingbusiness.org](http://www.doingbusiness.org).

<sup>45</sup> For most recent studies, see D. Venn: "Legislation, collective bargaining and enforcement: Updating the OECD employment protection indicators", 2009, at [www.oecd.org/els/workingpapers](http://www.oecd.org/els/workingpapers).

<sup>46</sup> See G. Bertola, T. Boeri and S. Cazes: "Employment protection in industrialized countries: The case for new indicators", in *International Labour Review*, 2000, Vol. 139, p. 57.

<sup>47</sup> GB. 306/ESP/3/1.

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European Member States supported the Office's continuing engagement in that regard. Thirdly, many representatives of the Governing Body supported the Office's intention to pursue research, publishing policy advice and organizing capacity building on individual components of flexicurity as part of its research on labour market institutions, regulations and policies, social dialogue, skills and lifelong learning for employability, social protection, and active labour market policies, all within the broader frameworks of the Decent Work Agenda, the Declaration on Social Justice for a Fair Globalization and the Global Jobs Pact.<sup>48</sup> Finally, the Global Jobs Pact states that, in order to prevent a downward spiral in labour conditions and build a recovery, it is especially important to recognize that, in addition to the fundamental Conventions, the instruments on termination of employment are to be considered as particularly useful in times of crisis.<sup>49</sup> It is beyond the scope of this paper to attempt to lay out flexicurity as an alternative to the balance of rights and obligations set out in the Convention and Recommendation. There is further discussion of this matter in Part IV, section C.

<sup>48</sup> See paragraph 89 of the report of the Committee on Employment and Social Policy (doc. GB.306/12(Rev.)). On that occasion, the Worker Vice-Chairperson stated that there was a consensus that the topic was not a priority at the present time. Nonetheless, European countries were entitled to ask the Office to continue its work on the topic. However, they should consider the implications of adapting the concept to the rest of the world. In particular, she asked them to consider how the high levels of social protection in countries where flexicurity was well established, such as Denmark, could be extended to developing countries. She reiterated that it was imperative for the ILO to work with the multilateral system to enhance the social protection floor at the country level. The Employer Vice-Chairperson expressed her disappointment that no consensus had been reached on further ILO engagement on the concept of flexicurity. She recalled the Business Europe–European Trade Union Confederation (ETUC) agreement on flexicurity as evidence of European workers' endorsement of the concept. She also recalled the conclusions of the tripartite ILO's 2009 European Regional Meeting, which had referred to flexicurity. While European models of flexicurity could not be superimposed on developing countries, there were relevant concepts that could be useful and further explored. She suggested considering alternative terminology and commended the way the representative of the Director-General had summarized the conclusions of the discussion.

<sup>49</sup> Global Jobs Pact, para. 14(2).

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## Part II. Contents of the instruments and relevant practice of the Committee of Experts on the Application of Conventions and Recommendations

31. The texts of Convention No. 158 and Recommendation No. 166 are provided in Appendix II. A brief summary of the main provisions is provided below.

### A. Summary of the main provisions

32. Convention No. 158 is framed in three parts. This organization is mirrored in the Recommendation. Part I sets out methods of implementation, scope and definitions. Part II sets standards of general application, including justification for termination, procedures prior to and at the time of termination, procedures of appeal against termination, period of notice, and severance allowance and other income protection. Part III has provisions that supplement those in the previous parts, where termination of employment occurs for economic, technological, structural or similar reasons, including provisions on consultation with workers' representatives and notification to the competent authority.
33. *Implementation methods, scope and definitions (Articles 1–2).* A ratifying State may choose between different methods to give effect to the Convention, by laws or regulations, “by means of collective agreements, arbitration awards or court decisions or in such other manner consistent with national practice” (Article 1). This reflects substantial flexibility regarding how to implement the Convention.
34. There are two types of exclusions – those that can be made at any time and those that can be made only with the submission of the first report on the measures being taken to apply the Convention under article 22 of the ILO Constitution. Workers employed under certain contracts of employment can be excluded; these are specified in Article 2, paragraph 2, and include fixed-term, task-specific, probationary and casual work contracts. These exclusions can be made at anytime provided that adequate safeguards are in place against recourse to “contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from th[e] Convention” (Article 2, paragraph 3). The Recommendation suggests particular safeguards against recourse to fixed-term contracts the aim of which is to avoid the protections set out in the instruments (Paragraph 3(2)). Certain categories of employed persons may also be excluded provided the competent authority first consults with the organization of employers and workers concerned (Article 2, paragraphs 4–5). The first category is employed persons whose “terms and conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention”. The second category is “limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them”. Where exclusions within these two categories are desired, they must be listed in the first report on the application of the Convention submitted under article 22 of the ILO Constitution (Article 2, paragraph 6).
35. *Justification for termination (Articles 4–6).* As a basic principle, the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the: (a) capacity; (b) conduct of the worker; or (c) based on the operational requirements of the undertaking. Certain reasons for terminating an employment are not permitted. These include: union membership and activities; seeking office as or acting as a workers' representative; filing a complaint or participating in proceedings alleging



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violation of law by the employer; race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and absence from work during maternity leave. Nor shall temporary absences from work because of illness or injury constitute valid reasons for termination, although what constitutes temporary absence shall be determined by the methods of implementation used to give effect to the Convention. The Recommendation suggests additional grounds that should not constitute valid reasons for termination (Paragraph 5).

- 36. *Procedure prior to or at the time of termination (Article 7).*** Where employment is to be terminated for reasons related to the worker's conduct or performance, workers shall have the opportunity to be heard prior to dismissal. The Recommendation gives guidance concerning disciplinary warnings prior to termination for misconduct (Paragraph 7); prior instruction in advance of termination for unsatisfactory performance (Paragraph 8); assistance in defence (Paragraph 9); the timeliness of termination in relation to worker misconduct (Paragraph 10); consultation with workers' representatives before a final decision on individual terminations (Paragraph 11); and details on notification (Paragraph 13).
- 37. *Procedure of appeal (Articles 8–10).*** Workers have the right to appeal (Article 8) and not to have to bear alone the burden of proving that the termination was not justified (Article 9). The Convention prescribes the establishment of an impartial body such as a court, labour tribunal, arbitration committee or arbitrator (Article 8) for this purpose, with the power to award remedies including reinstatement or compensation (Article 10). The Recommendation suggests conciliation before or during appeal proceedings (Paragraph 14) and the giving of information about possibilities of appeal against termination (Paragraph 15).
- 38. *Period of notice (Article 11).*** A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period (Article 11). The Recommendation suggests giving workers a reasonable amount of time off without loss of pay during the period of notice for the purposes of seeking new employment (Paragraph 16) and the provision of certification of employment upon termination (Paragraph 17).
- 39. *Severance allowance and other income protection (Article 12).*** A worker whose employment has been terminated shall be entitled to either severance allowance or other separation benefits or benefits from unemployment insurance or other forms of social security benefits (Article 12).
- 40. *Consultation of workers' representatives (Article 13) and notification to the competent authority (Article 14).*** When the employer contemplates termination for reasons of an economic, technological, structural or similar nature, an opportunity for consultation as early as possible with workers' representatives shall be provided. In the case of dismissals for economic, technological, structural or similar reasons, the Convention requires notification to the competent authorities (Article 14). The Recommendation suggests measures to avert or minimize termination, criteria for selection for termination, priority of rehiring and mitigating the effects of termination (Paragraphs 20–26).

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## B. Practice of the CEACR, article 24 committees and other supervisory bodies

41. The CEACR elaborated its understanding of the instruments in the 1995 General Survey. This section intends to highlight those comments particularly related to the positions expressed in the CCAS by the social partners and in particular in relation to difficulties alleged in applying the Convention. The concerns expressed by tripartite committees established in accordance with article 24 of the ILO Constitution are taken up in this section as they relate to the relevant substantive provisions of the instruments.
42. *Implementation methods, scope and definitions (Articles 1–2).* These provisions deal with the types of workers to be afforded protections under the Convention, and by what methods those protections might be afforded. The CEACR’s views on these subjects are set out in Chapters I and II of the 1995 General Survey.
43. The CEACR observed in its 1974 General Survey that its subject matter was regulated in most countries “by a varying mixture of legislation, collective agreements, arbitral awards, court decisions, custom or usage and work rules”.<sup>1</sup> In respect of scope of application, the CEACR that year emphasized the coverage of migrant workers. Discussion of the possible exclusion from the coverage of protection of workers engaged under fixed-term contracts, under probation, or engaged casually occupied one paragraph.<sup>2</sup> There was no reference by either the Workers’ or Employers’ groups to the protection of workers under fixed-term or task-specific contracts during the CCAS discussion of the 1974 General Survey; in relation to scope of protection, the emphasis was on the effective coverage of migrant workers.<sup>3</sup>
44. In recent years, the CEACR has had the opportunity to emphasize that the Convention applies to all workers, both to foreigners and to nationals.<sup>4</sup> It has also observed that contracts for a specified period play a varying and somewhat ambiguous role in that they can lead to recruitment into jobs of indeterminate duration or just as easily be a means of exclusion from stable employment. In the 1995 General Survey, it noted that there is a recent trend to substitute employment contracts by self-employment so as to avoid protection under the Convention.<sup>5</sup>

<sup>1</sup> ILO: General Survey of the reports related to the Termination of Employment Recommendation, 1963 (No. 119), 1974, para. 14.

<sup>2</sup> *ibid.*, para. 20.

<sup>3</sup> Second Part of the Report of the Conference Committee on the Application of Standards, *Record of Proceedings*, International Labour Conference, 59th Session (1974), p. 526, para. 9.

<sup>4</sup> CEACR observation: *Gabon* (2002).

<sup>5</sup> 1995 General Survey, para. 56.

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45. The Convention has not defined the concept of “reasonable duration” regarding workers serving a period of probation. It is for each country to determine the periods considered to be reasonable, subject to the requirement that this determination is made in good faith.<sup>6</sup> The only requirement established in the Convention is that the duration be determined in advance, in particular so that the worker is aware of the conditions under which he is engaged, and so that the period cannot be unduly prolonged.<sup>7</sup> The same applies to “qualifying period”.<sup>8</sup>
46. The Recommendation gives examples of safeguards that could be used against the recourse to contracts of employment for a specified period of time, the aim of which is to avoid the protection resulting from the Convention. The 1995 General Survey also included examples of measures from different countries to limit their use.<sup>9</sup> The CEACR through these years has expressed concern over countries that have not introduced safeguards.
47. The CEACR on several occasions has noted that Article 2(6) allows governments to take account of future developments that would enable a modification of the exclusions listed in a first report. It has reminded several governments that the Convention does not allow the introduction of new exceptions beyond those listed in the first report,<sup>10</sup> and since 2007 has called the attention of several governments to the exclusion of workers from the scope of application of the Convention despite the fact that they had not been mentioned in the first report.<sup>11</sup> It may be recalled that this is one matter noted for possible revision in the 2001 survey<sup>12</sup> and in the proposals submitted to LILS in March 2009.<sup>13</sup>
48. The supervisory bodies have taken up the matter of the use of fixed-term contracts in relation to application of the Convention in several cases.

<sup>6</sup> 1995 General Survey, para. 40.

<sup>7</sup> 1995 General Survey, para. 40.

<sup>8</sup> 1995 General Survey, para. 43.

<sup>9</sup> 1995 General Survey, paras 45–56.

<sup>10</sup> 1995 General Survey, para. 74.

<sup>11</sup> See, for example, CEACR comments: *Spain* (prisoners) (2007); *Morocco* (professional journalists, miners, film workers, janitors) (2009); *Australia* (exclusion of employers with 100 employees) (2008); *Turkey* (workers employed in establishments with fewer than 30 workers, employers’ representatives and managers) (2008).

<sup>12</sup> 2001 survey, para. 30.

<sup>13</sup> The Office suggested that it might be considered important to: (i) promote the core principles of the instruments of termination of employment; and (ii) explore the possibility of reviewing the flexibility clauses in the Convention. In paragraph 91 of document GB.304/LILS/4, it is also indicated that: “Promotional activities might be undertaken in conjunction with a process of considering the partial revision of the provisions of Article 2 of the Convention through the adoption of a Protocol. Consideration might also be given to introducing greater flexibility for ratifying States to avail themselves of the exclusions in the application of the Convention, while making provision for effective tripartite consultations prior to having recourse to the exclusions.”

**Case study: Article 24 representation alleging non-observance by France of Convention No. 158**  
(Governing Body document GB.300/20/6)

A Tripartite Committee was established to consider a representation brought under article 24 of the Constitution of the ILO by the Confederation Générale du Travail – Force Ouvrière, alleging non-observance by France of, inter alia, Convention No. 158. In respect of Convention No. 158, the Tripartite Committee considered whether Ordinance No. 2005-893 was in accordance with the provisions of Convention No. 158 which was ratified by France. The aforementioned ordinance established a contract of employment of indeterminate duration for any new employment in enterprises with not more than 20 employees (“CNE”), and served to exclude the application of certain protections under the Labour Code relating to individual or collective terminations of employment, for the first two years following conclusion of a CNE.

The Tripartite Committee thus addressed two issues relevant to Convention No. 158: (i) whether workers recruited under the CNE can validly be excluded from the protection of the Convention on the basis of Article 2, paragraph 2(b); and (ii) whether, and to what extent, the application of the Ordinance deprived workers of the protection under Article 4 of the Convention.

**Exclusions under Article 2, paragraph 2(b)**

The Tripartite Committee considered whether workers under the CNE might be excluded from the scope of the Convention by virtue of Article 2, paragraph 2, of the Convention. In this regard, while the Committee noted that an exclusion may be made under Article 2, paragraph 2, without any particular procedure, the Committee expressed its doubts “as to whether Article 2, paragraph 2, of the Convention offers an appropriate basis for justifying any exclusions from protections that might be considered necessary to achieve those objectives”. The Committee considered that the policy considerations underlying the establishment of the CNE, including in particular the promotion of full and productive employment, were of the kind that might have justified measures under paragraph 4 or 5 of Article 2. The Committee felt that those considerations had little relevance to the situations covered by Article 2, paragraph 2, and that the purpose of characterizing the period of employment consolidation as a qualifying period of employment was essentially to enable employees under the CNE to be excluded from certain provisions of the Convention.

Furthermore, the Committee considered whether the “period of employment consolidation” was of a reasonable duration, in the context of Article 2, paragraph 2(b), of the Convention. In this regard, the Committee noted that “the main concern should be to ensure that the duration of the period of exclusion from the benefits of the Convention is limited to what can reasonably be considered as necessary in the light of the purposes for which this qualifying period was established, namely in particular (to enable) employers to measure the economic viability and development prospects of their enterprise and to enable the workers concerned to acquire skills or experience”. The Committee thus found itself unable to conclude from the considerations which were apparently taken into account by the Government in determining the duration, that a period as long as two years was reasonable.

The Committee thus concluded that there was insufficient basis for considering the period of employment consolidation as a qualifying period of employment of reasonable duration, within the meaning of Article 2, paragraph 2(b), justifying the exclusion of the workers concerned from the benefits of the Convention during that period.

**Protections under Article 4 of the Convention**

The Tripartite Committee also considered whether workers under the CNE benefited from the protections under Article 4 of the Convention. The Committee noted from the Government’s communications that, in the case of termination under the CNE: (a) workers whose employment is terminated for reasons of performance or conduct (except for cases of a disciplinary nature) need not be provided an opportunity, prior to or at the time of termination, to defend themselves against the allegations made; (b) the requirement under Article 4, read with Article 7, of the Convention that the employee must be given a valid reason, prior to or at the time of termination, at least in cases relating to conduct or performance, need only be complied with where the termination is of a disciplinary nature; (c) employees could be obliged to take court proceedings simply to obtain information as to why their employment had been terminated; and (d) while a valid reason for termination must exist in the sense that the termination must not be an abuse of rights or for reasons connected with the employees health condition, their political or religious opinions or their customs in circumstances showing harassment or any of the discriminatory reasons referred to in the Labour Code, it was not clear that the

<sup>14</sup> This case study is reproduced from the 2009 Note, pp. 6–7; see also GB.300/20/6.

Ordinance allowed action to be effectively taken against terminations for other invalid reasons.

The Tripartite Committee thus concluded that Ordinance No. 2005-893 significantly departed from the requirements of Article 4 of Convention No. 158.

In this regard, the Tripartite Committee invited the Government, in consultation with the social partners: (i) to take such measures as may be necessary to ensure that the exclusions from the protection provided by the laws and regulations implementing Convention No. 158 are in full conformity with its provisions; and (ii) to give effect to Article 4 of Convention No. 158 by ensuring that the CNE can in no case be terminated in the absence of a valid reason.

In its 2008 report, submitted under article 22 of the Constitution, the Government reported that, taking into account the recommendations of the Tripartite Committee, it passed Act No. 2008-596 of 25 June 2008, implementing a national tripartite agreement, which repeals the provisions relating to the CNE. The CNEs in force at the time of publication of the Act were reclassified as contracts of unlimited duration. Furthermore, the social chamber of the French Cour de Cassation, in its judgment of 1 July 2008 (No. 1210), held that, under the terms of Article 2, paragraph 2(b), of the Convention, the CNE is not one of the categories of contracts that can be excluded from the protection of the Convention. The court also held that the CNE did not comply with the requirements of the Convention.

In its 2008 observation, the Committee of Experts noted with satisfaction the information provided by the Government which indicated that the Convention was applied at the national level.

**50.** The application of the Convention in *Spain* was discussed in the CCAS and noted in the 1995 General Survey. In the 1994 CCAS, the Worker members noted the large proportion of temporary contracts prevalent in the Spanish labour market. They considered that special attention should be given to the establishment of safeguards against abuse of this type of contract.<sup>15</sup> The Employer members said that the logic of the Convention consisted, on the one hand, of the possibility of excluding temporary contracts from its scope and, on the other, of requiring safeguards to be provided to prevent recourse from being had to such contracts to avoid the protection resulting from the Convention. They considered that it would be difficult to determine how many temporary contracts would constitute a violation of this provision of the Convention and noted further that the increasingly frequent use of temporary contracts seemed necessary in view of the changes in national economies. Information on the current situation in *Spain* is provided below, at paragraph 58 et seq.

**51.** *Justification for termination (Articles 4–6).* The CEACR has observed that the need to base termination of employment on a valid reason connected to the workers' capacity or conduct, or based on the operational requirements of the undertaking, is the cornerstone of the Convention's provisions.<sup>16</sup> This requirement is coupled with the prohibition of termination of employment for certain reasons specified in Article 5, several of which are related to other Conventions or fundamental principles and rights at work. The prohibition of temporary absence from work because of illness or injury as a valid reason for termination has been seen by the CEACR as a reason comparable to those listed in Article 5.<sup>17</sup>

<sup>15</sup> ILO: *Provisional Record* No. 25, International Labour Conference, 81st Session (1994), p. 25/123.

<sup>16</sup> 1995 General Survey, para. 76.

<sup>17</sup> 1995 General Survey, para. 137.

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52. The CEACR has noted that the construction and implementation of the Convention's requirements can vary to suit national conditions and circumstances, and has asked for clarifications in this regard.<sup>18</sup>
53. The CEACR has observed the role of the courts and other tribunals in interpreting national requirements and thus implementing the Convention's obligations.<sup>19</sup> In respect of dismissal because of temporary absence from work due to illness or injury, the CEACR has noted the methods used for defining "temporary" and "illness or injury", and in particular interpretation by tribunals; it has not commented on limitations placed in these contexts.<sup>20</sup>
54. While the CEACR has commented on the idea that incapacity for work may not under the Convention be the basis for disciplinary action leading to termination of employment, it has not commented on national laws or practices that may or may not require that termination of employment be a last resort in the context of disciplinary action.<sup>21</sup>
55. *Procedure prior to or at the time of termination (Article 7).* The opportunity for defence need not be given where the "employer cannot reasonably be expected to provide this opportunity". During discussion on the 1995 General Survey in the CCAS, the Worker members commented on the importance of Article 7; the Employer members made no comment. Since 1995, the CEACR has commented on the opportunity for defence in respect of several countries. In some, it asked what happens where the opportunity is not given.<sup>22</sup> In other cases, the CEACR asked how the opportunity for defence is afforded where provision does not appear to be made in legislation<sup>23</sup> and how the opportunity is provided in practice.<sup>24</sup> In one case, the CEACR has observed that prohibiting termination where the opportunity for defence has not been given does not amount to prohibition of termination without a valid reason.<sup>25</sup> The timing of the opportunity for defence in relation to the actual termination of the employment has been raised in two cases<sup>26</sup> and the availability of the opportunity for defence in cases other than those involving discipline has arisen once.<sup>27</sup>

<sup>18</sup> CEACR observation: *Turkey* (termination permitted in "situation incompatible with goodwill or the code of ethics or other similar situations") (2010); CEACR direct request: *Malawi* (valid reason required) (2010); CEACR direct request: *Namibia* (valid and fair reason) (2010).

<sup>19</sup> 1995 General Survey, para. 76; CEACR observation: *Turkey* (2010); CEACR observation: *Cameroon* (2010); CEACR direct request: *Antigua and Barbuda* (2010).

<sup>20</sup> 1995 General Survey, para. 137; CEACR direct request: *Antigua and Barbuda* (2010); CEACR direct request: *Bosnia and Herzegovina* (2010).

<sup>21</sup> CEACR direct request: *Morocco* (2007); 1995 General Survey, para. 93.

<sup>22</sup> CEACR direct request: *Antigua and Barbuda* (2010).

<sup>23</sup> CEACR direct requests: *Central African Republic* (2010); *Ethiopia* (2010).

<sup>24</sup> CEACR direct request: *Malawi* (2010).

<sup>25</sup> CEACR direct request: *Zambia* (2010).

<sup>26</sup> CEACR observation: *Spain* (1996).

<sup>27</sup> CEACR direct request: *Yemen* (2000).

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- 56. *Procedure of appeal (Articles 8–10).*** The instruments deal with the principle of this right, the competent body to examine the appeal, its powers and the burden of proof. Provisions deal also with remedy.
- 57.** In respect of these provisions, the Employer members expressed a concern during the discussion of the 1995 General Survey that the CEACR had adopted a view that consideration be given to the rules of a certain legal system when interpreting the Convention.<sup>28</sup>
- 58.** In terms of supervision since the 1995 General Survey, the CEACR has commented on the allocation of burden of proof in respect of eight countries. It has asked in most cases about the practical application of the burden's allocation.<sup>29</sup> In two cases it has asked that steps be taken to assure that the workers do not have to bear alone the burden of proving that termination was not justified.<sup>30</sup>
- 59. *Period of notice (Article 11).*** The CEACR has noted that the purpose of imposing this obligation on an employer intending to dispense with a worker's services is to prevent the latter from being taken by surprise by immediate termination and to mitigate its detrimental consequences.

<sup>28</sup> According to the Employer members,

“... a key to some misinterpretations might be found in paragraph 203 of the General Survey. There the clear provision of Article 9 relating to the burden of proof was made unclear by the statement that the Convention distanced itself from traditional contract law and was based on common law. Such a statement could only make sense if the intention was to consider as well the other rules of a certain legal system when interpreting the Convention. They clearly opposed such an attempt. Otherwise, in the future, not the terms of a Convention, but the domestic law system actually or supposedly used as a model would decisively influence the interpretation of the provisions of a Convention. The most serious misinterpretation could be found in the last sentence of paragraph 203 of the General Survey, stating that ‘in labour disputes legal provisions must be interpreted in favour of the worker’. Such an interpretation was contrary to legal criteria because it would mean that, in all cases, the legal provisions were to be interpreted in favour of the workers.” See *Provisional Record* No. 24, International Labour Conference, 82nd Session (1995), p. 24/30, para. 84.

<sup>29</sup> CEACR direct requests: *Ethiopia* (2010); *Luxembourg* (2010); *Lesotho* (2008); *Serbia* (2007); *Serbia and Montenegro* (2006); *Slovenia* (2001).

<sup>30</sup> CEACR direct requests: *Central African Republic* (2010); *Republic of Moldova* (2001).

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60. Since 1995, comments have been formulated in respect of about 11 countries on this matter. The scope of “serious misconduct” is the subject of several questions;<sup>31</sup> most others ask about the scope of an existing obligation and, in particular, whether it covers all justified terminations with the possible exception of those for serious misconduct.<sup>32</sup> One case involves the absence of provisions concerning notice.<sup>33</sup>
61. *Severance allowance and other income protection (Article 12).* The Convention gives equal recognition to employer-financed severance allowance and social insurance as methods for protecting income in the case of termination. The CEACR has highlighted the fact that the Convention allows countries to determine the appropriate income protection system adapted to their own specific conditions. It allows countries to move gradually from a scheme providing only a severance allowance to one in which the protection afforded by the severance allowance is supplemented by partial protection under a social security scheme providing unemployment benefits, or to one providing only unemployment insurance benefits.
62. The CEACR observed in the 1995 General Survey that severance allowance plays an important role in income protection in countries where a social security scheme does not provide such protection or where protection is inadequate.<sup>34</sup> It also noted the growing number of countries with social security schemes.<sup>35</sup> In 1993, 163 countries had set up a social security scheme; 63 had established unemployment benefit schemes. Today 15 more countries, coming to a total of 78, have statutory unemployment social security schemes.<sup>36</sup> In at least one case, the CEACR observed that social security reforms had been made and included unemployment insurance.<sup>37</sup> In several countries provisions are made for severance allowance in addition to those for unemployment insurance. This possibility is recognized in Article 12(1)(c) of the Convention. The comparative table in Appendix VI suggests that, of member States that have ratified the Convention, 13 provide income protection via severance allowance, 13 through both severance allowance and unemployment insurance, and only one through unemployment insurance alone.
63. In CCAS discussions on the 1995 General Survey, the Employer members expressed the view that “expecting that in the case of justified dismissals a severance allowance should be paid (Article 12 of the Convention) constituted an example of an inadequate provision of the Convention which was unrealistic about the allocation of resources”.<sup>38</sup> In these

<sup>31</sup> CEACR direct requests: *Morocco* (1997); *Yemen* (1997); *Namibia* (2001); *Central African Republic* (2009).

<sup>32</sup> CEACR direct requests: *Ukraine* (1998); *Republic of Moldova* (2001); CEACR observation: *Finland* (2000), in respect of part-time workers.

<sup>33</sup> CEACR direct request: *Serbia* (2007).

<sup>34</sup> 1995 General Survey, paras 267–268.

<sup>35</sup> 1995 General Survey, para. 274.

<sup>36</sup> ILO: *2011 World Social Security Report*, 2010, p. 59.

<sup>37</sup> CEACR observation: *Turkey* (2001).

<sup>38</sup> *Provisional Record* No. 24, pp. 24/31–32, para. 87.



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discussions, the Worker members were concerned about maintaining a balanced approach between the different systems of employment security.<sup>39</sup>

**64.** The CEACR has made comments in respect of 17 countries on the subject of severance allowance.<sup>40</sup> Several requests have asked about how provisions authorizing the loss of entitlement in the event of termination for serious misconduct are applied. Others have enquired about conditions pertaining to the level of wages or the length of service with the same employer. Following these requests, the countries in question have brought their legislation into conformity with the Convention.<sup>41</sup>

**65.** *Consultation of workers' representatives (Article 13).* Articles 13 and 14 are read in conjunction with the others in the Convention. The CEACR has noted that termination of employment, whether for economic, technological or other reasons must, like other terminations of employment initiated by the employer, be justified and accompanied by procedures for appeal.<sup>42</sup>

**66.** In paragraph 283 of the 1995 General Survey, the CEACR expressed that:

... consultation provides an opportunity for an exchange of views and the establishment of a dialogue which can only be beneficial for both the workers and the employer, by protecting employment as far as possible and hence ensuring harmonious labour relations and a social climate which is propitious to the continuation of the employers' activities.

**67.** The Employer member of the CCAS commented that:

... they wondered why this term "consultation" had to be divided up into the terms "an exchange of views" and "the establishment of a dialogue". The Employer members also considered that these sub-categories could indeed be translated into other languages, but they did have a traditional meaning only in one country. They questioned why these terms used in a particular national context were subjected to the term "consultation" for the whole world. The Employer members believed that, if compliance with Convention No. 158 was to be examined in the future in a particular case, reference would be made to paragraph 283 of this year's General Survey and there would be a conclusion that this particular term "consultation" must mean an exchange of opinions and the establishment of dialogue. If, in a specific case, one element was missing, this would no doubt be considered as non-compliance with the Convention.<sup>43</sup>

<sup>39</sup> *Provisional Record* No. 24, p. 24/32, para. 91.

<sup>40</sup> *Bosnia and Herzegovina, Central African Republic, Democratic Republic of the Congo, Cyprus, Ethiopia, Malawi, Republic of Moldova, Namibia, Niger, Saint Lucia, Serbia, Serbia and Montenegro, Spain, Turkey, Ukraine, Yemen and Zambia.*

<sup>41</sup> CEACR direct request: *Malawi* (minimum of five years with the same employer) (1993); CEACR direct request: *Namibia* (minimum of 12 months' uninterrupted employment) (2001); a question of practice is open with *Zambia*; CEACR direct request: *Zambia* (2008).

<sup>42</sup> 1995 General Survey, para. 276.

<sup>43</sup> *Provisional Record* No. 24, pp. 24/29–30, para. 81.

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- 68.** Expressing their views on the importance of consultation, the Worker members commented that:

Collective bargaining and consultation were excellent measures to prevent dismissals or to counteract the social costs. Nonetheless, recourse should be made to these tools before the decision to dismiss is taken. The public authorities also had an important role to carry out by supporting placement services for workers, mediating, financing, and co-financing guarantees of wages, etc.<sup>44</sup>

- 69.** In a 2009 general observation on the Convention, the CEACR stressed that “social dialogue is the core procedural response to collective dismissals – consultations with workers or their representatives to search for means to avoid or minimize the social and economic impact of terminations of employment for workers”.
- 70.** The CEACR has made comments acknowledging permissible limits placed on consultation,<sup>45</sup> asking how the consultation requirement is applied to civil servants,<sup>46</sup> requesting clarification on the scope of consultation referring specifically to the purposes set down in Article 13(1)(b),<sup>47</sup> requesting information on consultation in practice,<sup>48</sup> asking generally how effect is given to Article 13,<sup>49</sup> and asking that measures be taken to give effect to the provision.<sup>50</sup>
- 71.** The Employer members expressed the view that measures considered in the 1995 General Survey to avoid dismissals<sup>51</sup> “left an illusory impression that with enough goodwill and efforts it was possible to avoid dismissals even in situations in which it was necessary”.<sup>52</sup>
- 72.** Collective dismissals resulting from the 2008 global economic crisis demonstrate that in some circumstances terminations cannot be avoided and therefore regulation on

<sup>44</sup> *Provisional Record* No. 24, p. 24/36, para. 98.

<sup>45</sup> CEACR observation: *Spain* (1997).

<sup>46</sup> CEACR direct request: *Finland* (1996).

<sup>47</sup> CEACR observation: *Republic of Moldova* (2003); CEACR direct requests: *Serbia and Montenegro* (2006); *Latvia* (2003); *Ukraine* (1999); *Zambia* (2010).

<sup>48</sup> CEACR observation: *Lesotho* (2008); CEACR direct requests: *Malawi* (2010); *Republic of Moldova* (2009); *Serbia* (2007); *Ukraine* (2008).

<sup>49</sup> CEACR direct requests: *Central African Republic* (2010); *Saint Lucia* (2009); *Yemen* (2000).

<sup>50</sup> CEACR observations: *Turkey* (2001); *Bolivarian Republic of Venezuela* (2008).

<sup>51</sup> 1995 General Survey, para. 315 et seq.

<sup>52</sup> *Provisional Record* No. 24, p. 24/31, para. 86.

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termination is necessary.<sup>53</sup> Consultations with workers' representatives may be seen as a way of effectively managing the social consequences of these terminations.<sup>54</sup>

73. *Notification to the competent authority (Article 14).* The CEACR has noted that the Convention leaves the purpose of notification to the competent authorities entirely to each country to determine.<sup>55</sup> It has observed similarly that the timing of notification relative to consultations with workers' representatives will depend on the national methods of implementation and in particular on the respective role of the workers' representatives and the competent authority.<sup>56</sup>
74. Since 1995, the CEACR has made comments acknowledging permissible limits when notice to the competent authorities is required,<sup>57</sup> asking for details of practice,<sup>58</sup> inquiring about the minimum period of notice,<sup>59</sup> asking what measures are envisaged to give full effect to the provision,<sup>60</sup> and asking that a minimum period of time be set in accordance with Article 14(3).<sup>61</sup>

**Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies**

The European Council adopted in 1998 a Directive with notification and consultation elements relevant to those in Convention No. 158. Under the Directive, as transposed into national law, an employer contemplating collective redundancies shall begin consultations with the workers' representatives in good time with a view to reaching an agreement. The consultation must at least cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant. Information requirements are set down, along with procedures to be followed, including notification to the competent public authorities.

The Directive does not apply to collective redundancies effected under contracts of employment concluded for limited periods of time or for specific tasks; to workers employed by public administrative bodies or by establishments governed by public law; and to the crews of seagoing vessels. There are also limiting quantitative thresholds relating to the size of foreseen redundancies relative to employment in the establishment.

All 27 EU Members are obliged to transpose the Directive into national legislation.

