Network European Lawyers for Workers

Conference on the Collective Rights of Employees in the Crisis of the EU

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The Right to Strike as a fundamental Right in a Time of Austerity

Notes

by

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1. That the right to strike is a fundamental human right cannot be doubted:

   ILO Convention 87 as interpreted by Committee of Experts and Committee on Freedom of Association since 1952;

   Aticle 6(4) European Social Charter 1961;

   Article 8(1)(d) International Covenant on Economic, Social and Cultural Rights 1966;

   European Convention on Human Rights and Fundamental Freedoms 1951 as interpreted since 2002, discuss:

   OFS v Norway;[1]
   UNISON v UK;[2]
   Wilson, Palmer and ors v UK;[3]
   Enerji Yapi-Yol Sen v Turkey;[4]
   Danilenkov & Others v Russia;[5]
   Urcan v Turkey;[6]
   Saime Özcan v Turkey;[7]
   Kaya and Seyhan v Turkey;[8]
   Karaçay v Turkey;[9]

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[1] *Federation of Offshore Workers Trade Unions v Norway*, Application No. 381/97, (2002) ECHR 2002-VI, 301.
[2] [2002] IRLR 497.
[3] [2002] IRLR 568.
[4] Application No 68959/01, Judgment dated 21 April 2009.
[5] Application No 67336/01, 30 July 2009, definitive version 10 December 2009.
[6] Application No 23018/04 etc, 17 July 2008, definitive judgment 17 October 2008, only in French.
[7] Application No 22943/04, 15 September 2009, judgment in French only.
[8] Application No 30946/04, 15 September 2009.
[9] Application No 6615/03, 27 March 2007, definitive version of the judgment on 27 June 2007, only in French.

Dilek et al v Turkey[10]

Trofimchuk v Ukraine[11]

2. In the first two cases the right to strike was found in Article 11 but the restrictions on it were justified by reference to Article 11(2); in *Wilson* freedom to organise or take industrial action was part of the Article 11 reasoning though the case was not about industrial action; in the next 6 cases the right to strike was held to be protected by Article 11(1) and the restrictions on it were not justified by reference to Article 11(2). In *Trofimchuk a*bsence from work in order to peacefully picket was held protected but the restriction of it in the form of dismissal was justified under Article 11(2).

3. Article 11(2) provides that:

> No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

These restrictions on Article 11 (1) rights are, however, to be strictly construed: *Demir and Baykara v Turkey*.[12]

4. The condition that the restriction must be "*necessary in a democratic society*" is of the greatest significance in considering the legitimacy. The applicable standards for freedom of association will be as *Demir* put beyond doubt, the international labour standards, as well as the practice of other member States, "*European*

[10] On 17 July 2007 the judgment was under the name of *Satlimiş v Turkey* and the final version was dated 30 January 2008. This was rectified on 28 April 2008 when the name was corrected to *Dilek v Turkey*, Application Nos 74611/02, 26876/02, and 27628/02.

[11] Application No 4241/03, 28 January 2011.

[12] Application No 34503/97, 12 November 2008, para 146. This Court referred there to: *Refah Partisi (the Welfare Party) v Turkey* [GC], Application Nos 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II; and *Selmouni v. France* [GC], Application No 25803/94, ECHR 1999-V).

countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law".[13] Even the jurisprudence of other democratic States can be relevant, from Canada to Japan.[14]

5. A restriction which is "*necessary in a democratic society*" must be shown to fulfil a "*pressing social need*" which is proportionate and which relates to one or more of the legitimate aims based on an acceptable assessment of the relevant facts in the circumstances prevailing in the given country at the time[15]. "*[N]ecessary in this context does not have the flexibility of such expressions as 'useful' or 'desirable'*".[16] "*[E]xceptions to the rule of freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom*".[17] Necessity must be "*convincingly established*".[18] *Demir and Baykara* reiterated established jurisprudence in holding that:

> In determining in such cases whether a "necessity" – and therefore a "pressing social need" – within the meaning of Article 11 § 2 exists, States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts…[19].

6. As to proportionality, the task of the ECtHR:

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[13] *Demir*, paras 165-166; Preamble to the Convention, 4 November 1950.

[14] *Jehovah's Witnesses of Moscow v Russia*, below, para 85: Ontario Supreme Court; para 86: UK Court of Appeal; para 87: Court of Appeals of New York; para. 88: South African Supreme Court, Corte Suprema de la Nación Argentina, Constitutional Court of Spain, and Supreme Court of Japan.

