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The right to Strike : a comparative analysis between UK and Belgian legislation and jurisprudence

Introduction

The aim of this paper is to explain both of the UK and Belgian legal systems according to the right to strike and more particularly the limitations of this right. To find and identify the major differences in these rights between both the countries. To place these rights within a EU context and to explain the jurisprudence on this subject. A critical vision towards the future will be given.

This subject falls within the scope of the given areas from two different perspectives. Striking can be seen as a failure of Collective Bargaining, where a strike is the last mean of a trade union to show its employer(s) that it is serious about something and that something has to change about a particular situation. On the other hand a strike can be looked at as a part of the freedom of association where it is one of the forms of expression of the unions.

Strikes are only one form of expression of social conflict a small part of this document will intervene with other forms of social conflict as there are 'overtime bans, go-slows, a work of rule, withdrawal of co-operation, sit-ins and picketing'[1]. The scope of this article however will mainly stay with strikes itself but regulations towards other forms of social conflict are most likely similar in nature.

[1] Barnard C. 2000 p 573

Within strikes itself different types of strikes should be recognized. According to Barnard (2000) the different types are: primary strikes that relate to labour matters and are there to intent collective agreement, so called secondary or supportive strikes where people support another strike (these are generally considered to be legal in the EU except in the UK) and political strikes that are countered against government policies (these are generally considered to be illegal except in Belgium).

Different legislations

The European perspective

First of all it is important to look at what has been decided upon in the context of the European Union as both of the countries are part of this Union. The right to strike is according to Barnard (2000, p573) embedded in the European Social Charter 1989 that recognizes the right to 'resort to collective action in the event of a conflict of interests', this right however is 'subject to obligations arising under national regulations and collective agreements'. Barnard (2000) identifies a major difference between the right to strike and the freedom to strike. If there would only be the freedom to strike then a strike would be legally permitted but general legal order would apply. A right to strike however means that 'the legal order of the state must take precautions to ensure the exercise of that right'. The importance given to this right is a demonstration of the inequality understood by many legislators between the bargaining power of both parties in a contract of employment, it also recognises that the power of the collective should be stronger than the individual power.

On the implementation of these rights in the UK Barnard (2000) states the following: 'the right to strike does not exist as such, but, subject to certain stringent conditions, trade unions are

protected by immunities established by law when their members take certain forms of industrial action'

The general rules are as we have seen 'subject to obligations arising under national regulations' this means rules concerning balloting in for example the UK and Germany, the need to announce strikes in France and in the case of public employees in the UK, the notion of proportionality is also included in several countries etc.

The Community according to Barnard however is not itself legislating on the right to strike as such. Only council resolution no. 2679/98 that was adopted by all member states talks about ' this regulation may not be interpreted as affecting in any way the exercise of fundamental rights, as recognised in Member States, including the right of a freedom to strike'. The European Court of Civil Rights however has taken action relying on the phrase 'for the protection of his interests' in article 11(1) of the European Convention of Human Rights. This right is however very limited in its interpretation.

The UK

Definition

In the UK a strike is defined in the Employment Relations Act of 1996 s.235(5) as 'the cessation of work by a body of employed persons acting in combination, or a concerted refusal, or a refusal under a common understanding, of any member of employed persons to continue to work for an employer in consequence of a dispute, done as a means of compelling their employer or any employed person or body of employed persons, or to aid other employees in compelling their

employer or any employed person, to accept terms or conditions of or affecting employment'[2]. A shorter definition is given in the TULRCA 1992 s.246 which states a strike as being 'any concerted stoppage of work'.

There is however no right to strike as such in British law however this is partially covered by the Human Rights Act 1998 art 11 that gives a right to freedom of assembly and association.

Official strike ⇔ Unofficial strike

There is no legal definition of what is an official strike, however some kind of a definition of an unofficial strike can be found in TULRCA 1992 s.237(2) where this is defined as 'any strike … that is not authorised or endorsed by a trade union'. This means that the having of a trade union is essential to be able to have an official (or rather a non-unofficial strike). According to DTI PL869 rev 4 the worker on strike should also be a union member on the moment he began to take part in the strike in order to be part of an official strike.

