



The Charter of Fundamental Rights of the European Union

(From the UN Declaration on Human Rights
to the Lisbon Treaty.)

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1. Background to the emergence of the Charter of Fundamental Rights of the European Union.

At the Cologne European Union Council meeting of June 1999, it was decided that there was a need to establish a Charter of Fundamental Rights for the European Union, in order to make their “*overriding importance and relevance more visible to the Union’s citizens.*” The Conclusions of the Council Presidency noted that the “*Protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy.*” It was decided to establish a Convention consisting of representatives of the Member States, along with the different European Union Institutions, and for a draft document to be presented prior to the European Council meeting in December 2000.

The Council proposed that the Charter would be solemnly proclaimed by the Council, Commission and Parliament, and that also it should be considered whether and if so how it should be integrated into the Treaties. It also decided that in drawing up the Charter that account should be taken of the economic and social rights contained in the European Social Charter 1961 of the Council of Europe, and the Community Charter of the Fundamental Social Rights for Workers of 1989. The Council unanimously approved a draft of the Charter in October 2000, and following the assent of the Parliament and the Commission, it was formally adopted by the European Council at Nice in December 2000.

2. The United Nations Universal Declaration of Human Rights.

It was the celebration in 1998 of the 50th anniversary of the United Nations Universal Declaration of Human Rights of 1948 that provided the background and context for the initiative taken by the European Council meeting in Cologne. The Universal Declaration of Human Rights is a unique and visionary document that to this day, continues to speak to the whole world of the inalienable right of humankind to human dignity, and sets out a body of human rights across civil, political economic, social and cultural spheres that are universal, indivisible and interdependent. The United Nations Universal Declaration was followed in 1966 by two separate Covenants, one on Civil and Political Rights, and a second on Economic, Social and Cultural Rights. This decision to separate civil and political rights from economic and social rights had its origins in the Cold War division between West and East, with the West tending to put the emphasis on civil and political rights, while the East prioritised economic and social rights. This view in the West that civil and political rights were superior stemmed from a position that economic and social rights were not justiciable in the same manner as civil and political freedoms, and also reflected unwillingness among states to accept legal obligations in respect of these rights.

Since the fall of the Berlin Wall in 1990 and the demise of the Soviet Union, that distinction has started to be challenged once more. Many developed countries still wish to think in terms of human rights as those that are resource and cost free, namely

the standard civil and political rights such as freedom of thought expression and assembly, while seeking to confine human rights in the social and economic sphere to principles and aspirations rather than enforceable human rights that can confer entitlements on citizens. The Vienna World Conference on Human Rights in 1993 endorsed the principle of the equivalence and interdependence of both of the sets of rights outlined in the two Covenants of 1966, and stated,

*“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.”*¹

It is for this reason that the incorporation of a single legally enforceable Charter of Fundamental Rights in the European Union Treaty, spanning the complete spectrum of human rights, and that attaches equal importance to social and economic rights, alongside civil and political rights is of such profound significance. The Irish Human Rights Commission emphasised the importance of this inclusion of all human rights in a single document that can become primary EU law when it stated. *“The central importance of the European Union Charter of Fundamental Rights is that it eschews the traditional distinction drawn between civil and political rights on the one hand, and economic, social and cultural rights on the other, and places all such rights on the same footing, thus elevating the status of traditionally neglected rights within the Community legal order.”*²

3 The Origin of Fundamental Rights in the European Union

It was the vision of Jean Monnet and Robert Schuman that provided the impetus for the establishment of the European Economic Community that has evolved to become the European Union. The devastation of two world wars that destroyed the European continent twice in the space of thirty years, gave rise to a determination that it must never be allowed to happen again. The idea was to create a structure to bind France and Germany together, such that war between them would become unthinkable ever again. It was inspired by the Schuman Declaration of 1950, issued by the French Foreign Minister Robert Schuman, which proposed the creation of a united Europe to be built in small steps, and this idea commenced with the pooling of the “resources of war” in the European Coal and Steel Community established the following year by the Treaty of Paris. *“Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity.”* (Schuman Declaration.)³

