# THE EMPLOYEE'S RESPONSIBILITY FOR INDUSTRIAL ACTIONS: A STUDY OF FINNISH LAW

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## I. INTRODUCTION

In this article I shall examine the legal position of the individual employee in regard to industrial actions performed in connection with labour disputes. For practical reasons I am limiting the discussion to those instances in which it is the employees who have initiated or embarked upon such actions. The article is confined to a consideration of the legal implications arising in regard to individual employees. In other words the legal effects which directly affect a group of employees or employees' organizations as such are left out of consideration.

The assignment here undertaken calls for an examination of the legal position of the employee as defined in several different sets of norms. The explanation of the responsibility of the employee according to the Collective Agreements Act and the relevant collective agreement constitutes the most important part. Included in this is the explanation of the rules of the Labour Disputes Act regarding the mediation of certain labour disputes. Another set of problems is made up of the rules and regulations regarding industrial actions under the Employment Contracts Act. After dealing with this I shall proceed, in connection with each set of norms, to examine not only the norms connected with the behaviour of the employees but also the norms regarding the sanctions against such behaviour.

## II. THE RESPONSIBILITY OF EMPLOYEES UNDER THE COLLECTIVE AGREEMENTS ACT

In explaining the peace obligation in the Finnish Collective Agreements Act (sec. 8), there are, as I see it, grounds for distinguishing two different ways of approach. First, there has to be explained the relation of the peace obligation incorporated in sec. 8 to the employees who have taken part in industrial actions.

A question connected with this is the degree to which the provisions in the collective agreement on industrial peace impose obligations on the individual employees. In these cases there has to be an interpretation of several provisions of the Collective Agreements Act. Secondly, there is in my opinion ground for examining the legal position of the employees in connection with their actions in labour disputes from a "sociological" angle as well. I mean by this the clarification of the extent to which the interpretation of the norms contained in the Collective Agreements Act leads objectively to the imposing of definite obligations on the employees in connection with their actions in labour disputes. In this context I intend to present briefly certain viewpoints relating purely to legislative policy in general.

### *The statutory peace obligation*

Sec. 8 of the Finnish Collective Agreements Act makes it unlawful to embark upon industrial actions directed against the existing collective agreement as a whole or against any of its provisions. This obligation affects, among those bound by the collective agreement, the association of employers or employees and the individual employers. On the other hand, the individual employees bound by the collective agreement are not covered by this legal responsibility to keep the industrial peace. The fact that this omission was intentional is clear from the legislative history. The interpretation of the peace obligation on this point is universally adopted.

Sec. 8 of the Collective Agreements Act provides for an obligation to supervise in order that industrial peace be maintained. The associations of employers and of employees which are bound by the collective agreement are under a duty to work actively against recourse to industrial action by their members (associations, employers and employees). No obligation is "juridically" imposed upon the individual employee. The thrust of the legislators is only on the associations which are bound by the collective agreement.

From what has been said it is clear that the Finnish Collective Agreements Act does not impose any obligation on the individual employee to keep the industrial peace. The approach is thus completely different from that of the corresponding Swedish Act on Collective Agreements. In subsec. 1 of sec. 4 of that Act the peace obligation is imposed not only on the employer who is bound by the collective agreement but also on the employee.

### *The contractual peace obligation*

Closely related to the statutory peace obligation, treated above, is the question of the provisions regarding industrial peace in collective agreements, particularly as regards their legal effects on the individual employees. Accordingly, we shall examine not only the clauses which specifically refer to industrial peace but also, briefly, certain other provisions of the collective agreement which can be seen as affecting the situation of the individual employee as far as his undertaking actions in a labour conflict is concerned.

The provisions of the collective agreement affect the legal relations of parties who are strictly speaking not themselves parties to the agreement; specifically, they affect the employment relationship between the employer and the individual employee. Thus it is a function of the Act to set the limits on the competence of the organizations on both sides by making collective agreements to obligate not only themselves but also employers and employees who are members of the organizations. In Finland, a limitation of the area of the competence of the organizations follows from sec. 1 of the Collective Agreements Act, which provides that the collective agreement shall include provisions which are to be upheld in employment contracts or in employment relationships. Because of this prescription the competence of the parties to a collective agreement is limited to matters which are within the sphere of the employment contract. This limitation laid down in sec. 1 and the language of sec. 8 of the Collective Agreements Act, according to which a duty to avoid actions harmful to the collective agreement is incumbent upon "organizations and employers", together form the basis of the conclusion that no obligation can be laid on the individual employee on the ground of any provision in a collective agreement regarding industrial peace. On the other hand, the parties to the collective agreement have the power to bind themselves by means of industrial peace clauses in the collective agreement which go farther than the statutory peace obligation provided for in sec. 8.[1] The Labour Court, too, has taken the view that the responsibility for actions by individual members is outside the competence of the parties.[2]

[1] See Antti Suviranta, "Invisible clauses in collective agreements", 9 *Sc.St.L.*, pp. 195 f. (1965).

[2] See *Finnish Metal Trades Employers' Association* v. *Finnish Metal Workers' Association*, 1961 T.T. no. 13, in which the court dismissed the plain-

As stated above, in Sweden the statutory peace obligation extends to individual employees also. In addition, it is provided in the Swedish act that the parties to a collective agreement may properly extend their obligation to maintain the peace. Such clauses regarding an extended peace obligation are binding upon the individual employees to the same degree as are the other provisions of the collective agreement.[3] The general competence of the parties to a collective agreement is not much greater under sec. 1 of the Swedish Collective Agreements Act than it is under sec. 1 of the Finnish Collective Agreements Act. In the Swedish Collective Agreements Act, sec 1, the collective agreement is defined as an agreement "concerning the conditions applicable to the engagement of employees or concerning the relations between employers and employees in other respects". The competence which is thus assigned to the parties is interpreted more extensively than is the corresponding competence provided for in sec. 1 of the Finnish Collective Agreements Act.[4] In addition, subsec. 3 of sec. 4 of the Swedish Collective Agreements Act contains a special provision regarding the contractual peace obligation.

*The effect of certain other clauses of collective agreements*

Is it possible that a provision not on the face of it dealing with industrial peace but falling within the framework of the competence of the parties to a collective agreement would in fact function as an industrial-peace clause? What I have in mind here is a provision the primary purpose of which would appear to be something else than the securing of industrial peace. Such a provision might, for example, regulate the beginning and the end of the working day or some other matter.

