

LABOUR LAW WITHIN THE RECENT JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract. *The article deals with the impact of the recent jurisprudence of the European Court of Human Rights (ECHR) on the German labour law practice. After a brief introduction of the general importance of the jurisprudence of the ECHR for the German labour law (I.), the authors illustrate the German and the ECHR's jurisprudence on the duty of loyalty towards the ecclesiastic employer (II.) and whistle blowing (III.). Analysing this jurisprudence, the authors come to the conclusion that the ECHR approved the principles of the German jurisprudence in these cases. Therefore, its impact on the practice will be rather marginal as it does not obtain such a far-reaching significance that a change in the jurisprudence regarding dismissals is to be expected. The judgements merely raised the awareness for the set of problems in the context of ecclesiastic employers and whistle blowing. In this regard, the article will try to provide the reader with basic directions on how to deal with this jurisprudence. Finally, the authors argue that concerns, the ECHR could evolve into a further instance reviewing all German judgements not only regarding the question if there is a violation of the Convention*

or not but regarding the correctness of the findings are unfounded. On the other side, the article addresses the problem that – apparently – applications have been declared admissible by the ECHR despite Art. 35 para. 1 of the European Convention on Human Rights because the final decision on the national level – dismissing the complaint as inadmissible – did not reveal the reason why the application did not succeed.

Keywords: European Court of Human Rights, ecclesiastic employer, duty of loyalty, adultery, duty to observe secrecy, whistle blowing, German labour law, *Obst*, *Schüth*, *Siebenhaar*, *Heinisch*, admissibility.

Introduction

In addition to the increasing impact of the jurisprudence of the European Court of Justice on German practice in the field of labour law, also the jurisprudence of the European Court of Human Rights (ECHR) gains importance. *A fortiori*, this holds true when and where basic human rights like the freedom of speech or the freedom of religion are applied to the employer-employee-relationship. Recently, the ECHR delivered three judgements regarding the employee's duty of loyalty towards his ecclesiastic employer and one well observed judgement regarding whistle-blowing which will have an impact on the German practice.

After a brief introduction of the general importance of the jurisprudence of the ECHR for the German labour law, this article illustrates the mentioned jurisprudence and will elaborate on its impact on the practice. Furthermore, it will try to provide the reader with basic directions on how to deal with this jurisprudence.

1. The Jurisprudence of the ECHR

1.1. General Importance of the ECHR's Jurisprudence for German Labour Law

In principle, the jurisprudence of the ECHR has no immediate effects on the German labour law,¹ because the judgements of the ECHR bind the parties of the case (*inter partes*), hence they affect the German State as well as the applicant of the case – here being an employee. Neither the parties of a labour contract nor the German labour courts are bound by the ECHR's judgements. In the German legal system the European Convention on Human Rights (Convention) only has the status of non-constitutional law. In contrast, the jurisprudence of the German Federal Constitutional Court (FCC) directly binds all German courts and agencies pursuant to Sec. 31 para. 3 of the Federal Constitutional Court Act.

1 See Oetker, H. § 10. Europarechtliche Grundlage des Arbeitsrechts. *Münchener Handbuch zum Arbeitsrecht*. 3rd edition. München: C.H. Beck, 2009, para. 19.

Nevertheless, the Convention and the jurisprudence of the ECHR do have an indirect impact on the German practice as Germany is bound to it under international law. Therefore, the German labour courts have to consider the guarantees of the Convention and its construction by the ECHR while constructing German labour and constitutional law.²

Any complaint filed with the ECHR is not directed against the dismissal or other measures by the employer but against the judgment confirming the dismissal or measure. In case the ECHR rules in favour of the applicant, Germany is obligated to compensate the applicant's damage. There is, however, no title to reemployment or annulment of the dismissal. Apart from the possibility of revision according to Sec. 580 No. 8 of the Code of Civil Procedure (CCP),³ the labour court's judgment remains valid.⁴

1.2. The Duty of Loyalty towards the Ecclesiastic Employer

In principle, the German labour law is applicable to employer-employee-relationships in the ecclesiastic domain. Of course, this includes the dismissals protection according to Sec. 1 of the German Employment Protection Act and Sec. 626 German Civil Code (CC). Its scope of application is, however, influenced by the churches' right of self-determination, which may affect the employer-employee-relationships. Particularly, the churches may define duties of loyalty according to their own self-conception. Furthermore, the churches may determine which principles of the ecclesiastic doctrine its employees have to comply with even in their private domain.⁵ The limits of the church's room to manoeuvre are the prohibition of arbitrariness pursuant to Art. 3 of the German Basic Law, morality pursuant to Sec. 138 CC, and the *ordre public*.

2 Oetker, H., *supra* note 1.

3 See Braun, J. § 580 Restitutionsklage. *Münchener Kommentar zur Zivilprozessordnung*. 3rd edition. München: C.H. Beck, 2007, para. 73 *et seq.*

4 The possibility of revision is limited to a period of five years after the final German judgement according to Sec. 586 para. 2 clause 2 CCP. Given the occasionally very long duration of proceedings before the ECHR, this limitation leads to the consequence that sometimes even in case of the Court ruling in favour of the applicant – as in the cases *Obst*, *Schüth* and *Siebenhaar* – the revision fails. See Higher Labour Court Düsseldorf, 4 May 2011, Judgement (7 Sa 1427/10), *BeckRS* 2011, 72244.

