Collective Bargaining and Collective Dispute Resolution in the ILO

July 2011

The key point made is that for collective bargaining to reach its full innovative potential it must go beyond formal contract negotiations. We need a coordinated response at all levels of our employment relations system, from the determination of working conditions, wages and hours, to the level of strategic decision making, within our enterprises where the basic decisions about product design and technology and location are made. There needs to be continuous dialogue at that level, as much as there is continuous dialogue at the workplace. Collective bargaining can provide a framework that facilitates that coordination and dialogue.

Professor Thomas A. Kochan
Chairperson, High-Level Tripartite Meeting on Collective Bargaining
International Labour Organization, November 2009

This paper outlines the evolution of the concept of collective bargaining over the years in the international civil service, mainly in the ILO. It relies on analyses of the Staff Regulations, Collective Agreements, ILOAT caselaw and International Labour Standards to definitively establish the roles and rights of the different parties to collective bargaining.

WHAT IS SUBJECT TO BARGAINING?

Identifying and understanding the problems with collective bargaining in the ILO:

The introduction of collective bargaining in 2000 was followed by a period of considerable dispute¹ between the Administration and the Union over what was subject to bargaining, and what remained within the discretionary authority of the Director-General to decide. The speed with which collective bargaining was introduced exacerbated this situation, leading to problems both in terms of the content of the collective agreements, Articles of the Staff Regulations which were not amended to give effect to collective agreements, and a weak system of resolving collective or interest-based disputes.

First, there is an important issue in relation to the representativeness of the Union being questioned by management. Article 10.1 (a) of the Staff Regulations states that “The interests of the staff shall be represented in the Office by the Staff Union of the International Labour Office”, and as the only representative Union in the history of the ILO, this has rarely evoked problems. However, in recent years, management has increasingly questioned whether the Union represents all staff, suggesting that it represents only its members, and asking “what if people don’t want you to represent them?” Similarly, management has erroneously suggested that collective bargaining and collective agreements govern “the relationship between the Administration and the Union”, whereas “the employment relationship between officials and the Office, […] is governed by the Staff Regulations and IGDS.”

¹ This period, from 2002, was deemed “a period of growing unilateralism which featured confrontation between the parties and a significant loss of content in the negotiations” by a former General-Secretary of the Union.
This was made worse through the inclusion of a very poorly defined “management rights” clause into the current Recognition and Procedural Agreement, stating “The Union recognizes the rights and responsibilities of the Office to manage and vest its Management to do so, who shall at all times be solely responsible therefor.” As these clauses are much more prevalent in the US / UK (voluntaristic systems), they are much less understandable in a system of concertation as has been traditionally present in the ILO. This contributes to the confusion as to what is subject to collective bargaining, and what is considered by management as “co-gestion”.

That said, the Staff Regulations state clearly:

“Conditions of employment, including the general living conditions, of officials may be jointly determined by the Director-General or his or her designated representative(s) and the Staff Union through social dialogue, information, consultation and collective bargaining. The Director-General shall have authority to bargain collectively with the Staff Union, with a view to the conclusion of collective agreements. Collective agreements so concluded shall be attached to these Regulations.”

According to this article, which was adopted by the ILO Governing Body in 2000, collective agreements concluded between the Union and Administration would have the same standing as the Staff Regulations. There was no accompanying amendment compelling the DG to submit collective agreements to the Governing Body prior to their coming into effect or being appended to the Staff Regulations. Rather, the Staff Regulations foresee: “Where relevant, these Regulations will, subject to article 14.7 of the Staff Regulations, be amended to give effect to the provisions of a collective agreement or an amended agreement, or to reflect the expiry of an agreement.”

However, Article 14.7\(^2\) foresees only consultation of the Joint Negotiating Committee (JNC). This lack of clarity between bargaining over terms and conditions, and then consulting on changes to the Staff Regulations has led to considerable tension between the parties. Efforts to unilaterally amend terms and conditions of work and employment through direct submission of proposals to the Governing Body (absent good faith negotiation) represented one of the main factors behind the mobilization of March 2009.