<sup>53</sup> See reference to the ILO instruments on termination of employment in the Global Jobs Pact, paragraph 14(2).

<sup>54</sup> Baker and McKenzie: *The global employer: How to respond to a global crisis*, 2009; ILO Helpdesk 2009: *The financial and economic crisis: Responding responsibly, some frequently asked questions*.

<sup>55</sup> 1995 General Survey, para. 290.

<sup>56</sup> 1995 General Survey, para. 289.

<sup>57</sup> CEACR observation: *Spain* (1997).

<sup>58</sup> CEACR direct requests: *Bolivarian Republic of Venezuela* (1996); *Yemen* (1998); *Ukraine* (1998); *Latvia* (2003).

<sup>59</sup> CEACR direct requests: *Bolivarian Republic of Venezuela* (2000); *Namibia* (2001).

<sup>60</sup> CEACR observation: *Turkey* (2001); CEACR direct requests: *Ethiopia* (2010); *Malawi* (2010).

<sup>61</sup> CEACR direct requests: *Bosnia and Herzegovina* (2008); *Antigua and Barbuda* (2009); *Saint Lucia* (2010).

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## Part III. Review of employment termination legislation

### Ten country studies

75. This part looks at employment termination legislation and practice in ten countries selected for review. These studies were conducted nationally, based on common terms of reference, found in Appendix V, established through consultations with the Office. It was not possible in all cases for data sought by the terms of reference to be retrieved and reported. For example, data on dismissals were explicitly sought from the Swiss Statistical Office, which confirmed that such data are not kept. Data on contract types were reported from Chile, South Africa and *Spain*. Data on reasons for termination were reported from Chile (as stated in notice letters) and *Yemen*. Data on cases of appeal were reported from Jordan (although without subject matter), *Spain* and *Yemen*. This reflects the situation that it is generally known that comparative data on dismissals are scarce.<sup>1</sup> In some cases, available data were not relevant, and in others data were successfully found following through on issues raised in the country studies. This was the case in respect of labour market data for *Australia*, Singapore and *Yemen*. In these circumstances, conclusions have not been drawn about such matters as, for example, the effective scope of protection.

### *Australia*

76. *Australia* ratified the Convention in 1993. Trends in applying the Convention can be seen over three time periods governed by different but related legislative provisions coinciding with changes in government: the Workplace Relations Act 1996 (hereinafter “Workplace Relations Act”), the Workplace Relations Amendment (Work Choices) Act 2005 (hereinafter “Work Choices Act”), and the last reform enacted in the Fair Work Act 2009 (hereinafter “Fair Work Act”).

77. As a federation of States, the Australian Commonwealth (National) Parliament is empowered to legislate on certain specified matters. To the extent that the Commonwealth does not use those powers, the six States may pass laws of their own. As a result of judicial and legislative developments over the past 20 years, five of the six States have referred certain of their legislative powers to the Commonwealth.<sup>2</sup> Thus, the Fair Work Act, enacted by the Commonwealth, has been able to apply to all private sector employers and employees in those five States, without exception, since 1 January 2010. It also applies to all federal public sector employees, and to most public sector employees in Victoria. Only the State of Western Australia has refused to cooperate with the Commonwealth, but even in that State the Fair Work Act applies to over 60 per cent of employees. Prior to this, implementation through the Workplace Relations Act relied on several different

<sup>1</sup> OECD: *Employment Outlook 2010 – Moving beyond the jobs crisis*, p. 176.

<sup>2</sup> See Industrial Relations (Commonwealth Powers) Act 2009 (New South Wales); Fair Work (Commonwealth Powers) Act 2009 (Victoria); Fair Work (Commonwealth Powers) and Other Provisions Act 2009 (Queensland); Fair Work (Commonwealth Powers) Act 2009 (South Australia); Industrial Relations (Commonwealth Powers) Act 2009 (Tasmania). A similar arrangement had been in place for one of the five States, Victoria, since 1996.

constitutional bases; the CEACR during this period noted with interest the Government's first report on implementation and asked for information on practical application.<sup>3</sup>

- 78. *Implementation methods, scope and definitions.*** Three exemptions have been the subject of law and policy change during the periods under discussion.
- 79.** Under the Workplace Relations Act there was a qualifying period of three months' continuous service for protection from unfair dismissal. The period was extended to six months by the Work Choices Act and retained by the Fair Work Act. The Fair Work Act introduced a one-year qualifying period for "small business employers", that is those with less than 15 employees.
- 80.** Prior to the Work Choices Act, there had been no legislative limitations based on employer size. The Work Choices Act introduced an exemption for employers of fewer than 100 employees.<sup>4</sup> The Fair Work Act removed this exemption, but introduced the category of small business employers applying to aspects of protection described below.
- 81.** Lastly, prior to the Work Choices Act, employees who had been made redundant had been able to claim that an unfair dismissal had occurred if procedural fairness in the process of dismissal had not been respected. The Work Choice Amendments introduced a "genuine operational reasons" exclusion that barred a claim of unfair dismissal where reasons of an economic, technological, structural or similar nature relating to the employer's undertaking, establishment, service or business or relating to part of it, were claimed. The Fair Work Act replaced the "genuine operational reasons" exclusion with a more narrowly framed defence of "genuine redundancy" defined as a situation where "the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprises" and consultation as required by relevant awards or agreements has taken place.<sup>5</sup>

<b>Workplace Relations Act (1996)</b>	<b>Work Choices Act (2005)</b>	<b>Fair Work Act (2009)</b>
Three-month qualifying period	Extended three-month qualifying period to six months Exempted terminations where employer has 100 employees or less Exemption of employee engaged on a seasonal basis	Removed 100-employee exclusion from unfair dismissal claims Removed exemptions related to: (a) workers engaged on fixed-term contracts or specific task removed and (b) workers dismissed during or at the end of a probationary period Retention of six-month qualifying period Qualifying period for businesses with less than 15 employees set at 12 months

- 82.** The Fair Work Act has a "high-income threshold" – currently set at earnings of A\$108,300 or more – that prevents a claim of unfair dismissal. Annualized average earnings for a full-time employed adult are approximately A\$68,000 based on May 2010 average weekly earnings figures for the public and private sectors. A related limitation is that the claiming

<sup>3</sup> CEACR direct request: *Australia* (1997).

<sup>4</sup> Work Choices Act, section 643(10).

<sup>5</sup> See A. Forsyth: "Australian regulation of economic dismissals: Before, during and after 'Work Choices'", in *Sydney Law Review*, 2008, Vol. 30, pp. 506–536.

employee must be covered by a modern award or have an enterprise agreement apply to him or her; in practice this may exclude high-level managerial personnel.<sup>6</sup>

#### Law and policy changes for small employers in Australia

The 100-employee exemption was enacted in the Work Choices Act to help smaller enterprises. The Government of the day explained that “the costs of unfair dismissal claims weigh more heavily on smaller businesses which may not have the necessary expertise or resources to deal with an unfair dismissal claim. These are costs small and medium-sized businesses can ill afford”.<sup>1</sup> A study by Oslington and Freyens cited by the Government showed that the average cost of contested dismissals can reach almost A\$15,000<sup>2</sup> or 35.7 per cent of annual wage costs. The cited study also estimated that the average cost of an uncontested dismissal was A\$3,044 or 10.3 per cent of annual wage costs.

The Government explained also that “[t]he proposed exemptions will reduce barriers to job creation and will benefit potential employees who may have previously been excluded from the labour market.. The Government cited research by Harding that “showed that dismissal laws contributed to the loss of about 77,000 jobs from businesses which used to employ staff and now no longer employ anyone. However, the impact on jobs growth would appear to be greater than the estimates in this study as the figures do not take into account jobs that have been lost by businesses which have reduced their workforce due to the laws, but still have employees. Nor do they include jobs which would have been created if there were no unfair dismissal laws. The survey also showed that the laws impact negatively on the most disadvantaged jobseekers. It found that businesses were now less inclined to hire young people, the long-term unemployed, and those with lower levels of education, turning instead to casuals and others on fixed-term contracts or longer probationary periods”.

The study by Oslington and Freyens that had calculated costs also reviewed the survey-based literature and methodologies used to produce estimates of employment impact, including that by Harding. On the basis of empirical evidence of the actual costs of termination, taking into account the frequency of contested dismissals, Oslington and Freyens estimated the direct employment impact of Australia’s then proposed changes to unfair dismissal protection to be significantly below 77,000.<sup>3</sup>

Based on actual characteristics of employer size, the current Government has estimated that exclusion removed unfair dismissal protection from approximately 56 per cent of employees in Australia.<sup>4</sup> Applications for claims dropped significantly after the Work Choices Act was adopted.<sup>5</sup>

The Fair Work Act also targeted small business for special treatment in respect of employment termination; the threshold is now 15 employees rather than 100. In addition to a 12-month qualifying period, a Small Business Fair Dismissal Code was included. The Code lowers the burden of proof to be applied for these employers where serious misconduct is the basis for a discharge.<sup>6</sup> A recent decision has upheld the lower standard under the Small Business Fair Dismissal Code. A dismissal will be justified if the small business employer had reasonable grounds for conclusions reached; the belief of the employer not the conduct of the employee is the subject of review.<sup>7</sup>

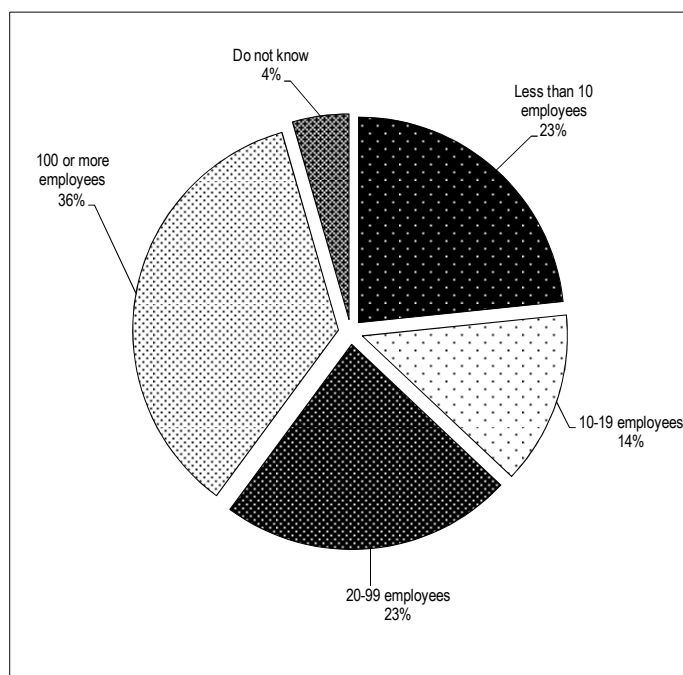
<sup>1</sup> Explanatory Memorandum, Workplace Relations Amendment (Work Choices) Bill 2005, p. 26. <sup>2</sup> Actually A\$14,705 according to Oslington and Freyens. <sup>3</sup> B. Freyens and P. Oslington: “Dismissal costs and their impact on employment: Evidence from Australian Small and Medium Enterprises”, in *The Economic Record*, 2007, Vol. 83, 99, pp. 1–15. <sup>4</sup> Explanatory Memorandum, Fair Work Bill 2008 (Cth) [r.210]. <sup>5</sup> A. Chapman: “Protections in relation to dismissal: From the Workplace Relations Act to the Fair Work Act”, in *University of New South Wales Law Journal*, 2009, Vol. 32(3), pp. 746–771. <sup>6</sup> *ibid.* <sup>7</sup> *Narong Khammaneechan v. Nanakhon Pty Ltd ATF Nanakhon Trading Trust T/A Banana Tree Café* (U2010/8180), 14 Oct. 2010, at [www.fwa.gov.au/decisionssigned/html/2010fwa7891.htm](http://www.fwa.gov.au/decisionssigned/html/2010fwa7891.htm) (accessed 5 Nov. 2010): “At the outset it is appropriate to note that unlike a consideration of the dismissal of an employee of a business that is not a small business employer, the function of FWA is not to determine on the evidence whether there was a valid reason for dismissal. That is, the exercise in the present matter does not involve a finding on the evidence as to whether the applicant did or did not steal the money. The application of the Small Business Fair Dismissal Code involves a determination as to whether there were reasonable grounds on which the respondent reached the view that the applicant’s conduct was serious enough to justify immediate dismissal. As such, the determination is to be based on the knowledge available to the employer at the time of the dismissal, and necessarily involves an assessment of the reasonableness of the steps taken by the employer to gather relevant information on which the decision to dismiss was based”, para. 60.

83. Data from August 2009, indicate that of 9.33 million employees, the largest proportion (36 per cent) of the size groups for which data are presented, are employed in locations with 100 or more employees. Those data do not group work locations of 15 or less

<sup>6</sup> A similar exclusion was noted in the 1995 General Survey, para. 85.

employees, making it difficult to say what percentage of employees work for small business employers. The figure would be more than 23 per cent but less than 37 per cent.<sup>7</sup>

**Figure 1. Australia: Size of work location by number of employees, August 2009**



Source: Australian Bureau of Statistics: *Employee earnings, benefits and trade union members*, table 5 (Series 6310.0) (Aug. 2009).

#### Coverage of workforce

The most recent figures from the Australian Bureau of Statistics (ABS) reveal that around 9 per cent of all “employed persons” work as “independent contractors” in their main job.<sup>1</sup> Those workers are therefore unable to benefit from the employment protection measures in the Fair Work Act. As far as employees are concerned, the federal Government estimated in November 2008 that its (then) proposed laws on termination of employment – taking into account qualification period and high-income limitations – would mean that some 80 per cent would be eligible to bring unfair dismissal claims, compared to only 44 per cent under the Workplace Relations Act as it then stood.<sup>2</sup> The figure is 100 per cent in relation to claims of termination for discriminatory or prohibited reasons, that is “unlawful termination” under previous legislation.

<sup>1</sup> Australian Bureau of Statistics: *Forms of Employment, November 2009*, Catalogue No. 6359.0, Canberra, 2010.

<sup>2</sup> Explanatory Memorandum, Fair Work Bill 2008, pp. lxxxi–lxxxiii (Regulatory Analysis, Attachment B).

- 84. Justification for termination.** During all three periods employment termination has been an “unfair dismissal” where it is determined to have been “harsh, unjust or unreasonable” and an “unlawful termination” where it has been done for prohibited grounds, which have at all times been consistent with those required by the Convention.

<sup>7</sup> Australian Bureau of Statistics: *Employee earnings, benefits and trade union members* (Series 6310.0) (Aug. 2009).

	Workplace Relations Act (1996)	Work Choices Act (2005)	Fair Work Act (2009)
Unfair dismissal	Where termination is “harsh, unjust or unreasonable”	Unchanged	Unchanged
Unlawful termination	Employer prohibited from terminating on grounds in Article 5	Unchanged	Substantively unchanged Additional new ground of “carers’ responsibilities” “Unlawful termination” subsumed within “adverse action”

- 85. Procedure prior to or at the time of termination.** The entire circumstances of a termination are examined to determine if it was unfair, that is “harsh, unjust or unreasonable”. This includes whether an opportunity for defence was given to an employee charged with misconduct or being unable to do the job. However, the fact that such an opportunity was not given will not automatically render a dismissal unfair, if the employer can otherwise justify the dismissal.<sup>8</sup>
- 86. Procedure of appeal.** An application for relief against an unfair dismissal can be lodged with the Fair Work Authority, which is authorized to conciliate, mediate and ultimately arbitrate the matter. The claim must be lodged within 14 days after the dismissal takes place; the Fair Work Authority may extend the time period in exceptional circumstances.<sup>9</sup> This period was 21 days under both the Workplace Relations Act and the Work Choices Act. A 60-day limitation is applied under the Fair Work Act for claims of unlawful termination.<sup>10</sup>
- 87.** The Fair Work Authority is empowered to examine the reasons for a dismissal and determine whether it was justified. Since the Fair Work Authority must be “satisfied” that a dismissal is unfair,<sup>11</sup> there is in a practical sense a burden on the applicant to establish a case for relief. On the other hand, where an employer alleges misconduct by the applicant, and that allegation is denied, the employer has an evidentiary onus to put forward some evidence to suggest that the misconduct occurred.<sup>12</sup> The situation in relation to the burden of proof is different where an employee alleges an unlawful termination. In such cases, the burden is on the employer to prove that the employee was not dismissed for a proscribed reason.<sup>13</sup>
- 88.** If a termination is found to be unfair or unlawful, a make-whole remedy – including reinstatement – may be ordered. Compensatory awards are capped in cases of unfair termination. They are uncapped in cases of unlawful termination, where a penalty may also be imposed on the employer.

<sup>8</sup> *Byrne v. Australian Airlines Ltd* (1995) 185 CLR 410, cf. Industrial Relations Act 1988, section 170DC, under which any failure to accord a fair hearing would render a termination unlawful, regardless of whether the employee’s conduct or performance appeared to merit dismissal: see, for example, *Shields v. Carlton & United Breweries (NSW) Pty Ltd* (1999) 86 FCR 446.

<sup>9</sup> Fair Work Act, section 394i.

<sup>10</sup> Fair Work Act, section 366.

<sup>11</sup> Fair Work Act, section 385.

<sup>12</sup> *Hinchey v. North Goonyella Coal Mines Pty Ltd* (2009) 178 IR 252.

<sup>13</sup> Fair Work Act, sections 261 and 783.



	Workplace Relations Act (1996)	Work Choices Act (2005)	Fair Work Act (2009)
Unfair dismissal	Reinstatement with or without back pay or, where reinstatement is inappropriate, compensation capped at six months' wages	Addition to take account of any employee misconduct that contributed to decision to dismiss Addition that no compensation to be paid for shock, distress or humiliation	Unchanged
Unlawful termination	Reinstatement, uncapped compensation, penalty	Unchanged	Unchanged

**89. *Period of notice.*** Notice of termination in accordance with the length of the employee's service is required under the three regulatory regimes. The Fair Work Act added that notice must be in writing. Under the Fair Work Act at least one week's notice is required, to a maximum of four weeks for an employee with more than five years of service. Payment in lieu of notice is permitted. The notice requirement does not apply to: (a) employees hired for a "specified period of time, for a specified task, or for the duration of a specified season";<sup>14</sup> (b) employees terminated for serious misconduct; (c) "casual" (temporary) employees; and (d) trainees (other than apprentices) engaged for a specified period or for the duration only of a training arrangement.

**90.** There are also special exceptions from the notice of termination provisions for certain "daily hire" or "weekly hire" employees in the building and construction industry or the meat industry.<sup>15</sup>

Workplace Relations Act (1996)	Work Choices Act (2005)	Fair Work Act (2009)
Employer to provide notice of termination in accordance with a sliding scale of minimum notice periods	Unchanged	Requirement added that employer must provide for notice in writing

**91. *Severance allowance and other income protection.*** A worker who loses his/her job is generally entitled to income support. Current supports are means tested. To be eligible, a person must be looking for paid work and participate in various activities designed to enhance their chances of obtaining such work. The Fair Work Act added a general entitlement to seniority-based redundancy payment in cases where the employee was terminated because the employer "no longer requires the job done by the employee to be done by anyone" and the employee has at least 12 months of service.<sup>16</sup> Small business employers are excluded from the redundancy payment obligation; in other cases special application for exemption can be made showing inability to pay.

<sup>14</sup> The courts have held that an employment contract will not be treated as being for a "specified" period, task or season if it can be terminated by notice, even though it may also be agreed that the hiring will expire at a set time or on the completion of a particular job: *Cooper v. Darwin Rugby League Inc.* (1994) 1 IRCR 130; *Andersen v. Umbakumba Community Council* (1994) 1 IRCR 457; *SPC Ardmona Operations Ltd v. Esam* (2005) 141 IR 338. It is also provided in section 123(2) that this exception will not apply if a "substantial reason" for engaging the employee on such a contract was to avoid the application of the minimum standards on notice of termination and redundancy. This provision, which dates back to 1993, was included to satisfy Article 2(3) of the Convention.

<sup>15</sup> Fair Work Act, section 123(3).

<sup>16</sup> See also E. Shi: "Redundancy pay in Australia – Before and after work choices", in *Labour Law Journal*, 2008, Vol. 59, pp. 47–68.

Workplace Relations Act (1996)	Work Choices Act (2005)	Fair Work Act (2009)
Unemployment benefit through social security	Unchanged	Unchanged Added general entitlement to seniority-based severance allowance in cases of redundancy, but not applicable to employers with less than 15 employees

- 92. *Consultation of workers' representatives.*** All modern awards – which cover virtually all workers in the country – contain a provision obliging employers to notify employees and their representatives of any major changes that are likely to have a significant impact on employees, and/or any decision to make employees redundant, and then discuss those changes.<sup>17</sup> The Fair Work Act requires that all new enterprise agreements contain a term mandating consultation over such changes. If the parties fail to agree on a term of their own, their agreement is taken to include a model term.<sup>18</sup>
- 93.** Where an employer decides to dismiss 15 or more employees for “reasons of an economic, technological, structural or similar nature”, it must notify any relevant union and give that union an opportunity to consult over measures to avert or minimize the proposed dismissals, or to mitigate their adverse effects.<sup>19</sup> If this is not done, an affected employee or union may apply for remedy to the Fair Work Authority.<sup>20</sup> The Fair Work Authority may make “whatever orders it considers appropriate, in the public interest” to put the employees and their union(s) in the same position, so far as possible, as if the employer had complied with its notification and consultation obligations. This power is subject to certain limitations.<sup>21</sup> For example, the Fair Work Authority may not order reinstatement of an already dismissed employee, withdrawal of a notice of termination if the notice period has not expired, or payment of an amount in lieu of reinstatement, or severance pay. Nevertheless, so long as an application is made quickly enough, the Fair Work Authority may be able to halt redundancies from being implemented, to ensure that appropriate consultation occurs.<sup>22</sup>
- 94. *Notification to the competent authority.*** Where 15 or more employees are dismissed for reasons of an economic, technological, structural or similar nature, the Fair Work Act requires the employer to notify the federal agency responsible for the administration of the social security system. The notice “must be given as soon as practicable after making the decision; and before dismissing an employee in accordance with the decision”.<sup>23</sup> Remedies for failure to comply are stipulated.

<sup>17</sup> See *Award Modernization Statement* (2008), 177 IR 8 at [18].

<sup>18</sup> Fair Work Regulations 2009, Schedule 2-3.

<sup>19</sup> Fair Work Act, sections 531 and 786.

<sup>20</sup> Fair Work Act, sections 533 and 788.

<sup>21</sup> Fair Work Act, sections 532 and 787.

<sup>22</sup> See, for example, *Australian Bureau of Statistics v. Community and Public Service Union* (2009) AIRC 476.

<sup>23</sup> Fair Work Act, sections 530 and 785.

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## Chile

95. Chile has not ratified the Convention. The 1995 General Survey reported a difficulty in applying Article 13, and contained no information on prospects for ratification. The 2001 survey reported that Chile was one of 15 member States for which the question of ratification was not excluded, was being examined or would be reconsidered after obstacles in national legislation had been removed.<sup>24</sup> Currently, the Government has not incorporated within its programme its intention to ratify the Convention nor to modify the legislation relative to termination of employment or protection against unjustified termination.
96. *Implementation methods, scope and definitions.* The Chilean Labour Code applies to all workers except to civil servants, workers in state undertakings or institutions,<sup>25</sup> and independent workers.<sup>26</sup> Services rendered by persons who work either directly with the public, or intermittently or sporadically at home, are not considered as involving employment contracts, and therefore also fall outside the scope of application of the Chilean Labour Code.<sup>27</sup> Graduates of institutions of higher education or professional technical training programmes, for a specified period, are also excluded.<sup>28</sup> Domestic workers and managers are subject to specific rules with regard to the termination of employment.
97. A special regulation allows easier dismissal without compensation, in the case of fixed-term contracts and contracts for specific tasks or on a casual basis.<sup>29</sup> Fixed-term contracts are limited to a one-year duration, including a single renewal.<sup>30</sup> The period is two years for managers or individuals with a professional or technical degree. A presumption favouring an indefinite contract of employment is made in cases of accumulated employment. The use of fixed-term contracts and contracts for specific work has increased in the last years. Labour Department figures for 2008 are shown in figure 2 below.

<sup>24</sup> 2001 survey, para. 17.

<sup>25</sup> Chilean Labour Code, article 1.

<sup>26</sup> Chilean Labour Code, articles 3 and 8.

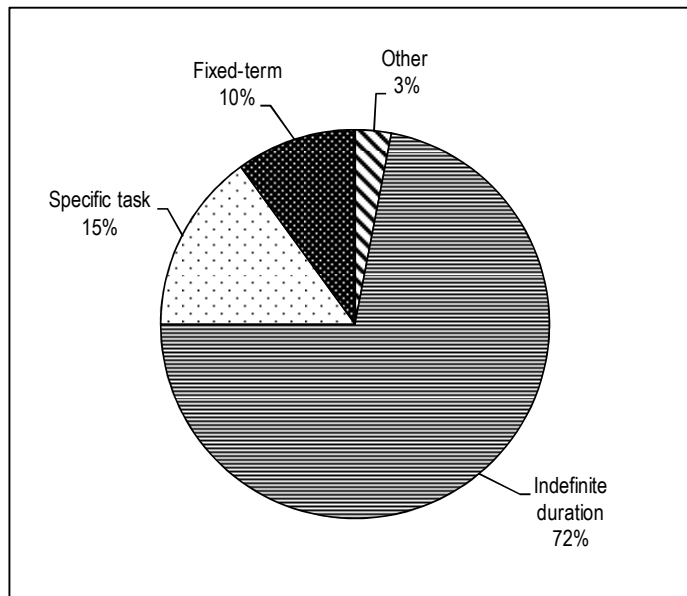
<sup>27</sup> Chilean Labour Code, article 8.

<sup>28</sup> Pursuant to article 7 of the Chilean Labour Code, an individual contract of employment is an agreement by which the employer and the worker enter into a reciprocal obligation, by which the latter agrees to render services under the supervision and immediate direction of the former, who agrees to pay an agreed remuneration for those services.

<sup>29</sup> Chilean Labour Code, articles 159(4) and 159(5).

<sup>30</sup> Chilean Labour Code, article 159.

**Figure 2. Chile: Contracts registered by the Labour Department, by type, 2008**



Source: Administrative records, Labour Department, Chile, 2009.

- 98.** Legislation does not provide for a probationary period, except for a two-week period for domestic workers within which either party can terminate the contract with three days' notice.
- 99.** *Justification for termination.* The Chilean Labour Code prohibits dismissal without just cause, that is based on conduct<sup>31</sup> or operational requirements, meaning economic or technical reasons or a combination of both.<sup>32</sup> Jurisprudence holds that "it is necessary that the [operation] circumstances do not solely derive from the will or liability of the company, but must be objective, serious and permanent ... The economic problems of the company should not be temporary or amendable ...".<sup>33</sup> Termination without cause (*desahucio*) is permitted in respect of the employment of employers' representatives and domestic workers.<sup>34</sup>
- 100.** The Chilean legislation includes all the reasons provided for in Article 5 of the Convention as circumstances that cannot constitute a valid reason for termination. Court decisions have uniformly supported these restrictions established by the law. In addition, some workers benefit from special status-based protection (*fuero laboral*). In these cases termination must be judicially authorized on the grounds of the worker's conduct, completion of contracted work or contract term.<sup>35</sup>

<sup>31</sup> Chilean Labour Code, article 160.

<sup>32</sup> Chilean Labour Code, article 161.

<sup>33</sup> Concepción Appeal Court. Rol No. 342-2007, Nov. 2007.

<sup>34</sup> Chilean Labour Code, article 161.

<sup>35</sup> Chilean Labour Code, article 174.

### Termination for reasons of capacity

Among the valid reasons for termination, the Chilean legislation does not contemplate reasons connected to the capacity of the worker since the entry into force of Law No. 19,759 of 2001. This law eliminated the reason of “performance or technical inadequacy” among the valid reasons for termination to motivate employers to train their workforce instead of resorting to termination. The employers’ associations consider that this inflexibility of the legislation leads to the issuing of fixed-term contracts or contracts for specific tasks.

The Convention envisages the capacity of the worker as one of the valid reasons for termination.

- 101.** *Procedure prior to or at the time of termination.* There are no requirements set out in law; employers may adopt internal rules in practice.
- 102.** *Procedure of appeal.* Workers can go to the labour inspectorate to challenge an unjustified, unfair or improper dismissal. The inspectorate is obliged to mediate the dispute. If mediation does not result in any agreement the worker may take the employer before the employment tribunal within 60 days of the termination.<sup>36</sup>
- 103.** A labour justice reform took place in 2008 that contemplated three procedures, one of general application, a monitoring procedure and a specific procedure for the protection of fundamental rights.
- 104.** There is no general right to reinstatement following unfair dismissal. Reinstatement is available only in cases of termination based on discriminatory grounds and in those cases related to the termination of workers who benefit from the *fuero laboral*.
- 105.** *Period of notice.* A notice period of 30 days is required both in the cases of termination without cause (*desahucio*) and based on the requirements of the undertaking; payment in lieu of notice is allowed. Summary dismissal without a notice period is permitted for conduct-related dismissals.<sup>37</sup>
- 106.** *Severance allowance and other income protection.* An unemployment insurance savings account scheme (UISA) was set up in 2002 to provide employed persons with an individual account to be drawn from upon involuntary unemployment.<sup>38</sup> Enrolment in the scheme has been mandatory for all workers entering into an employment contract since 2002, whether permanent, fixed term or hired to perform a specific task, although different rules are applied. Funding is co-contributory between the worker and the employer.<sup>39</sup> The individual account benefits are drawn down upon involuntary termination; a government-financed solidarity fund tops up benefits where the beneficiary qualifies for them. Qualifying periods and minimum contribution rules apply to the scheme.<sup>40</sup> The amount paid out depends on the account balance and the number of contributed months.

<sup>36</sup> Chilean Labour Code, article 168.

<sup>37</sup> Chilean Labour Code, article 161.

<sup>38</sup> Law No. 19,728 of 2001.

<sup>39</sup> 2.2 per cent of the wage: 1.6 per cent paid by the employer and 0.6 per cent paid by the worker, with an established maximum.

<sup>40</sup> Details summarized at [www.ssa.gov/policy/docs/progdesc/ssptw/2008-2009/americas/chile.html](http://www.ssa.gov/policy/docs/progdesc/ssptw/2008-2009/americas/chile.html) (accessed 9 Nov. 2010).

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- 107.** According to the administration that manages the system,<sup>41</sup> 6.2 million workers had accounts in September 2009, with a monthly average of 97,387 workers requesting unemployment benefits. During 2009, 559,063 workers under fixed-term contracts and contracts for specified time requested benefits from their individual accounts, compared with 251,066 workers with indefinite contracts.
- 108.** In addition to the income protection provided through the UISA system, where the grounds for terminations are not attributable to the worker (redundancy or *desahucio*), employers must pay workers 30 days' remuneration for each year of service<sup>42</sup> worked continuously up to a limit of 330 days, subject to a one-year qualification requirement.<sup>43</sup> This minimum obligation to pay is extinguished if an individual or collective agreement provides more favourable terms. Domestic workers, exempted under unemployment insurance schemes, are entitled to a different indemnity. If a court declares a dismissal unjustified, unfair or unlawful, the abovementioned compensation is increased by 30 per cent. If there is deemed to be no plausible reason for dismissal, the compensation is increased by 50 per cent. If the grounds for a dismissal based on conduct are unfounded, the compensation is increased by 80 per cent. Finally, the increase in compensation will be 100 per cent if the court rules that there were no plausible grounds for dismissal.<sup>44</sup>
- 109.** *Consultation of workers' representatives.* Where termination is on the grounds of the requirements of the undertaking, there is no requirement for prior consultation with trade unions for the need to implement measures to mitigate the adverse effects of any terminations. Collective bargaining agreements have never contemplated such clauses. The 1995 General Survey reported the Government's indication that this lacuna posed a difficulty in application.<sup>45</sup>
- 110.** *Notification to the competent authority.* Any termination of employment, for whatever reason, must be notified to the labour inspectorate at the time the worker receives the termination notice.<sup>46</sup> The notification must include a statement of the reason for the termination (see figure 3). Although there is no provision that specifically obliges notification in the case of large redundancies, the ordinary notification requirement would yield information of the number and categories of workers likely to be affected by a redundancy and the period over which the terminations are intended to be carried out.

<sup>41</sup> See [www.afcchile.cl/frameset.asp?orden=1](http://www.afcchile.cl/frameset.asp?orden=1) (accessed 7 Nov. 2010).

<sup>42</sup> And any fraction of a year greater than six months.

