

'Interpreting Employment Legislation through a Fundamental Rights Lens: What's the Purpose?

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Abstract

This paper examines the use of the EU Charter of Fundamental Rights as a tool of interpretation. Specifically, it assesses the influence of the Charter on the CJEU's existing purposive approach to the interpretation of employment legislation. From its inception, the Charter has been lauded for its inclusion of a number of employee-protective rights. The CJEU's early use of the Charter certainly appeared promising, with a number of legislative provisions seeming to be bolstered by a fundamental rights reading. On closer inspection, has the Charter really made any difference? It is shown that the Charter is simultaneously evolutionary and yet revolutionary. It is evolutionary in that the social rights derive largely from pre-existing legislation which has long been given a purposive and usually employee-friendly reading. It is revolutionary in that the economic freedoms, although similarly steeped in long standing jurisprudence, have emboldened the CJEU to disrupt existing approaches to the interpretation of legislation. Of particular concern is the CJEU's radical reinterpretation of the freedom to conduct a business in the case of *Alemo-Herron*.

Key words: Charter, social rights, economic rights, purposive interpretation

I. Introduction

It is said that the road to hell is paved with good intentions, a sentiment well-illustrated by the judiciary's chequered use of fundamental rights in the employment law context.

Perhaps the ultimate expression of judicial good will has been the Court of Justice of the EU's (CJEU) embrace of a fundamental rights discourse in the interpretation of EU employment legislation. This paper seeks to assess the place of fundamental rights among the CJEU's existing repertoire of interpretative tools. But, as has become customary, we must begin with a number of reservations. First, this paper falls into the trap so forcefully (if somewhat unfairly) highlighted by Gestel and Micklitz that EU doctrinal research has become too focused on the Court of Justice as its point of reference.¹ They argue that EU academics seem to have 'more trust in the supranational courts than in the EU legislature', which 'could be a first indication for herd behaviour; legal scholars following a wider trend without critical reflection'.² As we shall see, however, those turning to the EU legislature for interpretative guidance will be sorely disappointed. As such, I hope my own court-watching can be forgiven on this occasion. Second, given constraints of space and time, particular attention will be placed on the CJEU's use of the Charter of Fundamental Rights (the Charter) rather than on other fundamental rights instruments such as the International Labour Organization (ILO) Conventions, the European Convention on Human Rights (ECHR) or the Community Social Charter. This is largely because the Charter was intended to codify the EU's existing fundamental rights *acquis*. Finally, on the methodology adopted by this paper, it is of course notoriously difficult to measure the 'impact' of any

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¹ Rob van Gestel and Hans-Wolfgang Micklitz, 'Why Methods Matter' [2014] ELJ 292.

² *ibid* 299.

external source on judicial behaviour. This is perhaps particularly so in the case law of the CJEU, with its terse reasoning and absence of dissenting opinions. As such, an attempt has been made to assess both the quantitative, but more importantly the qualitative effects of the Charter on the CJEU's methods of interpretation. The relative weight of Charter arguments in the interpretation of employment legislation will be explored. This has been done by examining the precise point of entry of such arguments in the CJEU's reasoning. Essentially, the question is whether fundamental rights arguments are crucial to the outcome of cases or whether they simply act as ornaments or rhetorical flourishes.

A useful benchmark against which to answer this question are the CJEU's pre-existing interpretative methods. The limitations of the literal approach to EU legislation will be outlined before turning to the CJEU's preference for contextual and teleological approaches (Section II). This will be followed by an examination of the Charter as a tool of interpretation (Section III) before turning to the uneasy relationship between fundamental rights arguments and the interpretation of employment legislation (Section IV). Two aspects will be dealt with. First, there is the question of whether the Charter has led to a change in the CJEU's approach to the interpretation of employment legislation. It will be shown that the purposive or teleological approach remains dominant but that the Charter may lead to a blurring of the telos of employment legislation. In some cases, the Charter adds little to an interpretation that could have been achieved using existing methods. In others, the Charter diverts the CJEU from the true purpose of the legislation. It is rare that the Charter adds any practical value to the interpretative task.

The second aspect considered is the CJEU's à la carte approach to fundamental rights, with the economic appearing to dominate the social. From its inception, the Charter had been lauded for its inclusion of employee-protective rights. The CJEU's early use of the Charter certainly appeared promising, with a number of legislative provisions apparently being bolstered by a fundamental rights reading. On closer inspection, labour lawyers should have been careful what they wished for. Although the CJEU continues to interpret employment legislation through a fundamental rights lens, the prescription has changed. Out go the social rights, to be replaced by a magnified, or even distorted, concept of fundamental economic freedoms. This 'pick and choose' approach to the Charter has worrying implications for employment legislation, with the CJEU demonstrating its willingness to embrace a strong notion of economic freedom, whilst fundamental social rights are discarded at the side of the road as mere 'principles'.

II. The Baseline: The Existing Interpretative Methods of the CJEU

Much attention has been devoted to assessing the methods of interpretation adopted by the CJEU and it is not the intention of this paper to revisit this topic. Rather, the CJEU's pre-Charter approach to the interpretation of secondary legislation both generally (Section A) and more specifically in the employment context will be outlined (Section B). This Section will serve as the benchmark against which to examine the impact of the Charter on the CJEU's approach to interpretation.

A. What's the Purpose of Interpretation?

According to Fennelly, the object of interpretation 'lies in the true intention of the lawmakers, whether they be framers of a constitution or a treaty, legislators or drafters of

secondary legislation'.³ However, the interpretation of EU law 'demands of the common lawyer a readiness to set sail from the secure anchorage and protective haven of "plain words" and to explore the wider seas of purpose and context'.⁴ In order to assess the impact of fundamental rights arguments on the CJEU's reasoning it will be necessary to set out briefly its existing methods of interpretation.

First of all, we must determine when a provision of EU law may need to be interpreted. It goes without saying that legislation requires interpretation when there are doubts as to the meaning of its provisions. This may be for a number of reasons, including linguistic uncertainty, vagueness, ambiguity, imprecision, incompleteness, value pluralism, rule instability, gaps in the law, and most importantly in the context of Union legislation; open textured language.⁵ There are of course additional complications associated with the interpretation of EU law, notably multilingualism and a rather opaque legislative drafting process associated with the quest for compromise and consensus. These specific features only serve to heighten the difficulties of interpretative tools found in all national legal systems.

An added difficulty for the interpretation of EU legislation is that it must be interpreted in accordance with the Treaties (which now include the Charter). This is further complicated by the fact that the Treaties themselves require interpretation and often contain even vaguer and more open-textured language than legislation. Such indeterminate values as

³ Nial Fennelly, 'Legal Interpretation at the Court of Justice' (1996) 20 Fordham Int'l L J 656, 657.

⁴ ibid.

⁵ Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2012).

'human dignity', 'freedom', 'democracy', 'equality', 'ever closer union', 'solidarity', 'cooperation', 'justice' and 'citizenship' pepper the Treaty without any guidance as to how such values should be used or interpreted. Of course, some of these concepts have been further developed in secondary legislation leading to a certain symbiosis or indeed circularity, more of which below. An additional factor in EU law is that it is not always clear that a question of interpretation even needs to be referred to the CJEU in the first place. In *CILFIT*, the CJEU clarified that national courts are not obliged to refer a question in cases 'where previous decisions of the Court have already dealt with the point in law in question...even though the questions at issue are not strictly identical'.⁶ A question is further defined as *acte clair* when 'the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question is to be resolved'.⁷ A final complicating factor is the structure of the CJEU's judgments, which have been so heavily influenced by both French legal reasoning and by the French language. This has led to what Beck describes as certain 'building blocks' in the CJEU's judgments, 'that is, paragraphs which occur again and again in identical or nearly the same form in the Court's case law on particular subjects' which serves to further promote 'vagueness and general uncertainty about the precise meaning of the Court's pronouncements and the state of the case law'.⁸ These building blocks may lead to a false sense of familiarity and to an (over)reaction to minor changes in the language used. The

⁶ Case C-283/81 *CILFIT* [1982] ECR I-3145 para 14.

⁷ *ibid* para 16.

⁸ Beck (n 5) 174–175.

above difficulties associated with EU legislation lead to an inherent weakness in literal approaches to interpretation.

Having determined that a provision needs to be interpreted, we must look to the tools used to interpret it. Turning to the Treaties or secondary legislation for guidance is of little use as neither contain any provision governing interpretation. It is of necessity, therefore, that we must turn to the case law of the CJEU to discover its interpretative criteria. From a very early stage the CJEU has insisted that in interpreting the Treaties 'it is necessary to consider the spirit, the general scheme and the wording' of the relevant provision.⁹ Itzcovich identifies three more precise interpretive criteria used by the CJEU – linguistic, systemic and dynamic.¹⁰ Linguistic criteria involve the derivation of legal arguments from the semantic and syntactic features of the different language versions of an EU provision (wording).¹¹ Such an approach includes a determination of the 'proper meaning of the words' which is at the heart of literal interpretation.¹² Given the peculiarities of EU law, such an approach is not always appropriate or desirable. As such, the CJEU has benefited from more expansive interpretative criteria. This brings us to the second criteria, namely systemic or contextual interpretation which takes into consideration other provisions of the same legal text or other areas of the legal system (general scheme). In such cases, the

⁹ Case C-26/62 *Van Gend en Loos* [1963] ECR 3.

¹⁰ John L Murray, 'Methods of Interpretation – Comparative Law Method' Actes du colloque pour le cinquantième anniversaire des Traités de Rome 39.

