

Freedom of expression from a trade union perspective

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Whistleblowing has become an issue given considerable attention in recent years. The cliché tells a story about a courageous individual, breaking the pattern of indifference, silence or even fear at the workplace.¹ The motives for going public are – if it will make a good story – altruistic and the damage revealed is of significant public interest. The cases involved have highlighted legislation or legal initiatives from different starting points; public reaction to corruption, financial scandals or health and safety accidents, the proper functioning of stock markets and the wellbeing of shareholders, and the limits of freedom of expression for individuals from a human rights perspective.² The latter aspect touches an issue that thoroughly has been put forward in the writings of Professor Ruth Nielsen, namely the increasing influence of fundamental rights in labor case-law and legislative activities on different levels.³

Our contribution to this commemorative publication deals with a specific aspect of whistleblowing, namely the freedom of expression for trade union representatives. In this context, these representatives are employees and they express opinions or criticism towards their employer. The aim of our study is to assess the limits for the freedom of expression for these local union representatives. Furthermore, what importance has the trade union dimension when it comes to a judicial review? To find an answer to these questions we have examined case-law from the European Court of Human Rights (ECHR) and the Swedish Labor Court. Our ambition is to make a contribution to the debate about freedom of expression for trade union representatives and not to deliver a complete review of all relevant case-law.

¹ Hedin, Ulla-Carin, Månsson, Sven-Axel och Tikkanen, Ronny (2008) *När man måste säga ifrån. Om kritik och whistleblowing i offentliga organisationer*. Natur & Kultur.

² Important legal initiatives in this field are e.g. The British Public Interest Disclosure Act, the Sarbanes-Oxley Act Section 806 in the USA or the statutes about “varsling” in the Norwegian Work Environment Act.

³ See inter alia Ruth Nielsen, *European Labour Law* (2000) and *Europæisk arbejdsret* (2003).

1. The European Convention on Human Rights – freedom of expression within a trade union dimension

1.1. The ECHR and the limits for freedom of expression from a trade union perspective

Initially we want to give a short presentation of the content of Article 10 and 11 in the European Convention. We also explain some important principles that the ECHR is observing when assessing if there has been an infringement of Human Rights.

When the limits for freedom of expression under Article 10 are assessed this can be made from different angles such as the right to express one's opinion, the freedom of communicating information and the freedom to receive information. However, a person possessing those rights has simultaneously to consider important restrictions that follow from duties and responsibilities connected to these described rights. From Article 10 (2) follows that restrictions or penalties that are deemed as necessary in a democratic society may be prescribed by law. These restrictions may reflect issues like national security, the protection of the reputation or rights of others or the protection of health and morals. Thus, the article defining an individual's freedom of expression is complex in itself.

Article 11 protects the right to freedom of assembly and association, including the right to form trade unions. In cases about freedom of expression where trade union representatives are involved Article 10 as well as Article 11 has been invoked. Article 11 is phrased in a common way as Article 10. The first paragraph states the right while the second lists a series of legitimate exceptions.

Other important aspects when considering the case-law from the ECHR is that the court in its decisions uses a dynamic approach which means that important changes in environment, society or public opinion might be reflected. Furthermore, with the purpose to establish certain European minimum-standards as regards level of protection, the court gives certain expressions an autonomous definition irrespective of the meaning in the different contracting states.

As the ECHR is not an ordinary court of appeal, court-decisions from the contracting states are only partially examined. For example, generally, the ECHR is not reconsidering questions of evidence. This means that an application claiming that a national court has made an error of fact is inadmissible under the convention. One reason to this is that courts on a

national level are supposed of being in a better position in evaluating evidence or the application of national legislation. Thus, the main object for the ECHR is to assess whether there has been a breach of the obligations following from the European Human Rights Convention. In this way, the ECHR leaves a certain “margin of appreciation” or room for manoeuvre to assessments made by courts or other authorities on a national level. The ECHR seems to refer to this margin of appreciation in more sensitive cases and when a decision is finally balanced. Where the case is more apparent, either to accept or reject a decision on a national level, a reference to this margin is not commonly made.⁴

Hence, when contracting states are limiting the freedom of expression under Article 10 (1), it must be shown that the limitation was necessary in a democratic society for one or more of the exceptions under Article 10 (2). The limitation in itself must be reasonable as well as the imposed sanctions. In this way, the limitation is seen as necessary in a democratic society. Furthermore, the restriction must be prescribed by law and proportionate to a pressing social need. It seems as the core of the “margin of appreciation concept” is to found primarily in cases where considerations about public interest or the needs of democracy have to be made.⁵ The same principles are applicable in relation to Article 11.