Jorma Vuorio has discussed the implications in Finnish law of assigning an industrial-peace function to clauses of a collective agreement which do not explicitly deal with industrial peace. His premise is that a provision in a collective agreement may

tiff's action on the ground that, although the employees by their conduct had violated a clause in the collective agreement providing for a more extensive peace obligation than the statutory one, no compensatory fine could be imposed upon the employees in accordance with sec. 9 of the Collective Agreements Act, since their action had not constituted a violation of the peace obligation incorporated in sec. 8 of the Collective Agreements Act.

[3] See Folke Schmidt, *The Law of Labour Relations in Sweden*, Stockholm 1962, pp. 162 ff.

[4] See Schmidt, *op. cit.*, pp. 100 ff.

obligate an individual employee to perform work. Consequently it would be conceivable that employees refraining from doing work by participating in a labour conflict would be considered in breach of a duty incumbent upon them.[5] In sec. 7 of the Collective Agreements Act there is laid down a rule according to which the Labour Court may impose a compensatory fine upon an employer or employee who intentionally violates a provision of a collective agreement. Can the Labour Court consider an employee on strike as a person intentionally violating the collective agreement?

The Labour Court has not yet had occasion to take a final stand in any case falling under this category, and so nothing can be stated with certainty regarding the hypothetical case presented by Vuorio. As a matter of fact the Labour Court did have occasion to consider this question in 1961, in *Plumbing Trades Employers' Association* v. *Finnish Building Workers' Association,* 1961 T.T. no. 16, and *Finnish Association of Building Contractors* v. *Finnish Building Workers' Association and Finnish Bricklayers' Association,* 1961 T.T. no. 17. However, the Labour Court did not view the provisions in the collective agreements concerned on the working day as having imposed upon the employees an obligation to do work, so the question as to whether such provisions could be interpreted also as entailing the maintenance of industrial peace was by no means settled in these decisions. The collective agreement regulated only the number of ordinary hours of work and the times for the beginning and end of the working day.

An analysis of the hypothetical case presented above requires the division of the problem into two subproblems. The first subproblem is whether in general a collective agreement may incorporate provisions obligating the employees to do work. The second subproblem is the determination of the relation between any such obligation to do work and the abstention from work that is incidental to taking part in a labour conflict.

The norm obligating the doing of work is to be found primarily in the employment contract, according to which the employee is held as having promised to carry out specific work. There are explicit legal formulations referring to this in the Finnish Employment Contracts Act. But could the collective agree-

[5] See Jorma Vuorio, "Työrauhanvelvollisuudesta", *Juhlajulkaisu Toivo Mikael Kivimäki,* Vammala 1956, p. 471.

ment, too, validly incorporate a norm requiring the fulfilling of the obligation to do work?

Most of the provisions of collective agreements presuppose an obligation to do work. However, these provisions do not themselves *incorporate* an obligation to do work. In these cases the responsibility to do work which is presupposed, for example, in the rules regulating the length of the working day is based on the employment contract. These provisions are thus to be interpreted as meaning that "when work is being done, it is to be done in the way prescribed by the provisions of the collective agreement". The obligation to do work is thus an indispensable prerequisite for the application of the provisions of such a collective agreement, but this obligation is not itself based on a provision of the collective agreement in question.

Can employees who have actively participated in a strike be ordered by the court to pay a compensatory fine when a provision of a collective agreement is construed as incorporating the obligation to do work? In Finnish law the parties to a collective agreement are empowered to regulate employment relationships in the period after the coming into being of the employment relationship and not in the period before its initiation.[6] One may argue as follows. Since the normative provisions of the collective agreement can affect only an employment relationship and since the initiation of an employment relationship in turn always fundamentally requires the obligation to do work on the basis of an employment contract, it would be a needless duplication to have a provision obligating the doing of work in the collective agreement as well.[7] On the other hand, it can also be argued that such a provision in the collective agreement might be not merely a useless duplication of a provision already incorporated in the employment contract but might serve to bring the obligation to do work to the point of having the legal effects of a normative provision of the collective agreement. Thus the Labour Court would have the power to order an employee to pay a compensatory fine on the ground of his having intentionally violated an obligation incumbent upon him to do work as provided in the collective agreement.

[6] See *Finnish Food Industry Workers' Association* v. *Hannes Haara*, 1970 T.T. no. 10, in which a provision of a collective agreement was held not to be a binding normative provision on the basis of which the employer was obliged to reinstate discharged employees.

[7] Cf. Vuorio, *Juhlajulkaisu Toivo Mikael Kivimäki*, p. 471.

Although it might fall within the competence of the parties to the collective agreement to impose an obligation to do work upon individual employees, the question still remains open what kinds of cases this obligation applies to. In my view, one must start from the assumption that such a provision can be applied only to an existent employment relationship between the employer and an individual employee. Therefore, in certain cases it might very well happen that a compensatory fine might be used as a sanction against the intentional breach of an obligation to do work. On the other hand, there should be acknowledged an assumption or an implied term of a collective agreement that the duty to do work is suspended when there is recourse to industrial action. In my opinion, a provision of a collective agreement that the obligation to do work shall be in force even during recourse to industrial action should be held invalid, since actually it would have the character of an industrial-peace clause imposing obligations on the employees, and this in turn would be in contradiction to the previously presented view that the competence of the parties to a collective agreement, according to secs. 1 and 8 of the Collective Agreements Act, does not extend to commitments regarding industrial peace.

### *What is the basis for the responsibility of the organization for the actions of the employees?*

The employees as a matter of principle remain outside the norms on industrial peace which are embodied in the collective agreement. There is therefore a "legal gap" which has to be filled by means of a responsibility taken over by the organizations to which the employees belong. The analysis of this responsibility cannot stop simply with the statement that such a "legal responsibility" exists. In addition, it is necessary to clarify to what extent this responsibility is affected by the fact that the peace obligation is in no way incumbent upon the employees. An interesting body of comparative material is provided by the decisions of the Swedish Labour Court in cases regarding the responsibility of an organization. In Sweden its responsibility in the course of a labour conflict is rather strict, but, on the other hand, the individual employees are also responsible for their own illegal actions.

