CHAPTER 7

PRIVACY IN THE WORKPLACE: INTERNATIONAL PERSPECTIVES

W. GARY VAUSE*
ROGER BLANPAIN
MORDEHAI MIRONI
JACQUES ROJOT

W. Gary Vause: Since publication of a seminal article by Samuel D. Warren and Louis D. Brandeis in 1890 on the topic, "The Right to Privacy," there has been a growing awareness that American law must recognize that right as an important element of a free society. Interestingly enough, the greatest advancements in this area have occurred only in recent years, leading one commentator to observe that employee privacy is the "sleeping giant" of employment issues in the 1990s. There are several social phenomena that have converged in American life to generate greater employer concern and inquiry into areas that traditionally have been considered, at least by most employees, to be strictly matters of private concern.

Employers increasingly have been troubled by issues of workplace security, resulting in their attempts to identify potentially unstable or dangerous employees. Employers have been troubled by workplace health issues such as smoking, the spread of infectious diseases, and alcohol and drug abuse. They have been troubled by workplace relationships and fraternization that might lead to complaints of sexual harassment or even to domestic violence that can spill over into the workplace.

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*In the order listed: W.G. Vause, Member, National Academy of Arbitrators; Associate Dean, Stetson University College of Law, St. Petersburg, Florida; R. Blanpain, Professor of Law and Director, Institute for Labor Relations, Catholic University of Leuven, Belgium; Overseas Correspondent, National Academy of Arbitrators; M. Mironi, Professor of Law, Tel-Aviv University, Israel; Overseas Correspondent, National Academy of Arbitrators; J. Rojot, Professor of Management and Industrial Relations and Dean, Department of Management, University of Paris-Pantheon-Sorbonne, France; Overseas Correspondent, National Academy of Arbitrators.

Such employer concerns often have led to restrictive guidelines and employer rules. For example, there has been an increased incidence of testing for substance abuse, employee surveillance and monitoring, searches, applicant screening, physical examinations, use of polygraph tests, or the so called nonmechanical honesty tests, and related investigation and control techniques. These developments raise a host of interesting legal issues. Because such activities also may result in discharge or other discipline, and possible contract violations, they also raise challenging issues for both arbitrators and advocates in labor-management relations.

The National Academy has assembled a prestigious panel of international experts who will share their perspectives on these important employee privacy issues. I will ask each of our three international panelists to briefly discuss their respective legal and industrial relations systems and provide an overview of the legal context in which they consider workplace privacy issues. As will be noted, each system represented on this panel differs from that of the United States, although to varying degrees. I then will ask them to comment on a series of hypothetical case studies that represent typical problems faced by arbitrators (and courts) in the American workplace. They will share with you their perspectives on how each problem would be analyzed in their own country. After each has commented on the hypothetical, the audience will have an opportunity to also comment or ask questions.

A View From Belgium

ROGER BLANPAIN

I am extremely pleased to see again so many friends and acquaintances whom I have met over the years since 1967 when I first had the occasion to come back to the United States after studying at Columbia University. I have enjoyed meeting with members of this Academy, the Labor Law Group of the American Bar, and the International Bar. I am very impressed, I must say, with this Academy for both its content and style. As to content, this Academy seems to be a kind of a fountain, an oasis in the desert, where everyone is doing well in the broader sense of the word. As to style, the graciousness and friendliness of this organization is refreshing, moving forward with both the young and old generations, with the seniors being where they should be—amongst other seniors on the first row. This moving of generations makes me think of a fantastic,

beautiful painting in Brussels, a primitive medieval painting of the four generations of Flemish warriors.

The theme for today, workplace privacy issues, was discussed by us for the first time at a luncheon in Sydney, Australia, hosted by the Academy at the occasion of the International Industrial Relations Conference in 1992. As a matter of fact, I suggested the theme, and some of you who were there may remember the case I described, which brought me to the front page of the *International Herald Tribune.* The case involved construction of the Walt Disney Park in Paris. There was a strike on then, and an American journalist telephoned to ask why the workers were striking against Walk Disney. He explained to me why they were on strike, and I said: "Well, this is crazy, this is unacceptable." Management can impose requirements for haircuts, and prohibit earrings, rings, and certain styles of clothing. But to determine the color of the underwear of the French employees in Paris—no way, that is against their rights of privacy. This example must have tipped the balance in favor of the topic because it was then accepted for the program in 1992.

With respect to our topic of privacy, first, I offer one point of warning. U.S. labor law is one thing, but European labor law is a completely different thing. In Europe we have one common market, yet all the systems of the individual states remain very different. It may look like complete chaos, but apparently that is what we like. So forget about your system when listening to our presentation. The questions are the same, but the answers may be completely different.