In the ECHR case-law on freedom of expression for trade union representatives it is obvious that limits may follow out of two main reasons. On the one hand, local union representatives have loyalty obligations that follow from the contractual relation with the employer. The second aspect is the mandate as a union representative. As we can see in the following examples, the ECHR has declared, that certain activities may be seen as typically falling inside or outside such a mandate. Furthermore, restrictions in the freedom of expression may also follow from collective agreements or legislation as union representatives usually receive sensitive information from an employer`s perspective. Lastly, an assessment is also made whether an issue can be seen as a matter of public interest. The public interest may relate to matters inside or outside a company or organization.

1.2. The principle of loyalty in a trade union context

⁴ Greer, Steven (2000), *The Margin of Appreciation: Interpretation and discretion under the European Convention of Human Rights*, p 14. Human rights files No 17, Council of Europe Publishing.

⁵ Greer (2000), p 22.

The first case we have studied, *Marchenko v. Ukraine*, is from 2009.⁶ The applicant invoked Article 10 as well as Article 11. The ECHR found that the applicant's right to freedom of expression was at the heart of the complaint. Nevertheless, the grounds for decision make considerable reference to an existing trade union dimension.⁷ The context of the case was that a teacher and local trade union representative as well, Marchenko, had reported his director and employer to a "Control Inspection Department" alleging misuse of school property and funds. This reporting, on behalf of the regional trade union was followed up by a criminal complaint against the employer and a public picketing action. However, Marchenko's employer brought a private prosecution against Marchenko and he was condemned for false accusation of serious crimes to one year's imprisonment and to a fine.

The ECHR referred to the principles of loyalty in an employment relation developed inter alia in the *Guja* case.⁸ The signaling of illegal conduct or other wrongdoing in a workplace should in the first place be made to persons superior and inside the organization. As a second step a competent authority could be contacted and as a last resort, a disclosure to the public could be reasonable. However, in the assessment whether the criticism of the headmaster was made in bad faith, the trade union dimension is of importance. The ECHR acknowledges that Marchenko had acted on behalf of the local union and that various materials were presented in support of his allegations. On this point, a necessity to limit the freedom of expression could not be established.⁹

When it comes to the Ukrainian court's reasoning about the alleged participation in the picketing, which was considered being defamatory towards the employer, the ECHR found that the domestic authorities had acted within their margin of appreciation. Interestingly, in this part of the judgment there is no trace of any trade union dimension. In contrast, the ECHR argues about principles of loyalty in an employment relation, the protection of an individual's reputation under Article 8 of the Convention and the necessity to convict people acting defamatory. However, the Court found the sanction, one year of imprisonment being disproportionate. Such a sanction would have chilling effect on public discussions.¹⁰

⁶ *Marchenko v. Ukraine*, 19 May 2009.

⁷ See paragraph 45-51 of the judgment.

⁸ *Guja v. Moldova*, 12 February 20008.

⁹ Paragraph 47 of the judgment.

¹⁰ Paragraph 52 and 53 of the judgment. The ECHR did not pay attention to the fact that the imprisonment had been suspended.

1.3. Within the limits for trade union activities

The next case, *Vellutini and Michel v. France*, refers to two local representatives from a police officers' union who had acted on behalf of a member.¹¹ On a flyer directed to members of the municipality they had criticized the mayor in his function as an employer. The police officer in question had been disciplined by the mayor for having an offensive attitude. Furthermore, the mayor had criticized the officer in two issues of the municipal newsletter. As a response to the mayor's step to make the issue public, Vellutini and Michel had inter alia written that the mayor ruled the municipality like a dictator.

