Chapter 5

THE ILO AND THE EU – THE INTERFACE

Background

The ILO has been setting universal labour standards since 1919. It addresses them globally to humanity at large. Its universal standards are therefore not ultimate ideals, but rather minimum standards that both developed and developing countries can assume. It should be noted that according to Article 19(8) of the ILO Constitution:

“in no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any Member, be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation.”

Often ILO standards are a compromise or allow for supervised derogations in order to satisfy developing countries or to encourage more ratifications, especially as reservations to ILO Conventions are not an option.

This study deals with core equality standards that derive their legitimacy from the ILO Constitution and the Declaration of Philadelphia 1944 as well as the Post WWII Conventions, such as the 1951 Convention No. 100 on Equal Remuneration, Convention No. 111 on Discrimination (Employment and Occupation) 1958 and the complementary Convention No. 156 on Workers with Family Responsibilities 1981. Many of the ILO’s universally accepted standards have been replicated into EU law. In the words of Advocate General Trabucchi, “Article 119 and the 1975 Directive on Equal Pay are the ‘European translation’ of the ILO Convention No. 100 on Equal Remuneration 1951.”

Unlike the ILO standards, EU Directives are binding. Enforced through an infrastructure of control by the European Commission and by the powerful ECJ, they protect 500 million people in the 27 Member States of the EU.

Comparison of the substantive provisions of the ILO standards and EU law discloses a remarkable similarity of definitions, scope, and exceptions. Significantly, the early ILO Conventions predated the EU Directives by twenty years. The EU had no part in the creation of these legal norms. Until recently, the EU
harvested its basic rules from ILO Conventions and complemented them with more details. To use a metaphor created by Professor Blanpain the Community was a "trailer" rather than a "locomotive" when it comes to social law and fundamental principles of equality.¹

A Non-Formal Relationship between the ILO and the EU

Today, both the ILO and the EU aim to coin rules for fair conditions of work, social justice and equality. However, this was not always the case. The encounters between the ILO and the EU were not formalised and their relationship took place in isolated instances. We shall illustrate seven of these ad hoc instances, five involving decisions of the Community Court, in the following pages.

1. The Defrenne Case 1976

In the Defrenne (No. 2) Case² the ECJ referred to ILO Convention No. 111 as part of the general principles of law that the Court respects where there is a gap in EU written law. While it did not apply the Convention to the case, it mentioned the Convention as a possible inspiration for the future. As we shall see, at that time Community law recognised the principle of equal pay but the 1976 Directive on Equal Treatment was not yet adopted.

2. The Levy Case 1993

In 1993 The ECJ referred to the ILO Convention No. 89 on Night Work 1948 when it decided the Levy Case,³ ruling that the ban of night work for women was incompatible with the Equal Treatment Directive

"unless the application of such a provision (prohibiting night work) is necessary to ensure the performance by the Member State concerned of obligations arising under an agreement concluded with non-member countries prior to the entry into force of the EEC Treaty."

This Court ruling assumed that France had not yet denounced ILO Convention No. 89 and was bound by it. As we shall see in Chapter 8, the Court thus attributed supremacy to the ILO Convention. In fact France had denounced Convention No. 89 on 26 February 1993, some six months before the Court's ruling on 2

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² Case 43/75 (1976) ECR 455.