As stated before, sec. 8 of the Finnish Collective Agreements Act imposes on the organizations bound by a collective agreement the duty of seeing to it that union branches, employers and employees that are bound by collective agreements do not

embark upon industrial actions directed against the collective agreement as a whole or against any of its provisions. In this context it is of interest to examine the duty of a union bound by the collective agreement to ensure that the employees will not embark upon unlawful industrial actions. This is a question of two levels. First, there is the duty of the national union which concluded the collective agreement and its responsibility for the behaviour of the employees. Secondly, there is the responsibility of the union branch to which the employees belong. In what follows I shall present a brief survey of the general interpretation of the provision on this duty of supervision. Later, I will endeavour to present some "sociological" aspects particularly regarding the responsibility of a branch and the respect in which this responsibility goes beyond the responsibility of individual employees for the maintenance of industrial peace.

### *The responsibility of the organization according to the Collective Agreements Act*

The supervisory responsibility of the organization bound by a collective agreement regarding the conduct of the employees does not in any degree, according to sec. 8 of the Collective Agreements Act, extend to guaranteeing that the employees will not take part in unlawful actions or to implying that if such an action has been committed it must immediately be brought to an end. The association meets its supervisory obligations when it does what can reasonably be expected of it to prevent the initiation of an unlawful action or to bring it to an end if committed. If the association has fulfilled this obligation, there is no ground for an action for a compensatory fine as provided for in sec. 9 of the Collective Agreements Act.[8] To make myself quite clear, I repeat again here that the responsibility is imposed on the or-

[8] The questions regarding what should be required of an organization which is bound to supervise an agreement are extremely interesting, though they cannot be dealt with in this article. There is, for example, the controversial issue whether the organization is obligated to expel a number of members if there is no other way of restoring industrial peace. Is this obligation to expel involved in the obligation to supervise the members in order to maintain industrial peace? In my opinion the organization must in certain especially rare cases expel members in order to carry out the obligation to supervise the membership. This may be the case where an unlawful action appears to be exceptionally long-lasting. It may very well be that after the expulsion of members for participating in an unlawful action the situation may become worse than before, since any continuing obligation of the organization will thereafter appear to be meaningless, both legally and *de facto*.

ganization for the conduct of other persons regardless of the fact that those persons, the employees who are the object of this supervisory responsibility, are themselves under no legal responsibility to conduct themselves in the way prescribed.

We shall proceed from this point to analyse some situations in which the supervisory responsibility of the organization is substantiated as regards the initiation of industrial action, even when the organization cannot itself be viewed as having actively influenced the initiation of the action or its continuation.[9] A distinction could be made between the situation where the organization is in breach of the peace obligation, as initiator of an unlawful action, and the situation where only a breach of its supervisory duty is involved. However, the Labour Court has apparently not paid any particular attention to this distinction, possibly because of the fact that in either case the sanctions provided for in sec. 9 of the Collective Agreements Act apply. In my opinion, it is more appropriate to divide the cases into two groups according to whether the responsibility of the organization can be viewed as arising in connection with the conduct of union officers or whether it arises in connection with the conduct of the members.

Because the subject of this article is the legal position of individual employees in regard to industrial actions, there is no need in what follows to go into detail regarding the relation between the organization which is party to the collective agreement and the employees who have participated in an industrial action. In actual practice the relation between a national union as a party and its individual members is so remote, both legally and factually, that, as I see it, ordinarily no problem regarding the shifting of responsibility can arise. By this I mean that the responsibility of the organization for the violation of its supervisory responsibility can be assessed in those cases where such a question arises on the basis of reasonably clear juridical criteria. If the organization has honestly attempted to prevent the outbreak of a strike and when action has been taken in order to bring the strike to an end, the organization cannot be viewed as having been guilty of conduct violating sec. 8 of the Collective Agreements Act.[1]

[9] In this connection it is not possible to analyse the extent to which the exhibits as such have an influence on the decision of the court. Clearly it is quite easy for the trade union to present the situation in such a way as to make it appear that the union in no way influenced the employees actively in bringing about the labour-conflict situation or in continuing it.

[1] See, e.g., *Wood Processing Employers' Association* v. *Wood Workers'*

In analysing the responsibility of the union branch for the conduct of its officers and members, it should be remembered that what is meant here is not the responsibility of an organization for the ordinary normal functioning of its organs in accordance with law. It is quite clear that a juridical person itself cannot act but that there are physical persons who act on behalf of it as its organs. It can be maintained, albeit somewhat metaphysically, that in these cases the organization is responsible for its own conduct. The cases considered here are those in which the organization is responsible for the conduct of certain of its officers and members. The explanation of this responsibility is problematic, since there are no clearly formulated norms available.[2]

In explaining the responsibility of the union branch it is not so important to focus the attention on the conduct of its ordinary officials. In practice it is the shop stewards whose conduct is most important in the labour-conflict situation. The collective agreements define the shop steward as the representative of the employees in negotiations with the employer. In large enterprises there are likely to be a number of shop stewards for the various parts of the plant and also a chief shop steward for the whole enterprise. The shop stewards are generally elected at the workplace by the employees, but their appointment is then confirmed at a meeting of the union branch. It can thus be said that the shop stewards are duly appointed officers of the branch although they are not officers in the same sense as the chairman of the board or the other members on the board.

In a number of decisions the Labour Court has formulated a doctrine that the actions of the officers of an organization, including the shop stewards, are viewed as actions of the organization. Thus the organization will be found guilty of embarking upon an industrial action when its regular officers or the shop stewards have themselves participated. This doctrine must be based upon the assumption that the officers or shop stewards have the power to act on behalf of the organization in a way which binds it.[3]

*Association and Finnish Wood Processing Employees' Association,* 1971 T.T. no. 28, in which it was found that the association in the circumstances of the case could not have embarked upon more effective measures to restore industrial peace than it in fact did.

[2] There are no provisions concerning these situations either in the Collective Agreements Act or in the Associations Act.

[3] See Kaarlo Sarkko, *Työrauhavelvollisuudesta,* Vammala 1969, pp. 41 ff.