The person who strikes in an unofficial strike and is dismissed, will not be able to be taken into consideration for an unfair dismissal claim except if this claim is filed under one of the 'automatically unfair' reasons[3]. According to DTI PL869 rev 4 unfair dismissal can also be claimed in the case that there has been discrimination in dismissing the strikers. If not all the strikers are dismissed or some of them have been re-engaged afterwards (within three months) the claim for unfair dismissal might still be eligible.

Official actions have been given extra rights since the 1999 ERA under s.16. This includes that their dismissal will automatically be unfair if given within the first eight weeks of the strike and

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[2] as found on www.emplaw.co.uk

[3] infra

the strike to be found the reason for dismissal and the employer has taken steps necessary to resolve the underlying conflict.. In order for the strike to be the reason for dismissal according to Pitt (2000) the timing of the dismissal is important not the reason behind it, therefore the court has not to interpret the employer's state of mind but merely the fact of timing of the dismissal[4].

The problem of the trade union[5]

Under the common law system a call for a strike is regarded as a breach of the contract of employment. A call to make someone break his/her contract would therefore be illegal. Trade unions therefore have to make sure they can enjoy a 'statutory immunity'. In order to enjoy this the following tests can be used:

- there must be a trade dispute that has to do with the strike (this makes all secondary strikes or calls to take part in them therefore illegal)
- The trade union has first organized a secret ballot that has been properly conducted
- The trade union has informed the employer of its intentions and provide a list of people participating in the strike
- The action is not intended to prevent the employer from using non-unionized companies as suppliers
- The action is not in support of someone dismissed during an unofficial strike
- The action does not involve unlawful picketing

If these issues are not regarded the union can be held responsible for all damages arising from the strike.

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[4] TULRCA ss 237 and 238

[5] based on DTI PL870 rev 4

Consequences of a strike for the striker

A person on strike will not be paid for the time not worked.

ERA 1996 s.216(1) states that the time spent on strike is not included in calculating the length of an individual's period of continuous employment. This means that all legal periods are stretched during a strike.

TULRCA 1992 s.237(1) states that; in general, an employee dismissed while on unofficial strike forfeits every right to unfair dismissal compensations.

TULRCA 1992 s.239(2) states that the three month time limit for presenting a complaint of unfair dismissal is doubled to six months if the employee was on strike when he was dismissed.

Belgian law[6]

General

A definition of a strike is not written into Belgian legislation however the Prestatiewet art 1 states that it is 'the collective and temporary halt of the work by employees'[7] This definition includes the following parts:

- a strike has to be collective no one man strike is possible
- there is a complete halt of the work, not partial halt
- the halt can only be temporary and may not be permanent
- it is an action by employees (not unions)

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[6] based on Humblet P et al 2001

[7] Het collectief en tijdelijk stopzetten van de arbeid door werknemers

Till 1921 the participation or the organization of a strike was considered to be a criminal offence. Strikes however were only legalized through the ratification of international agreements.

- art 8 of the ECOSOC-treaty
- art 11 of the European convention of human rights
- ILO treaties nr 87 and 98
- Art 6 of the European Social Charter

Jurisprudence however is the major factor defining the rights to strike.

Some rules on strikes reside from the collective bargaining nr 58 of 7th of July 1994 (national collective bargaining is conducted in the Nationale Arbeidsraad, where representatives of employers and employees make numbered collective bargaining agreements that have the same power as a law in the legal system and therefore are binding for all employees. They have however to be rectified by the minister of employment and by the king) One example of this is that employment agencies are not allowed to allocate workers to plants where a strike is going on.

What happens during a strike

During a strike the person on strike's contract of employment is considered to be suspended, therefore it is impossible to dismiss the person and the salary for that period will not be paid.

If the strike however is unofficial the employer has the right to dismiss the employee after the strike without a right to notice.

There is no right of injunction from the part of the employer on the strike itself (unless a government official deems it necessary to call people to work) however he can protest against things like roadblocks, kidnappings etc. some of which are not uncommon in Belgium.

