



Assessing the impact of article 8 of the European Convention on Human Rights (ECHR) on employees' rights protection

por Elena Sychenko

I. Introduction

This article is chosen for the analysis as it is an example of the most “evolutionary” interpretation of Convention provisions by the ECtHR which significantly influenced the employment law of certain member states. Its provisions were drafted as a legal guarantee against the “horrors, tyrannies and vexations” that private and family life had suffered during the Communist and Fascist regimes¹. However, the Court has gradually expanded the scope of this article to the protection of the moral, psychological and physical integrity of the person² and protection of the rights to personal development³, to establish relationships with others, including relationships of a professional nature⁴ and to access a profession in the private sector⁵, to receive information about occupational risks⁶.

In the absence of the right to work⁷ the provisions of article 8 have become a link connecting ECHR and rights in employment. In *Campagnano v. Italy*⁸, the ECtHR found the violation of article 8 as the applicant was unable to engage in any professional or business activity on account of the entry of her name in the bankruptcy register. In *Mateescu v. Romania*⁹ it found the violation of article 8 as the applicant was not allowed to simultaneously practice two professions in the private sphere. In *Volkov v. Ukraine*¹⁰, unfair dismissal was found to be in breach of the right to respect of private life with the result that the State was obliged to ensure the applicant's reinstatement.

¹ DISSENTING OPINION OF JUDGE SIR GERALD FITZMAURICE in ECtHR, *Marckx v. Belgium* (6833/74) 13/06/1979, para. 7.

² ECtHR, *Brincat and others v. Malta, Raninen v. Finland* (20972/92) 16/12/1997; *Kyriakides v. Cyprus* (39058/05) 16/10/2008.

³ ECtHR, *Oleksandr Volkov v. Ukraine* (21722/11) 09/01/2013, para. 65.

⁴ ECtHR, *C. v. Belgium* (21794/93) 07/08/1996, para. 25.

⁵ ECtHR, *Sidabras and Džiautas v. Lithuania* (55480/00, 59330/00) 27/07/2004, para. 47.

⁶ ECtHR, *Brincat and others v. Malta* (60908/11, 62110/11, 62129/11, 62312/11, 62338/11) 24/07/2014; *Vilnes and others v. Norway* (52806/09 22703/10) 05/12/2013.

⁷ ECtHR, *Panfile v. Romania* (13902/11) 20/03/2012, para. 18, *Sobczyk v. Poland* (25693/94 and 27387/95 10 February 2000; *Dragan Cakalic v Croatia* (17400/02) 15 September 2003; *Torri and Others v. Italy and Bucciarelli v. Italy* (11838/07 and 12302/07) 24/01/2012.

⁸ ECtHR, *Campagnano v. Italy* (77955/01) 23/03/2006

⁹ ECtHR, *Mateescu v. Romania* (no. 1944/10) 14/01/2014.

¹⁰ ECtHR, *Oleksandr Volkov v. Ukraine* (21722/11) 09/01/2013

II. Main issues

1. According to the principle of subsidiarity, national courts in the first place should implement the European Convention on Human Rights and consider the alleged violation. Therefore considering cases related to employment law matters the ECtHR cannot assume the role of the competent national authorities, which should interpret and apply domestic law¹¹, and cannot question the way in which the domestic courts have interpreted and applied national law except in cases of flagrant non-observance or arbitrariness¹². These are the borders of international adjudication of employment law cases in the light of employee's human rights which permit the Court not to become "a higher-instance labour court adjudicating on the merits of labour disputes"¹³.

In the majority of employment cases, brought before the European Court of Human Rights, the violation of the ECHR was caused by the lack of consideration of employee's human rights in national proceedings. The ECtHR urged national courts to balance employer's rights with the employee's human rights, ensuring that each their restriction is proportionate to the legitimate aim pursued. Thus human rights have become a new tool in the arsenal of labour lawyers.

The ECtHR influences national employment regulations in three main ways: 1) through the adoption of general measures, required by a particular judgment; 2) through the elaboration of the positive obligations of the State in respect of human rights protection at the workplace; 3) through the establishment of requirements to adjudication of employment disputes at national level.

2. The impact of policy changes in the result of the adoption of general measures is clearly tangible. As such we may recall the introduction of the workers' right not to have an offer made to him to induce him to give up union membership¹⁴ or the abolition of the possibility to dismiss service men for homosexuality in UK¹⁵, the repeal of the requirement of the one-year qualifying period for challenging unfair dismissal in case of dismissal on political grounds¹⁶ and, finally, the drafting changes to Russian law, providing parental leaves to fathers performing military service¹⁷.