It should be noted that in such a case the responsibility of the organization arises merely on the basis of the fact that certain officers or shop stewards are participating in an industrial action. It is not necessary to prove that they have acted as initiators or that they have actively influenced other employees to participate. It is clear that in laying down this doctrine the Labour Court has relied upon general regulations for the carrying out of collective agreements. What is involved here is that the officers and shop stewards have themselves been violating the obligation to maintain industrial peace. Instead of their acting on behalf of the association in such a way as to influence the other employees as prescribed by the collective agreement they have set a contrary example and have influenced other members in that direction. Because of the way the officers and shop stewards have acted, the members get the impression that the organization itself approves of their unlawful action.

In addition, the responsibility of the organization can be analysed "sociologically". Without being able to present any precise body of material, I can safely assert that in many cases the possibility of the officers and shop stewards having an influence in initiating offensive actions in labour conflicts will in actual practice be quite insignificant. When an officer or a shop steward is himself on the job as one of the employees who have embarked upon an unlawful industrial action, he has very little chance either of remaining outside the action or of influencing the others to stop it, once it has begun. In these situations it is only the union which is party to the collective agreement that can have an influence on the development of the conflict. As regards the branch, it is important how effectively it informs its national union about the development of the dispute and how fully it carries out the instructions given by the union. I should say that the strict attitude of the Labour Court as regards the responsibility of the branch stems at least in part from the fact that the members of a branch who have embarked upon an unlawful action are not themselves under any sort of responsibility according to the Collective Agreements Act. It should be emphasized that in industrial actions a large proportion of the members of the branch—sometimes practically all of them—have been participants.

The Labour Court has not limited the incidence of the responsibility of a branch to cases in which branch officers or shop stewards have participated in an unlawful industrial action. In

addition, the Labour Court appears to assume that the responsibility of an organization can follow directly from the conduct of its members. To put it in another way, the Court appears to hold that, regardless of the conduct of the officers of a local association, the organization can be held responsible for measures in a labour conflict when a large proportion of the members have taken part in the conflict.[4] In my opinion, it is useless here, too, to refer to the Associations' Act. The rationale of these decisions of the Labour Court may be the same as regards the incidence of responsibility through the action of officers. On the other hand, such a responsibility may be based on the obligation to administer the collective agreement and on the general principles derivable from the Collective Agreements Act. On this point the Labour Court is trying to fill the gap in the Collective Agreements Act regarding the obligation of individual employees to maintain industrial peace.

I should like to call attention to the method by which the compensatory fine is meted out in actions for compensation in case of violation of the peace obligation. No precise reconstruction of the rationale for this can be presented, since the determination of the size of the fine is to a large part at the free discretion of the Labour Court. Within the limits of the maximum extent of the compensatory fine as set by sec. 9 of the Collective Agreements Act the Labour Court may, on the basis of sec. 10, determine the size of the compensatory fine by taking into account all the aspects of the case, particularly the amount of damage caused and the degree of guilt.[5] There is rarely any consideration of the extent of the damage, so this may not have much influence in determining the amount which the branch will be ordered to pay. On the other hand, the degree of guilt appears to have a considerable influence on the size of the fine. Further, the amount of the fine seems to be affected especially

[4] See, e.g., *Wood Processing Employers' Association* v. *Wood Workers' Association and Finnish Wood Processing Employees' Association*, 1971 T.T. no. 2, and *Wood Processing Employers' Association* v. *Wood Workers' Association and Finnish Wood Processing Employees' Association*, 1971 T.T. no. 3. Nevertheless, the approach of the Labour Court in this area has been at least for the time being rather "careful". In seeking to establish a basis for the responsibility incurred by the organization the court has preferred to find a basis in some other fact than that the major part of the membership of the branch has taken part in the action. Thus it appears that the Court has found it important to emphasize that among the participants were officers of the association or shop stewards.

[5] See Sarkko, "Työehtosopimuksiin liittyvistä tehosteista", *Lakimies* 1968, pp. 318 ff.

by the number of the members who participated in the action as well as by the total membership of the branch. There are several reasons why regard should be paid to these facts. These facts are of importance for the degree of guilt as well as for the general capacity of the branch to pay. In meting out the fine, considerations of this kind are to some degree a consequence of the idea that the members who have participated in an unlawful industrial action are thus themselves made to pay, through their organization, for the consequences of the violation of the peace obligation.

As I have mentioned before, subsec. 1 of sec. 4 of the Swedish Collective Agreements Act imposes responsibility also on the individual employees for violations of the peace obligation. This responsibility is nevertheless to some degree secondary. According to subsec. 2 of sec. 4 of the Swedish Collective Agreements Act, the primary responsibility for the violation of the responsibility to maintain industrial peace rests on the union.[6] The responsibility of the organization in Swedish law is similar to that in Finnish law.

The Swedish Labour Court holds, like its Finnish counterpart, that the responsibility of the organization for the violation of the peace obligation can be based on two grounds. In the first place, an organization bound by the collective agreement can incur responsibility because of the conduct of its board, of the members of the board or of its other officers. Secondly, responsibility can be incurred on the basis of actions by the organization as such. Either of these grounds will suffice by itself to establish responsibility.[7]

Strict requirements are imposed on the members of the board and on the other officers, and an organization bound by the collective agreement will easily find itself in the position of incurring responsibility for violating the peace obligation. In Sweden, attention is paid to whether the members of the board have stayed away from work without permission of the employer during a strike. Similarly, the branch is required to inform its national union about what has happened. Further, it is taken into consideration whether the board has presented the claims of the strikers to the employer.[8]

The responsibility of the organization may arise also on the

[6] See Schmidt, *The Law of Labour Relations in Sweden*, pp. 192 ff.
[7] See Schmidt, *op. cit.*, p. 195.
[8] See Schmidt, *op. cit.*, p. 196.

ground of measures which the organization itself has taken. In the opinion of the Swedish Labour Court, this means that even though the board has itself done everything which could be demanded of it in such a situation, the organization may incur liability for the reason that the general will of the members to embark upon an unlawful action, or to continue such action, has been expressed in such a way and in such a form that the conduct of the members would bind the organization as such. This kind of liability may follow when the strike decision has been taken despite a negative stand by the board. However, according to Swedish law, it is required that the will of the members shall have been expressed at a meeting which the members have been called to attend. It is to be noted that it has to be at a meeting within the framework of the organization. The decision of an improvised meeting does not bind the association.[9] Professor Schmidt has stated that this view of the origin of the responsibility of the association represents a compromise between the view prevailing in the law of associations and the particular requirements of labour law.[1]