The mayor found the flyer being defamatory and discreditable so he started criminal proceedings against the two union officers. They were convicted as the Bordeaux Court of Appeal had found them taken improper advantage of their freedom of expression as trade union officers. The court found that the allegations against the mayor were not based on appropriate evidence.

Vellutini and Michel made a complaint to the ECHR and the case was examined in relation to article 10 and article 11. The ECHR found that the issue dealt with trade union representative's freedom of expression towards an employer. As they had acted on behalf of a member, the court considered it as a topic within the mandate of a trade union officer. Furthermore, the court argued that the mayors' step to comment the police officer in a local paper made the whole task a question of public interest. So the flyer from the trade union was by the ECHR seen as a contribution to an already ongoing public debate. The court stated that within such a debate, there should be a certain margin for exaggeration, provocation and to use an immoderate language.¹² Referring to earlier case-law, politicians have to accept harsher critique than ordinary citizens. The court meant furthermore that the actual wording not had past the limits of what can be expected in a trade union discourse. The Court concluded that the conviction, with regard to the nature and harshness of the sanctions imposed on Mr Vellutini and Mr Michel had been disproportionate to the impugned conduct. The Court also declared that the interference with the applicants' right to freedom of expression, in their capacity as trade union officials, had not been necessary in a democratic society.¹³

¹¹ *Vellutini and Michel v. France*, 6 January 2012.

¹² *Handyside v. United Kingdom*, 4 November 1976.

¹³ The ECHR held that France was to pay the applicants EUR 4 000 each in respect of pecuniary damage and EUR 6 339 jointly for cost and expenses. One judge was of dissenting opinion holding that there had been no violation of Article 10.

1.4. Overstepping the limits for trade union activities

The circumstances were a bit different in the case of *Sanchez and others v. Spain*.¹⁴ Here the union representatives had a private employer, the dispute in question had a more company-internal character and there was a rivalry involved between two trade unions.

The six trade union representatives who had made a claim under article 10 and article 11 had worked as deliverymen for an industrial bakery company in Barcelona. The background was a long-drawn dispute about calculating remuneration. The conflict had led to the set up of an alternative local trade union, which the six applicants were representing, and to a series of court disputes.

The ultimate reason why they had been given notice were two satiric articles and a cartoon in the union's newsletter. The cartoon in question showed a caricature of the company's human resource manager being sexually attended by two representatives from the rival trade union. These two persons had witnessed in favor of the company during an earlier dispute in court. The employer's reaction was dismissal for serious misconduct and for impugning the reputation of their colleges. Another result following the dismissals was the termination of the trade union itself.

The union representatives appealed, but two Spanish courts took the same view and made a distinction between the applicants' trade-union membership and the content of the newsletter. The dismissals were not deemed as a measure of reprisal against the trade union itself. Instead, there was a genuine ground for terminating the contracts of employment, as the articles and the cartoon had overstepped the limits of admissible criticism in an employment relation.

In the judgment from the ECHR, the court resembled that the contracting states have a certain margin of appreciation in assessing the necessity and scope of any interference in the freedom of expression under Article 10. This is the case in particular when a balance has to be struck between conflicting private interests. The court continued that positive measures of protection for a state may arise even in the sphere of relations between individuals and against interference by private persons. In this case, the court made an examination under Article 10 in the light of Article 11. In contrast to the

¹⁴ Palomo Sanchez and others v. Spain, 12 September 2011. The judgement was made in Grand Chamber. An earlier judgement held by seven judges was made on 8 December 2008, Agilera Jiménez and others v. Spain.

Spanish courts, the ECHR observed that the conflict had a genuine trade-union dimension and therefore it also concerned a matter of general interest.

The court observed that the primary role of publications of this type should be to deal with matters essentially relating to the defense and furtherance of interests of the unions` members in particular and with labor questions in general. However, with reference to the certain margin of appreciation, the ECHR found that the conclusions of the domestic courts could not be regarded as unreasonable. The court argued that the cartoon and the articles were intended more as an attack on colleagues for testifying before court than as a means of promoting trade union action *vis-à-vis* the employer. Hence, the limits for an acceptable critique within labor relations had been overstepped and this could not be balanced by the, apparently limited, public interest in question. In that sense, the applicants` dismissals were not seen as a disproportionate or excessive sanction. Hence, there had been no violation of Article 10.

