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Jurisdiction of the ECJ and the ECtHR supporting shelter by labour law, directives and human rights – an overview

Rudolf Buschmann, Center for appeal and European law
German Trade Union Legal Service
University of Kassel, Germany

I. European Court of Human rights

1. Freedom of assembly and association, Art. 11 ECHR

- Art 11 ECHR does not guarantee a right not to be bound to a collective agreement.
(ECtHR 30.7.1998 – 1107043, Gustafsson)

- The case law of British Labour Courts having admitted that an employer may offer considerable pay rises to employees who agreed to the termination of collective bargaining, which were not provided to those who refused to sign contracts accepting the end of union representation, constituted a disincentive or restraint on the use by employees of union membership to protect their interests. By permitting employers to use financial incentives to induce employees to surrender important union rights, the UK has failed in its positive obligation to secure the enjoyment of the rights under Art. 11 of the Convention. This failure amounted to a violation of Art. 11, as regards both the applicant trade unions and the individual applicants.
(ECtHR 2.7.2002 – 30668/96, 30671/96, 30678/96, Wilson et al.)

- 85. The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.
86. In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies.
127. Accordingly, there has been a violation of Art. 11 ECHR on account of the failure to recognise the right of the applicants, as municipal civil servants, to form a trade union.
(ECtHR v. 12.11.2008 – 34503/97, Demir et Baykara)

- The Court acknowledged that the right to strike was not absolute and could be subject to certain conditions and restrictions. However, while certain categories of civil servants could be prohibited from taking strike action, the ban did not extend to all public servants or to employees of State-run commercial or industrial concerns.
(ECtHR 21.4.2009 – 68959/01, Enerji Yapi-Yol Sen)

- 78. Having regard to its case-law illustrating that strike action is clearly protected by Art. 11 (RMT v. UK, no. 31045/10, § 84, 8.4.2014, with further references), the Court sees no reasons for holding otherwise. 79. The Court further notes that such interference will constitute a breach of Art. 11 of the Convention unless it was “prescribed by law”, pursued one or more legitimate aims and was “necessary in a democratic society” for the achievement of those aims. 85. The foregoing considerations are sufficient to enable the Court to conclude that the interference with the applicants’ (flight cabin crew union members) rights under Art. 11 of the Convention was not based on sufficiently clear and foreseeable legislation. *Conclusion:* violation of Art. 11
(ECtHR 02.10.2014 – 48408/12, Tymoshenko)

- The ban on holding a strike against a branch union for medical personal and doctors under the condition of collective agreement plurality (other unions had concluded a collective agreement) in Croatia constituted a violation of Art 11 ECHR.
Concurring opinion Pinto de Albuquerque
(ECtHR 27.11.2014 – 36701/09, HLS/Croatia)

- 57. It is true that the obligation to contribute financially to the Social Welfare Fund could be regarded as creating a de facto incentive for the applicant company to join one of the employers’ associations in the building industry in order to be able to participate in that association’s decision-making process and to assert its interests by exercising control over the activities of the Social Welfare Fund. However, the Court finds that this de facto incentive was too remote to strike at the very substance of the right to freedom of association guaranteed by Art. 11 of the Convention and did, therefore, not amount to an interference with the applicant company’s freedom not to join an association against its will. 58. … the duty to contribute to the Social Welfare Fund did not in any way take away the applicant company’s right to establish an association, to promote it or to join an existing association. … *Conclusion*: no violation of Art. 11 (neither of Art. 1 of Protocol No 1)
(ECtHR 2.6.2016 – 23646/09, SOKA BAU)

- Art. 3: The injuries observed by doctors to 2 of the applicants, who had not engaged in violence, were to be considered attributable to the aggressive police operation to break up the demonstration for 1. May 2008 on the Taksim Place in Istanbul. As such treatment was not justified simply in order to disperse a demonstration, it constituted inhuman and degrading treatment - violation.
- Art. 11: In view of the brutality of the police intervention, particularly regarding the use of tear gas, the lack of any judicial scrutiny of its proportionality and necessity was apt to dissuade trade-union members and other members of the public from taking part in lawful demonstrations. *Conclusion*: violation (unanimously).
(ECtHR 24.5.2015 – 37273/10, Celebi)