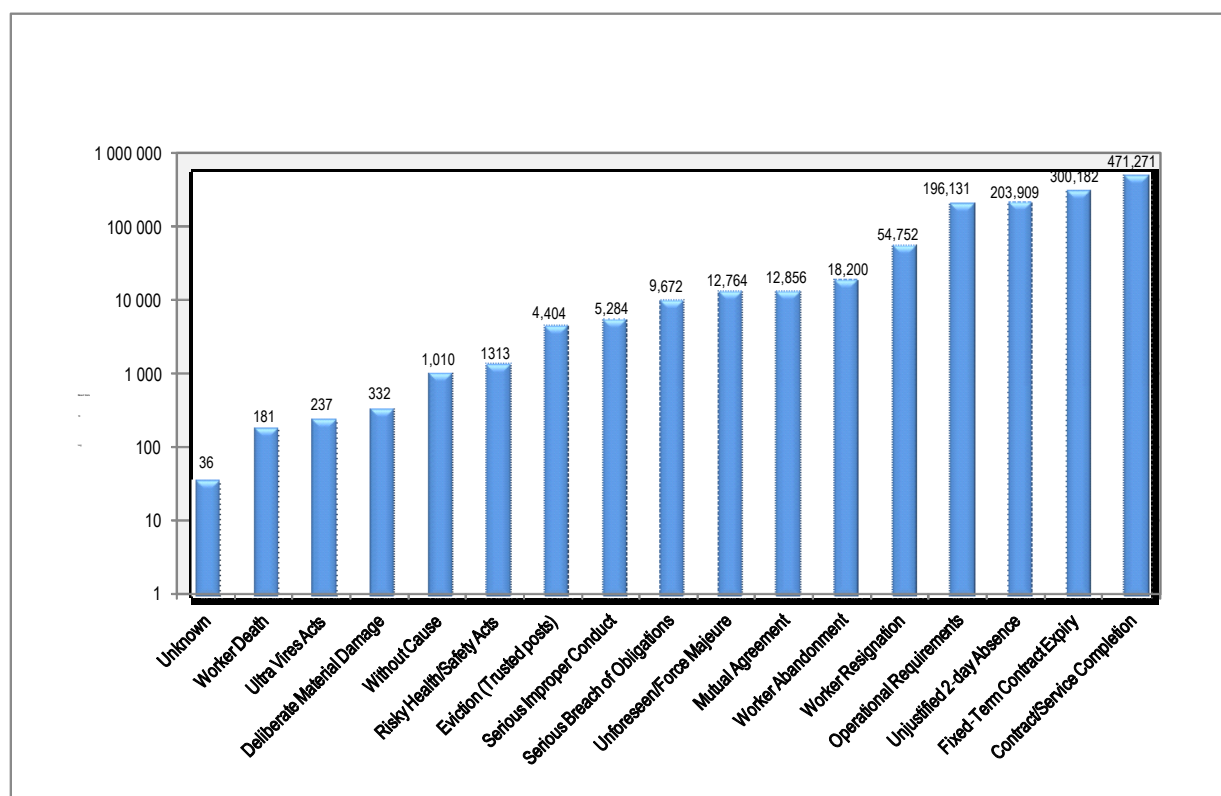
<sup>43</sup> Chilean Labour Code, article 163.

<sup>44</sup> Chilean Labour Code, article 168.

<sup>45</sup> 1995 General Survey, para. 359.

<sup>46</sup> Chilean Labour Code, articles 161 and 162.

**Figure 3. Chile: Number of notice letters registered, by reasons given for termination, Labour Department, January–September 2010**



## Gabon

- 111.** *Gabon* ratified the Convention in 1988. The CEACR currently requests information on the application of the Convention in practice.
- 112.** *Implementation methods, scope and definitions.* The Labour Code of 1994, as amended, covers all workers and employers in all branches of economic activity, regardless of formal legal status.<sup>47</sup>
- 113.** Safeguards are applied to contracts other than those of indefinite duration. Fixed-term contracts must be in writing, not exceed two years duration, and may be renewed only once. An amendment made in 2010 removed the possibility for fixed-term contracts to be renewed more than once, provided the cumulative duration of the contracts does not exceed two years.<sup>48</sup> A global safeguard interprets any employment not conforming to the requirements of the labour law to be one of indefinite duration.<sup>49</sup>

<sup>47</sup> Labour Code, article 1.

<sup>48</sup> Labour Code, article 23, as amended by Ordinance No. 018/PR/2010 of 25 February 2010.

<sup>49</sup> Labour Code, article 27.

#### Gabon's active population and labour market

The composition of Gabon's labour force has an impact on how "all branches of economic activity and employed persons" may be affected by the Labour Code and the Convention. The population of Gabon is approximately 1.5 million. In 2008, official estimates placed the economically active population at 687,000. It is estimated that 60 per cent of the labour force is occupied in agriculture, 15 per cent in industry and 25 per cent in services. The number of government employees at all levels in 1999 was 100,500.<sup>1</sup> According to the African Development Bank (ADB), businesses in Gabon fall into three categories. The first is large enterprises – some 20 major companies – that are mostly legally registered subsidiaries of major international groups. The second are medium-sized companies, mainly in retailing, hotels, restaurants and services. This group could account for the ADB's 25 per cent employed in services. The third group according to the African Development Bank are many small enterprises operating in the informal sector. The Ministry for SMEs considered in 2005 that there were about 4,000 firms officially defined as SMEs, as well as between 6,000 and 9,000 small trading businesses and other small units in the informal sector.<sup>2</sup>

<sup>1</sup> ILO LABORSTA database. <sup>2</sup> ADB: *African Economic Outlook 2005*, Gabon, 2005, p. 245.

- 114. Justification for termination.** A valid termination in Gabon is based either on personal grounds (*le motif personnel*) related to the capacity or conduct of the worker, or economic grounds related to the operation of the enterprise. The employer may terminate contracts of specific duration only where there is gross misconduct, and contracts for specific tasks, with notice where the worker commits error, and without notice in cases of gross misconduct.<sup>50</sup>
- 115. Invalid reasons for termination (*licenciements abusifs*)** include all those required by Article 5 of the Convention, in addition to others.<sup>51</sup>
- 116. Procedure prior to or at the time of termination.** Where dismissal on the grounds of capacity or conduct is proposed, a letter must be sent to the worker inviting him/her to an interview. Among other requirements, the letter must include the reason for the proposed action and give notice of the right to assistance or representation.<sup>52</sup> The worker is given an opportunity for self-defence during the interview and a "cooling off" period of five days is required afterwards, during which the employer may not terminate the worker.<sup>53</sup> These provisions are consistent with many offered in the Recommendation.

<sup>50</sup> Labour Code, articles 47 and 48.

<sup>51</sup> Labour Code, articles 78 and 36. These include race, colour, sex, religion, political opinion, national extraction and social origin. Also included in prohibited grounds are the opinions of the worker, his/her trade union activities and membership or non-membership in a trade union, as well as filing a complaint or involvement in proceedings alleging the violation of law by the employer, terminations contrary to authorization procedures or decisions taken by the labour inspectorate (of workers' delegates, for example), refusal to reinstate a worker whose contract has been legally suspended – such as during an enterprise closure, the workers' obligatory military or civil service, a period of non-work related sickness of not more than six months, a long illness, indisposition due to occupational illness or injury, maternity leave, during disciplinary investigation not exceeding eight days, etc.

<sup>52</sup> Labour Code, article 51.

<sup>53</sup> Labour Code, article 52.



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- 117. *Procedure of appeal.*** Labour courts have jurisdiction over claims of unjustified termination.<sup>54</sup> Disputes over termination are subject to conciliation.<sup>55</sup> Appeal may also be made to the courts for decisions taken in situations where termination must be approved in advance by the labour inspectorate.<sup>56</sup> Appeals can be brought at least five years after termination.<sup>57</sup> The Labour Code specifically empowers the courts to judge the justification for the termination<sup>58</sup> and the burden of proof rests with the employer.<sup>59</sup> Reinstatement may be ordered in cases of unjustified termination done in retaliation for the exercise of legal or collective bargaining rights, or of workers' delegates; otherwise, damages are to be awarded.<sup>60</sup>
- 118. *Period of notice.*** The terminating party must give notice of termination; payment may be made in lieu thereof. The period of notice is based on seniority. Notice is not required in cases of gross misconduct.<sup>61</sup>
- 119. *Severance allowance and other income protection.*** A severance allowance is to be paid to all workers terminated for any reason other than serious misconduct, provided the worker has two years' seniority with the employer; only one year's seniority is required in cases of termination for economic reasons. The rate of the severance allowance is set at not less than 20 per cent of average total salary during the previous 12 months' employment for each year of seniority.<sup>62</sup>
- 120. *Consultation of workers' representatives and notification to the competent authority.*** The labour inspectorate must approve in advance individual and collective terminations for operational reasons. An application for approval cannot be made before workers' representatives are consulted. Legislation sets out the information to be conveyed to workers' representatives, who those representatives are, and the time framework within which consultations are to take place. A social plan for the redundancies is required where more than ten workers are to be terminated. The outcome of consultations is to be noted in writing and reported to the labour inspectorate with the application for approval of the redundancies.<sup>63</sup> Failure to follow these procedures in cases of termination for operational

<sup>54</sup> Labour Code, article 317.

<sup>55</sup> Labour Code, articles 314–316.

<sup>56</sup> See Conseil d'Etat, 24 June 2005, aff. Ekoundangoye c/ Etat Gabonais, Rep. No. 37/2004-2005. Advance approval is required in cases of terminations for economic reasons, and dismissal of workers' delegates, pregnant women, and women on maternity leave.

<sup>57</sup> Labour Code, article 159, although cases of termination are not specifically mentioned; article 2262 of the Civil Code of France, which is still applicable in Gabon, sets the limit at 30 years.

<sup>58</sup> Labour Code, article 74; see, for example, Cour d'appel judiciaire de Libreville, 29 June 1999, aff. Ekang Ekang André c/ Africa Diffusion, Rep. No. 86/98-99.

<sup>59</sup> Labour Code, article 53.

<sup>60</sup> Labour Code, article 75.

<sup>61</sup> Labour Code, article 64.

<sup>62</sup> Labour Code, article 70.

<sup>63</sup> Labour Code, article 59.

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reasons is sanctioned both criminally and civilly.<sup>64</sup> Terminations not in accordance with these procedures are also declared abusive, and subject to the relevant remedies.

## **Jordan**

- 121.** Jordan has not ratified the Convention. The 1995 General Survey contained no information on obstacles to or prospects for ratification. The 2001 survey reported that Jordan was one of the eight countries that considered that their national legislation represented an obstacle to ratification but did not specify further the nature of the obstacles.<sup>65</sup>
- 122.** *Implementation methods, scope and definitions.* Employment contracts may be for a specified period of time or task or of indefinite duration. There are no limitations on the use of fixed-term or specific task contracts; slightly different rules apply however in respect of their termination. An employee may be employed for a maximum three-month probationary period. If the employee continues work after the probationary period, the employment is considered of indefinite duration, subject to the relevant rules on termination.
- 123.** *Justification for termination.* There is no general requirement to justify a termination. A complaint may however be brought to court claiming that a termination was “arbitrary and violates the provisions of the labour law”. A probationary employee may be terminated without notice or indemnity.
- 124.** There are a number of prohibited grounds for termination. These include during the employee’s pregnancy or maternity leave, while performing military or reserve service, while the employee is on annual or sick leave or on leave granted for the worker’s education, purposes of learning, pilgrimage, or on leave agreed by both parties to take up trade union office or studies in a recognized institute, college or university.<sup>66</sup> Nor may race, language and religion, which are constitutionally prohibited grounds for discrimination, be grounds for termination.
- 125.** An employer is not obliged to give a reason for terminating any type of employment contract. In principle, fixed-term and specific-task contracts terminate on the completion of the period or task. The employer may however terminate a fixed-term contract in advance of its expiration. No reason for premature termination is required, but the employer is obliged to pay full wages and benefits. There is no obligation to pay full wages and benefits if the premature termination was for reasons that otherwise (i.e. where the contract is of indefinite duration) permit termination without notice.<sup>67</sup>
- 126.** *Procedure prior to or at the time of termination.* There are no provisions in law dealing with this procedure.

<sup>64</sup> Labour Code, article 62; Labour Code, article 80, provides additionally for a fine and/or up to six months’ imprisonment.

<sup>65</sup> 2001 survey, para. 19; the other countries were Argentina, China, Estonia, Panama, Qatar, Singapore and the Syrian Arab Republic.

<sup>66</sup> Jordanian Labour Code, section 27.

<sup>67</sup> Jordanian Labour Code, sections 26 and 28; a reason for terminating the fixed-term contract in advance of its expiration is not required.

- 127. *Procedure of appeal.*** A claim of arbitrary termination may be made within 60 days of the act. The court will however take jurisdiction of a claim up until two years from the termination, provided that reinstatement may not be given as a remedy if an arbitrary termination is found.<sup>68</sup>
- 128.** As to burden of proof, the courts have indicated that: “Although the person who claims the occurrence of the injustice is under the obligation of proving the act, the person who is the employer, who claims that dismissal was lawful, and was not unfair, shall be responsible for proving the lawfulness of the dismissal in accordance with the legal provisions”.<sup>69</sup>
- 129.** Amendments made in 2008 and 2010 provide that the court may order the employer to reinstate the worker in his former job or pay him compensation equal to half of the monthly remuneration for each year of service, but not less than two months’ remuneration, in addition to compensation in lieu of notice and other entitlements.<sup>70</sup>
- 130.** The table below shows the number of labour cases heard and decided by courts. No statistics are kept on subject matter. Anecdotal information suggests that the majority of lawsuits filed under Article 25 (about 90 per cent thereof) are lawsuits that relate to termination.

**Jordan: Labour cases examined by courts, 2008 and 2009**

<b>Judicial year</b>	<b>Cases concluded during the judicial year</b>	<b>Cases examined during the judicial year</b>	<b>Of which filed during the judicial year</b>	<b>Filed prior to the judicial year</b>
2008	8 837	13 492	7 960	5 532
2009	7 993	12 934	8 279	4 655

- 131. *Period of notice.*** Either party may terminate contracts of indefinite duration by giving one month’s notice; payment in lieu is permitted.<sup>71</sup> No notice is required where the employer terminates any type of contract for reasons related to conduct or capacity.<sup>72</sup>
- 132. *Severance allowance and other income protection.*** Although provision is made for it in law, unemployment is not yet an active contingency under the system of public social security insurance. During the past two years there has been active debate and activities aimed at developing this particular branch of social security. The ILO has also provided technical assistance.<sup>73</sup>

<sup>68</sup> Court of Cassation Decisions Nos 98/793 (8 June 1999) and 97/2113 (29 Dec. 1997).

<sup>69</sup> Court of Cassation Decision No. 99/1067.

<sup>70</sup> Section 9 of Interim Act No. 26 of 2010, amending section 25 of the Jordanian Labour Code.

<sup>71</sup> Jordanian Labour Code, section 23(A) and (C).

<sup>72</sup> Jordanian Labour Code, section 28; specific grounds are noted.

<sup>73</sup> According to ILO sources, the Provisional Amended Social Security Law, which was enacted in March 2010, actually proposes an individual savings account.

- 133.** A seniority-based end-of-service payment is to be paid to all workers regardless of the reason for termination. An amendment was made in 2010 to make this rule applicable to workers on fixed-term contracts by providing that it should be paid wherever the term between contracts is more than 60 days.<sup>74</sup>
- 134.** *Consultation of workers' representatives and notification to the competent authority.* Notification of the reasons for redundancy, consultation with workers' representatives and notification to the competent authorities are accomplished via an obligation on all employers to give notice to the Minister before such terminations are contemplated and for the formation of a tripartite committee to review the procedures followed by the employer.
- 135.** The law has evolved since the first Labour Code in 1960 allowed the employer to terminate the service of any worker on the grounds of redundancy or restructuring without giving any power to a public authority to consider the subject.<sup>75</sup> The 1996 Labour Code permitted the employer to terminate employment on these grounds provided that the Ministry was notified and authorized the Minister to set up a tripartite committee to examine the validity of such measures.<sup>76</sup> Amendments made in 2002 obliged the employer to give the reasons with the notification and the Minister to form a committee, and established a right of appeal.<sup>77</sup> Amendments made in 2004 obliged the employer to immediately notify the Minister, and extended appeal to workers. Finally, changes made in 2010 specifically require the employer to make application before taking any action, indicating that termination must wait for the decision of the Ministry. A time frame for decisions by the committee and the Minister are set up in the law.

**Jordan: Applications to terminate services of workers for operational reasons, number of terminations requested and approved by the labour authority**

Workers affected	Year						
	2004	2005	2006	2007	2008	2009	2010
Requested	2 198	1 230	–	525	104	–	976
Approved	877	1 230	–	300	104	–	546
Approval rate	40%	100%	–	57%	100%	–	56%

**Singapore**

- 136.** Singapore has not ratified the Convention. The 1995 General Survey reported that legislation had not been modified in light of the Convention and that there were no plans to do so. The Government indicated that there were obstacles to ratification in the 2001 survey.
- 137.** The somewhat unique labour force composition in Singapore is relevant to the scope and basis of employment protection legislation in practice. Of a labour force of 3.03 million persons in 2009, two-thirds were residents. The remaining third were foreign workers

<sup>74</sup> Jordanian Labour Code, section 32.

<sup>75</sup> Jordanian Labour Code, section 16(B).

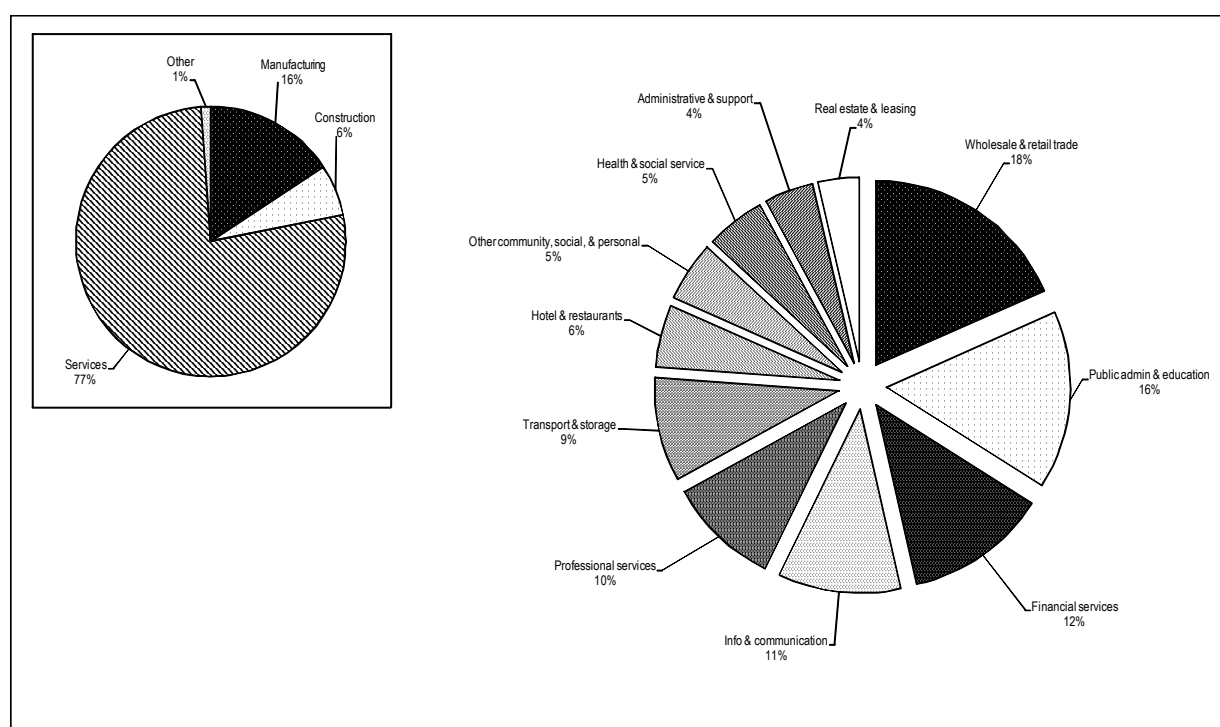
<sup>76</sup> Jordanian Labour Code, section 31(1) and (2).

<sup>77</sup> Jordanian Labour Code, section 31(D).

present in the country on a valid work (low-skilled) or employment (high-skilled) pass.<sup>78</sup> Occupationally segregated labour statistics are available only for residents' employment. Foreign workers present in Singapore on work passes are necessarily on task- or time-limited employment contracts; they are obliged to leave the country within seven days of the expiration of their contract.

- 138.** The service sector accounts for the largest proportion of residents' employment in Singapore – 370,800 (77 per cent) jobs in 2009. Public administration and education – government employees excluded from the Employment Act – is the second largest group (after the wholesale and retail trades) within the service sector with 57,900 jobs. Overlapping these figures, there are 120,000 officers in the public service.

**Figure 4. Singapore: Employed residents in all industries, and in the service sector, 2009**



Source: Ministry of Manpower, Manpower Research and Statistics Department, Labour Market, Second Quarter 2010, table 1.1, employment.

- 139.** *Implementation methods, scope and definitions.* The Singapore Employment Act applies to all employees (equally to foreign and resident workers) except government employees, seafarers, domestic workers, statutory board employees and employees filling managerial/executive positions. For those excluded from its provisions, the matter of employment termination is covered by common law or case law.
- 140.** In respect of protections set out in the Singapore Employment Act, there are no exclusions for workers under different forms of contracts or under periods of probation. A contract of service for a specified piece of work or period of time terminates when the work specified is completed or the period of time has elapsed or by the giving of notice just as in respect of other forms of employment contracts.

<sup>78</sup> *Singapore Yearbook of Manpower Statistics, 2010* (Ministry of Manpower), pp. A1 and A3.

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- 141.** *Justification for termination.* Under the Singapore Employment Act, no reason need be given – distinguished from having a justifiable reason – for the termination of a contract of service either by the employer or the employee. The sample employment contract suggested by the Government to the business community explicitly says that the “company reserves the right not to give any reason for termination”.<sup>79</sup> Employment termination must only conform with notice requirements. However, an employee can make representations to the Minister seeking reinstatement if he/she considers that he/she has been dismissed, with or without notice and whether on the grounds of misconduct or otherwise, without just cause or excuse.
- 142.** If an employee represented by a trade union feels that his dismissal is without “just cause or reason”, he/she can appeal to the Minister within one month of the dismissal under the Industrial Relations Act.<sup>80</sup>
- 143.** Termination on account of union membership or participation in union activities, for having filed a complaint against the employer regarding safety and health matters, during maternity leave “without sufficient cause”, and on the grounds of age are prohibited.<sup>81</sup>
- 144.** Occupational data for 2008 show that more than half of employed residents work in occupations excluded from the Singapore Employment Act. In respect of these and other employees not covered by the Singapore Employment Act,<sup>82</sup> common law applies. While there has been development of an implied term of trust and confidence in Singaporean law, and concepts of good faith are present in common law jurisdictions, relevant cases have not been litigated in Singapore and thus at the current moment the employer might terminate without justification unless contractual provisions have been made to the contrary.<sup>83</sup>

<sup>79</sup> [www.business.gov.sg/EN/ResourceLibrary/LawsNPolicy/rl\\_hire\\_samplecontract\\_full.htm](http://www.business.gov.sg/EN/ResourceLibrary/LawsNPolicy/rl_hire_samplecontract_full.htm) (accessed 4 Oct. 2010).

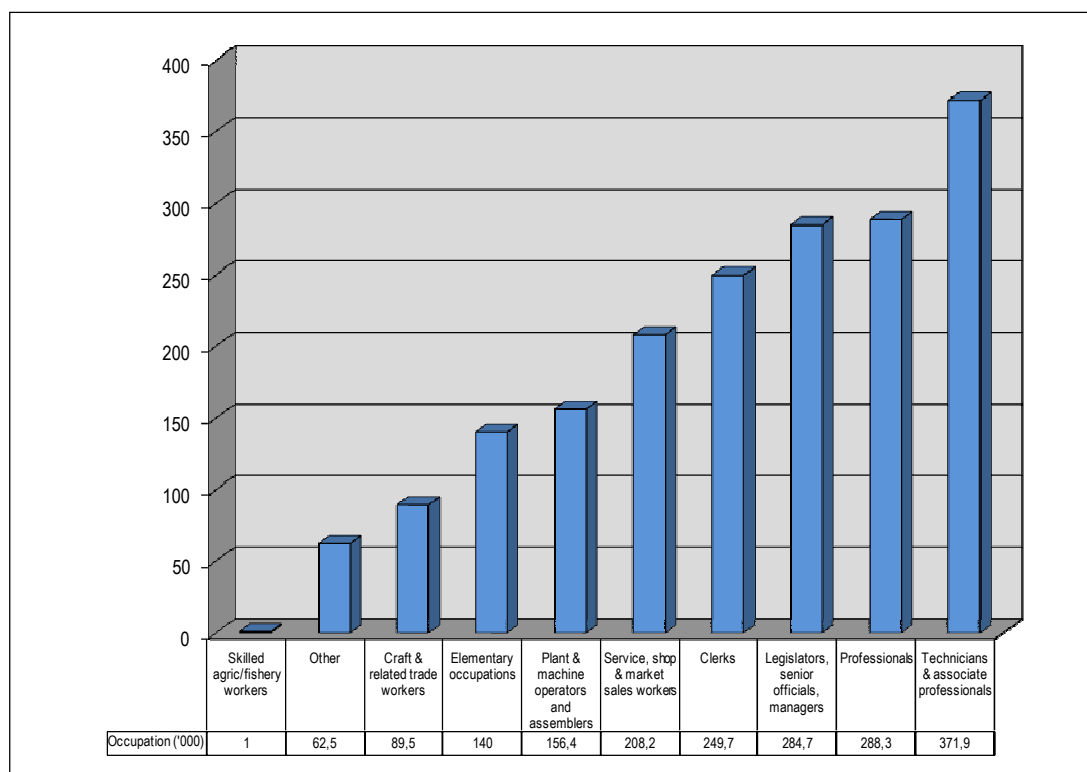
<sup>80</sup> Singapore Industrial Relations Act, section 35(3).

<sup>81</sup> Singapore Industrial Relations Act, section 82; section 18 of the Workplace Safety and Health Act; sections 81 and 84 of the Singapore Employment Act; section 4(2) of Retirement Age Act 1993.

<sup>82</sup> ILO: LABORSTA database.

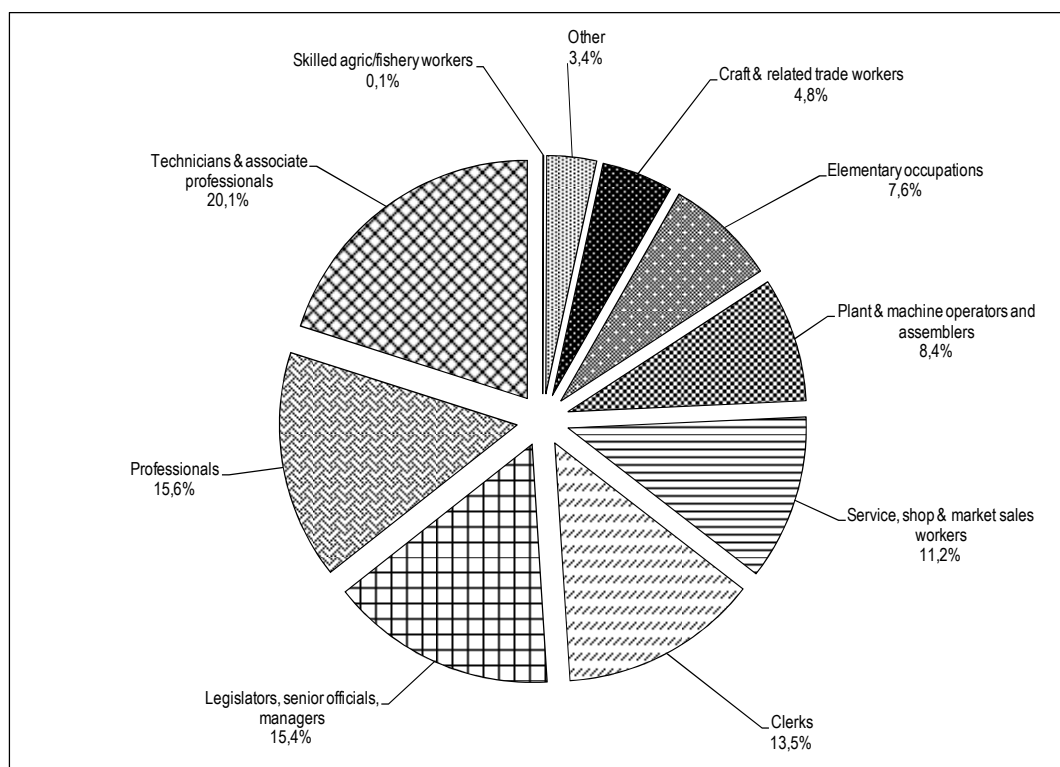
<sup>83</sup> *D’Cruz v. Seafield Amalgamated Rubber Co Ltd* (1963) 29 MLJ 154; *Latham v. Credit Suisse First Boston* (2000) 2 SLR 693; *Hui Cheng Wan Agnes v. Nippon SP Tech (S) Pte Ltd*, Suit No. 1069 of 2000, Singapore High Court, unreported; *GYC Financial Planning Pte Ltd v. Prudential Assurance Company Singapore (Pte) Ltd* (2006) 2 SLR 865.

**Figure 5. Singapore: Total employment, by occupation (residents only), 2009**



Source: Ministry of Manpower, Manpower Research and Statistics Department, Labour Market, Second Quarter 2010, table 1.1, employment.

**Figure 6. Singapore: Total employment, by occupation (residents only), 2008**



Source: Ministry of Manpower, Manpower Research and Statistics Department, Labour Market, Second Quarter 2010, table 1.1, employment.

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- 145. *Procedure prior to or at the time of termination.*** An employer may after “due inquiry dismiss without notice an employee employed by it on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of service”.<sup>84</sup> According to the Ministry of Manpower (MoM), the “inquiry is to follow the rules of natural justice: No man shall be a judge in his own cause; no man shall be condemned unheard”.<sup>85</sup> The MoM goes on to give further procedural suggestions on its website.
- 146.** Rules for investigating allegations of misconduct or neglect of duty by public officers under the jurisdiction of the Public Service Commission, providing for the opportunity of self-defence, are used both by the Public Service Commission<sup>86</sup> and management.<sup>87</sup>
- 147. *Procedure of appeal.*** In the Singapore Employment Act section headed “misconduct of employee”, where an “employee considers that he has been dismissed without just cause or excuse” he/she may make representations to the Minister seeking reinstatement. An amendment to the Singapore Employment Act in 2008 clarified that “dismiss means the termination of the contract of service of an employee by his employer, with or without notice and *whether on the grounds of misconduct or otherwise*” [emphasis added]. Parliamentary debate clarifies the intent of the amendment to broaden protection and establishes the burden of proof.
- This clarification on the application of the Act is important because an overly narrow interpretation of the term “dismissal” defeats the redress mechanism for unfair dismissal. The employer’s responsibility, which is that any dismissal should not be done unfairly, remains unchanged. ... Where employers dismiss employees without notice on grounds of misconduct, they will be required to show cause for the dismissal and that due inquiry has been carried out. In cases where notice is given and the contractual terms of termination are complied with, the onus would be on the employees to substantiate their claims. They may do so, for instance, by showing that their dismissal arose from the employer’s intent to deprive them of employment benefits they would otherwise have been entitled to ...<sup>88</sup>
- 148.** Where an appeal is filed it must be done within one month of the dismissal. The Minister can order reinstatement or compensation.<sup>89</sup> Since these matters are not reported, it is not possible to verify what standard is applied in judging them.
- 149. *Period of notice.*** The Singapore Employment Act allows either party to the contract of employment to terminate the contract by giving notice. In the absence of a provision governing the matter in the contract, minimum notice periods depending on the duration of service are set out in the Singapore Employment Act. The right to notice can be waived. Payment may be made in lieu of notice. Neither notice nor payment in lieu is required where there has been a wilful breach of contract or in cases of termination for misconduct.

<sup>84</sup> Singapore Employment Act, section 14(1).

<sup>85</sup> [www.mom.gov.sg/employment-practices/employment-rights-conditions/contract-of-service-termination/Pages/contracts-of-service-and-termination.aspx](http://www.mom.gov.sg/employment-practices/employment-rights-conditions/contract-of-service-termination/Pages/contracts-of-service-and-termination.aspx) (accessed 9 Nov. 2010).

<sup>86</sup> Public Service (Disciplinary Proceedings) Regulations (Revised edition, 1996).

<sup>87</sup> Public Service Commission (Delegation of Disciplinary Functions) Directions (1 Apr. 1997).

<sup>88</sup> Vol. 85 (2008), sitting 6.

<sup>89</sup> Singapore Employment Act, section 14(4).



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- 150.** *Severance allowance and other income protection.* There is no system of unemployment insurance in Singapore. In respect of any other form of payment on termination of contract, the Singapore Employment Act provides only that employees with less than three years of continuous service shall not be entitled to any retrenchment payment on dismissal on the ground of redundancy or by reason of any reorganization of the employer's profession, business, trade or work.<sup>90</sup> It is reported that in practice "employers in Singapore generally are willing to pay retrenchment benefits to their employees. This helps to pre-empt any complaints made by disgruntled employees to the MoM. In the absence of contractual commitments, the precise quantum of retrenchment benefits remains entirely a matter of negotiation. However it is common practice to pay retrenchment benefits of about one month for each year of service".<sup>91</sup> This is reported to typically cap at 25 years of service.<sup>92</sup>
- 151.** In the case of unionized employees, the collective agreements govern. It is reported that from one to up to two months' pay for every year of service is not uncommon. The practice of some Singapore organizations has been to pay non-unionized employees at the same rate as unionized employees. In terms of the scope of collective bargaining's influence, 354 collective agreements were certified in 2008, covering 51,312 employees.<sup>93</sup> Of 166 trade disputes referred to conciliation in 2009, 34 (20 per cent) concerned retrenchment benefits.<sup>94</sup>
- 152.** *Consultation of workers' representatives.* There are no legal requirements for consultation.
- 153.** *Notification to the competent authority.* There is no legal requirement for notification.
- 154.** The Tripartite Guidelines on Managing Excess Manpower (2008, updated in 2009) worked out between the social partners and intending to reflect good practice provide: "companies should notify the Ministry of Manpower ... as soon as possible of their impending retrenchment if a decision has already been made. Earlier notification will enable the Ministry and the relevant agencies to help your company manage any labour issues arising from a retrenchment exercise, and also help affected workers find alternative employment expeditiously and/or to provide them with relevant training for enhanced employability".