However, there was a dissenting opinion made by five judges out of twelve. Their first point was that the trade union dimension of the conflict had been diminished. The reason why the alternative trade union had been formed was because the company had renounced the workers` claim to salaried status, which earlier had been acknowledged by the Spanish Employment Tribunal. Therefore, the trade union connotation should have been assessed more thoroughly in the light of the ongoing industrial dispute. Moreover, the case-law applicable to the freedom of expression in media would have been pertinent to apply, as trade-unions have a watch-dog function similar to that of the press when it comes to questions related to the working life.

Another point of dissent was that the limits for using satire and caricatures were drawn narrower than the case-law under Article 10 states in general. This case-law observes, *inter alia*, that satire should be taken for what it is. Furthermore, the harsh criticism in question did not relate to the intimacy of the individuals or to other rights pertaining to their private lives but to their role in the industrial dispute.

Finally, the dissidents meant that the punishment in form of a dismissal did not meet a “compelling social need” that is “necessary in a democratic society”. Reference was made to the actual widespread employment crises in southern Europe and that the imposition of such a harsh sanction would have a “chilling effect” on the conduct of trade unionists in general.

1.5. Outside the scope for trade union activities

The case *Szima v. Hungary* is about a trade union representative and senior police officer.¹⁵ In her capacity of being the editor of the trade union's website she had for a period of two years published severe criticism about the leadership and management of the police corps. Her articles referred inter alia to outstanding remunerations due to police staff, alleged nepotism and undue political influence in the force as well as to dubious qualifications of senior police staff.

Two Hungarian courts found that the acting of Ms Szima had fallen outside the core of a trade union's activities and that her allegations were capable of causing insubordination. Hence, she was sentenced to a fine and demotion. The court of appeal made a remark that the views contained in her writings constituted one-sided criticism whose truthfulness could and – a bit surprisingly – even should not be proven.

Ms Szima made a claim under Article 10 and Article 11 to the ECHR. However, the court found that her acting had overstepped the mandate of a trade union leader as the allegations against the management of the police were “not at all related to the protection of labour-related interests of trade union members”.¹⁶ Hence, the case was examined not in relation to Article 11 but to the general perspective of freedom of expression under Article 10.

In view of the margin of appreciation for national courts in these cases, the ECHR found that the “trust and credibility of the police leadership” represented a “pressing social need”, in line with the restrictions under paragraph 2 of Article 10. The court shared the view that Ms Szima's criticism indeed was capable of causing insubordination since the legitimacy of police actions had been discredited. Furthermore, as a high-ranking officer and trade union leader she should have exercised “her right to freedom of expression in accordance with the duties and responsibilities which that right carries with it in the specific circumstances of her status and in view of the special requirement of discipline in the police force”.¹⁷ By entering the police, the applicant should have been aware of the restrictions that apply to staff in the exercise of their rights. The fact that the case touched questions of general interest was not in itself a strong argument for the court, especially as Ms Szima's allegations to a large extent were based on value judgments and not on facts. Still, the ECHR observed that it was a matter of serious concern that Ms Szima was barred from submitting evidence in the domestic proceedings that could have underpinned her allegations. However,

¹⁵ *Szima v. Hungary*, 9 October 2012.

¹⁶ Paragraph 31 of the judgment.

¹⁷ Paragraph 32 of the judgment.

the court concluded that there was no appearance that the domestic courts lacked impartiality or that the proceedings otherwise had been unfair or arbitrary. The sanctions imposed, the demotion and a fine, were deemed as “relatively mild”.

The president of the ECHR had a dissenting opinion. His major point was that the majority had diminished the trade-union dimension of the case. By contrast, he meant that a union’s role of protecting their members should encompass not only situations concerning ambiguities in remuneration but also alleged failings in an institution itself. He even wondered if not the court itself had overstepped its mandate by setting up such strict limits for the legitimate area of trade union activities.

