

**2003 ABAS International Conference
Brussels, Belgium
July 11-13, 2003**

Proprietary Rights of Employees in Workplaces in Israel

by

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ABSTRACT

Do employees have a right to their place of employment? In principle, private employers have the right to fire employees, in accordance with their contract, as they desire. The basic laws in Israel come to protect the *right of ownership*, including employers' rights to manage their businesses according to their desires. On the other hand, Israeli Labor Courts have recognized the *right to work*, and not only the right to salaries, as basic social right of the employees. Thus, the right of the employer to fire employees has been limited. There have been also some laws that restrict the ability of employers, public as well as private, to fire employees under certain situations. As a result, the employers' proprietary rights in their privately owned businesses are undermined. But even before this trend, the Israeli legal system has recognized the right of the employees to remuneration and benefits, paid out of the employer's pocket for their work, beyond salaries, like the right to severance pay, right to payments for sick leaves, and others. The paper will discuss the meaning of rights, in relation to labor relations and human resource management

Introduction

The idea that property rights provide the foundation for a free society has long been understood. To those who penned the Magna Carta in England, as well as to the American Founding Fathers who drafted the Declaration of Independence and the Constitution, protecting private property was of utmost importance. At the workplace the employers are the owner and thus their property rights are protected against

employees who are non-owners. In this respect the employer has the right to determine the terms on which the employee is granted access to the employee's property. Today, however, this traditional conception of property rights is being re-conceptualized by a variety of legal and industrial forces. This can partly be explained by the fact that constructions of social relationships that define one side, as an owner while the other is defined as a non-owner are conceptions that inevitably bias the analysis in favor of the owner.¹ Thus recognizing employee rights, and moreover their property rights, is a move towards greater equity in labor relationship.

More specifically, the employers have the right to manage their business as they wish. It is their prerogative in respect to their property, which includes their business. This right is anchored in the Basic Law: Human Dignity and Liberty that states: "There shall be no violation of the property of the person". Property was interpreted to include intellectual property, trade secrets, confidential information, goodwill, investments done for the business, and investments in training employees.

At the same time, another Basic Law; Freedom of Occupation, anchored the right of every Israeli national or resident to engage in any occupation, profession or trade". In addition, the Israeli Labour courts have recognized a right of the employee to work, and not only the right to salaries. This newly recognized right is a basic social right of the employees, as defined by the Labor Courts. Such a right reconceptualizes a kind of proprietary right² of the employee in the workplace, that is – in the employer's property. As a result, the employers' right to fire employees has been limited. There are circumstances and situations where the ability to fire employees is prohibited or at least firmly restricted. These restrictions and limits apply to private employers as well as to public workplaces. As a result, the private employers' proprietary rights to their privately owned business are undermined.

¹ Beerman and Singer (1993), in *Ethical Theory and Business*, T.L. Beauchamp and N.B. Bowie (ed.) 4th ed., Prentice Hall, New Jersey, 271).

² We use the term "proprietary rights" in its legal meaning. The aggregate of a person's proprietary rights constitutes the person's estate, assets or his property in one of the many senses of that most equivocal of legal terms. In German it is known as Vermoegensrechte. The proprietary rights of the employee are Rights *in re aliena*. These are rights that limit or derogate from general rights belonging to somebody else in respect of the same subject matter.

As discussed by Beermann and Singer (1993), an alternative conception of property rights in employment relationships is shifting the baseline of employment relationship favoring workers interests. In a certain respect workers gain proprietary rights in the workplace due to a relationship with the employee that made access to the property available in the past. In other words, employees can be seen as “part-owners” in virtue of the ongoing relationship with the employer and, possible, also due to the fact that they simply have a greater need than the employer. A worker’s job is in many cases one’s most important asset and he or she may depend upon it for their continued ability to remain a functioning member of society. In practice, what this comes to mean is that the jobs themselves come to be seen as one’s vital property interests in need of legal protection (ibid. 271-276).

