

Firing at will – the employers' response to the crisis

by Klaus Lörcher

The ILO convened a tripartite expert meeting in April 2011 to discuss obstacles to the ratification of Convention No. 158 on termination of employment. This is the most important international treaty on basic principles for the protection of workers against unjustified dismissal and on basic rights in the case of the termination of employment. At the end of the meeting, the employers suggested a simple but totally unacceptable and even unpredictable 'solution': abrogating the Convention.

This incredible demand has to be put into context. It should in particular be clarified whether it reflects the general opinion of employers. An analysis shows that they display a remarkable inconsistency in their approach to this Convention. At the time of adoption, in 1982, the employers' spokesperson had thrown his weight behind the Convention: "[S]ome employers will abstain or vote against the adoption of the instruments, in particular of the Convention [...]; I nevertheless hope that a great majority will come out in favour of adopting the proposed Convention and Recommendation." (ILC 68th Session, 1982, Record of Proceedings p. 35/3). In 1987 they had agreed that it should be promoted as a priority convention. However, after the fall of the Berlin Wall, employers started to change their attitude. Indeed, in 1995 they refused to recognise the Convention as "up to date". Conversely, in 2009 they confirmed its relevance in the ILO's Global Jobs Pact and in 2010 they fully supported the ILO HIV and Aids Recommendation No. 200 that refers to Convention No. 158 as the relevant provision to protect workers suffering from HIV/Aids against unjustified dismissal. This year, they changed their attitude once again and opposed the promotion of the Convention and have even called for its abrogation.

These glaring inconsistencies are obvious and cannot be considered as a 'good faith' approach.

This is even more striking when looking at the substance of what employers are opposing. Convention No. 158 edicts a number of very basic principles concerning the termination of employment which can be considered as fairly modest and which are often supplemented by further flexibility clauses:

- The employer has to give a valid reason for termination of employment. Trade union activity, race, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin are explicitly defined as not being valid reasons. The burden of proof for the existence of a valid reason for the termination shall not rest on the worker alone.
- A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof.
- A worker who considers that his or her employment has been unjustifiably terminated shall be entitled to appeal to a court or another impartial body.
- A worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to a severance allowance or other separation benefits or benefits from social security provisions or a combination of both.

- When the employer contemplates layoffs for reasons of economic, technological, structural or similar nature, the employer shall provide the concerned workers' representatives with the relevant information in good time and consult on measures to be taken to avert or to minimise the layoffs. The employer shall also provide measures to mitigate the adverse effects, such as help to find alternative employment.

While these principles shall in general apply to all workers in states party to the Convention, they can exclude certain groups of workers; enterprises of a certain size; those working under contract; or those who are temporarily or casually employed. However, they shall provide adequate safeguards against recourse to contracts of employment for a specified period of time. The aim of this measure is to deprive workers of the protection afforded by the Convention. Furthermore, when submitting their first report after ratification to the ILO, governments have to declare which other specified groups they exclude (but they cannot exclude any more groups after this point in time).

Against this background, employers are arguing that in the 21st century it is too much of a burden on them to tell workers why they are being fired. Giving workers advance notice about dismissal could also create unsustainable costs. Furthermore, there should be no possibility for workers to appeal against a dismissal as this would imply inappropriate third party interference in the employment relationship and more generally in entrepreneurial freedom. Moreover, governments should have the right to exclude new groups of workers from the scope of the convention at any time after ratification. This would mean at the end of the day that governments could ratify without the necessary transparency and legal certainty. Finally, employers oppose the Convention because the ILO supervisory bodies, in particular the Committee of

Experts for interpreting the Convention, are allegedly not taking into account the employers' needs. However, the Convention is about protection of workers and does not mention employers' needs. Thus, they ask the Committee to deviate from the Convention itself which is against the very substance of its mission.

This is not an isolated attack on the ILO's standard setting and supervisory mechanism. It is well known that employers are vigorously opposing the right to strike. Particularly in times of crisis, these two elements obviously play a key role in their overall strategy against international standards.

For those who think that collective bargaining, labour law in general and the protection against unfair dismissal in particular are essential for ensuring that workers in modern societies are not proletarians but citizens, this hostile attitude against Convention No. 158 is an attack on a key pillar of social peace and human dignity.

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