

ECtHR 2 June 2016, application 23646/09. (Geotech), Freedom of Association

Geotech Kancev GmbH – v – Germany, German case

Summary

A company's obligation to participate in the building industry's Social Welfare Fund did not breach the company's right to freedom of association, nor its right to protection of property.

Facts

Geotech Kancev GmbH ('Geotech') is a German company engaged in the building industry. In the building industry, a number of collective agreements were in force, containing regulations relating to the social welfare of employees in that sector. These agreements took account of the specific working conditions in the building industry, notably that building work was largely weather-dependent; the building industry was subject to considerable fluctuations in orders, but production in advance was not possible, so that low demand inevitably led to a shortage of orders; employee fluctuation between construction companies was generally high; and the majority of those employed in the building industry left the labour force before they reached retirement age. This resulted in employees in the building industry not being able to fulfil the prerequisites for obtaining social welfare benefits in respect of one single employer. In order to protect employees in the building industry any disadvantage and to guarantee them certain minimum social welfare benefits, supplementary social welfare schemes were introduced through collective agreements. The schemes eliminated the need for a link to specific employment relationship and instead focused on the fact that an employee worked in the sector, making it possible for employees who had moved from one employer to another to retain any previously accrued entitlement.

Geotech was not a member of the employers' associations in the building industry. Nevertheless, it was obliged to contribute financially to the Social Welfare Fund jointly set up by the associations and the trade union in the building industry, as the relevant collective agreement had been declared generally binding by the Federal Ministry of Labour and Social Affairs. Geotech did not pay its contributions and objected to being registered with the Fund and objected also that the obligation to pay amounted to a form of coercion to join an employers' association.

National proceedings

The Wiesbaden Labour Court ordered Geotech to pay contributions to the Social Welfare Fund. Geotech lodged an appeal submitting, in particular, that the generally binding effect of the relevant collective agreement violated its right to freedom of association (including the right not to associate). The Hesse Labour Court of Appeal rejected this claim. The Federal Constitutional Court refused to accept Geotech's complaint about the refusal to grant leave to appeal.

Geotech complained to the European Court of Human Rights that the obligation to participate in the Social Welfare Fund violated its right to freedom of association, as provided by Article 11 of the Convention. The relevant parts of Article 11 read as follows:

- “1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society... for the protection of health or morals or for the protection of the rights and freedoms of others...”

Geotech also complained that its obligation to contribute to the Social Welfare Fund violated its right to the peaceful enjoyment of its possessions guaranteed by Article 1 of Protocol 1 to the Convention, which provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

ECtHR's findings

Alleged violation of Article 11 of the Convention

The Court reiterated that the obligation to contribute financially to an association could resemble an important feature in common with that of joining an association and could constitute an interference with the right to freedom of association (including the right not to associate). There were nevertheless a number of differences which distinguished the present case from those in which the Court had found that such an obligation constituted an interference with (the negative aspect of) the right to freedom of association (see, for example, *Vörður Ólafsson – v – Iceland*, no. 20161/06, ECtHR 27 April 2010).

Firstly, the Court observed that Geotech was obliged to contribute financially to social welfare entitlements in the interests of all employees working in the building industry, based on the principle of solidarity (*see, a contrario, Vörður Ólafsson*). The contributions at stake in the present case can thus not be considered membership contributions.

Secondly, members of the associations that set up the Social Welfare Fund did not receive reductions in their membership fees, nor more favourable treatment than non-members in other areas. The members of these associations also had no direct control over the use of the financial contributions of the Fund. Moreover, all contributing companies, whether or not members of an employers' association received full information about the use to which their contributions were put. There was a high level of transparency surrounding the operation of the Fund. Non-members of employer's associations were thus not treated less favourably than members in relation to transparency and accountability (*see, a contrario, Vörður Ólafsson*).

Finally, unlike the position in *Vörður Ólafsson*, there was a significant degree of involvement in and control of the scheme by public authorities.

In conclusion, while it was true that the obligation to contribute financially to the Social Welfare Fund could be regarded as creating a *de facto* incentive for the applicant company to join one of the employers' associations in the building industry, that incentive was too remote to strike at the very substance of the right to freedom of association and therefore did not amount to an interference with the applicant company's freedom not to join an association against its will. The Court considered (unanimously) that there had been no violation of Article 11 of the Convention.

Alleged violation of Article 1 of Protocol 1 to the Convention

The Court referred to its considerations under Article 11 and concluded that there was an interference with Geotech's rights under Article 1 of Protocol 1, but that it was proportionate to the legitimate aim pursued, in that a fair balance had been struck between the general interest in ensuring the social protection of all employees working in the building industry on the one hand and Geotech's right to peaceful enjoyment of its possessions on the other hand. The domestic authorities acted within their wide margin of appreciation in the area of social and economic policy.

ECtHR 15 September 2016, application 44818/11. (Gurkha), Discrimination

British Gurkha Welfare Society and others – v – the United Kingdom

Summary

The ECtHR found no violation of Article 14 of the Convention read together with Article 1 of Protocol 1, in the pension schemes applying to the Brigade of Gurkhas. Although Gurkha soldiers could be regarded as having been treated less favourably than other soldiers in the British army, any difference in treatment had been objectively and reasonably justified.

Facts

The case concerned Gurkha soldiers' pensions. Nepalese Gurkha soldiers have served the Crown since 1815, initially as soldiers in the (British) Indian Army and then following Indian Independence in 1947, when four of its regiments became an integral part of the British Army. Only Nepali nationals are eligible for service in what is today known as the Brigade of Gurkhas. The Brigade of Gurkhas is not an operational brigade in the conventional sense; rather, it is an administrative entity which ensures that Gurkha units are able to be integrated into – and form part of – other operational brigades in the British Army.

Historically, the Gurkhas had been governed by a different pension scheme from other soldiers in the British Army, with different terms and conditions. Gurkha soldiers are required to retire after 15 years' service. The Gurkha Pension Scheme ('GPS') was established in 1949 and applied the former Indian Army Pensions