Belgium, a country of 10 million people, is a virtual superpower these days. We have one king, two queens, and three prime ministers. We have a federated state and labor law is federal, with extensive legislation. Sixty percent of the workers are organized. We have a minimum wage of $1,300 a month applicable to the entire private sector. Collective agreements cover about 98 percent of Belgium's workers. We have the labor courts, but no labor arbitration. We apply the deductive legal method, which means that lawyers first ask what is the principle involved when a case comes up. What are the rights and obligations of parties? We deduct and go from there.

Belgium recognizes the principle of privacy; it is a fundamental human right that was written into the constitution in 1994. Article 22 says that all persons are entitled to a private life and the private life of their family. This is the overall prevailing principle. If someone wants to invade my privacy, such as an employer wanting

to know things about me as an employee, he must have a good reason and inform me of those reasons. Since 1992, Belgium has had a law on data and data collection. Data collection must be justified and workers must be informed. Belgium has some cases, and I could go on at length on some of the cases, but I am not going to do that. We really don't know what is happening in the enterprises, nor do we know whether there are many cameras because the employers wouldn't tell us. Employees are in a weak position because the labor market is very bad. In the private sector there is what I call "social Parkinson." Unemployed people are afraid of not finding jobs and the employed are afraid of being fired. When we ask employees whether or not their employers respect their privacy, they do not answer because they fear losing their jobs. This makes it very difficult for us to accumulate data in this area. We have no system of reinstatement and a case may last for years. Workers are in a weak position and depend on union presence in the enterprise.

I would warn that there is an information phobia in Belgium. For example, I am President of the Alumni Association of my school. We have close to 12,000 alumni, with the wrong addresses for 3,000–4,000 of them. I cannot get the correct addresses anywhere. No one is going to give me the addresses now because, in a sense, I am prohibited from collecting the addresses. One should realize that new technologies can do a lot, but also can lead to danger. We have to respect privacy by balancing between the fundamental principle of privacy and a society with new technologies.

A VIEW FROM ISRAEL

MORDEHAI MIRONI

My presentation will be devoted to the right to privacy in Israel, including a short description of the substantive laws and procedures that can be invoked by an individual or a union in order to protect the right to privacy. When it comes to privacy rights in the workplace, Israel has lagged behind the Western world. Although the law protecting privacy was enacted in 1981, Israeli courts have seldom dealt with the issue of privacy in employment and labor relations. There are only a handful of court decisions and all are from recent years. The vast majority of these cases deal with the issue of privacy raised by employers as a defense against disclosure

of information sought by unions or individual employees. This situation indicates the significantly low level of awareness of the Israeli public when it comes to infringements of their privacy rights. This phenomenon can be explained by the particular set of goals and priorities that formed Israel's national agenda during the first few decades of statehood. During those years, an ideology of collectivism prevailed in Israel, under which individual identity was subordinated to the collectivist idea. The culture emphasized values typical to a large and cohesive family in a commune, such as solidarity, mutual aid, modesty, and conformity. Individual rights were subordinated to the collectivist mission. Close social links among people and a strong sense of community had priority over individual identity and personal needs. The universal compulsory reserve army service is an example. The army may mobilize private heavy equipment and vehicles, such as trucks and jeeps, including the kibbutz. But these are only a few examples of the aforementioned ideology and culture.

In such a culture, concerns about privacy will be considered out of place, because the legal protection of individual privacy is a low priority. In recent years we have witnessed a change. Parallel ideology and culture have developed on the premise of individualism. As in Belgium, the legislature began to enact the Israel Bill of Rights in 1992. Most important to our topic is the basic law of human dignity and freedom outlined in section 7 of the Bill of Rights. It provides that every person is entitled to privacy and confidentiality. The fact that Israel is in a transition toward protecting individual privacy explains my eagerness to participate here, sharing with you my own thoughts, and learning from your experience with the issue of privacy.

Now I return to the institutional setting of substantive norms and procedures as they relate to the protection of privacy. The industrialized system in Israel is predominately a collective bargaining system. As in many other Western countries, union membership in Israel has been declining for the last 15 years. But still, 60–70 percent of the work force is unionized. The main source of employment rights and duties is the network of collective agreements that consist of national industrywide multi-employer agreements. In addition, the Israeli legislature has enacted a broad spectrum of labor statutes that include a broad array of labor standards that regulate the collective bargaining process, as well as the process to be followed in the settlement of labor disputes. As a

matter of law, collective agreements do not deal with the issue of privacy. Consequently, the only sources of protection are substantive, statutory, and judicial rulings.

