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Staff Matters

Legal News from Union Syndicale

Right to strike – requisitioning – Art. 55(1) SR – Art. 28 Charter of Fundamental Rights – duty of loyalty – Art. 52(1) Charter – Art. 11 SR – non-material damage

The Court annuls a decision to requisition interpreters: the EP had infringed the staff's fundamental right to strike

Case T-402/18, R. Aquino and others / European Parliament, of 29 January 2020

We report in this newsletter about a recent decision of the General Court confirming the staff's right to strike. The Court ruled that during an action of strike the European Parliament (EP) had no legal basis to requisition interpreters and conference interpreters. The right to strike is a fundamental right of staff stipulated in Art. 28 of the EU Charter of Fundamental Rights. Any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law. The Court did not accept the various legal bases relied upon by the EP to justify the requisitioning measures, but stated that a limitation on the right to strike was not provided for by law. The Court further ordered the EP to pay 500 Euro each to the requisitioned staff for compensation of non-material damage.

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Legal Background

Art. 28 of the Charter of Fundamental Right treats the right of collective bargaining and action. It reads: "Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action."

Facts of the Case and Procedure

The applicants are interpreters and conference interpreters at the European Parliament. For the period of June and July 2018, the Inter-Trade Union Committee (ITUC), announced strike action for the EP. By decision of 2 July 2018, the Parliament's Director-General for Personnel requisitioned staff, including some of the applicants, for 3 July 2018 to ensure proper conduct of parliamentary business. In the subsequent days, the EP again requisitioned staff for a period between 4 and 11 July 2018. On 3 July 2018, the applicants brought an action against the decision of 2 July 2018 together with an application for interim measures and lodged a complaint. The interim measure was dismissed and, later, the complaint rejected. Further, the applicants modified their application in order to take account of three other decisions on 3, 4 and 7 July 2018 by which the EP requisitioned interpreters for 4 to 11 July 2018.

The Parties' Arguments and the Court's Decision

First, on a procedural note, the Court dismissed the action as inadmissible in so far as it was directed against the decisions adopted after the action was brought. The applicants had argued that the requisition measures were adopted at extremely short notice and that their right to an effective remedy provided for in Art. 47 Charter of Fundamental Rights (Charter) would be infringed without being able to challenge the subsequent decisions. The Court found that the control of lawfulness of measures which have not yet been adopted at the time of bringing the action was hypothetical and inadmissible. Art. 47 of the Charter was not intended to change the system of judicial review laid down by the Treaties, and therefore did not change this assessment. Also Art. 86(1) of the Court's Rules of Procedure did not alter this conclusion: although it

allows the applicant to modify the application in order to take account of a new factor "where a measure the annulment of which is sought is replaced or amended by another measure with the same subject matter". The Court stated that the decisions adopted after the action was brought cannot be regarded as replacing or amending the decision of 2 July 2018, because they related to different days and were addressed to different recipients.

As to the substance, the applicants pleaded - amongst others - an infringement of the right of collective action and the right to be informed and consulted (Art. 27 and 28 Charter and EU Directive 2002/14 establishing a general framework for informing and consulting employees), and an infringement of the right to good administration (Art. 41 Charter). The EP argued that Staff Regulations do not deal with the right to strike and that there was in any case a limitation of this right stipulated

in Art. 55(1) SR, which provides that officials in active employment at all times have to be at the disposal of their institution. The Council (as intervener) submitted that the Staff Regulations contain several provisions on which the requisition decision may be based. One such example was the official's duty of loyalty laid down in the first paragraph of Art. 11(1) SR, according to which an official is to carry out the duties assigned to him objectively, impartially and in keeping with his duty of loyalty to the Union.