Prior to that in 1949 ten Nations including Ireland came together to form the Council of Europe, which initially some intended as an assembly that could evolve into a Parliament that would help to construct a united Europe. However the reluctance of the United Kingdom to consider anything other than inter governmental arrangements, resulted in the Council of Europe evolving instead to become the European institution that has had as its core function the promotion of democracy and human rights on the continent of Europe. In contrast the European Coal and Steel Community (ECSC) was established in 1951 by the Treaty of Paris, with a High Contracting Authority that had supranational powers in relation to the competences conferred on it. This Community evolved under the Treaty of Rome of 1957 into the European Economic Community (EEC), with the High Contracting Authority becoming the European Commission, and following subsequent Treaty amendments

has evolved from what was essentially an economic entity into the political, economic and social community that was at the heart of the Schuman Declaration and is today the European Union.

The Council of Europe following on from the United Nations Universal Declaration of Human Rights of 1948 promulgated the European Convention on Human Rights in 1950 covering civil and political rights and followed with additional Protocols in subsequent years. In 1961 at Turin it adopted the European Social Charter covering economic, social and cultural rights and this was amended in 1996 to cover social inclusion and housing. To ensure that the member countries of the Council of Europe would enforce the Convention on Human Rights that they had signed up to, a European Court of Human Rights was established in Strasbourg. The Council of Europe today has 47 member states including all those on the continent of Europe with the exception of Belarus. Both the European Convention on Human Rights on civil and political rights and the European Social Charter on economic and social rights from the Council of Europe are key source documents for the Charter of Fundamental Rights of the European Union. The Charter rights that derive from within the European Union itself, apart from provisions taken directly from the Treaty, come primarily from the Community Charter of the Fundamental Social Rights for Workers of 1989, which set out a range of rights for workers including fair wages and an improvement in living and working conditions. The background to the emergence of that Charter and its adoption by the European Council in 1989, was the acceptance by the European Commission under the leadership of Jacques Delors that the completion of the Internal Market provided for under the Single European Act Treaty revision of 1986, must have a social dimension to ensure that Europe would have a Social Market economy and would not just be a free market.

The Social Dialogue that commenced between the social partners at European level in the 1980's, during the Delors period was given Treaty status in the Maastricht Treaty in 1992. Initially this was by way of a separate Protocol (14) between all the Member States except the UK due to the refusal of the Conservative Government to agree to the social dimension. In the Amsterdam Treaty in 1997 the new Labour Government reversed that decision and Protocol 14 became Articles 136 to 139 of the Treaty. This allowed agreements made at European level between the Social Partners to become EU law and to be enforced through a Directive which would be legally binding throughout the Union. This is an important dimension of the Charter in that many of the principles concerning workers rights that the Charter contains such as the promotion of gender equality, and the reconciling of work and family life have been given practical effect through the agreements that the Social Partners at European level have concluded under Article 139 of the Treaty.

At central level and applicable to all workers across Europe these agreements have covered;

- A right to Parental Leave 1995 and revised in 2009. (Directive 96/34/EC).
- Protection for Part-Time Workers 1997. (Directive 97/81/EC).
- Protection for Fixed Term Temporary Workers 1999. (Directive 99/70/EC).
- Rights to Teleworking 2002. (To be implemented at national level by the Social Partners)
- Protection against Stress at Work 2004. (To be implemented at national level by the Social Partners).

In addition at sectoral level a broad range of agreements have been concluded between the Social Partners for the sectors concerned.

4. Human Rights and the European Union. Internal and External Developments

The European Union which began as a Community for economic cooperation first made reference to human rights in the Declaration on Europe's Identity issued at the Copenhagen Summit in 1973, which said "*the nine wish to insure that the cherished values of their legal, political, and moral orders are respected, and to preserve the rich variety of their national cultures. Sharing as they do the same attitudes to life, based on a determination to build a society which measures up to the needs of the individual, they are determined to defend the principles of representative democracy, of the rule of law, of social justice—which is the ultimate goal of economic progress—and of respect for human rights. All of these are fundamental elements of the European identity.*"⁴ In 1986 a reference to human rights and fundamental freedoms was made in the Treaty for the first time when the Preamble to the Single European Act stated,

