17. Fundamental rights broadening the scope of labour law? The example of trainees

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17.1 INTRODUCTION

According to the Eurobarometer survey from 2013, 46 per cent of respondents aged 18–35 years had had at least one traineeship experience.¹ Even though the positive role of traineeships in enhancing young people's school-to-work transition has been confirmed in several studies,² concerns have been voiced regarding trainees' working conditions and the educational quality of traineeships.

To resolve these problems the Council of the European Union adopted a Recommendation on a Quality Framework for Traineeships (QFT) on 10 March 2014.³ The Council recommended member states improve the quality of traineeships, in particular their learning and training content and working conditions, with the aim of easing the transition from education, unemployment or inactivity to work.⁴

The QFT defines traineeship as a limited period of work practice, whether paid or not, which includes a learning and training component, undertaken in order to gain practical and professional experience with a view to improving employability and facilitating transition to regular employment.⁵ For the pur-

¹ TNS Political & Social, *The Experience of Traineeships in the EU* (Flash Eurobarometer 378, Directorate-General for Employment, Social Affairs and Inclusion, European Commission 2013) 7, http://ec.europa.eu/public_opinion/flash/fl_378_en.pdf, accessed 30 March 2021.

² See eg European Commission, Directorate-General for Employment, Social Affairs and Inclusion, *Apprenticeship and Traineeship Schemes in EU 27: Key Success Factors* (EU 2013).

³ Council Recommendation of 10 March 2014 on a Quality Framework for Traineeships [2014] OJ C88/1 (hereafter QFT).

⁴ Ibid para 1.

⁵ Ibid preamble 27.

poses of this chapter, I use the same definition even though I recognize that the concept of traineeship is far from clear.⁶

Although member states were encouraged to take appropriate measures to apply the QFT as soon as possible,⁷ by the end of 2015 the QFT had been only partly implemented by the member states. Out of 28 member states, eight had specific legal regulations on active labour market policy (ALMP) and open-market traineeships. All member states had some regulation concerning ALMP traineeships, but open-market traineeships were unregulated in most member states.⁸

Hence, the QFT has not solved the problems connected to traineeships. In addition, the scope of the QFT is limited to ALMP and open-market traineeships, excluding placements forming part of educational curricula, so it can be argued that the QFT on its own cannot ensure the quality of traineeships.⁹ Other possibilities need to be found to guarantee that traineeships are educational experiences, not an opportunity to use cheap or free labour.

The European Union (EU) has regulated many areas of labour law, usually through directives that need to be implemented through national measures and only apply to relationships defined as employment in the law of the member states. As traineeships include working and learning components and therefore differ from the traditional employment relationship, their inclusion in national and EU labour law has been problematic.

With the adoption of the Charter of Fundamental Rights (ECFR)¹⁰ in 2000, at the EU level some labour rights gained the status of fundamental rights.¹¹ The role of the ECFR became even more important with the ratification of the Lisbon Treaty, when it attained the same legal status as the founding treaties.¹² As treaty provisions are directly applicable¹³ and need no national implementation, the ECFR has the potential to contribute to the labour law protection of trainees. In this chapter I explore whether the ECFR can improve the protection of trainees by broadening the scope of national labour laws or EU labour directives, or by creating new labour rights directly applicable to trainees.

⁶ See eg Annika Rosin, 'Labour Law Protection of Trainees' (PhD thesis, University of Turku 2017) 12–13.

⁷ QFT (n 3) para 19.

⁸ European Commission, 'Applying the Quality Framework for Traineeships' (2016) European Commission Staff Working Document 324, 5.

⁹ Educational internships are discussed in Chapter 13 in this volume.

¹⁰ Charter of Fundamental Rights of the European Union [2000] OJ C364/1.

¹¹ Damian Chalmers, *European Union Law: Text and Materials* (3rd edn, CUP 2014) 255.

¹² Consolidated version of the Treaty on European Union [2012] OJ C326/13, art 6.

¹³ Paul Craig and Grainne de Burca, *EU Law: Text, Cases, and Materials* (6th edn, OUP 2015) 183–8.

