ished, only to be replaced by other bodies with similar characteristics. Experienced and effective organizations—the key to success—are never allowed to develop by the politicians.

SOME RECENT DEVELOPMENTS RELATING TO LABOR DISPUTE RESOLUTION IN FRANCE DURING 1982

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French labor law has undergone some important changes in the past two years, since the elections of May and June 1981 which brought to power a new left-wing majority. During the single year 1982, four statutes were voted by the National Assembly with the largely politicized purpose of granting "new rights to workers." These statutes concern such important subjects as the rights of workers within the enterprise (law of August 4), employee representation at the plant level (law of October 28), collective bargaining and settlement procedures (law of November 13), and health, safety, and labor conditions committees (law of December 23).

As it is impossible to cover such broad items in a brief survey, we shall restrict the present observations to provisions dealing with the role of courts, arbitrators, and other bodies in the resolution of labor disputes. Such provisions are of two kinds: some relate to the settlement of employee grievances following upon a disciplinary action of an employer, while others affect more generally the so-called "procedures for the settlement of collective labor disputes."

I.

Until recently, an employee who allegedly had been unfairly disciplined by his employer had no claim of any sort and no legal procedure was available to him. Only in two particular situations could he bring his case before a court: (1) when he could provide evidence that he had not committed the act for which he had been disciplined—the question at issue then being one of fact; and (2) when the employer could be charged with a *"détournement de pouvoir"*—that is, with having used his right to discipline the

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employee for a purpose other than that for which the right had been granted him. This concept of *"détournement de pouvoir,"* which had been borrowed from administrative law, was interpreted very narrowly by the courts and normally required, for its application, an act of deliberate bad faith on the part of the employer. If this were the case, the court could set aside the discipline and deprive the employer's action of any effect.

However, in no case did the judge have the power to determine whether the sanction imposed upon the employee was proportionate to, or justified by, the action for which he was disciplined. Indeed, the judge could not determine that the sanction was too severe and substitute his own decision for that of the employer. Management's discretion prevailed in these cases.

Limits on the discretionary power of employers were first established in cases of disciplinary discharges. A number of collective agreements and later, in 1958 and 1967, statutory law provided that an act of serious misconduct *(faute grave)* on the part of an employee would be a legitimate basis for an immediate dismissal without previous notice and without severance pay, but it was also clear that employer actions based on the concept of *faute grave* were subject to court review. Thus the judge could make sure that the sanction was proportionate to the employee's misconduct. Still more important was the requirement, introduced by the law of July 13, 1973, that any dismissal, whether disciplinary or not, should be based on a "real and serious" cause, failing which the employee could obtain damages (but not reinstatement). The "reality" and the "seriousness" of the cause advanced by the employer for his action were, of course, evaluated by the judge. This new regulation had important consequences for an employer's power to discipline, not only when employees were dismissed, but also when they were suspended, demoted, transferred, and so on. All an employee had to do in such cases was to reject the sanction and run the risk of discharge, thus giving a judge the opportunity to verify the existence of a "real and serious cause."

However, the 1973 regulations were not regarded as sufficient, and the legislators enacted a new and broader law on August 4, 1982, which, in effect, established rules applying to disciplinary actions that were very similar to those on dismissals. Notably, an employee who has been disciplined by any sanction other than dismissal now has the right to challenge that discipline in court and to have a judge decide whether or not the

sanction is appropriate for the misconduct. If the judge finds that the sanction is unjustified or excessive, he has no power to reduce it, but he may set it aside or nullify it; thus a judge's power in these cases goes beyond his authority in dismissal cases where he is limited to awarding damages. But as in cases of dismissal, the law expressly provides that the burden of proof lies not with only one party, but with both. It adds a supplementary note, however, stating that "the doubt, if any, benefits to the employer."

This change in the law is very significant as it gives the labor courts an overall power of review of all disciplinary matters. Besides some doubts about the propriety of the reform, there are real fears that the new system will lead to further congestion of the courts whose caseload had already increased to a dangerous level during the past decade. It is still too early to say to what extent these fears are justified and to describe the real impact of the new legislation.