*"Determined to work together to promote democracy on the basis of the fundamental rights recognised in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice. Convinced that the European idea, the results achieved in the fields of economic integration and political cooperation, and the need for new developments correspond to the wishes of the democratic peoples of Europe, for whom the European Parliament, elected by universal suffrage is the indispensable means of expression. Aware of the responsibility incumbent upon Europe to aim at speaking ever increasingly with one voice and to act with consistency and solidarity in order more effectively to protect its common interests and independence in particular to display the principles of democracy and compliance with the law and with human rights to which they are attached, so that together they may make their own contribution to international peace and security in accordance with the undertaking entered into by them within the framework of the United Nations Charter."*⁵

The end of the Cold War in 1990 saw the beginning of the promotion of human rights by the European Union in its external relations, including the introduction of conditionality on human rights compliance in external financial aid granted through its development programmes. The European Council meeting in Luxembourg in June 1991 made a Declaration on Human Rights which stated that "*The Community and its member States undertake to pursue their policy of promoting and safeguarding human rights and fundamental freedoms throughout the world. This is the legitimate and permanent duty of the world community and of all states acting individually and collectively*".⁶

The Maastricht Treaty in 1992 included explicit provisions on human rights and fundamental freedoms for the first time, and committed the Union to respect the European Convention on Human Rights in Article 6(2). The Amsterdam Treaty added Article 6(1) which together states,

Article 6(1) *“The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.”*⁷

Article 6(2) *“The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”*⁸

The European Social Charter of the Council of Europe was included in the preamble to the Single European Act, and this was further strengthened in the Amsterdam Treaty when both the Social Charter and the European Union’s own Community Charter of the Fundamental Social Rights for Workers 1989 was included in both the preamble and in Article 136 which provides the basis for Community action on workers’ rights.

The Lisbon Treaty now completes that process of social policy improvements aimed at protecting and enhancing workers’ rights by giving the Charter of Fundamental Rights full status as primary law. Article 6 of the Common Provisions of the Lisbon Treaty states that the Union recognises the rights, freedoms and principles set out in the Charter and that it has the same legal value as the Treaty.⁹ It incorporates both the European Social Charter and the Community Charter of the Fundamental Social Rights for Workers which has been the basis for so much of the progress over the past thirty five years.

5 The Charter of Fundamental Rights of the European Union.

The Charter is not an original document but draws its inspiration and content from a range of existing human rights Conventions and Charters along with European Treaty sources, both within the European Union, and from the Council of Europe which now comprises 47 member states. The most significant and important development in respect of the body of rights embodied in the Charter is that on the entry into force of the Lisbon Treaty, the Charter will become primary European Union law, with equivalent status to all other Treaty provisions. In so far as there have been concerns raised in relation to the priority that the European Court of Justice has given to Treaty freedoms, such as the freedom to provide services in some recent judgments, these freedoms can no longer have any priority over the fundamental rights in the Charter. In addition the Charter contains for the first time all the civil, political, social, economic and cultural rights in one single document, and also those economic and social rights for workers are now given full human rights status traditionally given only to civil and political rights. Apart from the existing protections for human rights from the European Court of Human Rights in Strasbourg, these Charter rights will be protected and enforced by the European Court of Justice in Luxembourg which has a consistent record of promoting human rights and fundamental freedoms particularly for workers in the areas of equality and the reconciling of work and family life.

The scope of the rights set out in the Charter apply to the European Union Institutions and to the Member States when implementing European Union law and do not

automatically apply to domestic law. However it will be a matter for the Court of Justice to determine the scope of applicability in the cases that come before it, and its track record to date has been one of expanding the boundaries of fundamental rights. In addition the trend in international law in recent years has been to extend the body of human rights to be enjoyed by workers and citizens.

The European Court of Justice was the first of the Institutions to explicitly set out the importance of fundamental rights in a judgment in 1970 (Case- 11/70 Internationale Handelsgesellschaft paragraph 4) when it held, "*In fact, respect for fundamental rights forms an integral part of the general principles of Community law protected by the Court of Justice. The protection of such rights whilst inspired by the constitutional traditions common to the member states must be ensured within the framework of the structure and objectives of the Community.*"¹⁰

In one of the most important judgments of the Court (Defrenne C-43/75) on the right to equal pay under Article 119(now 141)of the Treaty, the Court of Justice gave the Treaty provision direct effect irrespective of whether it was provided for in domestic law and held that "*this provision(Article 119) forms part of the social objectives of the Community, which is not merely an economic union but is the same time intended by common action to ensure social progress, and seek constant improvement of the living and working conditions of their peoples... ..This double aim which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the Community.*"¹¹ Thus the Court made clear that the equal pay provisions which some had considered were only aimed at preventing a competitive advantage for employers in different Member States also had a clear social objective .Subsequent Court of Justice rulings in the area of gender equality have been and continue to be progressive. In can therefore be said that the European Court of Justice has played an important role in the building of Social Europe.