¹¹ Giulio Itzcovich, 'The Interpretation of Community Law by the European Court of Justice' (2009) 5 German Law Journal 537, 550.

¹² *ibid.*

legal provision is to be interpreted in a way which is consistent with the ‘system’.¹³ Finally, dynamic criteria of interpretation look not to the text but the objectives pursued by EU law (spirit).¹⁴ It is these dynamic criteria of interpretation that are ‘the most characteristic of the [CJEU’s] legal reasoning’.¹⁵

Dynamic reasoning may be further broken down into three categories. First, there is a functional interpretation, which assumes that a provision should be interpreted in the manner that best ensures the realisation of the goal it seeks to achieve. Second, and most importantly in the EU context, there is the teleological or purposive approach under which a provision should be interpreted in accordance with the goals or purposes of a legal order or legislative scheme. A corollary to the teleological method is the doctrine of effectiveness. This means that ‘the Court identifies that interpretation of a text that contributes most adequately to the achievement of the objective embodied in the rule of [Union] law under examination’.¹⁶

Of course this classification is beset by limitations but for present purposes, it will act as useful shorthand for the division of interpretative approaches adopted by the CJEU. We now turn to examine how the CJEU applies these methods to the interpretation of employment legislation.

¹³ *ibid* 552.

¹⁴ *ibid* 549.

¹⁵ *ibid* 555.

¹⁶ Bastiaan van der Esch, ‘The Principles of Interpretation Applied by the Court of Justice of the European Communities and Their Relevance for the Scope of the EEC Competition Rules’ (1991) 15 *Fordham Int'l LJ* 366, 367–68.

A. Interpreting EU Employment Legislation

In the interpretation of secondary employment legislation, the CJEU adopts the same purposive/teleological method used in other contexts.¹⁷ EU employment legislation contains specific terms that must be given autonomous Union meanings. We need only think of the controversy surrounding the definition of the ‘worker’ or ‘pay’ in Union law and the complex relationship between the Union definition and national legal systems.¹⁸ In this respect, a literal interpretation would be wholly inadequate. As such, the CJEU will ‘seek to resolve the legal uncertainty by reference to the purpose, general scheme and/or normative status of the measure as well as the context in which it is to be applied’.¹⁹ As we shall see, the closest thing we have in legislation as a guide to interpretation are the recitals which often themselves contain concepts that ‘are either open-textured, vague and/or essentially contested concepts...They embody frequently conflicting goals that are sufficiently vaguely defined to allow the Court a very great margin of appreciation in interpreting, reinterpreting and re-configuring the purposive framework’.²⁰

Even the briefest of glances at the pre-Charter case law on EU employment legislation demonstrates teleology in action. The usual (although not universal) result is an employee-protective reading of the relevant legislation. Two Directives have been chosen to serve as the benchmark against which the Charter’s impact on the CJEU’s interpretative method will

¹⁷ Itzcovich (n 11) 542.

¹⁸ Case C-256/01 *Allonby v Accrington & Rossendale College* [2004] ECR I-873; *Jivraj v Hashwani* [2011] UKSC 40.

¹⁹ Beck (n 5) 189.

²⁰ ibid 174.

be assessed. These are the Working Time Directive (WTD)²¹ and the Transfer of Undertakings Directive (TUD).²² These pieces of legislation have been chosen for their particularly close connection to fundamental rights arguments. The Equal Treatment Directive has been excluded because equality as a general principle has enjoyed a long history in EU law and as such has infused the interpretation of legislation from the very beginning. In addition, the equality concept is intimately linked with the Treaties, somewhat impeding an assessment of the Charter's role in this context.

i. The Working Time Directive

The Working Time Directive is a good starting point given that it has been one of the most litigated pieces of EU employment legislation. Its purpose is to lay down minimum requirements intended to improve the living and working conditions of workers through approximation of national provisions concerning, in particular, the duration of working time. The recitals of the Directive show that it has a highly worker-protective telos; '[t]he improvement of workers' safety, hygiene and health...is an objective which should not be subordinated to purely economic considerations'; '[a]ll workers should have adequate rest periods'; '...the organisation of work according to a certain pattern must take account of the general principle of adapting work to the worker'. The recitals go on to recognise the need

²¹ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L299/9.

²² Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L82/16.

for flexibility, but even this is said to be conditional on ‘ensuring compliance with the principle of protecting the safety and health of workers’.

Of course, the Directive itself contains a comprehensive list of definitions. Working time is defined in article 2(1) as ‘any period during which the worker is working, at the employer’s disposal and carrying out his activity or duties, in accordance with national laws and/or practices’. It is immediately apparent that this seemingly comprehensive definition is in reality emptied of all content in the absence of further fleshing out, a task that has been left to the CJEU. The Court has consistently held that both working time and rest time may not be interpreted in accordance with national law but rather ‘constitute concepts of Union law which must be defined in accordance with objective characteristics by reference to the scheme and purpose of the Working Time Directive’.²³ The reason for adopting the purposive or teleological approach in this context was to secure the full efficacy and uniform application of those concepts in all Member States and *any* other interpretation would ‘frustrate’ the objective of the Directive. Furthermore, the CJEU declared that this interpretation was the *only* one that accorded with the purpose of the Directive.²⁴ This approach is particularly interesting, as the CJEU is saying that although it has been left the task of interpreting the legislation—which was clearly open to interpretation or the question would never have arisen—it was only realistically capable of one interpretation. As such, the CJEU was able to adopt an expansive interpretation of ‘working time’ in *SIMAP* to include inactive on-call time.²⁵ The CJEU has repeatedly held that, in view of both the

²³ Case C-151/02 *Jaeger* [2003] ECR I-8389 paras 58–59.

²⁴ *ibid* para 70.

²⁵ Case C-303/98 *SIMAP* [2000] ECR I-7963 para 53.

wording of the directive (literal interpretation) and its purpose (purposive/teleological interpretation) and scheme (schematic interpretation), its various provisions ‘constitute rules of Union social law of particular importance from which every worker must benefit as a minimum requirement necessary to ensure protection of is safety and health’.²⁶

In *Commission v United Kingdom*, the CJEU rejected the distinction drawn by the UK Government between limits and entitlements in the WTD. For the UK, the employer was only under an obligation to actively ensure that workers *actually* benefit from limits to working time but not entitlements such as rest periods. The CJEU held that such a distinction was unsustainable as ‘neither the various language versions of the Directive nor the Court’s case-law relating to the Directive, its objective, and the nature of the rights to rest which it lays down support the distinction between entitlements and limits’.²⁷ In the context of paid annual leave, we see the CJEU once again repeating the formula that this entitlement is ‘a particularly important principle of Union social law from which there can be no derogations’. This led the CJEU in *BECTU* to find that the expression contained in Article 7(1) WTD ‘in accordance with the conditions for entitlement to, and granting of such leave laid down by national legislation and/or practice’ must be interpreted as referring only to the arrangements for paid annual leave and not the existence of that right.²⁸

²⁶ Cases C-484/04 *Commission v United Kingdom* [2006] ECR I-7471 para 38.

²⁷ *ibid* para 53.

²⁸ Case C-173/99 *BECTU* [2001] ECR I-4881 paras 43, 52–53.

Despite the CJEU's embrace of the purposive approach in the context of working time, it will not go so far as to violate the clear wording of a legislative provision, regardless of the consequences for employees. In *Bowden* for example, the CJEU held that article 1(3) of the original WTD, which excluded all workers, including non-mobile (ie office) workers, in the transport sector from the scope of the Directive was intended to do just that. This was despite the fact that the workers in question were being denied a social right of particular importance.²⁹

ii. The Transfer of Undertakings Directive

The preamble to the Transfer of Undertakings Directive recognises that 'economic trends are bringing in their wake, at both national and [Union] level, changes in the structure of undertakings, through transfers'. It further emphasises that 'it was necessary to provide for the protection of employees in the event of a change of employer, in particular to ensure that their rights are safeguarded'. In other words, the Directive is intended to protect those employees who are performing the same job but under the orders of a different employer and as such, the term 'rights and obligations' is broadly construed.³⁰ As Barnard notes,³¹ the CJEU has been particularly influenced by this wording,³² being prepared to give a

²⁹ Case C-133/00 *Bowden* [2001] ECR I-7031.

³⁰ Case C-4/01 *Martin* [2003] ECR I-12859.

³¹ Catherine Barnard, *EU Employment Law* (OUP 2012) 578–579.

³² Case C-135/83 *Abels v Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie* [1985] ECR 469 para 6; Case C-19/83 *Wendelboe v L.J. Music* [1985] ECR 457 para 8; Case C-105/84 *Foreningen af Arbejdslidere i Danmark v Danmols Inventar* [1985] ECR 2639 para 15; Case C-24/85 *Spijkers v Benedik* [1986] ECR 1119 para 6.

purposive interpretation to ‘ensure as far as possible that the contract of employment or employment relationship continues unchanged with the transferee, in order to prevent the workers concerned from being placed in a less favourable position solely as a result of the transfer’.³³

Of course, for the rights to be engaged there must have been a transfer of an undertaking. How the notion of a ‘transfer’ is interpreted becomes crucial, and yet being typical of EU employment legislation, it is left (deliberately?) vague. If we turn to article 1(b) of the Directive we see that there is a transfer where (1) an economic entity; (2) has been transferred and (3) that entity retains its identity following the transfer. Article 1(1)(a) provides that the Directive’s provisions apply to the transfer of an undertaking as a result of a ‘legal transfer or merger’. This concept has been defined purposively. A number of language versions of the provision seemed to suggest that only contractual transfers were covered, whereas other versions (notably the English term ‘legal transfer’), suggested it was wide enough to cover other forms of non-contractual transfer.³⁴ The CJEU rejected the narrower definition, looking to the purpose of the Directive and finding that it can apply to all types of transfer.³⁵

Particularly problematic has been the CJEU’s interpretation of the third limb, namely that the entity has retained its identity post transfer. In early cases, the CJEU tended to look at

³³ Case C-287/86 *Landsorganisationen i Danmark for Tjenerforbundet i Danmark v Ny Molle Kro* [1987] ECR 5465 para 25; Case C-478/03 *Celtec Ltd v Astley* [2005] ECR I-4389 para 26.

