AS TO THE ADMISSIBILITY OF

Application No. 17789/91
by H.I.
against the Federal Republic of Germany

The European Commission of Human Rights sitting in private on 7 April 1992, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G. H. THUNE
Sir Basil HALL
MM. F. MARTINEZ RUIZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
A.V. ALMEIDA RIBEIRO
M.P. PELLONPÄÄ
B. MARXER

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 10 October 1990 by H.I. against the Federal Republic of Germany and registered on 12 February 1991 under file No. 17789/91;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a German citizen, born on 16 March 1947 and living at Cologne. He is represented by Mr. F.-A. Psolka, a lawyer in Cologne.

It follows from the applicant's statements and the documents submitted that he was employed as a member of the external staff by BASF. His employer put a car at his disposal for his business trips. As a consequence of the withdrawal of his driving licence because of drunken driving in August 1987, the applicant's employer wished to terminate their contractual relations. According to the allegation of the employer, on 20 August 1987 an oral agreement was reached that the employment relations would be terminated on 30 September 1987, the applicant was suspended from service but entitled to full salary. As the alleged oral agreement was contested by the applicant, BASF dismissed him, as a precaution, without notice on 29 September 1987 and

at the same time, as a precaution again, with notice for 31 March 1988. It being alleged that the letter of 29 September 1987 was not delivered until 1 October 1987, BASF dismissed the applicant, as a precaution, once more without notice by letter of 13 November 1987, and at the same time, as a precaution again, gave notice for 30 June 1988.

The applicant brought two Labour Court actions against the two dismissals requesting the Labour Court primarily to find that his employment contract continued to be valid.

I. The first labour court action (17 Ca 7167/87)

In the first set of labour court proceedings the applicant not only challenged the lawfulness of the notice of dismissal of 29 September 1987 but made various further requests, inter alia, for payments and attribution of a service car.

1. First partial judgment

On 2 February 1988 the Cologne Labour Court (Arbeitsgericht), by partial judgment, granted the action insofar as it was directed against the dismissal without notice but rejected it insofar as it was directed against the notice for 31 March 1988.

2. The appeal proceedings (7 Sa 496/88)

Both parties appealed. The appeal proceedings were registered under file no. 7 Sa 496/88.

On 23 November 1988 the Regional Labour Court (Landesarbeits-gericht), presided by Judge B., amended the judgment appealed from. The appeal of the defendant was granted while the applicant's appeal and his claim that his dismissal was unlawful were rejected. The Regional Labour Court directly took evidence, heard several witnesses and established the facts. Evaluating the evidence the Court in its written judgment mentioned several allegations of the applicant as not plausible or incredible. According to the findings of the appellate court the parties had agreed on 20 August 1987 to terminate the employment contract with effect as from 30 September 1987. Leave to appeal on points of law was denied. An appeal against this denial was declared inadmissible by the Federal Labour Court (Bundesarbeitsgericht) on 23 March 1989.

3. Second judgment (final judgment)

On 15 April 1988 the labour court proceedings (17 Ca 7167/87) were adjourned insofar as they related to the applicant's further claims which presupposed the validity of the employment contract. Therefore the outcome of the appeal proceedings 7 Sa 496/88 was considered to be decisive for the applicant's remaining claims.

On 31 January 1989 the Labour Court dismissed the remaining claims. It found itself bound by the finding of the Regional Labour Court in its judgment of 23 November 1988, that the parties had agreed on 20 August 1987 to terminate the employment contract with effect from 30 September 1987.

4. The appeal proceedings (7 Sa 401/89)

The applicant's appeal against the Labour Court's judgment of 31 January 1989 was rejected by the Regional Labour Court - the Chamber was composed without judge B. - on 28 February 1990. These appeal proceedings were registered under file no. 7 Sa 401/89.

II. The second labour court action (17/16 Ca 8350/87)

On 2 February 1988 the Cologne Labour Court granted this action and held that the notice given on 13 November 1987 did not terminate the employment contract.