In other judgments by the Court its decisions make it clear that it will be quite willing to stray into areas that are considered part of domestic competencies. In the Carpenter case (C-60/2000)¹² the Court used the Treaty freedom to provide services under Article 49 for Mr Carpenter to prevent the deportation of his Philippines wife, on the grounds that it would be a breach of Article 8 of the European Convention on Human Rights on the right to respect for family life. This is now Article 7 of the Charter. In the Chen case(C-200/2002)¹³ the Court of Justice allowed a right of residence in the UK based on the citizens' rights in the Union conferred by Article 18(1) of the Treaty, which states that every citizen of the Union has the right to move and reside freely within the territory. The decision by the UK Government to opt out of the Charter of Fundamental Rights is a clear indication of their concern that the European Court of Justice would in effect apply the Charter rights to domestic law. That is also why some countries including Ireland have negotiated Protocols on specific issues.

In an Editorial in the European Constitutional Law Review the view was expressed that once a claim arises that a fundamental right is infringed that it will be sufficient for the European Court of Justice to be competent. This assessment was made in the context that the existing threshold for the Court's intervention set in the Carpenter case was a hypothetical transnational context.¹⁴

While it is the case that no definitive conclusions can be made on the potential of the Charter, the track record of the European Court of Justice of pushing out the boundaries in a progressive way on areas where EU and domestic competencies overlap is clear from its judgments. This can only be of benefit to workers in Ireland and indeed workers throughout the Union.

6. Rights conferred on workers and citizens by the Charter of Fundamental Rights of the European Union.

The Preamble to the Charter sets out in a clear and concise manner, the intrinsic normative values that have been the hallmark of the European Union since its foundation over fifty years ago, *“Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.”*

The Charter contains fifty Articles setting out human rights that are essential in a modern democratic society to protect and promote the interests of workers and citizens. They are grouped in six separate sections set out as follows;

Dignity	Five Articles.
Freedom	Fourteen Articles.
Equality	Seven Articles.
Solidarity	Twelve Articles.
Citizens’ Rights	Eight Articles.
Justice	Four Articles.

The Charter confers important rights on all citizens in the areas of civil and political rights, and these are rights that have traditionally been the focus of human rights and fundamental freedoms in the Western democracies. These are well known within society as they cover the freedoms that people associate with the democratic society in which they live, such as freedom of speech, and assembly. In the main these are drawn from the European Convention on Human Rights which itself mirrors the United Nations Universal Declaration of Human Rights 1948. There are however also important new rights in respect of the consumer, a right to proper administration and environmental protection rights. In the case of rights for workers these are in the main in the Equality and Solidarity section of Charter rights and derive from both the European Social Charter and the Community Charter of the Fundamental Social Rights for Workers.

Charter of Fundamental Rights by Section.

This sets out a summary of the main rights contained within each section of the Charter. In the case of workers rights it also sets out where legally enforceable entitlements are already in place through a Directive that has its origin in the rights contained in the Charter. These rights mainly derive from the Community Charter of Fundamental Social Rights for Workers 1989, which was the Social Chapter to balance the economic dimension of the internal market. This serves to underline the potential of the Charter to advance workers rights even further once it becomes primary EU law.