2. Discussion

2.1. The public interest argument and the legitimate scope for trade union activities

When assessing the limits for the freedom of expression of a trade union representative this is a more complex issue compared to ordinary employees. In the *Marchenko* case it was obvious, that a union representative has a sort of double loyalties. The loyalty towards the employer stems from the contractual relation. Another loyalty derives from the mandate of the union members or, in terms of the ECHR, the legitimate scope of trade union activities.

By analyzing the ECHR case-law it is obvious that the linkage to a public interest plays an important role. In the *Sanchez* case the court found that the dispute had not been purely private as “it was at least a matter of general interest for the workers of the company”.¹⁸ Another dimension of public interest is that mismanagement or wrongdoings inside a company may affect third parties on the outside. We mean that this is the *raison d’être* why whistleblowing legislation has been put in place in a series of countries.¹⁹ At a work place, trade union representatives are often those employees who are in the best position of obtaining information about all kind of deficits in management. However, in the *Szima* case the court majority underlined that allegations about corruption, nepotism and mismanagement against the institution of employment itself overstepped the mandate of a trade union leader. These issues were not supposed to be related to the protection of

¹⁸ Paragraph 72 of the judgment.

¹⁹ See e.g. *Whistleblowing and democratic values* (2011), Wim Vandekerckhove & Dave Lewis (Ed.), E-book http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1998293.

labor related interests of a trade union member. Obviously, the court does not seem to acknowledge trade union representatives as potential whistleblowers in an up-to-date context. However, in the *Vellutini* case the court had acknowledged this external aspect of public interest. But the circumstances were distinguished from the Hungarian case. The French trade union representatives had not initiated the public discourse. They were taking part as a reaction to allegations from the mayor towards a union member.

In some comments to the *Szima* judgment it has been put forward that the protection under Article 10 seems to be reduced for certain individuals, namely when the individual is acting as a representative of a trade union. “The public interest aspect in all other circumstances is precisely a decisive element which extends and upgrades the level of protection of freedom of expression. This is especially the case when information is published or statements are made on alleged corruption, fraud or illegal activities in which politicians, high ranked civil servants or public institutions are involved.”²⁰

There are some interesting parallels in the dissenting opinions of the *Sanchez* case and the *Szima* case. We find similar arguments about insufficient acknowledgment of what can constitute a trade union dimension. Another argument is that trade union representatives seem to be limited to engage only in strict in-house management matters. One argument coming up was the role of potential watch dogs against all kind of wrongdoings in society. Here, the ECHR has acknowledged that media representatives play a crucial role. Hence, they should benefit from a high level of protection in “watch dog cases”. This specific role has been extended to environmental protection groups.²¹ However, the watch dog argumentation that can be found in several ECHR judgments has never been seen as adequate in relation to the potential role of a local safety representative or other trade union representatives.²²

2.2. The “margin of appreciation” and the freedom of expression

An important point in the *Szima* and in the *Marchenko* case was the ECHR:s reference to the so called margin of appreciation of contracting states when assessing the necessity and scope of possible interference with Article 10.

²⁰ Professor Dirk Voorhoof at Ghent University.

<https://inform.wordpress.com/2012/11/17/case-law-strasbourg-szima-v-hungary-trade-union-freedom-of-expression-dirk-voorhoof/> .

²¹ Vides Aizsardzības Klubs v. Latvia, 27 May 2004.

²² Paragraph 7 in the dissenting opinion of the Sanchez case.

These cases could be seen as sensitive cases where the court has to balance its decision.²³ In the *Szima* case the ECHR argued that the Hungarian judgments were made on basis of legislation with the purpose to maintain the discipline, trust and credibility of the armed forces. Furthermore, the relatively mild punitive measures had been considered as proportionate. In the *Marchenko* case the ECHR stated that the domestic courts “went beyond what would have amounted to a “necessary” interference with the applicant’s freedom of expression.”²⁴ One year of imprisonment was considered as disproportionate. Such a sanction would have chilling effect on public discussions.