I argue that, despite the fundamental nature of many important labour rights, the limitations to the application of the ECFR, as well as the restrictive interpretation of its provisions, reduce the ability of the charter to improve the rights of trainees. However, the ECFR is a useful tool for the Court of Justice of the EU (CJEU) to broaden the personal scope of secondary EU legislation, and to contest national limitations to the application of fundamental labour rights. If EU and national labour law provisions are consciously interpreted in the light of fundamental rights, the rights of trainees would improve slightly.

I limit my analysis to labour rights in the strict sense and discuss the most important ECFR provisions for trainees, including: the freedom of assembly and association; the right to participate in collective bargaining and action; and the right to fair and just working conditions. I start by discussing the general application of the ECFR and the distinction between rights and principles in the charter. I then analyse the personal scope of fundamental labour rights and their influence on trainees. Finally, I discuss each fundamental labour right separately in the light of traineeships.

17.2 GENERAL LIMITATIONS TO THE APPLICATION OF THE ECFR

Before analysing whether the ECFR can broaden the labour law protection of trainees, some preliminary issues concerning the overall scope of the charter need to be resolved. According to ECFR article 51(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’. Article 51(2) explains that ‘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’. Therefore, the scope of the rights and principles in the ECFR is limited to the situations governed by EU law,¹⁴ and the adoption of the ECFR does not broaden the competence of the EU. Even though article 51 appears to regulate the scope of the ECFR, the application of this provision in practice is complicated.

It is unclear what comprises ‘implementing Union law’. It has been argued that, although article 51(1) uses narrow wording, the explanations, some language versions and the aim of the adoption of the ECFR prove that

¹⁴ Massimiliano Delfino, ‘The Court and the Charter: A “Consistent” Interpretation of Fundamental Social Rights and Principles’ (2015) 6 *Eur Lab LJ* 86.

there was no intention to challenge the existing practice of the CJEU.¹⁵ Even though the charter uses the term ‘implementation’ in the same way as it was used in *Wachauf v Bundesamt für Ernährung und Forstwirtschaft*,¹⁶ that does not mean that article 51(1) must be interpreted as strictly as in this case. In *Wachauf* the CJEU limited the scope of application of the ECFR to situations in which the member states have enacted laws based on EU regulation.¹⁷ The classic example is directives that require implementation by national law.

However, after *Wachauf*, the CJEU broadened its interpretation of the scope of fundamental rights. For example, in *ERT v Dimotiki Etairia Pliroforissis and Others*¹⁸ the CJEU held that, when a member state relies on express treaty derogations, they must be interpreted in the light of fundamental rights. The Court talked about fundamental rights scrutiny within the scope of EU law, not only when the member state is implementing EU law.¹⁹

The practice of the CJEU after the adoption of article 51(1) shows it aims to confirm earlier case law.²⁰ In *Åklagaren v Åkerberg Fransson*²¹ the CJEU found that EU fundamental rights apply if national legislation falls within the scope of EU law. Fundamental rights become applicable even if national legislation is not adopted to implement a directive, if the member state intends to implement an obligation imposed by the Treaty on the Functioning of the European Union (TFEU).²²

Hence, even though article 51 limits the scope of the charter to situations in which the member states implement EU law, the term ‘implementation’ has been interpreted broadly by the CJEU. The national laws that are scrutinized from a fundamental rights perspective are not only those adopted to implement directives; national measures pursuing objectives covered by EU law also need to be in accordance with the ECFR. This broad interpretation implies that the charter does not only codify existing rights but can improve the national protection of rights covered by the ECFR. It has also been argued that, owing to

¹⁵ Jukka Snell, ‘Fundamental Rights Review of National Measures: Nothing New Under the Charter? (European Charter of Fundamental Rights, 2000)’ (2015) 21 Eur Pub L 285.

¹⁶ Case 5/88, *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 02609.

¹⁷ Snell (n 15) 290–91.

¹⁸ Case 260/89, *ERT v Dimotiki Etairia Pliroforissis and Others* [1991] ERC I-02925.

¹⁹ Snell (n 15) 289.

²⁰ Ibid 291.

²¹ Case 617/10, *Åklagaren v Åkerberg Fransson* (CJEU, 26 February 2013).

²² Snell (n 15) 292–3; Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

the obligation of EU institutions and member states to promote the application of fundamental rights, it forms a cause of action.²³

This is especially important from a labour law point of view. Fundamental labour rights, mainly found in the solidarity chapter of the charter, are only partly found in the constitutions of the member states. Therefore, the charter gives a fundamental character to particular labour rights, until now only protected by labour law. As national measures adopted to attain the objectives covered by EU law need to comply with fundamental rights, the ECFR might strengthen the protection of some labour rights.

