EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Information Note on the Court's case-law 264

July 2022

Association of Civil Servants and Union for Collective Bargaining v. Germany - 815/18, 3278/18, 12380/18 et al.

Judgment 5.7.2022 [Section III]

Article 11

Article 11-1

Form and join trade unions

Legislation, rendering conflicting collective agreements concluded by minority trade unions inapplicable, within the respondent State's margin of appreciation: *no violation*

Facts – The applicants are a confederation of trade unions and associations, an association and trade union, and individual trade union members. Their complaint concerns the issue of conflicting collective agreements between a company and different trade unions, covering employees working in the same business unit of the company.

In 2015, the domestic legislature adopted the Uniformity of Collective Agreements Act ("the Act"), which provided a new solution in case of conflicting collective agreements; under the relevant provision, only the collective agreement concluded by the trade union which has the highest number of members employed within the business unit of the company concerned remains applicable. Other collective agreements become inapplicable.

The applicants lodged an unsuccessful constitutional complaint with the Federal Constitutional Court targeting the Act, and arguing that the relevant legal provisions breached, in particular, their right to form associations and to safeguard and improve working and economic conditions under the German Basic Law.

Law – Article 11:

(a) *Whether there was an interference*

The impugned provisions of the Act might lead to a collective agreement concluded by a trade union with an employer becoming fully inapplicable if a conflicting collective agreement – which contained at least partly differing provisions on working conditions and overlapped with the minority union's agreement – had been concluded by another trade union having more members in the business unit of the company concerned. Moreover, as a result of the impugned provisions, trade unions might be obliged to disclose the number of their members in a business unit in the labour court proceedings to determine the majority union, and thus their strength in case of industrial action. Those provisions interfered with the applicants' right to form and join trade unions under Article 11 § 1, which includes a right, held by both trade unions and their members, to bargain collectively with the employer.

(b) *Whether the interference was justified*

The impugned interference had been "prescribed by law" and pursued the legitimate aim of protecting the rights of others: namely, the employees not holding key positions and of trade unions defending their interests, but also the rights of the employer. The Court therefore had to determine whether the interference had been necessary in a democracy society.

The trade unions concerned did not lose the right as such to bargain collectively – and to take industrial action in that context if necessary – and to conclude collective agreements. The relevant provision intended to encourage trade unions to coordinate their collective bargaining negotiations. In the event of a failure of coordination, it provided for different legal effects regarding the conflicting collective agreements concluded with the employer (in that only the collective agreement concluded by the largest trade union within the business unit remained applicable). The extent of the restriction on trade union freedom and in particular the right to collective bargaining by the said provision was limited in several respects:

- The trade unions whose collective agreements became inapplicable were entitled to adopt the legal provisions of the collective agreement of the majority union in their entirety. Those unions were not, therefore, left without any collective agreement against their will;

- Minority trade unions retained the right to effectively present claims and make representations to the employer for the protection of the interests of their members, to negotiate with the employer and to conclude collective agreements;

- Conflicting collective agreements would not become inapplicable where the statutory duty to hear those unions had not been observed. A conflicting collective agreement could only become inapplicable under domestic legislation if the majority trade union had seriously and effectively taken into account the interests of the employees of particular professions or sectors whose collective agreement had become inapplicable;

- Longer-term benefits such as contributions to a pension in a minority union's agreement could only be rendered inapplicable if there had been a comparable benefit in the majority union's agreement;

- In the procedure to determine which of several trade unions had the majority of members in that unit and whose collective agreement was thus applicable, the disclosure of the number of trade union members in a business unit had to be avoided, if possible.

In view of the scope of the restriction on collective bargaining, the interference with the applicants' right to collective bargaining could not be regarded as affecting an essential element of trade-union freedom, without which that freedom would become devoid of substance. The right to collective bargaining did not include a "right" to a collective agreement. What was essential was that trade unions might make representations to and were heard by the employer, which the impugned domestic law provisions effectively guaranteed in practice, as interpreted by the Federal Constitutional Court. Furthermore, minority trade unions' right to strike, as an important instrument to protect the occupational interests of their members, had not been curtailed by the impugned provisions.

In its case-law, the Court had considered more far-reaching restrictions on the right to collective bargaining, particularly the complete exclusion of a right of minority or less representative unions to conclude collective agreements at all.

The Court recalled that the breadth of the States' margin of appreciation depended also on the objective pursued by the contested restriction and the competing rights of others who were liable to suffer as a result of the unrestricted exercise of the right to bargain collectively. The impugned provisions were aimed, in particular, at ensuring a fair functioning of the system of collective bargaining by preventing trade unions representing employees in key positions from negotiating collective agreements separately to the detriment of other employees, and also at facilitating an overall compromise. Those objectives, which protected the rights of the said other employees and of trade unions defending their interests, but also the rights of the employer, had to be considered to be very weighty in that they were aimed at strengthening the entire system of collective bargaining and thus also trade union freedom as such.

There was a high degree of divergence between the domestic systems in the sphere of protection of trade union rights. The Court's case-law and comparative material submitted by third party interveners illustrated that most Contracting Parties had rules which prevented the application of several conflicting collective agreements. Moreover, legal systems permitting only "representative" trade unions to conclude collective agreements – which were more restrictive than the impugned provisions in the present case – were considered by international bodies to be compatible with pertinent international law instruments.

Having regard to the above, the respondent State had had a margin of appreciation as regards the restriction on trade union freedom at issue. That margin of appreciation was to be afforded all the more as the legislature had had to make sensitive policy choices in order to achieve a proper balance between the respective interests of labour – including the competing interests of different trade unions – and also of management.

Moreover, the fact that the impugned provisions might lead to a loss of attractivity and thus a decline in the membership of smaller trade unions often representing specific professional groups did not as such infringe union members' right to join or remain member of such trade unions, which they fully retained.

Accordingly, there had not been an unjustified interference with the applicants' right to collective bargaining, the essential elements of which they were able to exercise, in representing their members and in negotiating with the employers on behalf of their members. Since the respondent State enjoyed a margin of appreciation in the area, there was no basis to consider the impugned provisions as entailing a disproportionate restriction on the applicants' rights under Article 11.

Conclusion: no violation (five votes to two).

(See also *National Union of Belgian Police v. Belgium*, 4464/70, 27 October 1975*; Swedish Engine Driver's Union v. Sweden*, 5614/72, 6 February 1976; *Demir and Baykara v. Turkey* [GC], 34503/97, 12 November 2008, Legal Summary)