But even here, the Office has committed to an approach going far beyond consultation, engaging itself to negotiate over “[…] amendments to the Staff Regulations, […] administrative circulars or joint communications. Implementation of agreements shall be subject, where appropriate, to the authority of the Governing Body concerning approval of amendments to the Staff Regulations or of the resources necessary to enforce the agreements. The Staff Regulations will be amended to meet the terms of this Agreement.”\(^3\) For the Staff Union, even if the Staff Regulations require only consultation over certain items, the commitment made by the Office to negotiate amendments to the Staff Regulations engages its responsibility to seek compromise prior to submitting any such amendments to the Governing Body. This is in line with the opinion of the Committee on Freedom of Association, who found that “Mutual respect for the commitment undertaken in collective agreements is an

\(^2\) “Subject to the approval of the Governing Body, these Regulations may be amended, without prejudice to the acquired rights of officials, by the Director-General after consulting the Joint Negotiating Committee.”

\(^3\) Article 8, Paragraph 4 of the Recognition and Procedural Agreement as amended. It should be noted that the Staff Regulations were not subsequently amended.
important element of the right to bargain collectively and should be upheld in order to establish labour relations on stable and firm ground.”

Defining negotiation and consultation – And distinguishing between the two:

Reference to the ILOAT jurisprudence helps illuminate the distinction between consultation and bargaining. In Judgment No. 380, the Tribunal has provided an analysis of the distinction between consultation and negotiation. It notes,

“If the end-product of the discussions (to use a wide and neutral term) is a unilateral decision, ‘consultation’ is the appropriate word. If it is a bilateral decision, i.e. an agreement, ‘negotiation’ is appropriate. Decisions are reached after consultation; agreements after negotiation. Negotiation starts from an equality of bargaining power (i.e. legal equality; economic strength may be unequal); consultation supposes legal power to be in the hands of the decision-maker, diminished only by the duty to consult. Where there is only a simple obligation to consult, the decision-maker’s duty is to listen or at most to exchange views.”

The Tribunal goes on to state,

“The ordinary employer, who has no contractual power of fixing wages, is always in this position and always has to negotiate in order to get any agreement at all. The organisations on the other hand, with their reserve power of unilateral decision, are only in that position if they put themselves there voluntarily and because they want an agreed solution in preference to one that is imposed.”

Thus, the ILO Administration “put [itself] there voluntarily”, to use the language of the ILOAT, in signing the Recognition and Procedural Agreement. The broad parameters for collective bargaining were agreed by the parties in Article 2 of the Recognition and Procedural Agreement. Here, collective bargaining “is defined as negotiations in good faith with the objective of reaching collective agreement between the Parties on:

(a) so far as the Office has the authority to do so, policies, procedures and practices to give effect, in the Office, to common system terms and conditions of employment;

(b) common system terms and conditions of employment that the Parties agree they will jointly endeavour to change through the established mechanisms;

(c) policies, procedures and practices on terms and conditions of employment in the Office which are not covered by the common system;

(d) issues affecting a group of staff members arising from day-to-day management and administration in the Office, without prejudice to arrangements governing individual grievances.”

While there is room for clarification and strengthening this text, overall this language encompasses the issues that have historically been subject to bargaining, and complements

---

5 In re BENARD and COFFINO, under 21
6 Ibid, under 22
well the “conditions of employment” clause in Chapter X of the Staff Regulations. In signing the Recognition and Procedural Agreement of 2000, the Director-General voluntarily engaged the ILO Administration to relinquish its “reserve power of unilateral decision” in favour of negotiated agreements. Any employer recognizing a Union as a bargaining agent for its employees, recognizes the fact that it shares power with that institution, and commits the employer to compromise with the Union, through collective bargaining.