5. The appeal proceedings (7 Sa 537/88)

The judgment of 2 February 1988 determining the question of the validity of the notice of dismissal of 13 November 1987 was appealed from by the defendant company. The appeal proceedings were registered under file no. 7 Sa 537/88.

On 3 August 1988 the appeal proceedings were adjourned pending the outcome of the first labour court action in proceedings 7 Sa 496/88. On 20 September 1989 the Regional Labour Court with judge B. as presiding member amended the judgment of 2 February 1988 and dismissed the applicant's action. The Regional Labour Court found from a legal point of view that its judgment of 23 November 1988 (7 Sa 496/88) was binding insofar as it had been declared that the employment contract was terminated by oral agreement on 20 August 1987 with effect from 30 September 1987. On 15 December 1989 the Federal Labour Court rejected the applicant's complaint against the denial of leave to appeal on points of law.

III. The challenges of the presiding judge B. in the appeal proceedings

The applicant challenged the appellate Labour Court's presiding judge B. both in appeal proceedings 7 Sa 537/88 and 7 Sa 401/89. The Regional Labour Court on 7 September 1989 passed two separate decisions on this issue.

The Regional Labour Court stated in proceedings 7 Sa 401/89 that the challenge had to be granted - contrary to 7 Sa 537/88 - as to the exceptional, and therefore exclusive, matter of the appeal, which dealt with the question whether the finding of the Regional Labour Court, in its judgment of 23 November 1988 7 Sa 496/88, according to which the

parties had agreed to terminate the employment contract with effect from 30 September 1988, despite the substantial res iudicata effect of this judgment, was binding in proceedings 7 Sa 401/89. The applicant heavily criticised judge B. and how the judgment of 23 November 1988 (7 Sa 496/88) came about, in particular that the Court had regarded the applicant's allegations as not credible, contested therefore the binding effect of that judgment and offered new evidence as far as the termination of the employment contract was concerned. Thus the Court argued that, exceptionally, judge B. should not participate in proceedings 7 Sa 401/89 as the main point of appeal was the criticism of judge B. and the consequent contested legal effect res iudicata of the judgment of 23 November 1988.

On the other hand, the Regional Labour Court dismissed on the same day the challenge insofar as it related to proceeedings 7 Sa 537/88 stating that, contrary to proceedings 7 Sa 401/89, it is no matter of consideration whether the participation of judge B. in proceedings 7 Sa 496/88 could have given reasonable concern as to his impartiality because the criticism of the judgment of 23 November 1988 is inadmissible, the Federal Labour Court having rejected the appeal against the denial of an appeal on points of law. The applicant relied on circumstances which had to be invoked in the appeal procedure before the Federal Labour Court and are of no significance as to the question of impartiality. The Court further stated that those proceedings related to a very different subject-matter, namely the dismissal of 13 November 1987. Although the decision also depended on the question

whether the employment contract had been terminated by mutual agreement with effect from 30 September 1988 there were no objective elements justifying fear that the challenged judge B. would not examine the appeal in an unbiased manner. Insofar as the applicant had complained that, without his consent, it had been decided to hold a hearing on 20 September 1989 in the adjourned proceedings (adjournment 3 August 1988, see above), the Court pointed out that the challenged judge had been on leave when the decision fixing the date for the hearing had been taken.

A further challenge in proceedings 7 Sa 537/88 was rejected on 20 September 1989 during the oral hearing presided over by judge B. and the reasons were stated in the judgment of the same day, namely that the motion was abusive as it was based on the same grounds that had already been examined in the decision of 7 September 1989.

IV. Constitutional complaints

The applicant filed no constitutional complaint against the decision of 7 September 1989 dismissing the challenge of judge B. in proceedings 7 Sa 537/88.

The applicant's constitutional complaint against the judgment of 20 September 1989 (7 Sa 537/88) and the decision of the same day rejecting his motion of challenge was rejected by a group of three judges of the Federal Constitutional Court (Bundesverfassungsgericht) on 2 July 1990. Insofar as the applicant had complained that the challenged judge participated in the decision rejecting the motion of challenge, the Constitutional Court stated that this was unobjectionable as there was nothing to show that the motion had been rejected arbitrarily. Although according to the relevant procedural law the motion should have been decided without the judge concerned these rules did not apply in respect of abusive motions. The Regional Labour Court had in fact considered the motion to be abusive and the reasons stated in this connection did not disclose any arbitrariness.