In addition to the Basic Law—Human Dignity and Freedom, three other statutory sources may have a bearing on the issue of privacy. First is the duty to act in good faith. The Law of Contracts provides that a contractual obligation must be implemented in good faith. In a case before the High Court, a Justice remarked that a dismissed employee in Israel might be able to show that the employer is forbidden from dismissing the employee when the dismissal is not in good faith, constituting an abuse of right of dismissal. Second, section 30 of the Law of Contracts provides that a contract or a contractual provision that is illegal, immoral, or contradicts public policy is null and void. The third source is privacy law. These statutes provide that no person should infringe on the privacy of another without consent. One must stipulate to infringements of privacy such as spying, trailing, and photographing persons while they are in their private domain. Infringement of privacy is both a civil wrong and a criminal offense. The impact of the Basic Law—Human Dignity and Freedom on the private sector is not clear. In a recent decision, the National Labor Law Court held that although the Basic Law has no direct implication on the private sector, the principle and values that are imbedded in the Basic Law may have an indirect inference on private contractual relations through the concept of contracts that contradict public policy.

Let us now move to a brief description of the procedures. It is a dual system composed of labor courts and well-established grievance and arbitration procedures. Israel has a two-tier system of labor courts composed of five regional courts and one National Labor Court. In both, the judiciary is composed of professional judges and lay judges appointed by the Minister of Justice and the Minister of Labor upon recommendations made by employee associations and unions. National Labor Court decisions are not appealable, but they are subject to judicial review by the Supreme Court sitting as the High Court of Justice. It is interesting to note that two of our present Supreme Court Justices, including the new Chief Justice, were formerly lay judges in the National Labor Court.

Nearly all collective agreements provide for an informal two- to three-step grievance and arbitration procedure. The first two steps are bipartite committees composed of equal numbers of management and union representatives. If an agreement is not reached by the bipartite committee, the dispute is sent to arbitra-

tion before a single arbitrator or before our own version of a tripartite arbitration board. Under the latter models, the two partisan arbitrators conduct a full hearing and attempt to reach a solution. If they fail, the bipartisan arbitrators select a neutral arbitrator with the help of the disputing parties. From a labor relations perspective, the grievance procedures have been extremely successful. The vast majority of cases are settled by the bipartisan committees and only a few cases end up in arbitration.

The division of labor between the contractual grievance procedure and the labor court is rather problematic. I just want to say something about it because I think it is of importance. Broadly speaking, in Israel the rights bestowed upon employees by labor legislation are not arbitrable. In this way our system is similar to the system in Belgium. As to rights under collective agreement, I would like to refer you to the seminal article written by your former president, Professor Feller. Our theory of collective agreement is different. In Israel the collective agreement operates by bestowing rights and imposing duties in two levels: the obligatory or collective level and the individual level. If a personal provision in the collective agreement is breached and there are 100 employees represented by a union, it is possible for the union and the employees to submit 101 claims to the labor court. Employees can make 100 claims and the union can make one claim. But what happens when there is a contractual machinery of grievance procedure? As in the United States, the grievance and arbitration procedures may only be invoked by the union. At the same time, individual employee claims are not controlled by the procedure. As a result, if an employee files a claim, the court has jurisdiction. If the union invokes the grievance arbitration procedure and the final decision adheres to the norms of natural justice, then the decision is binding on individual employees. This is a chaotic system. If you are now confused by the complexity of this system it means two things: First, that lawyers were successful in messing up the system again; and second, that my presentation was indeed precise and clear. Thank you.

A VIEW FROM FRANCE

JACQUES ROJOT

Thank you Mr. Chairman. I want to join my colleagues in expressing my gratitude to the National Academy of Arbitrators for inviting me. I won't try to top the jokes already said. I just want to

go straight to the heart of the matter. I think that the best way to introduce my discussion is by outlining the five major differences between the United States and France when it comes to industrial relations and labor law.

First, France is a country of statutory law based on Roman tradition. This means that the main source of law derives from statutes. However, I should point out that the High Court can consistently interpret a statute in a way different from what the statute was meant to provide. Statutes are generally poorly written and the court can consistently misinterpret statutes. For example, even though reinstatement was possible under an existing statute, it took the High Civil Court 40 years to agree to the reinstatement of an unlawfully dismissed employee.

Second, the individual contract of employment between the individual employee and the employer is probably the most important legal concept in French labor law. Collective agreements play only a secondary role. Everything has to be interpreted in terms of an individual's employment. A strike triggers the suspension of a contract of employment. Therefore, at the time an employment relationship comes to life, it is assumed that the contract of employment includes all applicable statutory law, collective agreements, and regulations. As soon as an employer signs a collective agreement with a union, all employees are covered because the agreement becomes part of their individual contracts of employment. This is why, by definition, the rule for collective agreements is a secondary rule.

This brings us to the third major difference. There is no such thing as an exclusive jurisdiction or bargaining unit in France. They are not needed because individual contracts of employment regulate the relationship between individual employees and the employer. Because there are no bargaining units, unions coexist at the workplace by competing for the representation of employees on consigned collective agreements. When these consigned collective agreements are signed, they become binding on everyone.

The fourth major difference is that we have a dual system of representation. In France, unions have become weaker and weaker. They now represent at best 9 percent of the labor force, a decrease of 20 percent in the last 25 years. But this weakness is to some extent hidden behind the fact that there is the work council system for employee representation to which union representatives are elected. Therefore, unions are not as weak as membership figures might indicate because they control the work council

system. The system of employee representation stops short of the German co-determination system. Our system is a system of information and consultation.