This language also reflects the very broad and inclusive parameters set out by the Collective Bargaining Convention, 1981 (No. 154). Article 2 of the Convention defines collective bargaining as “all negotiations which take place between an employer, a group of employers or one or more employers’ organisations, on the one hand, and one or more workers’ organisations, on the other, for--

(a) determining working conditions and terms of employment; and/or

(b) regulating relations between employers and workers; and/or

(c) regulating relations between employers or their organisations and a workers’ organisation or workers’ organisations.”

Collective Bargaining: Negotiating for Social Justice, was published by the ILO on the occasion of the High-level Tripartite Meeting on Collective Bargaining in 2009, and provides state-of-the-art global trends in collective bargaining. It notes that, “[…]The collective bargaining agenda has expanded in many parts of the world. Collective agreements now include a wide range of issues such as training, demographic change and parental rights. This broadening of the collective bargaining agenda, which often includes many of the issues outlined in Box 1, enables the social partners to negotiate agreements that seek to address the needs of enterprises for increased flexibility in order to remain competitive, as well as those of workers for employment security, better working conditions and fair treatment.” It goes on to provide concrete examples of “new” areas for an expanding scope of collective bargaining, including:

- Changes in work organization, involving new technology and work processes;
- Employment security and non-regular (fixed-term, part-time, temporary or casual) employment, including measures to restrict precarious employment, to regularize non-regular workers, and to establish terms and conditions for non-regular workers;
- Vocational training and career development;
- Safeguarding employment during economic downturn or in face of restructuring.

As one well-known ILO publication hints, “Remember: Any issue can be a subject for bargaining.”

DEFINING GOOD FAITH

Whether engaged in consultations or in fully-fledged collective bargaining, the good faith of the parties must be assured. This is reflected in international norms, in the decisions and recommendations of the ILO supervisory system, and in national contexts.

---

7 Gender Equality: Guide to Collective Bargaining, Shauna Olney; Elizabeth Goodson; Kathini Maloba-Caines; Faith O'Neill.
As outlined above, consultations are defined as a process whereby a decision-making authority seeks the views of another party (or several other parties) before taking a final decision. “The end-product of the discussions (to use a wide and neutral term) [remains] a unilateral decision.” They imply no requirement to reach agreement, as is the case in collective bargaining, however, compromise should still be sought. As to what constitutes good faith in consultations, the CFA has indicated that “It is important that consultations take place in good faith, confidence and mutual respect, and that the parties have sufficient time to express their views and discuss them in full with a view to reaching a suitable compromise.”

In the public sector, there is a general recognition that certain elements fall outside the scope of negotiation due to their nature as “government business”. However, the CFA recognizes “It is equally clear that certain other matters are primarily or essentially questions relating to conditions of employment and that such matters should not be regarded as falling outside the scope of collective bargaining conducted in an atmosphere of mutual good faith and trust.”

In many modern industrial relations systems, even consultation is defined broadly. In its publication Dispute Prevention and Resolution in Public Service Labour Relations: Good Policy and Practice, the ILO has defined consultation as follows: “Genuine consultation means more than communication and information sharing. To be effective, it must be an exchange process where the interested parties are provided with a genuine opportunity to influence final decision-making. While the achievement of consensus is not a necessary feature of consultation, the goal of endeavouring to certainly is.”

Coming back to the clarifications provided by the ILOAT in Judgment 380, the Tribunal explained that good faith required particular effort to be made by both parties: “The object of the consultation is that he will make the best decision and the assumption is that he will not succeed in doing that unless he has the benefit of the views of the person consulted. The object of negotiation on the other hand is compromise. This object would be frustrated if either party began with the determination not to make any concession in any circumstances, just as the object of consultation would be frustrated if the decision-maker began with a determination not to be influenced by anything that might be said to him. On both these hypotheses there would be a lack of good faith.”