³⁴ Barnard, *EU Employment Law* (n 31).

³⁵ Case C-135/83 *Abels*; Case C-478/03 *Celtec*; Case C-29/91 *Redmond Stichting v Bartol and Others* [1992] ECR I-3189.

the labour law test focusing on similarity of activity. Adopting this labour law test was more employee-protective as it was likely to lead to a finding that a transfer had taken place.³⁶ This was entirely consistent with the Directive's employee-protection objectives. However, in *Süzen*, the CJEU adopted a commercial law test, finding that the fact that activities pre and post transfer are similar, even identical, does not lead to the conclusion that an economic entity has retained its identity.³⁷ This left open the question as to how the national court was to determine when a transfer of an 'economic entity' had taken place. The CJEU distinguished two different types of business, assets based and non-assets based. With assets based companies, there would be a transfer only where significant tangible or intangible assets were transferred. With non-assets based businesses, ie in labour intensive businesses, there is a transfer only where the transferees takes over a majority of the transferor's staff. It is apparent that either approach would allow the transferee to avoid its obligations under the Directive as 'if few assets are transferred the transferee can avoid the Directive by refusing to employ the 'major part' of the workforce. This test renders the Directive in many cases a 'voluntary obligation', contrary to the spirit of a Directive designed to give employment protection.³⁸ This was perhaps another early warning-shot that although the CJEU continues to adopt a purposive reading of employment legislation, this may not always lead to an employee-protective reading.

What, then, can we take from the CJEU's pre-Charter approach to the interpretation of employment legislation? We can see that invariably the structure of the judgments start by

³⁶ Case C-392/92 *Schmidt* [1994] ECR I-1311.

³⁷ Case C-13/95 *Süzen v Zehnacker Gebäudereinigung GmbH* [1997] ECR I-1259 para 15.

³⁸ Barnard, *EU Employment Law* (n 31) 597.

setting out in some detail, the relevant legislative provisions (including the preambles) of both the EU legislation and the relevant national implementing legislation. In some cases, the CJEU leaves it at that, referring back to these provisions only sparingly. In other cases, the CJEU draws heavily from the recitals³⁹ which play a strong role in the subsequent interpretation. We also see that the CJEU places less emphasis on the legal basis of the legislation in the Treaty. It appears that the CJEU will limit itself to interpretation within the framework of the legislation, turning only to primary law if the telos is not clear. In other cases, particularly in the working time context, the CJEU has drawn heavily from international rights instruments,⁴⁰ as well as related legislative provisions.⁴¹ All of the above is done in pursuit of the purpose of the legislation,⁴² whilst ensuring the effectiveness and uniform application of EU law.⁴³ In some cases, the CJEU goes beyond the purposive

³⁹ Cases C-484/04 *Commission v United Kingdom* para 2; Case C-173/99 *BECTU* para 37; Case C-135/83 *Abels* para 17; Case C-80/14 *USDAW* para 45.

⁴⁰ Case C-151/02 *Jaeger* para 47; Case C-173/99 *BECTU* para 39.

⁴¹ Case C-303/98 *SIMAP* para 49.

⁴² Case C-151/02 *Jaeger* para 45 ; Case C-303/98 *SIMAP* para 34 ; Case C-484/04 *Commission v UK* para 35; Case C-214/10 *KHS* [2011] ECR I-11757 para 30; Case C-173/99 *BECTU* para 36; Case C-4/01 *Martin*; Case C-135/83 *Abels* para 18; Case C-29/91 *Bartol* para 18 , Case C-478/03 *Celtec* para 26; Case C-55/02 *Commission v Portugal* para 48; C-449/93 *Rockfon* para 3; Case C-80/14 *USDAW* para 60.

⁴³ Case C-151/02 *Jaeger* para 58; Case C-55/02 *Commission v Portugal* para 44; C-449/93 *Rockfon* para 25; Case C-80/14 *USDAW* para 45.

approach by adopting a consequentialist analysis of the impact of various interpretations on employees.⁴⁴

In summary, the CJEU takes a broad, purposive/teleological approach to interpretation. The CJEU looks to the objectives as a starting point and attempts to fit the interpretation to this objective wherever possible. It usually does so without violating the meaning of the words. However, the case law provides an early glimpse of the fact that the CJEU does not shy away from reassessing the purpose of employment legislation in order to achieve a particular goal which may not always be employee-protective.

III. Fundamental Rights as a Vehicle of Interpretation

Having set out the CJEU's purposive approach to the interpretation of employment legislation, we can now proceed to examine the place of fundamental rights within this interpretative scheme. Of course, with all the discussion surrounding the Charter as an interpretative tool, we may lose sight of the fact that the fundamental rights have long been used as a tool of interpretation in the guise of general principles of EU law (Section A). This will be followed by a look at the Charter's potential use as a vehicle for interpretation (Section B).

A. Back to the Future: Fundamental Rights as General Principles

It will be recalled that the general principles of EU law are those principles that have been derived—largely by the CJEU—from unwritten rules not contained in the Treaty or

⁴⁴ Case C-151/02 *Jaeger* para 65; Case C-173/99 *BECTU* para 49; Case C-4/01 *Martin* para 46; Case C-135/83 *Abels* para 22.

secondary legislation. The reason for the CJEU's 'discovery' of fundamental rights as general principles results largely from the absence of any explicit commitment to fundamental rights contained in the founding Treaties. One function of the general principles is to act an aid to interpretation, allowing the Court to 'follow an evolutive interpretation and be responsive to changes in the economic and political order'.⁴⁵ Of course, the general principles are highly value-based and inherently vague and '[l]inguistic uncertainty at the level of principles therefore translates directly into secondary interpretative legal uncertainty'.⁴⁶

Initially, the CJEU was reluctant to allow litigants to invoke the fundamental rights they may have enjoyed in national law. This approach changed significantly following the *Stauder* case in which the CJEU held that the right to human dignity, found in German law, was part of the legal order of the Union itself.⁴⁷ Although the EU's commitment to fundamental rights via the general principles is to be broadly welcomed, the potential for unforeseen consequences was largely underestimated at the time. In fact, the debate as to the place of fundamental rights within the EU's legal order continues to prove contentious, a situation that, as we shall see, has not been resolved by the introduction of the Charter. As Leczykiewicz has remarked, '[d]oes the category of fundamental rights as concepts of EU law infuse that legal system primarily or exclusively with social values or is it perhaps a

⁴⁵ Takis Tridimas, *The General Principles of EU Law* (2nd edn OUP 2006) 18.

⁴⁶ Beck (n 5) 166.

⁴⁷ Case C-29/69 *Stauder v City of Ulm* [1969] ECR I-419.

vehicle of another transformation, towards greater liberalization and deregulation?'.⁴⁸

Despite such uncertainties, the CJEU's approach to interpretation in fundamental rights cases even more closely conforms to the purposive/teleological paradigm, reflecting a number of factors including 'the lack of detailed secondary legislation, conceptual vagueness in the key treaty provisions and value pluralism in the sense that many cases involve a clash between conflicting norms of roughly equal status'.⁴⁹ In the employment context, the impact of the general principles has been most keenly felt in the equality field.

Take, for example, the case of *P v S*, where the general principle of equality was used to grant an expansive reading to the Equal Treatment Directive.⁵⁰ The CJEU was here tasked with determining whether discrimination on the ground of gender could be extended to cases of gender reassignment. The CJEU held that 'the scope of the [Directive] cannot be confined simply to discrimination based on the fact that a person is of one or other gender. In view of its purpose and the nature of the rights that it seeks to safeguard, the scope of the directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned'.⁵¹

⁴⁸ Dorota Leczykiewicz, 'Horizontal Effect of Fundamental Rights: In Search of Social Justice or Private Autonomy in EU law? in Ulf Bernitz and others (eds), *General Principles of EU Law and European Private Law* (Kluwer 2013) 171, 171.

⁴⁹ Beck (n 5) 298.

⁵⁰ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

⁵¹ Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143 para 20.

As O’Leary notes, ‘[t]he sequence of the Court’s reasoning in this case is instructive. It recalled that the Equal Treatment Directive was but the expression, in a particular field, of the principle of equality, which is one of the fundamental principles of EU law and that the right not to be discriminated against on grounds of gender is one of the fundamental human rights whose observance the Court has a duty to ensure’.⁵² In other words, the CJEU took as its starting point the need to respect fundamental rights (read the need to respect the purpose/objectives of the legislation) when determining the scope of the legislation, rather than first assessing the scope and then verifying whether fundamental rights had, in that context, been respected.⁵³ Strains of this approach can also be seen in the controversial decisions in *Mangold*⁵⁴ and *Küçüdeveci*⁵⁵ which, although not concerning the interpretation of EU legislation, appear to show the scope of EU equality law being extended through the use of general principles, with the legislation in those cases being but mere specific expressions of a general principle.