<sup>90</sup> Singapore Employment Act, section 45.

<sup>91</sup> Baker and McKenzie: *Worldwide guide to termination, employment discrimination, and workplace harassment laws*, 2009, pp. 303–304; see also [www.entersingaporebusiness.info/Bus07.htm](http://www.entersingaporebusiness.info/Bus07.htm) (accessed 5 Nov. 2010).

<sup>92</sup> [www.entersingaporebusiness.info/Bus07.htm](http://www.entersingaporebusiness.info/Bus07.htm) (accessed 5 Nov. 2010).

<sup>93</sup> The Industrial Arbitration Court certifies collective agreements. They are required to be not less than two nor more than three years in duration; *2008 Annual Report of the Industrial Arbitration Court*, pp. 6 and 11. Union membership in Singapore has almost doubled from 1999 to 2009, from 289,707 to 526,089 members.

<sup>94</sup> *Singapore Yearbook of Manpower Statistics*, 2010, p. E8.

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## South Africa

- 155.** South Africa has not ratified the Convention. The 1995 General Survey contained no information on obstacles to or prospects for ratification. The 2001 survey reported no obstacles preventing or delaying ratification of the Convention.<sup>95</sup>
- 156.** *Implementation methods, scope and definitions.* The relevant legislative provisions have broad scope: the Labour Relations Act applies to almost all employers, workers, trade unions and employers' organizations;<sup>96</sup> the Basic Conditions of Employment Act applies also to almost all employers and workers.<sup>97</sup>
- 157.** A "Code of good practice: Dismissal", was issued as part of the legislative text as a schedule to the Labour Relations Act. Its provisions – including those requiring justification and procedural safeguards in cases of termination – effectively carry the force of law in so far as any person considering whether or not a termination is fair must take its provisions into account.
- 158.** Under South African law employers may engage employees under a fixed-term contract of employment without restriction. As a safeguard to ensure that the protections of unfair dismissal laws are not avoided, the failure to renew a fixed-term contract in circumstances where the employee has a reasonable expectation of renewal is considered a dismissal.<sup>98</sup> The courts have held that the employee must establish objectively that: (1) he or she in fact expected that the contract would be renewed; and (2) after taking into account all relevant factors, the expectation was reasonable. In the absence of proof of these circumstances, the failure to renew a fixed-term contract, irrespective of its duration, is not an unfair termination.<sup>99</sup>
- 159.** Probationary periods of employment are provided for in South Africa; protections against unjustified termination are unaffected during these periods.<sup>100</sup>

<sup>95</sup> 2001 survey, para. 18.

<sup>96</sup> The Labour Relations Act does not apply to members of the National Defence Force, the National Intelligence Agency or the South African Secret Service.

<sup>97</sup> The Basic Conditions of Employment Act does not apply to members of the National Defence Force, National Intelligence Agency, the South African Secret Service or unpaid volunteers working for charity.

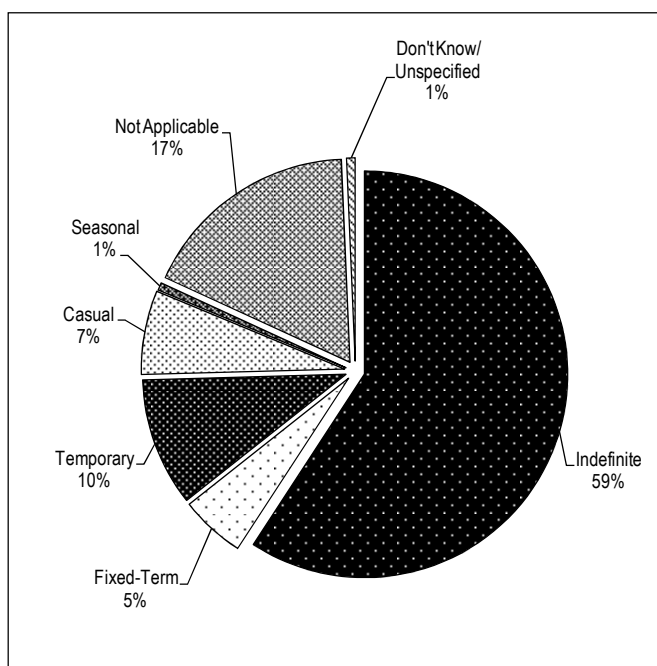
<sup>98</sup> Labour Relations Act, section 186(1)(b).

<sup>99</sup> Legal commentators have observed that the relevant conciliatory, arbitration and judicial bodies "have applied principles of fairness and reasonableness in ascertaining whether such a reasonable expectation exists". Factors that the courts have taken into account in determining whether an employee's expectation of a renewal of a fixed-term contract was reasonable include the wording of the contract, undertakings made by the employer or a representative of the employer to the employee, custom and practice in regard to renewing contracts, the availability of the post, the purpose or reason for having concluded the fixed-term contract, the extent to which the employer gave reasonable notice to the employee, and the nature of the employer's business; see S. Vettori: "Fixed term employment contracts: The permanence of the temporary", in *Stellenbosch Law Review*, Vol. 2, 2008.

<sup>100</sup> Code of good practice, section 8(2).

- 160.** Provisions of the Basic Conditions of Employment Act dealing with termination of employment do not apply to an employee who works less than 24 hours in a month for an employer.<sup>101</sup>

**Figure 7. South Africa: Types of contract, 2007**



- 161. Justification for termination.** Under section 188 of the Labour Relations Act a termination is unfair if the employer fails to prove that the reason for dismissal is: (a) a fair reason related to the employee's conduct or capacity; or (b) based on the employer's operational requirements; and (c) that the dismissal was effected in accordance with a fair procedure. The Labour Relations Act classifies terminations for certain reasons as being automatically unfair. In combination with the terms of the Code of good practice: Dismissal, the requirements of Articles 4, 5 and 6 of the Convention are reflected.
- 162.** In the case of probationary employees, the Code of good practice: Dismissal permits a reasonable period of probation during which an employer must provide appropriate evaluation, instruction, training, guidance and counselling to the employee. The Code also provides that any person (such as a judge or arbitrator) who must make a decision about the fairness of a termination for poor work performance during or on expiry of the probationary period ought to accept reasons for dismissal that may be less compelling than would be the case in dismissals effected after the completion of the probationary period. This approach has been criticized for the lack of certainty in the "less compelling standard" and because it does not apply to assessing an employee's suitability in the workplace.<sup>102</sup>
- 163. Procedure prior to or at the time of termination.** The Code of good practice: Dismissal outlines the "fair procedure" to be followed. It calls for employer investigation of grounds for dismissal, employee notification of the allegations, allowance for employee defence, and employer communication of the decision after the inquiry.

<sup>101</sup> Basic Conditions of Employment Act, section 36.

<sup>102</sup> H. Cheadle: *Regulated flexibility: Revisiting the Labour Relations Act and the Basic Conditions of Employment Act* (2006), 27 ILJ 663.

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- 164. *Procedure of appeal.*** In any proceedings concerning any dismissal, the employee must establish the existence of dismissal and the employer must prove that the dismissal is fair. This requirement in the statute is based on the common law requirement that the party relying on a material breach of contract in order to cancel the contract must prove the breach and its materiality.
- 165.** Disputes over termination for conduct or capacity can be referred to the public conciliation and arbitration agency, Commission of Conciliation, Mediation and Arbitration (CCMA). For employees in industries that have them, the 41 private sector and six public sector bargaining councils have jurisdiction over termination disputes.
- 166.** It is estimated that 4 per cent of the approximately 7 million employees in the private sector formal economy are dismissed each year and that one in two dismissed workers refer cases to the CCMA. Dismissal cases represent 80 per cent of the CCMA's caseload. Arbitrations are completed on average within 38 days of their commencement; the arbitrator's award must be delivered within 14 days of the end of the hearing and is not subject to appeal.
- 167.** Of cases that go to arbitration, one third of employees succeed with a claim. Less than 10 per cent of employees who win their cases (roughly 1,500 annually) receive a reinstatement award in their favour.<sup>103</sup> Factors contributing to the low level of reinstatement include the fact that a considerable number of referrals are by domestic workers and employees of very small businesses who are unlikely to be reinstated because of the personal nature of the relationship; the fact that many employees do not seek reinstatement and a reluctance by arbitrators to order reinstatement if the employer opposes. Of workers who are found to have been unfairly dismissed, the large majority receive an award of financial compensation; the average award is equivalent to four months' pay.
- 168.** The Labour Court has jurisdiction with regard to disputes concerning dismissal as a consequence of operational requirements.
- 169. *Period of notice.*** Periods of notice prior to the termination of a contract of employment are set out in the Basic Conditions of Employment Act; compensation in lieu thereof is also provided for.<sup>104</sup>
- 170. *Severance allowance and other income protection.*** Income protection in cases of employment termination takes the form of unemployment insurance and severance pay in South Africa.
- 171.** Severance pay is required by the Basic Conditions of Employment Act only where the termination is for operational requirements of the enterprise, meaning requirements based on the economic, technological, structural or similar needs of an employer. An employee who unreasonably refuses an offer of alternative employment loses his/her right to statutory severance pay. Contracts of employment and collective agreements may provide for higher levels of severance pay. Entitlement to unemployment benefits is unaffected by receipt of severance pay or compensation in a case of unfair dismissal.

<sup>103</sup> This assessment is based on information derived from the CCMA's electronic case management system: CCMA's Annual Reports, at [www.ccma.org.za](http://www.ccma.org.za) (accessed July 2010).

<sup>104</sup> Basic Conditions of Employment Act, sections 37 and 38; the Basic Conditions of Employment Act clarifies the common law requirement of notice to terminate.

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- 172.** An unemployed contributor is entitled in terms of the Unemployment Insurance Act, 2000, to unemployment benefits for a period of unemployment lasting more than 14 days.<sup>105</sup> To receive unemployment benefits, the unemployment must be due to the termination of the contributor's contract of employment by the employer; the ending of a fixed-term contract; the dismissal of the contributor or insolvency.<sup>106</sup> Receipt of benefits is conditioned on application in accordance with the prescribed requirements;<sup>107</sup> registration as a work-seeker with a labour centre;<sup>108</sup> and being capable of and available for work.<sup>109</sup> An employee accrues an entitlement to one day's unemployment benefit for every six days of employment completed as a contributor subject to a maximum accrual of 238 days' benefit in the four-year period immediately preceding the date of application for benefits.
- 173.** The number of employees receiving unemployment benefits increased by 32 per cent from 474,793 (2008–09) to 628,595 (2009–10). As at the end of March 2010, 7.75 million employees were registered with the Unemployment Insurance Fund as contributors representing an increase of 2.2 per cent over the figure for March 2009. There are 1.24 million employers registered with the Fund categorized mainly as commercial employers (657,859) with 6.95 million employees, domestic employers (557,985) with 637,987 employees, and taxi employers (5,516) with 5,643 employees. The most significant exclusions from the Fund are public servants employed by the national and provincial Governments, who are covered by other schemes for assuring income protection in the case of employment termination.<sup>110</sup>
- 174.** *Consultation of workers' representatives and notification to the competent authority.* The Labour Relations Act sets out the procedure for notification to and consultation with workers' representatives or workers to be followed for terminations based on operational requirements.<sup>111</sup> There are particular requirements for retrenchments in enterprises of 50 or more employees designed to facilitate consultation where needed. Thus, although the employer is not generally required to notify the labour administration when contemplating dismissals based on operational requirements, the labour administration may be requested to facilitate consultations in these larger enterprises. Where this is done full information is made available to the CCMA, which shall appoint a facilitator as requested either by the employer or employee's representatives.<sup>112</sup>

<sup>105</sup> Unemployment Insurance Act, section 16(1).

<sup>106</sup> Unemployment Insurance Act, section 16(1)(a)(iii).

<sup>107</sup> Unemployment Insurance Act, section 16(1)(b).

<sup>108</sup> Unemployment Insurance Act, section 16(1)(c).

<sup>109</sup> Unemployment Insurance Act, section 16(1)(d).

<sup>110</sup> Unemployment Insurance Act Annual Report of 2009.

<sup>111</sup> Labour Relations Act, section 189.

<sup>112</sup> Labour Relations Act, section 189A.

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## Spain

- 175.** *Spain* ratified the Convention in 1985. The CEACR has commented on the application of the Convention periodically and the CCAS discussed application of the Convention in 1994.
- 176.** *Implementation methods, scope and definitions.* The Workers' Statute<sup>113</sup> excludes civil servants employed in centralized or decentralized state administration, the National Congress and Judiciary, workers in state undertakings or institutions or workers employed in bodies to which they contribute, participate or are represented. Family work and independent workers<sup>114</sup> are also excluded.
- 177.** Various fixed-term contracts are permitted in *Spain* for temporary increases in workloads, for specifically delimited projects or to substitute workers,<sup>115</sup> each with safeguards.<sup>116</sup> Under any circumstance where fixed-term contracts are used employees are deemed permanent employees where they have been employed in the same position in the same company or group of companies, either directly or through temporary employment agencies, through two or more fixed-term contracts for more than 24 months within a 30-month period.<sup>117</sup>
- 178.** Probationary periods are generally established by collective agreement; they may not exceed six months for skilled technicians, or two months for other workers.<sup>118</sup> Companies in all sectors of the economy generally require a probationary period. In undertakings with up to 25 employees, a probationary period may not be more than three months for non-skilled workers.
- 179.** *Justification for termination.* The employer may terminate employment where there is an objective<sup>119</sup> or disciplinary cause. A termination is unfair if based on other than these reasons or where improper procedures are followed.<sup>120</sup> Fixed-term contracts are not excluded from these provisions.

<sup>113</sup> Act 8/1980, consolidated version, as amended by Act 40/2007 with respect to social security matters (*Ley 40/2007 de medidas en materia de Seguridad Social*).

<sup>114</sup> Workers' Statute, article 1.

<sup>115</sup> See *Temporary employment examined*, European Industrial Relations Observatory Online, at [www.eurofound.europa.eu/eiro/2004/09/feature/es0409104f.htm](http://www.eurofound.europa.eu/eiro/2004/09/feature/es0409104f.htm) (accessed 10 Nov. 2010).

<sup>116</sup> Workers' Statute, article 15(1)(a), as per the new labour market reform, Law 35/2010 of 17 September.

<sup>117</sup> Workers' Statute, article 15(5).

<sup>118</sup> Workers' Statute, article 14.

<sup>119</sup> Workers' Statute, article 52; for example, incompetence, or a demonstrated need for redundancy for operational reasons; persistent absenteeism was introduced by the labour market reform.

<sup>120</sup> Workers' Statute, articles 55(4) and 56.

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- 180.** Invalid reasons for termination include those based on sex, marital status, race, age (within the limits established by the law), ethnic origin, social status, religious or political beliefs, sexual orientation, membership or non-membership of a trade union, language and disability.<sup>121</sup> Terminations based on these grounds are considered null and void.<sup>122</sup> In establishing the nullity of such dismissals, the Constitutional Court<sup>123</sup> has cited Article 5 of the Convention when recalling the prohibition of dismissal of workers for exercising their right to action arising from their employment contracts.<sup>124</sup> Dismissals are also nullified in the following circumstances: pregnancy, suspension of contract due to maternity, risk during pregnancy, or breastfeeding leave; adoption or fostering; family leave to care for children or persons with disabilities; and certain circumstances in which female workers have been victims of gender-based violence. This is however not an absolute prohibition, since dismissal in those cases is allowed if the reason that motivated it is not related to pregnancy or the exercise of the right to the abovementioned types of leave.<sup>125</sup> Workers' and trade union representatives also enjoy special protection.
- 181.** A worker may be terminated without just cause during probation. In 2009, out of the 15.7 million employed persons, 42,500 (0.2 per cent) were on probation.<sup>126</sup>
- 182.** *Procedure prior to or at the time of termination.* The law does not explicitly contemplate a procedure prior to termination except in those cases of termination based on the conduct of a worker when he/she is a workers' representative. Also, under the same grounds, if the worker is a union member, and the employer is aware of it, a prior hearing should be held.<sup>127</sup>
- 183.** The CEACR and the CCAS took up the application of Article 7 in the late 1990's. The matter involved whether the safeguard provided by Article 7 was available to all workers irrespective in particular of the referral of the matter to the competent court and of the procedure of signing the receipt for the release presented by the employer when serving notice of the termination of a contract of employment.<sup>128</sup> It was considered that the administrative conciliation procedure (discussed below) should be conducted before dismissal takes effect in order to afford workers a better means of defending themselves than would a mere formal interview conducted in the enterprise prior to dismissal.<sup>129</sup>

<sup>121</sup> Workers' Statute, article 4(2)(c).

<sup>122</sup> Workers' Statute, articles 17(1) and 55(5).

<sup>123</sup> Among others, STC 7/1993, 18 Jan.; STC 14/1993, 18 Jan.; STC 54/1995, 24 Feb.; TC 136/1996, 23 July; STC 199/2000, 4 July.

<sup>124</sup> Workers' Statute, article 4(2)(g).

<sup>125</sup> Workers' Statute, article 53(4) (dismissal for an objective cause); and article 55(5) (disciplinary dismissal).

<sup>126</sup> Labour Force Survey.

<sup>127</sup> Workers' Statute, article 55(1).

<sup>128</sup> CEACR observations: *Spain* (1994 and 1996); CCAS discussion (1994).

<sup>129</sup> CEACR observation: *Spain* (1997).

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- 184.** The law determines that collective agreements may establish other procedural requirements for dismissal. One third of collective bargaining agreements provide additional protection to workers that are not workers' representatives or affiliated to a union.<sup>130</sup>
- 185.** *Procedure of appeal.* The labour courts have jurisdiction over individual labour disputes arising from the employment contract; complaints against terminations must be lodged within 20 days of the termination.<sup>131</sup> Remedies include the possibility for reinstatement and compensation.
- 186.** Preliminary conciliation at the competent service of the labour administration is mandatory before the dispute can reach the labour court.<sup>132</sup> Reinstatement with back pay is mandatory if the dismissal is deemed a nullity. If the termination is judged invalid (*despido improcedente*) or where the requirements applicable for objective dismissal have not been observed, the employer can choose between reinstatement plus back pay or compensation according to a formula.<sup>133</sup> If the terminated employee is a workers' representative, the employee makes the choice between reinstatement and compensation. Collective agreements can allocate to the unfairly dismissed worker the right to choose between these remedies.

<sup>130</sup> Collective agreements signed between January and September 2010.

<sup>131</sup> Labour Procedure Law, article 103(1).

<sup>132</sup> Labour Procedure Law, article 63.

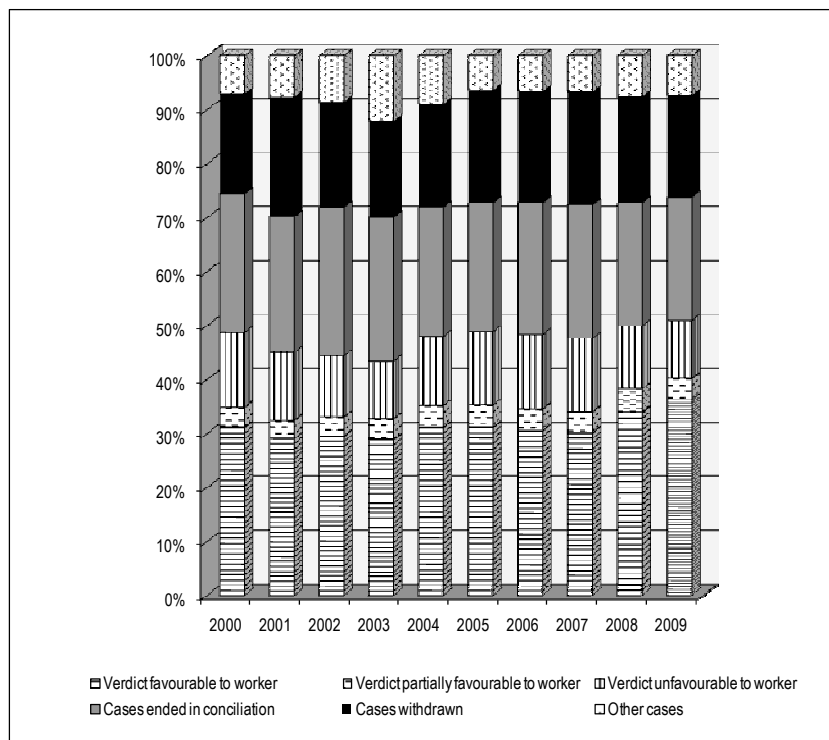
<sup>133</sup> 45 days' wages for each year of service up to a maximum of 42 months' pay and back pay from the date of the dismissal until the judicial decision or until the worker finds another job if that happens before the court's decision.



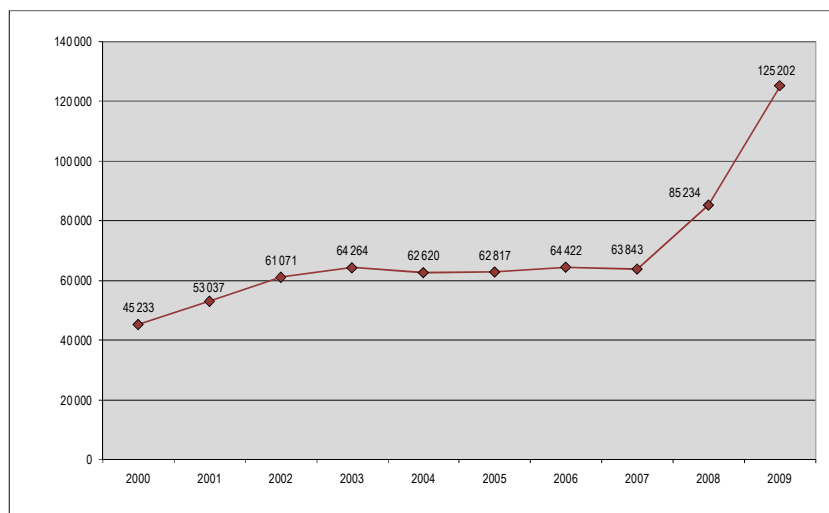
### Spain: Cases of appeal

The number and results of cases of appeal of termination each year from 2000 to 2009, inclusive. The proportion of results remained constant over the years 2000–09, despite a very large increase in cases coinciding with the global economic downturn in 2008 and 2009. The role of the labour courts in enforcing employment protections may be strengthened – with resulting high caseloads – by the complexity of Spanish labour legislation.<sup>1</sup>

**Figure 8. Spain: Results of termination appeals, 2000–09**



**Figure 9. Spain: Cases of termination brought before the courts, 2000–09**



<sup>1</sup> G. Bertola, T. Boeri and S. Cazes: "Employment protection in industrialized countries: The case for new indicators", in *International Labour Review*, Vol. 119 (2000), No. 1, p. 66.

- 187.** However, the law provides that the employer up until conciliation of a dispute may pay the following amounts, effectively liquidating any potential liability and formally terminating the contract.<sup>134</sup>

Basis of termination	Payment project or to provide a service	Limitation
Unfair termination	45 days' wages for each year of service	Maximum of 42 months' wages
Unfair termination, contract for encouraging indefinite hiring <sup>1</sup>	33 days' wages per year of service	24 months. Additional provisions 1°, section 4, Law 12/2001 of 9 July

<sup>1</sup> Law 12/2001 of 9 July.

- 188.** *Period of notice.* Fifteen days' notice is required in cases of termination based on an objective cause; no notice is required for disciplinary termination.<sup>135</sup> Either party can terminate a fixed-term contract of longer than one year's duration on 15 days' advance notice.<sup>136</sup> There is no pay in lieu of notice as such, but an employer that fails to observe the notice requirements will have dismissed unfairly and be liable to pay compensation in an amount equivalent to the period of notice that was not given.

- 189.** *Severance allowance and other income protection.* Unemployment benefits are paid in cases of involuntary unemployment, or where the worker's working hours, and accordingly income, are reduced (10–70 per cent). To qualify for unemployment benefits the insured must have at least 360 days of contributions during the last six years and be registered at an employment office. Workers under probation are also covered. The duration of the benefit varies according to the number of days of contributions to a maximum of 720 days.

- 190.** In addition to income protections through unemployment insurance, termination initiated by the employer attracts payments to the worker.

Contract type	Amount, based on wages and service	Limitation
Any (including fixed term), where termination for objective reasons (i.e. economic reasons or worker's capacity)	20 days' salary per year of service	Maximum of 12 months' wages <sup>1</sup>
Fixed-term contracts, where terminated on expiration	8 days' (up to 12 in 2015) salary per year of service	Maximum set only within context of fixed-term contract safeguards

<sup>1</sup> Workers' Statute, article 53(1)(b).

- 191.** A worker terminated for disciplinary reasons is not entitled to severance pay.

- 192.** Upon termination of a fixed-term contract by expiry of the term or completion of the work, the worker is entitled currently to a payment of eight days per year of service.<sup>137</sup> This does not apply to contracts concluded for training purposes or to replace employees temporarily absent from work.

<sup>134</sup> Workers' Statute, article 56(2).

<sup>135</sup> Workers' Statute, article 53(1)(c); the Labour Market Reform, enacted by Royal Decree Law 10/2010, has reduced notice period from 30 to 15 days.

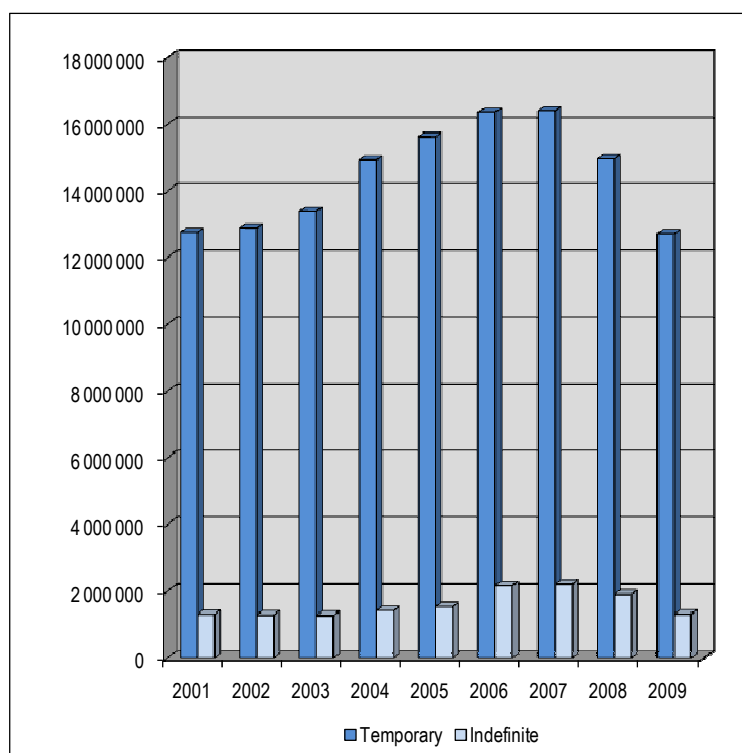
<sup>136</sup> Workers' Statute, article 49(1)(c).

<sup>137</sup> Workers' Statute, article 49(1)(c); the Labour Market Reform has amended article 49(1)(c) by increasing fixed-term contract termination indemnity on a yearly basis from a progressive eight days' wages to 12 days' wages in 2015.

### Reforms to address temporary employment under fixed-term contracts in Spain<sup>1</sup>

In recent years *Spain* has had one of the highest proportions of employment under fixed-term contracts in the European Union. In April 2010, one in four employees worked under a form of contract other than one of indefinite duration. The Government has acted on several occasions to change this situation.

**Figure 10. Spain: Employment contracts registered by type, 2001–09**



In 2001 contracts for encouraging indefinite hiring were introduced.<sup>2</sup> These contracts were made available only for hiring certain categories of workers; when terminated for objective causes the employer is obliged to pay 33 days' salary per year of service, to a maximum of 24 months.<sup>3</sup> Eligible categories of persons have been expanded over the years.<sup>4</sup>

Law 35/2010 on urgent measures for the reform of the labour market was adopted in September 2010. Incentives have been given to use indefinite term contracts, aimed at making fixed-term contracts less appealing. For example, if contracts for encouraging indefinite hiring are terminated due to objective causes and the dismissal is recognized or declared unfair, the compensation shall be 33 days of salary per year of service, to a maximum of 24 months. There has also been a transfer in costs of compensation in case of indefinite contracts terminated based on objective causes from private companies to the FOGASA (Salary Guarantee Fund) which will pay eight days of the compensation.

Safeguards against abuse in using fixed-term contracts have been strengthened. Among these, maximum limits have been placed on some contracts. Provision has been made to assure that fixed-term contracts are linked in terms of maximum limits not only when renewed with the same company, but also with a company in the same company group, where the business has been transferred or subrogated. The compensation due upon expiration of a temporary contract will be increased gradually from eight to 12 days' salary per year worked.<sup>5</sup>

<sup>1</sup> The National Institute of Statistics collects information on temporary contracts and identifies them as: (1) contracts to meet a temporary increase in production; (2) apprenticeship or trainee contracts; (3) seasonal work contracts; (4) contracts for a probationary period; (5) contracts to temporarily replace an employee absent from work; (6) contracts to perform a specific service or project; (7) verbal agreements not included in those listed previously; and (8) other types of contracts which are not for an undetermined duration. <sup>2</sup> Law 12/2001 of 9 July. <sup>3</sup> Additional provisions 1°, section 4, Law 12/2001 of 9 July. <sup>4</sup> Contracts for encouraging indefinite hiring can be issued currently to: (1) unemployed people (16–30 years of age); (2) unemployed women in sector with less female presence; (3) unemployed persons over 45 years of age; (4) unemployed persons with disabilities; (5) unemployed persons in general that have been registered at least three months; (6) unemployed persons who in the last two years have only had temporary contracts; (7) unemployed persons who have been terminated in the last two years from an indefinite contract; and (8) conversions from temporary contracts to indefinite contracts in 2010 and 2011. <sup>5</sup> This will be a gradual increase from 2010 to 2015.

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- 193.** *Consultation of workers' representatives.* An employer who intends to carry out collective terminations must consult the workers' representatives about the reasons for the terminations, alternatives, and measures to mitigate adverse effects on workers.<sup>138</sup> Consultations may last up to 30 calendar days, 15 days in the case of enterprises with fewer than 50 workers, that is, 98 per cent of all companies.<sup>139</sup>
- 194.** *Notification to the competent authority.* An employer who intends to carry out collective dismissals must request permission from the competent labour authority. The decision of the labour authority must be justified and consistent with the request of the enterprise.

## Switzerland

- 195.** Switzerland has not ratified the Convention. The 1995 General Survey contained no information on obstacles to or prospects for ratification. The 2001 survey reported that Switzerland was one of the five countries that considered that "their national legislation was based on the concept of freedom of termination employment, which was not in conformity with the Convention".<sup>140</sup>
- 196.** *Implementation methods, scope and definitions.* In respect only of the subject of collective termination, the Swiss Code of Obligations excludes enterprises with 20 or fewer employees. The Code of Obligations applies to every contract of private law and regulates the employment relationship between employers and workers who conclude individual employment contracts. Other applicable legislation includes the Federal Labour Statute, the Federal Act on Equal Treatment of Women and Men, and the Federal Statute on the Information and Consultation of Employees in the enterprise.<sup>141</sup>
- 197.** There are generally no limitations to the use of fixed-term contracts. Nevertheless, a fixed-term contract that is tacitly renewed is deemed to be concluded for an indefinite period. Eurostat reports that the percentage of employees employed in Switzerland with contracts of limited duration in 2009 approximated the EU-27 countries' average, about 13.2 per cent.<sup>142</sup> See figure 11, where a comparison can be made with countries applying other approaches to employment protection.

<sup>138</sup> Workers' Statute, article 51(4).

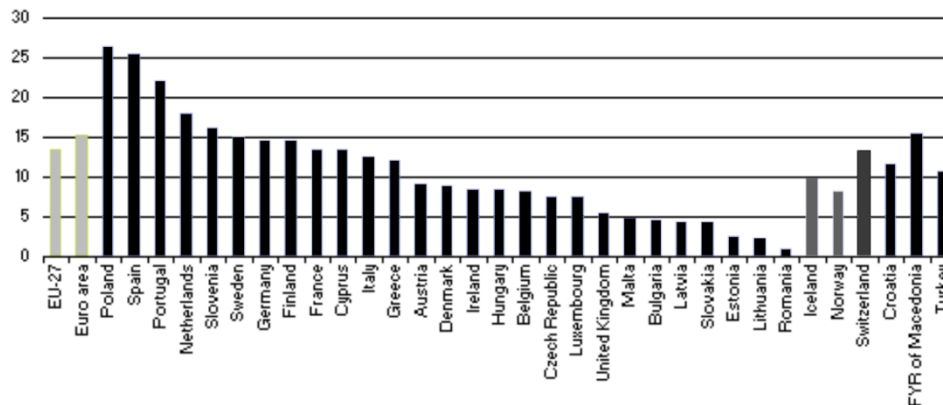
<sup>139</sup> Companies registered with Social Security (Aug. 2010).