5 Regarding duties of loyalty towards the ecclesiastic employer in general, see Richardi, R. § 328. Besonderheiten des kirchlichen Dienstes im Individualarbeitsrecht. *Münchener Handbuch zum Arbeitsrecht*. 3rd edition. München: C.H. Beck, 2009; Hohn, D. Arbeitsrecht und katholische Soziallehre. *Betriebsberater*. 1995, 50(51): 2648–2650; Klar, W. Grundrechtlicher Schutz des gekündigten kirchlichen Arbeitnehmers. *Neue Zeitschrift für Arbeitsrecht*. 1995, 12(24): 1184–1186; Ruland, F. Die Sonderstellung der Religionsgemeinschaften im Kündigungsschutzrecht und in den staatlichen Mitbestimmungsordnungen. *Neue Juristische Wochenschrift*. 1980, 33(1/2): 89–98; Rütbers, B. Wie kirchentreu müssen kirchliche Arbeitnehmer sein? *Neue Juristische Wochenschrift*. 1986, 39(7): 356–359; Spengler, E. Die Rechtsprechung zum Arbeitsrecht in kirchlichen Angelegenheiten - insbesondere zur Loyalitätspflicht der kirchlichen Mitarbeiter. *Neue Zeitschrift für Arbeitsrecht*. 1987, 4(24): 833–839; Vogler, B. Grundrechte und kirchliches Selbstbestimmungsrecht - dargestellt am Beispiel der Kündigung kirchlicher Mitarbeiter wegen Wiederverheiratung. *Recht der Arbeit*. 1993, 46(4): 257–263.

Therefore, in the context of dismissals protection according to the ecclesiastic labour law the test if a dismissal has been carried out lawfully is twofold. In a first step, it has to be examined if according to the self-conception of the church there is a duty of loyalty which has been violated and how serious this violation is. Thereafter, it has to be examined if this violation justifies the dismissal. While striking the necessary fair balance according to Sec. 1 of the German Employment Protection Act and Sec. 626 CC the church's self-conception against the background of the relevant human rights of the employee and the object and purpose of the provisions of the labour law have to be taken into account. In this regard, the jurisprudence has delivered case-law defining in which cases a dismissal can be justified.⁶ Based on the fact that the human right of the employee is pivotal for the question if a dismissal is justified or not, the jurisprudence of the ECHR plays a decisive role in this field. Recently, the ECHR delivered several decisions which have to be taken account of within this fair balance according to Sec. 1 of the German Employment Protection Act and Sec. 626 CC.

1.2.1. Adultery as Violation of the Duty of Loyalty – The Cases *Obst* and *Schüth*

a) *Procedural Process in Germany*

In both cases, the applicants have been dismissed by their ecclesiastic employers – the Mormon Church and a catholic parish respectively – because of adultery and adultery and bigamy respectively. The employers argued that, adultery constituted such a grave violation of the duty of loyalty that it justified the dismissals.

i) The Case *Obst*

In the case *Obst*, the German Federal Labour Court (FLC) annulled the judgement of the Higher Labour Court (HLC) Hessen which had considered the dismissal as unjustified⁷ and remanded the case to the HLC Hessen for reappraisal.⁸ The FLC referred to the leading decision of the FCC of 4 June 1985.⁹ According to the FLC, the Mormon Church is entitled to administer its affairs by itself within the boundaries of the applicable laws. Therefore, it is entitled to impose on their employees the duty to observe the primary principles of its doctrine and deontology in the interest of its credibility. Thus, the Mormon Church could demand marital fidelity from its employee. It was held by the FLC that this did not infringe upon the prohibition of arbitrariness pursuant to Art. 3 of the German Basic Law, morality pursuant to Sec. 138 CC, and the *ordre public*. Hence, taking into account the church's right of self-determination, the

6 See Moll, W.; Reufels, M. Teil IV Arbeitsrecht. *GmbH-Handbuch*. Köln: Verlag Dr. Otto Schmidt, 2012, para. 185.

7 See Higher Labour Court Hessen, 5 March 1996, Judgement (7 Sa 719/95).

8 Federal Labour Court, 24 April 1997, Judgement (2 AZR 268/96). *Neue Zeitschrift für Arbeit*. 1998, 15(3): 145–149.

9 Federal Constitutional Court, 2 June 1985, Decision (2 BVR 1703/83, 2 BVR 1718/83, 2 BVR 856/84). *Neue Juristische Wochenschrift*. 1986, 39(7): 367–371.

violation of the duty of loyalty constitutes a good cause for the extraordinary dismissal pursuant to Sec. 626 CC.