A complicated and as yet unanswered question is the relationship between the general principles and the Charter. The Charter was merely intended to codify or render more visible *existing* EU fundamental rights. This then begs the question of whether the Charter was intended to replace the general principles or whether the two sources are coterminous

⁵² Síofra O’Leary, ‘The Charter and the Future Contours of EU Social and Employment Law’ in Pascal Cardonnel, Allan Rosas and Nils Wahl (eds), *Constitutionalising the EU Judicial System Essays in Honour of Pernilla Lindh* (Bloomsbury 2012) 318, 328.

⁵³ *ibid* 329.

⁵⁴ Case C-144/04 *Mangold v Helm* [2005] ECR I-9981.

⁵⁵ Case C-555/07 *Küçüdeveci v Swedex* [2010] ECR I-365.

and mutually dependent. Most commentators appear to agree that the CJEU's primary point of reference is and should now be the Charter as this is 'in keeping with the intentions of the Treaty authors, which granted the Charter the same value as that of the Treaties' and is 'also more in keeping with the national constitutional culture which, bred in a civil law tradition, feel more comfortable with written lists of rights'.⁵⁶ Of course, this overlooks the fact that the general principles themselves have been explicitly recognised in the constitutional text, although whether this grants constitutional status to their content remains unresolved. Nevertheless, the CJEU's case law appears to confirm that the Charter will be its primary point of reference. Leaving aside the CJEU's use of the general principles, what is the role for the Charter itself in the interpretation of EU employment legislation?

B. The Charter as an Interpretative Tool

From the outset, the Charter has been characterised by its limited ambitions, being merely intended to codify or render more visible fundamental rights as derived from the general principles, ECHR, international conventions and the Community Social Charter. Although, the Charter 'very clearly states that it does not extend the field of application of EU law...it cannot be excluded, if one examines samples of the Court's existing case law, that the definition and delimitation of the field of EU social and employment law might be influenced by the existence of the Charter generally and/or by specific provisions thereof'.⁵⁷ The continued use of the purposive approach in the fundamental rights context appears to be facilitated by the Commission which has confirmed that legislative proposals

⁵⁶ Takis Tridimas, 'Fundamental Rights, General Principles of EU Law, and the Charter' (2014) 16 CYELS 377.

⁵⁷ O'Leary (n 52) 328.

that have a particular link with fundamental rights must include specific recitals that explain how the proposals comply with the Charter.⁵⁸ As such, '[t]he inclusion of a subject matter, whether in the form of a right or a principle, in the Charter, will of necessity influence the manner in which the Court will consider the precise content of the right or principle in question, its range of application and the weighing of conflicting interests'.⁵⁹

Of course, despite the rhetoric of indivisibility of rights, the Charter's provisions themselves are of potentially differing weight, a fact made (somewhat) explicit in this distinction drawn between rights and principles. Article 52(5) of the Charter makes clear that '[t]he provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in ruling on their legality'. Although following *AMS*, it may be the case that real distinction is not between rights and principles, but rather between those rights that are capable of direct effect and those that are not (usually the social rights contained in the Solidarity Title).⁶⁰ Although, the two may nevertheless map one onto the other, ie non-directly effective rights may in fact be principles. In any case, if we again confine our analysis to the use of the Charter as an interpretative tool, it may be that the distinction between rights and principles becomes less relevant. Despite this, and as we shall see, the CJEU may lend

⁵⁸ COM (2010) 573 final.

⁵⁹ O'Leary (n 52) 322.

⁶⁰ Case C-176/12 *Association de médiation sociale* ECLI:EU:C:2014:2.

greater weight to rights as opposed to principles when it comes to interpreting EU legislation.

That the Charter has a role to play in the interpretation of EU legislation should be unsurprising given that it is not in itself a source of rights, but rather a list of Union rights deriving from various other sources, including legislation. The Explanations attached to the Charter, and which act as interpretative guidance, are illustrative in this respect. Many Charter provisions that are related to the employment context are stated to derive from either EU legislation or existing case law. Particularly relevant for the present discussion are article 31 of the Charter on the right to fair and just working conditions and article 16 on the freedom to conduct a business, which has a potentially far-reaching and cross-cutting impact on the interpretation of employment legislation.

Another difficulty in using the Charter as a vehicle of interpretation is that the Charter provisions themselves must first be interpreted. If we look to the Explanations, we are either confronted with equally vague statements, or we are referred to existing legislative provisions and jurisprudence. This has led to the somewhat circular position that EU legislation will be interpreted against the backdrop of a Charter which itself is to be interpreted through the lens of EU legislation as already interpreted by the CJEU. Furthermore, and as Beck notes '[e]ven the less abstract, more specific fundamental rights such as some of the solidarity rights....are open-ended, imprecise and/or context-dependent; the relevant definitions in the Charter are often so vague as to raise doubts as to their core meaning, substance and justiciability in the absence of further legislation

designed to provide specific protection'.⁶¹ It should not be surprising therefore when inconsistent results begin to emerge.

Of course, the Charter can only act as a tool of interpretation if the CJEU chooses to engage with it. In many cases, where a fundamental rights link may have been thought to exist, the CJEU either finds that the Charter is inapplicable as the case is outside the scope of EU law, or it simply ignores the fundamental rights aspect altogether.⁶² Barnard has recently spoken of the silence of the Charter.⁶³ She argues that in some cases the CJEU has been unjustifiably reticent in its use of the Charter, notably in the context of the review of measures taken by Member States under the troika's Memoranda of Understanding. In other cases, she points to situations in which the CJEU has rightly refused to engage with fundamental rights arguments, especially in the context of posted workers. Finally, she argues that there are some contexts in which the CJEU would be perfectly justified in keeping silent, giving the example of age discrimination. Her concerns largely focus on democratic legitimacy, arguing that '[t]he legislative compromise...might not be one that the Court...likes, but it is the compromise that the legislature came to. And it would ill behove the Court to second guess...using the rhetoric of balancing under the Charter, to

⁶¹ Beck (n 5) 167.

⁶² Case C-34/10 *Bruestle v Greenpeace* [2011] ECR I-9821; Case C-34/09 *Gerardo Ruiz Zambrano* [2011] ECR I-1177.

⁶³ Catherine Barnard, 'The Silence of the Charter: Social Rights and the Court of Justice' in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Bloomsbury 2015) 173.

produce a different outcome'.⁶⁴ Another concern is that the use of the Charter may in fact obscure the real arguments rather than bringing any clarity. The following represents not so much a plea for silence in certain situations, but rather a recognition of the Charter's inherent limitations as an interpretative tool in the employment context despite the apparent interpretative role it has been given. It will be shown that the Charter, already beset by contradictions, is simultaneously inert and unpredictably dynamic.

IV. Fundamental Rights and the Interpretation of EU Employment Legislation

What then is the added value of bringing fundamental rights arguments to the interpretative task? Do they in fact add clarity to judicial reasoning or are they a vehicle for judicial activism and incoherent interpretation? There are two elements to be dealt with here. In the first instance it will be shown that the Charter's social rights add very little to the interpretation of employment legislation. Their use to date has been limited to bolstering an interpretation that could easily have been achieved using existing purposive methods that rely on the recitals of the relevant legislation. Where the effect of the Charter is felt, however, is that it allows the CJEU to pick and choose from the menu of its provisions, allowing for a potential disruption in the telos of social legislation. Once the telos has been shifted, this may allow the CJEU in future to interpret employment legislation in an entirely different manner (Section A). This situation has been most acutely

⁶⁴ *ibid* 182.

felt in the CJEU's radical use of article 16 on the freedom to conduct a business all the while ignoring competing social rights (Section B).

A. What do fundamental rights bring to the table?

In the first instance, we must ascertain the quantitative impact of the Charter in the employment context. A search on the CJEU's website using the rubric 'Court of Justice, 'social security', 'employment', 'social policy' and 'Charter of Fundamental Rights' reveals a marked increase in references to the Charter in recent years. We can see that there have been 82 judgments⁶⁵ and 102 Opinions⁶⁶ to date that match this rubric (although not all of these cases concern the interpretation of EU legislation). This demonstrates that the CJEU is by now well-used to dealing with the Charter in the employment context. Article 21 on the principle of non-discrimination is the most cited Charter provision. Other provisions that have been frequently cited are article 28, article 30, article 23 and finally articles 31 and 16, which form the focus of this paper. But of course, it is not enough that a Charter provision has merely been cited by the CJEU or an Advocate General (AG). What is the real impact of the Charter arguments? We will once again, take each piece of legislation in turn.

i. Working Time Directive

Article 31 of the Charter provides for fair and just working conditions. As the Explanations to that provision make clear, this right is largely derived from the Working Time Directive. Article 31(2) provides that '[e]very worker has the right to limitation of maximum working

⁶⁵ <<http://curia.europa.eu/juris/documents>> accessed 11 August 2016.

