The Supreme Court sitting as the High Court of Justice

HCJ 1181/03

Before: The Honorable President D. Beinisch
The Honorable Vice-President E. Rivlin
The Honorable Justice Emeritus A. Procaccia
The Honorable Justice E.E. Levy
The Honorable Justice A. Grunis
The Honorable Justice M. Naor
The Honorable Justice E. Arbel

Petitioner: Bar Ilan University

v.

Respondents:
1. National Labor Court
2. Organization of Senior Academic Faculty Members of Bar Ilan University
3. New General Federation of Labor [Histadrut]
4. Organization of Senior Academic Faculty Members of the Hebrew University of Jerusalem
5. Organization of Senior Academic Faculty Members of the Technion – Israel Institute of Technology
6. Organization of Senior Academic Faculty Members of Tel Aviv University
7. Organization of Senior Academic Faculty Members of Haifa University
8. Organization of Senior Academic Faculty Members of Ben Gurion

University of the Negev

9. Organization of Senior Academic Faculty Members of the Weizmann Institute of Science
10. Manufacturers Association of Israel
11. The Attorney General

Petition to grant an order nisi

Date of hearing:

On behalf of the petitioner:	Haim Berenson, attorney at law; Assaf Berenson, attorney at law
On behalf of Respondent 2 and Respondents 4-9:	Orna Lin, attorney at law; Orit Zilony, attorney at law; Sharon Lulachi, attorney at law
On behalf of Respondent 3:	Dorit Tenne Perchik, attorney at law
On behalf of Respondent 10:	Ofer Yohananoff, attorney at law
On behalf of Respondent 11:	Nurit Elshtein, attorney at law

Judgment

Justice Emeritus A. Procaccia:

The questions that arise for deliberation in this Petition are: Is a workers' organization, some of whose members are pensioners of the workplace, entitled to declare a strike against the employer on the issue of the pensioners' rights, although an employer-employee relationship no longer exists between the employer and the pensioners? Should such a strike be recognized as one that is protected by the labor laws?

What remains of a concrete labor dispute, which was resolved during the deliberations before the National Labor Court, are these conceptual-fundamental questions, which, in light of their importance,

have constituted a subject of rulings by the various instances of the Labor Courts and also the subject of a petition before this Court?

The background

1. The Organization of Senior Academic Faculty Members of Bar Ilan University (hereinafter: the University) is a representative organization of workers, whose members are the senior academic faculty members of the University and also pensioners of the senior academic faculty (hereinafter: the Workers' Organization or the Organization). During the period relevant to the dispute, the employer-employee relationship between the University and the Workers' Organization was governed by a special collective agreement dated December 6, 1998, which remained in effect until September 30, 1999. The agreement continued to apply even after that date, by virtue of Section 13 of the Collective Agreements Law, 5717-1957 (hereinafter: the Collective Agreements Law).

2. The pensioners of the University have been insured since 1959 by the Gilad Comprehensive Pension Fund, which is an external contributory pension fund. An agreement that was signed in 1988 between the University and the Workers' Organization stated that the pension should be linked to the Consumer Price Index, although, during the period that preceded the agreement, the pension had been linked to the salaries of the active faculty members. In the salary agreements for the years 1993-1996, the active faculty members received significant salary increments, at the rate of 14%. The senior faculty pensioners did not receive the said salary increments, because their pensions were linked to the Consumer Price Index, as stated above. On that basis, the Workers' Organization demanded that the University grant a pension increment of 14% to the academic faculty pensioners as well.

3. On October 7, 1999, the Workers' Organization gave the University notice of a labor dispute and a strike, pursuant to Sections 5 and 5A of the Settlement of Labor Disputes Law, 5717-1957 (hereinafter: the Settlement of Labor Disputes Law). The main issue of the dispute was the Organization's demand for the payment of a 14% increment to the

pensions of the pensioners. The University was also required to improve the pensioners' rights to the Pensioners' Research Fund.

4. Pursuant to the notice by the Organization, the University petitioned the Regional Labor Court of Tel Aviv-Jaffa with a petition by a party to the proceeding to hear a collective dispute and with a motion for temporary remedies in order to prevent the strike. The University claimed that the Workers' Organization could not declare a labor dispute and a strike, based on a cause pertaining to the improvement of the pensioners' retirement conditions. On November 7, 1999, the parties filed a joint motion to terminate the proceedings in the collective dispute, and the Organization announced the cancellation of the notices that it had given with respect to the labor dispute and the strike. This joint notice was given the validity of a court judgment.

5. On February 17, 2000, the Organization gave the University a second notice of a labor dispute and a strike, under the Settlement of Labor Disputes Law. The notice, stated that the subject of the dispute was "Terms of payment of the compensation for the academic grants increment to pensioners of the Faculty Organization." On the same day, a general meeting of the Workers' Organization was held, during which it was decided, *inter alia*, as follows:

> 1. The meeting of the senior academic faculty resolves to insist upon a claim for the immediate and unconditional payment of the 14% increment to the pensioners.
> ...
> 3. The meeting charges the Workers' Organization Committee with bringing before the next meeting, which will be convened as soon as possible, a draft resolution on implementing organizational measures, including a lockout, if the increment is not paid to the pensioners immediately and unconditionally....

Approximately two weeks later, on March 1, 2000, an additional general meeting of the Organization was held, during which it was decided that:

> In the absence of the 14% payment to the pensioners, the general meeting empowers the Committee to immediately adopt the required measures, sanctions and strike, pursuant

> to the resolutions by the Committee, until the aforementioned payment is made.

6. Following that resolution, on March 6, 2000, the Organization gave a third notice of a labor dispute and a strike. The matters in dispute were defined as follows:

> In the matter of determining rights that arise from an employer-employee relationship, in providing payment for academic grants to members of the faculty who have retired and will retire in the future, and stipulating conditions for making payment in an unreasonable and discriminatory manner.

7. Negotiations that were conducted by the parties on the subject of the dispute succeeded and, ultimately, the strike was averted. On April 9, 2000, an agreement was signed by the parties and was submitted for registration as a collective agreement. In this manner, the dispute was resolved.

The proceeding before the Regional Labor Court

8. Following the last notice given by the Organization regarding the labor dispute, and before the collective agreement governing the dispute was signed, on March 12, 2000 the University petitioned the Regional Labor Court for declaratory relief that would state that the Workers' Organization was not entitled to declare a labor dispute based on a cause pertaining to improving the retirement conditions of the university's pensioners and, in particular, was not entitled to declare a strike in that context. The signing of the collective agreement, which brought the dispute to an end, did not lead to the cancellation of the proceeding before the Labor Court, and the University sought to continue it, to allow for fundamental decisions on the questions that had arisen regarding the right of a workers' organization to declare a labor dispute and a strike based on matters related to pensioners of the workplace. The Workers' Organization, for its part, claimed that the question that had been raised for deliberation was theoretical, since an agreement had been reached and, therefore there is no need for the Court to deliberate the question. The Court rejected the argument made by the Organization and

decided to hear the University's petition on the merits, in light of the fundamental nature of the issue, and due to the fact that the issue is one that arises frequently and therefore justifies the issuance of a leading decision for the various systems.

9. The judgment of the Regional Labor Court focused on the legal question of whether a workers' organization is entitled to declare a strike on the issue of pensioners' rights. The Court (Judge Wirth-Livne and representatives of the public, Messrs. Dorscht and Mutai) responded in the negative and ruled that a workers' organization is not entitled to declare a strike that focuses on the subject of determining the rights of pensioners who had retired from the workplace.

10. In its ruling, the Regional Court did not deny the power of the organization to represent pensioners, as part of the freedom of association granted to them, or recognition of the organization's status as representing their affairs as well. Yet, according to the Court, the question is what is the meaning of the organization's representation of pensioners' affairs, and does this representation also extend to the right to declare a strike for the purpose of promoting their affairs?. According to the Court, as a general rule, a workers' organization is entitled, within the limits of the law, to declare a strike to achieve objectives in the realm of labor relations and in the realm of the working conditions of the active workers who are members of the organization. The same does not apply to pensioners. Upon their retirement from the workplace, the employer-employee relationship between the employer and the retirees is severed and the retirees' rights are determined by the articles of association of the pension fund of which they are members, or by another legal arrangement that applies to them. Even if a collective agreement is signed with regard to the pensioners, it will not constitute a "collective agreement," as this term is used in legislation, because it does not deal with "working conditions" or a "labor relationship," as these terms are defined in Section 1 of the Collective Agreements Law. A collective agreement is intended to serve as a substitute for an individual employment contract that governs a "labor relationship," while a contractual relationship between parties with no employer-employee relationship is not considered a "labor relationship" in the generally accepted legal sense.

Pensioners are also not "workers" and, accordingly, the improvement of their retirement conditions is not a matter encompassed by the terms "working conditions" or "labor relationship." Even if a collective agreement may apply to workers at the time of their retirement, it cannot determine rights and duties for workers who retired before the agreement went into effect. Therefore, the issue of pensioners' rights does not constitute a legitimate cause for a strike recognized under labor law, which aims to achieve objectives in the realm of labor relations and the working conditions of the active workers. The Court further held that the argument that a strike on behalf of pensioners' affairs can be considered a "sympathy strike," must be rejected. A sympathy strike is recognized by law, insofar as it constitutes a strike by workers to support the professional struggle of other workers, and provided that it takes place in support of a primary strike, which is recognized as a protected strike. A sympathy strike also requires the element of a professional struggle of "workers," and that element does not exist in the case at hand; Moreover, no "primary strike" exists in this case. In addition, from the standpoint of proper policy, the Court ruled that it was not appropriate to recognize the power of an organization to strike on matters pertaining to pensioners. Granting such power may not only improve the pensioners' status, but also work to their disadvantage in certain situations, thus detracting from their rights. In light of all the above, the Regional Court ruled that the Organization was not entitled to declare a strike that focused on determining the rights of the University's pensioners.

The Organization appealed that ruling to the National Labor Court.

<u>The judgment of the National Labor Court</u>

11. The National Labor Court, in a judgment written by President Adler, with which Vice-President Barak, Judge Arad, the employees' representative Mr. Harpaz, and the employers' representative Mr. Liav all concurred, allowed the appeal and ruled that a workers' organization, whose members include pensioners of the workplace, is entitled to declare a labor dispute and a strike, as part of its efforts to improve the pensioners' retirement conditions .

12. In its opening remarks, the Court noted that, as a general rule, a theoretical petition that does not require a decision for the purpose of resolving a pending concrete dispute should not be adjudicated. Yet, given that the ruling of the Regional Labor Court had been handed down and that it expressed a position on a fundamental matter that had not been previously adjudicated by the Courts, it is fitting and proper to adjudicate the matter and to establish case law with regard to the issue, especially as it concerns a substantive question related to an important right – the right to strike.

13. In considering the case on the merits, the National Labor Court classified the question in dispute regarding the scope of the pensioners' representation by the workers' organization. It ruled that, in light of case law and in view of the labor relations currently prevailing in Israel's economy, a workers' organization is entitled to include pensioners among its members and to represent them; such an organization is entitled to conduct negotiations to promote the rights of the pensioners of the relevant institution; and a collective agreement can grant rights to pensioners. The question, according to the Court, was whether a workers' organization has the right to declare a strike as part of negotiations to promote the pensioners' issues. According to the Court, because pensioners may be included among the members of a workers' organization and the organization is entitled to represent them, the organization, in any case, has the power to conduct negotiations to improve their conditions, as they belong to it. The question is whether a strike that is declared by the organization, within the framework of a labor dispute, which concerns only the pensioners' rights, is likely to be considered a protected strike that benefits from special protections under the law.

14. In the opinion of the Court, although the provisions of the Collective Agreements Law and the Settlement of Labor Disputes Law refer to "workers," "working conditions" and "labor relations," and contain no direct and explicit reference to pensioners, the purpose of these laws, when interpreted in the circumstances of the current reality, indicates that a workers' organization is entitled to strike for the sake of

its pensioners, and that such a strike is protected under law. The Labor Court pointed out the close relationship between the pensioners and the workplace in the organized sector. It noted that, with regard to the representation of workers and pensioners, there is a pertinent continuity between the period of the workers' employment in the workplace and the period of their retirement; this is especially true of a university, since pensioners continue to lecture, to perform research, and to publish articles and studies in the areas of the university, in which they acknowledge their relationship with the academic institution. Furthermore, there are pensioners who use the continuing education fund of the university's faculty members. The Court further ruled that, although the principal role of a workers' organization is to represent the active workers and to take measures for the improvement of their working conditions, this role also includes concern for the workers' retirement conditions and concern for the workers after they retire.

15. The National Labor Court examined the legislation relevant to the matter and reached the conclusion that it does negate the position that a workers' organization can declare a strike with regard to the rights of the pensioners who are among its members. As for the Collective Agreements Law, the Court referred to the definitions that appear in Sections 1, 15 and 19 of the Law, which include terms such as "worker" and "working conditions" in the context of the collective agreement and which imply, *prima facie,* that such an agreement applies to anyone who maintains an employer-employee relationship with his employer, and does not apply to anyone for whom the labor relations with his employer have ended. Nonetheless, the Court ruled that this Law should be interpreted according to its purpose, and according to the reality of life prevailing at present. Thus, it should be determined that the concept of "working conditions," which appears in the definition of a collective agreement in Section 1 of the Law, is broad in scope and also includes retirement rights and pension terms of the workers in the workplace; the term "labor relations" in the same provision also includes the affairs of workers who have retired, while the subject of pensioners' rights in the pension fund is considered part of the labor relations, and the Court has the jurisdiction to adjudicate it. The phrase "all the workers of the types included in the agreement," in the definition of the scope of the special

collective agreement in Section 15 of the Law, also includes pensioners. It was ruled that, in general, the definition of the subjects that can be governed by a collective agreement extends, in the pertinent sense, to the affairs of pensioners as well, and case law has already established that a condition in a collective agreement that grants rights to pensioners is valid. In light of the above, the Court concluded that, within the definition of the collective agreement, the Collective Agreements Law also includes, *inter alia*, an agreement that specifies the retirement conditions for the workers, and that the workers' organizations continue to represent the workers even after they have retired. Indeed, the Court emphasized that this does not transform a pensioner into someone who holds the same status as a worker for all intents and purposes, but he should be deemed as such for the purposes of his representation by the organization in matters resulting from his having been a worker in the past, and especially for the purposes of his representation with respect to the terms of his retirement.