Another limitation to the impact of the charter concerns the distinction between rights and principles. Art 52(5) foresees that ‘the provisions of this charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law’. The ECFR does not specify which articles contain rights and which principles. According to explanations of the ECFR, subjective rights need to be respected, and principles observed. Principles can be implemented through legislative or executive acts and they do not give rise to direct claims in the courts. It is explained that this is in accordance ‘with the approach of the Member States’ constitutional systems to “principles”, particularly in the field of social law’.²⁴ This implies that social rights are to be regarded as principles, not rights.

Academics argue that the intention of article 52(5) was to distinguish between justiciable negatively orientated civil and political rights and non-justiciable positively orientated economic and social rights.²⁵ In *Association de médiation social v Union locale des syndicats CGT (AMS)*, Advocate General Villalón differentiated between rights and principles, and found that “principles” contain obligations upon the public authorities, thus contrasting with “rights”, whose purpose is the protection of directly defined individual legal situations’.²⁶ He went further by analysing social rights, and argued: ‘The group of rights included under the title “Solidarity” incorporates mainly rights regarded as social rights with respect to their substance ... That means that there is a strong presumption that the fundamental rights set out in that title belong to the category of “principles”’.²⁷ Hence, labour rights that are set out under the

²³ Craig and de Burca (n 13) 397.

²⁴ Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17, explanation of art 52.

²⁵ Craig and de Burca (n 13) 398.

²⁶ Case C-176/12, *Association de médiation social v Union locale des syndicats CGT (AMS)* Opinion of AG Villalón (18 July 2013), para 50.

²⁷ Ibid para 55.

solidarity chapter are principles, not rights. These are not directly enforceable, but need further implementation.

Neither the CJEU nor all academics agree with this interpretation. In *AMS* the Court interpreted ECFR art 27 and found that the wording of this article means it must be given more specific expression in EU or national law to be fully effective. The CJEU compared the wording of article 27 with the wording of article 21 and concluded that ‘the principle of non-discrimination on grounds of age ... laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such.’²⁸ The CJEU refrained from categorizing all rights in the solidarity chapter as principles. Also some academics note that regarding the right to take part in collective bargaining and action (article 28) under the solidarity chapter as a principle would mean that it needs to be implemented by legislative and executive acts of the EU, which would be impossible owing to the EU has no competence to legislate in the field of strikes.²⁹

As an alternative, in *AMS* the CJEU seemed to suggest that rights and principles should be recognized on the basis of the wording of the rules. Precise and unconditional provisions give rise to individual rights that can be invoked, while provisions with more indeterminate content need to be implemented by EU or national law.³⁰ Some academics find that, on that basis, only one provision belongs to the first category: article 30, as ‘the protection against unjustified dismissal is not recognized “in the cases and under the conditions provided for by Union law and national laws and practices”’.³¹ Others argue that rights relating to the employment sphere, such as articles 27–28 and 30–33, expressly include actions of private parties, in addition to the possible obligations on member state and EU institutions, and should therefore be horizontally applicable.³²

However, this approach has also been questioned. It has been argued that if negative rights that do not need further legislative action belong to the group of rights-conferring provisions, and provisions that refer to national laws and practices to non-rights-conferring provisions, a two-tier system of the provisions of the ECFR is created. This creates a hierarchy between the provisions of the charter, although the ECFR does not see fundamental rights as hierarchical. This hierarchy again impacts the solidarity chapter more than

²⁸ Ibid paras 45, 47.

²⁹ Delfino (n 14) 90.

³⁰ Ibid 91.

³¹ Ibid 91–2.

³² Eleni Frantziou, ‘The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality’ (2015) 21 Eur LJ 657.

other chapters. In addition, negative rights can be meaningless if there is no cause of action to protect them.³³

It can be concluded that the difference between fundamental rights and principles in the ECFR is far from clear. Although rights-conferring provisions are directly applicable and therefore can straightforwardly influence the labour rights of an individual, principles are also important in improving the labour status of certain categories of workers. In implementing EU law, EU institutions and member states need to consider the fundamental principles.