⁶⁶ ibid.

hours, to daily and weekly rest periods and to an annual period of paid leave'. This article, perhaps more so than any other provision of the Charter, has played a prominent role as an interpretive guide to the WTD. Indeed, in this respect Article 31(2) has been described as 'a pioneering Charter provision in that it had an early and bold impact on the interpretation of the right to paid annual leave'.⁶⁷ Article 31(2) made its first appearance in the Opinion of AG Tizzano in *BECTU*.⁶⁸ In that case, BECTU, a trade union, argued that the UK Government had incorrectly implemented the WTD by imposing conditions (13 weeks' continuous work) on the entitlement to paid annual leave, for which there is no justification in the Directive. In what is now considered 'a landmark Opinion for its use of the Charter as an interpretive tool',⁶⁹ AG Tizzano thought it appropriate to take a step back from the WTD in order to place the entitlement to paid annual leave in the broader context of fundamental social rights.⁷⁰ The right to paid leave, he noted, was not introduced with the adoption of the WTD, but rather, it has long been considered a fundamental right.⁷¹ The AG considered that the inclusion of a right to paid annual leave in the Charter made it easier to 'apprehend the meaning and scope of the principle laid down in Article 7 of the Directive'.⁷² Indeed, as

⁶⁷ Alan Bogg, 'Article 31' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 835.

⁶⁸ Case C-173/99 *BECTU*.

⁶⁹ Bogg (n 67) 846. However, as we have seen, the AG's bold approach in *BECTU* is less in evidence in Case C-133/00 *Bowden* [2001] ECR I-7031.

⁷⁰ Opinion of AG Tizzano in Case C-173/99 *BECTU* para 26.

⁷¹ See article 24 UN Declaration on Human Rights 1948, article 2(3) European Social Charter 1961, article 7(d) UN Charter on Economic, Social and Cultural Rights 1966.

⁷² Opinion of AG Tizzano in Case C-173/99 *BECTU* para 29.

a fundamental social right, the right to paid leave is ‘an automatic and unconditional right granted to every worker’.⁷³ The fact that the Charter contained a right to paid annual leave had the effect of fortifying the AG’s conclusion that the precondition of 13 weeks’ continuous employment was an unlawful derogation from an inderogable fundamental social right.⁷⁴ As we have already seen above, the CJEU came to the same conclusion but avoided any reference to the Charter—which at this point did not have legal effect—preferring instead to classify the entitlement of every worker to paid annual leave as a ‘particularly important principle of Union law’, as demonstrated by the fact that there can be no derogations.⁷⁵ *BECTU* has been described as exemplifying a pattern of reasoning, that would subsequently develop in cases concerning paid annual leave, with the CJEU starting with ‘the highly abstract affirmation of its status as a fundamental social right to generate specific legal conclusions’.⁷⁶ But is this really the case? Undoubtedly, the CJEU’s approach in *BECTU* heralded a promising start to the life of the Charter as the Court appeared willing to infuse its interpretative task with fundamental rights arguments. If we delve deeper, however, can it be said that the Charter has made any real difference to the interpretation of employment legislation?

The CJEU is still adopting a strongly purposive approach, continuing to refer to the recitals and the objectives of the legislation but now simply adding the Charter into the teleological

⁷³ *ibid.*

⁷⁴ Bogg (n 67) 847.

⁷⁵ Case C-173/99 *BECTU* para 43.

⁷⁶ Bogg (n 67) 847.

mix. We can see this approach in *ANGED*,⁷⁷ a case in which the CJEU was asked whether Article 7(1) WTD must be interpreted as precluding national provisions under which a worker who becomes unfit for work during a period of paid annual leave is not entitled subsequently to the paid annual leave which coincided with the period of unfitness for work. The CJEU starts by using its well-worn mantra that paid annual leave ‘must be regarded as a particularly important principle of European Union social law from which there can be no derogations’.⁷⁸ In the next breath the CJEU states that not only is the right particularly important, but that it is *also* ‘expressly laid down in Article 31(2) of the Charter’.⁷⁹ This is the last we hear of the Charter. The CJEU instead reverts to its usual approach, noting that ‘the purpose of entitlement to paid annual leave is to enable the worker to rest’.⁸⁰ This pattern is continued in subsequent cases. The CJEU starts by noting that paid annual leave is ‘a particularly important principle of European Union social law from which there can be no derogations’.⁸¹ It then notes—almost in passing—that the right is also contained in article 31(2) of the Charter.⁸² The Court moves on to look at the

⁷⁷ Case C-78/11 *ANGED* ECLI:EU:C:2012:372.

⁷⁸ *ibid* para 16.

⁷⁹ *ibid* para 17.

⁸⁰ *ibid* para 19.

⁸¹ Case C-219/14 *Kathleen Greenfield v The Care Bureau Ltd* ECLI:EU:C:2015:745 para 26; Joined Cases C-229/11 and C-230/11 *Alexander Heimann and Konstantin Toltschin v Kaiser GmbH* ECLI:EU:C:2012:693 para 22; Case C-178/15 *Alicja Sobczyszyn v Szkoła Podstawowa w Rzeplinie* ECLI:EU:C:2016:502 para 19; Case C-337/10 *Georg Neidel v Stadt Frankfurt* ECLI:EU:C:2012:263 para 28.

⁸² Case C-219/14 *Greenfield* para 27; Case C-178/15 *Sobczyszyn* para 20; C-155/10 *Williams v British Airways* [2011] I-840918 para 18.

purpose and objectives of the legislation (as it has always done),⁸³ to find that, in accordance with settled case law, concepts such as working time and paid leave must be interpreted broadly.⁸⁴

That article 31(2) appears not to make a great deal of difference is perhaps unsurprising if we remember how closely linked that provision is to the wording of the WTD itself. In *Fenoll*, for example, the CJEU was asked to interpret the term ‘worker’ for the purposes of the WTD. In this case, the CJEU more carefully linked the question to the Charter, noting that ‘[t]he question to be answered is, therefore, whether Mr Fenoll carries out that activity as a worker within the meaning of Article 7 of Directive 2003/88 and of Article 31(2) of the Charter’.⁸⁵ In other words, the concept had the same meaning in both the Directive and the Charter. Looking to the Charter would not provide any help with determining the appropriate interpretation of the ‘worker’ concept. As such, the CJEU simply relied on its earlier case law, defining the ‘worker’ broadly.⁸⁶ AG Mengozzi also highlighted the fact that any interpretation of ‘worker’ within the meaning of the WTD must also apply to article 31(2) of the Charter ‘in order to ensure the uniformity of the scope of application ratione personae of the right to paid leave’.⁸⁷ He continues that it ‘is clear from the settled case-law of the Court that every worker’s right to paid annual leave must be regarded as a

⁸³ Case C-219/14 *Greenfield* para 29; Case C-539/12 Z.J.R. *Lock v British Gas Trading Limited* ECLI:EU:C:2014:351 para 15; Case C-178/15 *Sobczyszyn* para 23

⁸⁴ Case C-539/12Z *Lock* para 14, Joined Cases C-229/11 and C-230/11 *Heimann* para 23.

⁸⁵ Case C-316/13 *Gérard Fenoll* ECLI:EU:C:2015:200 para 23.

⁸⁶ *ibid* para 27.

⁸⁷ Opinion of Advocate General Mengozzi in Case C-316/13 *Gérard Fenoll* para 26.

particularly important principle of Union social law, *henceforth* enshrined in Article 31(2) of the Charter'.⁸⁸ The 'henceforth' is important in demonstrating continuity and merely serves to highlight the fact that the Charter will become a new point of reference. Having said that, the legislation itself remains relevant as it must be read 'in conjunction' with the Charter.⁸⁹ An unanswered question is whether the CJEU considers 'a particularly important social right' and the Charter's social rights to be coterminous. If they are, then again we should not be surprised if the Charter has no real bearing on the interpretative outcome. Going further, is the WTD but a specific expression of an already existing general principle of a right to paid annual leave that is now also reflected in article 31(2) of the Charter? This question arose in *Dominguez* but the CJEU refused to engage with it, reverting instead to its traditional stance that directives do not have horizontal effect.⁹⁰

Finally, the post-Charter case law continues to show the purposive/teleological approach will not always lead to an interpretation that protects employees. Although the CJEU has held, in the context of rolled up holiday pay that article 7 WTD does not preclude the loss of paid leave provided that the worker actually had the opportunity to take leave,⁹¹ that right is qualified where a worker is on prolonged sick leave, with the risk of accumulated periods of leave that this would entail.⁹² The CJEU here used the purposive approach to achieve an employer-protective reading of the legislation, holding that '...in light of the *actual* purpose

⁸⁸ *ibid* para 27.

⁸⁹ Case C-316/13 *Fenoll* para 46.

⁹⁰ Case C-282/10 *Dominguez* ECLI:EU:C:2012:33.

⁹¹ Joined Cases C-350/06 and C-520/06 *Schultz-Hoff and Stringer* [2009] ECR I-179.

⁹² Case C-214/10 *KHS*.

of the right to paid annual leave...a worker who is unfit for work for several consecutive years and who is prevented by national law from taking its paid annual leave during that period cannot have the right to accumulate, without limits'.⁹³ The CJEU went on to note that any '....carry-over period must also protect the employer from the risk that a worker will accumulate periods of absence of too great a length and from the difficulties for the organisation of work which such periods might entail'.⁹⁴ This appears to be no more than a standard application of the purposive approach until we consider that no such employer-protective purpose is mentioned in the Directive.

To conclude then, the post-Charter case law on the WTD is an exercise in continuity. The extent of the Charter's added value appears to be that the CJEU is more comfortable in relying on a written text. To this extent, the CJEU has been emboldened in that its long held approach to treating paid leave as an important social right has now essentially been codified by the legislature, although there is a certain irony in a return to textualism to boost a purposive approach. More democratically legitimate it may be, revolutionary it is not. The same cannot be said in the context of the Transfer of Undertakings Directive.

ii. Transfer of Undertakings Directive

We have seen that in the working time context, the Charter does little, if any, of the heavy lifting. By contrast, in the transfer of undertakings context, the Charter does not know its own strength and has been used to radically disrupt existing interpretative approaches and legislative balances. The potential use of the Charter as a destructive force in the

⁹³ ibid para 34.