In its judgement of 19 June 1998 the HLC Hessen obeyed the FLC regarding this question and considered the dismissal as justified.¹⁰ Although adultery as such does not constitute a cause for dismissal of the church's employees in every case it did in this particular one. The Mormon Church considers adultery as a particularly grave delinquency and the employee – given his position in the community – had special duties of loyalty towards his church. The HLC took into account that the employee's damage due to the dismissal has been limited because of his age and the duration of the employment. Furthermore, he grew up in the Mormon Church and held different positions within this church and, therefore, knew or must have known that his behavior would be considered as a grave violation by his employer. Furthermore, his delinquency was not a one-time misconduct but an extramarital long-term relationship.

ii) The Case *Schüth*

In the case *Schüth*, the German Federal Labour Court (FLC) annulled the judgement of the Higher Labour Court (HLC) Düsseldorf which had considered the dismissal as unjustified¹¹ and remanded the case to the HLC Düsseldorf for reappraisal, as well.¹² Again, the FLC referred to the leading decision of the FCC of 4 June 1985. The FLC emphasized that due to the right of self-determination of the church not only the public labour laws but also the ecclesiastical labour law applies to employer-employee-relationship. Thus, the application of public labour laws must not question the constitutionally protected characteristics of the ecclesiastic employment. Therefore, the catholic church is entitled to base its employer-employee-relationships on the overall concept of a Christian community. Furthermore, the church can demand from its employees to accept and to obey the catholic doctrine and deontology even in their private conduct of life. This includes the outstanding importance of marriage which constitutes not only a contract but an indissoluble sacrament. This concept of marital fidelity does not contradict the basic principles of the legal system, in particular the prohibition of arbitrariness, the concept of morality, and the *ordre public*. Hence, this violation of the duty of loyalty is in principle grave enough to justify a dismissal.

By judgement of 3 February 2000, the HLC Düsseldorf granted the church's appeal and considered the dismissal to be justified.¹³ Despite the considerable consequences for the employee of the dismissal, the catholic parish could not keep employing him without losing its credibility. Although, he did not belong to the employees with increased duties of loyalty, his occupation was very close to the teaching function of the church. Therefore, the interests of the parish outweighed the employee's interests in this case.

10 See Higher Labour Court Hessen, 19 June 1998, Judgement (7 Sa 1300/97).

11 See Higher Labour Court Düsseldorf, 13 August 1998, Judgement (7 Sa 425/98).

12 Federal Labour Court, 16 September 1999, Judgement (2 AZR 712/98). *Neue Zeitschrift für Arbeit*. 2000, 17(4): 208–213, p. 212.

13 See Higher Labour Court Düsseldorf, 3 February 2000, Judgement (7 Sa 425/98).

b) *Judgements of the ECHR*

The ECHR found in both judgements, delivered the same day, that the crucial question was, whether the German Courts did balance the church's interest in the protection of their credibility and the employee's interests in a fair manner.¹⁴

i) *The Case Obst*

The ECHR came to the conclusion that the German Court did balance these conflicting interests fairly. The FLC found that the applicability of the public labour law did not deprive the churches of their right to define the employer-employee-relationship. On the other hand, the labour judge is only bound by the primary principles of the ecclesiastic employer's doctrine and deontology if these principles accommodate the institutional church's doctrine and do not conflict with the basic principles of the legal system.¹⁵ To this effect, the FLC found in an unobjectionable way that the Mormon Church's rules on marital fidelity did not conflict with the basic principles of the legal system.¹⁶ Furthermore, the FLC came to the conclusion that with regard to the importance of the absolute marital fidelity for the Mormon Church a dismissal has been necessary to protect the credibility of the Church.¹⁷

According to the ECHR it was pivotal that the German labour courts did consider all the essential bearings of the case and did balance all the conflicting interests in detail and comprehensively.¹⁸ The ECHR found that the churches' right to demand duties of loyalty from their employees does not conflict with the Convention because the labour courts are not bound by the churches' rules absolutely; they rather have to examine if the churches do not demand unacceptable duties of loyalty from their employees.¹⁹

ii) *The Case Schüth*

Again, in the case *Schüth*, the ECHR did not object to the findings of the German Courts that an extramarital long-term relationship being a grave violation of the duty of loyalty could justify a dismissal in principle.²⁰ In this case, however, the ECHR concluded that – unlike in the case *Obst* – the German courts did not consider the rights and interests of the employer in an adequate way.²¹

The ECHR found a shortcoming in the examination of the German court where it – without further scrutiny or explanation – subscribed to the church's view that the tasks of the employee as organist and choirmaster were connected that closely to the teaching function of the church that the parish could employ him no longer without losing its credibility regarding the binding character of its doctrine and deontology.²² Because the

14 *Obst v. Germany*, no. 425/03, § 41, 23 September 2010; *Schüth v. Germany*, no. 1620/03, § 53 *et seq.*, ECHR 2010.

15 *Obst v. Germany*, no. 425/03, § 46, 23 September 2010.

16 *Ibid.*, § 47.

17 *Ibid.*, § 48.

18 *Ibid.*, § 49.

19 *Ibid.*

20 *Schüth v. Germany*, no. 1620/03, § 60 *et seq.*, ECHR 2010.

21 *Ibid.*, § 69.