In the case of *Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria* we find a similar situation, like in the *Szima* case, with criticism against the management of the armed forces in a trade-union like magazine, “der Igel”.²⁵ A national court had found articles in “der Igel” in breach with the law. Similarly to the *Szima* case, the soldier’s magazine had not agitated for any forms of disobedience or violence. However, in the “Österreich” judgment the ECHR underlined that the freedom of expression is applicable to ideas and information that offend, shock or disturb. Other to the *Szima* case, the court argued that an assertion of disobedience has to be illustrated and substantiated by specific examples. Such evidence could not be found in the articles of the soldier magazine. The court concluded that despite of the often polemic tenor, a mere discussion of ideas must be tolerated in the army of a democratic state just as it must be in the society that such an army serves.²⁶ The ECHR found that the refusal to distribute the magazine was disproportionate, hence a violation of Article 10.

It is obvious that the ECHR leaves a certain margin of appreciation for national courts to take into account legislation regarding national security that limits the freedom of expression. Nevertheless, this does not necessarily prevent the ECHR from criticizing a judgment of a national court.

3. Sweden - limits for trade union representative’s freedom of expression and the right to criticize

²³ Greer (2000) p 14.

²⁴ Paragraph 53 of the judgment.

²⁵ *Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria*, 19 December 1994. Though the Austrian VDSÖ is not a traditional trade union, it plays an equal role for recruits inside the Austrian army.

²⁶ Paragraph 38 of the judgment.

3.1. Legal framework

We start by giving an overview of some benchmarks for union representatives` legal protection in relation to their freedom of expression. Then we present four cases from the Labor Court. In contrast to some other countries, we do not consider that Sweden has an explicit law protecting whistleblowers.²⁷

The room to maneuver for trade union representatives is given primarily by statutes regarding the freedom of expression, the freedom of assembly and to organize and statutes for work environment. Furthermore, the case-law defining the freedom of expression for trade union representatives is embedded in the Swedish system for co-determination in working-life. One example where the Swedish Labor court has made a general statement about freedom of expression out of a trade union dimension is the case AD 1982 no110.²⁸ The court declares that employees as well as the trade union itself have an extensive right to criticize and dispute the acting of an employer. These rights derive from the freedom of expression in the Swedish constitution. However, the court goes further, and underlines that the right to criticize is an important prerequisite for good working conditions and good work performance. Moreover, a widespread right to criticize is necessary so that trade unions can act efficiently at the work place.

On the one hand, the freedom of assembly and right to organize is protected by the Co-determination act (MBL 7-9 §§).²⁹ Primarily, the purpose with these statutes is to protect the right to bargain. This means that the protection coming from these statutes mainly is based on a collective or organizational perspective.³⁰ But when it comes to the protection for criticizing an employer in relation to statutes concerning freedom of expression, the object being protected is not the union as such but its representatives. This means that the limits for trade union representatives` rights to criticize their employer are always assessed in the light of those obligations that follow from employment relations.

²⁷ Recently, the Swedish government has issued directives for an official report with the aim to strengthen the protection for employers who are “signaling”, dir 2013:16.

²⁸ The case dealt primarily with the employer`s notice of an engineer who as well was a local union representative. The court found that the notice had been made on factual grounds as the employee had acted outside the limits of what is acceptable in an employment relationship.

²⁹ Lag (1976:580) om medbestämmande i arbetslivet.

³⁰ Petra Herzfeld Olsson (2003), *Facklig föreningsfrihet som mänsklig rättighet*, p 30, Iustus förlag.

The protection coming from MBL 7-9 §§ gives inter alia a trade union member a right to contact a safety representative or other union representatives instead of signaling irregularities directly to the employer (AD 1994 no 79, AD 1997 no 57).³¹ In that sense, contacting the local trade union is deemed as an in-house whistleblowing channel. In that sense the “signaling” to a trade union representative gives a collective dimension to the issue.

Trade unions are expected to negotiate and cooperate with the employer about all kind of problems or incongruities. The Workplace Union Representatives Act offers a particular protection, among others against harassment.³² Representatives receiving the strongest protection are safety representatives by the Work Environment Act.³³ One of the duties of a safety representative is to raise the alarm about failures and imperfections at the workplace. Therefore, it is not an overstatement to consider that the provisions in the Work Environment Act render a status of a legitimate whistleblower to a safety representative.