⁹⁴ ibid para 35.

employment context became all too apparent in the wake of the CJEU's decision in *Alemo-Herron*.⁹⁵ The question that arose in this case was whether, in a situation in which contracts incorporating the terms of collective agreements transfer to new employers, they should be bound only by those terms in force at the time of the transfer (static approach) or whether new collective agreements negotiated after the transfer should also bind the new employer (dynamic approach). The CJEU was essentially tasked with determining whether article 3(1) TUD was to be interpreted as prohibiting the transfer of dynamic clauses.

The Opinion of AG Cruz-Villalón appears to provide a strong, but nuanced commitment to contractual autonomy while at the same time acknowledging the legitimate social objectives of the TUD.⁹⁶ As a starting point, the AG noted that the effect of the earlier decision of the CJEU in *Werhof*⁹⁷ was clearly to rule out the possibility that the TUD required Member States to permit the transfer of dynamic clauses referring to future collective agreements. The AG concluded that 'in the context of the transfer of an undertaking, there is no obstacle to Member States allowing a transfer of dynamic clauses referring to future collective agreements'.⁹⁸ He noted that although the principal aim of the Directive was to protect workers in the event of a change of employer, there were also several employer-protective elements that could be discerned.⁹⁹ This was his first misstep, as there is no such employer-protective purpose contained in the Directive. The AG

⁹⁵ Case C-426/11 *Alemo-Herron v Parkwood Leisure* ECLI:EU:C:2013:521.

⁹⁶ Opinion of AG Cruz Villalón in Case C-426/11 *Alemo-Herron v Parkwood Leisure* ECLI:EU:C:2013:521.

⁹⁷ Case C-499/04 *Hans Werhof v Freeway Traffic Systems GmbH & Co KG* [2006] ECR I-2397.

⁹⁸ Opinion of AG Cruz Villalón in Case C-426/11 *Alemo-Herron* para 20.

⁹⁹ ibid paras 21–22.

nevertheless went on to conclude that the TUD was no ‘impediment to the United Kingdom allowing parties to use dynamic clauses referring to future collective agreements and accepting that such clauses are transferable as a consequence of the transfer of an undertaking’.¹⁰⁰ This part of the AG’s Opinion is no more than a confirmation of the accepted view that the TUD, far from constituting a ceiling on Member State action, would allow for the continuation of the long-standing English approach to dynamic clauses referring to future agreements.

The next stage of the Opinion becomes more problematic, as in a somewhat surprising and indeed controversial move, the AG rather tersely dealt with the argument raised in *Werhof* that the freedom of association, which is guaranteed by both the Charter and the ECHR was being infringed. According to the AG, the issue was not that the new employer would be compelled to join an organisation in order to influence the contractual terms, but rather that it had no means of being so represented, as the relevant negotiating body was public, not private.¹⁰¹ The real issue according to the AG was the employer’s ‘fundamental right to conduct a business’, this was apparently despite the fact that the company had failed to raise this as an argument.¹⁰² This is the most controversial aspect of the AG’s Opinion as he appears to raise of his own volition, the hitherto rarely invoked freedom to conduct a business contained in the Charter.

In any event, despite highlighting the importance of the freedom to conduct a business in Article 16, which includes freedom of contract, the AG went on to hold that a dynamic

¹⁰⁰ ibid para 39.

¹⁰¹ ibid para 44.

¹⁰² ibid para 46.

interpretation would not run contrary to article 16 so long as it was not unconditional or irreversible.¹⁰³ The AG noted that although freedom of contract was indeed a component of the freedom to conduct a business, the absence of extended rulings on the matter and the lack of binding force of collective agreements in the UK meant that article 16 had not been violated in the present case.¹⁰⁴ What we can take from this Opinion is that although the AG reached the correct conclusion, the path to that conclusion was paved with a distortion of the purposive approach to interpretation. The AG interpreted the TUD through the lens of a purpose that it does not have, namely the need to consider the interests of the employer. The CJEU would simply take this abuse of existing interpretative methods to its logical conclusion.

The CJEU, in adopting the German static approach, held that where a transferee does not have the opportunity to participate in negotiations that are concluded after the date of transfer, the outcome of the negotiations should not be binding. The Directive must therefore be interpreted as *precluding* dynamic clauses referring to collective agreements negotiated after the date of transfer being enforceable against the transferee.¹⁰⁵ Like the AG, the CJEU held that a fair balance must be sought between the competing interests of employers and employees with due weight being given to the employer's freedom of contract found in Article 16 of the Charter:

[i]t is apparent that, by reason of the freedom to conduct a business, the transferee must be able to assert its interests effectively in a contractual process to which it is

¹⁰³ *Alemo-Herron* (n 95) para 58.

¹⁰⁴ *ibid* para 54.

¹⁰⁵ *ibid* para 37.

party and to negotiate the aspects determining changes in the working conditions of its employees with a view to its future economic activity.¹⁰⁶

To hold otherwise would be to reduce employer freedom ‘to the point that such a limitation is liable to adversely affect the very essence of its freedom to conduct a business’.¹⁰⁷ The CJEU went on to note that a dynamic interpretation would limit the employer’s room for manoeuvre to make adjustments and changes, particularly given that ‘the transfer is of an undertaking from the public sector to the private sector, the continuation of the transferee’s operations will require significant adjustments and changes, given the inevitable differences in working conditions that exist between those two sectors’.¹⁰⁸ Given the employer’s need for room to manoeuvre, the dynamic interpretation would be ‘liable to undermine the fair balance between the interests of the transferee in its capacity as employer, on the one hand, and those of the employees, on the other’.¹⁰⁹

There are number of problematic elements to the CJEU’s adoption of this interpretation of the TUD. In the first instance, it represents a distortion of the purpose of a directive which is explicitly employee-protective. It certainly appears that the CJEU has reached a conclusion as to the purpose it thinks the TUD should have rather than one it actually does have. In addition, the two stage analysis adopted by the CJEU apparently reveals its predisposition to reject the dynamic approach. The CJEU proceeded in two steps, the first of which was to find that there was a need to reconcile the competing aims of the Directive,

¹⁰⁶ ibid para 33.

¹⁰⁷ ibid para 35.

¹⁰⁸ ibid para 27

¹⁰⁹ ibid para 29.

that is to say between the protection of employees and the need for employer flexibility. This approach is, of course, in and of itself controversial and it appears that the CJEU felt compelled to reinforce this novel reading of the Directive by turning to article 16, regardless of the future consequences for employment regulation. This is not the CJEU's only violation of the text. Indeed, the CJEU's reasoning is based on the false assumption that the TUD requires such an explicit balancing of employer and employee interests in the first place.¹¹⁰ Lord Hope in the UK Supreme Court pointed out that '[n]o mention was made in the recitals of any need to protect employers in the event of a change in employer as against the rights that were to be safeguarded for the protection of employees'.¹¹¹ Rather, it could be said that the very logic behind the TUD is the restriction of contractual autonomy in order to protect employees. It is perhaps therefore 'ironic that *Werhof* and *Alemo-Herron* render the operation of the transfer of undertakings legislation potentially less favourable to the transferring employees than that which the common law interpretation...would produce'.¹¹² This is a damning indictment and demonstrates that the approach adopted in *Alemo-Herron* is fatally to undermine the very purpose of the legislation.

The judgment also ignores the wording of article 8 TUD which provides that Member States may introduce more favourable protection than that provided under the Directive. The

¹¹⁰ Jeremias Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law (Case C-426/11 *Alemo Herron v Parkwood Leisure*)' (2013) 42 ILJ 434, 439.

¹¹¹ [2011] UKSC 26 [7], [14] (Lord Hope).

¹¹² Charles Wynn-Evans, 'TUPE, Collective Agreements and the Static-Dynamic Debate' (2010) 39 ILJ 275, 279.

CJEU in its rejection of the dynamic interpretation appears to have upturned this provision, transforming it from a floor to a ceiling. This has worrying implications for other pieces of EU employment legislation and may potentially spell the end of minimum harmonisation.¹¹³

Another difficulty with the CJEU's interpretation of the TUD in this case is that it appears to run contrary to decades of existing case law on the concept of contractual autonomy and business freedom.¹¹⁴ In its earlier case law on the matter, article 16 had largely been neglected by the CJEU, which seemed 'unreceptive to any embrace of newly aggressive deregulatory bite driven by the Charter'.¹¹⁵ Even in cases where the CJEU accepted the application of article 16, it was heavily conditioned by competing social interests, notably the protection of consumers. *Alemo-Herron* can therefore be said to constitute a significant departure from existing case law on contractual autonomy.¹¹⁶ It is becoming apparent that the elevation of freedom of contract to the status of a fundamental right in article 16 has made all the difference, at least in the mind of the CJEU.

¹¹³ Marija Bartl and Candida Leone, 'Minimum Harmonisation and Article 16 CFR: Difficult Times Ahead for Social Legislation?' Amsterdam Law School Research Paper No. 2015-40.

¹¹⁴ Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415; Case C-240/97 *Spain v Commission* [1999] ECR I-6571 para 99; Case C-4/73 *Nold* [1974] ECR 491.

