



Zuzana Vikarská, Czech Society for European and Comparative Law

Strategic Litigation: Fundamental Training

...remember Mangold? (C-144/04)

- fixed-term employment contract between Mangold & Helm
 - the employment contract: 1 July 2003 to 28 February 2004
- two lawyers, testing the legality of German legislation
 - Gesetz über Teilzeitarbeit und befristete Arbeitsverträge (TzBfG)
- admittedly contrary to EU prohibition of discrimination
 - **Directive 2000/78** – to be transposed by 2 December 2006
 - **EU Charter** – not part of primary law until 1 December 2009
- very brave! (neither the Ch., nor the DIR were ‘ripe’ yet)

Mr Mangold's employment contract

The duration of the contract shall be based on the statutory provision which is intended to make it easier to conclude fixed-term contracts of employment with older workers, since the employee is **more than 52 years old**.

The parties have agreed that there is **no reason** for the fixed term of this contract **other** than that set out in para 2 above. All other grounds for limiting the term of employment accepted in principle by the legislature are expressly excluded from this agreement.

Mangold (C-144/04): admissibility

- in Lux, Germany argued inadmissibility (fictitious case!)
- ECJ: In the context of [the preliminary ruling procedure], the national court, which alone has direct knowledge of the facts of the case, is in the best position to assess, with full knowledge of the matter before it, the need for a preliminary ruling to enable it to give judgment.

Mangold (C-144/04): admissibility

- ECJ: ...in the case in the main proceedings, it hardly seems arguable that the interpretation of [EU] law sought by the national court does actually respond to an objective need inherent in the outcome of a case pending before it. In fact, it is common ground that the contract has actually been performed and that its application raises a question of interpretation of [EU] law. **The fact that the parties to the dispute in the main proceedings are at one in their interpretation of Paragraph 14(3) of the TzBfG cannot affect the reality of that dispute.**

Mangold (C-144/04): result

- what about the timing? (DIR not yet ‘ripe’)
- ECJ: Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation.
 - “the source of the actual principle underlying the prohibition of those forms of discrimination [can be] found [...] in various international instruments and in the constitutional traditions common to the MS.”
 - “The principle of non-discrimination on grounds of age must thus be regarded as a **general principle of Community law**.”

Mangold (C-144/04): consequence

- **TzBfG is contrary to EU law** → what happens next?
 - a) ECJ invalidates (quashes) the problematic provision(s) of TzBfG
 - b) national court must ignore the problematic provision(s) of TzBfG
 - c) nothing happens; German Parliament must amend the TzBfG
- old principle, **Simmenthal** (C-106/77) → disapply national law
 - national courts must ensure that EU rules are fully effective, setting aside any provision of national law which may conflict with that law

What is strategic litigation?

- strategic litigation, impact litigation, public interest litigation...
- carefully selected legal cases
- goal: achieving broader social / political changes
 - to create lasting systemic change (broader transformative purpose)
 - to set important legal precedents / to influence policy development
- often combined with other complementary tactics
 - social media campaigns, grassroots organising, academic engagement, public outreach, policy advocacy work...

What is strategic litigation?

- offensive (proactive) × defensive SL
- real cases × fabricated cases × cases with no injured 
 - **Mangold** (C-114/04)
 - **Firma Feryn** (C-54/07)
 - **NH v Associazione Avvocatura** (C-507/18)
- for comparison: ECtHR, **Beizaras and Levickas v. Lithuania**
 - “even if there might have been an element of strategic litigation in the LGL Association lodging the complaint on the applicants’ behalf, this is irrelevant for the admissibility; [LGL] acted not on the basis of any abstract situation [...] but in response to specific facts affecting the rights of the two applicants...”

Risk of counterproductive outcomes

- remember ***Brown v Board of Education*** [1954]?
- what preceded: ***Plessy v Fergusson*** [1896]
 - “That’s an example where strategic litigation very well intended, very well thought through, ultimately resulted in reinforcing a negative law, hardening a step backward in jurisprudence which took over a half century to overcome,” says **James Goldston**, Executive Director of the Open Society Justice Initiative

The power of precedent

- did Mangold only apply to Mr Mangold & Mr Helm?
- of course not: precedential power of CJEU jurisprudence
- proclaiming national law incompatible, interpreting EU law
- case study: C-518/15 *Matzak* (firefighter on duty)
 - many other similar cases in the following years
 - C-107/19 *Dopravní podnik*



**"REAL CHANGE,
ENDURING CHANGE,
HAPPENS ONE STEP AT A
TIME."**

Ruth Bader Ginsburg

Photo Ted Eytan / Flickr

**SYSTEMIC
JUSTICE**



Zuzana Vikarská, Czech Society for European and Comparative Law

Thank you!

EU Charter of Fundamental Rights

Legal Nature & Scope

Successful (Strategic) Application

Limits of Fundamental Rights

ECJ President on EU Charter

- The Charter is the EU's 'Bill of Rights' and has made a significant contribution to improving the EU system of fundamental rights protection, by giving more visibility to those rights. Quantitatively, since the Charter entered into force in 2009, the number of cases before the CJEU raising questions involving the interpretation of fundamental rights has grown considerably. Currently, in **1 out of 10 cases** brought before the CJEU, the Charter is expressly mentioned.

Koen Lenaerts, 2018

EU Charter: applicability

- EU Charter is not federal in nature
- it applies (**only!!!**) when EU law applies (Art 51(1))
- favourite metaphor:
EU Charter is the **shadow** of EU law



Art 51: Field of application

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States **only when they are implementing Union law**. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter **does not extend** the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

EU Charter & its contents

- direct applicability of EU Charter's provisions?
 - none × vertical × horizontal
- EU law in general only has direct effect if it is:
 - sufficiently clear & precise & unconditional
 - i.e., no need for additional measures; no margin of discretion
- not all provisions of EU Charter are **fully justiciable**
- Art 52(5): principles, may be implemented by secondary law

EU Charter: applicability

- but **even if** the Charter rights are sufficiently clear, precise, and unconditional, they still don't apply automatically
- the Charter must be **triggered / activated** by EU law
- i.e., the Charter doesn't work in **purely internal situations**
- the threshold for a cross-border element is very low
 - **BONVER WIN** (C-311/19) or **Blanco Pérez** (C-571/07)
 - “it is far from inconceivable that nationals established in Member States other than the Kingdom of Spain have been or are interested in operating pharmacies in the Autonomous Community of Asturias”

EU Charter: applicability

- and **even if** the Charter is truly applicable, the Court will always prefer secondary law (more concrete!) to the Charter
- example: **ProfiCredit Slovakia** (C-485/19)
 - the referring court asks about the Charter (Art 47)
 - but the ECJ prefers to talk about the directive
- lesson learned: if the discussion can be led in more concrete terms of secondary law, do not try to keep it in the clouds of the Charter (which is too vague)

EU Charter and its sharp teeth

- secondary EU law may be invalidated if it conflicts with primary EU law, incl. the Charter
- **Test Achats** (C-236/09): unisex insurance premiums
- **Digital Rights Ireland** (C-293/12 and C-594/12): retention of personal data (meta-data) by telecom operators
- **M – refugee** (C-391/16, C-77/17 and C-78/17): three cases from two countries; Grand Chamber; if Charter-conform interpretation is possible, invalidation may not be necessary