The Court ruled that Section 2 of the Settlement of Labor Disputes Law should be considered in the same spirit. Since pensioners' rights may constitute the subject of a collective agreement under this provision of the Law, they may also constitute the subject of a labor dispute in any case. While the dispute itself is between the employer and its workers, who are represented by the organization, the subject of the dispute may, nonetheless, focus on the retirement conditions of the pensioners. The Court clarified that its fundamental ruling refers to a situation in which the workers' organization represents pensioners who are among its members, along with its members who are active workers, and does not refer to a situation in which a separate and independent pensioners' organization wishes to negotiate with the employer with respect to the pensioners' retirement conditions.

16. As for the concrete matter of the relations between the University and the Workers' Organization, it was ruled that the pensioners of the institution continued to be members of the organization in practice, and that a close relationship between them and the University was maintained; the articles of association of the Organization enable the inclusion of pensioners among its members. Among the purposes of the

Organization is representing pensioners, including in matters relating to pensions and continuing education funds. In practical terms, the Organization conducts negotiations and signs collective agreements on matters pertaining to the pensioners. Accordingly, the Organization was entitled to declare a strike for the benefit of the pensioners among its members. The Court further emphasized that the proper policy is to extend broad protection over citizen-pensioners, and to enable the workers' organization, where it exists and acts, to represent pensioners and, in so doing, to declare a strike for the purpose of promoting their rights. Insofar as a workers' organization can represent pensioners, conduct collective negotiations on their behalf and sign collective agreements that include provisions relevant to pensioners, its right to declare a workers' strike on subjects pertinent to pensioners may be assumed, since, after all, striking is an integral part of the collective negotiation process, and without the power to strike as a means of conducting negotiations, the organization's power and status would be considerably weakened. Furthermore, the right to strike is anchored in the constitutional right to freedom of association, and the negation of that right is tantamount to a prohibited limitation of the freedom of association. The right to strike, which exists within the framework of collective negotiations, expresses the right of groups to promote their interests, as part of the processes of social change that take place in the state. Denying the right to strike is also liable to violate the human right to live with dignity, since "a pensioner's constitutional right to human dignity is meaningless if he has no way to protect his income" (paragraph 26 of the ruling). These were the reasons underlying the position of the National Labor Court with regard to the power of a workers' organization to declare a strike for the purpose of promoting the affairs of the pensioners among its members.

17. Against the background of the aforementioned rulings, the National Labor Court allowed the appeal and ruled that, under the circumstances of this case, the Workers' Organization was entitled to declare a labor dispute with the University as well as a strike, as part of its efforts to obtain better retirement conditions for the pensioners of the academic faculty.

The proceeding before the High Court of Justice

18. The University filed a petition with this Court, sitting as the High Court of Justice. After a first hearing of the petition before a panel of three, an order nisi was issued and organizations of senior academic faculty members of additional institutions of higher education in Israel – the Hebrew University of Jerusalem, the Technion – Israel Institute of Technology, Tel Aviv University, Haifa University, Ben Gurion University of the Negev and the Weizmann Institute of Science (hereinafter jointly, together with the Organization: the Academic Faculty Organizations) – were joinder to the proceeding. Also added to the proceeding were the New General Federation of Labor [the Histadrut] – as the largest representative workers' organization in the state (hereinafter: the Histadrut), and the Manufacturers' Association of Israel – as the largest employers' organization in the state in the business sector (hereinafter: the Manufacturers' Association). The attorney general also announced that he would participate in the hearing of the proceeding. At a later stage, it was decided to expand the bench.

The arguments in the petition

The arguments of the Petitioner

19. According to the Petitioner, it is not appropriate to recognize the power of workers' organizations to exert economic pressure on an employer to accede to economic demands for improving pensioners' rights. This is primarily because the labor relations between the pensioners and their employers were severed, and the pensioners' retirement rights were established prior to the date of their retirement.

According to the Petitioner, the Court deviated from the generally accepted rules of interpretation of the relevant pieces of legislation in order to achieve a social purpose, and it did so in an improper way, which was not the way that was paved for this purpose – the way of legislation. It argued that there is a need to return to the proper boundaries of the recognized strike, which is intended for a legitimate labor dispute and not for a pension dispute; there is a need to refrain from expanding the pensioners' right of representation by the Workers'

Organization, and from recognizing the authority of the Workers' Organization to conduct negotiations, to sign a collective agreement and to declare a labor dispute that changes the vested rights of the pensioners, for better or for worse. The Petitioner's position is that the judgment by the National Labor Court changed the existing balances with respect to the protected freedom of strike, thereby causing great harm to the University, the students, and perhaps even to the pensioners themselves. Recognition of the pensioners' right of representation by the Organization also amounts to the preferential treatment of pensioners, relative to other groups in society that do not have the privilege of being similarly represented.

20. It was further argued that the Court did not examine the factual foundation pertinent to the matter that was brought before it, and made unsubstantiated factual assumptions. It created a legal, economic, social and political revolution, which increases the damage done by strikes, which do harm to Israeli society. The Petitioner went on to argue that a difficulty had arisen in applying the "principle of representation": it is not clear how to determine the question of which pensioners would be entitled to be included in the represented group, how the collective agreement would be applied to pensioners, how the expansion orders would be applied to pensioners, and what would be determined regarding the deduction of pensioners membership fees and handling fees that are paid to a representative workers' organization, when the Wage Protection Law, 5718-1958, allows such deductions only from workers and only from wages. Instead of permitting a solidarity strike by active workers for the benefit of pensioners, which renders the strikers immune to liability for the damages that will be sustained by the strike victims, it would have been proper to examine alternative ways of achieving the desired goals, such as exercising the active workers' legitimate right to strike for the gradual improvement of their own retirement conditions when they become pensioners; utilization of workers' and citizens' rights of freedom of expression and freedom of civil protest on behalf of pensioners, but without using the right to strike; and promotion of social legislation in the Knesset. The Petitioner argued that the Court erred in interpreting collective agreements as applying to pensioners, notwithstanding the severing of the labor relations between them and the employer.

According to the Petitioner, while a collective agreement can refer to the future pension rights of active workers, it cannot create new economic rights for pensioners after they cease to be workers. The expressions "labor relations" and "working conditions" in Section 1 of the Collective Agreements Law also refer to collective labor relations, and to the working conditions of workers, which, by their very nature, cannot apply to the conditions of pensioners after their retirement. No indirect approval should be given for a "sympathy strike," which is recognized under Israeli law as a mere exception and is limited to a strike by workers as a sign of their identification with other workers who are embroiled in a labor dispute with an employer. It was claimed that the Court also erred in applying the Settlement of Labor Disputes Law to this matter.

The Petitioner further argued that the improvement or reduction of the existing legal rights of pensioners and senior citizens is a matter for the legislator and is not part of labor law, and, in any event, the judiciary branch must exercise restraint when intervening in a matter of this type. The Petitioner further noted that, when an arrangement for the involvement of a representative organization in the rights of civil service pensioners was required, a special legislative arrangement was established for that purpose in the Civil Service Law (Pensions) [Combined Version], 5730-1970 (Sections 1 and 103-104); in addition, the bill, Basic Law: Social Rights, which defined the right to strike as a constitutional right, also limited that right to active workers, in contrast to pensioners.

21. The Petitioner emphasized that the interpretation that was given to the right to strike in matters pertaining to pensioners detracts from the balance required for delimiting the right to strike as a relative basic right. Granting protection to strikers against contractual or tortious claims requires restraint and strict interpretation of the applicability of the right to strike, which is protected under labor law for active workers only, within the framework of a labor dispute in which they are involved. The expansive interpretation of the right to strike is liable to open the way for encompassing other weak groups within society, which are not composed of "workers," within the circle for which a protected sympathy strike could be conducted through a workers' organization. This is not the

proper way to improve the status of various groups that do not hold the status of "workers," and permitting this, in practical terms, is equivalent to recognizing a prohibited sociopolitical strike, which is likely to cause irreparable damage. It was further argued that the risk that the Workers' Organization, in representing the pensioners, would not act only for their benefit, but also to their detriment, has not been taken into account. It was finally argued that, in the case before us, the classification of the Organization as a representative workers' organization is doubtful, because the membership of faculty members in the Organization is automatic and even depends on the employer and, as such, it does not comply with the conditions required for voluntary membership in a workers' organization. The pensioners' membership in the Organization is a "disabled" membership, since, pursuant to the articles of association, they cannot exert a real influence on the Organization's decisions.

22. In summary, it was argued that the requirements of justice, from both the general and the individual standpoint, require judiciary intervention in the ruling handed down by the National Labor Court. The ruling violates the property rights of employers and the legitimate interest of their expectations; it involves severe harm to the entire Israeli public, and especially to the university.

The arguments of the Academic Faculty Organizations

23. The Academic Faculty Organizations argued that the determinations made in the National Labor Court judgment should be adopted, as they are compatible with the existing legal framework, and the developments that have taken place in Israel's labor economy over the years. The Workers' Organization of the University represents mainly active workers, but its members also include pensioners, who are former workers of the University. Over a period of many years, the Organization has handled the affairs of the pensioners, who have maintained constant contact and a close affinity with their employer even after their retirement. It has acted simultaneously to promote the rights of active workers who had not yet become pensioners and to promote the retirement and pension terms of those who had formerly been active workers. According to their argument, there was nothing new in the

judgment's ruling that pensioners are entitled to organize within the framework of an existing representative workers' organization, and that a collective agreement may include provisions related to the retirement and pension terms of pensioners. The right to organize includes the right to conduct collective negotiations and the power to take various organizational measures, including the measure of striking, in order to promote the objectives that the organization wishes to achieve. The definition of the term "strike" is dynamic. No binding definition has been attached to it under the law, and its content may change according to the state of Israel's economy and society. The various concepts in the relevant items of labor legislation – "worker," "working conditions" and "labor relations" – should also be dynamically interpreted in accordance with the purposes of the legislation. Therefore, it is reasonable and correct to interpret them as governing the retirement conditions as well, so that a pensioner may be considered a "worker" for the purposes of the conditions required for a collective agreement, and for the purposes of the ancillary matters governed by the Collective Agreement Law. The definition of a "labor dispute" in Section 2 of the Settlement of Labor Disputes Law may also include matters that are related to the retirement conditions of pensioners, whose affairs are represented by the workers' organization vis-à-vis the employer.

24. The Academic Faculty Organizations added that this case involves a classic economic strike and not a sympathy strike, but that, insofar as sympathy strikes are recognized in Israel, it is *a fortiori* necessary to recognize a strike by workers, who will become pensioners when the time comes, based on the cause of harm to people who were formerly workers of the same institution and who, after retiring, remained members of the Workers' Organization. They claimed that the Petitioner's argument about the risk of the Organization violating the pensioners' rights was also not appropriate. It has already been established that the abrogation of pensioners' rights by virtue of a subsequent collective agreement would only be valid with regard to pensioners who retired from their work after, and not before, the date on which the agreement took effect. Furthermore, the Organization has a duty of proper representation vis-à-vis its members, including the pensioners among them. The fact that the Organization does not have the

power to violate the pensioners' rights cannot lead to the conclusion that it has no power to act in their favor through the use of its organizational strength. The reality of the labor market and the developments that have taken place in the field of labor relations in the last decades emphasize the potential risk of violating pensioners' rights and the need to represent their affairs vis-à-vis the employer even after their retirement. Corroboration for this recognition can be found in the close partnership that exists between the Workers' Organization and the pensioners and their rights. Finally, it was claimed that the Petitioner's argument about the doubt as to the representative nature of the Organization in the matter before us is not appropriate, in light of the factual and legal infrastructure that was established, and the dozens of collective agreements that were signed between the Parties, all of which are inconsistent with this argument.

The arguments of the Histadrut

25. The Histadrut concurred with the position of the Organization. According to the Histadrut, it would have been appropriate, *a priori*, to deny the petition before this Court as being theoretical in nature. In any event, the judgment that is the subject of the petition does not have the important lateral implications that people are attempting to attribute to it: the rights in question are not those of "senior citizens" as a whole, but rather, of the pensioners of the Workers' Organization alone. The judgment contains no general assertions with regard to senior citizens and other population groups within society. The pensioners who are members of the Organization have a special affinity to the Organization, and this is the source of their uniqueness; this applies *a fortiori* in the matter before us, because, unlike senior citizens and other population groups, which are entitled to certain rights by virtue of general constitutional principles, the pensioners' rights result from a prior contractual relationship between them and the employer. The ruling by the Court in this case has an especially narrow field of application, also because parts of it rely on the special facts of the case and, *inter alia*, on the fact that the employer in this case, as a matter of fact, customarily negotiated with the Workers' Organization with regard to pensioners. At the legal level as well, this is not a legal precedent, because the right to strike in favor of pensioners

derives from the right to associate, and this right is well anchored in law and case law. There is no practical meaning to the right to associate without the possibility of exercising that right, *inter alia*, by striking. Support for the position adopted by the National Labor Court can also be found in international law. Thus, for example, the International Labor Organization Convention (No. 87) on Freedom of Association and Protection of the Right to Organize (hereinafter: the Convention on Freedom of Association and Protection of the Right to Organize) establishes that a workers' organization is entitled to determine the content of its articles of association without governmental intervention. On this basis, the Histadrut concluded that a workers' organization may also determine that it will take measures to represent the pensioners' affairs. According to the Histadrut, the position of Israeli law is consistent with the position of international law, which, in the opinion of the Histadrut, tends to expand the objectives of the workers' organization and the right to strike. It was further argued that the right to strike should not be limited to the definition of "labor relations" in to the Collective Agreements Law or the Settlement of Labor Disputes Law. There is no inevitable connection between the ability to sign a collective agreement and the right to strike. The right to strike is a basic right that should not be limited unnecessarily, and the legislation with regard to collective agreements and the resolution of labor disputes should not be interpreted in a manner that will restrict its scope. A purposive interpretation of the term "employee" in labor legislation may justify an expansive interpretation, which includes a pensioner, *inter alia*, for the purpose of exercising the right to strike. Finally, it was argued that the position of the National Labor Court is in line with the current reality. In contrast to the state's argument that it is not possible to establish conditions in a collective agreement with regard to people who had already retired from their work prior to its formulation, the state, in actual fact, signs collective agreements that govern the affairs of pensioners after their retirement – and examples of these agreements were cited. The Histadrut ended its arguments by stating that, in its capacity as a workers' organization, it encompasses both active workers and those who have retired from work but continue to be included among its members. The Organization looks after the entire professional life of the workers, both during their active work and thereafter, and all of the workers' rights,

including pension rights, are determined with a direct connection to the period of their work.