¹¹⁵ Stephen Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: On the Improper Veneration of "Freedom of Contract" - Comment on Case C-426/11 *Mark Alemo-Herron v Parkwood Leisure*' (2014) 10 ERCL 167, 177.

¹¹⁶ *ibid* 167.

Prassl argues that the real problem with the CJEU's approach to freedom of contract lies neither with its recognition of contractual autonomy as a general principle nor with its application of the Charter. Rather, it 'is the aggressive interpretation of the hitherto rarely applied Article 16...to justify the abrogation of employees' rights that breaks with well-established case law'.¹¹⁷ Furthermore, the CJEU adopts a subtle yet fundamental change in language between the present case and its earlier jurisprudence on freedom of contract. In *Scarlet Extended* for example, the CJEU noted that a 'fair balance' needed to be achieved between article 16 and competing fundamental rights.¹¹⁸ In *Alemo-Herron* on the other hand, the CJEU has moved towards the test of the 'core content' or 'very essence' (despite continuing to use the language of balancing). Under the former, *Scarlet Extended* test, litigants merely had to show that the outcome represented a fair compromise between two competing fundamental rights of equal value. The latter *Alemo-Herron* approach requires that the irreducible core of one right has not been affected ie there is no need to balance. Once the core content of contractual autonomy has been eroded, it is irrelevant that a competing—and perhaps stronger—social right has been invoked. It is apparent that this case represents an unexpected rupture with existing jurisprudence and aptly demonstrates the potential use of the Charter to defend employer flexibility against the protection of employees. Weatherill has been particularly scathing in his assessment of *Alemo-Herron*, remarking that sometimes 'a decision of the Court of Justice...is so downright odd that it

¹¹⁷ Prassl, 'Freedom of Contract as a General Principle' (n 110) 441.

¹¹⁸ Case C-70/10 *Scarlet Extended v SABAM* [2011] ECR I-11959 para 45.

deserves to be locked into a secure container, plunged into the icy waters of a deep lake and forgotten about'.¹¹⁹

In its decisions immediately following *Alemo-Herron* the CJEU appeared to have realised the error of its ways and has shied away from invoking the Charter. In *Österreichischer Gewerkschaftsbund*, a case also concerning the interpretation of article 3 TUD, the CJEU relied on the most uncontroversial elements of *Alemo-Herron* while (deliberately?) overlooking article 16 of the Charter.¹²⁰ This case concerned the potential continuation, in the event of a transfer, of the effects of a rescinded collective agreement. The CJEU was asked whether article 3(3) TUD must be interpreted as also covering terms laid down under a collective agreement which have continuing effect indefinitely under national law, despite the termination of the agreement, until a new agreement—whether collective or individual—has been concluded. The CJEU noted that the purpose of article 3(3) TUD was not the continuation of collective agreements as such, but rather the terms and conditions of employment, regardless of their origin.¹²¹ Therefore, such terms come within the scope of the Directive, ‘irrespective of the method used to make those terms...applicable to the persons concerned’, including in this case national legislation maintaining the effects of collectively agreed terms.¹²² Such an interpretation accords with the purpose of the TUD, which is to avoid a sudden rupture in the terms and conditions of employment. In addition, the interpretation adopted conforms to the TUD’s (contested) objectives of ensuring a fair

¹¹⁹ Weatherill (n 115) 167.

¹²⁰ Case C-328/13 *Österreichischer Gewerkschaftsbund* EU:C:2014:2197.

¹²¹ ibid paras 23–24.

¹²² ibid para 25.

balance between the interests of employees and the transferee employer who must, citing *Alemo-Herron* 'be in a position to make the adjustments and changes necessary to carry on its operations'.¹²³

The CJEU, adopting a generous approach held that '[t]he rule maintaining the effects of a collective agreement...has limited effects, since it maintains only the legal effects of a collective agreement on the employment relationships directly subject to it before its rescission...In those circumstances, it does not appear that such a rule hinders the transferee's ability to make the adjustments and changes necessary to carry on its operations'.¹²⁴ The contrast between both the tone and substance of this judgment at that adopted in *Alemo-Herron* is remarkable. In the former, the CJEU has no difficulty in concluding that the continuation of the collective agreement does not interfere with the employer's room for manoeuvre, while in the latter, an equally innocuous provision is struck down as intolerable interference. It certainly appeared as if the CJEU was willing to invoke only the least controversial elements of *Alemo-Herron*, that is to say the principle of contractual autonomy stripped of the trappings of a fundamental right. In any case, it now seems that article 16 when used an interpretative tool has the potential to disrupt both existing legislative balances and long-standing approaches to the interpretation of employment legislation. But why is this the case? What is it about article 16 that renders it such a powerful tool of interpretation, while the Charter's social provisions barely make a difference? Does the CJEU simply have a predisposition to prioritise the economic rights over the social?

¹²³ ibid para 29.

¹²⁴ ibid para 30.

B. Fundamental rights à la carte?

As can be seen from the above, a difference appears to be emerging between the CJEU's use of the economic and social provisions in the Charter. Not only do the social provisions, dismissed as 'principles', appear to be weaker interpretative tools, but the CJEU seems to be actively preferring the freedom to conduct a business over competing social rights. If we look at *Alemo-Herron* itself we see that no attempt was made to engage with competing Charter provisions that may have acted as a counterweight to contractual autonomy. This appears to be a fundamental problem. Unless the CJEU chooses to engage with a Charter provision, then it will of necessity have no impact in its approach to interpretation. Of course, even within the working time context, the Charter's use has been most prevalent in paid leave cases. As Bogg warns, 'the interests of a coherent interpretive approach, there is a need for greater consistency of interpretive practice in relation to the rights...Otherwise there is a risk of serious distortion if Article 31 is applied selectively, as seems to be the situation currently'.¹²⁵

We also see that in cases such as *AMS* and *Dominguez* the CJEU is very careful to avoid the Charter's social provisions becoming directly enforceable individual rights either because they are not sufficiently clear and precise, or because they are dependent on national laws

¹²⁵ Bogg (67) 848.

and practices.¹²⁶ Article 16 faces no such limitations despite its similar wording. In fact, in the context of the freedom to conduct a business, the CJEU, as we have seen, appears willing to ignore precedent, including its long standing case law on contractual autonomy as a general principle. It does so in a manner which overrides the limitations contained in the case law and which is expressly referenced in the Explanations attached to the Charter. It is certainly apparent from this case that the CJEU is willing to give precedence to an employer's freedom of contract over the rights of employees as expressed in legislation.¹²⁷ Even if a piece of employment legislation engages article 16 (as it almost invariably would), it is likely to have been carefully drafted to assess competing interests with the legislature having decided on the correct balance to be achieved. In its case law on freedom of contract as a general principle, and in its early jurisprudence on article 16, the CJEU certainly appeared to adopt this deferential approach to the will of the legislature. EU legislation was only rarely found to constitute a negation of the core content of business freedom. For Prassl, this test 'is likely to constitute the most important hurdle to the success of any action brought to vindicate an individual's economic freedoms under Article 16 CFR, especially once it is applied in combination with the Court's proportionality scrutiny against a right's social function'.¹²⁸ However, it is difficult to square this with the decision in *Alemo-Herron*. In that case, the CJEU found that what had been considered no more than an

¹²⁶ Case C-176/12 *Association de médiation sociale*; Case C-282/10 *Dominguez*.

¹²⁷ Jeff Kenner, 'Article 30 – Protection in the Event of Unjustified Dismissal', in S Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 821.

¹²⁸ Jeremias Prassl, 'Business Freedoms and Employment Rights in the European Union' (2015) 17 Cambridge Yearbook of European Legal Studies 189, 197.

ordinary application of the common law freedom of contract did in fact violate the very core of contractual autonomy as a fundamental right. Had *Alemo-Herron* involved a clash between two competing fundamental rights, one social and one economic, would the outcome have been any different? The evidence to date does not appear promising.

Undoubtedly, the approach the CJEU appears to be adopting is to be welcomed from the perspective of employers. Labour lawyers on the other hand should be worried indeed. The best-case scenario may be that the CJEU will confine this expansive approach to the limited context of the transfer of undertakings, while preserving its employee-protective reading of legislation in other contexts. The worst-case scenario paints a very bleak picture for the future of EU regulation in both the employment context and beyond. Article 16 can now be seen as having the potential to undermine the existing balances that have been achieved in EU employment legislation by requiring a higher threshold of justification for EU regulatory intervention. It is certainly apparent from reaction to *Alemo-Herron* that the deregulatory potential of article 16 was largely underestimated and perhaps continues to be so. This can be seen in a recent raft of cases in the employment context in which article 16 has made an appearance. In her recent Opinion on an employer's banning of a headscarf in the workplace, AG Kokott found that 'the employer must be allowed a degree of discretion in the pursuit of its business, the basis for which lies ultimately in the fundamental right of freedom to conduct a business... Part of that freedom is the employer's right, in principle, to determine how and under what conditions the roles

within its organisation are organised and performed and in what form its products and services are offered'.¹²⁹ She goes on to stipulate that:

In a Union which regards itself as being committed to a social market economy...and seeks to achieve this in accordance with the requirements of an open market economy with free competition...the importance that attaches to the freedom to conduct a business is not to be underestimated. That fundamental right, which, previously, already constituted a general principle of EU law, is now enshrined in a prominent position in Article 16 of the Charter of Fundamental Rights.¹³⁰

Accordingly, the employer's freedom to conduct a business would allow him to derogate from the prohibition on discrimination contained in the Equal Treatment Directive. Tellingly, it is now article 16 that is being cited without any reference to *Alemo-Herron* rather than the other way around. The approach to article 16 adopted by AG Kokott can be contrasted with that taken by AG Sharpston in another recent Opinion in *Bougnaoui*.¹³¹ In that case, the AG found that the employer had not advanced any commercial interest in its relations with its customers that could justify the prohibition on wearing the headscarf. She goes on to repeat the formula found in the CJEU's earlier case law that whilst the freedom

¹²⁹ Opinion of Advocate General Kokott in Case C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* ECLI:EU:C:2016:382.