Fifth, we do not have arbitration. We have a system of labor courts. Our system of labor courts consists of elected labor and umpire representatives. There is a right to appeal and the right to go in front of the highest court as part of the normal legal system. These are basically the five main differences that will come into play when we discuss the cases which our Chairman has prepared.

As far as privacy is concerned, in the past 25 years we have moved from almost no right to privacy for employees to more extended rights. The legal doctrine of 25 years ago was the doctrine of the employer as the master of the shop. As a result, the employer was the only one to make decisions regarding employee competence, hiring, promotion, and behavior on and off the job. This has changed very slowly because of a massive wave of statutory laws that have been interpreted by courts in ways not favorable to employees. In the late 1970s, a law was passed to regulate the use of data bases and their effects on individual freedom. The civil court moved to provide individuals a right to privacy in labor relations. The labor court also moved to better protect individuals against discrimination and harassment. Finally, two years ago an act was passed to limit an employer's power to investigate employees on matters regarding employment. This is very important because the rate of unemployment in Europe is quite high. Thank you.

Discussion

W. Gary Vause: Thank you very much. I would like to give credit to Alvin Goldman of the Program Committee for supplying the hypothetical cases we will be using. For the benefit of those of you who do not have a copy of the cases, I am going to briefly read through them as we come to them. Again, the procedure is that each member of the panel will give us his response and critique of the case within the context of his individual system. The first case is called the Personal I.D. Number Case and it reads as follows:

> An enterprise maintains all of its pay and personnel records (including medical records) based on a personal identification number that is identical to the number used on government social security or insurance documents. This same number appears on the employee's photo identification badge which must be worn while at work. A few workers object to the use of such numbers because it violates the tenets of their religious belief that identification numbers are an instrument for the

work of the Devil. Many workers object to the use of such numbers because they think they are a potential means of intruding upon their privacy.

I would like to ask the speakers to assess this in the order in which they appeared earlier, beginning with Roger.

Roger Blanpain: At this point we do not have a religion of that kind. Therefore, that will not be a problem in Belgium. The problem of using numbers is not a real problem for us because everyone has a number, which is the number of the national register. That number is used on I.D. cards. The use of this number is an accepted fact of life. Those who have the information are responsible for ensuring that the system functions in such a way that only those authorized would have access to the information. Therefore, this is not a problem.

Mordehai Mironi: The use of a uniform identification system for personnel records, such as birth and social security numbers, is not an issue since Israelis are born into an automatic uniform identification system that follows them from birth to death. Everyone has an official personal identification number given by the Ministry of the Interior, and all adults have to carry their identification cards at all times. All government records, driving licenses, and passports contain the official identification numbers, and the same numbers are used by insurance agents, universities, unions, medical care providers, etc. Thus, it is only natural for employers to keep personnel records using the same official identification number. However, many employers who use employee badges provide the employees with a system of in-plant identification numbers that do not use the official identification number. I think that the use of official personal identification numbers for employee badges should not be permitted because a potential unauthorized user may learn the number and try to access all information kept on this individual. The employer should utilize another common and less intrusive instrument for identification such as an in-plant identification system.

Jacques Rojot: This problem would fall under the Computer Science and Freedom Act. This Act created in 1978 a national commission to provide guidance on the creation of data bases. The act also guarantees that information such as union membership and employee life styles would not be included in data bases. Employees are given access to the data base to monitor its accuracy, and to ensure that the information included in the data base is being safely kept by the employer. Employees rarely object to the

data bases, unless the employer is in noncompliance with the 1978 Act. In France, there is a social security number similar to the one in Belgium and Israel. These social security numbers are used for a variety of purposes. However, the national commission disapproves of the connection of different data bases. The national commission would probably not allow the use of the social security number on badges. The number may be used in the data base, but it is unlikely that the commission would allow the number to be worn on employee badges. Another point is medical records. The employer is only allowed to store basic physical data of an employee and data for fitness for certain kinds of jobs. The person who decides fitness or unfitness is a labor physician. The labor physician cannot communicate any information regarding the health of employees beyond the fact that they are fit or unfit for their type of job. Therefore, medical records cannot be stored. The courts would probably not accept religious objections. An employment relationship limits freedom of religion. In a recent case, an employee objected to working on a Saturday morning on the ground that it violated his private life because he had to care for an invalid daughter. The court rejected the employee's argument. Therefore, it is unlikely that the "religious" argument would be accepted by the courts.

W. Gary Vause: Again, we want to encourage you to participate. If you have questions for the panelists, or if you have comments to make with respect to your own observations and experience in similar kinds of cases, either in terms of legal requirements in the United States, or perhaps experiences you have had as arbitrators or advocates in similar cases, please step up to the microphone and make your comments. Does anyone case to make a comment or ask a question about this particular subject or this case scenario?