The arguments of the Manufacturers' Association

26. The Manufacturers' Association concurred with most of the Petitioner's arguments. It argued that the right to strike was expanded in the judgment, which is the subject of the petition, beyond its proper dimensions with regard to pensioners who have retired and no longer have the status of workers. No proper balance was made between the employers' proprietary right, which is protected in the Basic Laws, and the workers' right to strike. This expansive approach is likely to encourage strikes that cause great damage to employers and the society as a whole. In addition, a workers' organization that generally represents the active workers is liable to become embroiled in a conflict of interest if the causes for striking are expanded to include causes that concern pensioners' rights. It was further argued that recognizing the Organization's power to change pensioners' rights after they have retired is also liable to harm the pensioners and cause them damage in the future. Accordingly, the position adopted by the Manufacturers' Association is that the judgment that is the subject of the petition should be overturned.

The position of the attorney general

27. The attorney general, who appeared before the Court, claims that it was not appropriate to adopt the National Labor Court ruling, whereby a workers' organization is entitled to declare a protected strike for the purpose of promoting the affairs of the pensioners among its members.

According to him, the position adopted by the Labor Court expands the status of pensioners to that of "quasi-workers" and such a position finds no support in law or in the basic principles of the system, both of which see fit to distinguish between a person who is a worker and one who is not. According to the judgment that is the subject of the petition, the status of "quasi-employee" is a significant one, because, by virtue of that status, it is possible, *inter alia*, to declare a strike. However,

the scope, the essence, and primarily the boundaries of this status are not defined in the judgment. Workers need the power to strike to adapt the employment contract to the changing circumstances of life. Pensioners, on the other hand, have rights that are vested in them. There is no need to adapt those rights to the changing reality and the force of those rights results from their fixed, vested nature.

28. According to the position adopted by the attorney general, a workers' organization cannot properly represent the affairs of pensioners. First, from a conceptual standpoint, a workers' organization, as defined in HCJ 7029/95, New General Federation of Labor v. National Labor Court, IsrSC 51 (2) 63 (1997) (hereinafter: the Amit Case), is an organization in which the members are workers whose membership is voluntary, for the purpose of promoting their employment conditions within the framework of a collective agreement. These characteristics do not exist with regard to pensioners. Hence, for the purpose of recognizing a workers' organization as an entity capable of promoting pensioners' affairs, a legislative amendment of the labor laws is required. As long as no such amendment has been made, the Organization's activities to improve the pensioners' conditions constitute social welfare activities, which are external to labor law. Therefore, from the conceptual standpoint, it is not appropriate to speak of a workers' organization that acts for the benefit of pensioners. Second, membership in a workers' organization and competence to enter into collective agreements both mean that the workers' organization could also detract from pensioners' rights, and not only benefit them. This is liable to give rise to an inherent conflict of interest in the operation of the workers' organization, between the rights of active workers and those of pensioners. Third, "employment conditions" in a collective agreement may, indeed, include retirement conditions, but only insofar as those terms concern workers who have not yet retired, in contrast to those who retired previously. In the absence of working relations between the employer and the pensioner, and in the absence of an employment contract between them, no provisions of a collective agreement, which confer "individual" normative validity with regard to pensioners, can exist. Fourth, the legitimacy of the strike is contingent upon its purpose being the improvement of workers' conditions, in contrast to promoting the interests of other groups, the

nature of which the Labor Court did not clarify. In failing to do so, the Labor Court created too wide an opening, and the outcome of its action cannot be predicted. The ruling by the Labor Court approaches, in essence, a complete recognition of the right to hold a sympathy strike, which, to date, has been recognized under Israeli law only in an extremely limited way. According to the existing legal situation, the strike by the Organization cannot be considered a "sympathy strike," because the latter is limited to a sympathy strike by "workers" with regard to other "workers" who are embroiled in a labor dispute. It was further argued that the Labor Court did not properly distinguish between a budgetary pension and a contributory pension. In this case, which involves contributory pension insurance, the pensioners' adversary is not the University but, rather, the pension fund alone. In the attorney general's opinion, solutions for the aforementioned difficulties faced by the pensioners must be found in other ways, such as the establishment of an independent pensioners' organization or holding protest rallies or consumer strikes. Expanding the applicability of the concepts of "strike," "worker," "collective agreement" and "collective dispute" to pensioners, as done by the Labor Court, deviates from the purpose of the legislation and from the foundations of the legal system. It cannot be accomplished without the intervention of the legislators; it endangers the existing protection of the basic concepts and basic interests of labor law. In light of all of the above, it was argued that the obvious legal error in the National Labor Court ruling justifies the intervention of this Court in order to change it.

Decision

29. The petition confronts this Court with the question of whether a workers' organization has the power to declare a strike that will be protected under law, in a matter intended to promote the rights of the pensioners among its members. The answer to this question involves the examination of various issues that pertain to the status of pensioners relative to the workplace from which they retired: their status relative to the workers' organization that represents the active workers in the workplace; the extent of the pensioners' ability to belong to that organization; the scope of the organization's power to represent the

pensioners among its members, to take action to improve their social benefits, and to engage in a collective agreement for that purpose; and finally, the question of whether, within the framework of collective negotiations, a workers' organization is entitled to declare a strike that is intended to promote the rights of the pensioners among its members, which will be protected under law. Against the background of the emerging issue and its various complexities, we will first address the argument that was raised, according to which the proceeding does not justify decision on the merits, because the case is of a purely theoretical-academic nature.

A theoretical petition

30. A rule that has been adopted by this Court is that it does not customarily address itself to petitions of a theoretical nature (HCJ 5095/07, Israel Law Center v. MK Peres (unpublished, June 12, 2007); HCJ 967/07, A. v. National Insurance Institute (unpublished, April 29, 2007); HCJ 3206/06, Typhoon Contractors Ltd. v. Minister of Construction and Housing (unpublished, October 23, 2006); HCJ 1853/02, Nawi v. Minister of Energy and National Infrastructures (unpublished, October 8, 2003); HCJ 10026/04, Poalim IBI Underwriting and Issues Ltd. v. Antitrust Commissioner (unpublished, February 6, 2005); and in civil matters, see e.g.: CA 7175/98, National Insurance Institute v. Bar Maimon Ltd. (in liquidation) (unpublished, December 17, 2001)). A theoretical petition is defined as a petition that is not required for the resolution of a sustainable dispute at the time it is heard. It is not based on a specific set of facts and does not involve a petition for a concrete remedy; rather, it raises a legal question of a general nature, with no close relationship to the circumstances of a specific case (HCJ 6055/95, Tzemach v. Minister of Defense, IsrSC 53 (5) 241, 249 (1999) (hereinafter: the Tzemach Case)). As a general rule, a decision on a theoretical petition is not consistent with the definitive judiciary role, which is intended to decide in real disputes and to find a solution for them; it is thus liable to trespass into the domain of other branches of government; it is devoid of any concrete delineation of the matter requiring decision; and there is concern, which is inherent in the adversarial system, that a theoretical argument will not cover all the strata

of the matter; this is accompanied by the concern of placing an improper burden on the Court in matters that do not require a decision, in view of the heavy burden resting on its shoulders, which requires it to rule in matters of real significance.

31. Notwithstanding the aforementioned reasons, special considerations may justify this Court's dealing with an issue, although a decision is not required for the purposes of a concrete matter. The exceptions to the rule, which reject the notion of hearing a theoretical petition, are narrowly interpreted, and the mere fact that an important legal issue is involved is not sufficient reason for hearing a theoretical petition (HCJ 2406/05, Beersheba Municipality v. National Labor Court (unpublished, July 27, 2005); Eliad Shraga and Roi Shahar, Administrative Law: Threshold Causes [Hebrew], 241 (Volume II, 2008)). One of the exceptions to the rule is a situation in which an important question arises and it cannot be adjudicated unless it is presented as a general question, without connection to any specific case (Tzemach Case, at 250; HCJ 73/85, Kach Faction v. Speaker of the Knesset, IsrSC 39 (3) 141, 146 (1985)). When the nature of the matter is such that, in general and for reasons of time it is not possible to render a decision before the matter becomes theoretical, the Court will tend to address the matter even though it is not connected to any concrete dispute that calls for a decision. Another exception concerns a situation in which the parties have already invested considerable input in a legal proceeding that began with a concrete dispute, but a new development in the circumstances, shortly before the ruling was rendered, obviates the need for a decision. In such a case, the Court has discretion as to whether to decide in the matter, notwithstanding the fact that the dispute has already been resolved. This exception will be exercised when the decision is of special fundamental importance, and when considerable input has been invested in the judiciary proceeding that preceded the decision. The Court is given broad discretion in hearing threshold arguments with regard to a theoretical petition, and its role is to strike a balance between the opposing values involved in the matter in question.

32. The matter before us is not a typical case of a theoretical petition that deserves to be denied *in limine*. First, the proceeding began with a

specific, real dispute between the Workers' Organization and the University. which was resolved prior to the National Labor Court decision, yet the details of this dispute are what dictated the framework of the judiciary decision, which was delineated within a defined topical domain. Second, and more important, this is an issue that has both broad fundamental significance, in the legal and social context, and great immediate practical value. The question of whether a workers' organization can represent pensioners who are among its members, can declare a labor dispute, and can launch a strike based on a cause that concerns the pensioners' affairs, has practical and direct consequences for the systems of labor and society. It is not restricted to a legal-conceptual question which is disconnected from day-to-day reality. A decision on this question will have an extensive impact on the relationships between pensioners as a group and workers' organizations within the circle of labor relations in the state, even if it is not necessarily related to the existence of a specific labor dispute in any particular organization. Such a decision can affect and shape patterns of behavior and activity in the labor economy and in the field of social security, which have a comprehensive, direct and immediate impact. Third, refraining from rendering a decision on the merits of the fundamental question that arises in the petition will mean allowing an important fundamental ruling, which was made by the National Labor Court, to stand with no judicial review, notwithstanding the broader impact of that ruling on nationwide social systems. And fourth, considerable resources have been invested, by all the entities involved in the proceeding, in the judicial handling of this issue.

The cumulative weight of these factors justifies hearing the petition on the merits, notwithstanding the fact that a decision is not required for the resolution of a concrete dispute. Under the circumstances of this case, the examination of the Labor Court's judgment by this Court, according to the generally accepted tests of judicial review, is meaningful and has important concrete consequences for the establishment of standards of behavior with respect to the extent to which any workers' organization has the power to represent the affairs of the pensioners among its members. This matter is of importance for Israeli society as a whole and, accordingly, it is fitting and proper to decide it. This was the

opinion of the first panel that heard this petition and decided to issue an order nisi in the matter, and this was the opinion of the second panel that heard the petition and determined, at a later stage, that it was necessary to expand the panel to which it was assigned.

Under these circumstances, it is therefore fitting and proper to address the petition on the merits and render a decision.

The outline of the decision

33. The question for decision is whether a workers' organization has the right to declare a protected strike with the aim of promoting the social rights of the pensioners among the members of the organization.

It is important, even at this stage, to emphasize that the Labor Court limited its rulings to a state of affairs in which the workers' organization is the entity that seeks to declare a strike, when the labor dispute within which the strike is declared concerns the affairs of pensioners who are members of the organization, which are discussed in collective negotiations related to a collective agreement. The Court's rulings do not extend to the affairs of pensioners who are not organized within the workers' organization, and the general aspects of the question of their right to organize and to take measures to promote their rights are not included in the Court's rulings. The deliberation and decision in the petition will, therefore, focus on the issue of the decision that is subject to judicial review.

34. In the outline of the decision, we will examine the following questions, insofar as they are required for judicial review: what has the situation of Israel's aging population been in the last decades, and, as a result, what is the status of pensioners in society, and does the law provide them with proper protection of their status and rights; what is the status of the workers' organization within the framework of labor relations, and is it entitled to accept pensioners who have retired from their work as members, to represent them in negotiations with the employer for the purpose of protecting their rights, and to engage in a collective agreement on their behalf; what are the advantages and

disadvantages, the "opportunities and risks," in the organization representing the pensioners' affairs in collective negotiations; does the organization's ability to represent the pensioners also mean the right to declare a strike on their behalf; and is the wording and the purpose of the relevant labor laws – the Collective Agreements Law and the Settlement of Labor Disputes Law – compatible with the recognition of the power of a workers' organization to declare a strike for the purpose of promoting pensioners' affairs?

This is the course that we will pursue: as a background for this matter, we will begin by considering the social and legal status of the population group of pensioners in Israel; we will continue with a description of existing case law with regard to the representation of pensioners in workers' organizations from the standpoint of the freedom to organize, and afterwards with defining the status of the right to strike under our legal system. Against the background of these basic principles, we will address the interpretation of the relevant legislation, for the purpose of providing an answer to the question of whether said legislation enables recognition of the right and power of a Workers' Organization to declare a workers' strike for the purpose of promoting the rights of the pensioners among its members.