17.3 TRAINEESHIPS AND THE PERSONAL SCOPE OF FUNDAMENTAL LABOUR RIGHTS

Having discussed the general limitations of the application of the ECFR, I return to the question of whether the ECFR can strengthen trainees' labour protection. The charter can either broaden the personal scope of certain labour rights by including trainees, or change their material scope by broadening their content.

The inclusion of trainees in the personal scope of labour laws has, owing to the different features of traineeships, been problematic.³⁴ First, traineeships include both working and learning components, which makes it difficult to determine whether they are a working or educational experience. Second, trainees often do not receive monetary remuneration, which is one of the most important conditions of a traditional employment relationship. Third, in some traineeships three parties are involved: the educational institution/unemployment agency, the host organization and the trainee, which complicates the determination of the employer. Finally, a formal traineeship agreement can exempt trainees from the scope of national labour laws.

Even though traineeships fulfil the most important condition of employment, subordination, owing to the interpretation of 'employment relationship' through the lens of traditional employment, trainees are often left outside the protection of national labour laws. The ECFR could improve the protection of trainees if its personal scope was interpreted more broadly than that of national labour laws.

The personal scope of fundamental labour rights is determined in two ways. Labour rights that are included other than in the solidarity chapter, for

³³ Eleni Frantziou, 'Case C-176/12 Association de Médiation Sociale: Some Reflections on the Horizontal Effect of the Charter and the Reach of Fundamental Employment Rights in the European Union' (2014) 10 *Eur Const L Rev* 332.

³⁴ Annika Rosin and Merle Muda, 'Labour Law Status of a Trainee: The Case of Estonia with Comparative Insights from the US, Finland and France' (2013) 4 *Eur Lab LJ* 292.

example, freedom of assembly, are granted to everyone. Labour rights found in the solidarity chapter, such as the right to fair and just working conditions, are provided to workers. The ECFR is silent concerning the definition of ‘worker’. It is unclear whether ‘worker’ is defined according to national labour law, or whether it has an EU meaning. If an EU meaning should be used, is it the definition worked out by the CJEU in cases concerning free movement or is it a new concept that needs interpretation by the CJEU? At the same time, the meaning of the term ‘worker’ is crucial in determining the personal scope of fundamental labour rights.

One option is to use the concept of ‘worker’ used by the CJEU in free movement cases. The core of this concept has been determined by three decisions. In *Hoekstra v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten*³⁵ the CJEU held that the term ‘worker’ for the purposes of TFEU article 45 has a European Community meaning and is broader than the concept of ‘employee’. In *Levin v Staatssecretaris van Justitie*³⁶ the Court found that a person can be considered a ‘worker’ even if they earn a wage that is below the minimum level guaranteed in the sector under consideration, if they pursue economic activity that is effective and genuine, and not merely marginal and ancillary. In *Lawrie-Blum v Land Baden-Württemberg*³⁷ the Court found that ‘worker’ must be defined in accordance with objective criteria distinguishing the employment relationship. The Court stated that ‘the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration’.³⁸ Hence the defining characteristics of the employment relationship (‘worker’) include the continuity of the relationship, subordination and the receipt of remuneration. Although the member states use similar criteria, the CJEU appears to give more weight to the continuity of the relationship and interprets the content of other characteristics differently.³⁹

In my earlier research I analysed the criteria used by the CJEU and legislators and courts in Finland, Estonia and France to determine the ‘worker’ and ‘employee’ status of trainees. I detected three mismatches. First, the CJEU and the member states evaluate the remuneration criterion differently. While

³⁵ Case C-75/63, *Hoekstra v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 00177.

³⁶ Case C-53/81, *Levin v Staatssecretaris van Justitie* [1982] ECR 01035, paras 16, 17.

³⁷ Case C-66/85, *Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 02121, para 17.