Roger Blanpain: I would like to say something on what Jacques said concerning computers and data bases. I'm president of the governing board of the Cross Data Bank for Social Security in Belgium. We have many different institutions collecting the same information for pension funds, sickness funds, and insurance funds for work accidents. Our idea was to combine those data bases. We have no data of our own in the cross data bank, but we know where the information is, and we authorize organizations to go to another organization to collect the information needed. In Belgium we have 10 million people, and there are 10 data for each Belgian. This is 100 million data in Belgium for several security purposes. Today, our collective data bases have been in operation

for three years and the idea is a model for other European countries. For example, now pensions are paid much more quickly. It used to take ages. We now have around 3,000 institutions linked to our collective data bases, and every day information is efficiently exchanged.

W. Gary Vause: I suspect the next hypothetical case will be more familiar to you. It is one that does occur with a great deal of frequency in labor-management relations in the United States. It is called the Excessive Monitoring Case.

> Employees at a pharmaceutical research laboratory complain that the employer is engaging in excessive monitoring. Each employee must at all times while at work wear an electronic locator card that emits a signal enabling a computer to locate the worker's whereabouts at any time. Video surveillance cameras are located throughout the facility except in the toilet stall areas of bathrooms. Employee packages, purses, and pockets are subject to security searches when the employee enters and leaves the facility. Telephone calls, electronic mail, and computer word processing files are subject to security monitoring.

Roger Blanpain: Is all this necessary? Employers need to show it is necessary for them to know where employees are exactly located at all times. They would have to prove that they have a good reason. Video surveillance is not accepted by courts in Belgium. In the past, the court prohibited a bank and a big retail store from surveilling people while they were working. An employer can have security cameras with the permission of a judge. Security searches are authorized. However, physical searches can only be done by the police. Therefore, the employer would need to have the police come in to conduct the searches. Employers are also allowed to know when employees use the company phones and where they are calling. However, the employer cannot investigate the content of the calls unless it involves a criminal activity and the employer has secured permission from a judge.

Mordehai Mironi: As Roger said before me, we really don't know how common these practices are in every country. It appears to me that most of the practices described in these hypothetical situations are uncommon in Israel. Today more employers are considering monitoring telephone calls in order to control personal telephone calls during working hours. Israelis speak a lot on the telephone during working hours. In some plants, especially in the food industry, the guards may check the employees' bags before they leave the plant. Banks and department stores in Israel use hidden video cameras in order to protect their institutions against robbery

and shoplifting. However, cameras are not used to monitor the work force. Considering the absence of case law on the matter, it appears that employees' privacy is being protected by the Basic Law—Human Dignity and Freedom and the Law of Privacy. Most of these statutory protections will render such practices unlawful, although there may be close decisions in court. I think, as Roger said before, the employer would have to justify the encroachment upon an employee's privacy. They will have to demonstrate a concrete interest or danger to the enterprise. The employer would have to further show that the company is unable to protect this interest using less extensive means of monitoring and surveilling. I just want to tell you that I was involved in a case where a company discovered that, for a long period of time, a manager had his own business competing with his employer. They discovered this by activating the memory on the fax machine and printing out every letter that came out of that machine for the last two years. The company concluded that these were grounds for dismissing the manager. I don't know if there was another way for the company to discover such wrongdoing.

Jacques Rojot: We are somewhat in the middle from the two other situations. Regarding surveillance and monitoring of employees, there have been a few cases recently. It is possible under two conditions. First, employees must be informed beforehand that there will be electronic surveillance and monitoring. This cannot be done behind their backs and without their knowledge. That is condition number one. Condition number two is that, in order to be lawful, this practice must be justified with some good reason. We can look at the characteristics of the task to be performed, either by the nature of the work or by specific circumstances. Therefore, we cannot have general surveillance on everyone at all times. It can be applied in certain areas for employees with special confidential responsibilities, or it can be used after security leaks. This applies also to the monitoring of telephone calls, as well as the monitoring of electronic mail, or correspondence between two private persons. Employers have the right to forbid personal calls during work hours, but they have no right to listen to the content of those calls. It is not clear whether evidence gathered by video cameras could be used in court against an employee because the lower court has recently held that videotapes are easy to tamper with. The decisions about searches are basically the same. An employer cannot conduct general searches at all times. Searches have to be justified by specific facts. For instance, a search cannot

be conducted without the consent of the employee. The hypothetical situation of the electronic locator is one that has not been decided. The employer would probably have to prove that such an electronic locator is necessary. The burden of the proof would be on the employer. Also, it should be noted that the switchboards that companies use to record telephone calls or numbers called fall under the jurisdiction of the national commission for computer use. Such systems have to be approved by the commission before they can be used.