In the 1970’s and 1980’s the social policy Directives used Article 117 of the Treaty of Rome, which provided for the *“need to promote improved working conditions and an*

improved standard of living for workers” as the legal basis for action.¹⁵ Article 119 on equal pay was the legal basis for the equal pay Directive. The addition of Article 118a to the Treaty by the Single European Act of 1986, required Member States to “*pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers*”, and this resulted in a range of Health and Safety Directives including on Maternity Leave and protection for pregnant workers. The Maastricht Treaty introduced a Social Policy Protocol which was intended to implement the Charter agreed in 1989 to ensure that the social dimension to the internal market was enhanced. The need for a Protocol arose because of the refusal of the UK government to sign up to the Charter. The Protocol expanded the areas of social policy competences and also allowed for Social Dialogue agreements to be made between the Social Partners at European level. The Amsterdam Treaty incorporated the Social Policy Protocol into the text of main Treaty following the decision of the new UK Labour government to end their opt out. New social policy competences were also agreed such as information and consultation rights for workers, and the Social Dialogue Treaty provisions allowed for agreements between the European Social Partners to be given the full force of law throughout the Union. A new Treaty Article 13 also provided for the equality non discrimination provisions to expand beyond gender, to encompass a broad range including race, religion, age, disability and sexual orientation. The Nice Treaty made modest social policy changes, which included the combating of social exclusion. Protection for public services against competition policy so as to ensure that their provision would continue to be a matter for national decision was adopted in the Amsterdam Treaty and further strengthened through a Protocol in the Lisbon Treaty.

(A) Dignity

In respect of the five rights covering **Human Dignity**, these include the need to respect human dignity which is inviolable, the right to life and integrity of the person, along with the prohibition of torture and inhuman or degrading treatment or punishment, and the prohibition of slavery and forced labour.

What is of particular note in respect of these fundamental rights is that the European Union has abolished the Death Penalty in all circumstances including in time of war. The Union pursues a strong and active global campaign against the Death Penalty, and has even funded groups in the United States to conduct research and campaign against the death penalty there. The right to the **Integrity of the Person** includes a ban on eugenic practices, and reproductive cloning of human beings, along with a prohibition on making the human body and its parts a source of financial gain.

(B) Freedoms.

There are fourteen Articles covering fundamental **Freedoms** primarily drawn from the European Convention on Human Rights. These include the right to liberty and security, freedom of thought, conscience and religion, expression and information, along with freedom of assembly and association. These freedoms also include the right to marry and found a family along with respect for private and family life. The right to engage in work, and freely choose an occupation is covered along with the right of every citizen to seek work, and to provide services or establish a business in any Member State. It also covers the right to property including the protection of intellectual property along with the freedom to conduct a business.

The right to education includes a right to free compulsory education and also the right of parents to ensure the education of their children in accordance with their religious convictions.

Among the other rights covered in this section of the Charter are the protection of personal data, freedom of the arts and sciences, along with the right of asylum, and a prohibition on collective expulsions.

(C) Equality.

This is a very important section in respect of **workers rights**, particularly in the case of women workers, and also in respect of the entitlements of people with disabilities and their rights to independence, social and occupational integration and participation in the life of the community.

There are seven Articles of which unquestionably the most prominent is the provision for equality between men and women, set out in Article 23. This provision has its origins in the main founding Treaty of what is today the European Union, the Treaty of Rome of 1957, which uniquely for its time provided in Article 119 for equal pay between men and women. It was the decision of the European Court of Justice in the *Defrenne v Sabena* case in 1976 (C-43/75) that ensured that irrespective of national legislation the Treaty contained a direct right to equal pay for women. In its judgment the Court put the social dimension of the Community on a par with the economic aspect for the first time

This was a hugely important and in fact controversial decision at the time. What was intended as an economic community, which had equal pay between men and women provisions to prevent competitive advantage between employers from different Member States, now had social provisions that were not merely aspirational but gave rise to specific legally enforceable rights. This interpretation by the European Court of Justice of Article 119 was central to its subsequent very progressive rulings on women's rights issues and also was an important milestone in the creation of the social dimension to the European Union.

A range of Directives are in place to prevent discrimination on grounds of gender starting with the original Directives on Equal Pay (75/117/EEC), and on Equal Treatment (76/207/EEC, amended with 2002/73/EEC). These have now been combined in a recast gender equality Directive (2006/54/EC) covering both pay and conditions of employment. A prohibition on discrimination on gender grounds in Social Security was put in place for statutory schemes in Directive (79/7/EEC), and in occupational schemes in Directives (86/378/EEC, and 96/97/EC). In the case of indirect gender discrimination which is lawful if it can be objectively justified, the burden of proof for such justification was placed on the employer in Directive (97/80/EC.)

