VIEWPOINT STEVE ADLER

Small disputes make big law

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The National Labor Court in Jerusalem.

URI ARBEL was dismissed in mid-September 1991 by his employer, H.P.H. Products Ltd, after working 16 months as sales manager and CEO. According to their agreement, H.P.H. agreed to give Uri one month's paid dismissal notice. Uri was also entitled to payment for 24.5 unused vacation days. Uri expected that he would work the month of the advance dismissal notice and receive payment for his 24.5 unused vacation days but things didn't work out that way.

H.P.H. told Uri to stop coming to work the first day of the advance dismissal notice period and to be on vacation during that period. This would use up Uri's vacation days because the advance notice payment days would also be for the vacation days. When he received a month's salary for the dismissal pay but only 14 of the 24.5 days' vacation days he was entitled to, Uri sued in the Regional Labor Court for the additional 10.5 days. Uri's claim was rejected, he appealed to the National Labor Court, and I wrote the judgment accepting his claim.

This dispute had relatively minor monetary importance, but significant legal implications.

The legal issue related to interpretation of the Annual Leave Law of 1951, which in 1951 entitled each employee to an annual vacation of 14 days. Vacation is absence from work, but some absences are not considered vacation, such as army reserve service, illness, maternity leave and the first 14 days of an advance dismissal notice period. H.P.H.'s defense was that when the law said that absence during the first 14 advance notice days was NOT vacation, absence after that during advance notice days was vacation.

Therefore, Uri's absence during the first 14 days of advance notice did not reduce the 24.5 vacation days owed him, but his absence during the next 10.5 days was vacation and H.P.H. did not have to pay him for those days. Previous Labor Court interpretation supported H.P.H.'s position and we decided there was a preferable way of understanding the law.

Our interpretation of Section 5(a)(7) was an example of adapting a 1951 law to the economic reality forty years later. When the law was passed in 1951 the annual vacation was 14 days (from 1965 it is 16-28 work days, depending on seniority). Section 5(a)(7) prevented an employer from putting a worker on vacation during the advance notice period in order to deprive him of unused vacation payment. The statute does not permit an employer to force a worker to take vacation during the advance discharge notice period. However, when the employer wants the worker to work during the advance notice period, but the employee decided not to work and take vacation, the worker is only entitled to payment for his annual 14 days' vacation, but excess accrued vacation days are considered absence from work and paid for with the advance notice payment. Since Uri did not take vacation during the advance notice period his entitlement to unused vacation pay is not reduced by the advance notice payment.

Our interpretation of Section 5(a)(7) caused an uproar from some manufacturers and the Chamber of Commerce: the "activist" Labor Court changes laws and precedent, favors employees and should be eliminated.

However, when calm was restored most employment law practitioners acknowledged that the result was fair and a reasonable interpretation of Section 5(a)(7). The Israeli Labor Law and Social Security Society had previously recommended amending Section 5(a)(7) according to our interpretation. Ten years later the Knesset passed the law requiring advance notice without changing our interpretation in the H.P.H. judgment. The Manufacturers Association and Chamber of Commerce, together with the trade unions, are staunch supporters of the Labor Courts till today.

Our interpretation was according to the purpose of the vacation and advance notice benefits. The advance notice payment is for the worker to have funds while he seeks another job. Payment for unused vacation is not for an actual vacation, but compensation instead of a vacation.

The Israeli Supreme Court is sometimes criticized as "activist" for doing what we did in Uri's case. In my opinion, the modern "text and intent" legal interpretation method is not "activist" but realistic. Activity resulting in change is generally preferable to stagnation. When a dispute is brought before a court and there is a lacuna in a law or its language is subject to various interpretations, the court should interpret the law according to how it understands the text and the law's intent and purpose in today's society. Those who claim courts should not decide in such instances are really advocating continuation of the existing and usually irrelevant unfair situation.

Understanding a law's purpose and context is important to interpreting the text. Law, like life, is in perpetual flux and needs to be adapted to current society and values. U.S. Supreme Court justice Benjamin Cardozo summarized the judicial process: "logic, and history, and reason, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law".

This approach is extremely important in employment, labor and social welfare laws. Israel's economy and workplace of 1951 has been replaced by the start up nation economy and welfare-equality workplace. Labor laws of the 1950's have not been updated and many are not compatible with today's economy. Employer's associations and trade unions do not rely on the Knesset to update protective labor legislation. They prefer that it be done by the Labor Court, because of its' expertise, impartiality, and the participation in court panels of labor and management lay judges along with the professional judges.

A modern economy requires law which is suitable to current technology and can cope fairly with innovations and change. Employment law must also accommodate societies current values, such as human dignity, equality, fairness to both employees and managers, and a workplace free of discrimination, harassment and unacceptable behavior. Uri's judgment was not "legal activism", but a modern realistic method of legal interpretation, which enabled the Labor Court to prevent employers from unfairly depriving workers payment for unused vacation days. ■

The writer is a retired president of the National Labor Court.