In my view, the practice of the Swedish Labour Court in questions concerning the responsibility of an organization may to some degree have affected the practice of the Finnish Labour Court. One difference in respect of the responsibility resulting from the conduct of union officers is that in Sweden special attention is paid to the board and the conduct of its members. In Finland, on the other hand, the conduct of the shop steward comes into the foreground. As to the responsibility arising through the conduct of the members, the Swedish Labour Court relies heavily on the norms of the law of associations. As just mentioned, the strike has to be decided at a meeting within the framework of the organization. Nevertheless, in Finland, special attention is paid to the objective behaviour of the members, and specifically to the question how large a part of the membership participated in the strike. Two reasons can be given for this difference. The Labour Court in Finland does not need to rely on formal-juridical arguments; it prefers to consider the actual conduct of the members and to draw conclusions directly therefrom as regards the responsibility of the organization. The actual conduct of the members is taken as a kind of indication of their having together decided to embark upon an unlawful industrial

[9] See Schmidt, *op. cit.*, p. 197.
[1] See Schmidt, *op. cit.*, p. 198.

action either at a meeting or in some other way. Without such a collective commitment, the effectuation of measures of collective character would hardly have been possible, at least in the case of measures of great extent.

Another possible explanation why in Swedish law a meeting of the members within the framework of the organization is required in order for the organization to incur responsibility is that otherwise the strike would have been held to be a set of actions by individual employees exclusively and they would have been held individually responsible according to subsec. 1 of sec. 4 of the Swedish Collective Agreements Act. In Finnish law the individual member does not incur responsibility in embarking upon unlawful industrial actions. Therefore the consequences of the conduct of the employees are more readily allocated by the Finnish Labour Court to the sphere of responsibility of the organization.

### *Some political aspects*

It is difficult to give a clear answer to the question of legal policy as to whether, following the example of Sweden, the peace obligation should be extended in Finland to the individual employees. I am hesitant about the idea that responsibility for maintaining industrial peace should explicitly be imposed directly on the employees by means of statutory provisions. In my view such a solution would be too rigid and impractical. Questions regarding industrial peace should wherever possible be kept as a matter primarily between the employer and the trade union. The collective character of labour conflict is the basis for this.

It is also clear that because of the great number of employees who in many cases participate in unlawful industrial actions such a regulation would be practically speaking meaningless. It is clear, further, that the possibility of legal action would tend to damage the relations between an employer and the employees during the period of a labour conflict, when these relations are in any case strained. It should further be remembered that in many cases the reason for setting industrial actions in motion is a dispute regarding the proper interpretation of a collective agreement. In such a situation the employer, relying on his managerial prerogatives in the employment relationship, may require that his own interpretation of the collective agreement shall be upheld until the Labour Court has settled the differences regarding interpretation. If in such a case the individual employees would incur

responsibility for resorting to industrial action, the responsibility of the employer for incorrect application of the collective agreement would also have to be made more strict. Under the present law as laid down in sec. 7 of the Collective Agreements Act, the employer is responsible only for intentional violation of a provision of the collective agreement.

In my view there are grounds of legal policy for extending the competence of the parties to a collective agreement in such a way that these parties would, by means of the industrial-peace clauses, have power also to bind the individual members of the union.[2] Such a solution would be flexible and would correspond to the actual requirements of practical working life. Thus, in the bargaining process the parties would have complete freedom to consider all the different conflict situations which might actually appear in practice and which would have to be touched upon in the industrial-peace clause. Further, in such a clause it might be possible to limit the peace obligation so as to cover only certain employees in key positions, e.g. the members of the board of a branch, the shop stewards, and others. It should also be possible in the drafting to take into account possible violations and their consequences. I believe that such a peace obligation based upon agreement would provide a useful method of controlling irresponsible employees.[3]

## III. THE RESPONSIBILITY OF EMPLOYEES ACCORDING TO THE LABOUR DISPUTES ACT

Since this essay deals with the legal position of the employee who is initiating an industrial action, there are some provisions in the Labour Disputes Act which need not be considered. They concern the function of the mediator when work stoppages have occurred.

According to sec. 7 of the Labour Disputes Act no work stoppage or extension of a work stoppage or any other such measure may be embarked upon in connection with a labour dispute unless two weeks before, at the latest, notice in writing has been

[2] Cf. Swedish Collective Agreements Act, sec. 4, subsec. 3.

[3] See also in this connection Schmidt, "Rättsläget vid vilda strejker", *Sv.J.T.* 1970, pp. 719 ff.

given to the mediator and to the other party, in which notice the reason for the intended work stoppage or extension of a work stoppage and the moment of its initiation are specified. The duty to give notice concerns only work stoppages. Thus there is no such requirement as regards other kinds of industrial action. It should further be observed that the duty to give notice applies only to a work stoppage in connection with a labour dispute. Theoretically, this obligation to give notice also covers employees who initiate an unauthorized action, although in practice the significance of this may be very slight.

According to sec. 8 of the Act, when an expected work stoppage or the extension of an existing work stoppage constitutes, because of its scope or the special character of the work threatened by the stoppage, an interference with the economic functioning of the community as a whole or is notably socially harmful, the Ministry of Health and Public Welfare may restrain the employees from embarking upon the intended work stoppage or extension of a work stoppage, for a maximum period of fourteen days. This power to postpone a work stoppage applies only to work stoppages in connection with labour disputes. It should further be noted that the presumed danger to society as a whole arises either from the extent of the work stoppage or from the special character of the work involved. Furthermore, the provision makes it clear that the reason for the postponement of the permissible date for the beginning of the work stoppage is to gain time for mediation of the labour dispute.