<sup>140</sup> 2001 survey, para. 21; the other countries were Austria, Belgium, Thailand and the United States.

<sup>141</sup> Baker and McKenzie: *Worldwide guide to termination, employment discrimination and workplace harassment laws*, 2009, p. 333.

<sup>142</sup> Eurostat:  
[http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php?title=File:Proportion\\_of\\_employees\\_with\\_a\\_contract\\_of\\_limited\\_duration,\\_2009%28%25\\_of\\_total\\_employees%29.PNG&filetimestamp=20100729152319](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Proportion_of_employees_with_a_contract_of_limited_duration,_2009%28%25_of_total_employees%29.PNG&filetimestamp=20100729152319) (accessed 4 Dec. 2010).

**Figure 11. Switzerland: Proportion of employees with a contract of limited duration, 2009**



198. *Justification for termination.* There is generally no requirement for basing termination at the initiative of the employer on valid grounds.
199. Dismissal may not, however, constitute an abuse of rights; numerous non-exhaustive grounds are listed.<sup>143</sup>
200. *Procedure prior to or at the time of termination.* The law does not specify procedures prior to or at the time of termination. The law provides that the party giving notice should state the reason for terminating employment in writing if requested by the other party.<sup>144</sup>
201. *Procedure of appeal.* Ordinary and labour courts, depending on the canton, have jurisdiction for claims of abusive termination.
202. An abusive termination in any of its forms is nevertheless valid. An indemnity must be paid in such cases in an amount that may not exceed six months' wages. Reinstatement is exceptionally available in the case of a dismissal because of gender discrimination where the employee was terminated during an internal complaint or a court proceeding relating to gender discrimination or within six months of ending such a proceeding.<sup>145</sup>
203. The Federal Statistics Office has confirmed that no data are kept on the number of employment terminations.
204. *Period of notice.* No notice is required with termination of a fixed-term contract. Employment contracts of indefinite duration can be terminated during the probationary period – maximum of three months – by respecting a notice period of seven days; after the first year with a notice period of one month; in the second year, and up to and until the

<sup>143</sup> Baker and McKenzie: *Worldwide guide to termination, employment discrimination and workplace harassment laws*, 2009, p. 335; according to EPLex, prohibited grounds for termination of employment include marital status, pregnancy, maternity leave, family responsibilities, temporary work injury or illness, race, colour, sex, sexual orientation, political opinion, social origin, nationality, age, trade union membership and activities, disabilities, performing military or civil service, exercise of a right, solely frustrate the formation of claims arising out of the employment relationship.

<sup>144</sup> Code of Obligations, article 335(2).

<sup>145</sup> Baker and McKenzie: *Worldwide guide to termination, employment discrimination and workplace harassment laws*, 2009, p. 341.

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ninth year of service, with a notice period of two months; and thereafter with a notice period of three months.

- 205.** In case of a termination without notice, the dismissal remains valid. The employee, however, has grounds for a claim for compensation representing what he or she would have earned until the expiration of the fixed employment term or, in the case of an employment relationship for an indefinite term, what the employee would have earned if the relationship had been terminated with due observation of the notice period.<sup>146</sup> If no fair reason is shown for the dismissal with immediate effect, compensation may be awarded which cannot exceed six months' wages.<sup>147</sup>
- 206.** *Severance allowance and other income protection.* Unemployment insurance benefits are provided via social insurance. A long service payment is applicable in cases of termination of a worker who is at least 50 years old and has 20 or more years of service with the same employer.
- 207.** *Consultation of workers' representatives and notification to the competent authority.* Both consultation with workers' representatives and notification to the competent authorities is obliged in the case of collective dismissal as defined in the Code of Obligations.<sup>148</sup> Consultations should permit the formulation of propositions for avoiding terminations, limiting their number, as well as mitigating their consequences. Information should be provided in writing on the number of collective dismissals foreseen, the reason, the number of workers usually employed, and the period during which the dismissals are foreseen to take place. Written notification to the public authorities should include the same information as well as the indications of the results of consultations with the workers or their representatives.

### ***Bolivarian Republic of Venezuela***

- 208.** The *Bolivarian Republic of Venezuela* ratified the Convention in 1985. Different legislative regimes have through the years protected workers from unjustified termination. Currently, the Constitution of 1999 says that "[s]table employment shall be guaranteed by law, with provisions as appropriate to restrict any form of unjustified dismissal. Dismissals contrary to the Constitution are null and void".<sup>149</sup> The CEACR's most recent comment invites the Government to indicate the measures adopted to ensure that managerial workers are covered by the protection afforded by the Convention and urges tripartite consultation to resolve disagreement over the policy of labour stability.<sup>150</sup>

<sup>146</sup> *ibid.*, p. 337.

<sup>147</sup> Code of Obligations, article 337c.

<sup>148</sup> Collective dismissals are those made by the employer within a period of 30 days for reasons which are not related to the personality of the workers and affecting the following numbers of workers: (1) at least ten workers in undertakings employing between 20 and 100 workers; (2) at least 10 per cent of the workforce in undertakings employing between 100 and 300 workers; or (3) at least 30 workers in establishments employing at least 300 workers.

<sup>149</sup> Constitution, article 93.

<sup>150</sup> CEACR observation: *Bolivarian Republic of Venezuela* (2010).

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- 209.** *Implementation methods, scope and definitions.* The Organic Labour Law <sup>151</sup> applies to all workers except domestic workers, civil/public servants, police, and army and state security corps. Workers on missions funded by government subsidies for education, health and other matters are also excluded, <sup>152</sup> as well as workers in cooperatives, whose rights are provided for elsewhere. <sup>153</sup>
- 210.** The Organic Labour Law provisions on unjustified termination are not applicable to managers, domestic, seasonal or occasional workers, and workers hired under fixed-term contracts or for a particular task when the cause of termination occurs near the end of the term or the completion of the work. <sup>154</sup>
- 211.** Several safeguards are placed on the use of fixed-term contracts. They can be issued only when the nature of the work warrants it. Contracts of blue collar workers cannot exceed a year, and white collar workers three years. <sup>155</sup> A fixed-term contract is considered to be of indefinite duration if it is renewed a second time. <sup>156</sup>
- 212.** Fixed-term contracts are frequently used in the public sector. Jurisprudence holds that these workers and contracts are not excluded from the Organic Labour Law, although the Labour Inspection Services considers that they have no competence to supervise matters of job security.
- 213.** The duration of contracts for a specific task may run for as long as the time needed to complete the task. Where a new contract is issued within a month of expiry, it is presumed that the intention of the parties is to conclude contracts of an indeterminate duration. Contracts in the construction industry are excluded from this presumption, <sup>157</sup> despite the fact that this type of contract is frequently used in this sector.
- 214.** Permanent workers may be obliged to serve a maximum three-month probationary period before protections against unjustified termination are applied. <sup>158</sup>

<sup>151</sup> Organic Labour Law, 20 Dec. 1990, consolidated version, as amended by the 1997 reform, *Official Gazette* No. 5152, Special, 19 June 1997.

<sup>152</sup> There are no reliable statistics of employed personnel in the missions but it is estimated that it could range over 200,000 individuals and subsidies can be as high as 6 per cent of the GDP.

<sup>153</sup> Decree No. 1.440 of 30 August 2001 says that “individuals associated to the cooperatives do not have a relationship of dependency with the cooperative and that advanced payments are not considered salaries ... therefore they are not subject to labour laws applicable to dependent workers”. In 2007, there were 184,000 registered cooperatives, of which only about 60,000 were active with an average of five to ten members who also hire other individuals. It is estimated that more than 1 million people are working under this system. Statement made by the Superintendent of Cooperatives, Juan Carlos Alemán to the newspaper *El Universal*, dated 24 March 2007 (see [http://noticias.eluniversal.com/2007/09/21/eco\\_art\\_cooperativas-agrupan\\_487545.shtml](http://noticias.eluniversal.com/2007/09/21/eco_art_cooperativas-agrupan_487545.shtml) (accessed 30 Nov. 2010)).

<sup>154</sup> Organic Labour Law, article 112.

<sup>155</sup> Organic Labour Law, article 76.

<sup>156</sup> Organic Labour Law, article 74.

<sup>157</sup> Organic Labour Law, article 75.

<sup>158</sup> Organic Labour Law, article 112.

- 215. Justification for termination.** Employment terminated at the initiative of the employer is either justified or unjustified.<sup>159</sup> A termination grounded in the employee's conduct is justified.<sup>160</sup> In cases of serious breach of the obligations under the contract of employment the worker may also be terminated.<sup>161</sup> Collective dismissals for economic or technological reasons are permitted in accordance with specific procedures.<sup>162</sup>
- 216.** Marital status, race, sex, sexual orientation, religion, political opinion, social origin, age, trade union membership and activities are invalid grounds of termination. Certain workers, for various reasons, are classified as "irremovable" and may not be dismissed, transferred or employed in less favourable working conditions without just cause approved in advance by the labour inspector.<sup>163</sup>

#### Immobility decrees

In addition to those workers established as "irremovable" in the Labour Code, decrees and other forms of regulation have since 2002 provided for the same protection to other categories of workers. For example, "immobility decrees" have been enacted, usually with one-year validity, in favour of all workers in the private sector and all those covered within the scope of application of the Labour Code. Prior accreditation of just cause by the labour inspectorate is required for termination. Violation of this rule may be remedied through reinstatement, where requested. Managers, workers with less than three months' seniority, employees in positions of trust, and workers who earn more than three times the minimum wage – only about 5 per cent of employed workers – are excluded. Workers in the oil and extraction sectors also enjoy security in employment and may not be dismissed unless there is a just cause.

The Venezuelan Federation of Chambers and Associations of Commerce and Production (FEDECAMARAS), communications to the CEACR have referred to these protections and maintained that the policy of job protection is in violation of the Convention. The CEACR has recalled that the Convention reflects a well-constructed balance between the interests of the employer and those of the worker, particularly in relation to dismissals for reasons relating to the operational needs of the enterprise, and has stressed that the Government and the social partners should make a commitment to promoting and reinforcing tripartism and social dialogue.<sup>1</sup>

<sup>1</sup> CEACR observations: *Bolivarian Republic of Venezuela* (2009 and 2010).

- 217. Procedure prior to or at the time of termination.** The Organic Labour Law does not contemplate giving a worker terminated for reasons related to conduct or performance the opportunity of defence against the allegations made. The CEACR has brought this to the Government's attention in previous comments.<sup>164</sup>

<sup>159</sup> Organic Labour Law, article 98; employment may be terminated by the worker's resignation, mutual agreement, at the initiative of the employer, and for reasons beyond the will of both.

<sup>160</sup> Organic Labour Law, article 102.

<sup>161</sup> *Juzgado Transitorio Primero de Primera Instancia del Estado Lara*, Decision of 17 May 2005, which makes an explicit reference to Article 5 of the Convention and which concludes that the dismissal of an employee as a result of having exercised a claim against the courts constitutes a clear violation of the right to effective judicial protection and therefore cannot constitute a valid reason for dismissal on the grounds of misconduct or serious breach of contract.

<sup>162</sup> Organic Labour Law, article 34.

<sup>163</sup> Organic Labour Law, article 449; workers' representatives, pregnant women and/or women on maternity leave, workers with family responsibilities, workers performing military/alternative service.

<sup>164</sup> CEACR observation: *Bolivarian Republic of Venezuela* (2008).



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- 218.** *Procedure of appeal.* Labour courts are competent to hear cases of alleged unjustified termination; the court may determine whether the termination is justified or not. About 90 per cent of cases are resolved through compulsory pre-adjudication conciliation. Appeals may be taken both on the merits and the adjudicated remedy. Unjustified termination carries the right to adjudicated reinstatement.
- 219.** The employer has the right either to comply with the reinstatement of the worker, or to decline to do so and pay seniority-based compensation for unfair termination in addition to the wages the worker would have earned during the legal proceedings.<sup>165</sup> The employer may, upon termination, double the indemnity and thereby avoid legal proceedings for reinstatement and the payment of wages accrued during the course of such proceedings.<sup>166</sup> Workers in enterprises employing less than ten employees do not have a right to reinstatement; they are only entitled to compensation for unjustified termination.
- 220.** *Period of notice.* Workers are entitled to seniority-based notice only in cases of unjustified termination or terminations based on economic or technological reasons. Payment in lieu of notice is permitted.<sup>167</sup> In case of justified dismissals no notice period is necessary.
- 221.** *Severance allowance and other income protection.* Income protection in case of termination of employment is ensured through unemployment benefits and severance pay.
- 222.** Unemployment benefits are available to all workers in public and private employment who have lost their employment involuntarily, been affiliated to the social security system and made contributions for at least 12 months in the 24 months immediately preceding unemployment.<sup>168</sup> Workers on fixed-term contracts, hired for a specific task, independent workers and members of cooperatives are eligible for benefits.
- 223.** In addition, upon termination and regardless of the grounds for termination, every worker is entitled to a seniority award that accrues interest and that is to be deposited monthly or paid upon termination.<sup>169</sup>
- 224.** *Consultation of workers' representatives and notification to the competent authority.* When the employer intends to reduce the workforce based on operational requirements he must inform the labour inspectorate by presenting a document that specifies the number of workers to be affected, modifications intended and the economic situation of the company.<sup>170</sup> Workers' representatives and the competent authorities are notified and consulted through the formation of a tripartite conciliation board whenever mass

<sup>165</sup> Organic Labour Law, article 125; ten days' wages if the employee's length of service is between three and six months; 30 days' wages if the length of service is six months or more, and then 30 days' wages for each year of service, up to a maximum of 150 days' wages.

<sup>166</sup> Organic Labour Law, article 126.

<sup>167</sup> Organic Labour Law, article 106.

<sup>168</sup> *Ley de Régimen Prestacional de Empleo*, Official Gazette No. 38.281 of 27 Sep. 2005.

<sup>169</sup> Organic Labour Law, article 108.

<sup>170</sup> Organic Labour Law Regulations, article 46.

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terminations for operational reasons are contemplated.<sup>171</sup> The board is to reach a unanimous agreement on the number of workers affected by the reduction of the workforce, the time frame and redundancy payment.<sup>172</sup> The board can also agree on alternatives to termination. If the parties do not reach an agreement, the matter is submitted to arbitration.<sup>173</sup>

## Yemen

- 225.** *Yemen* ratified the Convention in 1989. The CEACR commented on the Government's first report on application of the Convention in 1997, following the adoption of the Labour Code in 1995. The CEACR noted an ongoing legislative review and issues concerning the protection of domestic workers against unjustified dismissal and the definition of serious misconduct.<sup>174</sup>
- 226.** Most people in *Yemen* (population 23.5 million, active population 5.2 million)<sup>175</sup> are employed in agriculture, and in herding. It is estimated today that less than one fourth of the labour force is employed in services, construction, industry and commerce. The figure is 44 per cent according to the most recent available statistics from the 1999 Labour Force Survey.<sup>176</sup> The 1999 workforce survey was a household survey that captured "other branches" of employment, likely reflecting own-account, family and informal enterprises. The breakdown is shown below.

<sup>171</sup> These will be considered mass dismissal when there are terminations of 10 per cent of the workers in an enterprise employing more than 100 persons, 20 per cent of more than 50 workers, or ten workers in an undertaking employing fewer than 50 workers, within a period of three months; Organic Labour Law, article 34.

<sup>172</sup> Organic Labour Law, article 34; Organic Labour Law, article 479; Organic Labour Law Regulations, article 47.

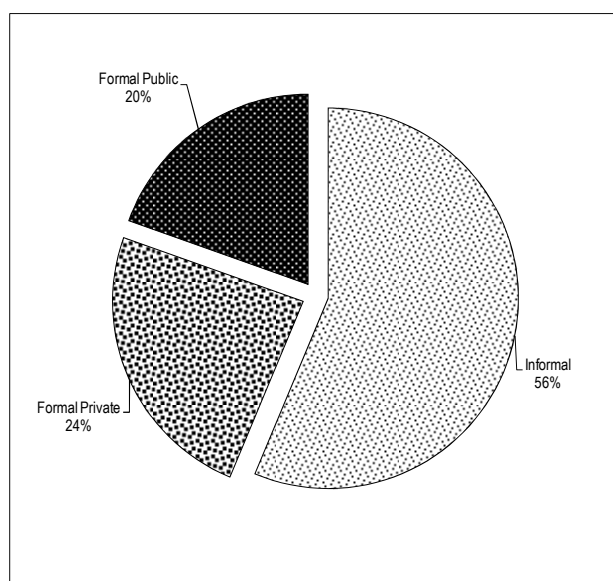
<sup>173</sup> There is also a general obligation to notify the competent judge regarding any dismissal and, in the absence of such notification, the dismissal will be deemed unjustified; Organic Labour Law, article 116.

<sup>174</sup> CEACR direct request: *Yemen* (2009).

<sup>175</sup> LABORSTA database.

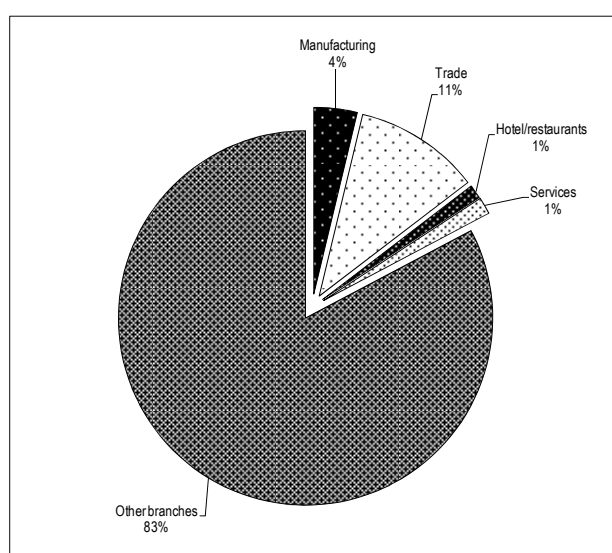
<sup>176</sup> 1999 Labour Force Survey. A similar characterization was made in 2004: "Total employment in Yemen may be broadly divided into four sectors: subsistence and small holding agriculture (about 50 per cent); government including public administration, public education and health (about 20 per cent); establishments sector, both private and public (about 18 per cent); and the remaining non-establishment employment (12 per cent) including casual workers in construction, and taxi drivers and other self-employed workers in transport and allied activities." F. Mehran: *An analysis of the results of the Labour Force Survey of establishments in Yemen, 2002–03*, Geneva, International Labour Office, 2004, p. 29.

**Figure 12. Yemen: Total employment in the formal/informal sectors, 1999**



Source: 1999 Labour Force Survey.

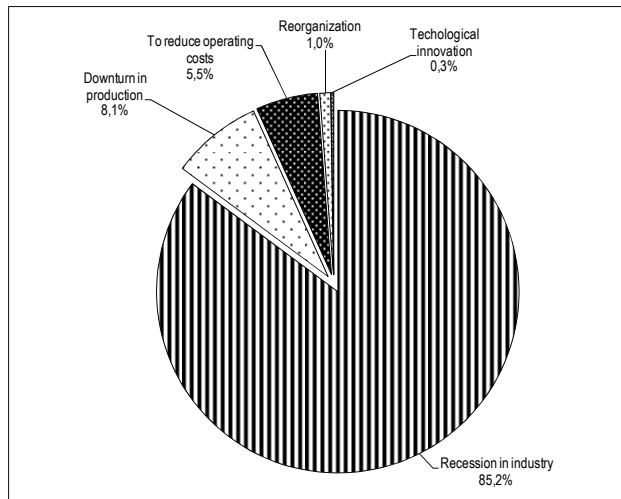
**Figure 13. Yemen: Total employment by branches of economic activity, 1999**



Source: 1999 Labour Force Survey.

**227.** Despite a proportionately small amount of employment in formal sector establishments, the Labour Demand Survey of Establishments in 2003 (LDSE) was able to count 19,049 workers dismissed. The proportions terminated for the reasons of recession, downturn in production, to reduce operating costs, reorganization and technological change are shown below.

**Figure 14. Yemen: Reasons given for termination, 2003**



**228.** The same survey inquired of enterprises' workforce needs. Just over 1 per cent of 250,903 establishments reported needing more employees. Some 93 per cent of these establishments reported difficulty in filling the available vacancies; larger establishments had greater difficulty in this respect. Among these, the major reported obstacle was the unavailability of skilled labour; the availability of funds was the second, and unacceptable terms of contract – offer of part-time work where a full-time job was sought – were the third.<sup>177</sup> Despite evidence of knowledge and use of laws protecting against unjustified termination (see below), there is no mention of protective labour law as hindering hiring. A future analysis of net job growth and loss captured by LDSE concluded “medium and larger establishments [ $\geq 10$  workers] registered net job gains, while smaller and micro establishments have experienced net job losses ... contrast[ing] with experience in many other countries where the bulk of job creation is concentrated in small establishments”.<sup>178</sup>

**229.** *Implementation methods, scope and definitions.* Casual and domestic workers are excluded from the scope of the Yemen Labour Code. The Civil Service Law, 19/1991, regulates employment in the public sector.

**230.** There are generally no limitations placed on the use of fixed-term contracts or contracts for specific tasks. Several rules are established however. A worker's contract of employment is considered of indefinite duration unless otherwise specified by the parties. Upon expiry, a contract for a specified duration is considered to be valid for the same duration as initially provided if the employment relationship continues.<sup>179</sup> A probationary period of a maximum of six months' duration may be applied only once per job per worker.<sup>180</sup>

<sup>177</sup> *ibid.*, pp. 21–22.

<sup>178</sup> *ibid.*, p. 17.

<sup>179</sup> Yemen Labour Code, article 29(1) and (2).

<sup>180</sup> Yemen Labour Code, article 28.

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- 231. *Justification for termination.*** Termination at the initiative of the employer is permitted for reasons connected with the capacity or conduct of the worker, or the operational requirements of the undertaking, as well as upon the reaching of retirement age.<sup>181</sup>
- 232.** Termination is prohibited on the basis of maternity leave, the filing of a complaint against the employer, during temporary absence as a result of illness, work disease or injury, race, colour, sex, religion, age, trade union membership and activities, language and participation in a lawful strike.<sup>182</sup>
- 233. *Procedure prior to or at the time of termination.*** No provisions are made in the Yemen Labour Code concerning the possibility of self-defence prior to termination.
- 234. *Procedure of appeal.*** Should the employer terminate the contract of employment arbitrarily or if the worker terminates the contract on account of the conduct of the employer,<sup>183</sup> the worker may bring an action to the competent arbitration committee for damages in addition to other entitlements in wages, failed notice, and other entitlements. Reinstatement is not authorized in the Yemen Labour Code. Ministerial conciliation precedes arbitration.

<sup>181</sup> Yemen Labour Code, article 36. The reasons are specified: “(a) if one of the parties fails to observe the terms of the contract or labour legislation; (b) if work permanently ceases, either entirely or in part; (c) if there is reduction in the number of workers for technical or economic reasons; (d) if the worker absents himself without a legitimate reason for more than 30 days within the same year or for 15 consecutive days, provided that termination of contract is preceded by a written warning from the employer after 15 days of absence in the former case and seven days in the latter; (e) if the worker reaches statutory retirement age; (f) if the worker is declared unfit to work by decision of the competent medical committee”.

Yemen Labour Code, article 38(1). Reasons permitted for summary dismissal (without notice): (a) if the worker assumes a fraudulent identity or presents forged certificates or documents; (b) if the worker is convicted under a final judgement of an offence damaging to his honour, honesty or public morals; (c) if the worker is found in a state of inebriation or under the effect of a drug during working hours; (d) if, during work or for a reason related to work, the worker assaults the employer or his representative or his direct supervisor in a manner punishable by law or if he physically assaults another worker at the workplace or for a reason related to work; (e) if the worker fails to prove his competence for work during his probationary period; (f) if the worker commits a fault which results in material loss for the employer, provided that the employer shall notify the competent authorities of the incident within 48 hours of his becoming aware of it; (g) if the worker fails to observe instructions for the safety of the workers and work after being warned to that effect, provided that such instructions shall be detailed in writing and posted visibly in the workplace; (h) if the worker fails to fulfil basic obligations arising from his contract of employment; (i) if the worker carries a firearm at the workplace, except where his job so requires; (j) if the worker divulges a secret concerning the job he performs or which came to his knowledge because of his job; (k) if the worker fails to comply with a final judgement delivered in accordance with the provisions of Chapter XII, Part I, of this Code, or if he fails to abide by the provisions of this Code.

<sup>182</sup> Yemen Labour Code, articles 5, 37, 80–83, 142, 148(2) and 152.

<sup>183</sup> Yemen Labour Code, article 25(2).

### Yemen: Appeal of terminations in practice

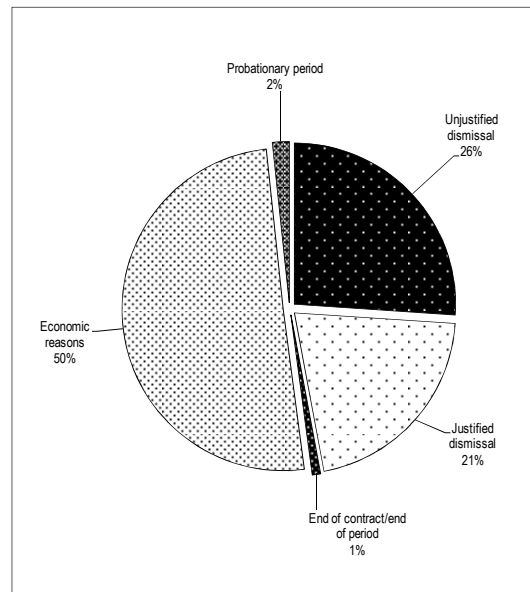
Arbitration committees are tripartite bodies appointed by the minister responsible for labour. There are several arbitration committees with geographic jurisdiction around the country. They have broad subject matter jurisdiction over collective and individual disputes.

The Arbitration Committee for North Sana'a received 675 complaints concerning unjustified dismissal between 2007 and 2010. Of these, 38 cases ended with conciliation; decisions were issued in 225 cases; and the Committee reserved judgement in 30 cases; 182 cases remain pending.

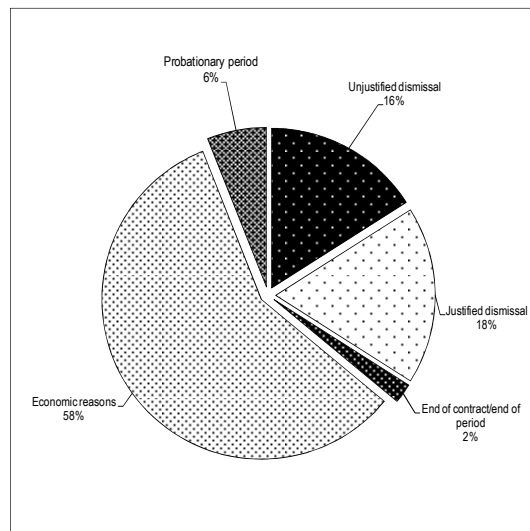
The Arbitration Committee for South Sana'a dealt with 629 cases just during the period 2009 to mid-2010. Some 80 per cent or approximately 500 concerned unjustified dismissal. Of these, 30 cases ended through conciliation. Compensation was awarded to workers in 48 cases.

During the first six months of 2010, the Labour Dispute Settlement Directorate and the Arbitration Committees of Taiz Governorate and the Arbitration Committee of Aden Governorate resolved 169 cases through conciliation or arbitration. The breakdown of results is shown below.

**Figure 15. Yemen: Cases ended through arbitration to mid-2010**



**Figure 16. Yemen: Cases ended through conciliation to mid-2010**



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- 235.** *Period of notice.* Notice is required for justified termination; payment may be made in lieu thereof. No notice is required in cases of serious misconduct. The period of notice is set according to the worker's pay period.<sup>184</sup> No notice is required for termination where the worker has proved unfit during a probationary period.<sup>185</sup>
- 236.** *Severance allowance and other income protection.* Where employees are not entitled to a monthly pension or a lump sum payment pursuant to the Social Insurance Act or other regulations, they are entitled to receive severance pay equivalent to at least one month's wages for each year of service at the termination of employment.<sup>186</sup>
- 237.** *Consultation of workers' representatives.* There are no provisions for consultation with workers' representatives in terms of Article 13 of the Convention.<sup>187</sup>
- 238.** *Notification to the competent authority.* There are no provisions for notification of the competent authorities in cases of large-scale termination for operational reasons.

<sup>184</sup> Yemen Labour Code, articles 35(1) and 38.

<sup>185</sup> Yemen Labour Code, article 35(1).

<sup>186</sup> Yemen Labour Code, article 120(2).

<sup>187</sup> CEACR direct request: *Yemen* (2001).

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## Part IV. Employment termination in practice

- 239.** This Part presents a dynamic view of employment termination by drawing and building upon snapshots taken of country situations in the 1974 and 1995 General Surveys, the 2001 survey, the work of the supervisory bodies and the EPLex database. This approach, in combination with the detailed country studies above, may help the Meeting of Experts identify trends.
- 240.** The comparative table of termination of employment legislation in 105 member States in Appendix VI at the end of this paper is based upon a similar table presented in the 2001 survey. An explanation of the methodology used to compile and present the table is provided in that appendix.

### A. Trends since the 1974 General Survey

- 241.** *Scope.* The 1974 General Survey noted instances where general legislation concerning unjustified termination of employment was not applicable to certain categories of workers; in some cases the categories were covered by separate legislation or other methods of implementation. The sample of legislation presented in the 1974 General Survey is too small to show the trend at that time. A hint of the situation might be given in observing that eight countries were named in respect of domestic workers;<sup>1</sup> the situation is unchanged in respect of at least seven.<sup>2</sup> Five countries were named in respect of the exclusion of undertakings employing less than a given number of persons;<sup>3</sup> the exclusion has been removed in two countries,<sup>4</sup> reduced in one country;<sup>5</sup> increased on one country,<sup>6</sup> and remained the same in one country.<sup>7</sup>
- 242.** The legislation of 53 of the 75 countries in EPLex makes no exclusion based on enterprise size. The remaining 22 make exclusions which are in respect of enterprises with less than five,<sup>8</sup> ten,<sup>9</sup> 15,<sup>10</sup> 20<sup>11</sup> or 30<sup>12</sup> employees.

<sup>1</sup> Chile, Egypt, Cambodia, Libyan Arab Jamahiriya, Netherlands, Panama, *Sweden*, Trinidad and Tobago.

<sup>2</sup> Chile, Egypt, Cambodia, Netherlands, Panama, *Sweden*, Trinidad and Tobago.

<sup>3</sup> *France*, Germany, Italy, Sri Lanka, United Kingdom.

<sup>4</sup> *France*, United Kingdom.

<sup>5</sup> Italy, from less than 35 to less than 15.

<sup>6</sup> Germany, from less than five to less than ten.

<sup>7</sup> Sri Lanka, less than 15.

<sup>8</sup> Austria, Republic of Korea.

<sup>9</sup> Germany, Morocco, *Slovenia*, *Bolivarian Republic of Venezuela*.

<sup>10</sup> *Australia*, Italy, Kyrgyzstan, Sri Lanka, United States.

<sup>11</sup> Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, *Finland*, Greece, Hungary, *Serbia*, Switzerland.



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243. EPLex shows that the main labour legislation of some countries today excludes categories of workers from protection against unjustified termination. Only four of the 75 countries have not made exclusions. Most excluded categories are civil service and traditional public sector workers, which as the CEACR has pointed out in its 1995 General Survey, are typically covered by separate legislation or methods of implementation.<sup>13</sup>
244. To the extent the exclusion of categories of workers from general national legislation complies with either Article 2(4) or Article 2(5) of the Convention, member States would be obliged to indicate these exclusions in their first report on application of the Convention following ratification. The Office suggested that it might be considered important to explore the possibility of reviewing the flexibility clauses in the Convention.<sup>14</sup>
245. In respect of safeguards applied to fixed-term contracts, no limitations are applied in 19 of the 75 EPLex countries.<sup>15</sup> Of these 19, 12 generally require a valid reason for termination.<sup>16</sup> If recourse were to be taken to fixed-term contracts to avoid the effects of employment protection legislation in these jurisdictions, consideration would need to be given at the national level to put safeguards in place to prevent abuse. Looked at the other way around, 46 countries require a valid reason for termination and have some form of safeguards in place in respect of the use of fixed-term contracts.<sup>17</sup>
246. *Countries without requirements for justification.* The CEACR noted 19 countries in the 1974 General Survey that had neither adopted the justification principle in legislation nor in generally applicable collective agreements.<sup>18</sup> Since then, 11 of these jurisdictions have adopted the justification principle; six have not.<sup>19</sup> Information is not available on Myanmar and Lebanon. According to EPLex, an additional 13 countries do not generally

<sup>12</sup> CEACR observation: *Turkey* (2010).

<sup>13</sup> 1995 General Survey, para. 63.