22 *Ibid.*

dismissal was triggered by a decision of the employee within the scope of his private and family life which is protected by the Convention, a more thorough examination would have been necessary in order to balance the conflicting interests.²³

This careful examination – considering the church’s interests as employer and the employee’s right to privacy protected by Art. 8 of the Convention – was not conducted by the HLC. The labour court did not mention the virtual family life and the legal protection it enjoys under the Convention and considered only the employee’s interest in keeping his employment.²⁴ This, however, constitutes a violation of the Convention. While the church has the right to demand the respect of certain fundamental principles from its employees, the status of the employees of a church does not become “clericalised”. This means that the employer-employee-relationship based on public civil law does not become a kind of ecclesiastic relationship seizing the person concerned absolutely and covering his whole private life.²⁵ By signing the contract, the employer assumed a duty of loyalty vis-à-vis the Catholic Church limiting his right to privacy to a certain degree which is as such permitted by the Convention.²⁶ What is not permitted by the Convention is questioning the core of the right to privacy.²⁷ This aspect counts all the more, as the employee did not oppose publicly to the church’s position but rather could not follow the church’s rules in practice.²⁸

Finally, the fact that the HLC merely established that it did not misjudge the consequences of the dismissal without specifying what exactly it considered while balancing the interests as such constitutes a shortcoming in the necessary fair balance.²⁹ Of particular importance is that an employee who has been dismissed by an ecclesiastic employer only has limited possibilities to find a new employment.³⁰ This is all the more true if the employer holds a dominant position in the specific field of activity and enjoys several statutory privileges like the Protestant and the Catholic Church in Germany. The same holds true if due to the nature of the apprenticeship it is very difficult or even impossible for the dismissed employee to find a new employment outside of the church.

c) Impact on German Labour Law

These two judgements will only have a limited impact on German labour law in relation to the duties of loyalty towards an ecclesiastic employer.³¹ In principle, the ECHR approved the FCC’s and FLC’s jurisprudence. It followed the twofold test developed by the German jurisprudence and approved in principle the possibility that a violation of the duty of loyalty defined by the churches themselves can justify a dismissal.

23 *Schüth v. Germany*, § 69 *et seq.*

24 *Ibid.*, § 67.

25 *Ibid.*, § 70.

26 *Ibid.*, § 71.

27 *Ibid.*

28 *Ibid.*, § 72.

29 *Ibid.*, § 73.

30 *Ibid.*

31 See also Joussen, J. Die Folgen des Mormonen- und des Kirchenmusikerfalls für das kirchliche Arbeitsrecht in Deutschland. *Recht der Arbeit*. 2011, 64(3): 173.

The ECHR considered it crucial that the interests of the employer and the employee's interests get balanced in a fair manner. A comparison of the cases *Obst* and *Schüth* clearly shows that the ECHR did not set exaggerated standards for the necessary fair balance. While the ECHR held the balancing done in the case *Obst* to be satisfactory, the one conducted by the German courts in the case *Schüth* seemed to be short of arguments, in particular in relation to the employee's right to privacy.

In the end, both judgements did not extend beyond the remark that an adequately substantiated weighing of arguments and interest of both sides has to be done. However, this is foreseen in Sec. 1 of the German Employment Protection Act and Sec. 626 CC as well. Therefore, it can be concluded that the dismissal of an employee due to a grave violation of particular duties of loyalty towards ecclesiastic employers has been neither complicated nor facilitated. In fact, the test developed by the jurisprudence will be still applied in the future.

The necessity of a carefully conducted examination and weighing of all relevant issues – taking into account the affected interests and rights of the employee – has been emphasized. This will raise the awareness on the part of the employers and the labour courts that it is not enough to establish a duty of loyalty, the violation of that duty and the graveness of the violation. But furthermore, this violation and its effects on the employer has to be balanced with the employees interest in every single case.

1.2.2. Promotion for Another Denomination as Violation of the Duty of Loyalty – The Case *Siebenhaar*

a) Procedural Process in Germany

The applicant, a kindergarten teacher in a protestant kindergarten, has been dismissed because of her public promotion of a different community of faith and its doctrine which differed notably from the protestant doctrine. From the employers point of view this constituted such a grave violation of her duty of loyalty that a further cooperation did not seem possible.

The FLC approved the dismissal and held – referring to the leading decision of the FCC – that a violation of a duty of loyalty defined by the church itself could – in principle – justify a dismissal. The crucial issue is whether the breach of duty can justify the dismissal according to Sec. 626 CC. While trying to strike a fair balance, the FLC referred to the fact that the applicant was not only a member of the different denomination but even offered introductory courses on the doctrine of the “Universal Church” and served as contact person on registration forms. Due to the active work, in particular the active and public promotion of the doctrine, the Protestant Church could assume that these activities compromise the employee's work in the kindergarten and the credibility of the church. Furthermore it took the comparatively short job tenure of the applicant into account.

b) *Judgement of the ECHR*

Again, the ECHR established that the crucial issue in such cases is striking a fair balance of the interests of the employer and the employee.³² Regarding that point the ECHR held that the German labour courts considered all the essential arguments of the case and thoroughly balanced the interests at stake.³³ The ECHR held that the conclusions drawn by the German courts were reasonable.³⁴

c) *Impact on German Labour Law*

The judgement of the ECHR in the case *Siebenhaar* did not establish new principles or guidelines for the German labour law. It rather raised the awareness for the importance of the different interests that have to be balanced; a balance that is also required by the test of Sec. 626 CC. It did approve the principles of the German jurisprudence regarding dismissals due to grave violations of the duties of loyalty towards ecclesiastic employers. To that effect, the judgement is consistent with the judgements in the cases *Schüth* and *Obst*.