[15] *Sunday Times v UK*, above, paras. 59 and 62; *Olsson v Sweden* (1988) 11 EHRR 259; *Observer and Guardian v UK* (1991) ECHRR (series A) 216; *Lingens v Austria* (1986) ECHRR (series A) 103, para 43; *Ezelin v France* (1991) ECHRR (series A) 202, para 51; *Oberschlick v Austria* (1991) ECHRR (series A) 204, para 60; *Demir and Baykara*, above, para 164.

[16] *Young, James and Webster v UK*, above, at para 104; *Jehovah's Witnesses of Moscow v Russia* (2011) 53 EHRR 4, Application No.302/02, 10 June 2010, at para 100, citing *Gorzelik v Poland* (2005) 40 EHRR 633, at paras 94 and 95 with further references.

[17] *Jehovah's Witnesses of* Moscow, above, at para 100.

[18] *Autronic AG v Switzerland* (1990) ECHRR (series A) 178, para 61; *Weber v Switzerland* (1990) ECHRR (series A) 177, para 47; *Barthold v Germany* (1985) ECHRR (series A) 90, para 58.

[19] Para 119. The Court referred in that passage to *Sidiropoulos v Greece*, 10 July 1998, para 40, *Reports* 1998-IV. This principle was recently restated in *Patyi v Hungary*, Application No 5529/05, 7 January 2009, paras 38-39 and *Jehovah's Witnesses of Moscow*, above, para 108.

> is not to substitute its own view for that of the relevant national authorities but rather to review the decisions they delivered in the exercise of their discretion. This does not mean that it has to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reason adduced by the national authorities to justify it are "relevant and sufficient." In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in the appropriate provision of the Convention and, moreover, that they based their decisions on an acceptable assessment of the relevant facts.[20]

7. It goes without saying that "*the nature and severity of the sanction are factors to be taken into account when assessing the proportionality of the interference*".[21]

8. The European Committee of Social Rights has rejected the proposition that there is any principle of proportionality between the damage caused by, and the object of, industrial action.[22] Likewise the ILO:

> …has never included the need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services. The Committee has only suggested that, in certain cases, the notion of a negotiated minimum service in order to avoid damages which are irreversible or out of all proportion to third parties, may be considered and if agreement is not possible the issue should be referred to an independent body…[23].

9. Even the EU has recognised the right to strike : Article 28 EU Charter of Fundamental Rights, 2000 (right to strike in conflicts of interest – all subject to Articles 51-54 and the "Explanations" including the UK and Poland opt-outs); and in *Viking* and *Laval* in 2007.[24]

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[20] *Jehovah's Witnesses of Moscow*.
[21] *Jehovah's Witnesses of Moscow*.
[22] ECSR, *Conclusions XVI-1* (Belgium).
[23] 2010 Report of the Committee of Experts.
[24] *ITF v Viking Line ABP* [2008] IRLR 143 and *Laval un Partneri Ltd v Byggnadsarbetareförbundet* [2008] IRLR 160.

10. Yet that decision shows that this fundamental human right is, in the EU, to be subverted to employer freedoms and judicial discretion. Despite the suggestions that these decisions were an unfortunate aberration, the ECJ has not sought to reverse them notwithstanding the decisions of the ILO Committee of Freedom of Association in the BALPA v UK complaint in 2010 and 2011, decisions which must surely bind the ECtHR. Quite how this will be resolved on the accession of the EU to the ECHR is not clear.

11. The EU is not resiling form the principles established in those cases. For, notwithstanding the prohibition in the EU Treaty against legislation on industrial action, now Monti II is drafted to provide that "no primacy exists between" human rights and economic freedoms (Article 2(1)). It is likely to be approved by the EU Commission on 14th March 2012.

12. What has been achieved in the ECtHR in relation to fundamental trade union rights is now under threat. The UK Government has now circulated a paper for the forthcoming Committee of Ministers meeting in Brighton, UK in April which contains dangerous proposals to weaken the authority of the ECtHR, to widen the margin of appreciation and to devolve jurisdiction on ECHR issues to national courts so far as possible. http://www.scribd.com/fullscreen/82798045; http://www.documentcloud.org/documents/321465-pages-from-echr-reform-draft-uk-declaration-23.html#document/p1. And see http://libertes.blog.lemonde.fr/2012/02/27/menaces-sur-la-cour-europeenne-des-droits-de-lhomme/.

13. Finally, the UK courts have simply denied that there is any right to strike protected by the ECHR thus the extensive restrictions on that right in UK law persist: *Metrobus ltd v UNITE* [2009] IRLR 851 CA.

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