W. Gary Vause: It is useful to recall that from the American point of view, we do not have a basic right of privacy specifically addressed in the U.S. Constitution. However, some state constitutions do protect the right of privacy. There have been a number of statutory developments in recent years. Most of you may be aware that the Fourth Amendment protects employees against unreasonable searches and seizures where the state is involved. Increasingly, where police authorities may use private employers as an arm of the police to conduct searches, the Fourth Amendment may be invoked. This is also true in a private-sector setting with respect to such things as the monitoring of e-mail or the monitoring of telephones. You have to take into account the Electronic Communications Privacy Act of 1986, which basically amended Title III of the Omnibus Crime Control and Safe Streets Act of 1968. There have been a number of cases filed in this area. There is a very broad federal prohibition against wire tap that applies to virtually any kind of telecommunications. There are some exceptions to the statute that are relevant to the workplace. The two most common affirmative defenses in these cases are implied consent and the ordinary course of business exception. Let me read for you the third hypothetical, which is called the Personality Profile/ Handwriting Sample Case.

> A warehouse employee who has applied for a higher paid job in the purchasing department is required to take a personality profile test and submit a handwriting sample. She is told that the test and sample will be used in assessing her aptitude for the work, and her honesty, loyalty, and diligence. She protests that she should not be required to undergo these methods of evaluation in order to get the new job.

Roger Blanpain: I have no problems with this case. I think that if a person wants the job the employer certainly can perform a personality profile test provided that the test is conducted in a

professional way. A handwriting sample is not commonly used in Belgium because a number of people think it is really not a test. I don't see any problems with it.

Mordehai Mironi: I'll second this answer. I think it is a very common practice in Israel. Many collective agreements stipulate that the employment requires that the job applicant or employee who is being considered for promotion submit to a personality test. There is a significant number of employers in Israel who primarily use the graphological analysis at the entry level. As a result, it is quite common for employers who advertise job openings to require the job applicant to submit handwriting samples. Employers who use graphological analysis for decisions regarding promotion are likely to have sufficient handwritten notes in the employee's file. I just want to add that in Israel personality tests are conducted by authorized professionals. These professionals are highly regulated by law. The same is true regarding psychological analysis. The difference is that graphology is not a regulated profession in Israel.

Jacques Rojot: The situation is exactly the same in France. This may change if the powers of investigation vested in the employer are extended by the courts. Today, an employer has the right to submit a candidate for promotion to an investigation of a psychological nature but also has to attest in writing to the fact that the psychological investigation and the writing test have scientific value.

W. Gary Vause: One additional consideration about this problem, and it is really more of a legal issue than an arbitration issue, is the Equal Employment Opportunity Commission guidelines on test validation. The question I would raise as an attorney would be whether the screening process by employers has an impact on any protected class or classification of employees. Any comments or questions?

Alvin Goldman: In the interest of not making the question too long, I didn't describe what sorts of questions are included in the written psychological exams that are used in the United States. Occasionally, questions are asked if they are based on what is called the Minnesota Multiphasic Personality Inventory. These questions ask about religious beliefs, personal habits, frequency of urination, dreams, and fears. But these are administered by professionals. They are less universally accepted by the professionals today than they were just a few years ago. But would that make any difference? Would the fact that it is a certified professional who is administering the test or is authorizing the test be sufficient to remove any question or basis of challenge under your systems?

Roger Blanpain: Like in France, those who want to advise companies on the implementation of psychological testing and screening need to get permission from the government. You need to get a license, and that license is given after an investigation by a professional body. This is to assure that people are really qualified to do this. Including religion is not a good idea. We have a vague stipulation in nonbinding collective agreements in the national level where it is said that one should respect employees' privacy when hiring them, and that one should not inquire about the diseases of the grandfathers, grandmothers, or religion. How is this enforced? I don't know. It is possible to know a person's religion or philosophy by asking what kind of newspapers they read, whether they are members of an organization, or social security institution, which sometimes are organized along religious lines. I don't think that dreams and fears could be included in a professional psychological test.

Q: The hypothetical as stated doesn't say whether the job to which the individual aspires is covered by a collective bargaining agreement. If it were, I think that if the employer used the results of the test to determine who would get the promotion, most unions would file a grievance saying that is entirely improper. Employers would have to validate the test as a test in the line of what the individual can do on the job.

Roger Blanpain: Well I must say that, at least in Belgium, seniority is not given the kind of weight in collective agreements as in the United States. In our system, seniority would not be a determining element for promotion. Seniority may be an element, but it is usually left to the discretion of the employer.

Jacques Rojot: I think the same thing would apply in France. The employer may have to consider seniority, but it wouldn't go beyond that. Seniority wouldn't give automatic access to the job. It is up the employer to decide what he wants to do with the results of the test. It doesn't hurt to promote the person with the higher score on the test. He can just consider the result of the test. Regarding Alvin's question, the subjects that cannot be asked of a job candidate or an employee are religion, personal habits, life style, and sexual preference.