One may assume that the recognition of the employee’s rights to their workplace is a new trend. However, analyzing the Israeli legal system, and this can be true also in other legal systems as well, it seems that the Israeli legal system recognized this kind of right, though not in the broadest meaning, much before it was declared by the Labor Courts. The Israeli laws recognized the right of the employees to remuneration and benefits, paid out of the employers’ pockets beyond salaries. This comes about in the right to severance pay, maternity leave, and the right to payments for sick leaves may serve as examples.

These employees’ rights to remuneration and benefits are anchored in “protecting laws” which means that both employers and employees are bound by them. The employees cannot waive their rights. This means that freedom of negotiation with respect to the rights declared in these protecting laws is limited. The freedom of negotiation here is limited to betterment of employees’ condition, but not derogating from them.

Severance Pay

The right to severance pay, whose sources are in the Jewish Law from biblical times, started as mere social aid or a security benefit voluntarily offered by employers to employees who lost their jobs. Had it remained so, the sum the employees get would have been the same, disregarding the duration of their employment. However, as the Israeli law developed out of custom, the severance pay is relative to the period of

employment, i.e. an employee who is fired after one year of employment is entitled to severance pay of the amount of his last monthly salary multiplied by the number of years he was employed by the same employer or at the same workplace even if the employers changed. The longer he works the higher is his severance pay. The law goes even further and stipulates situation in which the employer may quit or retire, even against the wish of the employer, and will have the right to severance pay as though he was fired. Some of the examples are: an employee who has to leave job as a result of getting married and is moving to the spouse's place which is further from the workplace; an employee leaves his job because of sickness, either of the employee or any of the employee's close family; quitting a job because of a move from a town to an agricultural settlement; reaching the age of 65 which is the accepted retirement age, and others. In all these cases and others, the fired, quitted or retired employee is entitled to severance pay, calculated on the basis of the period he was employed. Such a right is a proprietary right in the employer's business and workplace. One can look at it also from another aspect – if an employer wants to get rid of an employee, in cases the law allows him to fire him, the employer has to “buy back” the employee's place. The longer the employee works, the higher is the price.

An employee will be entitled to severance pay in case he quits on ground of worsening employment conditions, or when circumstances at workplace have become unbearable so that it would be unfair or unreasonable to expect from an employee to continue his work at that workplace. That means that the employee has got the right to a certain set of conditions in the workplace. Breaching of whom entitles him for compensation. That compensation is, in this case, the severance pay, though he was not dismissed, but decided to walk out of his choice.

Maternity Leave

Another example is pregnant workers and maternity leave. According to Women Labor Law in Israel, pregnant workers cannot be dismissed during the period from the beginning of their pregnancy to the end of 45 days after parental leave is over. During pregnancy such women may be dismissed only under a special individual permit by the Minister of Labor for serious reasons not connected with their condition. After birth, a mother cannot be dismissed during the parental leave, which can last until a year, and during the first 45 days after the mother returned to work. At the end of the

parental leave the worker is entitled to return to the same job, or, if that is not possible, to an equivalent or similar job consistent with her employment contract or employment relationship.

Soldiers' rights

An employee who was called up to military reserve service cannot be dismissed while being in service, and is entitled to return to the same job upon end of the service.

Sick Leave

Employees are entitled to sick leave up to certain amount of days per year, as may be agreed upon by the employer and the employees, with a minimal amount of days prescribed in the law. Hence, when an employee is sick, he or she are entitled to paid sick leave. The money comes out of the pocket of the employer.

Firing

The right to fire employees has been limited by the labor courts. These limits are of two faces: In public workplaces, the employer has to show a good cause for dismissal of the employee. Had he not been successful proving his cause, the employee is entitled to go on with his post at that workplace. The second face is that even there is a good cause for dismissal, the employee has the right of hearing. The employer is obliged to give the employee an opportunity to show why he should not be dismissed.

All disputes in respect of dismissals are heard by the labor courts, and they may decide whether the dismissal would be upheld or not. If the dismissal is not approved, the employee has the right to be back at work.

Equality laws

The Israeli equality laws, and mainly the Equal Opportunities Law at Work, entitle all employees at the same workplace to be treated alike. This law derogates from the employer's rights to manage his business as he thinks. Any benefit given to any employee entitles all the other employees who are doing equal work to the same benefit.