The social and legal status of pensioners

35. The status of the elderly in Western society has undergone far-reaching changes and upheavals in the last decades. "At the dawn of the 21st century, we are facing a changing demographic reality; human aging characterizes this development" (Ruth Ben-Israel and Gideon Ben-Israel, "Senior Citizens: Social Dignity, Status and Representative Organization" [Hebrew], *Avoda, Chevra ve-Mishpat* IX 229 (2002) (hereinafter: Ben-Israel, Senior Citizens). Indeed, similar to processes that are taking place throughout the world, a clear process of aging is affecting Israeli society as well. This process is expressed, *inter alia*, in a decline in the birth rate, a significant increase in life expectancy, and a constant and considerable increase in the proportion of the elderly population in society (Israel Doron and Ido Gal, "Prevention and Legal Planning in Old Age" [Hebrew], *Hamishpat* IX 427, 428 (2004)). The

degree to which the world's population is aging is extremely impressive: if, during the 1950s, only 8.1% of the population was over 60 years old, in 2050, 100 years later, some 30% of the world's population is expected to be above that age (Tal Golan and Israel Doron, *Aging, Globalization, and the Legal Construction of "Residence": The Case of Old Age Pensions in Israel*, 15 ELDER L.J. 5 (2007). The situation in Israel is similar: although Israel's population is considered relatively young compared with the populations of Western countries, the proportion of people aged 75 and up among Israel's population has increased moderately over the years. Thus, for example, it was 4.7% in 2009, in contrast to 3.85% in the early 1990s. People aged 65 and up represent approximately 10% of Israel's population, whereas, at the establishment of the State [in 1948], they constituted only 4% of the entire population of the state. Nearly half the people aged 65 and up (some 47%) are over 75. The trend of aging among the population is continuing, and life expectancy in Israel is also continuing to rise, compared with earlier periods. In 2009, Israel's life expectancy was 79.7 years for men and 83.5 years for women; this reflected, relative to 2008, an increase of 0.7 years among men and 0.5 years among women. In the last two decades, the life expectancy of both men and women has increased by nearly 4 years. Looking to the future, the trend of aging is expected to continue among Israel's population. Although the percentage of 65-year-olds in Israel's population has been stable since 1995, forecasts show that, by 2030, they will account for some 14% of the population, and the population group consisting of people aged 65 and up will double, totaling 1.367 million people. In comparison to the international level, the proportion of people aged 65 and up in Israel is higher than their proportion throughout the world and in Asia, Africa and Latin America – areas in which the birth rate is now, or was, in the recent past, relatively high; on the other hand, in comparison to Europe and North America – areas in which the birth rate is lower than in Israel – the percentage of the elderly in Israel is lower. Finally, it should be noted that approximately 20% of people registered in the Departments of Social Services of Israel's Ministry of Social Affairs are elderly people over age 65; this is twice the percentage of their proportion in the general population (9.8%). As of 2008, 34% of all people aged 65 and up were registered in those departments (Israel Central Bureau of Statistics, Press Release: Data in Honor of

International Elderly Day [Hebrew] (2009), http://www.cbs.gov.il/www/hodaot2009n/11_09_220b.doc; Israel Central Bureau of Statistics, Press Release: Selected Data from Israel's Statistical Yearbook No. 61 [Hebrew], 2010, http://www.cbs.gov.il/www/hodaot2010n/11_10_207b.doc; Israel Central Bureau of Statistics, Israel's Population, 1990-2009 – Demographic Characteristics [Hebrew] (2010), http://www.cbs.gov.il/www/statistical/isr_pop_heb.pdf).Israel is therefore undergoing a revolution with regard to the scope of its elderly population, and these changes have a profound impact on both social and legal aspects of life (Israel Doron, "Old Age and Economic and Social Rights: the Reciprocal Relationship between the Aging of Israeli Society and the Status of Economic and Social Rights in Israeli Law" [Hebrew], *Economic, Social and Cultural Rights in Israel*, 893, 896 (Y. Rabin, V. Shani, eds., 2004) (hereinafter: Doron)). The marked change in the scope of the elderly population gives rise to changing social needs that did not exist in the past. The expansion of the population group of senior citizens and the considerable increase in life expectancy emphasize, more than in the past, the need to protect the rights of elderly people to a dignified existence, standard of living and lifestyle, and recognition of their social status and their ability to contribute to society as long as the state of their health allows. A broad social stratum is arising, which was not recognized in the past, whose needs in various areas of life must be addressed by society. It is also necessary to adapt the resources and tools available to the Court to ensure proper protection for the elderly (for a description of the demographic revolution that is taking place and its dramatic effect on the nature of labor relations, see: Tal Golan and Israel Doron, "The Rise and Fall of the Halamish Case: 'Residence' and the Right to Old-Age Pensions in the Era of Globalization and Aging" [Hebrew], *Mishpat u-Mimshal* X (2) 637, 641 (2005)).

36. As part of the social development in question, a broad social concept is in the process of formulation. This concept aims to ensure solidarity and mutual support among the various age groups in society, based on recognition of the need to maintain reciprocal responsibility between intergenerational groups, on the assumption that the members of each age-based stratum in society can be expected to move up the scale as

the years go by, and eventually to reach their declining years. Arising in this changing reality is an extensive population stratum with special needs, which requires the formulation of a social and legal infrastructure to meet those needs. The aging of the population and the significant increase in life expectancy poses new challenges for society and the law. Principles of intergenerational reciprocal responsibility, founded on respect for senior citizens and concern for their needs, require the adjustment of social and legal patterns to the dynamic, changing reality.

37. The needs of the elderly are reflected in various areas of life, but the most basic need concerns the means of subsistence that are left to them, which are intended to ensure that they live through old age with dignity. The right to human existence with dignity is linked to and interwoven with the right to economic subsistence with dignity. If a person's basic right to economic subsistence is violated in his old age, his constitutional right to human dignity is also liable to be violated (HCJ 5578/02, Manor v. Minister of Finance, IsrSC 59 (1) 729, 736 (2004); LCA 4905/98, Gamzo v. Yishayahu, IsrSC 55 (3) 360, 375-376 (2001); HCJ 161/94, Atari v. State of Israel (unpublished, March 1, 1994)). The existence of a multi-age society, which is continuing to develop as a result of the demographic changes taking place, calls for the existence of inter-age solidarity as an essential element in securing social dignity for the various age groups in society (Ben-Israel, Senior Citizens, at 230-231). Indeed, "a society that includes senior citizens who do not have sufficient means of subsistence, or whose means of subsistence are uncertain or irregular – such a society is devoid of human dignity, because it deprives individuals of the possibility of being active partners in the social and economic life of the society in which they live" (Ruth Ben-Israel and Gideon Ben-Israel, Who's Afraid of the Third Age [Hebrew] 113 (2004) (hereinafter: Who's Afraid of the Third Age)). Ensuring reciprocal responsibility and brotherhood in society therefore necessitates giving senior citizens, like any other individual in society, means of subsistence that will ensure their right to human and economic dignity.

38. One of the pivotal strata in the economic and social system – a stratum intended to provide social security to Israel's aging population –

is that of the occupational pension, which is designed to prevent a steep decline in the standard of living of people once they reach old age, by maintaining a reasonable ratio between their income before and after reaching old age. From a conceptual standpoint, occupational pensions confer eligibility for a secure pension allowance upon people after they retire from work and for the rest of their lives. However, not only do some of Israel's elderly not benefit from pension insurance (thus, for example, it has been estimated that, as at 2000, approximately one-half of Israel's civilian labor force did not have such insurance); the pension insurance itself suffers from a number of basic problems and does not always guarantee economic security for the elderly or protect their right to existence with dignity (Doron, at 903-905; for a description of various basic problems in the field of pension insurance, see *id.*, at 905-910). Furthermore, the pension insurance that is given to workers cannot fulfill its purpose over time if it is not formulated to adapt itself to life's changing circumstances: "In order to ensure that the pension will be able to fulfill its purpose and provide senior citizens with an alternative to the loss of their possibility to earn from work, it is necessary to ensure that it does not become eroded. ... Pension erosion is liable to push senior citizens below the poverty line, even though, throughout their active lives, they worked and did everything that was necessary to ensure their social security after retirement ... As long as fixed, normative, appropriate mechanisms are not established to keep pensions and old-age allowances from eroding, the social dignity of senior citizens will not be secured" (Who's Afraid of the Third Age, at 105). In this reality, it is essential to give pensioners effective power to secure their economic and social status to make use of recognized legal means, including negotiations with the employer or the pension fund in order to adapt the pensions to the changing conditions of life, especially insofar as pensions are classified as a long-term contract that requires periodic adjustments, based on the wishes of the parties (cf. Gideon Hollin, "Adjusting Employment Contracts and Collective Agreements to Changing Situations" [Hebrew], Menahem Goldberg Commemorative Volume [Hebrew] 288 (2001); David (Freddie) Ronen, Adapting Contracts to Changing Circumstances [Hebrew], 103-109 (2001)).

The representation of pensioners by a workers' organization – the aspect of freedom of association and organization

39. One of the definitive expressions of the integration of pensioners as a group into the protected social system is reflected in the existing recognition of the power of workers' organizations to represent pensioners who have retired from the workplace. This representation is recognized in labor law worldwide and in Israel. It basically stems from the principle of freedom of association and organization, which was recognized as early as 1948, within the framework of the Convention Concerning the Freedom of Association and Protection of the Right to Organize. The provisions of Section 3 of the Convention give employees and employers complete freedom to organize in order to promote their rights, and forbid the authorities from imposing limitations upon that right. The freedom of association and the freedom of organization have also been recognized as basic rights in Israeli case law:

> The right to associate is 'one of the human freedoms'... It is deeply anchored and well protected in case law ... both generally and with regard to the right to associate in a workers' organization... The right to associate in a workers' organization has been recognized in international conventions... Indeed, in Israel as well, workers, whoever they are, are entitled to establish an organization according to their choice and with no need for previous authorization (Amit Case, at 94-95 (Justice Zamir)).

40. Besides being an independent basic right, the right to freedom of organization within the framework of a workers' organization fulfills the human right to dignity: "Workers' organizations play an essential role in regulating labor relations and promoting workers' rights. Through them, a balance is achieved between the worker's individual weakness and the employer's economic strength, thus preventing the exploitation of weakened workers to the point of violating their dignity" (Hani Ofek-Gendler, "Organization for Soldiers – Has the Time for Change Come in Israel?" [Hebrew], *Mishpat ve-Tzava* XIX 117 (2007)). At the international level, the right to organize is perceived as a framework right, which is composed of three complementary rights: the right to organize; the right to conduct collective negotiations; and the right to

strike (Ruth Ben-Israel, "Strikes as Reflected in Public Law: Strikes, Political Strikes and Human Rights" [Hebrew], Berenson Commemorative Volume [Hebrew] 111, 112 (Volume III, 2007) (hereinafter: Ben-Israel, Strikes as Reflected in Public Law)). However, the question of whether a workers' organization will be recognized as such for the purpose of a certain law is a separate question, which depends on the purpose that the law in question was meant to achieve.

41. For many years, workers' organizations in Israel have included pensioners from the workplaces within their ranks, as reflected in the articles of association of various workers' organizations. This appears in the articles of association of the University, in the matter before us, and in the articles of association of the Histadrut as well. For quite some time, the case law of the National Labor Court has recognized pensioners' membership in workers' organizations and the role of the organization in protecting the pensioners' rights. Thus, for example, the National Labor Court noted, as early as 1975:

> We have not heard of anyone who, when he stopped working and became a pensioner, stopped being a member of the workers' organization to which he had belonged before he retired from the workplace – in contrast to membership in a trade union; and it is reasonable to assume that the workers' organization in question – in this case, the General Federation of Labor – was capable, through its appropriate agencies, of looking after the affairs of members who had stopped working and had become pensioners. Obviously, what is meant here is representation within the framework of negotiations for determining rights. But if what is meant is securing rights and imposing obligations in a collective arrangement with legal validity, there is no other solution than by way of legislation... (National Labor Court File 3-18/35, Israel Electric Corporation Ltd. – Pravosky, IsrNLC VI 253, 269 (1975) (hereinafter: the Israel Electric Corporation Case)).

In (National) Labor Court Appeal 300040/98, Shekem Pensioners' Organization – Shekem Ltd., IsrNLC XXXVII 289 (2002) (hereinafter: the Shekem Pensioners' Organization Case), the National Labor Court also addressed the question of the power of a workers' organization to represent pensioners, in these words:

> The Israeli model of a workers' organization is broad in scope and includes activity on behalf of the pensioners... It has already been ruled that handling the determination of pension terms falls within the realm of the legitimate activity of a workers' organization. Chapter XI of the Constitution of the General Federation of Labor empowers the Pensioners' Federation to take measures for the sake of pensioners' rights in the realm of pensions. A pensioner can be a member of a workers' organization, and a workers' organization can include a section or an extension that handles the affairs of the veteran pensioners... Accordingly, in addition to representing workers, which is the main function of the workers' organization, the workers' organization is also authorized to represent the pensioners, under certain circumstances and within certain limits (*id.*, at 301-302).

42. The question of extending membership in a workers' organization beyond the active workers who are its members was addressed by this Court in the Amit Case. According to that judgment, the ability of a workers' organization to represent the pensioners among its members should be recognized. However, for a workers' organization to be recognized as having the status required for the Collective Agreements Law and the Settlement of Labor Disputes Law, membership in the organization must be voluntary and reflect the member's right to join and to withdraw from the organization. Furthermore, the majority of the organization's members must be active workers in the employer's service, because the organization's principal role is to represent the workers' affairs vis-à-vis the employer and to promote and improve their working conditions by way of collective negotiations. This means that a workers' organization that is recognized for the purpose of the labor laws in the field of collective agreements and resolution of labor disputes is an organization whose major function is to represent active workers and to take measures to promote their working conditions, whereas representation of pensioners and their affairs, although it is recognized, is not essential. Indeed:

> A workers' organization in which a large part of the members are not wage-earning workers, is a contradiction in terms, and not only from the linguistic standpoint, but from the substantive standpoint as well. This is because, as stated, a workers' organization, as this term is used in labor laws and according to the purpose of these laws, is an organization whose principal function is to represent the

> workers vis-à-vis their employer – and the workers, of course, are wage-earners (*id.*, at 108).

The difficulty in recognizing an organization with many members who are not active workers lies in the concern that it is liable to split its loyalties between its activity at the collective level and other activities, and this is not proper conduct, in the opinion of the Court in the Amit Case. However, the judgment in the Amit Case did not negate the status of a workers' organization for the purpose of the relevant labor laws, when it has a minority of members who are not active workers, and especially when this minority is composed of the pensioners of the workplace, who were active workers and members of the organization before they retired from work.

43. The representation of the pensioners' interests by the workers' organization has two aspects: one, at the stage when the worker is still active in his workplace and wishes to ensure a proper standard of retirement conditions before he leaves his work; and the other, after the worker retires, when he has to ensure that the standard of his retirement conditions will be preserved and will not be eroded and, if necessary, will be adapted to the changing conditions of Israel's economic, social and financial situation.

The representation of the pensioners' interests by the workers' organization, including both of these aspects, is closely linked to workers' rights – both before and after they retire from work. The shaping and formulation of workers' retirement rights are inextricably tied to the workplace and the period of the work, and are primarily governed within the active years of work. Even after retirement, in most cases, pensioners maintain an ongoing relationship with the workplace, not only in the intergenerational joint activities for the institution's employees, but also in the context of the continuous and constant concern that the employer is required to exercise in preserving the pensioners' rights and status. It is only natural for the workers' organization that represented the workers during their working years, and took care, *inter alia*, to formulate the retirement conditions to which they could look forward, to extend its protection to them after their retirement as well and

to be in charge of exercising their rights and preserving their status after they leave the workplace. In this way, the workers' organization constitutes the natural link between active workers and workers who have retired, and the continuity of protection that it gives its members in the intergenerational transition from one stage to the next in the workers' lives is an obvious and natural part of the concept of the workers' right to organize for the purpose of protecting their rights.

44. The National Labor Court judgment discloses data – which cannot be disputed – showing that the prevailing reality, from the standpoint of customs that are generally accepted and recognized in society, is that, in many workers' organizations, pensioners are among the organization's members even after they retire; the close cooperation between the actual workers and the pensioners of the workplace is an existing fact; in many workplaces, the continuous ties between the employer and the pensioners are preserved by means of a collective agreement, a personal contract or internal regulations, which express these ties; in many cases, a collective agreement includes conditions that refer to pensioners, and in the prevailing reality, workers' organizations that include pensioners actually conduct negotiations on the pensioners' rights within the framework of collective agreements; frequently, pensioners even continue in vocational activity in their former workplaces, and the institutions of higher education are a typical example of this.