Neglect of the duty to give notice is punishable by a fine, specified in sec. 17.[4]

## IV. THE TERMINATION OF THE EMPLOYMENT RELATIONSHIP IN CONNECTION WITH INDUSTRIAL ACTIONS

A new Employment Contracts Act came into force in Finland in January 1971. It includes certain provisions which attempt to clarify the effect on the legal position of the employee engaging in strikes or other industrial actions as regards a number of

[4] For a more detailed interpretation of the Labour Disputes Act, see Arvo Sipilä, *Suomen työoikeuden pääasiat*, Porvoo 1968, pp. 152 ff., and Sarkko, "Om varsel vid sympatikampåtgärder", *F.J.F.T.* 1969, pp. 292 ff.

points which previously appeared problematic.[5] Of particular interest are those provisions which have bearing upon the actual discontinuance of the employment relationship in consequence of an industrial action.

*The termination of the employment relationship upon notice*

The effect of a stoppage of work on the employment relationship can be analysed in three different ways. First, it is conceivable that an industrial action, either in the form of a strike or in the form of a lockout, might itself have the effect of automatically terminating the employment relationship. Another possibility is that the attacked party may have the right to terminate the employment relationship upon notice. The third possibility is the termination of the employment relationship as a right of one party to rescind the contract on the ground that the other party has initiated an offensive action. It is not necessary to pay much attention to the first-mentioned possibility, since both the legislative history and those provisions of the Act which deal with termination of the employment relationship clearly indicate that because of its collective character the initiation of industrial action does not have the effect of bringing about an automatic termination of the employment relationship. The employment relationship is considered as being held in abeyance during a labour conflict and being dissolved only on the basis of a special notice with that intent. Thus it is the two latter possibilities that have to be analysed here more deeply.

According to subsec. 1 of sec. 37 of the Employment Contracts Act, an employment contract which has been made for the time being or which is otherwise in force for the time being has to be terminated upon notice. According to subsec. 2, the employer is not entitled to give notice without an important reason.[6] It is explicitly stated that participation of an employee in a strike or some other form of industrial action shall not be considered a

[5] For the legal situation prevailing before the passing of the new Employment Contracts Act, see Raimo Pekkanen, *Työsuhteen alkamisesta ja päättymisestä*, Vammala 1968, pp. 76 ff.

[6] As regards the provisions regarding protection against dismissal in subsec. 2 of sec. 37 of the Employment Contracts Act, certain errors and defects have been noticed in the law as it stands. Therefore there is an intention to amend these provisions by a special act regarding protection against dismissal. It is nevertheless highly probable that any amendment of this law will not occasion any significant changes in the way the question has been treated in this article regarding the termination of the employment relationship in connection with industrial actions.

reason for termination. It should be noted, first of all, that this protection against dismissal affects only actions taken by the employee. The employee can thus with complete freedom declare the employment relationship terminated where the employer has resorted to a lockout or other industrial action. It should further be noted that the protection against dismissal concerns only employment contracts which are in force for the time being. It should be noted that an employment contract made for a definite period of time continues independently of any action in a labour conflict. Thus it is perfectly possible that the period of the contract may come to an end at a time which happens to fall within the period of a labour conflict.

The protection against dismissal covers other means of participation in labour conflicts besides striking. Thus, refraining from doing a certain part of the work or an intentional go-slow or other industrial action cannot be taken as grounds for dismissal. According to sec. 43 of the Employment Contracts Act, a party has the right to rescind the contract with immediate effect in a number of situations, among them specified types of misconduct of the other party. In so far as participation in a strike or other form of industrial action would justify the employer, on the basis of sec. 43, in rescinding the employment contract, the employer may be viewed as having the right, within the framework of the main rules involved, of resorting to a dismissal upon notice instead of a termination with immediate effect by means of rescission.

If the employer, acting contrary to the statute, actually dismisses the employee on the ground that he has participated in an offensive action, it does not follow that the employer is obliged to take the employee back into his employment. Instead the employer may incur the costs of paying a certain sum, determinable on specific grounds, to the employee who was illegally dismissed.

It is clear that the shop steward, as the representative of the employees, is particularly liable to be at cross-purposes with the employer in a labour conflict situation. The statute pays regard to his need for more effective protection against dismissal than that enjoyed by other employees. Thus subsec. 2 of sec. 53 of the Employment Contracts Act provides that the employer can dismiss the shop steward only if a majority of those employees of whom he is the shop steward approve or if, in case of redundancy, no other work corresponding to his skills can be arranged for him. Despite the somewhat unclear language of this

provision, the shop stewards who are viewed as being protected include both the shop stewards referred to in certain acts and other shop stewards appointed by the local trade unions. If, contrary to subsec. 2 of sec. 53 of the Act, the employer has dismissed a shop steward, he is not obliged to take him back. However, the dismissal constitutes a criminal offence and the employer may be sentenced to the payment of a fine as set forth in sec. 54 of the Employment Contracts Act.

### *The rescission of the employment relationship*

As will have appeared from the previous subsection of this article, the protection of the employee against dismissal upon notice in the labour-conflict situation is unconditional. Because this protection is viewed as affecting all types of industrial action, the interpretation of the protection against dismissal does not in practice cause difficulties.[7] However, there are situations, albeit of a limited character, where the question arises whether the conduct of the employee should be evaluated independently and not as an action in a labour conflict. It is not possible to go into this question here.[8] The other possibility, that of rescinding an employment relationship on the ground of participation in a labour conflict, is considerably more problematic. It is also more important for the employer, because rescission, unlike dismissal, affects employment contracts made for a definite period of time too

[7] The relation between termination of the employment relationship by notice of dismissal and its termination by rescission is difficult to explain, inasmuch as the language of subsec. 2 of sec. 37 of the Employment Contracts Act implies that termination of the employment relationship by notice of dismissal is not permitted in a situation where for the same cause the employment relationship could be terminated by rescission. In my view, however, the protection against dismissal is not to be interpreted as being so unconditional. This view can be based on the principle that it is the general legislative intent always to take account of the fact that the termination of the employment relationship by dismissal upon notice may have more disturbing consequences for the employee than its termination by rescission. In certain cases the employee might view rescission as being a better alternative for him personally, rather than dismissal, which binds the employee to the employment relationship during the period of notice. In such a case the employee is viewed as having the right to demand that the employment relationship shall not be terminated by dismissal instead of rescission. In the Government proposal for a new act regarding the general protection of employees against dismissal this inconsistency has been removed. In the draft it is provided that the employment relationship can be terminated by dismissal where the employer would on the same ground be justified in rescinding the employment contract.