Acting within the scope of what is deemed as trade union activities gives a union representative a particular protection. The Labor Court has emphasized that a union representative should have the ability to act with strength in a situation of negotiation, albeit in respect of those limits being made up by law and collective agreements. Consequently, putting forward contradictory positions towards an employer is part of everyday life of union representatives (AD 2007 no 53). This explains why a union representative has a stronger protection for expressing opinions and putting forward critique towards the employer than an ordinary employee. At the same time the Labor Court underlines that a trade union representative should act with a higher sense of responsibility when it comes to general behavior at the workplace (AD 2007 no 53).

However, the freedom of expression for trade union representatives is also limited by a duty of confidentiality. We find these statutes in the Co-determination act, the Workplace Union Representatives Act, the Work Environmental Act, the Official Secrets Act and the Anti-discrimination Act.³⁴

Hence, the right to put forward criticism for a union representative has certain limits. By having a contractual obligation as an employee, he or she

³¹ AD means “Arbetsdomstolens domar”, e.g. judgments by the Labor Court.

³² Lag (1974:358) om facklig förtroendemans ställning på arbetsplatsen, 3 §.

³³ Arbetsmiljölagen (1977:1160).

³⁴ Offentlighets- och sekretesslagen (2009:400), Diskrimineringslagen (2008:567).

runs the risk of getting a notice of dismissal if these limits have been overstepped. The assessment whether an employer's decision to give notice has been made on factual grounds is generally made in relation to the Employment Protection Act, LAS.³⁵ This is also the case when an employee has been a trade union representative or even a safety representative (AD 1997 no 57). In a few cases the representative has received damages for infringement not on the base of LAS but on the base of the Work Environment Act (AD 2007 no 70).

Rarely mentioned in the case-law of the Labor Court are obligations in relation to Article 10 and 11 in the European Convention on Human Rights. The same goes for ILO-convention 158 about termination of employment. Sweden, as a contracting state, has obligations by international law and in addition, since 1995 the European Convention is incorporated into Swedish law. However, the unwillingness of the Swedish Labor Court to acknowledge human rights protection with reference to international conventions in workplace disputes is well known.³⁶ In cases about an employee's limits for putting forward criticism, the litigants reference to Article 10 has not been a successful strategy.³⁷ The reason to this can be disputed. We believe that this fact can partly be explained by ignorance, a dualistic legal tradition and pragmatism. However, in legal disputes where the court has not developed own legal principles or no adequate statutes in Swedish labor law are available and the issue is sensitive between the parties of the labor market, the European Convention is more frequently acknowledged. This is the case when it comes to issues related to e.g. the negative freedom of association or compulsory monitoring fees to the local union branch.³⁸

3.2. Case-law - trade union representatives in whistleblowing situations

The four following cases from the Swedish Labor Court refer to situations more or less connected to deficiencies in safety arrangements at the workplace.

In AD 1987 no 65 a union representative, and pilot as well, had expressed that the management was lousy (or even "to hell"). The issue was about lack

³⁵ Lag (1982:80) om anställningsskydd.

³⁶ Petra Herzfeld Olsson (2012), *Folkrätten i arbetsrätten* in "Folkrätten i svensk rätt", Stern and Österdahl (Ed), Liber förlag and Kent Källström and Jonas Malmberg (2013), *Anställningsförhållandet. Inledning till den individuella arbetsrätten*, Iustus förlag.

³⁷ AD 1994 no 79 and AD 1997 no 57.

³⁸ AD 1998 no 17 and AD 2012 no 74.

in safety arrangements. The statement had been made in a situation of conflict where the union was involved. However, the Labor Court found that the representative had acted within the limits even if the tone had been “rough”. As the employer had dismissed the pilot, this was deemed by the court as a threat and an infringement of the freedom of association. The pilot and the union were entitled damages.