Official ⇔ Unofficial strikes

The only necessity for a strike to be official is that a recognised trade union has recognised it to be a strike. This recognition can even be retrospective where a union recognises a wild strike after it actually took place. Therefore in practice unofficial strikes are almost non-existent

What about employees that want to work

The employer has to pay people who show up for work even if they are not able to do anything due to the lack of security or for any other reason. This has led to the situation where only key people within an organization will participate in the strike eg. The fire brigade of the airport went on a strike once and therefore the whole airport had to be shut down because safety could not be guaranteed, all other employees however had to be paid by the airport authorities.

Cases related to the right to strike

By now the legislation has sufficiently shown the difference in approach as to what rights are given to employees on strike, and how to make a strike official. Using some cases the author will try to point out this difference even further.

UK Cases

London underground Ltd v National Union of Rail, Maritime and Transport workers [1995] IRLR636[8]

In this case the main issue is that the ballot that has been held and the notice that was given to the employer did not include all the names of the persons participating in the official strike. It concerned members who had joined the union between the date of the ballot held and the date of the actions. They did participate in the actions and the employer argued that this made the action unofficial (at least for the in this case 692 non mentioned members). Therefore the employer wanted injunctive relief of the strike.

The court ruled that the union was right as to include these members into the strike as some of the members were not even employed at the time of the ballot and would therefore not vote in it. This is in contradiction with the *Post office v Union of Communication workers [1990]IRLR143* that states that ' any call for action for industrial action following a ballot should expressly be limited to those who were employed by the employer, and given an opportunity to vote at the time of the ballot'.

This case clearly identifies a real world situation in which the union has to even if the strike is agreed on after the secret ballot, not all of the employees are allowed to strike (only union members. Now including new union members since the ballot).

University College London Hospital NHS Trust v UNISON[1999]IRLR31

In this case the hospital would be taken over, UNISON union called for a ballot to strike against the new working contracts and working conditions. The judge decided that this was not an

[8] as in Painter pp 777 – 782

official ballot for strike since it was countered against a future employer and therefore it did not fall under the definition of worker under TULRCA s.244.

This case shows that the right to strike officially is very limited within the UK legal system.

Belgian case

The author hopes to show clearly by using one important case in recent history that within the Belgian legal system a strike can be official for about every aspect.

Case Volkswagen Vorst v Gemeenschappellijk Vakbondsfront Arbeidshof Brussel 13th of March 2001 rolnr 51559_1

In this case the management of the Volkswagen plant in Vorst complaint against what they found was an illegal abuse of the right to strike. The unions had called a strike giving as an official reason the dismissal of a union activist. The person was dismissed because he stole on several occasions cars from the parking lot of finished cars, he could do this because he was part of the security force and was their union representative.

The strike was found to be legal since it was authorized by an officially recognized union and the reason for the strike was of no importance whatsoever. In order to end the strike the person was reinstated and given different tasks to avoid him from being able to steal anything, his contract of employment however was suspended for the time he spent in jail.

This case shows that under Belgian legislation the reason for a strike is irrelevant as opposed to the UK

A comparative analysis

Both systems show a lack of legislation and especially in Belgium strikes are based more on jurisprudence and legal doctrine than on laws and regulations. This creates a certain form of legal insecurity that makes it difficult both for employees and employers to know their respective rights and duties.

The two systems are completely different as to what they consider as the right to strike. The Belgian interpretation is quite open allowing employees almost to strike at their own discretion or at that of their trade unions. In the UK system strikes are more strictly controlled and a ballot makes sure that strikes are not held at random at the discretion of the trade unions.

Both systems show clear advantages and disadvantages. In the Belgian system it is easy to organize a strike, however sometimes this leads to strikes that are completely absurd. Also the fact that only a crucial part of the workforce can strike letting the employer pay for all the others seems kind of ineffective. The UK system on the other hand clearly gives employers more rights, sometimes the right to strike might be withdrawn where it should have applied.

Conclusion

The paper has tried to identify and explain the major legal differences between Belgium and the UK in respect to the right to strike. The two systems have found to be completely different where according to the author the Belgian system is too open, the UK system is too strict in the regulation of strikes.

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