Article 13 of the Treaty provides for appropriate action to be taken to combat discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. This has been implemented through two Directives on Race, and Ethnic origin (2000/43/EC) and Religion, belief, disability, age or sexual orientation (2000/78/EC). The provision for non-discrimination in Charter Article 21 adds to the prohibited grounds, colour, social origin, genetic features, language, political or other opinion, membership of a national minority along with property and birth. The second paragraph of Charter Article 21 prohibits discrimination on grounds of nationality, and this is taken directly from Treaty Article 12. Article 39 of the Treaty which provides for the free movement of workers also prohibits discrimination

on grounds of nationality, and specifies that it is with regard to employment, remuneration, and other conditions of work and employment.

One of the issues raised by the European Trade Union Confederation in respect of the freedom to provide services is that workers are treated differently depending on whether they work in another Member State under Article 39 which provides for free movement of workers and also prevents discrimination on grounds of nationality or Article 49 under the freedom to provide service which may not carry the non discrimination provisions of Article 39. This arose from the *Rush Portuguesa* judgment of the European Court of Justice(C-113/89)¹⁶, when it held that the transitional restrictions on rights under Article 39 for the free movement of workers from Portugal to other Member States did not apply in the case of workers providing services under Article 49. An important point to note here is that the legal basis for the Posting of Workers Directive (96/71/EC)¹⁷ is not the usual social policy Treaty basis whose purpose is to improve workers conditions, but rather its legal basis is Article 47 covering rights to establishment and freedom to provide services.

Article 21 of the Charter goes beyond existing non discrimination provisions on nationality and contains a very extensive prohibition over a very broad range of grounds. In the *Laval*(C 341-/05)¹⁸ judgment a factor in the decision, concerned a prohibition on discrimination on nationality grounds between service providers, which arose because in Sweden industrial action is prohibited where a collective agreement is in place and the Latvian trade union had actually signed a collective agreement to cover the posting to Sweden. In the Agency Workers Directive (2008/104/EC) the principle of an entitlement to the same pay from day one has been established It is certainly the case that Article 21 of the Charter has the potential to remove the artificial distinction between workers terms and conditions being different depending on whether they are working in the other Member State under Article 39 or Article 49 of the Treaty.

This section also provides for the **rights of children** and provides that the child's best interests must be the primary consideration in all actions taken by both public authorities and private institutions. It also provides for a child's right to maintain a personal relationship and direct contact with either his or her parents. Rights for the **elderly** along with the integration of people with disabilities and provision for cultural, religious and linguistic diversity are also covered. A prohibition on discrimination on grounds of **disability** is included in Directive (2000/78/EC).

(D) Solidarity.

This is a key section in respect of workers rights with an extensive range of rights to prevent exploitation of workers, and ensure their entitlement to fair and just working conditions in a manner that respects their human dignity in the workplace. There are twelve rights in all which also include **environmental and consumer protection** along with access to public services.

Article 28 of the Charter provides for the right for workers through their trade union to negotiate and conclude collective agreements. In an Irish context given the difficulties that have arisen in recent years, due to employer resistance to collective bargaining rights, and the refusal by the Supreme Court in the *Impact/Ryanair* case

(No.377/05) to uphold even a minimum entitlement in relation to collective bargaining which was decided by the Labour Court in its decision of 25 January 2005 (DECP051), the importance of Article 28 which grants a clear right to collective bargaining and collective action cannot be underestimated. It has the potential to resolve what is now a major problem for workers in Ireland.

It is certain that provided the Charter becomes primary European Union law on the ratification of the Lisbon Treaty, that it will represent a major advance in the campaign for formal recognition of this important right for workers. The European Court of Human Rights has recently decided that Article 11 of the European Convention on Human Rights can now be interpreted as granting the right to collective bargaining.¹⁹ This Article concerns trade union rights but these are now considered to have wider application and to include the right to collective bargaining.

The explicit right to collective bargaining in Article 28 of the Charter will therefore have very significant implications for collective bargaining rights in an Irish context, once it becomes primary European Union law. This would then put it under the jurisdiction of the European Court of Justice whose judgments unlike those of the Court of Human Rights in Strasbourg automatically take precedence over the Irish Constitution. Of course a case solely concerned with domestic pay and conditions which are designated as domestic competences under Article 137 of the European Union Treaty would not be justiciable before the European Court of Justice. It would require an issue concerned with an EU Directive or entitlements under Community law or alternatively an issue on pay and conditions that had a transnational dimension.