3. Other two directions of the ECtHR's impact on national employment regulation can be illustrated through a more detailed analysis of the positive obligations, that the states should implement while adopting relevant policies and in an adjudication of employment disputes. Developing a framework for considering cases concerning employees' privacy is one of the most significant contributions to the protection of employees under ECHR. The focus of the Court on the lawfulness and necessity of interference with an employee's private life, as well as its consideration of the concept of a "reasonable expectation of privacy", has provided national courts with the well-elaborated guidelines to consider such cases, in particular as far as e-monitoring is concerned¹⁸.

The possibility to claim the violation of the right to respect for private life in case of unfair dismissal is another contribution of the ECtHR to the employee's rights protection. The Court has repeatedly found that dismissal from a work position amounted to the interference with the right to respect for private life¹⁹. The research of relevant case law demonstrates that unfair dismissal and

¹¹ ECtHR, *Perinçek v. Switzerland* (27510/08) 17/12/2013, para. 66; *Delfi As v. Estonia* [GC] (64569/09) 16/06/2015, para. 127.

¹² ECtHR, *Yordanova and Toshev v. Bulgaria* (5126/05) 02/10/2012, para. 41.

¹³ ECtHR, *Rubins v. Latvia*, Dissenting Opinion Of Judges Mahoney and Wojtyczek, para. 16.

¹⁴ ECtHR, *WILSON, NATIONAL UNION OF JOURNALISTS AND OTHERS v. THE UNITED KINGDOM* (30668/96 30671/96 30678/96) 02/07/2002. See more in ACL DAVIES, *Workers' Human Rights in English Law in Human Rights at Work: Perspectives on Law and Regulation*, Colin Fenwick, Tonia Novitz, editors. Bloomsbury Publishing, 2010, p. 186.

¹⁵ ECtHR, *Lustig-Prean and Beckett v. the UK* (31417/96, 32377/96) 27/09/ 1999; *Smith and Grady v. the UK* (33985/96, 33986/96) 27/09/1999.

¹⁶ ECtHR, *Redfearn v. the UK* (47335/06) 06/11/2012

¹⁷ ECtHR, *Markin Konstantin v Russia* (30078/06) Grand Chamber, 22/03/2012

¹⁸ See in particular, *Bărbulescu v. Romania* (61496/08) 05/09/2017.

¹⁹ ECtHR, *Ihsan Ay v. Turkey* (34288/04)21/01/2014, *Oleksandr Volkov v. Ukraine* (21722/11) 09/01/2013, *Özpınar v. Turkey* (20999/04) 19/10/2010.

the right to respect for private life might be linked in several ways. This right might be infringed when the information used to justify the dismissal was of private character -in this situation the violation of the right for private life precedes the dismissal- determines it and the link with a human right is direct²⁰. In the second situation, the right is infringed as a consequence of unfair dismissal, which was unfair due to the violation of some other ECHR provision and as a result, affected the dismissed person's right to establish and develop relationships with others²¹. The link with the right for private life can be referred to as a consequential link in these circumstances.

III. Conclusions

The research of the ECtHR's jurisprudence under article 8 demonstrates that the Strasbourg bodies significantly contributed to employees' rights protection establishing the standards for privacy protection, acknowledging a link between private life and employment and stating that unfair dismissal might violate the right to respect for private life.

The ECtHR's approach to the private life of employees has become broader with the years and there is an obvious trend of enlarging the scope of the ECHR upon employment relations with the use of this article.²² This observation permits us to argue that article 8 of the ECHR has great potential in the field of employment law²³.

Elena Sychenko

PhD, Associate Professor, Saint Petersburg State University

²⁰ ECtHR, *Lustig-Prean and Beckett v. UK* (31417/96, 32377/96) 27/09/ 1999; *Smith and Grady v. UK* (33985/96, 33986/96) 27/09/1999; *Perkins and R. v. UK* (43208/98 and 44875/98) 22/10/2002; *Beck, Copp and Bazeley v. UK* (48535/99, 48536/99 and 48537/99) 22/10/2002; ECtHR, *Knauth v. Germany* (41111/98) inadmissible 22/11/2001; *Özpınar v. Turkey* (20999/04) 19/10/2010; *Pay v. UK*(32792/05) inadmissible 16/09/2008.

²¹ *Hülya Ebru Demirel v. Turkey* (application no. 30733/08) 19.06.2018, *Žičkus v. Lithuania* (26652/02) 07/04/2009; *Bečaj v. Albania* (1542/13) inadmissible 24/06/2014; *Oleksandr Volkov v. Ukraine* (21722/11) 09/01/2013.

²² This point of view is shared by other scholars, see, for example, Rory O'Connell, *The Right to Work in the European Convention on Human Rights*. *European Human Rights Law Review*, No. 2, 2012, pp. 176-190; Virginia Mantouvalou, *The Protection of the Right to Work through the European Convention on Human Rights*, *Cambridge Yearbook of European Legal Studies*, Vol 16 2013-2014.

²³ See, for example, the case *Dolopoulos v. Greece* (36656/14)10.12.2015, where the application about the lack of protection from workplace harassment was considered under article 8.