Roger Blanpain: Even with the Catholic Church as a guide?

Jacques Rojot: Recently the dismissal of a homosexual sexton by the most conservative segment of a parish of the Catholic Church was held unlawful.

Roger Blanpain: Religion can be an important issue in countries where you have a lot of private Catholic schools. For example, in my country 60 percent of the schools are private Catholic schools and 70 percent of hospital beds are in Catholic hospitals. I think religion plays a role in personal life. For example, if you are divorced, you cannot work in a Catholic school in Belgium.

Jacques Rojot: In our case it would depend on the level of the employee and the role of his position. For instance, a professor of theology could not switch religions. In a case where a teacher in a Catholic high school was fired when she got a divorce, the court held that the teacher could be fired. I think that is no longer good law. I don't think the court would hold that it is a justified dismissal, unless she had an administrative responsibility.

Q: I think that I would challenge such requirements. I would challenge them with the provision that deals with making reasonable rules. Most collective bargaining contracts have a provision about management's duty to make reasonable rules. It is one thing to use handwriting tests to identify someone's handwriting, but it is another thing to make those kinds of generalizations from psychological tests. I think I would challenge those tests.

W. Gary Vause: Moving on to the next hypothetical, the Medical Exam Case.

> Employees in an automotive assembly plant must take annual medical examinations. During the examination they are required to provide urine and blood samples, which are used to test for genetic traits, disease, alcohol abuse, and illegal drug use. Many of the employees object to providing the blood and urine samples for these purposes.

Roger Blanpain: No cases dealing with genetic screening have been decided in Belgium. When I was in Parliament I introduced a bill to make genetic screening almost impossible because it means that you can predict what the health situation will be for someone in 15 to 20 years. I think that we have to be extremely careful. Genetic examinations should be made only on the request of a medical doctor and not by private institutions for commercial purposes. I consider this to be inappropriate except in very specific cases. For example, pilots should be examined. As far as diseases are concerned, it would depend on what kind of disease. I think that the employer would have to prove the necessity of the examinations and a medical doctor, not the employer, should decide what kind of jobs require certain types of medical examinations. In Belgium, we do not require that everyone be subject to alcohol or

drug tests. Again, I think that such tests would have to be justified by the nature of the job, rights of third parties, etc. Obviously, employees should be informed and their consent should be obtained. I disagree with genetic testing.

Mordehai Mironi: Fortunately, in Israel we do not have problems with drugs and alcohol in the workplace. In Israel, some employers provide a yearly checkup as a fringe benefit to their employees. Others require that employees undergo periodical medical examinations. In such cases, the practice may be authorized by a collective agreement. Thus far employees have not objected to such mandatory medical examinations, nor have they objected to the fact that the results are given to the employer. This has to do with the fact that Israelis are not familiar with privacy issues. However, recently we had a case called *Noni v. State of Israel.* In that case, a state employee petitioned the Labor Court and the High Court of Justice for a declaratory judgment prohibiting an employer from forcing an employee to submit to medical examination. The employee, who was a diabetic, had an extremely bad record of behavior and was involved in several incidents of violence in his workplace. The state required him to submit to medical examination under a special authorization obtained from the public service court. The union of the state employees petitioned the Labor Court in order to challenge the legality of the authorization given by the public service court. The National Labor Court and the High Court of Justice decided that the medical examination was neither illegal nor immoral, and did not contradict public policy. However, the court refused to compel the employee to submit to the medical examination under a court order. The court further held that the state is free to take the employee's refusal into account in a decision regarding the employee's future employment. Because the hypothetical situation given to us takes place in an assembly plant in the private sector, the employer would probably have to prove that by requiring the urine and blood test, he acted in good faith. The employer would also have to prove that the test was for job-related purposes. Since the Basic Law—Human Dignity and Freedom is likely to control these kinds of cases, the test will probably be declared invalid in Israel.

Jacques Rojot: We have three different issues covered by three different regulations. First, genetic testing is unlawful. There is an act that provides that genetic testing can be performed only in research for scientific purposes and only with the consent of the person involved. Second, only a labor physician, who is bound by

his profession to secrecy, can inquire into the condition of an employee. It is unlawful for the employer to test for diseases. Finally, general testing for alcohol or drug abuse is probably unlawful. Such testing should only be lawful in specific cases and for specific jobs. For instance, alcohol abuse tests could be given to truck drivers or bus drivers, but not to all employees. If there is a situation where someone appears to be intoxicated, then alcohol or drug testing should be allowed.

Frances Bairstow: In practically all of your cases you talk about legal restrictions in the workplace, and discrimination is subtle. Efficiency is a reason why employers require sure examinations. Absenteeism, tardiness, and attitude problems motivate employers to demand such medical examinations. But what can employees do to protect themselves in the absence of unions? Do they have access to the courts? Do they have financial help? Is it an easy process? Is it a long, complicated process? Are the regulations so difficult and complicated that in effect they really don't help employees?