Another key area of significant benefit to workers is in respect the rights contained in Article 31, which sets out workers entitlements to fair and just working conditions, which respect his or her health, safety and dignity, along with restrictions on working time and minimum annual leave. In terms of actual enforceable legislation, the rights contained in this Article (as point 17 of the Community Charter of the Fundamental Social Rights for Workers 1989), has already resulted in a range of health and safety provisions of both a general nature applicable to all workers (Directive 89/391/EC on Health and Safety at Work) alongside some very specific safety legislation for individual sectors. The right to paid Maternity Leave and the rights of pregnant mothers to safe working conditions during pregnancy, with a right to time off where this cannot be adequately provided, alongside provisions of proper conditions for breastfeeding on return to work were also provided on health and safety grounds in Directive (92/85/EC)

In addition the European Union's Organisation of Working Time Directives (93/104/EC, 2000/34/EC, 2003/88/EC) provide detailed protection for workers across the Union which includes an entitlement to 20 days of paid annual leave, restrictions on maximum weekly working hours, minimum rest periods during the working day and at night and minimum rates of premium payments for Sunday and Bank holiday working. It also outlaws zero hours contracts. Also in a landmark decision the European Court of Justice in 2000 (C-303/98 Simap)²⁰, designated that on call time must be classified as working time. A revised Directive to deal with this, and other issues such as the UK opt out is still under discussion between the Parliament and the Council.

There are also a range of very important Directives that protect workers in the case of a transfer of Undertakings (Directives 77/187/EEC, and 98/50/EC consolidated in 2001/23/EC) which covers entitlements to job retention and existing pay and conditions of employment on a change of business ownership, and which are linked to Charter Article 29 which covers protection against unjustified dismissal. The inclusion of pension protection which was optional in the Directive has been agreed under the recent Social Partnership agreement. In the case of the Employers Insolvency Directives (80/987/EEC, and 2002/74/EC consolidated in 2008/94/EC), any pay outstanding and pension rights of the employee are protected. The European Court of Justice has already decided in the Robins case (C-278/05.)²¹ that this must provide a level of minimum protection for the pension rights of workers. This has not been adequately provided for in Ireland and is currently the subject of a reference back to Europe.

Article 27 on workers rights to information and consultation has resulted in Directives (94/45/EC, and 2002/14/EC) that covers both Works Councils for transnational companies and rights in national enterprises. However more progress is still required with areas of the public sector still excluded from the information and consultation Directives.

The right to reconciliation of family and working life set out in Article 33, is another Charter Article that has already had real and tangible benefits particularly for women workers arising from agreements that have put into practice the rights contained in the Charter. Among the benefits has been the protection of the rights of part-time workers and work sharers to their pay and promotion rights, set down by the European Court of Justice in a range of cases including the Irish Civil Service case *Hill/Stapleton v Revenue Commissioners*(C-243/95).²² The Social Dialogue provisions set out in Article 139 of the European Union Treaty has also allowed the Charter rights to have practical effect in a range of social partner agreements that date back to 1995.

These have included the Agreement on Parental Leave (Directive 96/34/EC) which gives an entitlement to each parent to two months unpaid parental leave for children up to eight years of age. This has only recently been renegotiated to increase the leave by one month and to make one of the three months non-transferable to encourage better take up by fathers. In addition each member state must examine the issue of payment for parental leave with the matter to be reviewed in five years time. This Social Dialogue process at European level has also allowed agreements to be concluded at European level providing for protection for Part-time workers against exploitation, (Directive 97/81EC) and to prevent the casualisation of workers by providing that fixed term contracts with the same employer must be made permanent after four years (Directive 1999/70/EC). This has been of tremendous benefit to countless Irish and European workers. In the case of protection for Agency workers the Social Partners were unable to reach agreement, but nonetheless the European Commission put forward proposals that were eventually adopted and provide in principle for equal conditions for Agency workers from day one (Directive 2008/104/EC).