2. Respect for private and family life, Freedom of thought, conscience and religion, Freedom of expression, Art. 8- 10

The dismissal of a teacher of German and French in a secondary school with the legal status of a civil servant based and legitimated on her membership and activities in the DKP (Deutsche Kommunistische Partei) and her refusal to keep distant from this party constituted a violation of Art. 10 and 11 ECHR. The Grand Chamber considered the dismissal disproportionate to the legitimate aim pursued. There was no evidence that Mrs Vogt herself, even outside her work at school, had made anti-constitutional statements or personally adopted an anti-constitutional stance. The DKP had not been banned by the Federal Constitutional Court and consequently, the applicant's activities on its behalf were entirely lawful. *Conclusion*: violation
(ECtHR 26.9.1995 – 17851/91, Dorothea Vogt)

- A divorced organist of a (catholic) church was dismissed on the grounds that he had violated basic regulations of the Catholic Church. In particular, having engaged in a new marriage with another woman who expected a child from him, he was blamed of having committed adultery and bigamy. The German labour courts had failed to weigh Mr Schüth’s rights against those of the Church employer in a manner compatible with Art. 8 ECHR. The interests of the Church employer had not been balanced against Mr Schüth’s right to respect for his private and family life and the legal protection afforded to it. A more detailed examination would have been required when weighing the competing rights and interests at stake. *Conclusion*: violation (unanimously).
(ECtHR 23.9.2010 – 1620/03, Schüth)

- Signalling (whistleblowing) by an employee in the public sector of illegal conduct or wrongdoing in the workplace should enjoy protection. Being mindful of the importance of the right to freedom of expression on matters of general interest, of the right of employees to report illegal conduct and wrongdoing at their place of work, the duties and responsibilities of employees towards their employers and the right of employers to manage their staff, and having weighed up the other various interests involved in the present case, the Court comes to the conclusion that the interference with the applicant's right to freedom of expression, in particular her right to impart information, was not "necessary in a democratic society". The domestic courts failed to strike a fair balance between the need to protect the employer's reputation and rights and the need to protect the applicant's right to freedom of expression.
Conclusion: violation
(ECtHR 21.7.2011 – 28274/08, Heinisch)

- The fact that the employer had accessed Mr Bărbulescu’s professional Internet account and that the record of his communications had been used in the domestic litigation to prove the employer’s case (dismissal of the applicant) was sufficient to engage the applicant’s “private life” and “correspondence”. So Art. 8 was applicable. The domestic courts had struck a fair balance between Mr Bărbulescu’s right to respect for his private life and correspondence under Art. 8 and the interests of his employer.
Conclusion: no violation, dissenting opinion Pinto de Albuquerque
(ECtHR 12.1.2016 – 61496/08, Barbulescu; 6.6.2016: referral to Gr. Chamber)

- Also prisoners have a right to receive information of general interest. The access to the Internet is a subjective right, serving the use of diverse human rights (right to internet access in a penitentiary – refusal of internet access as obstruction to enrolling at online studies)
(ECtHR (4. section) 17.1.2017 – Nr. 21575/08, Jankovskis / Lituania)

- Systematic storage and other use of information relating to an individual's private life by public authorities entails important implications for the interests protected by Art. 8 of the Convention and thus amounts to interference with the relevant rights. This is all the more true where the information concerns a person's distant past (medical information from a long dated military service). The use of the disputed data for deciding on the applicant's promotion and its unrestricted disclosure to various third parties in this context were not necessary in a democratic society. Conclusion: violation of Art. 8 in connection with retention and disclosure of the applicant's mental-health data as well as its use for deciding on the applicant's applications for promotion.
(ECtHR (5. section) 26.1.2017 – Nr. 42788/06, Surikov / Ukraine)

- A duty of loyalty, reserve and discretion normally prevents employees from publicly criticising the work of their employers. However, in the present case it was another officer of the company, namely the chairman of the company's General Meeting, who had been the first to resort to the media and had publicly criticised the applicant's work. In such specific circumstances it could not have been expected of the applicant that she should remain silent and not defend her reputation in the same way. To do so would overstretch her duty of loyalty, contrary to Art. 10 of the Convention which, inter alia, requires that an employee's freedom of expression is secured against unreasonable demands of loyalty by his or her employer. The applicant's statements in reply to those of M.U. were not disproportionate and did not exceed the limits of permissible criticism. Accordingly, the Court finds that the interference with the applicant's freedom of expression in the form of her summary dismissal was not "necessary in a democratic society" for the protection of the business reputation and the rights of the company she headed. Conclusion: violation of Art. 10
(ECtHR v. (2. section) v. 28.3.2017 – Nr. 51706/11, Marunić / Kroatien)

