ECtHR – BARIŞ v Turkey
14.12.2021 - No. 66828/16

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Facts, legal reasoning and decision

Facts

- 7. From 21 May to 3 June 2015, 3,000 to 4,000 **workers**of the company Ford Otomotiv, including the applicants, **demonstrated** on a vacant lot 500 metres from their workplace to **challenge the provisions of the collective agreement** concluded in autumn 2014 **between the trade union Türk Metal, to which they were affiliated**, and MESS, their employer's trade union, for the period from September 2014 to August 2017. They began by holding a press conference in Sabri Yalım Park in İzmit and **declared that they would not return to work until their demands were accepted**.
- 8. … About 4,000 workers **left the Türk Metal trade union** and 1,000 to 1,500 of them **joined the Birleşik Metal İş trade union**.
- 10. After the resumption of work, 50 workers, including the applicants, **were dismissed**, on the ground that they had been absent from work from 25 May to 2 June 2015 without leave or excuse.

The Law - General question

- 43. … answer the relevant question, which is
  - **not whether** individual **workers**, outside the framework of action organised by a trade union, **have the right** under national or international law to initiate or participate in a **strike**,
  - but **whether such a right falls within the scope of Article** 11 of the Convention.

The Law - Principles

- 45. The Court then notes that, according to its settled case-law, strikes are in principle protected by Article 11 of the Convention. However, it considers that a strike protected by Article 11 is an instrument available to a trade union to defend the professional interests of its members. **It has never accepted that a strike conducted not by a trade union but by members of that trade union or non-members can also benefit from the protection of Article 11 …**
- All these **cases concerned strike action** or strike-like slowdown action (see, in this connection, Dilek and Others v. Turkey, nos. 74611/01 and 2 others, 17 July 2007) **taken by a trade union**. **In other words**, strike action is, in principle, protected by Article 11 **only to the extent that it is organised by trade union bodies** and considered to be an actual - and not merely presumed - part of trade union activity.

The Law - Principles

- 46. Moreover, **taking into account the elements of international law** other than the Convention, the interpretations of those elements by the competent bodies and the practice of European States reflecting their common values (as pointed out in the Demir and Baykara judgment, cited above, § 85), the Court also notes that, according to the case-law of the **European Committee of Social Rights**, reserving the decision to call a strike to the trade unions is consistent with Article 6 § 4 of the European Social Charter, provided that the formation of a trade union is not subject to excessive formalities (see paragraph 34 above).

- The decision to call a strike can be taken only by a trade union provided that forming a trade union is not subject to excessive formalities.562 563
- 562 Conclusions 2004, Sweden
- 563 Conclusions 2014, Germany

The Law – Application to the present case

- 48. **According to the Court of Cassation's judgment**, …
- 49. … **the Court of Cassation found** …
- 50. **The Constitutional Court's reasoning is along the same lines**. …
- 51. The Court notes that the applicants complained to it that their rights under Article 11 had been violated by reason of their dismissal "for participation in a strike". They therefore do not allege that their dismissal was based on the fact that they wanted to leave the Türk Metal trade union and join another trade union. In other words, the conditions of union membership were not the subject of the action at all. In any case, the **facts of the case as established by the Court of Cassation** do not allow such a conclusion.

The Law – Application to the present case

- 52. Furthermore, the **applicants do not dispute** that they **failed to comply with the procedures laid down in domestic law** for taking industrial action organised by a trade union.

- 53. From the facts established on the basis of the documents placed on file by the parties, it is not even clear whether and when the applicants left Türk Metal and joined another trade union. In this respect, it should be noted that in total about 4,000 workers left Türk Metal, of which 1,000 to 1,500 workers allegedly joined a new union. All the measures taken by the employer were taken in relation to the workers' failure to return to work and not for membership or non-membership of a specific trade union. The possibility or otherwise for the applicants to leave a trade union and join another trade union does not therefore appear to be at issue in this case. **According to the facts established by the Court of Cassation**, their dismissal was based on their **participation in a strike outside a trade union action** and not on their wish to leave Türk Metal and join another trade union.

The Law – Application to the present case

- 54. In the Court's view, since, on the basis of the material in the case file, the applicants **had not been dismissed for participating in a demonstration organised by the trade union** or for asserting occupational rights within the framework of the trade union's activities or for leaving a specific trade union or for deciding not to join a specific trade union, **they could not effectively claim a right to freedom of association protected by Article 11**.

- 55. It follows that the applicants' complaint under Article 11 of the Convention is incompatible ratione materiae with the provisions of the Convention and must be rejected under Article 35 §§ 3 and 4 of the Convention.

- For these reasons, the Court, **by a majority** …

- Declares the applications **inadmissible**.