1.3. Whistle Blowing – The Case *Heinisch*

The fourth – and maybe most interesting – case is related to the questions if and when a criminal complaint against the employer by an employee can justify a dismissal.

1.3.1. Legal Situation in Germany

Due to the employer-employee-relationship the employee is bound by a duty to observe secrecy regarding trade and industrial secrets. Moreover, the employee is bound to secrecy if the employer classifies a particular fact as confidential and the secrecy is justified by an actual need of the company. Finally, an agreement between employer and employee can define duties to observe secrecy regarding certain facts. The disclosure of facts covered by the duty to observe secrecy constitutes a violation of contractual obligations – the duty to observe secrecy as well as the duty to consider the employer's interests – which can in principle justify a dismissal.³⁵ This is all the same true for a disclosure by the means of a criminal complaint. In such a case not only the employer's and the employee's interests have to be balanced but also the public interest in the disclosure of criminal behaviour has to be taken into account.

Therefore, the disclosure of internal matters by the employee, the so-called whistle blowing, can be justified under certain circumstances. This, however, implicates that the dismissal due to the violation of contractual duties by the employee is unjustified. The Federal Court of Justice (FCJ) found – in the context of post-contractual duties to

32 See *Siebenhaar v. Germany*, no. 18136/02, § 38, 3 February 2011.

33 *Ibid.*, § 45.

34 *Ibid.*, § 46.

35 See Federal Labour Court, 7 December 2006, Judgement (2 AZR 400/05). *Neue Zeitschrift für Arbeit*. 2007, 24(9): 502–504.

observe secrecy – that this is the case when grave internal deficiencies are disclosed which are of public interest and which could not be overcome by internal measures within reach of the employee.³⁶

According to the jurisprudence of the FLC a dismissal by the employer is only justified in such cases of knowingly or frivolously disclosure of wrong facts³⁷ or if the criminal complaint constitutes a disproportional reaction to the employer's conduct or the conduct of the employer's representative.³⁸ For the examination of whether the disclosed facts are true or rather incorrect, the outcome of the criminal proceedings does not represent any evidence but only an indication.³⁹ Indication for the complaint being a disproportional reaction is (1) the validity of the complaint, (2) the motive for the complaint, and (3) the absence of any internal attempts to clarify the issue.⁴⁰ The complaint has been filed illegitimately if its aim is causing damage to the employer instead of stopping the internal deficiencies.⁴¹ The necessity of a prior attempt to solve the matter internally arises from the contractual obligation of the employee to protect the employer from damages.⁴² This obligation may reach as far as requiring more than one attempt to clarify and solve the issue internally, especially where it is not the employer itself or its legal representative but another superior of the employee who committed the criminal act.⁴³ The same reasoning applies to crimes which damage the employer. Being a requirement for a justified dismissal, the onus of presentation and the burden of proof regarding the fact that the employee disclosed knowingly or frivolously wrong facts or if the criminal complaint constituted a disproportional reaction is on the employer.⁴⁴

It may be unacceptable for the employee to try to solve the issue internally sometimes, with the consequence that the duty to consider the employer's interests becomes irrelevant. There is no general primacy for the attempt to solve an issue internally.⁴⁵ This holds especially true when the employee obtains knowledge of crimes which oblige the employee to disclose this knowledge in order to not render himself liable to prosecution.⁴⁶ The same applies if he gains knowledge of serious crimes or

36 Federal Court of Justice, 20 January 1981, Judgement (VI ZR 162/79). *Neue Juristische Wochenschrift*. 1981, 34(20): 1089–1095.

37 Federal Labour Court, 3 July 2003, Judgement (2 AZR 235/02). *Neue Zeitschrift für Arbeit*. 2004, 21(8): 427–432; Federal Constitutional Court, 2 July 2001, Decision (1 BvR 2049/00). *Neue Zeitschrift für Arbeit*. 2001, 18(16): 888–890.

38 Federal Labour Court, 3 July 2003, Judgement (2 AZR 235/02), *ibid*.

39 Federal Labour Court, 7 December 2006, Judgement (2 AZR 400/05), *supra* note 35, p. 504.

40 Federal Labour Court, 3 July 2003, Judgement (2 AZR 235/02), *supra* note 37.

41 *Ibid.*, p. 430.

42 *Ibid*.

43 *Ibid*.