³⁸ *Ibid.*

³⁹ Annika Rosin, ‘Cross-Border Trainees and the Personal Scope of Labour Law: The Puzzle of National, EU and Private International Law’ (2017) 42 EL Rev 848.

national labour laws regard the relationship as employment even if no remuneration is paid, for the CJEU payment is obligatory to classify the person as a 'worker'. Second, while national labour laws allow the classification of trainees as 'employees' regardless of the duration of the traineeship, the CJEU insists on continuity in the relationship. However, the duration needed is up to national courts to decide. Third, the educational nature of traineeships can exempt trainees from the category of 'employees' but not from the category of 'workers'.⁴⁰

Regardless of the CJEU's confirmation that the concept of 'worker' is broader than 'employee', in the case of traineeships it is not that clear cut. Depending on the conditions of the traineeship, a trainee can be classified as both a 'worker' and an 'employee', or only as a 'worker' or an 'employee'. For example, Erasmus+ trainees who fulfil the condition of subordinate work, remuneration and continuity are likely to be classified as 'workers', but not as 'employees', because the traineeship forms part of an educational curriculum. Unpaid open-market trainees are probably classified as 'employees', but not as 'workers', because the remuneration criterion is not fulfilled. If they receive some compensation or payment in kind, they can be classified both as 'workers' and 'employees'.⁴¹ In contrast, if open-market trainees are not paid, but the traineeship includes learning objectives, they may fall outside both the scope of national labour law and the category of 'worker'.

Therefore, carrying over the concept of 'worker' from the CJEU free movement practice to the field of fundamental rights would not necessarily improve the labour position of trainees. It is also unlikely that the CJEU will start to work out a separate EU concept of 'worker' for the application of fundamental rights, since this would contravene the unity of EU law.⁴²

Another option is to return to national definitions of 'worker'. This is supported by the EU concept having been developed to ensure the right to free movement, not to infringe on the determination of the scope of national labour laws. This again is confirmed by the directives and the practice of the CJEU in applying national laws using national concepts of 'employee'.⁴³ However, in discussing the scope of the ECFR, the Court has emphasized the need to protect the unity, primacy and effectiveness of EU law, and avoid the varying protection of fundamental rights in the member states.⁴⁴ This would be the result if national concepts were used. In the context of traineeships, using

⁴⁰ Ibid 859–60.

⁴¹ Ibid 860.

⁴² Case 206/13, *Siragusa v Regione Sicilia* (CJEU, 6 March 2014).

⁴³ Brian Bercusson, *European Labour Law* (2nd edn, CUP 2009) 372.

⁴⁴ *Siragusa* (n 42) paras 31–32.

national concepts would not solve the existing problems connected to the application of labour laws to trainees.

It seems that we have two poor options in defining the concept of ‘worker’. Irrespective of whether we use the EU concept or national concepts, some groups of trainees can end up being exempt from the scope of fundamental labour rights. Nevertheless, using the EU concept appears to be more promising. Since the CJEU has repeatedly stressed the importance of interpreting the concept of ‘worker’ broadly, more ‘workers’ can be included in the scope of fundamental labour rights than can ‘employees’. To ensure this outcome, the CJEU should keep in mind its own recommendation and avoid interpreting ‘worker’ through the lens of traditional employment. If the concept is interpreted according to its substance, the main characteristic of a ‘worker’ would be subordination to the employer. Fulfilling the subordination criterion is not problematic for trainees, since a traineeship is a supervised learning process in a workplace and not the performance of independent work. The CJEU should consider whether the special features of traineeships, such as the non-receipt of monetary remuneration or a short term, are sufficient reason to exempt trainees from the category of ‘worker’.

17.4 FUNDAMENTAL LABOUR RIGHTS APPLICABLE TO TRAINEES

If the CJEU interprets ‘worker’ broadly, trainees would most probably be covered by the personal scope of fundamental labour rights. However, it is not clear whether these rights are broader than those already guaranteed to trainees regardless of their labour law status by national or EU law. Although trainees can be exempted from the category of ‘employees’, they are sometimes entitled to limited labour rights if the scope of some labour laws or provisions is explicitly broadened to include trainees or a wider group of workers.

17.4.1 Collective Rights

According to ECFR article 12(1), everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of their interests.

Article 12(1) confers the right to form or to join trade unions on everyone. Although at first it may appear that article 12(1) is applied regardless of a person’s employment status, trade unions aim to protect interests connected to working, so the right to form and join trade unions seems to be reserved to people who work. However, it is not clear how this should be defined.