One country’s experience in enforcing good faith in collective bargaining is instructive. New Zealand has enacted a “Code of Good Faith in Collective Bargaining” under the auspices of the Employment Relations Act, 2000. The Code provides guidance on good faith, and may be used to demonstrate compliance with the good faith provisions of the Act. It “requires the

---

9 Ibid, Paragraph 920.
10 C. Thompson, Dispute Prevention and Resolution in Public Service Labour Relations: Good Policy and Practice, Sectoral Activities Department Working Paper No. 277, ILO Geneva, 2010, p. 21. This section of the Working Paper includes a brief analysis of bargaining and consultation, as well as a series of examples illustrating successful approaches to engagement through either (or both).
11 In re BENARD and COFFINO, under 21
12 Due to space constraints, the New Zealand case is highlighted here. However, there are references to good faith bargaining in the labour legislation in, inter alia: Argentina, Australia, Canada, Finland, Ghana, Grenada, Japan, Republic of Korea, Lesotho, Malawi, Mauritius, Morocco, Philippines, Sweden, United States and Uruguay. More information can be provided on request.
parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship. This includes a requirement that the parties are responsive and communicative and do not do anything likely to mislead or deceive each other. Therefore, when bargaining for a collective agreement the parties need to consider whether their actions will establish and maintain the type of relationship required.”

The Code covers the establishment of an effective and efficient process for negotiating. It encourages the parties to identify their representatives for bargaining, the nature of bargaining teams, identification of who has authority to enter into an agreement as well as any limits on their authority, frequencies of meetings and timelines, and dispute resolution procedures. Importantly, it “requires a union and an employer […] to conclude a collective agreement unless there is a genuine reason not to, based on reasonable grounds.” A genuine reason cannot include opposition in principle to negotiating a collective agreement. While bargaining, both unions and employers are required to provide information, and “consider and respond to proposals made by each other.” When faced with disagreements, they should “give further consideration to their respective positions in the light of any alternative options put forward.” This should continue even when the parties reach deadlock on a particular issue. The Code also provides for dispute resolution machinery, as well as a mechanism to address breaches in the principle of good faith.

COLLECTIVE DISPUTE RESOLUTION

An important consideration to any party to collective bargaining is where they can go to resolve disputes over the terms of a contract. In the case of the ILO, the only place where a binding judgment can be sought is the ILO Administrative Tribunal. For reasons that will be elaborated in this section, the Union has opted for industrial action, or a combination of direct action and adjudication, to enforce the terms of contracts, rather than pass through other dispute resolution procedures. However, it is important to establish the legal basis through which the ILO Staff Union could (and in some cases still does) make use of the formal system of adjudication or collective dispute resolution.

Article 5 of the Collective Bargaining Convention, 1981 (No. 154) calls for measures to promote collective bargaining, noting that “bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining.” Additionally, Article 8 of the Labour Relations (Public Service) Convention, 1975 (No. 154) foresees that “The settlement of disputes arising in connection with the determination of terms and conditions of employment shall be sought […] through negotiation between the parties or through independent and impartial machinery, such as mediation, conciliation and arbitration, established in such a manner as to ensure the confidence of the parties involved.”

The opening paragraph of Dispute Prevention and Resolution in Public Service Labour Relations: Good Policy and Practice recognizes that the best protection against industrial conflict is a consensus-based labour relations system. It notes that “processes and institutions that in their very design and functioning recognize, address and reconcile the legitimate interests of the workplace parties and the wider societies should be the goal. An ounce of prevention being worth a pound of cure, the significance of the foundation work can scarcely be over-emphasized.” However, the paper also recognizes that not all differences can be settled, nor conflicting interests reconciled through negotiation alone. Here, the ILO
recommends that before making recourse to power, “the first call must always be for more persuasive and less drastic means”: dispute resolution machinery.