45. The expansion of the elderly stratum of the population, the need to protect the rights of those belonging to this social stratum, the close ties between pensioners and their former workplace, and the close affinity between active workers and pensioners from the standpoint of the interest in protecting retirement rights, confer upon both the pensioners and the workers' organization an explicit interest in having the organization represent the affairs of the pensioners among its members. This phenomenon is well known in society and under law, in Israel and worldwide. The phenomenon of intra-organizational frameworks that handle pensioners within the workers' organization is also known in Italy, and finds support in the mechanisms of the European Union as well (Ben-Israel, Senior Citizens, at 246; on the important contribution made by

workers' organizations in securing pensioners' substantive rights, see: *id.*, at 247).

The means available to the workers' organization for the purpose of representing its members' affairs

46. The workers' organization is basically intended to give workers the power to enable them to deal collectively with the employer's power. Recognizing the organization's status as the representative of the group of pensioners among its members, in order to protect their rights, in any event means recognizing the organization's power to conduct negotiations with the employer in the context of retirement rights, not only with regard to active workers who have not yet retired, but also with regard to workers who have already retired, as long as they remain members of the organization. Recognizing the existence of this power also means recognizing the organization's power to use the means made available to it by the law for the purpose of conducting collective negotiations and obtaining a collective agreement. If this power of the organization is not recognized, the pensioners' affairs remain with no real protection. The collective agreement is what makes the protection of the pensioners' rights real, and the means available to the workers' organization for achieving the collective agreement and safeguarding its arrangements are the true expression of the existence of solidarity regarding the protection of pensioners as a group.

47. The principal means available to the workers' organization in its struggle to promote the workers' interests is collective activity. In the Amit Case, the Court defined the principal means available to the workers' organization for the purpose of collective activity, as follows:

> The organization conducts collective negotiations with the employer, or with an employers' organization, with a view to signing a collective agreement that will determine the working conditions of the organization's members, or of all of the employees in the workplace or the industrial sector. In the event of a dispute between the workers and the employer, the workers' organization can exercise its collective power through sanctions against the employer, primarily by means of a strike (*id.*, at 91).

Without the power to conduct collective negotiations with a view to signing a collective agreement and, in the case of a dispute, to exercise the collective power through the means available to the organization, including a strike, the organization would be deprived of the effective power to fight for the achievement of its objectives and to achieve results in its fight.

48. Recognizing the organization's power to represent the affairs of the pensioners among its members assumes, *prima facie*, that the organization has the power to "exercise its collective power through sanctions against the employer, primarily by means of a strike," (Amit Case, *id.*) *inter alia*, in order to promote the affairs of the pensioners represented by it. This assumption is reinforced by the status of the right to strike as a right with a supreme normative status, which also impacts the nature of the means available to the organization in its struggle on behalf of the pensioners' affairs.

The right to strike

49. As in many other countries across the globe, the rights of strike and lockout in Israel are not explicitly specified by law, nor does legislation provide an explicit definition of the term "strike" (Menahem Goldberg and Nahum Feinberg, Labor Law [Hebrew], Volume III, Chapter 5, at 3-4 (50th edition, 2010) (hereinafter: Goldberg and Feinberg)). In case law, "strike" has been defined as "a coordinated act of pressure, conducted by a group of workers within the framework of the workers' professional struggle with an employer for the purpose of achieving demands related to the terms of their employment or related to the demands of other workers that were presented to their employer" (HCJ 525/84, Hatib v. National Labor Court, Jerusalem, IsrSC 40 (1) 673, 701 (1986) (hereinafter: the Hatib Case)). A strike is held to be "a coordinated collective refusal to perform work in an attempt to influence the employer with regard to labor relations or working conditions" (Guy Mondalek, "Quasi-Political Strike, Quasi-Political Teaching: Thoughts on Legal Distinctions and Their Teachings" [Hebrew], *Iyyune Mishpat* Hebrew] XXV (2) 343, 346 (2001) (hereinafter: Mondalek)); a striker is a

person who, "without breaking his work connection with his employer, stops working, together with other workers, in order to achieve his demands from his employer or in order to help other workers achieve their demands from their employer" (CA 573/68, Shavit v. Hanan, IsrSC 23 (1) 516, 520 (1969) (hereinafter: the Shavit Case)). A strike does not sever the labor relations; rather, it is part of the worker's professional struggle (Hatib Case, *id.*). The starting point is that workers are given freedom to strike, but in order for said freedom to be recognized, without the workers being exposed to the risk of actions for damages caused by the strike, certain conditions must be fulfilled so that the strike will be considered to be protected (Mondalek, *id.*; for another definition of "strike," see also: Ben-Israel, Strikes as Reflected in Public Law, at 112-113); for the meaning of an unprotected strike and its consequences, see, *inter alia*: Goldberg and Feinberg, at 16-17; Sections 37a-c of the Settlement of Labor Disputes Law).

50. The right to strike is basically a social right, which is held to be of special normative value (Ruth Ben-Israel, Strikes and Lockouts as Reflected in Democracy [Hebrew] 77 (2003) (hereinafter: Ben-Israel, Strikes and Lockouts)). In order to anchor the right to strike in a direct constitutional provision, it would have been necessary to promote the legislation of Basic Laws concerning social rights – a course of action that has not yet borne fruit in Israel, notwithstanding repeated attempts. Nonetheless, despite the fact that the right to strike has not yet been expressly anchored in a Basic Law, it is considered to be a basic right that is not anchored in the statute book (HCJ 1074/93, Attorney General v. National Labor Court, Jerusalem, IsrSC 49 (2) 485, 496-497, 507 (1995) (hereinafter: the Bezeq Case); (National) Collective Dispute Appeal 25/07, Israel Electric Corporation Ltd. – New General Federation of Labor in Israel, paragraph 18 (unpublished, January 27, 2008); Goldberg and Feinberg, at 3; cf.: CA 593/81, Ashdod Vehicle Enterprises Ltd. v. the late Tzizik, IsrSC 41 (3) 169, 190-192 (1987); CA 25/71, Feinstein v. Secondary School Teachers' Organization, IsrSC 25 (1) 129, 131 (1971)).

The right to strike has been recognized at the international level as a universal human right (Section 8 of the International Covenant on Economic, Social and Cultural Rights, 1966; Ben-Israel, Strikes as

Reflected in Public Law, at 112)). This is a right of a constitutional nature, which reflects social values of supreme importance. From the beginning, the right to strike has been perceived as a right derived from the very essence of collective labor relations and the recognition of the freedom to organize, which is recognized in our legal system as a basic right that is fundamentally linked to the value of human dignity (Goldberg and Feinberg, *id.*). A question has arisen as to whether it is possible to include the right to strike among the basic rights anchored in the Basic Laws, as "framework rights," such as the human right to dignity (Ben-Israel, Strikes as Reflected in Public Law, at 130). There is an approach that holds that the human right to dignity pursuant to Section 2 of Basic Law: Human Dignity and Liberty also extends, *inter alia*, to the workers' right to a dignified existence, from which the right to strike – which is an essential means of ensuring the exercise of the right to a dignified existence– is derived. On the relationship between the right to strike and human dignity, Prof. Barak commented in the past:

> "Human dignity" must be shaped as a basic constitutional value that has an independent existence of its own. It must not be restricted... It must not be expanded... What we have before us, then, is a rather broad 'living space,' within which the Courts – and primarily the Supreme Court – will shape the scope of human dignity in the modern State of Israel. They will have to confront many and varied problems, such as the question of whether a worker's right to strike and an employer's right to lock out fall within the human dignity of the worker and the employer (Aharon Barak, "Human Dignity as a Constitutional Right" [Hebrew], *Hapraqlit* XLI (3), 271, 285 (1994); emphasis added).

Parenthetically, he added, to preclude all doubt, that: "The right to strike is a basic human right. ... The realm of doubt is whether it is included in 'human dignity'" (*id.*, loc. cit.). In his book on constitutional interpretation, Prof. Barak also referred to the issue of the constitutionality of the right to strike, in the following words:

> It appears to me that it is appropriate to argue that, in fact, the workers' right to strike and the employers' right to lock out are derived from human dignity. This expresses the autonomy of their individual will. From the workers' point of view, what is expressed is their right to associate and to realize their professional struggle through striking. From the

> employers' point of view, what is expressed is their freedom of occupation (Aharon Barak, Interpretation in Law – Constitutional Interpretation, 431 (Volume III, 1994)).

51. The developments in case law have established that it is possible to include within human dignity various situations that are closely related to human dignity as expressing "autonomy of individual will, freedom of choice and freedom of action, and similar aspects of human dignity as a constitutional right" (HCJ 6427/02, Movement for Quality Government in Israel v. Knesset, paragraph 38 of the ruling by President Barak (unpublished, May 11, 2006)). It may be said that the workers' right to strike as part of their struggle for their working conditions, their wages, their standard of living and the retirement conditions to which they are entitled touches on the core of the right to human dignity, and is not merely marginal to it. Without the means of striking, the workers and the workers' organization that represents them lose a considerable portion of their power to negotiate with the employer for their working and retirement conditions. The right to strike is central and essential to the struggle for workers' and pensioners' existence and living conditions, to the point that it arguably constitutes part of human dignity.

52. The right to strike can also be regarded as being derived from the right to freedom of occupation, which is protected by Basic Law: Freedom of occupation, and from the right to property, which is protected by Basic Law: Human Dignity and Liberty. The combination of these two rights, on the one hand, embodies the freedom given to human beings to choose their profession and, on the other, confers upon workers proprietary protection, in the broader sense, so that they receive fair consideration for their work, with regard to both the terms of their wages and the terms of their retirement (for the broad concept of freedom of occupation, which also includes the right to reasonable and fair working conditions, see: Aharon Barak, "Basic Law: Freedom of Occupation" [Hebrew], *Mishpat u-Mimshal* II 195, 200 (2007); HCJ 1/49, Bejerano v. Minister of Police, IsrSC 2 80, 82-83 (1949); Guy Davidov, "The Right to Work as a Community and Individual Right and its Constitutional Potential" [Hebrew], *Economic, Social and Cultural Rights in Israel* 542 (Y. Rabin, V. Shani, eds., 2004) (hereinafter: Davidov)). As for the

aspect of protecting the workers' proprietary rights, this is also likely to include workers' general economic interests (cf. e.g.: CA 6821/93, United Mizrahi Bank Ltd. v. Migdal Cooperative Village, IsrSC 49 (4) 221 (1995); National Labor Court File 3-7/98, Moadim – Ministry of Defense, IsrNLC 33 441 (1998)). The principles of freedom of occupation and the protection of workers' proprietary right therefore have an impact, in the broad sense, on the right to strike.

53. The right to strike is also accompanied by a prominent element of freedom of expression. Freedom of expression has been given a supreme constitutional status in our legal system as a basic right that constitutes a preeminent principle in a democratic regime (HCJ 75/53, Kol HaAm Co. Ltd. v. Minister of Interior, IsrSC 7 (2) 871, 876-878 (1953); HCJ 153/83, Levi v. Southern District Commander, Israel Police, IsrSC 38 (2) 393, 398-399 (1984); HCJ 4804/94, Station Film Ltd. v. Film Control Board, IsrSC 50 (5) 661, 674-675 (1997)). The right to strike encompasses the freedom that is given to workers to express their position and their protest (Davidov, at 536; National Labor Court File 41-27/57, General Federation of Labor – Makhteshim Chemical Enterprises Ltd., IsrNLC 30 449, 459-460 (1997) (hereinafter: the Makhteshim Case)). Protest by workers, which is reflected in the right to strike, therefore carries with it a prominent component of freedom of expression.

54. Case law has referred in the past to the constitutional nature of the right to strike. In the case before us, the National Labor Court noted that the freedom to strike is anchored in the freedom to associate, which is recognized as a constitutional right, and it also tied the right to strike with the human right to dignity, as a way of protecting peoples' economic status (*id.*, in paragraph 26 of the ruling). In the Bezeq Case, Justice D. Levin commented that: "It appears that the 'strike,' which we have always considered to be included among the basic freedoms that are not written in the statute book... will now take shelter under the wings of the value of 'human dignity,' which is anchored in this Basic Law" (*id.*, at 497). However, the remaining justices in that case left that question open (*id.*, at 507; see also: Makhteshim Case, at 468; for development in the law on the issue of the freedom to strike from the standpoint of case law, see: Steve Adler, "The Freedom to Strike as Reflected in Case Law"

[Hebrew], Berenson Commemorative Volume [Hebrew] 475 (Volume II, 2000) (hereinafter: Adler)).

55. In summary, it can be said that the right to strike is a right with a supreme normative status. There are weighty reasons for perceiving it as a right derived from the statutory constitutional rights in the Basic Laws – the right to dignity, the right to property and the right to freedom of occupation. There is no need for an absolute determination for the purposes of the matter before us here; the determination that this is a basic human right which is a product of case law will suffice.

56. However, it should be emphasized that the right to strike, which is given to employees, is not absolute. There are other important interests that must be considered and balanced against the right to strike. The laws of strikes examine, *inter alia*, the circumstances under which a strike is legitimate, and seek to create a balance, for this purpose, between the workers' right to strike, within the framework of their organizational struggle, for the improvement of their living conditions, and weighty conflicting interests; the latter include the harm to the property of the employer against whom the strike is directed, and damage that the strike is likely to cause to third parties and even to the general public. The recognition of a strike as legal and protected requires the creation of proper balances between the strike and the conflicting values. Recognizing the expansion of the right to strike requires consideration of the system of balances set forth above.

Interim summary

57. We have examined the issue of the relationship between a workers' organization and the pensioners of the workplace, *inter alia* against the background of the changes and developments that have taken place in the status and needs of Israel's elderly. We have discussed the power of a workers' organization to include pensioners from the workplace among its members and to represent them vis-à-vis the employer in matters concerning the terms of their retirement as part of the basic right of organization. We have pointed out that most of the organization's representative power is reflected in collective activity –

i.e., collective negotiations, for the purpose of achieving a collective agreement and preserving the protections that it provides. We have also pointed out that one of the definitive means of promoting the collective activity of a workers' organization is the means of strike, which is given to employees as a right of utmost importance. Against the background of this infrastructure of principles and values, the question to be asked is: Are all of the means available to a workers' organization in representing its members who are active workers – the main object of its activity – also available to it with regard to the pensioners among its members? – and, especially: Does a workers' organization have the power to utilize the means of strike in its struggle to protect pensioners' rights?

The answer to this question is derived from a purposive interpretation of the labor laws relevant to the matter before us – the Collective Agreements Law and the Settlement of Labor Disputes Law – and from examining the question of whether the existing format of these pieces of legislation denies or supports the power of a workers' organization to use the means of strike in order to promote pensioners' affairs. We will now turn to the examination of this issue.