The Court decided to annul the EP's decision to requisition staff during strike action. It acknowledged the right to strike under Art. 28 Charter, reminding that this provision also applies in the relation between the EU institutions and their staff. Art. 52(1) Charter demands that any limitation on the exercise of the rights and freedoms recognised by the Charter must be **provided for by law** and **respect the essence** of those rights and freedoms. Subject to the principle of **proportionality**, limitations may be made only if they are necessary and genuinely meet **objectives of general interest** recognised by the Union or the need to **protect the rights and freedoms of others**. The Court found that the requisitioning constituted a limitation of the right to strike.

The Court then specified that the term 'provided for by law' means that the legal basis must be **sufficiently clear, precise and predictable** as regards their effects, especially where they may have negative consequences on individuals and undertakings (principle of legal certainty). The legal basis must define the scope of the limitation on the exercise of the right to strike and afford a measure of **legal protection against any arbitrary interferences** by the authorities. Neither paragraph of Art. 55 SR, the Court carries on, can serve as a legal basis for requisitioning measures: the obligation of staff in active employment contained in Art. 55(1) SR: to be "at all times" at the "disposal" of their institution is silent on the matter of strike; it is also silent on any requisitioning measure. The general obligation to be "at the disposal" of their institution is not sufficient, in the view of the Court, in order to establish a clear and precise limitation on the exercise of the right to strike. Neither did the Court find any other legal basis for the limitation and therefore had to annul the decision to requisition staff during the action of strike.

The Court found that the annulment of the requisitioning decision had no practical effect for the applicants, because the time of respective working days has passed. The annulment of the decision alone would not constitute appropriate and sufficient compensation for the non-material damage suffered by the applicants. The Court therefore ordered to pay as compensation the amount of 500 Euro to each applicant.

Comments :

1. The judgment of the Court follows the line of case-law in that it acknowledges the right to strike for staff members (cf. T-17/14, U4U and Others / Parliament and Council, para. 77). This is important news, also because the Staff Regulations are silent on the right to strike. Any duty of loyalty of staff in the context of the right to strike has to be read in the light of Art. 28 Charter.

2. There is no such thing as a "requisitioning" of staff: they cannot be legally requisitioned, at least under the applicable rules in force at the EP that lead to the present case.

3. Dogmatically, it is important that the Court applies Art. 52(1) Charter as the measuring stick for assessing justified limitations to the fundamental right of strike (Art. 28 Charter): namely that any limitation has to meet an objective of general interest, that it has to be provided for by law and that it must be proportionate. One key question is which type of rule amounts to a "law" ("provided for by law") so it may be a sufficient basis to justify the limitation of the fundamental right. This is the case where a limitation is sufficiently clear, precise and predictable, and provides legal protection against arbitrary interference. The limitation must respect the "essence" of the fundamental right, which means that the substance of the right or freedom at issue must not be undermined.[1]

4. The case at hands may have been decided differently in a situation where the employing institution works under a set of rules regulating the right to strike and where explicit limitations to that right may have been clearly stipulated or agreed upon between the social partners, potentially including an explicit regulation of requisitioning measures. In some institutions, Agreements have been concluded between trade unions and appointing authorities, namely within the Council and within the Commission: (1) between the "Deputy Secretary-General and the trade union or professional organizations on the arrangements to be applied in the event of a concerted work stoppage by the staff of the General Secretariat of the Council", May 2004; (2) "Accord concernant les relations entre la Commission Européenne et les organisations syndicales et professionelles", of 2008.

5. The judgment may thus be a reason for those EU institutions which do not yet have qualified framework rules in force to enter into negotiations with the staff representatives in order to establish them.

6. When deciding upon the claim for non-material damage sustained by the applicants, the Court took a decision "ex aequo et bono" in order to justify and determine the compensation payment of 500 Euro.[2] It took into account that the challenged decision exhausted all of its effects and that the requisitions were made very late and the applicants informed about them only in the eve of the day to be implemented.

[1] On the essence of the fundamental right, s. O. Mader, EuR (Europarecht), Nomos, 2018, p. 339 subs.

[2] On damage claims for non-contractual liability in staff cases, s. O. Mader, EuR 2012, p. 355 subs. and KritV/CritQ 2013, p. 154 subs.