<sup>14</sup> See footnote 13 in Part II.

<sup>15</sup> *Antigua and Barbuda, Australia, Burkina Faso, Canada (Federal only), Cyprus, Egypt, Georgia, Ghana, Japan, Jordan, Lesotho, Malaysia, Singapore, South Africa, Sri Lanka, Switzerland, Uganda, Yemen, Zambia.*

<sup>16</sup> *Antigua and Barbuda, Australia, Burkina Faso, Canada (Federal only), Cyprus, Egypt, Ghana, Japan, Singapore, South Africa, Uganda, Yemen.*

<sup>17</sup> *Argentina, Armenia, Azerbaijan, Bulgaria, Cambodia, Central African Republic, Chile, China, Comoros, Democratic Republic of the Congo, Côte d'Ivoire, El Salvador, Ethiopia, Finland, France, Gabon, Germany, Hungary, Indonesia, Italy, Republic of Korea, Kyrgyzstan, Luxembourg, Madagascar, Malawi, Mexico, Republic of Moldova, Morocco, Namibia, Netherlands, Niger, Panama, Peru, Philippines, Russian Federation, Saudi Arabia, Senegal, Serbia, Slovakia, Slovenia, Spain, Sweden, Turkey, United Kingdom, Bolivarian Republic of Venezuela, Viet Nam.*

<sup>18</sup> *Argentina, Australia, Bangladesh, Burma, Canada, Guyana, Ireland, Jamaica, Kuwait, Lebanon, Malawi, Nicaragua, Nigeria, Qatar, Thailand, Turkey, United States, Yemen, Zambia*; see 1974 General Survey, para. 40.

<sup>19</sup> Have adopted: *Argentina, Australia, Bangladesh* (except for certain dismissals), *Canada* (implicitly in federal legislation), *Guyana, Ireland, Jamaica, Malawi, Nicaragua, Turkey, Yemen*; have not adopted: *Kuwait, Nigeria, Qatar, Thailand, United States, Zambia* (although exceptions to the employment at will rule have developed in the common law and there are prohibitions against termination for most of the reasons set out in Article 5).

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require valid grounds for termination.<sup>20</sup> As reflected in the comparative table, 59 of the 75 countries in EPLex generally do require a valid reason for termination.

- 247.** The 1974 General Survey noted requirements for approval of individual terminations by the authorities in Sri Lanka, Netherlands, *France* and Mali. Today, a valid reason for termination of employment is said generally not to be required in Sri Lanka, but is required in the Netherlands,<sup>21</sup> and Egypt, which was noted in 1974. In each of these countries, termination of contracts of indefinite duration must be approved in advance by the authorities; in Egypt where termination is on disciplinary grounds, and in the Netherlands and Sri Lanka in cases that are not summary dismissal or based on disciplinary reasons, respectively. These are the only countries in EPLex that require approval by public authorities in cases of individual dismissal. The similar requirements in *France* appear no longer to be in force; information on Mali is not available.<sup>22</sup> It should be recalled that prior authorization is not a requirement under the Convention.
- 248.** The 1974 General Survey observed that protection against dismissal for reasons set out in Paragraph 3 of the 1963 Recommendation – corresponding to Article 5 of the Convention – were either implicitly provided for in jurisdictions where a valid reason was required for termination or explicitly provided for in most countries; however, gaps in protection were not identified. The General Survey of 1973 on freedom of association identified only Switzerland as a country that did not provide protection; it now explicitly does.<sup>23</sup> The General Survey of 1971 on equality does not identify gaps, and thus does not provide a basis for finding a trend.
- 249.** *Procedure prior to or at the time of termination.* The data available do not permit an assessment of changes in the situation over time.
- 250.** *Procedure of appeal.* As noted above, CEACR comments in respect of Articles 8, 9 and 10, have focused largely on the assignment of the burden of proof. Looking for trends in national practices, benchmarks for following subsequent developments are difficult to establish. The comparative table does capture some recent changes in respect of the remedy available.<sup>24</sup>

<sup>20</sup> Austria, Belgium, Brazil, *Cameroon*, Denmark, Georgia, Greece, Jordan, Malaysia, Singapore, Sri Lanka, Switzerland, Syrian Arab Republic.

<sup>21</sup> Baker and McKenzie: *Worldwide guide to termination, employment discrimination and workplace harassment laws*, 2009, p. 362.

<sup>22</sup> 1974 General Survey, para. 721, footnote 6.

<sup>23</sup> General Survey of 1973 on freedom of association, para. 144: “There are, however, cases where the legislation contains no special provisions protecting the workers against dismissals on account of trade union membership or activities, and where the employer is usually not bound to give reasons for effecting dismissals.” Protection is now found in the Code of Obligations, articles 336(2) and 336(1)(e).

<sup>24</sup> In Brazil, for example, it was observed in 1974 that compensation could be awarded instead of reinstatement if the competent body considered that the continuation of the employment relationship was inadvisable. EPLex now reports that compensation is usually the only remedy for unfair dismissal. However, reinstatement is available as a matter of right in special situations including where serious reasons for dismissal are not recognized by the labour court (1974 General Survey, p. 48, footnote 3). In the United States, EPLex reports that reinstatement is always available under numerous anti-discrimination laws and that reinstatement may be awarded where common law actions based on contract or tort are successful. In Cambodia, damages were previously the only remedy; today reinstatement is available.

- 251. *Period of notice.*** Almost all countries examined have requirements for giving notice where employment is terminated.<sup>25</sup>
- 252. *Severance allowance and other income protection.*** Thirty countries were noted in the 1974 General Survey as reporting having unemployment benefits as a branch of social security.<sup>26</sup> As observed above,<sup>27</sup> 78 countries have statutory unemployment social security schemes today. Thirty-two countries were noted in the 1974 General Survey as having legislation that provided for the payment of severance or termination allowances, length of service bonuses or other separation benefits payable by the employer on termination of a worker's employment.<sup>28</sup> Column 10 of the comparative table indicates the current situation.

#### **Unemployment Insurance Savings Account in Brazil**

In Brazil the employer is required each month to deposit an amount equal to 8 per cent of the employee's monthly salary into an account managed by the Federal Savings Bank on behalf of the employee. The amount is not a deduction from wages as compared, for example, with the situation in Chile where an employee contribution of 0.6 per cent is directly deducted by the employer from wages. The employee is entitled to withdraw the balance of the account in several situations, including the following: dismissal without cause (that is, for any reason other than those listed as "just causes" in the Chilean Labour Code); expiry of a fixed-term contract; closure of the undertaking; termination due to force majeure; termination by mutual agreement; death of the employer; retirement; when the worker or his/her dependant suffers from cancer or is HIV positive; in order to purchase a house, settle or amortize the debt or payment of part of housing loan instalments, etc. If an employee is dismissed without cause (which includes economic reasons), in addition to the total amount deposited in his or her account, he or she will be entitled to an additional indemnity of 40 per cent of the updated value of deposits in the account. An extra 10 per cent shall be paid by the employer directly to the Government. Workers under a fixed-term contract who are dismissed without cause are also entitled, in addition to the aforementioned amount, to the payment of a sum equal to half the remuneration to which he or she would have been entitled on the expiry of the contract. These sums are payable upon dismissal together with any other employee's entitlements, and there is no need for a court decision acknowledging the absence of just cause. If the dismissal is for a just cause, once the serious misconduct has been acknowledged by the court, the worker forfeits the right to the aforementioned compensation and to immediate withdrawal of his or her deposits.

Similar arrangements are in place in Argentina, Colombia, Ecuador, Panama, Peru, Uruguay and the Bolivarian Republic of Venezuela.<sup>1</sup>

<sup>1</sup> A.M. Ferrer and W.C. Riddell: "Unemployment Insurance Savings Accounts in Latin America: Overview and Assessment", in *Social Protection & Labor*, Washington, DC, World Bank, 2009, p. 32.

- 253. *Consultation of workers' representatives and notification to the competent authorities.*** The data available do not permit a representative assessment of changes in the situation over time.

<sup>25</sup> See EPLex in respect of Belarus, Mexico (legislation does not establish the timing of notice), Panama (with exceptions for some specific categories of workers), *Spain*, *Ukraine* and the Russian Federation; Guatemala: see the Labour Code, article 78.

<sup>26</sup> 1974 General Survey, para. 115, footnote 3.

<sup>27</sup> See para. 47.

<sup>28</sup> Argentina, Bangladesh, Brazil, Bulgaria, Byelorussia, Cambodia, Canada, Côte d'Ivoire, Denmark, Egypt, *France*, Guatemala, India, Islamic Republic of Iran, Kuwait, Lebanon, Libyan Arab Jamahiriya, *Luxembourg*, Mali, Mauritius, Mexico, *Morocco*, Pakistan, Panama, Qatar, Russian Federation, Sudan, Switzerland, Tunisia, *Turkey*, Ukraine, Viet Nam.

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## B. Trends since the 1995 General Survey

254. Several countries' prospects for ratifying the Convention were reported in the 1995 General Survey. They can now be observed in the light of the events of the subsequent 15 years.

### **Recent ratifications**

255. Twelve countries have ratified Convention No. 158 since the 1995 General Survey was discussed at the ILC in June 1995. The Employers' group expressed doubts as to whether the Convention's requirements were too demanding and would thus hinder prospects for additional ratifications.<sup>29</sup> Those countries' situations are presented in this section.
256. The 1995 General Survey reported that *Portugal* had submitted ratification of the Convention to its Parliament for approval; the ratification was registered in November 1995. The matter of safeguards concerning contracts for specified periods of time has been raised by workers' organizations in comments to the CEACR. Several tripartite agreements, the details of which aimed to strengthen safeguards and protections, have been adopted over the years. A new labour law and regulations were adopted in August 2003 and July 2006 with a view to giving effect to the provisions of the Convention. In its most recent comment, the CEACR in 2007 requested information about the application of the Convention in micro-enterprises. It also noted comments made by a Portuguese trade union and an employers' association:

The UGT [General Union of Workers] summarizes the national provisions establishing protection against termination of employment without a valid reason and expresses concern that the frequent use of fixed-term contracts is contributing to uncertainty among workers. The Portuguese Confederation of Tourism observes that, in its view, the national provisions appear to be in conformity with the principles of the Convention, although the provisions of the Labour Code appear to be outmoded in a globalized economy in view of their lack of flexibility, which does not encourage the economic development of enterprises.<sup>30</sup>

257. The 1995 General Survey indicated that *Namibia* had reported that there were no difficulties in ratifying the Convention; if necessary legislation could be amended to ensure better compliance. The ratification was registered in June 1996. The most recent comments from the CEACR, made in 2010, ask for clarifications and further information on some points in the light of the adoption of the Labour Act No. 11 of 2007. Under the Act, termination without a "valid and fair reason" is prohibited. The CEACR has asked for confirmation that these are reasons set out in Article 4. The CEACR has asked how the national legislation and practice ensure that temporary absence from work because of illness or injury shall not constitute a valid reason for termination, and has asked that practical information be supplied on how "serious misconduct" has been defined in the context of disentitlement to severance allowance.
258. The *Republic of Moldova* ratified the Convention in February 1997. Since then it has been providing the CEACR reports as requested and supplying answers to the CEACR's inquiries. The current direct request asks for further information on how existing

<sup>29</sup> Employer Vice-Chairperson on the report of the CCAS, *Record of Proceedings*, International Labour Conference, 1995, p. 27/7. The Employers' group expressed the view in 1995 that positive statements in the General Survey concerning the prospects of future ratifications had limited validity, *Record of Proceedings*, International Labour Conference, 1995, p. 24/31, para. 85.

<sup>30</sup> CEACR observation: *Portugal* (2007).

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legislation is applied in practice. The CEACR has also asked the Government: (a) how it ensures that the filing of a complaint or the participation in proceedings against an employer involving alleged violations of laws or regulations or the recourse to a competent administrative authority does not constitute a valid reason for termination; (b) to clarify how it is ensured that persons who are not covered by applicable collective agreements are entitled to receive a reasonable period of notice or compensation in lieu thereof; and (c) to provide information on the role of collective agreements in the provision of severance pay, so as to allow the Committee to better assess whether all persons covered by the Convention are entitled to severance payment, benefits from unemployment insurance, or a combination of the two.<sup>31</sup>

- 259.** *Papua New Guinea, Serbia and Saint Lucia* ratified the Convention in June, November, and December 2000, respectively. The 1995 General Survey did not include information on these countries concerning the prospects for ratification of the Convention. *Papua New Guinea* has been asked to provide information on the application of the Convention since the CEACR's first direct request in 2006. The drafting and promulgation of a new legislative regime featuring provisions compliant with the Convention have been reported by the Government and most recently observed by the CEACR in 2010. In *Saint Lucia*, where the Government had first indicated application through an as yet un-promulgated Labour Code, and subsequently through a 1970 Act, work is being done to be in compliance with the CARICOM model law on termination of employment. In *Serbia*, the Government has been requested to provide further information in respect of notice requirements and income protection.
- 260.** *Luxembourg and Lesotho* ratified the Convention in March and June 2001, respectively. Numerous references were made in the 1995 General Survey to termination of employment practices in *Luxembourg*; none were made in respect of *Lesotho*. *Luxembourg* resolved a number of points soon after they had been posed by the CEACR. The Committee in 2010 invited the Government to continue providing information on some points. In the case of *Lesotho*, the CEACR has asked how the Convention is applied to the public sector, all of which is not covered by the Labour Code. The CEACR has directly requested clarifying information about the application of the Convention to probationary employees and safeguards taken in respect of the use of fixed-term contracts.
- 261.** In September 2002, *Antigua and Barbuda* ratified the Convention. The Government provided caseload information with its first report. Of 463 disputes handled by the Labour Department, 216 cases (46 per cent) were related to termination, suspension, redundancy or lay-off of the employee concerned. In 2004–05, 46 of the 53 cases heard at the Industrial Court related to unfair dismissal. Of these 53 cases, none were decided in favour of the employer, 14 were decided in favour of the employee, while the others were either withdrawn, settled out of court, or were pending. The CEACR in 2010 asked for further information about application in practice.
- 262.** On becoming a member State of the ILO in 2006, *Montenegro* accepted the obligations under Convention No. 158. The first report on the application of the Convention is due in 2011.

<sup>31</sup> CEACR direct request: *Republic of Moldova* (2009).

**263.** The *Central African Republic* ratified the Convention in June 2006. In connection with governments having referred to general problems of application, the CEACR in the 1995 General Survey noted the Government's citation of "current reorganization taking place following political changes".<sup>32</sup> The CEACR raised points in respect of its application after examining the first report in 2008.

**264.** *Slovakia* ratified the Convention in February 2010 and it will come into force in February 2011.

### ***Other prospects for ratification***

**265.** The 1995 General Survey included information on prospects for ratification from other countries that have since not ratified. The situation of countries listed below is summarized in the comparative table of termination of employment legislation in Appendix VI.

Country	Indication in 1995 General Survey
Comoros	Indicated that ratification had been proposed to its Parliament.
Indonesia, Iraq, Swaziland	Indicated that they were examining the possibility of ratification.
Burkina Faso	Indicated that they did not consider that there were any difficulties preventing ratification.
Guinea, Senegal, Côte d'Ivoire	Did not point out any difficulties concerning the instruments or considered that the then current law and practice did not present obstacles to ratification.
Bangladesh, Hungary	Indicated that their legislation was in accordance with the Convention or its spirit and there would therefore no longer appear to be any obstacles to ratification.
Argentina, Belarus, Plurinational State of Bolivia, Egypt, Peru, Russian Federation	Reported that they preferred to postpone the question of ratification as their labour legislation and law respecting industrial relations, employment and supervisory procedures were then undergoing revision.
Syrian Arab Republic, United States	Had indicated that they did not then envisage ratification.
Austria, Azerbaijan, Guinea, Madagascar, Mauritius, Philippines, Poland, Republic of Korea, Russian Federation, Tunisia, Zimbabwe	Had indicated that amendments had been adopted or were envisaged which would make it possible to bring the national legislation closer to the standards contained in the Convention and Recommendation.

**266.** The scope of this study does not permit the collection of information concerning Botswana (considered that recommendations could be made to the competent authorities to ratify); Benin and Mali (indicated that their legislation was in accordance with the Convention or its spirit and there would therefore no longer appear to be any obstacles to ratification); Belize, Croatia and Romania (reported that they preferred to postpone the question of ratification as their labour legislation and law respecting industrial relations, employment and supervisory procedures were then undergoing revision); Ecuador and Norway (did not then envisage ratification); Canada, Dominica, Equatorial Guinea, Estonia, Grenada, Lebanon, Malta, Norway, Romania, Seychelles and Thailand (indicated that amendments had been adopted or were envisaged which would make it possible to bring the national legislation closer to the standards contained in the Convention and Recommendation).

<sup>32</sup> Para. 360.

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- 267.** Twenty-three countries said that legislation had not been modified and that changes had not been planned.<sup>33</sup>

### ***On ratification rate***

- 268.** The rate of ratification has been argued mainly by the Employer members to be an indicator of the viability of the Convention.<sup>34</sup>
- 269.** The Worker members however, have persistently indicated, including in the November 2008 consultations, that the ratification rate alone was not a good indicator of the relevance of the Convention. For instance, several countries that have not ratified Convention No. 158 have a higher degree of protection than the protection afforded by the Convention. Another important aspect is the use made of the Convention by national courts.<sup>35</sup>
- 270.** The Convention is in force in 35 countries and has been denounced by Brazil.<sup>36</sup>
- 271.** If the Meeting of Experts considers this factor relevant, two comparative graphic presentations are offered in Appendices III and IV on this matter. The graphic entitled

<sup>33</sup> Bangladesh, Belgium, Botswana, Bulgaria, Canada (Province of Alberta), Cuba, Ecuador, Germany, Ghana, Guinea, Indonesia, Iraq, Kuwait, Mexico, New Zealand, Panama, Peru, Qatar, Saudi Arabia, Singapore, Sri Lanka, Suriname, United Kingdom.

<sup>34</sup> CCAS 1995 General Survey discussion, para. 80.

<sup>35</sup> See Part III of the 2009 Note.

<sup>36</sup> Brazil ratified the Convention on 5 January 1995 and denounced it on 20 November 1996. The CEACR noted in paragraph 15 of its 1997 General Report the reasons given by the Brazilian Government for its action:

The Government of Brazil stated that it had taken the decision to denounce Convention No. 158 after holding the pertinent tripartite consultations on the matter. It recalled that it attaches great importance to the protection of employment against arbitrary dismissal or dismissal without cause and that this matter is dealt with by article 7(I) of the Federal Constitution. A Bill to supplement the constitutional provision has been the subject of tripartite discussions. According to the Government, complex circumstances of a legal and economic nature, which could not have been foreseen at the time of ratification, made it difficult for the Brazilian Government to implement Convention No. 158 within the Brazilian legal system. The Government considers that in fact the Convention could, on the one hand, be invoked to justify excessive and indiscriminate dismissals, based on the rather general and vague “operational requirements of the undertaking, establishment or service”, as stated in Article 4, or, on the other hand, give way to a broad prohibition of dismissals which would not be compatible with the current programme of economic and social reform and modernization. Furthermore, the Government considers that the Convention constituted a step backwards in the course towards less state intervention and more collective bargaining. According to the Government, such uncertainty regarding the scope of the provisions of the Convention would, in the context of the Brazilian legal system, based on positive law, generate insecurity and litigation, without practical advantages for the improvement and modernization of labour relations. The Government nevertheless emphasized that it is sensitive to the issues dealt with in the Convention and has the intention of continuing to apply and improve the national legislation concerning the protection of employment.

In February 2008, President Lula da Silva submitted Convention No. 158 to the National Congress for ratification. In July 2008, the Foreign Affairs Committee of the National Congress voted against ratification. The issue was forwarded for examination by the Labour Committee of the National Congress.

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“ratifications of up-to-date Conventions (excluding fundamental Conventions)” places each of the relevant Conventions from left to right along the x-axis in order of the number of ratifications each has attracted. Convention No. 158 is ranked 38 out of 67, with 36 ratifications registered. The graphic entitled “ratification rates, Conventions Nos 158, 140, 156” shows the progress of ratification of the Termination of Employment Convention, 1982 (No. 158), the Paid Education Leave Convention, 1974 (No. 140), and the Workers with Family Responsibility Convention, 1981 (No. 156). This display shows the speed with which reasonably comparable instruments have been ratified. Two comparators were selected: Convention No. 140 because it is the Convention next most ratified after Convention No. 158, and Convention No. 156 because it was adopted in 1981, the year before Convention No. 158. The Maintenance of Social Security Rights Convention, 1982 (No. 157), adopted in the same year as Convention No. 158, would have been an inappropriate selection because it has attracted only three ratifications. The Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159), might also have been selected as a comparator, except that it could be seen as an exceptional success, having benefited from several decades of promotion by a dedicated technical cooperation division within the Office.

272. The importance of promotional activities by the Office can similarly be seen in respect of the Minimum Age Convention, 1973 (No. 138), which suffered from what was considered a low level of ratification until its promotion began with the adoption of the Declaration on Fundamental Principles and Rights at Work and its Follow-up in 1998. In fact, Worker members argued that more ratifications might be obtained by promotional activities conducted by the Office.

## C. Other considerations

### ***Employment termination and a flexicurity approach in four European countries***

273. It may be useful for the Meeting to consider how employment termination at the initiative of the employer is treated in terms of the requirements of the Convention in some European countries applying a flexicurity approach to their labour markets. Two such countries, *Finland* and *Sweden*, have ratified the Convention. Two other countries, the Netherlands and Denmark, are often closely associated with the flexicurity approach.
274. In the case of *Sweden*, the CEACR most recently observed in 2008 that safeguards applied in respect of fixed-term employment by agreement of the parties. The CEACR observed that: “the Swedish Confederation of Professional Associations (SACO), the Confederation of Swedish Enterprises, the Swedish Agency for Government Employers and also the Swedish Association of Local Authorities and Regions indicated that the establishment of fixed-term contracts had not given rise to any conflict”. A second point was raised concerning the exclusion from the scope of the 1982 Employment Act and its provisions concerning termination of employment of persons employed for work under special employment support schemes. The Government reported that amendments were being drafted to remove this exclusion.
275. In the case of *Finland*, the CEACR most recently observed in 2008 the repeal of a provision temporarily extending the possibility of concluding employment contracts for a fixed term when demand was unstable for the services in an enterprise. The CEACR also examined comments from Finnish trade unions concerning the use of fixed-term contracts, in a context that could be considered to touch on a flexicurity labour market intervention. The CEACR observed:



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The Central Organisation of Finnish Trade Unions (SAK) and the Confederation of Unions for Academic Professionals in Finland (AKAVA) argue that the protections afforded by the Convention and the Employment Contracts Act are being eroded by the following practice. Employers are hiring employees to work for customers. The employees are hired on fixed-term contracts aligned to the length of the contract between the employer and the customer. The fixed-term contracts are justified on this basis even though the customer's need for employees is ongoing. According to the SAK and the AKAVA, in this case the provisions on temporary work relations, are eluded.

With reference to previous comments, the Government explains that, according to the Public Employment Services Act (No. 1295 of 2002), the purpose of subsidized employment is to improve the labour market position of a person by promoting placement at work and improving vocational and other skills. Fixed-term contracts are used to support particularly the employment of the long-term unemployed, young persons and disabled workers to prevent the lengthening of periods of unemployment and to level out regional differences in unemployment. In this regard, the Government indicates that, at the end of June 2006, 38,300 persons had been employed through the Labour Administration's employment subsidy measures, 1,400 less than the figures of the previous year. Of those that had been placed, 6 per cent were working for the State, 25 per cent for municipalities and 69 per cent in the private sector, and the objective is to further increase the share of the private sector. The Finnish Confederation of Salaried Employees (STTK) alleges that fixed-term contracts are to a great extent used in the public sector (20–30 per cent of the public sector's employment relationships) despite the fact that the Employment Contracts Act requires hiring persons for a permanent employment relationship when the need for labour is permanent. The Committee asks the Government to indicate what safeguards have been provided to guarantee fixed-term contracts are not used in practice with the aim of avoiding the protection resulting from the Convention, providing examples of how the notion of "justified reasons" in the Employment Contracts Act is used in public and private sectors. In this respect, the Committee would appreciate receiving information on the subsidized employed persons, the maximum length of use of fixed-term contracts in such instances, and their impact.

- 276.** The regulation of labour relations in Denmark is marked by reliance on collectively bargained rules at national, sectoral and enterprise levels. It is estimated that 80 per cent of the Danish workforce are covered by these agreements, either as a result of the employer being bound via its employers' organization or as a result of voluntary application of collectively bargained rules.<sup>37</sup> It should be recalled that this mechanism is acceptable for implementing the Convention. As reflected in the comparative table in Appendix VI, the principles of the Convention appear respected in practice to the vast majority of workers.<sup>38</sup> The justification principles have long been collectively bargained into employment relations in the country. In sum, the Danish labour market model, described as a "flexicurity triangle" combining a high degree of mobility between jobs with a social safety net for the unemployed and an active labour market policy,<sup>39</sup> appears to operate in

<sup>37</sup> Even temporary work agencies – arguably an employment arrangement that is a significant part of a flexicurity labour market ethos – are within this 80 per cent estimate, and rights concerning termination of employment are "usually written into the collective agreement covering the TWA [temporary work agency] worker"; see *Denmark: Temporary agency work and collective bargaining in the EU*, at [www.eurofound.europa.eu/eiro/studies/tn0807019s/dk0807019q.htm](http://www.eurofound.europa.eu/eiro/studies/tn0807019s/dk0807019q.htm) (accessed 8 Jan. 2011).

<sup>38</sup> EPLex can be consulted for details and citations.

<sup>39</sup> P.K. Madsen: "The Danish road to flexicurity: Where are we? And how did we get there?", in T. Bredgaard and F. Larsen (eds): *Employment policy from different angles*, 2005, Copenhagen, DJØF Publishing.

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harmony with the provisions of the Convention.<sup>40</sup> The 2001 survey reported that the Government was or would soon be examining ratification.<sup>41</sup>

277. In the Netherlands, fixed-term and fixed-task contracts are an important feature of the flexicurity approach implemented in the country. As in Denmark, collective bargaining plays an important role in the regulation of employment relations. However, a body of legislation setting employment termination rules plays an important role.<sup>42</sup> Prior approval of a justifiable termination by the public authorities is required in the Netherlands, both in cases of indefinite and fixed-term contracts, where termination is premature in the latter. Termination with immediate effect is permitted where the employer cannot reasonably be expected to continue the employment. Safeguard provisions are also applied to consecutive fixed-term contracts, assimilating a chain of fixed-term employment to employment of indefinite term under prescribed circumstances. Beyond this, as shown in the comparative table, the flexicurity approach in the Netherlands includes the features of the Convention, including those concerning collective dismissals. The 2001 survey reported that national legislation relevant to the question of termination of employment was under discussion, and ratification would be considered when final discussions on those matters had been taken; there seemed to be no obstacles preventing or delaying ratification of the Convention.<sup>43</sup>

278. The experience suggests that in the context of these four European countries, Convention No. 158 is implemented by providing security at the same time as other agreed measures are taken to promote flexibility in the labour market. This is broadly in line with the observation made by Auer and Cazes in a 2000 study that *Finland* and *Sweden* have labour markets that exhibit both comparatively high average job tenure as well as a high proportion of temporary (i.e. fixed-term or fixed-task) work, suggesting both flexibility and security in these labour markets, contrary to the hypothesis that all jobs are moving to short-term and insecure jobs.<sup>44</sup>

### ***Economic impact of employment protection legislation***

279. There have been many attempts to find the best methodological approach to study how employment protection legislation affects the operation of labour markets. Recent research suggests that innovation and economic growth are fostered by stringent laws governing the dismissal of employees, especially in the more innovation-intensive sectors.<sup>45</sup> Interestingly, the effects of laws governing dismissals of employees on innovations were

<sup>40</sup> For a description of termination procedures, see [www.eurofound.europa.eu/emire/DENMARK/TERMINATION-DN.htm](http://www.eurofound.europa.eu/emire/DENMARK/TERMINATION-DN.htm) (accessed 8 Jan. 2011).

<sup>41</sup> 2001 survey, para. 51.

<sup>42</sup> Baker and McKenzie, p. 360 et seq.

<sup>43</sup> 2001 survey, paras 17–18.

<sup>44</sup> P. Auer and S. Cazes: “The resilience of the long-term employment relationship: Evidence from the industrialized countries”, in *International Labour Review*, Vol. 139, No. 4, 2000, p. 394.

<sup>45</sup> According to this research, “stringent labour laws can provide firms with a commitment device to not punish short-term failures and thereby spur their employees to pursue value-enhancing innovative activities. ... We find that, within a country, innovation and economic growth are fostered by stringent laws governing dismissal of employees, especially in the more innovative-intensive sectors”, V.V. Acharya, R.P. Baghai and V. Krishnamurthi, “Labor laws and innovation”, Working Paper 16484, National Bureau of Economic Research, Oct. 2010.

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examined by using the Regulation of Dismissal Index which is made up of the main requirements defined in the Convention and Recommendation.<sup>46</sup>

- 280.** The OECD summarized in its 2010 Employment Outlook no less than 20 important country-specific studies, published since 2004, investigating on the basis of micro-data the impact of employment protection legislation and jurisprudence on job flows. Some studies look at the impact of small employer exemptions on worker turnover.<sup>47</sup> Others look for the effects of employment protection legislation in a before/after context in light of reforms.<sup>48</sup> These studies show that more work is still required to find a co-relation between observed labour market outcomes, such as the flow of workers in and out of jobs, characteristics of the labour market, the use of atypical forms of contract and working arrangements, etc., and the provisions of employment protection legislation.
- 281.** These studies, as recalled by the Worker members in March 2001, look at national employment protection legislation and do not study the labour market effects of the Convention per se.<sup>49</sup> For this reason, the findings of those studies may not be directly useful in judging the Convention. As the OECD has noted, “employment protection includes quite heterogeneous provisions that are unlikely to have the same economic importance as well as the same impact”.<sup>50</sup> The explicit flexibility in the Convention’s provisions permits this heterogeneity.

<sup>46</sup> Variables 16–24 of the Regulation of Dismissal Index described in S. Deakins, P. Lele and M. Siems: “The evolution of labour law: Calibrating and comparing regulatory regimes”, in *International Labour Review*, Vol. 146, No. 3-4, 2007. The Project Law, Finance and Development was completed by the Centre for Business Research of the University of Cambridge in 2009; see [www.cbr.cam.ac.uk/research/programme2/project2-20.htm](http://www.cbr.cam.ac.uk/research/programme2/project2-20.htm).

<sup>47</sup> *Australia*: D. Venn: “The impact of small-firm exemptions from employment protection”, in *OECD Social, Employment and Migration Working Paper*, 2010, OECD Publishing, Paris (forthcoming); *Germany*: T. Bauer, S. Bender and H. Bonin: “Dismissal protection and worker flows in small establishments”, in *Economica*, Vol. 74, 2007, pp. 804–821; *Sweden*: D. von Below and P. Thoursie: “Last in, first out? Estimating the effect of seniority rules in Sweden”, in *Labour Economics*, 2010 (forthcoming); *Portugal*: P. Martins: “Dismissals for cause: The difference that just eight paragraphs can make”, in *Journal of Labour Economics*, Vol. 27, No. 2, 2009, pp. 257–279.

<sup>48</sup> *Italy*: A.D. Kugler and G. Pica: “Effects of employment protection on worker and job flows: Evidence from the 1990 Italian reform”, in *Labour Economics*, Vol. 15, No. 1, 2008, pp. 78–95; *United Kingdom*: I. Marinescu: “Job security legislation and job duration: Evidence from the United Kingdom”, in *Journal of Labour Economics*, Vol. 27, No. 3, 2008; *Spain*: A. Kugler, J.F. Jimeno and V. Hernanz: “Employment consequences of restrictive permanent contracts: Evidence from Spanish labour market reforms”, in *Journal of the European Economic Association*, 2010 (forthcoming); *Turkey*: D. Venn: “The impact of small-firm exemptions from employment protection”, in *OECD Social, Employment and Migration Working Paper*, 2010, OECD Publishing, Paris (forthcoming).

<sup>49</sup> See GB.280/LILS/5, para. 63.

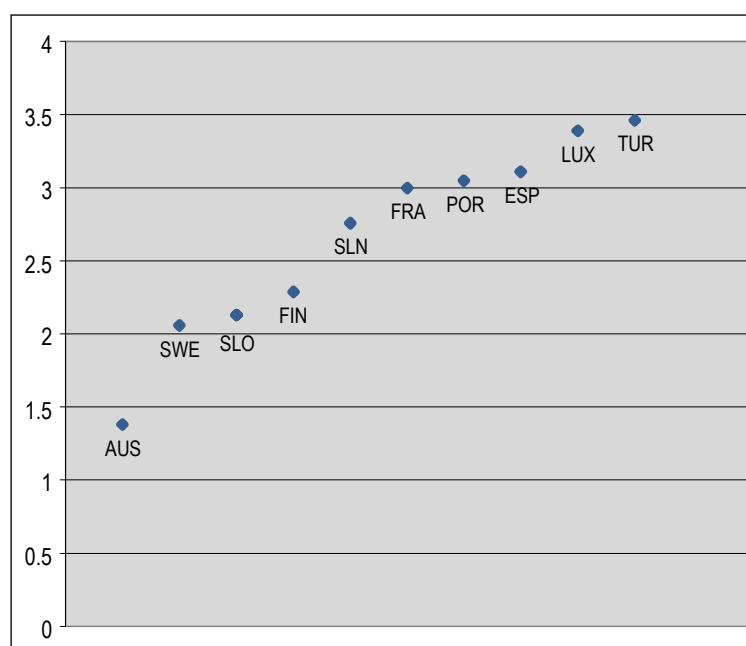
<sup>50</sup> OECD: *Employment Outlook*, 2010, p. 186.