The power of a workers' organization to use the means of strike to promote pensioners' affairs – as reflected in the labor laws

58. We will therefore examine the Collective Agreements Law and the Settlement of Labor Disputes Law for the purpose of the following questions: Are the basic provisions of these laws consistent with the representation of pensioners by a workers' organization, and with its ability to declare a strike to promote their affairs? Do the definition of a collective agreement, and the power of a workers' organization to engage in a collective agreement, also extend to pensioners' affairs, and is the meaning of the concept of a "labor dispute," which has implications for the means that a workers' organization is entitled to use as part of negotiations for the promotion of its members' affairs, liable to extend to pensioners' affairs as well?

59. Section 1 of the Collective Agreements Law defines a collective agreement in these words:

> A collective agreement is an agreement between an employer or an employers' organisation and an employees' organisation made and submitted for registration under this Law, concerning all or any of the following matters: the engagement of employees or the termination of employment, terms of employment, labour relations, and the rights and obligations of the organisations which are parties to the agreement or any part of these matters (emphasis added).

The Collective Agreements Law distinguishes between a "special" collective agreement, which applies to a specific plant or to a specific employer, and a "general" collective agreement, which applies to all or part of the State of Israel, or one or more specific sectors of employment (Section 2 of the Law). The type relevant to the matter before us is the former; with regard to the scope of an agreement of this type, Section 15 of the Law states as follows:

> Scope of Special Collective Agreement
> A special collective agreement shall apply to –
> (1) The parties to the agreement
> (2) The employers represented, for the purposes of that agreement, by an employers' organization which is a party to the agreement;
> (3) All employees of the classes included in the agreement, who are employed in trades or functions included in the agreement by employers who are parties to the agreement or who are represented as specified in paragraph (2) (emphasis added).

Section 19 of the Law concerns the rights and duties of workers and employers in a collective agreement:

Rights and obligations of employee and employer.

Provisions of a collective agreement concerning terms of employment and termination of employment, and personal obligations imposed on, and rights granted to, an employee and employer by such provisions (hereinafter referred to as "Personal Provisions"), shall be regarded as a contract of employment between each employer and each employee to whom the agreement

applies, and shall have effect even after the expiration of the collective agreement, so long as they have not been validly varied or cancelled; participation in a strike shall not be regarded as breach of a personal obligation (emphasis added).

The Settlement of Labor Disputes Law defines a "Labor Dispute" to which the Law applies and which, in any event, has implications for the question of whether or not a strike initiated within its framework is protected. The term "Labor Dispute" is defined in Section 2 of the Law as follows:

> For the purpose of this Law, "labour dispute" means a dispute as to any of the matters enumerated hereunder arising between an employer and his employees or part of them or between an employer and an employees' organisation or between an employers' organisation and an employees' organisation, but does not include an individual dispute; the matters in question are:
> (1) the conclusion, renewal, alteration or cancellation of a collective agreement;
> (2) the determination of terms of employment;
> (3) the engagement or non-engagement of employees and the termination of employment.
> (4) the determination of rights and obligations arising from employer-employee relations (emphases added)..

60. The questions that arise in the matter before us are as follows: Are the language and purpose of the Collective Agreements Law and the Settlement of Labor Disputes Law consistent with the possibility that a workers' organization will be a party to a collective agreement that concerns pensioners' social benefits, and will therefore have a status that enables it to conduct collective negotiations on pensioners' affairs? And is the existing legal concept with regard to a "Labor Dispute," as this term is defined in the Resolution of Labor Disputes Law, consistent with the existence of such a dispute with respect to pensioners' affairs, or are the concepts and purposes in the laws in question intended for the affairs of active workers only, thereby entirely excluding pensioners' affairs from the scope of these concepts? In other words: What is the breadth of the "interpretive margins" for concepts such as "termination of work," "working conditions," "labor relations," "workers," and "the

establishment of rights and duties that arise from an employer-employee relationship," which appear in the Collective Agreements Law and the Settlement of Labor Disputes Law, in the context of the definition of a "collective agreement" and the concept of a "labor dispute," and are they likely to include pensioners' affairs as well, or do the language and purpose of these laws require the application of these provisions to collective agreements and labor disputes that refer to active workers only?

Obviously, insofar as the provisions of these pieces of legislation can also be applied to pensioners, then, subject to fulfillment of the conditions they stipulate, it will also be possible to declare a protected strike within the framework of a "labor dispute" that is recognized under Chapter IV of the Settlement of Labor Disputes Law, for the purpose of promoting the affairs of pensioners who are members of the organization.

61. As we have seen, a collective agreement applies, by definition, in matters related to hiring a person for work, termination of his work, working conditions and labor relations (Section 1 of the Collective Agreements Law); the scope of a special collective agreement applies to all the workers of the types included in the agreement, who are employed by the employer (Section 15 of that Law); the definition of rights pursuant to a collective agreement is attributed to a worker and an employer (Section 19 of that Law); a labor dispute is a dispute that has broken out between an employer and workers or a workers' organization that is bound by a collective agreement, and relates, *inter alia*, to the hiring or not hiring of a person or the termination of his work, and with the establishment of rights and duties arising from an employer-employee relationship (Section 2 of the Settlement of Labor Disputes Law).

62. From the literal, narrow wording of the text, it seems that the laws in question are directed toward governing the labor relations between the employer and the active workers, through the workers' organization. This is true of a collective agreement and the definition of its subjects, its purview, and the nature of the rights that it grants; this is true of the definition of a labor dispute, which refers to the relationship

between the employer and the active workers in the context of matters related to the collective agreement, and of other subjects related to the active working relationship between them.

63. However, the process of interpreting the wording of the law does not end with a technical examination of the language of the law. Expressions that appear in the law may have different meanings in different contexts. In order to ascertain that meaning, we must examine the context of the expression and its connection to the subject and purpose of the legislation:

> In principle, every expression has a special meaning in a specific context, according to that context. Therefore, the meaning of the same expression may vary from one context to another, according to the environment in which the expression lives, according to the purpose of the law into which it is inserted and according to other interpretive considerations (Amit Case, at 97 (Justice Zamir)).

And also:

> One of the rules of interpretation is that a certain expression may be interpreted in different ways in different pieces of legislation, in accordance with the purpose of each of the pieces of legislation, the context in which the expression appears and various other tests (CA 480/79, A. Trager Investment and Construction Co. Ltd. v. Customs Collector, Jerusalem, IsrSC 35 (2) 303, 306 (1981)).

When interpreting the expressions and concepts in legislation, weight should be given to both the purpose of the law and the nature of the material with which it deals, both of which affect the degree of flexibility and dynamism that is likely to accompany the interpretation of the expression, as well as to developments and changes that take place in the natural environment in which it lives and operates (HCJ 1583/94, Saroussi v. National Labor Court, IsrSC 49 (3) 469, 475 (1995)). The field of labor law is known for its dynamism and the rapid changes that take place within it. This has an effect, *inter alia*, on the interpretation of expressions and definitions that appear in it. The dynamism that characterizes labor law has been expressed, for example, in extreme flexibility in interpreting the term “worker” in various contexts and for

various needs, according to the purposes of the legislation and the changing social concepts (CA 502/78, State of Israel v. Nissim, IsrSC 35 (4) 748, 758 (1981); HCJFH 4601/95, Saroussi v. National Labor Court, IsrSC 52 (4) 817 (1998)). The need for a practical interpretation of concepts and definitions in the law, with a view to the changing times and the conceptual and systemic transformations that have taken place, has also been pointed out by the Court in the context of interpreting terms in criminal norms – notwithstanding the unique characteristics of the interpretation of a criminal norm, due to the principle of legality and interpretation favoring lenience for the accused within its framework. Thus, for example, the interpretation of the definition of "public employee" was expanded for the purpose of the offense of bribery, *inter alia*, against the background of the privatization processes that took place in Israeli society and the social concepts that changed (CrimFH 10987/07, State of Israel v. Cohen (unpublished, March 2, 2009)). In that case, I pointed out the need to adapt the interpretation of concepts and definitions in the law to the changing times and the dynamic of life:

> A purposive interpretation of an act of legislation, by its very nature, is forward-looking and encompasses the inherent need to adapt the legislative arrangement to the changing times, and to the social needs that arise from time to time, all within the framework of the purpose that the law seeks to achieve. The integration of changing needs into the framework of the purpose of the law is not only consistent with the purpose of the law. It is inherent to the very core of the purpose itself – 'its flesh and blood'. Severing the purpose from the changing needs and the changing dynamic of life freezes the purpose at a historic point in time, and adherence to that point is liable to impair attainment of the purpose of the law, and lead to missing the mark that the legislation aimed to achieve. Within the framework of the possible linguistic options of the written text, it is necessary and proper to implement the purpose of the law in order to truly and completely accomplish its objectives (*id.*, paragraph 2 of my opinion).

A similar interpretive approach – possibly *a fortiori* – should also be adopted in the matter that is being heard before us.

64. The basic purpose of the Collective Agreements Law and the Settlement of Labor Disputes Law is to enable, through the collective

workers' organization, the protection of the workers' rights vis-à-vis the employer. Indeed, the focus of the protection is directed toward active workers, with regard to both the terms of their wages and the terms of their retirement, which are formulated while they are still workers. Yet, in order for this focus of protection to accomplish its complete purpose, there is a need to extend the protection provided by the workers' organization to the stage of exercise of the retirement rights, in the broad sense, after the worker has retired from his work. Without protection of the status of workers who have retired, the protection of their rights, in the broader and deeper sense, is harmed, and precisely at the stage when they are especially in need of representation by a strong entity that will concern itself with their fate. The considerable growth of the retired population has led to establishment of the concept that the role of the workers' organization is not limited to protecting only active workers, but rather, should also be extended to workers who have retired, for the purpose of preserving their status and their dignity. This reality affects the proper interpretive approach, which is affected by the profound changes that have taken place in the reality of life and by the need to adapt the concepts of the law to those changes, in order to achieve their true purpose (HCJ 4948/03, Elhanati v. Minister of Finance, paragraphs 7-8 of my opinion (unpublished, June 15, 2008) (hereinafter: the Elhanati Case)). The view of active workers and pensioners as two links connected to each other by way of an intergenerational bond, both of which have a direct affinity to the workplace as the source from which the retirement rights have derived, justifies an expansive interpretation of the various concepts that appear in the labor laws, in such a way as to ensure that those concepts include, in the practical context, not only active workers, but also workers who have become pensioners. The purpose of the Collective Agreements Law and the Settlement of Labor Disputes Law will not be accomplished in its entirety if the protection that those laws give to workers is limited to the stage of their active employment and the stage of formulation of the retirement conditions, but is removed from them after they have retired, at the stage in which the pensioners' retirement conditions must be fulfilled and their economic and social status must be protected. Protecting the fairness of the retirement conditions is required during the stage of the workers' active work, and is *a fortiori* required after the workers retire; the creation of an artificial

barrier between today's workers and tomorrow's pensioners undermines the purposes of the laws and does not promote them; leaving pensioners without the protection of the organization means creating retirement rights during the existence of the employer-employee relationship, without granting effective means of protecting the exercise of those rights, through an organized entity, and preventing their erosion after the date of retirement. This, in turn, means that the pensioners will be left as a weak group, devoid of any organized power to protect its status and its rights. A legal interpretation that negates the power of the organization to represent pensioners' affairs undermines, at least in part, the purposes for which the workers' organization operates, and leaves those of its members who are pensioners with no real power to protect their legitimate rights during their retirement years. It should not be assumed that this was the purpose of the relevant labor laws.

65. The purpose of the relevant labor legislation therefore justifies the extension of the Collective Agreements Law and the Settlement of Labor Disputes Law, not only to actual workers, but also to pensioners who are members of the workers' organization, for certain specific purposes. The various expressions that appear in these pieces of legislation are subject to such expansive interpretation. Thus, under certain conditions, and for certain purposes, the term "worker" may also be extended to a pensioner, in his capacity as a worker who retired, due to the close connection between a former worker and an active worker, and given that both of them are entitled to the protection of their status – one as a worker in the present, and the other as a worker in the past and a pensioner today. The terms "termination of work," "working conditions" and "labor relations," which are included among the issues to which a "collective agreement" is likely to apply according to its definition in Section 1 of the Collective Agreements Law, should be broadly interpreted as also applying to the affairs of pensioners, members of the organization, who were formerly active workers: "termination of work" is a term that is likely to encompass the retirement conditions related to the termination of a worker's employment, which are relevant to both the stage of their creation, during the existence of the employer-employee relationship, and the stage of their realization, when the worker retires. "Labor relations" is a broad term, which also includes workers'

retirement conditions both when they arise and when they are realized. Moreover, the applicability of the special collective agreement to "all the workers of the types included in the agreement," as set forth in Section 15 of that Law, is likely to include pensioners within the expression "workers" as people who were workers in the past and who need protection of their rights that were formulated by virtue of their [former] status as active workers; the same applies to the details of workers' and employers' rights and duties, in Section 19 of the Law, which includes, *inter alia*, matters related to "termination of work" and "working conditions." A broad interpretation that is suitable for the purpose, requires that these concepts be interpreted as applying not only to the affairs of actual workers, but also to the affairs of pensioners in their capacity as former workers, who are members of the workers' organization. It should be noted that the case law of the National Labor Court has already given a broad interpretation to the term "working conditions" in the definition of a collective agreement, as including, *inter alia*:

> Conditions under which a person will retire from his work, such as severance pay, pension and other retirement allowances, in the meaning thereof. To what does this refer? To benefits that are promised to the employee as a condition of his work. By the very nature of these, they shall apply even after the expiry of the contract period, and even after the employer-employee relationship between the holder of the right and the entity required to grant it has ceased to exist (National Labor Court File 7-2/33, State of Israel – Rosenblatt, IsrNLC 5 42, 48 (1973)).

This is directed not only at retirement conditions that were established while the person was serving as the "worker," but also to retirement conditions that were established after he retired from his work.

