

Holship i EMD – Konsekvenser for EU-retten

21. oktober 2021

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Potensielle spenninger mellom retten til arbeidskamp og fri bevegelse

- Arbeidskamp kan utgjøre en restriksjon på etableringsretten og tjenestefriheten, jf. sak C-438/05, *Viking* og sak C-341/05, *Laval*
- EU-domstolen anså ikke retten til fri bevegelse og retten til kampskritt som to likestilte rettigheter
- EMD tar i *Holship* utgangspunkt i retten til kampskritt etter EMK artikkel 11. Inngrep må være forankret i lov, forfølge et legitimt formål og være «nødvendig i et demokratisk samfunn».
- To ulike tester med motsatt utgangspunkt
- Er *Holship* et bjef fra Strasbourg?

Er *Viking* og *Laval* fremdeles gjeldende rett?

- Viktig praksisendring – *Demir & Baykara* (kollektive forhandlinger) og *Enerji Yapi-Yol Sen* (streikeretten)
- Praksis fra ILOs ekspertkomité og Sosiapaktkomiteen
- Utvikling i EUs traktatverk – menneskerettscharteret rettslig bindende
- Er retten til arbeidskamp og retten til fri bevegelse nå likestilte rettigheter?
- Sak C-112/00, *Schmidberger*: «the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests. ... The competent authorities enjoy a wide margin of discretion in that regard. (avsnitt 81-82).»

Er *Viking* og *Laval* fremdeles gjeldende rett?

Sak C-201/15, *AGET Iraklis*: «Since the European Union thus has not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 151 TFEU, the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion. (avsnitt 77).»

GA Trstenjak i sak C-271/08 *Kommisjonen mot Tyskland*:

«In the case of a conflict between a fundamental right and a fundamental freedom, both legal positions must be presumed to have equal status. That general equality in status implies, first, that, in the interests of fundamental rights, fundamental freedoms may be restricted. However, second, it implies also that the exercise of fundamental freedoms may justify a restriction on fundamental rights. (avsnitt 81)»

«A fair balance between fundamental rights and fundamental freedoms is ensured in the case of a conflict only when the restriction by a fundamental right on a fundamental freedom is not permitted to go beyond what is appropriate, necessary and reasonable to realise that fundamental right. Conversely, however, nor may the restriction on a fundamental right by a fundamental freedom go beyond what is appropriate, necessary and reasonable to realise the fundamental freedom. (avs 190)»

«Having regard to the broad convergence between fundamental freedoms and fundamental rights, in the event of a conflict, only this analysis based on the principle of proportionality is capable of producing an outcome which ensures the optimum effectiveness of fundamental rights and fundamental freedoms. (avsnitt 191).»