Paid maternity leave across the European Union as provided for under Articles 31 and 33 is currently under review with a view to increasing entitlements and possible extending its legal base beyond health and safety and including paternity leave. The Solidarity section also provides for access to social security benefits and social services for all citizens, and in order to combat social exclusion and poverty Article 34 provides for a right to social and housing assistance so that those lacking in resources can still have a decent existence. Also in this section, Articles 37 and 38 provide for a high level of Environmental and Consumer protection, and in Article 35 a right of access to preventative health care and the right to benefit from medical treatment.

(E) Citizens' rights.

There are eight rights covered in this section which include the right for all European Union citizens the right to stand and vote in Municipal and European Parliament elections. In Article 41 a new entitlement of the **Right to Good Administration**, which derives from the case law of the European Court of Justice provides for --the right of a person to be heard before any individual measure that would affect him or her is taken.

--the right of every person to have access to their file, and an obligation on the administration to give reasons for its decisions.

An Ombudsman is established to hear cases of maladministration of EU Institutions or bodies and Article 44 gives each EU citizen the right to petition the European Parliament.

(F) Justice

This section covers four long established civil rights for citizens, such as the right to a fair trial and the presumption of innocence. The right to an effective remedy for those whose rights or freedoms are violated is guaranteed, and the requirement of proportionality and the right not to be tried twice for the same offence is also covered.

(G) General Provisions.

In this section the scope of the Articles are set out including as already mentioned that the Charter covers European Union institutions and bodies and Member States when they are implementing Union law. The very limited context in which the application of the Charter rights may be restricted is also set out, as is the provision that the Charter does not convey any right to engage in activity or to perform any act aimed at the destruction of rights contained in the Charter.

7. Conclusion.

The history of the development of human rights and fundamental freedoms in the European Union to cover the full range of civil, political, economic, social and cultural has been one of progressive incremental progress. The key initiative for workers rights was made under the Jaques Delors Commission with the Community Charter of Fundamental Social Rights for Workers in 1989. However it must be recognised that the founding Treaty of Rome with Article 119 on equal pay as it was interpreted by the European Court of Justice made an enormous contribution to Social

Europe. The end of the Cold War brought a renewed focus on human rights externally and also Treaty revisions thereafter had a clearer focus on fundamental freedoms, and also incorporated very progressive new social policy provisions. It is still a unique provision that the Treaty provides for agreements between the Social Partners to have legal effect for all workers throughout the Union.

The rights contained in the Charter of Fundamental Rights of the European Union as drawn from other Charters have already inspired the development of the European Union's Social policy and has resulted in real, tangible and substantial benefits for workers and citizens. The adoption now of the Charter as primary Union law if the Lisbon Treaty is ratified, can only lead to more progress in the development of Social Europe.

25 August 2009

References

Note: For ease of reading the Title European Union is used throughout the document even where the European Community is the correct legal description.

For a full list of European Social Policy Directives please see Document on “The Importance of the European Union for the development of Workers’ Rights in Ireland”. Also available on the website www.thechartergroup.ie

1 Irish Human Rights Commission Discussion Document. “*Making Economic, Social and Cultural Rights Effective.*” Page 12

2 Irish Human rights Commission Discussion Document. “*Making Economic, Social and Cultural Rights Effective*” Page 56.

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4 “Declaration on Europe’s Identity”. Presidency Conclusions Copenhagen Summit 1973

5 Single European Act 1986.

6 European Council Presidency Conclusions Luxembourg June 1991.

7 Amsterdam Treaty 1997

8 Maastricht Treaty 1997

9 Lisbon Treaty 2007

10 European Court of Justice (Case 11/70) Internationale Handelsgesellschaft.

11 European Court of Justice (Case 43/75) Defrenne/Sabena

12 European Court of Justice (Case 60/2000) Carpenter.

13 European Court of Justice (Case 200/2002) Zhu and Chen

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15 Treaty of Rome 1957.

16 European Court of Justice (Case 113/89) Rush Portuguesa/ Office national d’immigration.

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18 European Court of Justice (Case 341/05) Laval

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20 European Court of Justice (Case 303/98) Simap

21 European Court of Justice (Case 278/05) Robins and others.

22 European Court of Justice (Case 243/95) Hill/Stapleton v Revenue Commissioners.