On 2 July 1990 another constitutional complaint against the judgment of the Regional Labour Court of 28 February 1990 (7 Sa 401/89) was rejected as being partly inadmissible and clearly ill-founded as to the remainder. Insofar as the applicant had complained that the Regional Labour Court had wrongly decided that the employment contract had been dissolved by mutual agreement, the Constitutional Court points out that this finding had already been made in the partial judgment of 23 November 1988 (7 Sa 496/88) and that this was binding, no constitutional complaint having been lodged against this judgment.

COMPLAINTS

The applicant invokes Article 6 para. 1 of the Convention insofar as the judgment of 28 February 1990 (7 Sa 401/89) has not been given by an impartial tribunal. Factually the decision has been made by judge B., because he had declared in his judgment of 20 September 1989 (7 Sa 537/88), that his judgment of 23 November 1988 (7 Sa 486/88) is binding insofar as the employment contract has to be considered as dissolved by oral agreement of 20 August 1987.

The applicant points out that appeal proceedings 7 Sa 537/88 were terminated before appeal proceedings 7 Sa 401/89. As the judgment of 20 September 1989 (7 Sa 537/88) was not quashed on 28 February 1990, judge R., in appeal proceedings 7 Sa 401/89, was bound by the judgment of 20 September 1989 (7 Sa 537/88) and had no other choice from a legal point of view than to follow the opinion that the judgment of 23 November 1988 (7 Sa 486/88) was binding. The applicant submits that therefore it could happen that the successfully challenged judge B. has decided indirectly upon the appeal in proceedings 7 Sa 401/89.

THE LAW

The applicant alleges a violation of Article 6 para. 1 (Art. 6-1) of the Convention which guarantees to everyone:

> "In the determination of his civil rights ... a fair and public hearing ... by an independent and impartial tribunal established by law".

The applicant considers this provision to be violated because a judge of the Regional Labour Court of Cologne who had participated in a judgment given against him by that Court on 23 November 1988 again participated in further appeal proceedings brought by him although they raised an issue that had been the subject of the previous proceedings, namely the question whether his employment contract with the defendant in the Labour Court proceedings had been dissolved by mutual consent of the parties.

The Commission notes that it is common in the Convention countries that higher courts may have to deal with the same or similar matters on different occasions. This is not in itself capable of giving rise in the present case to legitimate doubts as to the impartiality of the Regional Labour Court (cf. Eur. Court H.R., Gillow judgment of 24 November 1986, Series A No. 109, p. 28, para. 73). It is true that the applicant's challenge of the judge in question was accepted in proceedings 7 Sa 401/89 and not in proceedings 7 Sa 537/88.

However the two proceedings did, as was pointed out in the Regional Labour Court decisions of 7 September 1989, deal with different subject-matters based on different factual circumstances. In proceedings 7 Sa 401/89 the applicant mainly contested the binding effect of the partial judgment of 23 November 1988 and tried to pursue his first instance claims. In proceedings 7 Sa 537/88, on the other hand, the binding effect of the partial judgment of 23 November 1988 could no longer be put in question as leave to appeal to the Federal Labour Court had meanwhile been denied in this respect. Furthermore the judge challenged had not been responsible for the procedural arrangement from which it resulted that the appeal in the matter 7 Sa 537/89 was decided earlier than in the matter 7 Sa 401/89.

In view of these particular circumstances the Commission concludes that also from a subjective point of view there were no justified reasons to fear that the judge in question would not examine the case in an unbiased manner. The main reason for the applicant's complaint is the fact that the judge in question was, as were all other judges of the Regional Labour Court, bound by a previous and final decision which the applicant criticises.

This is, however, irrelevant under Article 6 (Art. 6) of the Convention. It follows that the application has to be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission unanimously

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission President of the Commission

(H.C. KRÜGER) (C.A. NØRGAARD)