II.

The law concerning dispute settlement procedures makes a fundamental distinction between individual and collective disputes.

Individual disputes are necessarily disputes over rights. In the absence of any sort of grievance procedure (none is imposed, and rarely can one be found in a collective agreement), the normal forum for such disputes is the specialized labor court, the *conseil de prud'hommes.* This court's jurisdiction is fixed by statute, which is *d'ordre public* in the sense that it cannot be disregarded by private agreements, either individual or collective. The result is, although it is always possible for the parties to submit an existing dispute to a different settlement procedure, such as conciliation, mediation, or arbitration, they may not provide for the submission of any future dispute to an alternative procedure. No such provision as, for example, an arbitration clause in a collective agreement can limit the jurisdiction of the labor court and deprive an aggrieved employee of his right to bring an action before the judge. This explains why arbitration of individual labor disputes is practically never used and why such disputes are brought before the labor court without any previous attempt to settle the matter by conciliation or otherwise. It is precisely to compensate for this lack of a screening procedure

before a case comes before a labor court that the law requires the court itself to attempt to conciliate the matter. But this attempt is regarded as part of the judicial procedure; it is, in fact, the first step of the labor court procedure which must necessarily precede the adjudication stage. Statistics show that conciliation is successful in about 20 percent of the cases.

Collective disputes may be disputes over either rights or interests. When they involve rights, they always may be brought before a court which is not, in this case, the specialized labor court (whose jurisdiction does not extend beyond individual disputes), but the ordinary court—that is, the *tribunal de grande instance.* There they are dealt with like any other legal dispute, and there is no special rule that deserves to be noted here.

The ordinary court does not always appear to be the best forum for the resolution of disputes of this kind, and it is not at all suitable for the settlement of interest disputes. This is why the law provides for other special extrajudicial procedures that are designed to help the parties reach a peaceful settlement and avoid strikes or other types of industrial action. There are three such procedures: conciliation and arbitration which were introduced in the law in 1892, and mediation which was added in 1955.

For many years conciliation was purely a voluntary procedure; however, it was made compulsory in 1936, with two sanctions attached. A strike called without a prior attempt at conciliation was unlawful and the case was automatically referred to an arbitrator. In 1950, conciliation remained theoretically compulsory, either by provisions in the collective agreement or by statutory provisions, but the legal context changed so that the obligation imposed on the parties to conciliate ceased to be effective. The law no longer required conciliation prior to an industrial action, and the resort to arbitration was now dependent upon the good will of the parties. The result was that the procedure lost most of its importance and was used less and less frequently except in a very informal way. The act of November 13, 1982, changed the law to conform with practice by providing that conciliation was to be purely voluntary.

The new act has not made any significant changes with regard to mediation and arbitration, which means that these two procedures are bound to remain as ineffective in the future as they were in the past. Mediation can be imposed on the parties, but only on the initiative of public authorities and, in fact, it is rarely

resorted to except where some major conflict has an impact on public opinion. It is a process by which the government tries to persuade the people, and especially the parties, that it is "doing something," but even here mediation is often doomed to failure. However, during 1982 it was successful in resolving two notable conflicts in the automobile industry—at the Citroen and Talbot plants—where the issues were very similar and were submitted to the same mediator. The situation with regard to arbitration is even gloomier. After a period of great success when it was compulsory (between 1936 and 1939), it now has fallen into almost complete disuse after it was made voluntary in 1950, and the superior court of arbitration meets only rarely.

The National Assembly deliberately refused to enact any statutes in 1982 that would have revived, or even revitalized, these procedures because, in fact, the members have lost all confidence in their efficacy. The experience of the past 25 years has shown that informal collective bargaining is the only effective procedure through which labor and employers can reach agreements and it is not a process—at least in the French environment—that can be regulated by law. It is only alluded to in the Labor Code, but the provision that mentions it among the possible procedures for the settlement of labor disputes is merely a theoretical statement with no practical consequences.