[8] For a discussion of the significance of the content of the concept of industrial action, see Sarkko, *Työrauhavelvollisuudesta*, pp. 31 ff.

and has in all cases the effect of immediately terminating the employment relationship, whereas a termination of the employment relationship by dismissal may presuppose a relatively long period of notice before the dismissal comes into effect.

According to subsec. 1 of sec. 43 of the Employment Contracts Act, both an employment contract for a definite period of time and an employment contract for the time being can be rescinded with immediate effect when justified for some "important reason". According to the Act, the reasons justifying rescission include "such actions of the other party to the contract and such changes in the circumstances attending the contract, particularly changes within the party's own sphere of risk, that it would not be reasonable to demand from the party the continuance of his contractual relationship". These general prerequisites have to be satisfied before the contractual relation can be rescinded. The quoted provision is based upon the general principle in the law of contracts that a party may rescind the contract in case of a serious breach by the other party to the contract. Nevertheless, in regard to the employment relationship, it is to be remembered that the grounds on which rescission would be justified are to be evaluated in a stricter manner than in the law of contracts generally, as a consequence of the principle of the protection of the employees being embodied in labour-law legislation. Thus the employer is not permitted to avoid the rules on protection against dismissal upon notice by rescinding the employment contract because of a minor or completely fabricated violation.

There are a number of cases listed in subsecs. 2 and 3 of sec. 43 of the Employment Contracts Act in which the employer or the employee are in general viewed as having the right to rescind the employment relationship.[1] As mentioned before, it is provided in subsec. 4 of the same section that the provisions in this section regarding the right of rescission are not to be applied to the stoppage of work "resulting from a strike or a lockout". However, this immunity will not apply where the employees have failed to have "recourse to the provisions of the Labour Disputes

[1] Among other situations where the employer is entitled to rescind the employment contract the following is mentioned in the Employment Contracts Act, sec. 43, subsec. 2: "Intentionally or by negligence the employee fails to perform work assigned to him"; regardless of warnings he continues his neglect. As is made clear by subsec. 4, the provisions of sec. 43 do not apply to industrial actions. The application of sec. 43 may come into play in those rare cases in which the employees' refusal to do work cannot be held to be an industrial action.

Act" or where the action was "contrary to the provisions of the Collective Agreements Act or the collective agreement".

From this, it is clear that so far as the main rules are concerned there is no general right of rescission in cases in which the performance of work was stopped because of a strike or a lockout. The exemption clause refers only to strikes and lockouts. Any possible other grounds for the right of rescission in case of resort to industrial action must therefore be evaluated on the basis of the general prerequisites for the right of rescission in subsec. 1 of sec. 43 of the Employment Contracts Act. What is involved is, for example, the refusal to do a part of the work and the intentional slowing-down of performance on the job.

Further, the limitation of the right of rescission in respect of strikes and lockouts nevertheless presupposes that the initiation of an offensive action in labour conflict shall not violate "the provisions of the Labour Disputes Act" or be "contrary to the provisions of the Collective Agreements Act or the provisions of the collective agreement". Here it is to be noted that, as will be clear from the preceding analysis, the employee cannot himself in a legally relevant way violate the provision on peace obligations in sec. 8 of the Collective Agreements Act any more than he can violate the possible peace clauses in the collective agreement. However, the employees who embark upon an unauthorized industrial action are obliged to uphold the regulations regarding work stoppages in the Labour Disputes Act. In so far as the initiator of the work stoppage is an organization of employees, the obligations imposed in the Labour Disputes Act affect the organization. Thus it can be stated that the possible right of rescission in such cases incorporates a norm, in which consequences are imposed on the employee in those cases in which the action of the employee is connected with the illegal behaviour of another person or with the illegal behaviour of an organization of employees.[2]

The legislators have by no means assumed that the participation of the employee in a strike in a manner contrary to the Labour Disputes Act or the Collective Agreements Act or the collective agreement would in itself constitute a reason justifying

[2] Assume that an unorganized employee participated in an industrial action which was put into motion by an organization in breach of sec. 8 of the Collective Agreements Act. Then the situation becomes somewhat problematic. Possibly the exemption clause in subsec. 4 applies to unorganized employees who have taken part in an industrial action.

the rescission of an employment contract. Certainly, participation in a strike is a matter of concern. It is quite clear, however, that not just *any* sort of violation of the above-mentioned norms will suffice to fulfil the requirement that there should be an important reason justifying the right of rescission. No simple formula can be presented. In my view each concrete situation has to be examined from two aspects, one of which is related to the extent of the violation objectively evaluated, and the other to certain subjective aspects connected with the violation.

Moreover, the requirement in sec. 43 of the Employment Contracts Act that there should be an "important reason" presupposes that there shall have been an essential violation of the system of rules. As stated in the same section, "it would not be reasonable to demand from the other party that he shall continue his contractual relationship". In the author's opinion, in evaluating the essentiality of the violation the previously mentioned sets of regulations can be put into a certain "abstract" order. Although the evaluation in some concrete case may well be different from this, my view is that in general a violation of the peace obligation in sec. 8 of the Collective Agreements Act is to be held a more serious offence than leaving unfulfilled the regulations of the Labour Disputes Act or the violation of a peace clause in a collective agreement. This is regardless of the fact that the sanction prescribed in the Collective Agreements Act is a compensatory fine which is a civil sanction ranged along with the payment of damages, while the Labour Disputes Act provides for a punitive fine.

In each situation where there is a decision to be made regarding the seriousness of the resort to industrial action, attention must also be paid to a great number of factors which are in part independent of the activity of the employee engaging in such an action. Such factors include, for example, the length of time involved, the number of the employees participating in the offensive action, the damage caused, and the extent to which the employer himself shares responsibility for the outbreak of the offensive action. If the judge considers that the employer deliberately or disingenuously interpreted incorrectly some provision of the collective agreement, he has to take this into account as a mitigating factor. Attention must be paid, too, to the questions whether the negotiations were made unnecessarily troublesome and who may have been to blame for this. There may have been some excuse—e.g. its ambiguity—for the misinterpretation of a

provision. Further, the judge may look for guidance in decisions of the Labour Court concerning the size of the compensatory fine for initiating industrial actions and in the "first reasons" listed in subsec. 2 and 3 of sec. 43 of the Employment Contracts Act on the basis of which the employer or the employee may in general rescind the employment contract.