¹³⁰ *ibid* 134.

¹³¹ Opinion of Advocate General Sharpston in Case C-188/15 *Asma Bougnaoui Association de défense des droits de l'homme (ADDH) v Micropole SA* ECLI:EU:C:2016:553

to conduct a business is a general principle that has now been enshrined in the Charter, it must be reviewed in relation to its function in society.¹³²

Another highly deregulatory opinion has recently been handed down by AG Wahl in *AGET*.¹³³ This case concerned the compatibility of Greek legislation with the Collective Redundancies Directive and article 49 TFEU on freedom of establishment. The opening paragraph makes for sober reading for any labour lawyer: ‘The European Union is based on a free market economy, which implies that undertakings must have the freedom to conduct their business as they see fit’.¹³⁴ Despite holding that ‘it follows from Article 52(1) of the Charter and the case-law of the Court that the freedom to conduct a business guaranteed under Article 16 of the Charter is not absolute, and may be regulated’,¹³⁵ he went to find that the freedom of establishment must be read in light of the freedom to conduct a business.¹³⁶ The AG recognised that a balance must be struck between the protection of workers and the freedom of establishment of employers. Therefore, a similar balance had to be struck between article 16 and competing social provisions in the Charter.¹³⁷ However, the AG went on to find that no such social provision was capable of counteracting contractual autonomy. Article 27 concerning worker information and consultation was

¹³² ibid 100.

¹³³ Opinion of Advocate General Wahl in Case C-201/15 *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis* ECLI:EU:C:2016:429.

¹³⁴ ibid para 1.

¹³⁵ ibid para 52.

¹³⁶ ibid para 50

¹³⁷ ibid para 57.

found to be irrelevant given the CJEU's judgment in *AMS*, finding that such a provision would require specific expression in EU or national law to be fully effective.¹³⁸ Although the Collective Redundancies Directive could have been considered a specific expression of article 27 (and perhaps article 30), it was found not to apply to the present case. The AG was particularly concerned about interfering with the legislative compromise reached as to unilaterally impose 'additional obligations on the employers, thereby removing the workers' incentive to take part in negotiations with the employers, without providing for any compensatory safeguard mechanisms which take into account the employers' situation, risks upsetting that equilibrium from the point of view of Article 49 TFEU and Article 16 of the Charter'.¹³⁹ Bizarrely, in the commercial context article 16 does not fare so well, with the CJEU dismissing outright arguments based on this provision.¹⁴⁰ But in the employment field it appears to be rising from Weatherill's icy lake. Whether it is resurrected as an interpretative tool is as yet unknown.

V. A brief note on Brexit

What are the consequences of Brexit for the continued use of fundamental rights in the interpretation of UK employment legislation? Undoubtedly, a lot depends on the model chosen to govern the UK's future relationship with the EU. The UK's attitude to the Charter has always been rather hostile, and it appears that the ambiguous opt-out will be granted full fruition. Of course, it may not be as simple as that. Should the UK adopt the Norway

¹³⁸ *ibid* para 58

¹³⁹ *ibid* para 63

¹⁴⁰ Case C-134/15 *Lidl* ECLI:EU:C:2016:169.

model of joining EFTA, the Charter will formally cease to be of application in the UK. That is not to say that the Charter will become irrelevant.¹⁴¹ As Wahl remarks, '[f]rom the absence of incorporation one cannot just assume that the Charter does not have any effects of a secondary and/or indirect nature. Such ancillary effects can be significant and should in any event not be underestimated'.¹⁴² Such effects can in particular, be achieved via the principle of homogeneity which governs the relationship between the EEA Agreement and EU law. The EFTA Court itself has stated that the that 'the objective of establishing a dynamic and homogenous European Economic Area can only be achieved if EFTA and EU citizens, as well as economic operators enjoy, relying on EEA law, the same rights in both the EU and EFTA pillars of the EEA'.¹⁴³ The homogeneity principle extends to fundamental rights, with the Court referring to judgments of the ECtHR and CJEU as well as AG Opinions in fundamental rights cases.¹⁴⁴ Specifically in the employment context, the EEA Agreement incorporates all of the EU Directives on health and safety, equality law and labour law. Having said that, 'most of the principles have been developed by the Court of Justice and

¹⁴¹ Iceland has relied on the social provisions of the Charter in infringement proceedings brought against it but the EFTA Court did not engage. See Case E-12/10 *ESA v Iceland* para 92. However, the Court went on to confirm the relevance of the Charter in Case E-15/10 *Posten Norge v ESA* and in Case E-4/11 *Arnulf Clauder*.

¹⁴² Nils Wahl, 'Uncharted Waters: Reflection on the Legal Significance of the Charter under EEA law and Judicial Cross-Fertilisation in the Field of Fundamental Rights' in The EFTA Court (ed), *The EEA and the EFTA Court: Decentred integration : to mark the 20th anniversary of the EFTA Court* (Hart 2014) 281, 282.

¹⁴³ Case E-18/11 *Irish Bank Resolution Corporation v Kaupping* para 122.

¹⁴⁴ Case E-2/03 *Asgeirsson and Others* para 23; Case E-8/97 *TV 1000* para 26; Case E-2/02 *Bellona*.

the EFTA Court has faithfully applied them'.¹⁴⁵ As such, the EFTA Court has closely shadowed the CJEU's interpretation of employment legislation, notably in the context of the transfer of undertakings.¹⁴⁶ In *Deveci*, the EFTA Court noted that the Charter was formally of no application. Nevertheless, it went on to rely on *Alemo-Herron* without mentioning article 16 of the Charter.¹⁴⁷ According to the Court, '[t]he EEA Agreement has linked the markets of the EEA/EFTA States to the single market of the European Union. The actors of a market are, *inter alia*, undertakings. The freedom to conduct a business lies therefore at the heart of the EEA Agreement and must be recognised in accordance with EEA law and national laws and practices. Thus, the freedom to conduct a business seems to have become a general principle of EEA law and risks being deployed in a similar disruptive way. In the event of a 'clean' Brexit, there will be no EU employment legislation in the UK to which the Charter can be applied. In that case, we must once again turn to the incorporation of fundamental rights through the common law. It is not difficult to imagine, however, that unabashed contractual autonomy will be the order of the day. Although the removal of a large common law jurisdiction is unlikely to influence the CJEU's interpretative method, the UK is likely to see a return to a decidedly less purposive interpretation of its own legislation. It has long been apparent that 'UK courts 'have tended to deploy an interpretative approach that is decidedly non-purposive, construing specific provisions in

¹⁴⁵ Catherine Barnard, 'Social Policy Law' in Carl Baudenbacher (ed), *The Handbook of EEA Law* (Springer 2016) 809, 809.

¹⁴⁶ Case E-2/95 *Eidesund v Stavanger Catering* para 24; Case E-3/96 *Tor Angeir Ask and Others v ABD Offshore Technology AS*.

¹⁴⁷ Case E-10/14 *Deveci v Scandinavian Airlines System Denmark-Norway-Sweden*.

the working time context without locating the interpretive exercise within a wider understanding of fundamental social rights'.¹⁴⁸

Conclusion

From a brief analysis of the use of the Charter as an interpretative tool, we can see that it is both evolutionary and revolutionary. It is evolutionary in that the social rights derive largely from pre-existing legislation which has long been given a purposive and usually employee-friendly reading. It is revolutionary in that the economic freedoms, although similarly steeped in long standing jurisprudence, have emboldened the CJEU to disrupt existing approaches to the interpretation of legislation. What the case law does show is that there is a glimmer hope that the Charter's social provisions may have bite but only if the CJEU chooses to engage with them in any meaningful way. Even if the social provisions lack any real force as tools of interpretation that is not to deny the other uses to which they may be put. One might wonder whether the Charter's social rights may act as a constraint on the EU legislature's ability to amend existing employment legislation if that legislation, whether or not that legislation has been explicitly tied to the Charter via the Explanations.¹⁴⁹ As the CJEU's pick and choose approach demonstrates, however, such an outcome is far from guaranteed. Of course, the present paper may be open to similar criticisms of being overly selective, having engaged only with articles 31 and 16 of the Charter. Having said that, it has long been accepted that art 31 is the strongest of the social

¹⁴⁸ Bogg (n 67) fn 67.

¹⁴⁹ Petra Herzeld Olsson, 'Possible Shielding Effects of Article 27 on Workers' Rights to Information and Consultation in the EU Charter of Fundamental Rights' (2016) 32 International Journal of Comparative Labour Law and Industrial Relations 251, 252; O'Leary (n 52) 324.

rights contained in the Charter, being free from any constraints of 'EU law or national laws and practices'. If such a provision has proven incapable of influencing the CJEU's approach to interpretation, then it is unlikely that any social provision can. It can only be hoped that the CJEU will abandon its formalistic approach to the Charter by embracing a more holistic analysis of all of its provisions.