Another case is about an elevator-mechanic who was a local safety representative (AD 1987 no 65). The employer had given notice after the employee had made a report to a supervisory authority as an elevator was defective. The court meant that a safety representative has to have a certain amount of discretion when it comes to act adequately in safety issues. Furthermore, the court found that the report to the supervisory authority had been made on reasonable grounds. The fact, that this report later had been high lightened and published in a trade union paper, was not a reason for putting the blame on the mechanic. The notice was annulled by the Labor Court.

In a case about ambulance service that had been contracted out to a private entrepreneur, three union representatives and safety representatives as well had been given notice (AD 1997 no 57). The reason was extensive criticism about inadequate management and deficient equipment. The employer argued that a strong reason for giving notice was that the union representatives had handed over a sort of log book to a local supervisory authority and a trade union newspaper. This log book was revealing all kind of criticism, e.g. related to the internal management of the company and the maintenance of the ambulances. As a result of these actions, the attention in the media had been significant and the company had received bad publicity. However, the Labor Court observed that the highlighted problems were based on factual grounds and that the proper functioning of the ambulance-service was of general interest and financed by the public as well. The court reminded that the representatives had tried to find solutions with the employer before they blew the whistle outside the workplace. Neither could the court find any motives for deliberately damaging the employer. The judgment was annulment of notice and damages.³⁹

Our analysis from this case is that a trade union dimension or the question of freedom of expression for trade union representatives rarely has been acknowledged by the Labor Court. The roll of the safety representative as a

³⁹ One of the representatives received lower damages as the court found that she had been a bit too active in putting forward her criticism outside the company. Two judges had a dissenting opinion as they meant that the notice had been made on factual grounds.

legitimate whistleblower is in no way considered. Primarily, the Labor court makes its decision in relation to general principles of loyalty in an employment relation. In this case the court found that the limits for acceptable criticism towards the employer had not been overstepped.

The last case is about a dismissal of a union representative and train driver at the Underground in Stockholm (AD 2007 no 53). The context was given by ongoing disputes about the employer's human resource management and the way safety arrangements were handled. In these conflicts, the court found that the union representative had used a language towards the employer that had passed the limits of what can be acceptable. The use of verbal threats and comments like "ashole" were not deemed as acceptable, especially from a labor representative when acting on behalf of the union members. Accordingly, the dismissal had been made on factual grounds.

4. High lightening the trade union dimension

We have analyzed disputes about the freedom of expression at the workplace and where the employees in question have acted as trade union representatives. We believe that there are strong arguments for high lightening the trade union dimension on a more general level. In addition, this dimension is connected to specific problems with double loyalties; on the one hand following from the contractual employment relation itself and on the other hand following from the mandate representing the union's members. However, the Swedish Labor Court as well as the ECHR put this trade union dimension in the background in relation to the demands of loyalty in an employment relation. Hopefully, a case like the *Szima* case will be examined in the ECHR grand chamber in the future. This will give the ECHR an opportunity to develop more general guidelines for assessing the freedom of expression for trade union representatives, and to clarify the meaning of the interpretation of Article 10 in the light of Article 11. We believe that the principles about freedom of expression for employees the court has developed in the cases *Guja v. Moldova* and *Heinisch v. Germany* are not sufficient for those situations that we have described.⁴⁰ Until now, it seems that the ECHR only can coop with a trade union dimension when the representatives are defending individual union members in a strict sense like in the *Vellutini* case or act on behalf of the trade union like in the *Marchenko* case.

⁴⁰ *Heinisch v. Germany*, 21 July 2011.

We also hope that the Swedish Labor Court to a higher extent makes reference to the European Convention on Human Rights and the case-law of the ECHR in cases concerning individuals' human rights. Otherwise the Labor Court in practice is undermining the status of the European Convention in Sweden.⁴¹

This leads us to some concluding remarks. We can see that trade union representatives have a natural role as watch-dogs in working-life. However, when mismanagement or security deficits are addressed, public interest aspects that a court might acknowledge may go far beyond the mere concern for union members. Furthermore, the double loyalty that a union representative is facing has to be considered when the limits of freedom of expression are examined. We find good arguments that trade union representatives need a broader scope for action when acting as whistleblowers than given by the ECHR and by the Swedish Labor Court.

⁴¹ Petra Herzfeld Olsson (2012).