44 See also Federal Labour Court, 3 July 2003, Judgement (2 AZR 235/02), *supra* note 37, p. 428. Regarding the burden of proof in relation to the existence of a reason for dismissal see generally Federal Labour Court, 6 August 1987, Judgement (2 AZR 226/87). *Neue Juristische Wochenschrift*. 1988, 41(7): 438–439; see also Ulber, D.; Wolf, S. Anmerkung zum Urteil des LAG Berlin. *Entscheidungen der Landesarbeitsgerichte*. § 626 BGB 2002 Nr. 7b, p. 17 *et seq*.

45 Federal Labour Court, 3 July 2003, Judgement (2 AZR 235/02), *supra* note 37, p. 430.

46 *Ibid*.

crimes committed by the employer itself.⁴⁷ On the other hand, this is the case when remedial measures by the employer could not be expected reasonably.⁴⁸ This is certainly probable if the employer tried to solve the issue internally in vain.⁴⁹ Once again, the employer has the onus of presentation and the burden of proof regarding these facts.⁵⁰

1.3.2. Judgement of the HLC Berlin

The HLC's judgement which approved the dismissal established – referring to the jurisprudence of the FLC – that a criminal complaint might under certain circumstances justify a dismissal. These circumstances are that the complaint is based knowingly or frivolously on wrong facts or that it constitutes a disproportional reaction.⁵¹

Especially the appraisal of the facts in this case has been criticised. The HLC found that the employee based her complaint knowingly or at least frivolously on wrong facts which she could not present in court, and therefore, the complaint was not valid.⁵² In this connection the HLC referred to the fact that the Public Attorney's Office discontinued the prosecution,⁵³ and found that the engagement of a lawyer who assessed the story of the employee and approved the complaint did not exclude levity.⁵⁴

Furthermore, the HLC found that the complaint constituted a disproportionate reaction. It established that the employee's motive had to be disapproved,⁵⁵ that she did not try to clarify the issue internally,⁵⁶ and that the employer was under control of the Medical Review Board of the Statutory Health Insurance Funds (MRB).⁵⁷

1.3.3. Judgement of the ECHR

The ECHR came to the conclusion that the approval of the dismissal constitutes a violation of the freedom of expression, Art. 10 of the Convention.⁵⁸ The ECHR established that the dismissal and its approval by the German labour courts did interfere

47 Federal Labour Court, 7 December 2006, Judgement (2 AZR 400/05), *supra* note 35; Federal Labour Court, 3 July 2003, Judgement (2 AZR 235/02), *supra* note 37, p. 430.

48 Federal Labour Court, 3 July 2003, Judgement (2 AZR 235/02), *supra* note 37, p. 430.

49 *Ibid.*

50 This conclusion is suggested by the constant jurisprudence of the FLC regarding the onus of presentation and the burden of proof regarding the reason for dismissal and possible reasons for justification by the employee. See Federal Labour Court, 6 September 2007, Judgement (2 AZR 264/06). *Neue Zeitschrift für Arbeit*. 2008, 25(11): 636–641, p. 636, 638; Federal Labour Court, 17 June 2003, Judgement (2 AZR 123/02). *Neue Zeitschrift für Arbeit*. 2004, 21(10): 564–567, p. 566; Federal Labour Court, 6 August 1987, Judgement (2 AZR 226/87), *supra* note 44.

51 Higher Labour Court Berlin, 28 March 2006, Judgement (7 Sa 1884/05). *Entscheidungen der Landesarbeitsgerichte*. § 626 BGB 2002 Nr. 7b, para. 2.1.1.

52 *Ibid.*, para. 2.1.2.

53 *Ibid.*, para. 2.1.2.1.

54 *Ibid.*, para. 2.1.2.1.2.

55 *Ibid.*, para. 2.1.2.2.3.

56 *Ibid.*, para. 2.1.2.2.1.

57 *Ibid.*, para. 2.1.2.2.2.

58 *Heinisch v. Germany*, no. 28274/08, § 93 *et seq.*, ECHR 2011.

with the freedom of expression of the employee.⁵⁹ Therefore, it had to examine if this interference was prescribed by law and if it pursued a legitimate aim.⁶⁰ In this regard, the ECHR found that the possibility of a dismissal without notice according to Sec. 626 CC and the constructing jurisprudence of the FCC and the FLC prescribed such an interference and that this interference by protecting the employer's interests pursues a legitimate aim. The crucial point was whether the interference is necessary in a democratic society.⁶¹

In order to assess that question especially the employee's right to freedom of expression on the one hand and the employer's business reputation and commercial interests on the other hand have to be considered.⁶² In this regard, considering the employee's duty of loyalty, restraint and confidentiality towards the employer, the ECHR established the following four criteria: (1) the public interest in the disclosed information,⁶³ (2) whether the applicant had alternative channels for making the disclosure,⁶⁴ (3) the authenticity of the disclosed information,⁶⁵ and (4) whether the applicant acted in good faith.⁶⁶ Furthermore, the possible detriment for the employer in proportion to the public interest and the severity of the sanction have to be considered.⁶⁷

To define these criteria the ECHR refers to the jurisprudence of the German FCC and FLC. Regarding the criterion that the employee did not have alternative channels for making the disclosure, it held that the employee has to try to clarify the issue internally.⁶⁸ However, seeking a previous internal clarification of the allegations could not be reasonably expected of an employee if he or she obtained knowledge of an offence of which the failure to report would result in him or herself being liable to criminal prosecution or if redress could not legitimately be expected.⁶⁹ In the end, the ECHR came to the conclusion that the employee – after she has already tried to clarify the issue internally – could expect that any further internal complaints would not have constituted an effective means with a view to investigating and remedying the shortcomings.⁷⁰

Regarding the authenticity of the disclosed information, the ECHR likewise refers to the German jurisprudence by taking into account that the employee did not report knowingly or frivolously incorrect information.⁷¹ To this effect, it does not matter

59 *Schüth v. Germany*, § 45.

