Discrimination based on trade union membership: Zakharova and others v. Russia

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In the case of Zakharova and others v. Russia, the ECtHR ruled against Russia on its failure to fulfil its positive obligations to ensure effective and clear judicial protection against discrimination on grounds of trade union membership. Despite the fact that the applicants demonstrated a prima facie case of discrimination, the domestic (Regional) court refrained from effectively shifting the burden of proof onto the employer.

Facts

The applicants before the ECtHR (three leading members of a primary trade union at 'the Youth Creativity Centre' – a municipal educational institution) were allegedly subjected to harassment and discriminatory practices by their employer on account of their trade union activity in the course of 2008. Their primary trade union formed part of a district trade union for education and science employees. Following a conflict between the district and regional trade unions it was decided for the district union to be liquidated. The primary trade union was (allegedly) pushed to join (directly) the regional trade union. The applicants however chose to join an alternative regional trade union for 'culture employees'. This union cancelled its decision to accept the primary trade union as a member as the employees concerned were not from the sphere of culture. In response to this an independent trade union was created at the Youth Creativity Centre, where the applicants fulfilled the roles of chair and deputy chairs.

As an employer, the Youth Creativity Centre changed the staff schedule reducing the working hours and consequently the salaries of the applicants in March 2008. In April 2008, the independent trade union joined the All-Russia Trade Union's Association. The applicants were asked to either resign from their jobs or secede from the association their union joined.

The independent trade union complained to the local prosecutor's office that the liquidation of the formed disctrict trade union had been unlawful, that they suffered discrimination and violations of their labour rights and that financial offences had been commited by the director of the Centre.

As two applicants had refused to work under the revised conditions (reduced working hours) they were dismissed from their jobs in June 2008. Following an objection by the prosecutor's office which had found a breach of the applicable legislation concerning the dismissal procedure, this decision of the Centre was set aside. Soon after, the Centre however again reduced the applicants' working hours and informed them that their positions would be abolished. They were eventually dismissed just before the moment their post would be abolished with reference to the need to make staff redundant in November 2008. This dismissal took place during collective agreement negotiations between the Centre and its employees' trade unions in which the applicants also participated.

Procedure

The applicants successfully challenged their dismissal before the Town Court, which ruled that following a breach of the applicable procedure to consult the independent trade union, the decision was to be set aside. The Town Court awarded them their unpaid salaries for the period between dismissal and reinstatement and also awarded them non-pecuniary damages for the unlawful dismissal.

The Regional Court upheld the above-mentioned judgment, but set aside the reasoning regarding the discriminatory actions against the applicants. The Regional Court could not agree with the finding of the Town Court that the actions of the director of the Centre discriminated against the applicants and that the applicants' membership of the trade union was the reason for the dismissal. Following the (reconfirmed) reinstatement, the applicants remained to work for the Centre.

Findings of the ECtHR

The ECtHR reiterates that it is crucially important that individuals affected by discriminatory treatment should be provided with an opportunity to challenge it and should have the right to take legal action to obtain damages or other relief. States are required under Articles 11 and 14 of the ECHR to set up a judicial system that ensures real and effective protection against anti-union discrimination. The ECtHR came to this conclusion in earlier cases also (see as example Konstantin Markin v. Russia and Danilenkov and Others v. Russia).

The ECtHR considers that the applicants belonged to a protected group (members and leaders of a trade union) and suffered adverse actions on the part of their employer (reduction of working hours and repeated attempts to dismiss them). The ECtHR concludes that the concurrent adverse actions against the applicants are sufficient so that an independent observer could reasonably draw an interference that the applicants' trade unionism could have played a principal role in the way they had been treated by their employer. Therefore there is a prima facie case of discrimination against the applicants on the grounds of their trade union membership and related activities. The ECtHR rebukes Russia for not addressing the applicants' discrimination complaint with proper attention in order to ensure real and effective protection from anti-union actions.

The ECtHR is of the opinion that (both in line with the positions of the European Committee of Social Rights and the International Labour Organisation) the burden of proof was to be shifted to the employer, once the applicants had demonstrated a prima facie case of discrimination (see also Baka v. Hungary and 'Baka v. Hungary: Judicial independence at risk in Hungary's new constitutional reality'). It is for the employer, usually having control over relevant evidence, to demonstrate the existence of legitimate grounds for the applicants' dismissal. Those legitimate grounds could not be established.

The general statement by the Regional Court (in contrast to the judgment of the Town Court) that the applicants' allegations of discrimination were unsubstantiated is insufficient to discharge the state authorities from the obligation requiring the rebuttal of an arguable allegation of discrimination (see also Begheluri and others v. Georgia and Makhashevy v. Russia). The ECtHR concludes that Russia failed to fulfil its positive obligations to ensure effective and clear judicial protection against discrimination on the grounds of

trade union membership. It follows thus that there has been a violation of Article 14 juncto Article 11 ECHR.