The ILO Administrative Tribunal is competent to hear claims related to collective agreements:

Judgment 1369\(^{13}\) recognizes the fact that the Tribunal may consider the content of collective agreements in rendering its judgements. It states, “It is a truth universally acknowledged that the collective agreement is a basic vehicle of social progress, justice and peace […] An international organisation is still of course free to choose whatever methods or means it likes – be they formal rules or contracts of employment – to define the terms of appointment of staff. But any collective agreement it does conclude becomes part of the law of the international civil service. Signing such an agreement puts it under obligations in law; a member of its staff may plead such obligations in a complaint to the Tribunal; and the Tribunal will review compliance with the letter and spirit of the agreement.” (Emphasis added)

The ILOAT does not allow for class action, but will allow staff representatives to bring cases:

While the ILOAT may hear claims related to collective agreements, this is not a replacement for a collective dispute resolution mechanism. The ILO Staff Union and Administration reached agreement on the possibility of bringing class action\(^{14}\) complaints before the Tribunal in 2004. Since that time, the ILO Administration has not taken the necessary steps\(^{15}\) to implement this clause of the collective agreement.

Nevertheless, Judgment 2919 recognizes that “[…] members of the Staff Committee could challenge a general decision that is not implemented at the individual level and affects all staff. Further, as stated in Judgment 1451, under 18, it is often more efficient to have the members of the Staff Committee bring these types of matters forward rather than the individual staff members […] However, where decisions allegedly have a broad adverse impact on a large number of permanent employees, in the interests of efficiency, consistency in decision making and the timely resolution of disputes, it may be that the members of the Staff Committee have a legitimate role in bringing the issue forward.”

While other cases see Organizations raising objections to staff representatives bringing collective disputes to the ILOAT, the Tribunal is able to sidestep such a sensitive issue by arguing that, notwithstanding its Statute (which limits it to consideration of individual disputes), the so-called collective disputes are, in fact, a collection of individual disputes. “Each of them is defending his own individual interests, even though they are the same as the others.”\(^{16}\) Thus, the right of a staff representative to bring a grievance (called by some a “representative action”) in his or her personal capacity, on a question of general interest, is fully recognized by the ILOAT.

---

\(^{13}\) In re DECARNIERE No. 2 and VERLINDEN Nos. 1 and 2. More recently, in Judgment 3032, the ILOAT referenced the text of a collective agreement in its considerations.


\(^{15}\) Reasons given relate to the desire of other Organizations under the ILOAT to avoid such a possibility, and the fact that such an approach is not allowed in the UN System of Justice, neither of which are germane to the current situation. See: [http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_150512.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_150512.pdf)

\(^{16}\) In re HAMOUDA et al, Judgment 1451.
Thus, the possibility for a union representative to bring a grievance before the ILO Administrative Tribunal exists. However, from the Tribunal caselaw itself, it is clear that the judges were required to perform some legal manoeuvring in order to address a legal vacuum created by the lack of a robust mechanism for resolving collective disputes in international organizations. In the absence of such institutions, the ILOAT remains the only place where staff members could resolve disputes having an impact on their terms and conditions or the equitable application of the rules.

This is, however, far from ideal, and the ILO Staff Union has opted for industrial action for cases which would clearly be adjudicated in its favour simply due to the fact that it regularly takes up to three or four years for a grievance to make its way to the Tribunal.

The Review Panel – An ineffectual system for resolving collective disputes

Another important factor stemming from the rapid introduction of collective bargaining to the ILO, and leading directly to the current difficulties is the lack of strong institutional mechanisms for mediation, conciliation and arbitration within the ILO. What happens when the parties fail to reach agreement?

Article 7 of the current Recognition and Procedural Agreement addresses the procedures for collective dispute settlement. It establishes a “Review Panel” and mandates the body to address failures to reach agreement in the Joint Negotiating Committee or in the event of a difference of opinion in the interpretation or application of existing agreements. The Review Panel is a peer body, consisting of three members, “one chosen by each Party and the third one, who shall act as Chair, jointly nominated by the Parties.” In their deliberations, members of the Review Panel do not represent either party, but seek to “find a solution to the dispute to which both Parties can agree. In the event of a failure to find such a solution, the Review Panel will issue a recommendation to the Parties.” After having received the recommendation, the parties have the option of rejecting the recommendation, in a written, motivated submission within 15 working days. Following rejection by one party, either party may take any action it deems necessary.