International Labour Organization (ILO) Convention No 87 grants the right to join and found organizations to workers and employers.⁴⁵ In interpreting the term ‘worker’, the Freedom of Association Committee of the Governing Body of the ILO has stated that the status under which workers are engaged with the employer, as apprentices or otherwise, should not have any effect on their right to join workers’ organizations and take part in their activities. The committee has also found that persons hired on training agreements should have the right to organize.⁴⁶

Although most of the member states have accepted the Convention, the explanations of the ECFR avoid citing the Convention in support of article 12, and therefore its scope cannot be straightforwardly drawn from the Convention.⁴⁷ Nevertheless, it is reasonable to assume that the personal scope of article 12(1) will be determined according to the EU concept of ‘worker’. As this concept has the potential to include trainees, article 12(1) could improve the labour rights of trainees in some member states. For example, in France, trainees can join associations but not trade unions since they are regarded as students, not as individuals engaged in a trade or occupation.⁴⁸ For the CJEU the educational content has not been a reason to exempt trainees from the category of ‘worker’. In *Lawrie-Blum*, the CJEU held that

any person who, even in the course of vocational training and whatever the legal context of that training, pursues a genuine and effective economic activity for and under the direction of an employer and on that basis receives remuneration which can be perceived as the consideration for that activity must be regarded as a ‘worker’ for the purposes of Community law.⁴⁹

Article 12(1) cannot be discussed without reference to ECFR article 28, which states that workers and employers, or their respective organizations, have, in accordance with EU law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

⁴⁵ ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87) art 2.

⁴⁶ ILO, *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th edn, ILO 2006) 258–9.

⁴⁷ Bernard Ryan, ‘The Charter and Collective Labour Law’ in Tamara Hervey and Jeff Kenner (eds), *Economic and Social Rights Under the EU Charter of Fundamental Rights: A Legal Perspective* (Hart 2003).

⁴⁸ Jean Pélissier, Gilles Auzero and Emmanuel Dockès, *Droit du travail* (25th edn, Dalloz 2010) 965.

⁴⁹ *Lawrie-Blum* (n 37) para 34. See also Rosin, ‘Cross-Border Trainees’ (n 39) 858.

The personal as well as material scope of article 28 is broader than that of national laws. First, article 28 applies to ‘workers’, not to ‘employees’, which could improve the collective rights of trainees in some member states. For example, in Finland, the conclusion of collective agreements is reserved for ‘associations of employees’.⁵⁰ Although trainees have a right to form and to join trade unions, these trade unions cannot conclude collective agreements.

Article 28 also foresees the right to collective bargaining and action. National laws and international instruments, such as ILO Convention Number 98, refer to voluntary negotiations between employers or employers’ and workers’ organizations with the aim to regulate terms and conditions of employment by means of collective agreements.⁵¹ To avoid conflict between the right to collective bargaining and trade union freedom, it has been proposed that article 28 needs to be interpreted in the light of freedom of association. This means that the right to collective bargaining includes the freedom to choose whether to initiate negotiations or not, and whether to conclude any agreement. Nevertheless, article 28 reinforces the right to collective agreements by insisting both contracting parties act in cooperation and good faith to reach the agreement and abstain from any conduct limiting the enjoyment of the right.⁵²

Even though article 12(1) and article 28 appear to improve trainees’ collective rights by broadening their right of association and collective bargaining and action, as well as reinforcing the content of the latter, the general limitations to the application of the ECFR can reduce this effect. According to article 51 the scope of the rights and principles in the ECFR is limited to the situations governed by EU law. Treaty on the Functioning of the European Union article 153(5) sets out that ‘The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.’ This prevents the social policy power of the EU from being used to lay down minimum standards concerning the right of association, the right to strike or the right to impose lock-outs. However, it has been argued that the assumption that the matters listed in TFEU article 153(5) fall exclusively to the competence of the member states is questionable. The EU has competence to act in these areas under other treaty provisions.⁵³ Two possible alternatives include TFEU articles 115 and 352. Article 115 confers on the EU power to adopt directives for the approximation of such laws, regulations or administrative provisions

⁵⁰ Työehtosopimuslaki 436/1946, s 1.

⁵¹ ILO Right to Organise and Collective Bargaining Convention, 1949 (No 98) art 4.

⁵² Bercusson, *European Labour Law* (n 43) 327–8.