Comments

The ECtHR refers in its judgment to the Digest of decisions and principles of the Committee of Freedom of Association of the International Labour Organisation (ILO). There are several general principles and recommendations regarding the protection of anti-union discrimination iterated by the Committee of Freedom of Association of the ILO that the ECtHR referred to, e.g.:

– that anti-union discrimination is one of the most serious violations of freedom of association, as it may jeopardize the very existence of trade unions;

– no person should be dismissed or prejudiced in employment by reason of trade union membership or legitimate trade union activities;

– acts of anti-trade union discrimination should not be authorized under the pretext of dismissals based on economic necessity;

– ensuring the protection of trade union officials, provide that they may not be dismissed, either during their period of office or for a certain time thereafter except, of course, for serious misconduct;

– measures to ensure the effective protection of workers' representatives, by the adoption of provision for laying the burden of proof upon the employer, in the case of any alleged discriminatory dismissal or unfavourable change in the conditions of employment of a workers' representative.

A similar approach can be found within the framework of the European Committee of Social Rights of the Council of Europe (the supervisory body of the European Social Charter), which also held that domestic law should provide for an alleviation of the burden of proof in favour of the plaintiff in discrimination cases. Indeed, as is stated in the Digest of the case law of the European Committee of Social Rights and also stated by the ECtHR in the case at hand, the burden of proof must not rest entirely on the requesting party and must be the subject of an appropriate adjustment in the case of discrimination. States have to explicitly lay down remedies and penalties against acts of anti-union discrimination and ensure that complaints of anti-union discrimination are examined in the framework of national procedures.

As is the case in many mature legal systems, in Russia additional measures are actually in place to ensure fuller protection for leaders and delegates and members of trade unions against discriminatory acts. Russia also has legislative instruments that should prevent discrimination related to union membership (Articles 19 and 30 of the Constitution of the Russian Federation, the Article 3 of the Labour Code of the Russian Federation, and section 9 of the Trade Union Act).

In 2004 the Supreme Court of the Russian Federation even ruled that 'in the examination of a reinstatement claim by a person whose employment contract has been terminated at the initiative of the employer, an obligation to prove the

existence of legitimate grounds for the dismissal is imposed on the employer' (Ruling no. 2 of 17 March 2004 of the Plenum of the Supreme Court of the Russian Federation).

Although it appears that the Town Court accepted the reasoning of discrimination brought forward by the employees, the (higher) Regional Court could not agree with the findings that the actions of the employer were of a discriminating nature because the material in the case file did not contain evidence to that effect. However, when assessing the facts as a whole, it is indeed difficult to escape the view that the employer has not only flagrantly neglected the right of association but even more actively reverted to intolerable practices to conceal the true reasons to remove the employees from their post solely on the basis of their trade union activities. Despite that the principle of affirmanti incumbit probatio usually applies as a standard, only a reversal of the burden of proof can result in safeguarding employees' freedom of association. Should this not be the case it would be extremely difficult for them to prove discrimination.

That in this case the reinstatement was ordered by the national courts seems to be an appropriate measure, with the side note however that this was granted because of a breach of procedural aspects rather than because of the argument of discrimination brought forward. The ECtHR correctly observes that even though the reinstatement took place, the breach of the applicants' rights under Article 14 juncto Article 11 ECHR had not been acknowledged.

The ECtHR should be appropriately praised for their strong reminder that as soon as it is prima facie clear that discrimination by the employer based upon trade union membership of an employee is (likely) at stake, the burden of proof shifts to the employer to prove the contrary. This converges clearly with the views of the ILO that are derived from the 'freedom of association and collective bargaining' as its founding principles and enforced in the ILO Declaration on Fundamental Principles and Rights at Work (see also Convention C087 – Freedom of Association and Protection of the Right to Organise Convention and Convention C098 – Right to Organise and Collective Bargaining Convention).

This judgment also demonstrates the increasing value of human rights in employment relations in labour-related cases before the ECtHR. While the European Court of Justice (CJEU) remains firmly anchored to a functional approach to economic goals, the ECtHR appears to be more sensitive to an approach that allows for 'social justice' (see similar A. PERULLI and E. SYCHENKO, Recent jurisprudence of the European Court of Human Rights relevant to employment law, European Labour Law Journal, 2018). This case also contributes to what is suggested in doctrine that the ECtHR can also be seen as a 'European court for the protection of social rights' (see J.P. MARGUÉNAUD and J. MOULY, L'avènement d'une Cour européenne des droits sociaux, Recueil Dalloz 2009). In the end 'social rights' indisputably converge with human rights in pursuit of a more equal society. The strength of the ECtHR may however be found in the fact that (individual) workers can -to a certain extent- directly address this court (as opposed to the CJEU where the litigant is subject to national courts to refer questions for a preliminary ruling).

Finally, it should be noted that the explicit referencing by the ECtHR to the (soft) jurisprudence of the ILO committees (as in this case the Committee on

Freedom of Association) allows this jurisprudence to become more ‘enforceable’.

From the perspective of more states trying to deregulate (and maybe even attack) collective bargaining, the protection the ECtHR can offer from a social justice perspective is very much to be welcomed.