60 *Ibid.*, § 47 *et seq.*

61 *Ibid.*, § 62 *et seq.*

62 *Ibid.*, § 64.

63 *Ibid.*, § 66, 69, 71.

64 *Ibid.*, § 65, 69, 72 *et seq.*

65 *Ibid.*, § 67, 69, 77 *et seq.*

66 *Ibid.*, § 69, 82 *et seq.*

67 *Ibid.*, § 68, 88 *et seq.*

68 *Ibid.*, § 65.

69 *Ibid.*, § 73.

70 *Ibid.*, § 74 *et seq.*

71 *Ibid.*, § 78.

per se whether the investigations will lead to an indictment or will be terminated.⁷² Furthermore, the Court held that although the lack of evidence may result in the preliminary investigations to be discontinued, this does not necessarily lead to the conclusion that the allegations underlying the criminal complaint had been without factual basis or frivolous at the outset.⁷³

Pertaining to the motive, the ECHR found that the employee acted in good faith and in the belief that it was in the public interest to disclose the alleged wrongdoing on the part of her employer to the prosecution authorities and that no other, more discreet means of remedying the situation was available to her.⁷⁴ Insofar, the ECHR commented on the HLC's reasoning that in the light of the control of the MRB a criminal complaint has not been necessary and held – rejecting that reasoning – that in the applicant's experience previous complaints by the MDK about the conditions in the nursing home had not brought about any change and she was therefore of the opinion that a further visit by the MRB could not be considered as an effective alternative to remedy the shortcomings and to avoid her own criminal liability.⁷⁵

1.3.4. Impact on German Labour Law

It may be expected that this judgement will have a certain impact on the German labour law and especially on the law on dismissals in cases of whistle blowing. It becomes apparent though that there are no fundamental differences between the ECHR's judgement and the jurisprudence of the FCC and the FLC.⁷⁶ The ECHR only comes to a contrary conclusion in the particular case which is indicated by its references to the German jurisprudence regarding the key points. According to the ECHR, a criminal complaint which is based knowingly or frivolously on incorrect facts can constitute a reason for dismissal as well. Furthermore, the complaint must not constitute a disproportional reaction which will be judged – correspondent to the FLC jurisprudence – by the question if there has been an attempt of an internal clarification, whether the complaint was legitimate respectively whether the employee acted in good faith. Therefore, it can be assumed that the dismissal of employees in the case of whistle blowing has neither been simplified nor complicated. Rather, the principles developed by the jurisprudence of the FCC and the FLC still apply. However, the judgement has raised the awareness for the set of problems in the context of whistle blowing.⁷⁷

72 *Schüth v. Germany*, § 80.

73 *Ibid.*

74 *Ibid.*, § 71, 82 *et seq.*

75 *Ibid.*, § 84.

76 See also Ulber, D. Whistleblowing und der EGMR. *Neue Zeitschrift für Arbeitsrecht*. 2011, 28(17): 962–964, p. 963.

77 See also Becker, C. Das Urteil des EGMR zum Whistleblowing - Neuer Lösungsweg auch für deutsche Arbeitsgerichte? *Der Betrieb*. 2011, 64(39): 2202–2204, p. 2204.

3. Impact on the Practice

Summing up, it can be established that the mentioned judgements of the ECHR will not obtain such a far-reaching significance for the German labour law practice that a change in the jurisprudence regarding dismissals in the case of violations of the duty of loyalty towards the ecclesiastic employer or in the case of whistle blowing is to be expected.

However, the judgements regarding the duty of loyalty illustrate that the labour courts have to consider carefully if an extraordinary dismissal is justified without generally relying on the employer's assessment. Therefore, the ecclesiastic employer should take into account the rights and particular interests of the employer when deciding on a dismissal. Furthermore, the employer has to substantiate its dismissal and present the underlying facts, if for no other reason to allow the labour court to approve the dismissal without the risk of the ECHR finding a violation of the Convention. For a dismissed employee it might be a reasonable measure to take recourse to the ECHR after having exhausted all domestic remedies where the balancing of the different interests has not been conducted carefully by the courts. Thereby, the employee can obtain financial reparation and a ground for an action for retrial according to Sec. 580 No. 8 CCP.

In cases of whistle blowing, employees should – before reporting to the public or the public attorney – reassess the authenticity of the facts underlying the complaint. Furthermore, it seems advisable to mandate a lawyer to reassess the allegations and to try – even if redress could not legitimately be expected – to clarify the matter internally.