The term "labor dispute" in the Settlement of Labor Disputes Law should be interpreted in the same vein, thereby establishing that matters related to the signing, renewal, modification or cancellation of a collective agreement are also likely to apply to pensioners; matters related to the termination of work are also likely to refer to pensioners; and the establishment of rights and obligations that arise from an

employer-employee relationship is also likely to refer to pensioners, since the retirement rights arise from the employer-employee relationship, and the same applies to the exercise of those rights upon retirement. The definition of "labor dispute" is likely to include aspects related to the protection of pensioners' rights, either in the framework of an issue related to a collective agreement dealing with that issue or in the framework of issues related to the "termination of work" of a certain person or the establishment of rights that "arise" from an employer-employee relationship. The term "termination of work" is broad in scope and includes issues that refer to pensioners' rights, which originate in the employer-employee relationship, and which are implemented in practice at the time of retirement. Retirement does not sever the connection between the worker and the employer; that connection continues even after the work has ceased, if only for the purpose of compliance with the rights related to the retirement conditions. The actual labor relations are replaced by a different type of relationship and connection between the pensioner and the employer, which also require representation. Furthermore, the term "rights and duties arising from an employer-employee relationship" is also broad enough to include the rights of pensioners, whose retirement conditions arise from the labor relations that preceded the retirement.

Applying the term "labor dispute" to matters that concern pensioners' rights imports into the dispute the means that the law makes available to the workers' organization, for the purpose of promoting its members' affairs, including the means of strike.

66. It is therefore possible to see that the purposive interpretation of the Collective Agreements Law and the Settlement of Labor Disputes Law do not negate the ability of the workers' organization to represent the pensioners among its members and to include pensioners' affairs in the issues for which the organization can conduct collective negotiations, and even to engage in a collective agreement on those issues. They also do not rule out the possibility that the pensioners' affairs will constitute the subject of a labor dispute. As a direct result, the laws in question do not negate the power of the workers' organization to utilize the means of strike, within the framework of a labor dispute, for the purpose of

promoting the affairs of the pensioners among its members. The interpretive flexibility of these laws, which is required in light of the purposes they seek to accomplish, leads to the outcome that they are not only capable of providing effective protection for the rights of active workers vis-à-vis the employer, but also of providing proper representation for former workers who have retired, whose rights were established, for the most part, prior to their retirement.

67. Needless to say, the broad concept of an "employer-employee relationship" as including the affairs of pensioners for certain purposes, characterizes not only substantive labor law, but also the rules of procedural jurisdiction in the field of labor law. The Labor Court, within the framework of its exclusive jurisdiction, adjudicates matters connected with employer-employee relations. Within this framework, it also adjudicates pensioners' affairs, although the employer-employee relationship between them and their employer ended upon their retirement. The fact that the Labor Court adjudicates the affairs of pensioners is consistent with the concept that issues related to retirement conditions are still considered an integral part of labor relations. The concept of procedural jurisdiction with regard to labor relations is broad and purposive.. Since the relationship between pensioners and the employer basically resulted from labor relations that prevailed between them prior to the retirement, and given the existence of a connection between the pensioner and the employer by virtue of the previous labor relations between them, actions by pensioners against the employer are perceived as matters within the unique jurisdiction of the Labor Court, as stated above (Elhanati Case). In the Shekem Pensioners' Organization Case, the Labor Court ruled as follows:

> Section 24 of the Labor Court Law gives the Labor Court extensive jurisdiction to adjudicate matters connected with the relationship between an employer or an employers' organization and workers or a workers' organization. In the earliest days of the Court... it was ruled, in the Beersheba Municipality Case, that the test for interpretation of its jurisdiction would be '... the "purposive interpretation," i.e., the interpretation that is intended to promote the legislators' purpose' (*id.*, at 256). The ruling stated that the interpretation of the term '"labor relations," not in the technical-institutional sense... but the broad meaning of the term,

> refers to all the reciprocal relations between workers, employers and the state authorities. These relations are governed by a system of rules, including rules that determine the status of the active entities – the workers, their employers and their organizations; "labor relations" are nothing more than part of the "work system," i.e., the system of societal, economic and value-based relations that are centered on "work" (*id.*, at 256-257...).
>
> When implementing this policy at the personal level, it was established that the Labor Court has jurisdiction to hear actions between an employer and someone who used to work for it, notwithstanding the fact that the language of the section of the Law refers to a 'worker' and not to 'someone who was a worker' (*id.*, at 299; emphasis added).

Therefore, adapting the definitions of "worker" and "employer" to the purpose of the law with regard to the Labor Court's jurisdiction led, as stated, to extending the jurisdiction to people who were workers, but who retired from their work, with respect to matters whose cause is the employer-employee relationship – and pensioners' affairs in the context of the retirement rights given to them are among these matters. Thus, for the purpose of determining the scope of the unique subject matter jurisdiction of the Labor Court, the expression "worker" is also likely to include "pensioner," in his capacity as a worker who retired – and it has already been ruled that "worker" also includes a retired worker for the purpose of an action for severance pay and social benefits (see Shekem Pensioners' Organization Case, at 303; National Labor Court File 3-8/31, Beersheba Municipality – Ben-Ami, IsrNLC 2 253, 258-260 (1971)).

68. However, it is important to emphasize that, with regard to representation by the workers' organization, there is no complete congruence between pensioners and active workers, and rights that are granted in a collective agreement to active workers should not necessarily be automatically interpreted as given to pensioners, who constitute a sector with a different status and different needs. However, a collective agreement can establish conditions that the workers will receive upon retirement, and also grant conditions to workers who have already retired, by way of a distinct reference to the two sectors represented by the

organization (Israel Electric Corporation Case, at 269; Shekem Pensioners' Organization Case, at 301-302).

69. A direct result of all this is that a workers' organization is also qualified to represent the pensioners among its members, to conduct negotiations on their behalf and to act to obtain beneficial terms for them within the framework of a collective agreement. A labor dispute is likely to address issues related to pensioners' rights, hence, the means that the law makes available to the workers' organization for the purpose of promoting its affairs in such a dispute also include the instrument of the strike.

This interpretation is reinforced by the special normative status of the right to strike, which is designed to give the organization more strength in conducting collective negotiations. Without it, the organization's power is considerably weakened. Indeed, "legal limitations on the right to strike deprive the workers' organization of the principal tool that enables it to exert pressure on the employer and cause the workers to perceive the organization as superfluous" (Adler, at 489). The right to strike, as a means available to the workers' organization within the framework of collective negotiations, is intended not only to serve the interests of active workers in promoting their working conditions, but also to give the organization an effective means of protection for promoting pensioners' affairs and to prevent the erosion of their economic and social status.

The extent of the connection between the right to strike and the power to sign a collective agreement

70. An argument was made that under Sections 3 and 5 of the Settlement of Labor Disputes Law, an entity representing workers, which is not a workers' organization, can be a party to a collective dispute, under circumstances in which no workers' organization represents the majority of the workers affected by the dispute. According to this argument, this means that the existence of a "labor dispute," as this term is used in the Law, does not depend on the existence of a workers' organization and the ability to engage in a collective agreement, which

only such an organization can sign. Accordingly, the argument continues, the right to a protected strike is not derived from the Collective Agreements Law, from the existence of a collective agreement, and from the ability to sign such an agreement at the end of the dispute; rather, it belongs to all workers, organized and unorganized alike. As a result, the right in question is also given to groups that do not belong to a workers' organization – such as, for example, senior citizens who are not members of an organization (Michal Shaked, "A Theory of Prohibition of the Political Strike" [Hebrew], *Shnaton Mishpat Haavoda* VII 185, 209, footnote 60 (1999) (hereinafter: Shaked); Ruth Ben-Israel, Strike 51 (1987) (hereinafter: Ben-Israel, Strike)).

71. This question, of the required extent of the connection between the right to strike and the existence of a workers' organization with the power to engage in a collective agreement, is a complex question which does not require a decision in the matter before us. The National Labor Court ruling delimited the deliberation, restricting it to a defined set of data, in which a workers' organization, which represents members who are pensioners, wishes to conduct collective negotiations for the purpose of a collective agreement related to the pensioners' affairs, and to declare a strike within the framework of a labor dispute for the purpose of promoting the negotiations. The petition in the matter before us does not deviate from this set of data. Therefore, we will leave the discussion of the above question for an appropriate time.

Conflicts of interest in the activity of the workers' organization

72. One of the arguments voiced against recognition of the power of a workers' organization to represent pensioners' affairs is that this is liable to drag the organization into actions that constitute a conflict of interest. The conflict is liable to arise between the organization's action to promote the interests of active workers – which is the organization's main function – and the organization's role in representing the affairs of the pensioners, which will not necessarily be consistent with those of the workers. The concern was also raised that, as part of the attempt to reconcile the conflict of interest in question, the organization may use its

power in a way that will not benefit the pensioners, and may even detract from their rights.

73. The answer to this argument has several aspects. First, with regard to the fear of conflict of interest in the organization's activity, although it is not possible to entirely rule out a possible conflict of interest between handling the working and retirement conditions of the active workers and handling the exercise and improvement of the rights of pensioners who have already retired, the assumption is that the organization must, in any case, represent all the sectors it encompasses in a fair and balanced manner and must do so faithfully. The organization's duty of faithfully representing its various sectors is examined according to generally accepted criteria, which establish the norms of behavior in the internal relationship between the organization and its members. This matter, then, is decided according to rules pertaining to the appropriate area of representation, in accordance with the generally accepted standards in that framework.

On the merits, it can be said that the fear of a possible conflict of interest in the organization's activity vis-à-vis the employer, between the interests of active workers and those of pensioners, is not of great concern. Although the interests of active workers are not always consistent with those of people who have already retired, in most cases, the retirement conditions that will promote the affairs of present-day pensioners will also serve the active workers upon their retirement in the future. Both groups have a common interest in setting and maintaining fair retirement conditions over the long term. This means that, even if a certain conflict of interest between the two groups may occur, the dominant interest of improving the retirement conditions, for the purpose of implementing them in the present and in the future, is common to both groups and, to a great extent, it reduces the concern about the existence a conflict of interest, as stated.

Second, as to the fear that the workers' organization may harm the pensioners' affairs rather than benefit them, it has already been ruled that it is not possible to derogate from the rights vested in pensioners by means of a collective agreement signed after the date of their retirement,

because their rights were finalized and became permanent upon their retirement and cannot be violated or reduced ((National) Labor Court Appeal 629/97, Eliav – Comprehensive Pension and Provident Fund Center Cooperative Society Ltd., IsrNLC 36 721, 793, 806 (2002); National Labor Court File 3-60/5750, Barkan – Central Pension Fund for Federation of Labor Employees Ltd., IsrNLC 22 258, 265 (1990) (hereinafter: the Barkan Case)). The United States Supreme Court, in Chemical Workers v. Pittsburgh Glass, 404 U.S. 157 (1971) (hereinafter: the Chemical Workers Case), reached a similar conclusion, whereby the workers' organization and the employer do not have the power to change the rights vested in pensioners, in contrast to rights that are not vested, and, should they seek to do so, the pensioners will have a contractual cause of action against them (*id.*, at 181, footnote 20). The activity of the workers' organization is therefore intended solely for improving the conditions of the pensioners, and it has no power to derogate from their rights. Derogation from rights gives rise to a legal cause of action (Barkan Case; National Labor Court File 6-8/5750, Grant – Nativ Pension Fund for Workers and Employees of Essential Enterprises of the General Federation of Labor Ltd., IsrNLC 23 104 (1991)). The power of the workers' organization with respect to pensioners therefore focuses on activity to benefit their retirement conditions, and it has no power to detract from their rights, which were already finalized at the time of retirement.

Fixing pensioners' retirement rights, in the context of the power of the workers' organization to improve their conditions

74. Another argument raised by the Petitioner and the representative of the attorney general is that recognition of the power of the workers' organization to represent the affairs of the pensioners among its members is not consistent with the basic legal concepts, whereby pensioners' retirement rights become fixed upon their retirement, and they cannot expect those rights to be changed in their favor. Moreover, a workers' organization must not be permitted to declare a strike for the purpose of promoting pensioners' rights, which were already formulated and fixed from the legal standpoint, in a manner that involves harm to the employer and damage to third parties and, at times, even to the entire public.

75. Indeed, pensioners' rights become legally fixed at the time of their retirement, and it is not possible to diminish them – not even through collective negotiations – after the workers have retired. On the other hand, this legal assumption does not mean there is a need to negate the power of the workers' organization to represent pensioners vis-à-vis the employer with regard to their retirement conditions, as the years go by and representation is required in order to preserve the pensioners' economic status and living conditions. Protection by the organization is likely to be required in order to preserve the fixed retirement conditions against erosion, which is liable to cause a decline in the pensioners' standard of living. Such protection is also likely to be required when the economic and social reality changes over the years and what were once considered fair retirement conditions become unfair as a result of the changing times. The status of the workers' organization as the entity in charge of protecting the pensioners and preserving their status and standard of living as they grow old does not conflict with the fixing of the retirement rights granted to pensioners upon their retirement. The role of the organization is to protect the pensioners' rights against violation, in the broader sense.

The nature of a strike by members of the organization to improve the conditions of their retired fellow members

76. In labor law, it is customary to distinguish between types of strikes from the standpoint of their nature and objectives, for the purpose of examining the degree of their legitimacy. This practice also has implications for a strike that is declared by a workers' organization for the protection of pensioners' rights and, therefore, we will discuss this briefly.

77. The most definitively recognized type of strike is the "economic strike," which is intended to improve employees' economic conditions. A strike of this type is considered a generally accepted, legitimate means of achieving the objectives that underlie the collective labor relations. This is a strike "that is generally directed against an employer, which is attempting to harm the workers' rights or refusing to improve their

working conditions, a strike that may also be directed against the sovereign power, when the latter is acting in its capacity as an employer or attempting to intervene, through the exploitation of its sovereign power, in order to change existing arrangements in the labor relations between workers and employers or to prevent such arrangements" (Bezeq Case, at 500). An economic strike is a means that is primarily intended to equalize the disparity of power between the worker and the employer. What characterizes an economic strike is its purpose – improvement of, or prevention of harm to, the workers' economic interests (Ben-Israel, Strikes and Lockouts, at 101). An economic strike is considered legitimate, and benefits from the protection of the law, subject to the fulfillment of the conditions imposed by the law in this regard.

78. Another type of strike is the "political strike." This is a strike directed against the sovereign power and intended to change a policy set by it, or to set a policy held to be desirable by the strikers (Frances Raday, "Political Strikes and Fundamental Change in the Economic Structure of the Workplace" [Hebrew], *Hamishpat* II 159 (1994) (hereinafter: Raday); (National) Collective Dispute Appeal 1013/04, Israel Discount Bank Ltd. – New General Federation of Labor / Union of Clerks and Administrative Public Service Employees (ruling by Vice-President Barak) (unpublished, September 26, 2005)). (National) Collective Dispute 53/05, Association of Banks in Israel – New General Federation of Labor / Union of Clerks and Administrative Public Service Employees (unpublished, May 4, 2005)). A strike of this type gives rise to the concern that the striking entity will impose its will on the elective institutions of the authority and will attempt, by means of coercion, to influence democratic processes (Hatib Case, at 703-704; Bezeq Case, at 500-501, 507). The assumption is that a political strike is not protected, since it does not involve improvement of the economic situation of the workers: rather, its purpose is to affect the institutions of government by way of coercion. In Israel and in many countries throughout the world, the legality of the political strike is not recognized (Raday, at 160-161; Mondalek, at 347; for the position in Europe, see: Erika Kovacs, *The Right to Strike in the European Social Charter*, 26 COMP. LAB. L. & POL'Y. J. 445, 449 (2004-2005). For a different concept, which considers the political strike, in certain circumstances, to be legitimate, as a means

of improving employees' standard of living and quality of life, see Ben-Israel, Strikes and Lockouts, at 106-111; Shaked, at 193-207).