**282.** To illustrate this point, consider the element of the Convention concerning notice to the authorities of large-scale redundancies and redundancy allowance. The national labour laws for countries A and B are summarized below.<sup>51</sup>

Country A	Country B
Prior authorization required	Minimum ten calendar days' notice to the authorities
Threshold > 10 workers	Threshold > 25% of workforce, but not less than 50 workers
Failure to secure authorization is remedied by reinstatement, without option to "buy out" redundant workers	Failure to give notice to authorities remedied by capped lump sum to each worker based on seniority
Where authorization is granted, employer pays seniority based redundancy allowance	Social security fund pays redundancy allowance

**283.** The requirements in both countries conform to Article 14 of the Convention. Each potentially has different effects on employer and worker behaviour. Empirical analysis aiming to link these provisions with labour market outcomes is concerned only with the national provisions and not the international standard. Account taken of flexibilities inherent in all the Convention's provisions – regarding safeguards possibly placed on the use of fixed-term and task-based contracts, limitations on the scope of application, notice requirements, arrangements for defence and appeal, income protection and consultation, to name a few – it is very complex to judge the international standard on the basis of vastly varying forms of compliant national implementation.

**Figure 17. OECD: Strictness of overall employment protection, ten countries, 2008**



Scale from 0 (least stringent) to 6 (most restrictive)

**284.** This difficulty to link empirical analysis of national legislation and of the Convention can be seen graphically. Figure 17 plots the strictness of overall employment protection of ten

<sup>51</sup> Assume in both cases that the law requires the prior authorization request/notification to include 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".

countries as indexed by the OECD.<sup>52</sup> While each of the countries – *Australia, Finland, France, Luxembourg, Portugal, Slovakia, Slovenia, Spain, Sweden* and *Turkey* – have ratified Convention No. 158, the Convention is applied in these countries by different means and their practice has evolved since ratification. The scale ranges from 0 (least stringent) to 6 (most restrictive). Even if difficulties were observed over the years, an examination of the most recent CEACR comments for these countries suggests that none have major issues in implementation; all implement the provisions of the Convention. At present, the CEACR has identified few or no issues of application in *France, Portugal, Slovenia* and *Spain*; issues of scope of protection/exclusion of workers in smaller enterprises have been raised in *Australia* and *Turkey* (along with procedural issues in *Australia*); and several miscellaneous issues have been taken up in respect of *Luxembourg, Sweden* and *Finland*. *Slovakia* has recently ratified the Convention and its first report is due in 2011. In sum, this small sample alone shows that the Convention is flexible enough to accommodate up to almost two points of variation in strictness of national employment protection legislation. While economic arguments and research results are relevant to the mix of provisions dealing with termination at the initiative of the employer, they may only be anecdotally useful for judging some of the effects of the Convention considering that a mix of provisions can vary substantially and still be consistent with the Convention.

#### Some conclusions from OECD research

Empirical research has previously explored implications using econometric analysis and has provided mixed results as to the influence of EPL on labour market performance. One critical problem relates to the measurement of labour legislation. Accordingly, caution should be exercised in generalizing certain results, since they could depend on the methodology used to construct EPL indicators, as well as the assumptions underlying the model.

Based on the OECD's overview of the empirical evidence,<sup>1</sup> some general conclusions might be drawn: (i) EPL has generally been found to have little or no effect on overall unemployment, although it may affect the duration of unemployment and its demographic composition; (ii) higher EPL tends to reduce turnover in the labour force and to increase the proportion of long-tenure jobs, while the effect on temporary employment and part time is rather ambiguous; and (iii) strong EPL may favour higher unemployment among women, less skilled workers and young people. Moreover, multivariate analysis gives an insight of the linkages between EPL and other labour market institutions: collective bargaining at the central level has been found to mitigate the negative effect of stricter EPL. The OECD's overview also finds a significant negative impact of the replacement levels of unemployment benefits on unemployment and employment, even if it is dispersed when generous benefits are combined with effective active labour market policies. Finally, the analysis confirms that the impact of EPL seems to be greater on the dynamics and the composition of employment, than on the level of employment.

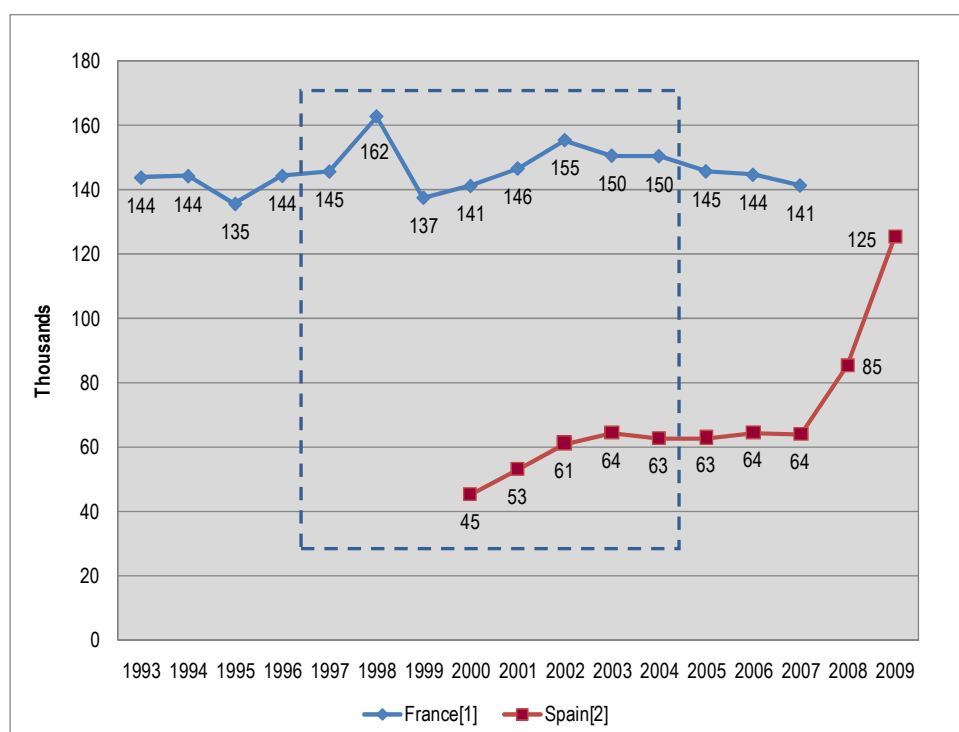
However, recent empirical evidence suggests that a general agreement is far from being reached. For instance, some authors find that job security legislation in India has a negative effect on job opportunities and reduces workers' welfare;<sup>2</sup> while in another paper, the effects of notice period and indemnities for dismissal in Latin America are not found to have any significant effect on unemployment and employment, while payroll taxation seems to reduce employment and increase unemployment.<sup>3</sup> Other researchers have found evidence that EPL has had a positive effect on employment performance<sup>4</sup> or on job tenure and productivity<sup>5</sup> suggesting that EPL provisions can have positive effects by increasing investments in human resources. To sum up, policy recommendations on the effect of EPL on economic and labour market outcomes should be formulated with great caution, in the light of ambiguous empirical results and measurement issues.

<sup>1</sup> OECD: *Employment Outlook*, 2006. <sup>2</sup> A. Ashan and C. Pagès: "Are all labour regulations equal? Assessing the effects of job security, labour dispute and contract labour in India", 2007, World Bank. <sup>3</sup> J. Heckman and C. Pagès: "The cost of job security regulation: Evidence from Latin America countries", in *NBER Working Paper 7773*, 2000, NBER, Cambridge, MA. <sup>4</sup> B. Amable, L. Demmou and D. Gatti: "Employment performance and institutions: New answers to an old question", Institute of the Study of Labour (IZA) Bonn, Mar. 2007. <sup>5</sup> P. Auer, J. Berg and I. Coulibaly: "Is a stable workforce good for the economy? Insights into the tenure-productivity-employment relationship", in *International Labour Review*, Vol. 144, No. 3, 2005.

<sup>52</sup> Source: OECD indicators of employment protection at [http://stats.oecd.org/Index.aspx?DatasetCode=EPL\\_OV](http://stats.oecd.org/Index.aspx?DatasetCode=EPL_OV) (accessed 8 Jan. 2011). The OECD calculates four indicators of strictness of regulation on dismissals and the use of temporary contracts: (1) overall; (2) regular employment; (3) temporary employment; and (4) collective dismissals.

285. Furthermore, when comparing statistics between 2000 and 2007 available from two countries, *France* and *Spain*, which have similar values regarding strict employment protection according to the OECD, the number of *cases of termination* that are challenged in the courts vary substantially. Figure 18 shows the number of cases of termination brought before the labour courts in *France* based on recent multidisciplinary research that explored in detail French legislation and practice on termination.<sup>53</sup> It also shows the number of *cases submitted* to the labour courts in *Spain* (previously discussed in Part III). As it appears from the graph, a greater number of cases of termination have been reported in *France* compared to cases submitted in *Spain*. There was a decline in *France* from 2002 to 2007, whereas the number remained stable in *Spain* over the same period. In 2007, the number of cases of termination reported in *France* was about 141,000, whereas in *Spain* the number was closer to 64,000.<sup>54</sup> This graph suggests that in the two ratifying countries applying an equivalent level of strict employment protection, the level of cases of termination may vary considerably while still complying with Article 8 of the Convention in law and practice.

Figure 18. France and Spain: Cases of termination, 1993–2009



All reasons by year (1993–2009)

<sup>53</sup> B. Gomel, E. Serverin and D. Méda: *L'emploi en ruptures*, Editions Dalloz; more specifically, E. Serverin and J. Valentin: *Licenciement et recours aux prud'hommes, questions de mesure*, 2009, pp. 121–138, among other studies included in the publication that contain references to Convention No. 158 and to the work of the ILO.

<sup>54</sup> In Jordan the number of cases examined by courts reached 13,492 in the 2008 judicial year, and 12,934 in the 2009 judicial year (see Part III).

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**286.** The total number of cases of termination in *France* include those for reasons connected with the capacity or conduct of the worker (termination for personal reasons) and those based on reasons of an economic, technological, structural or similar nature (for economic reasons). Cases of termination brought before the French labour courts for economic reasons represent a small portion of the total number of cases and were in a constant downward trend in the 1993–2007 period.<sup>55</sup> In 1993, this represented 3.6 per cent; in 2004, 2.8 per cent; and in 2007, 2.2 per cent.<sup>56</sup> In *Spain*, for the 2000–07 period, cases that were not settled out of court were more often decided in favour of the worker. In 2007, for example, 19,238 cases were found in favour of the worker, while 8,629 cases were found in favour of the employer. For the same year, 246.6 million euros were awarded by courts and 103.7 million euros were awarded through conciliation.

<sup>55</sup> The situation is quite different in *Yemen* where, in the first half of 2010, 50 per cent of the 119 cases ended through arbitration and 58 per cent of the 50 cases ended through conciliation, concerned cases of termination based on economic reasons (see Part III).

<sup>56</sup> This information was also included in the abovementioned study (see footnote 53). It might be interesting to recall that, in *Chile*, any termination of employment, for whatever reason, must be notified to the labour inspectorate, and the number of notice letters registered with regard to termination concerning operational requirements was close to 200,000 for the period January–September 2010 (see Part III).

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## Part V. Conclusion and points for discussion

- 287.** The provisions of the Termination of Employment Convention, 1982 (No. 158), and of the Termination of Employment Recommendation, 1982 (No. 166), aim to ensure the employer's right to dismiss a worker for a valid reason and the worker's right not be deprived of work unfairly. Thus, the purpose of these instruments is to define a balance between the interests of the employer and those of the worker.
- 288.** The basic requirement of the Convention and its corresponding Recommendation is that the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service. The majority of countries scrutinized for this Meeting of Experts, 59 of the 75 countries included in EPLex generally do require a valid reason for termination. Other principles included in the Convention and recognized in most countries concern notice, a pre-termination opportunity to respond and an appeal to an independent body.
- 289.** As a means to avoid or minimize the social and economic impact of terminations, the Convention and Recommendation provide for a procedural response to collective dismissals by requiring consultation with workers or their representatives, as well as information to the responsible governmental authorities.
- 290.** Concerns for due process in employment termination, prohibition of termination for invalid reasons listed in Article 5, opportunity for independent appeal, and consultation in the case of large redundancies finds some resonance among member States, as it appears from the data collected for this Meeting of Experts.
- 291.** Furthermore, the Convention offers flexibility in Article 2 where two types of exclusions from the application of the Convention exist: the exclusions that can be made at any time (Article 2, paragraph 2) and those which are listed in the first report on the application of the Convention submitted under article 22 of ILO Constitution (Article 2, paragraphs 4–6). The Meeting of Experts might want to envisage if those provisions might need revision.
- 292.** Countries which have ratified the Convention are requested, in accordance with the report form for article 22 reports, to indicate whether courts of law or other tribunals have given decisions involving questions of principle relating to the application of the Convention. Interestingly, the judicial cases provided with the reports as well as those that have been collected for this Meeting of Experts permit the conclusion that national courts make reference to or rely on the requirements in the Convention when rendering their decisions.
- 293.** Member States that ratify the Convention are also requested to provide general information concerning the manner in which the Convention is applied in practice, including available statistics on the findings of appeal bodies and on the number of cases of termination for economic or similar reasons. A difficulty encountered relates to the fact that data are collected differently in countries making it difficult to undertake comprehensive comparative analysis on the matters covered by the instruments.
- 294.** In the light of the information contained in this background paper, the Meeting of Experts might consider the following points for discussion :
- Taking into account the experience of the crisis, the Global Jobs Pact and the information provided in the background paper, what are the common principles on protection against unfair dismissal currently prevailing in the world? Is the current protection effective?



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- What should be the main objectives for ILO action on employment protection against unfair dismissal?
  - Are Convention No. 158, Recommendation No. 166 and the principles enshrined in those instruments still appropriate today to achieve the Organization's wider strategic objectives as set out in the 2008 Social Justice Declaration and the 2009 Global Jobs Pact?
  - What role should social dialogue play in finding optimal solutions to termination of employment?
  - What specific provisions in the Convention give rise to particular difficulties?
  - Does the Convention contain sufficient flexibility (Article 2, paragraphs 2 and 4–6)?
  - In which areas covered by the instruments should data be collected and what type of data?
  - What concrete proposals should be submitted to the Governing Body concerning the follow-up to this Meeting and any action that should be required concerning the Convention and the Recommendation?



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## Appendix I

### List of ratifications in force (alphabetical order)

Antigua and Barbuda	16 September 2002
Australia	26 February 1993
Bosnia and Herzegovina	2 June 1993
Cameroon	13 May 1988
Central African republic	5 June 2006
Cyprus	5 July 1985
Democratic Republic of the Congo	3 April 1987
Ethiopia	28 January 1991
Finland	30 June 1992
France	16 March 1989
Gabon	6 December 1988
Latvia	25 August 1994
Lesotho	14 June 2001
Luxembourg	21 March 2001
Malawi	1 October 1986
Republic of Moldova	14 February 1997
Montenegro	3 June 2006
Morocco	7 October 1993
Namibia	28 June 1996
Niger	5 June 1985
Papua New Guinea	2 June 2000
Portugal	27 November 1995
Saint Lucia	6 December 2000
Serbia	24 November 2000
Slovakia	22 February 2010
Slovenia	29 May 1992
Spain	26 April 1985
Sweden	20 June 1983
The former Yugoslav Republic of Macedonia	17 November 1991
Turkey	4 January 1995
Uganda	18 July 1990
Ukraine	16 May 1994
Bolivarian Republic of Venezuela	6 May 1985
Yemen	13 March 1989
Zambia	9 February 1990

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## Appendix II

### Text of Convention No. 158 and Recommendation No. 166 (substantive provisions)

#### The Termination of Employment Convention, 1982 (No. 158)

##### PART I. METHODS OF IMPLEMENTATION, SCOPE AND DEFINITIONS

###### *Article 1*

The provisions of this Convention shall, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or court decisions or in such other manner as may be consistent with national practice, be given effect by laws or regulations.

###### *Article 2*

1. This Convention applies to all branches of economic activity and to all employed persons.
2. A Member may exclude the following categories of employed persons from all or some of the provisions of this Convention:
  - (a) workers engaged under a contract of employment for a specified period of time or a specified task;
  - (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;
  - (c) workers engaged on a casual basis for a short period.
3. Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention.
4. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention.
5. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them.
6. Each Member which ratifies this Convention shall list in the first report on the application of the Convention submitted under article 22 of the Constitution of the International Labour Organisation any categories which may have been excluded in pursuance of paragraphs 4 and 5 of this Article, giving the reasons for such exclusion, and shall state in subsequent reports the position of its law and practice regarding the categories excluded, and the extent to which effect has been given or is proposed to be given to the Convention in respect of such categories.

###### *Article 3*

For the purpose of this Convention the terms termination and termination of employment mean termination of employment at the initiative of the employer.

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## PART II. STANDARDS OF GENERAL APPLICATION

### DIVISION A. JUSTIFICATION FOR TERMINATION

#### *Article 4*

The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

#### *Article 5*

The following, inter alia, shall not constitute valid reasons for termination:

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

#### *Article 6*

1. Temporary absence from work because of illness or injury shall not constitute a valid reason for termination.

2. The definition of what constitutes temporary absence from work, the extent to which medical certification shall be required and possible limitations to the application of paragraph 1 of this Article shall be determined in accordance with the methods of implementation referred to in Article 1 of this Convention.

### DIVISION B. PROCEDURE PRIOR TO OR AT THE TIME OF TERMINATION

#### *Article 7*

The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.

### DIVISION C. PROCEDURE OF APPEAL AGAINST TERMINATION

#### *Article 8*

1. A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.

2. Where termination has been authorised by a competent authority the application of paragraph 1 of this Article may be varied according to national law and practice.

3. A worker may be deemed to have waived his right to appeal against the termination of his employment if he has not exercised that right within a reasonable period of time after termination.

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### *Article 9*

1. The bodies referred to in Article 8 of this Convention shall be empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified.

2. In order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation referred to in Article 1 of this Convention shall provide for one or the other or both of the following possibilities:

- (a) the burden of proving the existence of a valid reason for the termination as defined in Article 4 of this Convention shall rest on the employer;
- (b) the bodies referred to in Article 8 of this Convention shall be empowered to reach a conclusion on the reason for the termination having regard to the evidence provided by the parties and according to procedures provided for by national law and practice.

3. In cases of termination stated to be for reasons based on the operational requirements of the undertaking, establishment or service, the bodies referred to in Article 8 of this Convention shall be empowered to determine whether the termination was indeed for these reasons, but the extent to which they shall also be empowered to decide whether these reasons are sufficient to justify that termination shall be determined by the methods of implementation referred to in Article 1 of this Convention.

### *Article 10*

If the bodies referred to in Article 8 of this Convention find that termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate.

## DIVISION D. PERIOD OF NOTICE

### *Article 11*

A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period.

## DIVISION E. SEVERANCE ALLOWANCE AND OTHER INCOME PROTECTION

### *Article 12*

1. 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.

2. A worker who does not fulfil the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any allowance or benefit referred to in paragraph 1, subparagraph (a), of this Article solely because he is not receiving an unemployment benefit under paragraph 1, subparagraph (b).

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3. Provision may be made by the methods of implementation referred to in Article 1 of this Convention for loss of entitlement to the allowance or benefits referred to in paragraph 1, subparagraph (a), of this Article in the event of termination for serious misconduct.

PART III. SUPPLEMENTARY PROVISIONS CONCERNING TERMINATIONS OF  
EMPLOYMENT FOR ECONOMIC, TECHNOLOGICAL,  
STRUCTURAL OR SIMILAR REASONS

DIVISION A. CONSULTATION OF WORKERS' REPRESENTATIVES

*Article 13*

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:

- (a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;
- (b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.

2. The applicability of paragraph 1 of this Article may be limited by the methods of implementation referred to in Article 1 of this Convention to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.

3. For the purposes of this Article the term the workers' representatives concerned means the workers' representatives recognised as such by national law or practice, in conformity with the Workers' Representatives Convention, 1971.

DIVISION B. NOTIFICATION TO THE COMPETENT AUTHORITY

*Article 14*

1. 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.

2. National laws or regulations may limit the applicability of paragraph 1 of this Article to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.

3. The employer shall notify the competent authority of the terminations referred to in paragraph 1 of this Article a minimum period of time before carrying out the terminations, such period to be specified by national laws or regulations.

PART IV. FINAL PROVISIONS

*Article 15*

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

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### *Article 16*

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.
2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.
3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

### *Article 17*

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.
2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

### *Article 18*

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.
2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

### *Article 19*

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

### *Article 20*

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

### *Article 21*

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides-
  - (a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 17 above, if and when the new revising Convention shall have come into force;
  - (b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.



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2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

*Article 22*

The English and French versions of the text of this Convention are equally authoritative.

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## The Termination of Employment Recommendation, 1982 (No. 166)

### I. METHODS OF IMPLEMENTATION, SCOPE AND DEFINITIONS

1. The provisions of this Recommendation may be applied by national laws or regulations, collective agreements, works rules, arbitration awards or court decisions or in such other manner consistent with national practice as may be appropriate under national conditions.

2.

- (1) This Recommendation applies to all branches of economic activity and to all employed persons.
- (2) A Member may exclude the following categories of employed persons from all or some of the provisions of this Recommendation:
  - (a) workers engaged under a contract of employment for a specified period of time or a specified task;
  - (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;
  - (c) workers engaged on a casual basis for a short period.
- (3) In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Recommendation or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements, which as a whole provide protection that is at least equivalent to the protection afforded under the Recommendation.
- (4) In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Recommendation or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them.

3.

- (1) Adequate safeguards should be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from the Termination of Employment Convention, 1982, and this Recommendation.
- (2) To this end, for example, provision may be made for one or more of the following:
  - (a) limiting recourse to contracts for a specified period of time to cases in which, owing either to the nature of the work to be effected or to the circumstances under which it is to be effected or to the interests of the worker, the employment relationship cannot be of indeterminate duration;
  - (b) deeming contracts for a specified period of time, other than in the cases referred to in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration;
  - (c) deeming contracts for a specified period of time, when renewed on one or more occasions, other than in the cases mentioned in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration.

4. For the purpose of this Recommendation the terms termination and termination of employment mean termination of employment at the initiative of the employer.

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## II. STANDARDS OF GENERAL APPLICATION

### JUSTIFICATION FOR TERMINATION

5. In addition to the grounds referred to in Article 5 of the Termination of Employment Convention, 1982, the following should not constitute valid reasons for termination:

- (a) age, subject to national law and practice regarding retirement;
- (b) absence from work due to compulsory military service or other civic obligations, in accordance with national law and practice.

6.

- (1) Temporary absence from work because of illness or injury should not constitute a valid reason for termination.
- (2) The definition of what constitutes temporary absence from work, the extent to which medical certification should be required and possible limitations to the application of subparagraph (1) of this Paragraph should be determined in accordance with the methods of implementation referred to in Paragraph 1 of this Recommendation.

### PROCEDURE PRIOR TO OR AT THE TIME OF TERMINATION

7. The employment of a worker should not be terminated for misconduct of a kind that under national law or practice would justify termination only if repeated on one or more occasions, unless the employer has given the worker appropriate written warning.

8. The employment of a worker should not be terminated for unsatisfactory performance, unless the employer has given the worker appropriate instructions and written warning and the worker continues to perform his duties unsatisfactorily after a reasonable period of time for improvement has elapsed.

9. A worker should be entitled to be assisted by another person when defending himself, in accordance with Article 7 of the Termination of Employment Convention, 1982, against allegations regarding his conduct or performance liable to result in the termination of his employment; this right may be specified by the methods of implementation referred to in Paragraph 1 of this Recommendation.

10. The employer should be deemed to have waived his right to terminate the employment of a worker for misconduct if he has failed to do so within a reasonable period of time after he has knowledge of the misconduct.

11. The employer may consult workers' representatives before a final decision is taken on individual cases of termination of employment.

12. The employer should notify a worker in writing of a decision to terminate his employment.

13.

- (1) A worker who has been notified of termination of employment or whose employment has been terminated should be entitled to receive, on request, a written statement from his employer of the reason or reasons for the termination.
- (2) Subparagraph (1) of this Paragraph need not be applied in the case of collective termination for the reasons referred to in Articles 13 and 14 of the Termination of Employment Convention, 1982, if the procedure provided for therein is followed.

### PROCEDURE OF APPEAL AGAINST TERMINATION

14. Provision may be made for recourse to a procedure of conciliation before or during appeal proceedings against termination of employment.

15. Efforts should be made by public authorities, workers' representatives and organisations of workers to ensure that workers are fully informed of the possibilities of appeal at their disposal.

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## TIME OFF FROM WORK DURING THE PERIOD OF NOTICE

16. During the period of notice referred to in Article 11 of the Termination of Employment Convention, 1982, the worker should, for the purpose of seeking other employment, be entitled to a reasonable amount of time off without loss of pay, taken at times that are convenient to both parties.

## CERTIFICATE OF EMPLOYMENT

17. A worker whose employment has been terminated should be entitled to receive, on request, a certificate from the employer specifying only the dates of his engagement and termination of his employment and the type or types of work on which he was employed; nevertheless, and at the request of the worker, an evaluation of his conduct and performance may be given in this certificate or in a separate certificate.

## SEVERANCE ALLOWANCE AND OTHER INCOME PROTECTION

18.

- (1) A worker whose employment has been terminated should be entitled, in accordance with national law and practice, to-
  - (a) a severance allowance or other separation benefits, the amount of which should 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.
- (2) A worker who does not fulfil the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any allowance or benefit referred to in subparagraph (1)(a) of this Paragraph solely because he is not receiving an unemployment benefit under subparagraph (1)(b).
- (3) Provision may be made by the methods of implementation referred to in Paragraph 1 of this Recommendation for loss of entitlement to the allowance or benefits referred to in subparagraph (1)(a) of this Paragraph in the event of termination for serious misconduct.

## III. SUPPLEMENTARY PROVISIONS CONCERNING TERMINATIONS OF EMPLOYMENT FOR ECONOMIC, TECHNOLOGICAL, STRUCTURAL OR SIMILAR REASONS

19.

- (1) All parties concerned should seek to avert or minimise as far as possible termination of employment for reasons of an economic, technological, structural or similar nature, without prejudice to the efficient operation of the undertaking, establishment or service, and to mitigate the adverse effects of any termination of employment for these reasons on the worker or workers concerned.
- (2) Where appropriate, the competent authority should assist the parties in seeking solutions to the problems raised by the terminations contemplated.

## CONSULTATIONS ON MAJOR CHANGES IN THE UNDERTAKING

20.

- (1) 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

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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.

- (2) To enable the workers' representatives concerned to participate effectively in the consultations referred to in subparagraph (1) of this Paragraph, the employer should supply them in good time with all relevant information on the major changes contemplated and the effects they are likely to have.
- (3) For the purposes of this Paragraph the term the workers' representatives concerned means the workers' representatives recognised as such by national law or practice, in conformity with the Workers' Representatives Convention, 1971.

#### MEASURES TO AVERT OR MINIMISE TERMINATION

21. The measures which should be considered with a view to averting or minimising terminations of employment for reasons of an economic, technological, structural or similar nature might include, inter alia, restriction of hiring, spreading the workforce reduction over a certain period of time to permit natural reduction of the workforce, internal transfers, training and retraining, voluntary early retirement with appropriate income protection, restriction of overtime and reduction of normal hours of work.

22. Where it is considered that a temporary reduction of normal hours of work would be likely to avert or minimise terminations of employment due to temporary economic difficulties, consideration should be given to partial compensation for loss of wages for the normal hours not worked, financed by methods appropriate under national law and practice.

#### CRITERIA FOR SELECTION FOR TERMINATION

23.

- (1) 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.
- (2) These criteria, their order of priority and their relative weight, should be determined by the methods of implementation referred to in Paragraph 1 of this Recommendation.

#### PRIORITY OF REHIRING

24.

- (1) Workers whose employment has been terminated for reasons of an economic, technological, structural or similar nature, should be given a certain priority of rehiring if the employer again hires workers with comparable qualifications, subject to their having, within a given period from the time of their leaving, expressed a desire to be rehired.
- (2) Such priority of rehiring may be limited to a specified period of time.
- (3) The criteria for the priority of rehiring, the question of retention of rights-particularly seniority rights-in the event of rehiring, as well as the terms governing the wages of rehired workers, should be determined according to the methods of implementation referred to in Paragraph 1 of this Recommendation.

#### MITIGATING THE EFFECTS OF TERMINATION

25.

- (1) In the event of termination of employment for reasons of an economic, technological, structural or similar nature, the placement of the workers affected in suitable alternative employment as soon as possible, with training or retraining where appropriate, should be promoted by measures suitable to national circumstances, to be taken by the competent

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authority, where possible with the collaboration of the employer and the workers' representatives concerned.

- (2) Where possible, the employer should assist the workers affected in the search for suitable alternative employment, for example through direct contacts with other employers.
- (3) In assisting the workers affected in obtaining suitable alternative employment or training or retraining, regard may be had to the Human Resources Development Convention and Recommendation, 1975.

26.

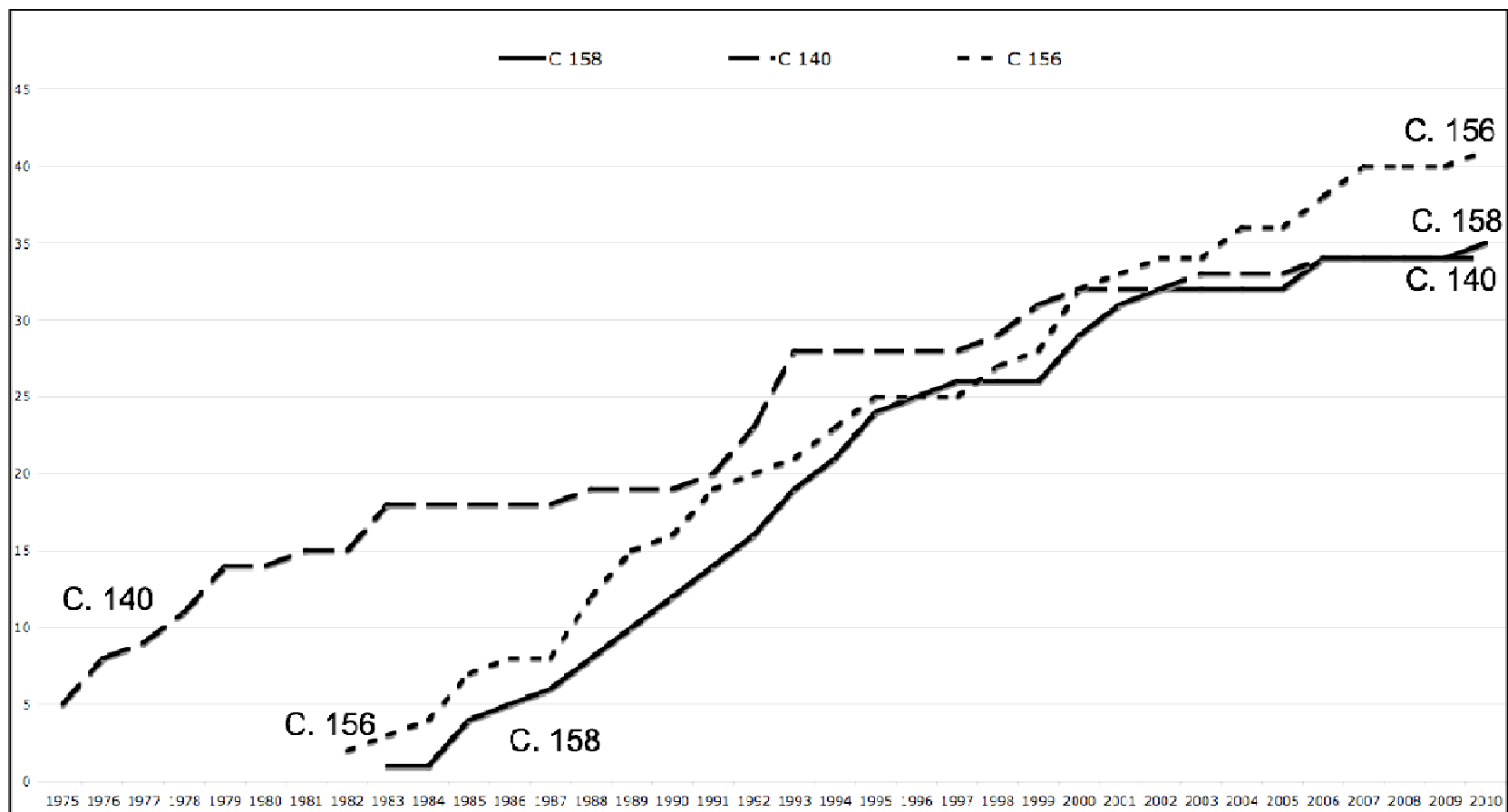
- (1) With a view to mitigating the adverse effects of termination of employment for reasons of an economic, technological, structural or similar nature, consideration should be given to providing income protection during any course of training or retraining and partial or total reimbursement of expenses connected with training or retraining and with finding and taking up employment which requires a change of residence.
- (2) The competent authority should consider providing financial resources to support in full or in part the measures referred to in subparagraph (1) of this Paragraph, in accordance with national law and practice.