In addition, attention must be paid to certain criteria for the actual behaviour of the employees. First, in assessing whether there is ground for rescission, it must be taken into account whether the employee in question has himself violated some legal obligation by resorting to industrial action. As regards the individual employees, such a violation can come into question only within the framework of the provisions of the Labour Disputes Act, as was explained earlier. What is in question here are those cases where the employees engage in unauthorized action without fulfilling the requirement of giving prior notice as provided in sec. 7 of the Labour Disputes Act.

Secondly, in assessing whether there is ground for rescission, attention has to be paid to the connection between the trade unions and employees participating in an industrial action. In other words, it must be taken into account whether the employee knew, or should have known, that the action in which he participated was against the provisions of the Labour Disputes Act or the Collective Agreements Act or against the provisions of the collective agreement. In practice this comes into question primarily when the action is viewed as violating the peace obligation embodied in sec. 8 of the Collective Agreements Act. Following the indications of sec. 8 of the Collective Agreements Act, one should ask whether the employees have understood that their action was against either the collective agreement as a whole or any of its individual provisions. In borderline cases, the decisive point may be whether the trade union or its branch has let the employees understand that their action was legal or whether the employees were informed that the action was in violation of sec. 8 of the Collective Agreements Act.

*The responsibility of the employee for the payment of damages*

Sec. 51 of the Employment Contracts Act deals with the responsibility for the payment of damages by the parties to an employment relationship. In subsec. 4 it is provided, however, that compensation need not be paid for damage caused in connection with such stoppage of the work as is referred to in sec. 43, subsec. 4,

unless for such a reason the rescission of the employment contract is permitted. Thus it is quite clear that the individual employee does not incur responsibility for the payment of damages to the employer caused by his participation in a strike when the strike was not contrary to the provisions of the Labour Disputes Act or the Collective Agreements Act or the provisions of the collective agreement. Even so, a duty to pay damages will not fall upon the employee unless the general conditions set forth in subsec. 1 of sec. 43 of the Employment Contracts Act regarding the rescission of the employment relationship are fulfilled.[3]

Of the different kinds of industrial actions by the employees from which responsibility for paying damages may arise, subsec. 4 of sec. 43 of the Employment Contracts Act deals only with the strike. Similarly, subsec. 4 of sec. 51, which sets certain limits to the responsibility for paying damages, deals only with the strike. The question arises, therefore, what shall be decided regarding the responsibility for the payment of damages in respect to other kinds of industrial action. The answer to this question must be looked for in subsecs. 1 and 2 of sec. 51 of the Employment Contracts Act.

I will begin the analysis with subsec. 2, which provides that a party to a contract who on the basis of sec. 43 has rescinded the contract because of the deliberate or negligent misconduct of the other party is entitled to reparation for the damage caused by the premature termination of the contractual relationship. It should be recalled that the general prerequisites for rescission set forth in subsec. 1 of sec. 43 of the Employment Contracts Act are applicable to the conduct of the employee as regards other offensive actions in labour conflicts than the strike, and indeed are also applicable to those involved in a strike in so far as the strike is effectuated contrary to the provisions of the Labour Disputes Act or the Collective Agreements Act or contrary to the provisions of the collective agreement. When the employer has had the right on this ground to rescind the employment contract, he has a right to the payment of damages by the employee for the injury caused to him by the premature termination of

[3] The obligation to compensate loss is limited by subsec. 4 of sec. 51 to cover only damage caused directly by the interruption of the work that is incidental to the carrying on of a strike. In so far as the effectuation of an industrial action involves other conduct which is not directly connected with the interruption of work and this other conduct causes damage to the employer, the obligation to pay damages is to be based on other norms than those of subsec. 4 of sec. 51 of the Employment Contracts Act.

the contractual relationship. Sec. 51, subsec. 2, covers only damage caused by the rupture of a contractual relation.[4] In so far as other damage is caused in such a case, compensation for that damage is to be evaluated according to the chief rule dealing with it in subsec. 1 of sec. 51 of the Employment Contracts Act.

Sec. 51, subsec. 2, presupposes that the employment contract was in fact rescinded. Thus it is not sufficient that the violation should be such as would justify rescission. If the employer does not actually wish to rescind the contract although he would be justified in doing so, his claim for damage has to be evaluated according to the chief rule laid down in subsec. 1 of sec. 51, which runs as follows: "A party who deliberately or by negligence fails to perform his duties under the employment contract is liable to pay reparation to the other party for damage caused." According to this general norm the payment of damages might impose on the employee liability for the reparation of damage caused by deliberate go-slows or other such offensive actions in labour conflicts.

Sec. 51, subsec. 3, contains a provision for mitigation of damages similar to the provision in sec. 8, subsec. 3, of the Swedish Collective Agreements Act.[5] According to sec. 51, subsec. 3, of the Finnish Employment Contracts Act, the reparations to be paid by the employee can be reduced to such an amount as seems reasonable, taking into account the extent of the damage, the nature of the neglect, the status of the person causing the damage and other circumstances surrounding the case.

In my view it is precisely in connection with industrial actions that the application of this norm of reasonableness can come into question. Its application arises from factors in the situation which have to be taken into account. First, there are certain circumstances frequently associated with the initiation of industrial actions which tend to make the evaluation of the conduct involved more lenient than the evaluation of many other kinds

[4] The committee on the redrafting of the Employment Contracts Act mentioned, as examples of loss which should be compensated when the employer rescinds the contract of employment, loss incurred because it was not possible to find a replacement for the person who had been discharged or because the employer had to pay higher wages to the replacement. When the employee rescinds the employment contract because of a violation by the employer, the employee should be compensated for loss because he was unable to find another job during the time in which the original contract would have been in force. See *Työsopimuslakikomitean mietintö* 1969: A 25, p. 61.

[5] See Schmidt, *The Law of Labour Relations in Sweden*, pp. 217 ff.

of conduct deliberately causing damage. For example, the circumstances which are taken into account include the employer's own conduct in the labour-conflict situation and other similar circumstances surrounding the resort to industrial action. On the other hand, the extent of the damage caused in labour-conflict situations can become so great that it is completely disproportionate to the employee's capacity to pay.