79. Given the approach that a political strike may, under certain circumstances, be motivated by the employees' wish to improve their economic situation and standard of living, recognition has been given to the "quasi-political strike," which is launched against the sovereign power, but also pertains to the economic conditions of workers who were harmed by changes in the sovereign's policy. Unlike a political strike, in a quasi-political strike, the workers' interests are directly related to the sovereign's policy. Accordingly, such a strike is recognized as legitimate, albeit to a limited extent (Bezeq Case, at 501; Raday, at 163; Mondalek, at 347, 351-354)

80. Another type of strike is the "sympathy strike," whose normative content has not yet been fully developed. A partial definition of the nature of a sympathy strike appears in HCJ 566/76, Elco Israeli Electromechanical Manufacturing Co. Ltd. v. National Labor Court, IsrSC 31 (2) 197, 207 (1977), in the ruling by Justice Berinson:

> There is no general statutory definition of a strike in our country, and in the matter before us, we can utilize the concise definition that was given in the above-cited Shavit Case, which reads as follows:
>
> A striker is a person who, without breaking his work connection with his employer, stops working, together with other workers, in order to attain his demands from his employer, or in order to help other workers attain their demands from their employer.
>
> A work stoppage of the latter type, in which workers come to the aid of other workers, is what people call a 'sympathy strike' (*id.*, at 207-208; emphasis added).

The sympathy strike has been given a certain degree of support in Israeli case law, and there are those who believe that it constitutes part of common-law (Ben-Israel, The Strike, at 56; Haim Berinson and Assaf Berinson, "Sympathy Strike – Its Status and Proportionality" [Hebrew], Berinson Commemorative Volume [Hebrew] 764, 767-769 (Volume II,

2000) (hereinafter: Berinson); Shavit Case, *id.*) What characterizes a sympathy strike is that it involves one group of workers, who strike as a sign of identification with another group of workers, as an expression of the principles of collectiveness and solidarity among workers (Berinson, at 766-767, 701; for a comparative examination of the matter, see: *id., at 782-786*). However, many questions with regard to this type of strike have not yet been clarified, such as the question of the entity against which the strike is directed, the type of motives that will be considered legitimate for the purpose of initiating such a strike, and the nature of the means that may serve it.

81. When workers strike to protect their own interests, it is not a sympathy strike at all, and the proper framework for analyzing the legality of the strike is the framework related to the laws of economics strikes (Ruth Ben-Israel, "Political Strike" [Hebrew], *Iyyune Mishpat* XI (3) 609, 621 (1986); James Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 545 (2004-2005). A strike that is declared by a workers' organization for the purpose of promoting pensioners' affairs, by its very nature, is not a sympathy strike. It is an economic strike aimed at improving the economic conditions of members of the organization, which is held for the purpose of promoting an interest of a certain sector within the organization. This is not a sympathy strike by one group of workers on behalf of another group of workers; rather, it is a joint strike by members of the organization, who are taking measures in order to achieve a shared economic purpose, which is relevant to both the sector of active workers and the pensioners. As such, it is an economic strike that is recognized in principle as a legal strike, subject to the fulfillment of the conditions specified in law for that purpose. However, naturally, the precise classification of the strike and the extent of its legitimacy will be derived from the specific circumstances of the case, and from data that do not concern us here.

82. It should be noted that the United States Supreme Court deliberated a question similar to the matter before us, in *Chemical Workers*, and ruled (in a judgment by Justice Brennan) that the power of a workers' organization to represent the affairs of pensioners after their retirement should not be recognized and that, in any event, the

organization cannot declare a strike in order to promote their affairs. This ruling was subject to severe criticism; in this regard, see: George Feldman, *Unions, Solidarity and Class: The Limits of Liberal Labor Law*, 15 BERKELEY J. EMP. & LAB. L. 187 (1994).

Conclusion

83. In the social perspective of the 21st century, with the considerable increase in life expectancy and the significant growth in the numerical scope of the elderly population, the stratum of older people becomes an entity with a prominent presence in society. This fact requires special attention, *inter alia*, at the level of labor relations, insofar as it affects retirement and pension conditions. Senior citizens, as a group, strive to protect their quality of life and standard of living in their old age and to live out their declining years with a feeling of security and well-being. Not only does this interest on the part of pensioners not conflict with the interests of active workers, it integrates and merges with it. After all, today's active workers look forward to the future and know that the day will come when they, too, will be pensioners; accordingly, the achievements of today's pensioners will also constitute the advantages of the active workers, when they retire in the future.

84. Labor legislation, including the Collective Agreements Law and the Settlement of Labor Disputes Law, is framework legislation, whose internal content is flexible to the extent required in the field of labor relations, due to the dynamism and rapid changes that affect that field from time to time, a field which serves as a mirror, reflecting the social changes and upheavals that take place in practice. The rapid changes in labor relations are also reflected in the legal patterns that are designed to govern these relations in the area of law. The purposive interpretation of labor legislation is characterized by the need to bridge between the law and the needs of life as reflected in day to day reality. However, flexibility in interpreting legislation is not unlimited. It is delimited by the boundaries of the purpose of the legislation and is anchored in the literal wording of the text, insofar as it can tolerate the purposive interpretation.

85. In the social reality of this era, the place of pensioners in the system of labor relations is an existing phenomenon. Although pensioners' basic rights are legally fixed at the time of their retirement, the need to protect those rights against erosion and to adapt them to the changing economy in the years after their retirement calls for giving pensioners, as a group, the organized power to protect their rights. There are various ways of protecting those rights – not necessarily within the framework of the representative workers' organization. Yet, it seems,, that this mode of protection is the most natural and proper, with regard to pensioners who are members of the organization. The organization was the entity that represented the pensioners while they were active workers and looked after their working conditions, including formulating the terms of their future retirement. The same organization is also supposed to represent the pensioners among its members, for the purpose of exercising and enforcing the retirement rights that are granted to them upon their retirement. The organization is supposed to protect pensioners' standard of living, in cases where economic fluctuations threaten to impair that standard, or where general changes in the economy are liable to cause a relative decline in their economic status. The pensioners' ties and connections to the workers' organization and the active labor system are natural and organic, since yesterday's worker is today's pensioner, today's worker is tomorrow's pensioner, and the protected interests of workers and pensioners are basically identical and combine into a single system with a plurality of ages and institutions. Recognizing the power of the workers' organization to represent the pensioners among its members and to act for their benefit constitutes an organic result of the actual social reality of life, the needs of life, and the basic internal purposes of labor legislation – which not only tolerates a purposive interpretation that integrates the pensioners into the fabric of the representative workers' organization, but also makes that interpretation obvious and worthy. This integration of pensioners into the fabric of the organization means giving the organization all the means to represent the pensioners, and those means also include the power to institute sanctions and strikes if necessary.

86. Striking in favor of the organization's pensioners is closely related to the basic rationales that underlie the right to strike – including

human dignity, the freedom of property, the freedom of occupation and the freedom of expression. Furthermore, striking in favor of pensioners reflects the concept of intergenerational and intra-organizational solidarity between the generation of actual workers and the generation of senior citizens who have retired, between whom there is a close connection. Granting legal recognition to this affinity is consistent with the concepts of social morals and organizational ethics that underlie modern-day social perceptions, which seek to provide the means for effective protection of those sectors of the population that require it. Recognizing the right to strike in favor of the organization's pensioners is one of the expressions of social solidarity and reciprocal responsibility, which are among the basic values of society; the role of those values is strengthened by the expansion of multi-age society and the need to provide a response to the needs of various strata of the population (Ben-Israel, Senior Citizens, at 230-231). The use of the means made available by the Collective Agreements Law and the Settlement of Labor Disputes Law for the purpose of realizing these principles is appropriate and worthy, especially as it serves the interests of active workers no less than those of pensioners.

The conclusion that arises from all the above is that the workers' organizations should be given the possibility of using the collective power at its disposal, *inter alia*, to promote the rights and ensure the status of the pensioners among its members. This includes recognition of its ability to utilize the means of strike, in the appropriate cases, and subject to the limitations established in law and case law for that purpose.

87. In order to set the boundaries of the ruling in this proceeding, it is fitting and proper to emphasize the following points:

First, the legal rulings refer to pensioners who are members of the workers' organization, in which their membership is voluntary, and as long as that membership continues; they do not refer to other pensioners, to whom the decision does not apply.

Second, within the framework of collective negotiations and the collective agreement, active workers are not identical or equivalent to

pensioners in terms of the conditions and arrangements on their own merits. These are two categories of organization members, and the arrangements with regard to each category require specific and separate attention.

Third, the workers' organization is entitled to take collective action to improve the pensioners' conditions, and to make use of all the means recognized under law to promote the matter, including strikes. However, the classification of the strike – for the purpose of examining its legitimacy in terms of content and objectives – will be determined according to the circumstances of the concrete case.

Fourth, the organization is entitled to take action to improve the conditions of the pensioners among its members, but it is not entitled to violate their rights as they existed at the time of their retirement.

Fifth, the legal rulings in this proceeding focus on a situation in which the workers' organization represents the pensioners among its members. It does not provide a response to the much more extensive needs of Israel's senior citizens as a whole, which call for the creation of effective mechanisms that will help to protect their rights and status. This broad sector currently has no real means of protecting its rights and status. This social phenomenon, which is extremely complex and important to every person in Israel, deserves a comprehensive examination by the appropriate public authorities, and even intervention by the legislator for the purposes of its resolution, and the sooner the better.

88. I will therefore propose to my colleagues to adopt the main rulings of the National Labor Court in this proceeding, and to deny the petition.

I will further propose that no order for costs be issued.

Justice (ret.)

Justice E.E. Levy:

I concur.

Justice

President D. Beinisch:

I concur with the comprehensive judgment of my colleague, Justice Emeritus A. Procaccia, in which she extensively discussed the background for the deliberations on the issue that arose before us, which is rooted in the social and legal status of pensioners. Like my colleague, I agree that the changing times and data with regard to the elderly require the protection of the members of this age group. One of the definitive means of protection is the representation of pensioners by the workers' organizations, to which they continue to belong in and after their retirement. In this state of affairs, the absence of any possibility for the workers' organization to take organizational measures, including the possibility of exercising the right to strike with respect to the rights of the organization's pensioners, is liable to give rise to a situation in which the representation of those pensioners will be rendered devoid of content. In addition, I see no basis for the Petitioners' argument that the conclusion reached by the National Labor Court gives rise to a real fear that the power of the workers' organizations will be expanded by giving status to various groups that do not hold the status of workers. Like my colleague, Justice Emeritus Procaccia, I also believe that the organization's pensioners have a special connection to the workers' organization in which they grew through the years, *inter alia*, because, in their capacity as workers until their retirement, they were also involved in its achievements, including aspects connected with their retirement conditions. It should be noted that the actual workers, whom the workers' organization represent, wish to improve both their working conditions and their rights after retirement, and the power of the continuing organization enables their achievements to be preserved even after their

retirement. This outline does not resemble that of other, external entities, and there is no fear that they will become part of an existing, active workers' organization. These workers' organizations constitute a continuing dynasty, in which the connection to employer-employee relations is preserved for the purpose of the rights that accrued to the pensioners and remain available to them even after their retirement. This means that, from the standpoint of those rights, the workers do not break the connection with their employer, or even with the workers' organization, which continues to represent them in this relevant segment. The organization represents the "long arm" of the pensioners in exercising their right to associate, where such an association is required to realize or to improve their retirement conditions or to prevent harm to the pension to which they are entitled. In this, I concur with the opinion of my colleague, Justice Emeritus Procaccia, and with the ruling by President Adler of the National Labor Court. In this regard, I believe that it makes no difference whether the pensioners have a direct and essential interest in the workplace from which they retired, because that workplace gives them a budgetary pension, or whether their rights are exercised by means of a pension fund.

Workers' organizations have a social role. In the absence of a Basic Law to reinforce the status of social rights, the relevant entities must be given appropriate tools, insofar as the legal norms allow it, for the protection of the social rights of weak groups in society. In the social and economic reality that has arisen in Israel, pensioners undoubtedly represent a weakened group. It is therefore appropriate to preserve and develop the few tools available to this sector of the population. Giving the workers' organizations that represent them the possibility of protecting pensioners' rights, which sprang from the framework of their employment, is a tool that can adapt the legal situation to the needs of the new reality.

The President

Justice E. Arbel:

I also concur with the ruling by my colleague, Justice Emeritus A. Procaccia, who authored an extensive opinion with regard to the question of whether a workers' organization has the power to declare a strike that will be protected under law, in a matter intended to promote the rights of the pensioners among its members. In order to provide a response to this question, my colleague examined various complex issues – *inter alia*, those concerning the status of pensioners relative to the workplace from which they retired, their status relative to the workers' organizations, the pensioners' ability to belong to the organization, the extent of its power and its ability to act on behalf of the pensioners. At the end of a long journey, Justice Emeritus A. Procaccia reached the conclusion that leaving the pensioners without the protection of an organization would mean creating retirement rights during the existence of the employer-employee relationship, without effective means of protecting the exercise of those rights and preventing their erosion after their retirement. I agree with my colleague that any other mode of interpretation would frustrate the purposes for which the organization acts and would leave the pensioners among its members with no real power to protect their legitimate rights during their retirement years. The role of the organization in this context is to protect the pensioners' rights, standard of living and status during their retirement years. The zenith of this protection lies in making use of the collective power held by the organization – the power to strike – in favor of the pensioners who are members of the organization.

Justice

Justice M. Naor:

I concur.

Justice

Vice-President E. Rivlin:

I also concur with the comprehensive ruling by my colleague, Justice Emeritus A. Procaccia, and the comments by my colleague, President D. Beinisch.

The Vice-President

Justice A. Grunis:

I concur.

Justice

It is therefore decided as set forth in the ruling by Justice Emeritus A. Procaccia.

Given this day, 24 Nisan 5771 (April 28, 2011).

The President The Vice-President Justice Emeritus
Justice Justice Justice Justice