Recent history in the Office demonstrates how the purely voluntary nature of the Review Panel led to the recent conflicts. In 2008 the Union brought a complaint to the Review Panel, disputing what it perceived as unilateral changes to the Collective Agreement on a Procedure for Recruitment and Selection. The Review Panel unanimously concluded that the “unilateral modifications were in breach of the collective agreement and of Annex I of the Staff Regulations.” In spite of these clear conclusions made by the Review Panel, the Office “took note” of the recommendation. It did not reject the recommendations, in whole or in part. It simply “took note” and did nothing to give effect to the recommendations. These actions called into question the legitimacy of the Review Panel, and require a more robust, and binding, mechanism for resolving collective disputes.

POSSIBLE SOLUTIONS

Based on the lessons of the past 10 years of collective bargaining in the ILO, the Union is of the opinion that the Staff Regulations and Recognition and Procedural Agreement must be reviewed, any disparities definitively addressed, and a robust, binding dispute resolution mechanism established.
First, consideration should be given to the re-introduction of a neutral, independent chairperson of the Joint Negotiating Committee. The predecessor to the JNC, the Administrative Committee, benefited from a neutral chairperson. This person, jointly nominated by both sides, often for their personal or professional qualities, served as a front-line conciliator, seeking to bring the parties to consensus on any disagreements they encountered. The chairperson could participate regularly in meetings of the JNC, presiding over the deliberations and drafting the records of proceedings which will register the decisions taken, or s/he could be “on call”, and brought in as a mediator of first instance in disputes.

Next, in order to ensure the effective and efficient functioning of the Office, and the development and revision of policies through negotiation, a system of collective dispute resolution must be established, should mediation by the JNC chairperson prove ineffective. Given the complex rule-making systems in the ILO, different approaches to arbitration would be foreseen for questions falling under the delegated authority of the Director-General, and those questions which require Governing Body approval.

**Subjects for negotiation which fall within the competence of the Director-General**

For such subjects, when the parties are not able to arrive at an agreement, or in the event of a dispute over the interpretation or application / enforcement of a policy, procedure or practice (whether or not it is subject to a collective agreement) the staff representatives may submit the subject in dispute to an arbitrator who will be chosen jointly by the parties (or drawn from among the various members of the ILO Committee of Experts on the Application of Conventions and Recommendations, or another impartial, independent expert).

The arbitration proceedings will be recorded and shall give rise to a binding arbitration award. Generally, this award should be pronounced within one month after the parties have submitted their positions, unless extended through agreement with the parties. The arbitrator may be called upon to order an injunction or suspension of action, pending the arbitration award, should such an action be determined to be in the interest of the arbitration process, industrial peace or the effective functioning of the Office.

Arbitration awards, like agreements concluded in the Joint Negotiating Committee and its subcommittees, will be directly applied.

**Subjects for negotiation which fall within the competence of the ILO Governing Body**

The function of the Joint Negotiating Committee when considering questions relating to such subjects will consist in arriving at an agreement on a ruling proposal to be presented to the competent committee of the Governing Body for decision.

When the permanent negotiation committee is not able to reach an agreement on the proposal in question, the staff representatives may submit the dispute to the Chairperson and Vice-Chairpersons of the competent committee of the Governing Body for arbitration, the arbitration outcome being presented to the competent committee of the Governing Body for decision.

**Determination of subjects of negotiation which fall within the competence of the Director-General or the Governing Body**
The disputes which arise between the parties concerning the determination of the authority who is competent for the matter which is the object of the negotiation shall be submitted for legal opinion to a member chosen from the ILO Committee of Experts on the Application of Conventions and Recommendations and, in any case, distinct from the person designated to resolve the other aspects of disputes. Except in special circumstances, and in agreement with the parties, the expert will hand down the legal opinion on this question within 30 working days from the time of the presentation of the dispute.