Criticical assessment

Incomplete references to international standards

Double nature of right to strike is denied

Incomplete references to international standards

- **UN**:
  - **CCPR and CESCR**: 4. Freedom of association, along with the right of peaceful assembly, also informs **the right of individuals** to participate in decision-making within their workplaces and communities in order to achieve the protection of their interests. The Committees recall that the **right to strike is the corollary to the effective exercise of the freedom to form and join trade unions**. Both Committees have sought to protect the right to strike in their review of the implementation by States parties of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. file:///C:/Users/LRCHER~1/AppData/Local/Temp/G1933773.pdf
  - **CESCR**: The Committee also recommends that the State party guarantee the exercise of the **right to strike in law and in practice**, in full compliance with the Covenant. The Committee draws the State party ' s attention to its general comment No. 18 (2005) on the right to work and refers it to its **joint statement with the Human Rights Committee on freedom of association**, including the **right to form and join trade unions** (E/C.12/66/5-CCPR/C/127/4), adopted in 2019 . E/C.12/BEL/CO/5 (CESCR 2020)
    - clearly lay down the necessary criteria for the establishment of a union E/C.12/MLI/CO/1 (CESCR 2018

Incomplete references to international standards

- **ILO**
  - **Positive**:
    - 784: Regarding various types of strike action denied to workers (**wild-cat strikes**, tools-down, go-slow, working to rule and sit-down strikes), the Committee considers that these **restrictions may be justified only if the strike ceases to be peaceful**.
  - However **negative**:
    - CFA: Compilation 2018: 756. It does not appear that making the right to call a strike the **sole preserve of trade union organizations** is incompatible with the standards of Convention No. 87. Workers, and especially their leaders in undertakings, should however be protected against any discrimination which might be exercised because of a strike and they should be able to form trade unions without being exposed to anti-union discrimination. (See the 2006 Digest, para. 524.) https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70002:0::NO::P70002_HIER_ELEMENT_ID,P70002_HIER_LEVEL:3945527,2
    - CEACR: 122: … '(i) the right to strike is a right which must be enjoyed by workers" organizations (trade unions, federations and confederations); … Accordingly, subject to the restrictions authorized, a general prohibition of strikes is incompatible with the Convention, although the **supervisory bodies accept the prohibition of wildcat strikes.**'] General Survey 2012

Incomplete references to international standards

- **CoE ECSR**: in relation to Art. 6(4) ESC the judgment is **not sufficiently** taking into account
  - the **sense of the ECSR's formulations** (only referring to the Digest 2018)
    - the Committee recalls that reserving the right to call a strike for trade unions may be compatible with the Charter **if workers may easily, and without undue requirements or formalities, form a trade union for the purpose of a strike**. (Conclusions XX-3 – Germany (2015))
    - only compatible with Article 6§4 if there is **complete freedom to form trade unions** and the process is **not subject to excessive formalities** that would **impede the rapid decisions** that strike action sometimes requires (Conclusions 2004 – Sweden)
  - Article H RESC (**most favourable principle**) thus denying the reference to a ESC provision if it is not favourable to the person concerned
  - the need to examine whether it is indeed 'easy' to found a new trade union (the fact that they wanted to join another trade union would obviously not be sufficient to deprive them of their rights under Article 11)

Double nature of right to strike is denied

Article 11 is a right with double dimension: individual and collective

- 'Everyone' concerning at least also **individual** (worker)s; trade union rights are (also) part of the more general right to freedom of association ("including")
- It is **against the fundamental judgment *Enerji Yapi-Yol Sen*** referring in para. 32 not only to members of trade unions but also to '**any other person wishing to participate**'
  - (para. 32 : 'La Cour considère que ces sanctions sont de nature à dissuader les membres de syndicats **et toute autre personne souhaitant le faire de participer légitimement** à une telle journée de grève ou à des actions visant à la défense des intérêts de leurs affiliés (*Urcan et autres*, précité, § 34, et *Karaçay c. Turquie*, n° 6615/03, § 36, 27 mars 2007)). https://hudoc.echr.coe.int/eng?i=001-92266

Dangerous example for ‚Subsidiarity' approach

- The (very large extent of) references to the
  - **information by the Government** and
  - **domestic jurisprudence**

  is very problematic
- This could be seen as a **further example of the increasing** approach of the '**subsidiarity**' principle?

Preliminary Conclusion

- Even if the decision may sound at first glance in favour of trade unions it is very problematic:
  - **Until now** the ECtHR has accepted a **wide material scope** of the right to strike.
  - **Now, limiting the material scope** by using a **very problematic method** shows the dangers in relation to the right to strike and all other aspects of freedom of association.
  - Moreover, if the Chamber was decided to dismiss the complaint by all means, it could have come to the same result by using the 'margin of appreciation' without major problems but leaving the material scope intact.
  - Finally, it is the **Second Section** dealing with cases from Turkey which until now appeared to be more in favour of full exercise of the right to strike, but now…

Thank you very much for your attention.