Equality is the term used in employment relationship. But what does equality mean? Aristotle tried to solve the problem by stating that Equality in morals means things that are alike should be treated alike.³ But who is alike? Western⁴ is in opinion that the concept of equality is tautological. He says equality tells us to treat like people alike; but when we ask who “like people” are, we are told they are “people who should be treated alike”. He claims that Equality is an empty vessel with no substantive moral content of its own, Since equality provides no internal guidance on the relevance of particular characteristics of groups or individuals, the principle of non-discrimination may help to fill the vacuum.⁵ The Israeli Law of Equal Opportunities in Work, follows this line of thought and says that the principle of equal treatment means the prohibition of any discrimination whatsoever on grounds of sex, sexual orientation, personal status, being parents, age, race, religion, nationality, origin, political view, and disability.

The employers, both the public employers as well as the private ones, are bound by this law and hence are limited in their prerogative to manage their businesses.

Minimal salary

Another right given to all employees is the right to a **minimal salary**, as prescribed in the law. This is also a proprietary right vested in the employee in respect of the employer’s property.

Strikes

The freedom to strike is another layer in the employees’ rights and freedoms. A strike is a kind of collective action. It is not yet clear from the judicature in Israel whether the strike is a right or only a freedom. The difference is that if the strike is only a freedom it means that it is legally permitted and tolerated but not privileged, and its legal limits are dictated by the general order. If the strike is a right, it means that the authorities, the government, should take precautions to ensure the exercise the right to strike, which is privileged. However, the strike, being a right or a freedom, is recognized as a part of the collective autonomy of the employees, and derogates from

³ Aristotle, *Ethics Nicomachea* - V.3.1131a-1131b (Translated by Ross, 1925).

⁴ Western, “The Empty Idea of Equality”, (1982) 95 Harvard Law Review 537, 547

⁵ Ch. Barnard, *EC Employment Law*, 2nd ed., 2000, Oxford University Press, 204-205.

the rights of employers in his business. True, the right of the employers to lock-outs is recognized but only as defense to lessen the harm caused to the employer by the employees' strike.

Conclusion

On such a background it was not too unexpected to find out that labor courts started to recognize another right employees have. In the beginning the national labor court recognized a “quasi proprietary right” of the employees in the workplace, despite the prerogative the employers have to manage their business.⁶ Later on the labor courts recognized the right of the employee to work, and not only to salary, and imposed a duty on the employers to provide work to the employees. It started with recognition of the right to actual work of professionals, like physicians, that without actual work they may lose their abilities to practice⁷ but later on it was applied to all employees.⁸

One of the main reasons, if not the main one, for such a development, is the wish of employees for job security. Job security is becoming in Israel an increasing concern, particularly in times of economic changes in the marketplace. This situation is well recognized in the USA and in many other places all over the world⁹. Usually this has often translated into reasonable notice prior firing or any other employment changes, just termination, and due process. However the labor courts in Israel were not sure it was enough, and hence recognized more employee rights. The metaphor used for a long time by employers of “employees are our most important assets” is found to be a mistake.¹⁰ It repeats the mistake of thinking of employees as costs. This metaphor confuses the provider of the services – the employee – with the asst itself – the goods or the services. Recognizing employee proprietary rights in workplaces brings to and end that mistaken treatment. One can see it as one of main changes resulted from or caused the new social contract.

⁶ L. App. 3-7/80 Navon v. M.T.M. Ltd. P.D.A. 32, 584

⁷ L. App. 3-182/96, 9-213/96, 9-227/96 “Shaare Zedek” Medical Center and oth. v. Dr. O. Prat, (not published. Judgment given on Oct, 24, 1996)

⁸ L. App. 359/99 Levin v. Broadcast Authority, (not published. Judgment given on February 28, 2001)

⁹ P.H. Werhane, T.J. Radin & N.E.Bowie, *Employment and Employee Rights*, 2004, Blackwell Publishing 145

¹⁰ T. O. Davenport, 2000, “Workers are *Not* Assets”. *Across the Board*, June: 30 – 34.