Concerns, the ECHR could evolve into a further instance reviewing all German judgements not only regarding the question if there is a violation of the Convention or not but regarding the correctness of the findings are unfounded. The ECHR did establish that it does not want to take the position of the courts of the member states.⁷⁸ Rather, it reviews the judgements regarding the question whether the courts did appreciate carefully the values of the case taking into account the rights protected by the Convention and if this appreciation of values is comprehensible.⁷⁹ This becomes apparent in the judgement in the case *Schüth* in which the ECHR did not try to strike a fair balance again but established a violation of the Convention due to the deficiencies of the balancing carried out by the German court. But also regarding the case *Heinisch*, such a concern does not seem appropriate as in this case the ECHR did not review the application of Sec. 626 CC by the HLC but analysed if there was a violation of the freedom of expression by the HLC's approval of the dismissal.

Surprising and in a certain way problematic seems the fact that the ECHR in the case *Heinisch* applied almost literally the principles developed by the FCC's and the FLC's jurisprudence but came to a conclusion being absolutely contrary to the conclusion of the HLC Berlin. And, that the legal remedies filed with the FLC and the FCC did not succeed. As far as this could be traced back to the fact that the legal remedies have been

78 *Schüth v. Germany*, no. 1620/03, § 65 *et seq.*, ECHR 2010.

79 See *Siebenhaar v. Germany*, no. 18136/02, § 45 *et seq.*, 3 February 2011.

inadmissible by some reason, the question arises – assuming that the available legal remedies in Germany are in principle sufficient – why the application despite Art. 35 para. 1 of the Convention has been declared admissible by the ECHR. Generally, before filing the application with the ECHR, an application regarding substantially the same matter has to be filed with the national (appeal) courts in accordance with the formal requirements and respites set by the national provisions including the requirements for the substantiation of grounds.⁸⁰ An individual application with the ECHR regarding substantially the same matter as a constitutional complaint declared inadmissible for such a reason should be inadmissible according to Art. 35 para. 1 of the Convention.⁸¹ Thus, the crucial question is whether the constitutional complaint has been dismissed as inadmissible, as otherwise the ECHR has no choice than to admit the application as admissible. This fact, at least from the national point of view, seems a little disturbing in these cases where the final decision on the national level does not reveal the reason why the application did not succeed. This is because – as in the case *Heinisch* – the consequence might be that, despite the availability of legal remedies which – if filed in accordance with the formal requirements and respites – would probably have remedied the violation of the Convention, Germany faces a sentencing by the ECHR. This consequence seems all the more disturbing when the perpetuation of the violation has to be blamed on the applicant itself.

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EUROPOS ŽMOGAUS TEISIŲ TEISMO NAUJAUSIOS JURISPRUDENCIJOS ĮTAKA VOKIETIJOS DARBO TEISEI

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Santrauka. Straipsnyje analizuojama naujausios Europos Žmogaus Teisių Teismo (toliau – EŽTT) jurisprudencijos įtaka Vokietijos darbo teisės praktikai. Trumpai pristatę bendrusius EŽTT jurisprudencijos įtakos aspektus, autoriai straipsnyje analizuoja Vokietijos teismų ir EŽTT praktiką bylose dėl lojalumo dvasiniam darbdaviui (Bažnyčiai) bei įskundimo. Išanalizavę minėtą jurisprudenciją, autoriai daro išvadą, kad tokiose bylose EŽTT patvirtino Vokietijos nacionalinių teismų suformuluotus principus. Todėl EŽTT jurisprudencijos poveikis bus gana nežymus, kadangi jis nėra toks reikšmingas, kad pakeistų nacionalinių teismų jurisprudenciją bylose dėl atleidimo. EŽTT sprendimai tik atskleidė problemas, kylančias bylose dėl dvasinių darbdavių veiksmų bei įskundimo. Straipsnyje analizuojami svarbiausi ir problemiškesni šių bylų aspektai.

Autorių nuomone, nėra pagrįstas susirūpinimas, kad EŽTT taps ketvirtąja instancija, kurioje bus peržiūrimi ne tik tie Vokietijos nacionalinių teismų sprendimai, kurie menamai pažeidžia Europos žmogaus teisių konvenciją, bet ir visi sprendimai, dėl kurių teisingumo kyla dvejonų. Straipsnyje atkreipiamas dėmesys ir į problemą, kad EŽTT pripažino peticijas priimtiniomis, nepaisydamas Europos žmogaus teisių konvencijos 35 straipsnio 1 dalies nuostatų, kadangi nacionalinių teismų galutiniuose sprendimuose, kuriais skundai buvo atmesti, nebuvo nurodytos priežastys, dėl kurių šie skundai nebuvo nagrinėjami.

Reikšminiai žodžiai: Europos Žmogaus Teisių Teismas, dvasinis darbdavys, lojalumo pareiga, neištikimybė, pareiga išlaikyti paslaptį, įskundimas, Vokietijos darbo teisė, Obst, Schüth, Siebenhaar, Heinisch, priimtinumai.

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