Roger Blanpain: I think that your point is extremely well taken. In my opening remarks I indicated that the employees are in a weak position unless a union is there to protect them. When there are no unions, employees are at the mercy of the employer. There is the case of an automobile company headquartered in Detroit that was secretly drug testing employees. Medical doctors were sampling urine and were making little crosses on employee files. When this practice was discovered, there was a big scandal.

The unions protested. However, workers supported the policy because they did not want to work with people who take drugs. It was a situation where workers supported the company policy while the unions were fighting against it. But I agree with you, the law does not sufficiently protect employees in my country.

Mordehai Mironi: The same would be true in Israel because in our country there is no reinstatement unless the claim was filed by the union or such remedy is secured through arbitration. As a result, if an employee complains in a nonunionized place he would be fired. There is no question about it, and there is no way for him to challenge it. He can use the good faith requirement and sue the employer. He may get some damages three years later or he may get $2,000 in damages because of the illegal medical examination. That is all.

Roger Blanpain: There was a case before the European Court which involved discrimination in Germany. A female candidate was denied employment on the basis of her gender. The judge gave

compensation to the woman and said that she was entitled to the amount of money she spent on the tram ticket to the place where the test was administered. That was one Deutsche mark and two fennigs. We know the Deutsche mark is very high these days. The case came up to the European Court and the Court held that national law should provide for decent sanctions and should also determine sufficient compensation.

Jacques Rojot: Most of the case law I have alluded to takes place after dismissal. It's a different situation when an employee is dismissed. He has quick, cheap, and efficient access to the liberal courts in France. He doesn't even need a lawyer. The law we outlined is so complex that most people are not familiar with it. Small employers and most employees do not know about it. I would say, that 9 times out of 10, the law of the International Commission on Competitive Science and Freedom is not applied except for union status and things like that because people simply do not know it exists.

W. Gary Vause: Are there comments or questions from the audience? I know that Alvin put the Sexual Liaison Case in the materials to wake up the audience in the middle of an afternoon. It looks like we may not be able to fully explore it, but let me get to the Sexual Liaison Case.

> Two assembly line employees in a computer manufacturing company are dismissed from work for violating a plant rule that prohibits workers from having sexual liaisons with any other company employee unless married to that other employee.

Incidentally, there is a case pending in New York that involves two employees who were discharged from Wal-Mart because they were dating. That case is being challenged under an unusual New York statute that prohibits such rules to the extent that they violate privacy. Other states are beginning to adopt such statutes, but you might want to follow what's happening in New York. Well, let's hear from the panel on this case.

Roger Blanpain: I don't know what a sexual liaison is, but there is no problem unless this would amount to harassment. What employees do after work is their own business unless it offends or insults the name of the company. We had a case, a very interesting case, where an employer fired a young worker found making love to the employer's daughter in the employer's car outside the company. This happened after work hours. The question is, was this just cause? This I will discuss with you tonight at the dinner-

dance, and I promise no sexual liaisons at the dinner-dance because that's a condition for membership in this organization.

Mordehai Mironi: The problem described in the hypothetical does not exist in Israel. However, the Civil Service Court as well as many collective agreements provide that two employees may not work at the same location or for the same employer if they are married. However, it is unlikely that such a rule would be enforced now since it violates the Employment (Equal Opportunities) Law of 1988. A law that prohibits workers from having sexual liaisons with other company employees will probably be declared invalid by the courts. There is no question in my mind. The basic approach in Israel is that off-duty conduct is part of the employee's private life and is not subject to employer control unless it adversely reflects on the employee's ability to carry out his job function in the employer's business. This approach is particularly important when employees are in positions of trust. For example, teachers who engage in immoral or highly controversial activities that contradict the values they allegedly represent may be dismissed. An employee can also be dismissed if off-duty behavior causes unreasonable difficulties with customers or co-workers. Since plant rules are considered part of the employment contract, the court may use the "blue-pencil" doctrine in order to nullify a rule that contradicts public policy. The declaration by the court invalidating the plant rule will render the dismissal "unjustified" in Israel. As to remedy, the general rule is that courts may not order reinstatement. However, employees will be entitled to compensation for unjust dismissal in addition to severance pay.

Jacques Rojot: There is no law in France establishing rules regarding sexual behavior of the types already discussed. Such a law would probably be unlawful. A case that may be prohibited is the case where a high level employee, a top manager, marries a top manager in a competitor's company. But there has to be more than suspicion. An employer must demonstrate some reason to attack such a liaison. It doesn't have to be an actual breach, but it has to be more than lack of confidence. In such a case, the employer may be authorized to dismiss the employee. It's sort of a gray area. Everything pertaining to sexual life belongs to the private life of the employee, unless it brings trouble into the company. For instance, an employer would be justified in firing a female employee wearing a see-through blouse.