#### IV. EFFECT ON EARLIER RECOMMENDATION

27. This Recommendation and the Termination of Employment Convention, 1982, supersede the Termination of Employment Recommendation, 1963.

## Appendix III

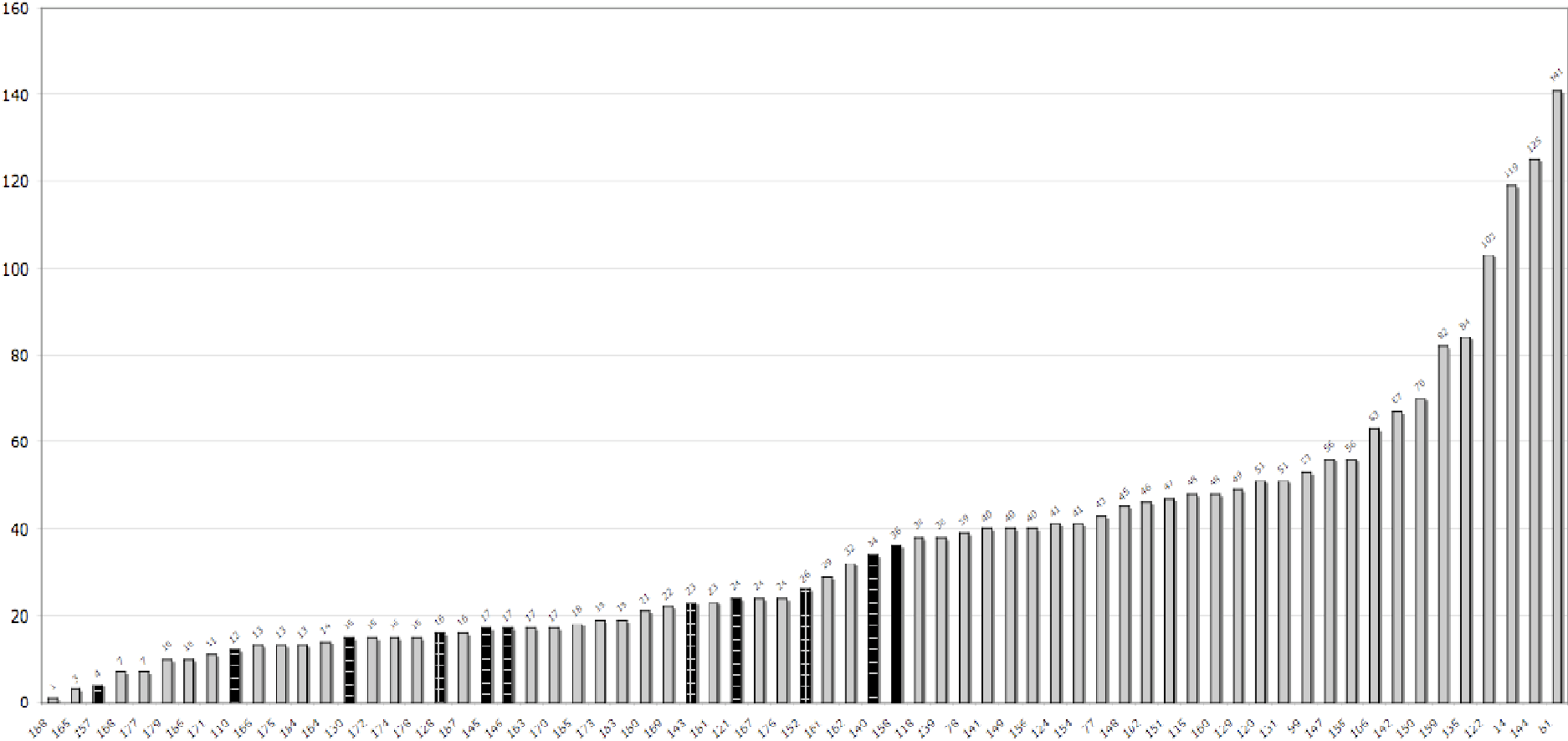
### Ratifications of Conventions Nos 158, 140 and 156 from 1975 to 2010



Ratifications to date (registered and in force): Conventions Nos 140 (34); 156 (41) and 158 (35).

Appendix IV

Ratifications of up-to-date Conventions, excluding fundamental Conventions (as of December 2010)





Conventions numbers are seen along the x-axis. Convention No. 158 is shown in black with 36 ratifications registered. Conventions adopted earlier than Convention No. 158 (affording more time for additional ratifications) with fewer ratifications are shown with checked fill pattern.

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## Appendix V

### Terms of reference for country studies

#### *Country profile on employment termination*

##### I. Background

At its 206th Session (November 2009), the Governing Body decided to convene a meeting of a tripartite working group of experts to examine the Termination of Employment Convention, 1982 (No. 158), and Recommendation (No. 166), as follow-up to the discussions held by the LILS Committee in its 304th Session (March 2009). The meeting will call together six Government, six Employer and six Worker experts.

Information related to the ongoing discussion on the status of Convention No. 158 and Recommendation No. 166 is available in a Note on Convention No. 158 and Recommendation No. 166 concerning termination of employment (2009) and other relevant materials are available on the ILO website.

##### II. Role of the external collaborator

The external collaborator is expected to conduct a review of national legislation and practice in relation to Convention No. 158 and Recommendation No. 166 and provide information on judicial decisions concerning termination of employment and any use made by Convention No. 158 and Recommendation No. 166 as well as of the comments of the ILO supervisory bodies.

- The external collaborator will provide a quantitative assessment (share of the workforce) of legal coverage, taking into account existing legal exemptions from the scope of application, such as exemption of:
  - workers whose terms of reference are governed by special arrangements (e.g. civil servants);
  - workers under a probationary or qualifying period;
  - self-employed workers;
  - fixed-term workers; short-term workers; temporary workers; workers working on service contracts;
  - workers in small business and family enterprises, etc.;
  - workers in exempted sectors (e.g. agriculture, domestic work).
- He/she will also provide a quantitative assessment (share of the workforce) of coverage in practice taking into account non-application of the legislation for reasons such as unemployment, importance of the informal economy, lack of compliance with the rule of law (ineffectiveness of labour inspection or obstacles to access to the labour courts).
- The collaborator will make a quantitative assessment of effectiveness of employment protection laws, where applied, in ultimately discouraging dismissal and protecting job and, if available, provide data on the following matters:
  - number of dismissals in relationship to workforce;
  - share of dismissals for particular reasons (economic reasons; personal reasons; behavioural reasons);
  - share of all dismissals that are taken to court;
  - outcome of court proceedings:
    - share of dismissals declared unjustified;

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- share of dismissals declared justified;
  - share of dismissals settled in a different way.
- He/she will assess possible other effects of employment protection laws on, for example:
    - share of (less protected) fixed-term workers and self-employed workers of the workforce;
    - overall unemployment rate and unemployment rate of particular groups in the labour market, such as low-skilled workers; long-term unemployed, workers with disabilities, older workers, younger workers, women workers;
    - average length of employment relationships;
    - average length of unemployment spells and share of long-term unemployed among the unemployed;
    - job creation, in particular by small businesses;
    - employment protection costs for enterprises (court fees, lawyer fees, separation payments, social plans, unclear duration of court procedures and outcomes, etc.).
  - The collaborator will also assess the availability and efficacy of existing complementary means of employment protection, which mitigate the effects of termination and promote employment, such as:
    - income support through social security systems;
    - incentives to take up work;
    - training/retraining systems.

### III. Outputs

The external collaborator is requested to provide a document of around 15–20 pages – 5,000 words – within one month.

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## Appendix VI

### Termination of employment legislation in 105 member States – Comparative table

The following table contains information on termination of employment legislation in 105 member States. Four reference sources were used to compile the table.

- (1) The *Termination of employment digest: A legislative review*, Geneva, International Labour Office, 2000, was relied upon in 2000 for the data relevant to the 59 member States selected for the 2001 survey.<sup>1</sup> Those countries' names are underlined.<sup>2</sup>
- (2) The *Employment Protection Legislation Database* (EPLex) contributes data for an additional 37 countries that were not covered in the appendix to the 2001 survey.<sup>3</sup> Drawing on the EPLex it was possible to compare/update the situation for 36 of the 59 short survey countries.<sup>4</sup>
- (3) The *2011 World Social Security Report*, Statistical Annex Part B, table 18. Unemployment, was used for information on unemployment benefits.
- (4) Seven additional countries presented in the table draw on information presented in the 2009 Note and from article 22 reports.<sup>5</sup>

Of the 105 countries included, 33 are currently bound having ratified Convention No. 158 and 72 have not.<sup>6</sup> One of these ratifying countries (*Lesotho*) was also included among the 59 countries reviewed in the 2001 survey. The States are grouped by region. Eleven subjects are covered in the table, all associated with indicated provisions of Convention No. 158. The first nine subjects correspond to those surveyed in the 2001 short survey. The last two, concerning income protection, are derived from the EPLex Database and the Social Security Report. The most recent available

<sup>1</sup> Argentina, Austria, Bangladesh, Belgium, Plurinational State of Bolivia, Brazil, Bulgaria, Cambodia, Canada, Chile, China, Colombia, Côte d'Ivoire, Czech Republic, Dominican Republic, Egypt, Gambia, Germany, Ghana, Guinea, Hungary, India, Indonesia, Islamic Republic of Iran, Iraq, Israel, Italy, Jamaica, Japan, Kenya, Republic of Korea, *Lesotho*, Malaysia, Mauritius, Mexico, Nepal, Netherlands, New Zealand, Nigeria, Pakistan, Panama, Peru, Philippines, Poland, Russian Federation, Senegal, Singapore, South Africa, Sri Lanka, Swaziland, Switzerland, Syrian Arab Republic, United Republic of Tanzania, Thailand, Tunisia, United Kingdom, United States, Viet Nam, Zimbabwe.

<sup>2</sup> Country names marked with \* are newly added, as they have been included in EPLex. For them, it is not possible to compare the situation from 2000. Countries marked with “†” were included in the 2009 Note. Countries marked with an X are not included in EPLex.

<sup>3</sup> *Antigua and Barbuda, Armenia, Australia, Azerbaijan, Burkina Faso, Cameroon, Central African Republic, Comoros, Cyprus, Democratic Republic of the Congo, Denmark, El Salvador, Ethiopia, Finland, France, Gabon, Georgia, Greece, Jordan, Kyrgyzstan, Luxembourg, Madagascar, Malawi, Republic of Moldova, Morocco, Namibia, Niger, Saint Lucia, Saudi Arabia, Slovakia, Spain, Sweden, Turkey, Uganda, Bolivarian Republic of Venezuela, Yemen, Zambia.*

<sup>4</sup> Argentina, Austria, Belgium, Brazil, Bulgaria, Cambodia, Canada, Chile, China, Côte d'Ivoire, Czech Republic, Egypt, Germany, Ghana, Hungary, Indonesia, Italy, Japan, Republic of Korea, Lesotho, Malaysia, Mexico, Netherlands, Panama, Peru, Philippines, Russian Federation, Senegal, Singapore, South Africa, Sri Lanka, Switzerland, Syrian Arab Republic, United Kingdom, United States, Viet Nam.

<sup>5</sup> Belarus, Bosnia and Herzegovina, Latvia, Portugal, Serbia, Slovenia, Ukraine.

<sup>6</sup> No information is available to the CEACR for *Papua New Guinea*; for *Montenegro*, a first report is due in 2011. These two countries are not included in the table.

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information on the situation is shown; where changes have occurred since 2000, the earlier entry is also shown and underlined, thus giving a picture of trend over time. Information available today that was not previously available has made it possible to identify corrections needed to earlier data tables. This has been done here. In these cases, no indication is made of an actual change having occurred.<sup>7</sup>

<sup>7</sup> In some cases changes have been made to follow the manner in which information is abbreviated into “yes/no” responses in EPLex. For example, if reinstatement is available as a remedy but only in selected cases, “yes” is indicated with a clarification.

## Termination of employment legislation in 105 member States – Comparative table

Country	Justification for termination	Compensation/reinstatement		Notice		Invalid reasons		Collective dismissal		Income protection	
	1. Valid reason?	2. Compensation for unjustified dismissal	3. Claim for reinstatement available?	4. Notice period granted?	5. Pay in lieu of notice?	6. Protection of trade union officials and other workers' reps?	7. Maternity protection	8. Consultation of workers' reps required?	9. Notification to the competent authority required?	10. Severance allowance?	11. Unemployment insurance?
	Yes/No	Yes/No	Yes/No	Reasonable period	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No
	Can be proposed or ordered by the impartial body										
	Art. 4	Art. 10	Art. 10	Art. 11	Art. 11	Art. 5(a) & (b)	Art. 5(d) & (e)	Art. 13	Art. 14.1	Art. 12(1)(a)	Art. 12(1)(b)
Africa	Africa	Africa	Africa	Africa	Africa	Africa	Africa	Africa	Africa	Africa	Africa
Burkina Faso*	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes (B)	No provision
Cameroon*†	Yes	Yes	No, except for workers' representatives	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No provision
Central African Republic*	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No (B)	No provision
Comoros*	Yes	Yes	Yes	To be defined	No	Yes	Yes	No	Yes	To be defined	No provision
Congo, Dem. Rep. of*†	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No provision
Côte d'Ivoire	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No provision
Egypt† 1	Yes	Yes	No, except for dismissal for trade union activities Yes	No, except for apprentices Yes	n.a. Yes	Yes	No Yes	No Yes	Yes	Yes (A)	Social insurance
Ethiopia*†	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	No	Yes	No provision
Gabon*†	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No provision
Gambia X	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No info	No provision
Ghana† 2	No Yes	No Yes	No Yes	Yes	Yes	Yes	Yes	No Yes	Yes	Yes (A)	No provision

Country	Justification for termination	Compensation/reinstatement		Notice		Invalid reasons		Collective dismissal		Income protection	
	1. Valid reason?	2. Compensation for unjustified dismissal	3. Claim for reinstatement available?	4. Notice period granted?	5. Pay in lieu of notice?	6. Protection of trade union officials and other workers' reps?	7. Maternity protection	8. Consultation of workers' reps required?	9. Notification to the competent authority required?	10. Severance allowance?	11. Unemployment insurance?
	Yes/No	Yes/No	Yes/No	Reasonable period	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No
	Can be proposed or ordered by the impartial body										
	Art. 4	Art. 10	Art. 10	Art. 11	Art. 11	Art. 5(a) & (b)	Art. 5(d) & (e)	Art. 13	Art. 14.1	Art. 12(1)(a)	Art. 12(1)(b)
<u>Guinea</u> X	Yes	Yes	Yes (in cases of termination for economic reasons)	Yes	Yes	No	No	Yes	Yes	–	No provision
<u>Kenya</u> X	Yes	Yes		Yes	Yes	Yes	No	Yes	Yes	No info	No provision
<u>Lesotho</u> †	Yes	Yes		Yes	Yes	Yes	Yes	<u>No</u> Yes <sup>3</sup>	No	Yes	No provision
Madagascar*	Yes	Yes		No	Yes	Yes	Yes	Yes	Yes	Yes (A)	No provision
<u>Malawi</u> *†	Yes	No	Yes	Yes	Yes	Yes	Yes	No	<u>No</u> Yes <sup>4</sup>	Yes	No provision
<u>Mauritius</u> X	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	No info	Social assistance, social insurance
<u>Morocco</u> *†	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No provision
<u>Namibia</u> *	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No provision
<u>Niger</u> *†	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No provision
<u>Nigeria</u> X	No	Yes	Yes (only for specific categories of dismissals)	Yes	Yes	Yes	Yes	Yes	No	No info	Limited provision: provident funds
<u>Senegal</u> †	Yes	Yes		Yes (only for workers' representatives)	Yes	Yes	Yes	Yes	Yes	Yes	No provision
<u>South Africa</u> †	Yes	Yes		Yes	Yes	Yes	Yes	Yes	Yes, for facilitation of	Yes (A)	Social insurance

Country	Justification for termination	Compensation/reinstatement		Notice		Invalid reasons		Collective dismissal		Income protection	
	1. Valid reason?	2. Compensation for unjustified dismissal	3. Claim for reinstatement available?	4. Notice period granted?	5. Pay in lieu of notice?	6. Protection of trade union officials and other workers' reps?	7. Maternity protection	8. Consultation of workers' reps required?	9. Notification to the competent authority required?	10. Severance allowance?	11. Unemployment insurance?
	Yes/No	Yes/No	Yes/No	Reasonable period	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No
	Can be proposed or ordered by the impartial body										
	Art. 4	Art. 10	Art. 10	Art. 11	Art. 11	Art. 5(a) & (b)	Art. 5(d) & (e)	Art. 13	Art. 14.1	Art. 12(1)(a)	Art. 12(1)(b)
<u>Swaziland</u> X	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	consultation Yes	No info	No provision
<u>Tanzania, United Republic of</u> X	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No info	Limited provision: employer-liability
<u>Tunisia</u> X	Yes	Yes	No	Yes	Yes	No, except for works committee members	Yes	Yes	Yes	No info	Social assistance
<u>Uganda</u> *	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	No provision
<u>Zambia</u> *†	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes (C)	No provision
<u>Zimbabwe</u> X	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No info	No provision
Americas	Americas	Americas	Americas	Americas	Americas	Americas	Americas	Americas	Americas	Americas	Americas
<u>Antigua and Barbuda</u> *	Yes	Yes	Yes	Yes	Yes	No	No	No	No	Yes (A)	No provision
<u>Argentina</u> †	Yes	Yes	No	Yes	Yes, but not in small and medium-sized companies	Yes	Yes	Yes	Yes	Yes (A)	Social insurance
<u>Bolivia, Plurinational State of</u> X †	<u>No</u> Yes	Yes	No	Yes	Yes	Yes	Yes	No	No	Yes	Limited provision: employer-liability
<u>Brazil</u> †	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	No	Yes	Social assistance



Country	Justification for termination	Compensation/reinstatement		Notice		Invalid reasons		Collective dismissal		Income protection	
	1. Valid reason?	2. Compensation for unjustified dismissal	3. Claim for reinstatement available?	4. Notice period granted?	5. Pay in lieu of notice?	6. Protection of trade union officials and other workers' reps?	7. Maternity protection	8. Consultation of workers' reps required?	9. Notification to the competent authority required?	10. Severance allowance?	11. Unemployment insurance?
	Yes/No	Yes/No	Yes/No	Reasonable period	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No
	Can be proposed or ordered by the impartial body										
	Art. 4	Art. 10	Art. 10	Art. 11	Art. 11	Art. 5(a) & (b)	Art. 5(d) & (e)	Art. 13	Art. 14.1	Art. 12(1)(a)	Art. 12(1)(b)
<u>Canada</u>	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Social insurance
<u>Chile</u> †	Yes	Yes	Yes (only discriminatory dismissal)	Yes	Yes	Yes	Yes	No	Yes	Yes	Mandatory private insurance, social assistance
<u>Colombia</u> † X	Not if compensation for damages is paid	Yes	Yes (only for specific categories of dismissal)	Yes	Yes	Yes	Yes	No	No	Yes	Mandatory private insurance
<u>Dominican Republic</u> † X	Yes	Yes	No	Yes	Yes	Yes	Yes	No	Yes	Yes	No provision
<u>El Salvador</u> *	Yes	Yes	No	No	n.a.	Yes	Yes	No	No	No	No provision
<u>Jamaica</u> X	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No info	No provision
<u>Mexico</u> †	Yes	Yes	Yes	No	n.a.	Yes	Yes	No Yes	No Yes	Yes	Limited provision: employer-liability
<u>Panama</u> †	Yes	Yes	Yes	No <sup>1</sup>	n.a.	Yes	Yes	No	Yes	Yes (A)	Limited provision: employer-liability
<u>Peru</u> †	Yes	Yes	Yes	Yes (limited to certain types of dismissals)	No	Yes	Yes	Yes	Yes	No (Only in cases of arbitrary dismissal)	Limited provision: employer-liability
<u>Saint Lucia</u> *	No	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes (A)	No provision
<u>United States</u> †	No	Yes	Generally, No <sup>5</sup>	No (B)	<u>No</u>	Yes	Yes	No (B)	Yes	No (B)	Social insurance
<u>Venezuela, Bolivarian Republic of</u> †	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Social insurance

Country	Justification for termination	Compensation/reinstatement		Notice	Invalid reasons		Collective dismissal		Income protection		
	1. Valid reason?	2. Compensation for unjustified dismissal	3. Claim for reinstatement available?	4. Notice period granted?	5. Pay in lieu of notice?	6. Protection of trade union officials and other workers' reps?	7. Maternity protection	8. Consultation of workers' reps required?	9. Notification to the competent authority required?	10. Severance allowance?	11. Unemployment insurance?
	Yes/No	Yes/No	Yes/No	Reasonable period	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No
	Can be proposed or ordered by the impartial body										
	Art. 4	Art. 10	Art. 10	Art. 11	Art. 11	Art. 5(a) & (b)	Art. 5(d) & (e)	Art. 13	Art. 14.1	Art. 12(1)(a)	Art. 12(1)(b)
Asia	Asia	Asia	Asia	Asia	Asia	Asia	Asia	Asia	Asia	Asia	Asia
Armenia*†	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Social insurance
Australia*†	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes (A); exception for small employers	Social assistance
Azerbaijan*†	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Social insurance
Bangladesh † X	Yes, except for certain dismissals <sup>2</sup>	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes	Limited provision: employer-liability
Cambodia†	Yes	Yes	No Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No provision
China† <sup>6</sup>	Generally, no Yes	Yes	No Yes	Yes	No Yes	Yes	Yes	Yes	Yes		Social insurance
India† X	Yes, with exceptions	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Social insurance
Indonesia	Yes	Yes	Yes	No	n.a.	Yes	Yes	Yes	Yes <sup>7</sup>	Yes	No provision
Japan† <sup>8</sup>	Generally, No Yes <sup>9</sup>	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No Yes	No (B)	Social insurance
Korea, Republic of†	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Social insurance
Malaysia	No	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes	No provision
Nepal X	Yes	No	Yes	Yes	Yes	No	No	No	No	No info	Limited provision: employer-liability
New Zealand X	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No info	Social assistance

Country	Justification for termination	Compensation/reinstatement		Notice		Invalid reasons		Collective dismissal		Income protection		
	1. Valid reason?	2. Compensation for unjustified dismissal	3. Claim for reinstatement available?	4. Notice period granted?	5. Pay in lieu of notice?	6. Protection of trade union officials and other workers' reps?	7. Maternity protection	8. Consultation of workers' reps required?	9. Notification to the competent authority required?	10. Severance allowance?	11. Unemployment insurance?	
	Yes/No	Yes/No	Yes/No	Reasonable period	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No	
	Can be proposed or ordered by the impartial body											
	Art. 4	Art. 10	Art. 10	Art. 11	Art. 11	Art. 5(a) & (b)	Art. 5(d) & (e)	Art. 13	Art. 14.1	Art. 12(1)(a)	Art. 12(1)(b)	
<u>Pakistan</u> X	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes, authorization needed to close down or retrench more than 50% of employees	No info	Limited provision: employer-liability	
<u>Philippines</u>	Yes	Yes	Yes	Yes (only for terminations for economic reasons)	No	Yes	Yes	No	Yes	Yes (A) (and authorized causes)	No provision	
<u>Singapore</u>	Yes <sup>10</sup>	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No (B)	No provision	
<u>Sri Lanka</u>	No (prior authorization in specific cases)	Only for valid reasons	Yes	Yes	No	No	Yes <sup>11</sup>	No	Yes	Yes	No provision	
<u>Thailand</u> X	Generally, No	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	No info	Social insurance	
<u>Viet Nam</u>	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Social insurance	
Europe	Europe	Europe	Europe	Europe	Europe	Europe	Europe	Europe	Europe	Europe	Europe	
<u>Austria</u> †	No, except for specific categories of dismissal	Yes	Yes	Yes	Yes	Yes, for works council members and candidates	Yes	Yes	Yes	Yes	Social insurance, social assistance	
Belarus† X	Yes	No info	No info	Yes		Yes	Yes	Yes	Yes	Yes		

Country	Justification for termination	Compensation/reinstatement		Notice		Invalid reasons		Collective dismissal		Income protection	
	1. Valid reason?	2. Compensation for unjustified dismissal	3. Claim for reinstatement available?	4. Notice period granted?	5. Pay in lieu of notice?	6. Protection of trade union officials and other workers' reps?	7. Maternity protection	8. Consultation of workers' reps required?	9. Notification to the competent authority required?	10. Severance allowance?	11. Unemployment insurance?
	Yes/No	Yes/No	Yes/No	Reasonable period	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No
	Can be proposed or ordered by the impartial body										
	Art. 4	Art. 10	Art. 10	Art. 11	Art. 11	Art. 5(a) & (b)	Art. 5(d) & (e)	Art. 13	Art. 14.1	Art. 12(1)(a)	Art. 12(1)(b)
<u>Belgium</u>	No, except for specific categories of dismissals	Yes	Yes (only specific categories of dismissals)	Yes	Yes	Yes, for members of works councils and of committees on occupational safety and health	Yes	Yes	Yes	Only for collective dismissals established by a national collective agreement	Social insurance
<i>Bosnia and Herzegovina</i> † X	Yes	Yes	Yes	Yes		Yes	Yes	Yes	Yes	Yes	
<u>Bulgaria</u>	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No Yes <sup>12</sup>	Yes	Yes (C)	Social insurance
<i>Cyprus</i> *†	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes (A)	Social insurance
<u>Czech Republic</u>	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes (C)	Social insurance
<i>Denmark</i> *	No, except yes were covered by broad collective agreement	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	No (B)	Mandatory private insurance, social assistance
<i>Finland</i> *†	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Mandatory private insurance, social assistance
<i>France</i> *†	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Social insurance, social assistance
<i>Georgia</i> *†	No	Yes	No	No	No	Yes	Yes	No	No	Yes	...

Country	Justification for termination	Compensation/reinstatement		Notice		Invalid reasons		Collective dismissal		Income protection		
	1. Valid reason?	2. Compensation for unjustified dismissal	3. Claim for reinstatement available?	4. Notice period granted?	5. Pay in lieu of notice?	6. Protection of trade union officials and other workers' reps?	7. Maternity protection	8. Consultation of workers' reps required?	9. Notification to the competent authority required?	10. Severance allowance?	11. Unemployment insurance?	
	Yes/No	Yes/No	Yes/No	Reasonable period	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No	
	Can be proposed or ordered by the impartial body											
	Art. 4	Art. 10	Art. 10	Art. 11	Art. 11	Art. 5(a) & (b)	Art. 5(d) & (e)	Art. 13	Art. 14.1	Art. 12(1)(a)	Art. 12(1)(b)	
<u>Germany</u> †	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes (A)	Social insurance, social assistance	
Greece*	No	Yes	Yes	Only for white-collar workers	Yes	Yes	Yes	Yes	Yes	Yes	Social insurance, social assistance	
<u>Hungary</u> <sup>13</sup>	Yes	Yes	Yes	Yes	No	<u>n.a.</u> Yes	Yes	<u>No</u> Yes	<u>No</u> Yes	Yes	Social insurance, social assistance	
<u>Israel</u> X	Yes <sup>3</sup>	Yes, damages for wrongful dismissal	Yes (only for dismissals in breach of anti-discrimination legislation)	Not in statute, but may be by collective agreement or custom. <sup>4</sup>	Yes	Yes	Yes	Yes <sup>5</sup>	Yes	No info	Social insurance	
<u>Italy</u>	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Social insurance	
Kazakhstan† X	Yes			Yes		Yes	Yes	Yes	Yes	Yes (A)	...	
Kyrgyzstan*†	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes (A)	Social insurance	
<i>Latvia</i> † X	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	No	Social insurance	
<i>Luxembourg</i> *†	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Social insurance	
<i>Macedonia, FYO</i> X	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Social Insurance	
<i>Moldova, Rep. of</i> *†	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Social insurance	
<u>Netherlands</u>	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	No	Social insurance, social assistance	
<u>Poland</u> X	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	No info	Social insurance	
<i>Portugal</i> † X	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Social insurance	

Country	Justification for termination	Compensation/reinstatement		Notice		Invalid reasons		Collective dismissal		Income protection	
	1. Valid reason?	2. Compensation for unjustified dismissal	3. Claim for reinstatement available?	4. Notice period granted?	5. Pay in lieu of notice?	6. Protection of trade union officials and other workers' reps?	7. Maternity protection	8. Consultation of workers' reps required?	9. Notification to the competent authority required?	10. Severance allowance?	11. Unemployment insurance?
	Yes/No	Yes/No	Yes/No	Reasonable period	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No
	Can be proposed or ordered by the impartial body										
	Art. 4	Art. 10	Art. 10	Art. 11	Art. 11	Art. 5(a) & (b)	Art. 5(d) & (e)	Art. 13	Art. 14.1	Art. 12(1)(a)	Art. 12(1)(b)
<u>Russian Federation</u> †	Yes	Yes	Yes	Yes (A)	Yes (A)	Yes	Yes	Yes	Yes	Yes	Social insurance, social assistance
<u>Serbia</u> *†	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes (A)	Social insurance
<u>Slovakia</u> *	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes (C)	Social insurance
<u>Slovenia</u> *†	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Social insurance
<u>Spain</u> *†	Yes	Yes	Yes	Yes	No <sup>14</sup>	Yes	Yes	Yes	Yes	Yes	Social insurance, social assistance
<u>Switzerland</u>	No, except for specific categories of dismissals	Yes	No	Yes	No	Yes	Yes	Yes	Yes	No	Social insurance
<u>Sweden</u> *†	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes (B)	Social insurance, provident funds
<u>Turkey</u> *†	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No Yes <sup>15</sup>	No Yes	Yes	Social insurance
<u>Ukraine</u> † X	Yes	Yes	Yes	Yes	No	Yes	Yes	No YES	Yes	Yes	Social insurance, social assistance
<u>United Kingdom</u> †	Yes	Yes	Yes	Yes	No <sup>16</sup>	Yes	Yes	Yes	Yes	Yes (A)	Social insurance, social assistance

Country	Justification for termination	Compensation/reinstatement		Notice		Invalid reasons		Collective dismissal		Income protection	
	1. Valid reason?	2. Compensation for unjustified dismissal	3. Claim for reinstatement available?	4. Notice period granted?	5. Pay in lieu of notice?	6. Protection of trade union officials and other workers' reps?	7. Maternity protection	8. Consultation of workers' reps required?	9. Notification to the competent authority required?	10. Severance allowance?	11. Unemployment insurance?
	Yes/No	Yes/No	Yes/No	Reasonable period	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No
	Can be proposed or ordered by the impartial body										
	Art. 4	Art. 10	Art. 10	Art. 11	Art. 11	Art. 5(a) & (b)	Art. 5(d) & (e)	Art. 13	Art. 14.1	Art. 12(1)(a)	Art. 12(1)(b)
Arab States	Arab States	Arab States	Arab States	Arab States	Arab States	Arab States	Arab States	Arab States	Arab States	Arab States	Arab States
<u>Iran, Islamic Republic of</u> X	Yes	Yes	Yes	No	n.a.	No	No	No	No	No info	Social insurance
<u>Iraq</u> X	Yes	Yes	Yes	No	n.a	No	No	No	No	No info	No provision
Jordan*	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No provision
Saudi Arabia*†	Yes	Yes	Yes	Yes	Yes	No	Yes	No	No	Yes	No provision
<u>Syrian Arab Republic</u>	<u>Yes</u> No	Yes	<u>No</u> Yes	Yes	Yes	<u>No</u> Yes	<u>No</u> Yes	<u>No</u> Yes	Yes	No (only due in limited instances)	No provision
<i>Yemen*</i>	Yes	Yes	No	Yes	Yes	Yes	Yes	No	Yes	Yes	No provision

<sup>1</sup> Labour Law of 2003, with amendments in 2008. <sup>2</sup> Labour Act of 2003. <sup>3</sup> *Serame Khampepe v. Muela Hydropower Project Contractors and four others* (1997). <sup>4</sup> Recent administrative order issued. <sup>5</sup> Except in cases of termination for unlawful discriminatory reasons and under collectively bargained "just cause" requirements. <sup>6</sup> Employment Contract Law, 2007. <sup>7</sup> For facilitation of consultation. <sup>8</sup> Employment Measures Act, 1966, amended in 2009. <sup>9</sup> Labour Standards Act, amended in 2003.. <sup>10</sup> See country study in the main text for details. <sup>11</sup> 1999 amendments. <sup>12</sup> Amendment in 2004. <sup>13</sup> Amendments to Labour Code in 2007. <sup>14</sup> However, employer is liable to pay compensation in an amount equivalent to the period of notice due if notice requirement is not observed. <sup>15</sup> 2009 amendments not registered in the 2009 Note. <sup>16</sup> May be provided in employment contract.