3. Procedure

- In the instant case the length of the proceedings (11 years) was excessive and failed to meet the "reasonable time" requirement. Conclusion: breach of Art. 6 § 1 ECHR.
Art. 46 ECHR, as interpreted in the light of Art. 1, imposes on the respondent State a legal obligation to implement, under the supervision of the Committee of Ministers, appropriate general and/or individual measures to secure the right of the applicant which the Court found to be violated. There is no effective remedy under German law capable of affording redress for the unreasonable length of civil proceedings. Conclusion: Violation of Art. 13 ECHR
The respondent State must introduce without delay, and at the latest within one year from the date on which this judgment becomes final, a remedy or a combination of remedies in the national legal system in order to bring it into line with the Court's conclusions in the present judgment and to comply with the requirements of Art. 46 of the Convention.
(ECtHR 2.9.2010 – 46344/06, Rumpf/Germany)

II. Court of Justice of the EU

1. Freedom of Association

- Art. 43 EC is to be interpreted as meaning that, in principle, collective action initiated by a trade union or a group of trade unions against a private undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, is not excluded from the scope of that article.
(CJEU 11.12.2007, C-438/05, Viking)

- Art. 49 EC and Art. 3 of (Posted Workers)DIR 96/71/EC of 16.12.1996 are to be interpreted as precluding a trade union, in a Member State in which the terms and conditions of employment covering the matters referred to in Art. 3(1), first subparagraph, (a) to (g) of that directive are contained in legislative provisions, save for minimum rates of pay, from attempting, by means of collective action in the form of a blockade ('blockad') of sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions.
(CJEU 18.12.2007, C-341/05, Laval)

- If the 'dynamic' interpretation, supported by the claimant, of the contractual reference clause were applied, that would mean that future collective agreements apply to a transferee who is not party to a collective agreement and that his fundamental right not to join an association could be affected. Art. 3(1) of DIR 77/187/EEC of 14.2.1977 (transfers of undertakings, businesses or parts of businesses) must be interpreted as not precluding, in a situation where the contract of employment refers to a collective agreement binding the transferor, that the transferee, who is not party to such an agreement, is not bound by collective agreements subsequent to the one which was in force at the time of the transfer of the business.
(CJEU 9.3.2006, C-499/04, Werhof)

- The interpretation of Art. 3 of DIR 2001/23 must comply with Art. 16 of the Charter, laying down the freedom to conduct a business. Art. 3 of Council Directive 2001/23/EC must be interpreted as precluding a Member State from providing, in the event of a transfer of an undertaking, that dynamic clauses referring to collective agreements negotiated and adopted after the date of transfer are enforceable against the transferee, where that transferee does not have the possibility of participating in the negotiation process of such collective agreements concluded after the date of the transfer.
(CJEU 18.7.2013, C-426/11, Alemo-Herron)

Breaking news:
- Art. 3 of DIR 2001/23/EC and Art. 16 of the Charter of Fundamental Rights of the EU, must be interpreted as meaning that, in the case of a transfer of a business, the continued observance of the rights and obligations of the transferor arising from a contract of employment, extends to the clause which the transferor and the worker agreed pursuant to the principle of freedom of contract, pursuant to which their employment relationship is governed not only by the collective agreement in force on the date of the transfer, but also by agreements subsequent to the transfer and which supplement it, amend it or replace it, if the national law

provides for the possibility for the transferee to make adjustments both consensually and unilaterally.
(CJEU 27.4.2017, C-680/15 and 681/15, Asklepios)

2. Application of Fundamental and Human Rights

- The exercise of the fundamental right to bargain collectively must be reconciled with the requirements stemming from the freedoms protected by the TFEU Treaty, which in the present instance Dir 92/50 and 2004/18 are intended to implement, and be in accordance with the principle of proportionality (see, *Viking*, § 46, and *Laval*, 94).
(CJEU 15.7.2010, C-271/08, Commission / Germany)

- Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of EU law, situations cannot exist which are covered in that way by EU law without those fundamental rights being applicable. The applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter.
(CJEU 26.2.2013, C- 617/10, Akerberg Fransson)

- Art. 27 of the Charter of Fundamental Rights of the EU, by itself or in conjunction with the provisions of DIR 2002/14/EC of 11.3.2002 (Information and Consultation), must be interpreted to the effect that, where a national provision implementing that directive, such as Art. L. 1111-3 of the French Labour Code, is incompatible with EU law, that article of the Charter cannot be invoked in a dispute between individuals in order to disapply that national provision.
(CJEU 15.1.2014, C-176/12, AMS)

- The agreement on the accession of the EU to the ECHR is not compatible with Art. 6(2) TEU or with Protocol (No 8) relating to Art. 6(2) of the TUE on the accession of the Union to the ECHR.
(CJEU, opinion 18.12.2014 – 2/13)

2. Data protection

- DIR 2006/24/EC of 15.3.2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC is invalid.
(CJEU 8.4.2014, C-293/12)

- Art. 12(b) and subparagraph (a) of the first § of Art. 14 of DIR 95/46 are to be interpreted as meaning that, when appraising the conditions for the application of those provisions, it should inter alia be examined whether the data subject has a right that the information in question relating to him personally should, at this point in time, no longer be linked to his name by a list of results displayed following a search made on the basis of his name, without it being necessary in order to find such a right that the inclusion of the information in question in that list causes prejudice to the data subject. As the data subject may, in the light of his fundamental rights under Art. 7 and 8 of the Charter, request that the information in question no longer be made available to the general public on account of its inclusion in such a list of results, those

rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question.
(CJEU 13.5.2014, C-131/12, Google Spain)

- Art. 25(6) of DIR 95/46/EC of 24.10.1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data as amended by Regulation (EC) No 1882/2003 of 29.9.2003, read in the light of Art. 7, 8 and 47 of the Charter of Fundamental Rights of the EU, must be interpreted as meaning that a decision adopted pursuant to that provision, such as Commission Decision 2000/520/EC of 26.7.2000 pursuant to DIR 95/46 on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce, by which the Eur. Commission finds that a 3. country ensures an adequate level of protection, does not prevent a supervisory authority of a Member State, within the meaning of Art. 28 of that DIR as amended, from examining the claim of a person concerning the protection of his rights and freedoms in regard to the processing of personal data relating to him which has been transferred from a Member State to that 3. country when that person contends that the law and practices in force in the third country do not ensure an adequate level of protection. Decision 2000/520 is invalid.
(CJEU 6.10.2015, C-362/14, Safe Harbour)

4. Procedure

- The entry into force of the Lisbon treaty, incorporating the Charter into EU primary law, cannot be considered a new matter of law within the meaning of the first subparagraph of Art. 42(2) of its Rules of Procedure. Even before that treaty entered into force, the court had found that the right to a fair trial, which derives inter alia from Art. 6 ECHR, constitutes a fundamental right which the EU respects as a general principle under Art. 6(2) EU. According to the *ECtHR*, a failure to adjudicate within a reasonable time must, as a procedural irregularity constituting the breach of a fundamental right, give rise to an entitlement of the party concerned to an effective remedy granting him appropriate relief. However, where there are no indications that the excessive length of the proceedings before the General Court affected their outcome, failure to deliver judgment within a reasonable time cannot lead to the setting aside of the judgment under appeal.
(CJEU 26.11.2013, C-40/12 P)

5. Equal treatment

- Art. 4(1) of DIR 2000/78/EC of 27.11.2000 must be interpreted as meaning that the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of that provision.
(CJEU 14.3.2017, C-188/15)

- An employer’s wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is recognised in Art. 16 of the Charter and is, in principle, legitimate, notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer’s customers. Art. 2(2)(a) of DIR 2000/78/EC of 2711.2000 must be interpreted as meaning that the prohibition on wearing an Islamic headscarf, which arises from an internal rule of a private undertaking prohibiting the visible wearing of any political, philosophical or religious sign in the workplace, does not constitute direct discrimination based on religion or belief within the meaning of that directive. …
(CJEU 14.3.2017, C-157/15)