⁵³ Brian Bercusson, ‘The Role of the EU Charter of Fundamental Rights in Building a System of Industrial Relations at EU Level’ (2003) 9 *Transfer* 209.

of the member states that directly affect the establishment or functioning of the internal market. Yet, it is unlikely that the freedom of association and right to strike directly affect the functioning of the internal market.⁵⁴ Treaty on the Functioning of the European Union article 352(1) enables the EU to adopt appropriate measures if action by the EU is necessary, within the framework of the policies defined in the treaties, to attain one of the objectives set out in the treaties, and the treaties have not provided the necessary powers. Nevertheless, the CJEU has stated that ‘other articles of the Treaty may not ... be used ... in order to circumvent the express exclusion of harmonisation’.⁵⁵ Therefore, it is questionable whether the EU can adopt measures concerning the right to association and right to strike under other treaty provisions.

Next, the rights and principles distinction can reduce the potential of fundamental collective rights to improve trainees’ labour conditions. Although there is no express denial of EU competence over the right of collective bargaining, the wording of article 28 shows that this is a principle not a right. The condition ‘in accordance with Union law and national laws and practices’ indicates that it is not horizontally applicable but binds only the member states and the EU. Even if article 28 were interpreted as being horizontally applicable because it consists of express rights of workers and employers and their respective organizations, the ability of article 28 to improve trainees’ collective rights would be questionable. As Voogsgeerd argues, the real problem is that the condition ‘in accordance with EU law and national laws and practices’ is so wide that potentially anything decided at the EU or national level can interfere with the right to collective bargaining.⁵⁶

17.4.2 Right to Fair and Just Working Conditions

Another important provision that could influence the labour rights of trainees is article 31. According to ECFR article 31(1) every worker has the right to working conditions which respect their health, safety and dignity. Article 31(2) sets out that every worker has the right to a limitation on their working hours, to daily and weekly rest periods, and to an annual period of paid leave.

According to the explanations of the ECFR, there is already EU legislation in the fields of fair and just working conditions.⁵⁷ First, the EU has adopted Directive 89/391/EEC (the Framework Directive) to encourage improve-

⁵⁴ Ryan (n 47) 85.

⁵⁵ Case C-376/98, *Germany v Parliament and Council* [2000] ECR I-8419.

⁵⁶ Herman Voogsgeerd, ‘The EU Charter of Fundamental Rights and Its Impact on Labor Law: A Plea for a Proportionality-Test Light’ (2012) 4 *Goettingen J Int L* 313.

⁵⁷ Explanations (n 24) explanation of art 31.

ments in the safety and health of workers at work.⁵⁸ The personal scope of the Framework Directive is problematic from the viewpoint of trainees. Even though ‘worker’ is defined broadly as ‘any person employed by an employer, including trainees and apprentices but excluding domestic servants’,⁵⁹ the legal definition of ‘employer’ appears to delimit the personal scope of the directive. According to the directive, ‘employer’ is ‘any natural or legal person who has an employment relationship with the worker and has responsibility for the undertaking and/or establishment’. Therefore, an ‘employer’ is responsible only for the health and safety of ‘workers’ with whom they have an employment relationship. As a consequence, only trainees who can be regarded as ‘employees’ belong to the scope of the Framework Directive.⁶⁰

Here article 31(1) could broaden the personal scope of the Framework Directive. The ECFR confers the right to the protection of health and safety on every ‘worker’. If ‘worker’ has the European Community meaning and is interpreted broadly, it should extend this right compared with earlier legislation. The personal scope of the Framework Directive could be then broadened to include trainees. This is also supported by the Framework Directive explicitly including trainees in the definition of ‘worker’. When the Framework Directive was adopted, problems concerning the employment status of trainees were probably not foreseen and it is unlikely that the definition of ‘employer’ aimed to exclude non-employee trainees from the scope of the directive. That trainees are learning by working does not mean that their health and safety in the workplace should not be protected.

The second part of article 31 concerns working time limitations, rest periods and the right to annual leave. According to the explanations of the charter, article 31(2) is based on Directive 93/104/EC. This directive has been replaced by Directive 2003/88/EC (the Working Time Directive, WTD),⁶¹ which does not include a definition of ‘worker’. In *Syndicale Solidaires Isère v Premier ministre and Others*⁶² the CJEU stated that the WTD makes no reference to either the definition of a ‘worker’ in the Framework Directive or the definition of a ‘worker’ derived from national laws and/or practices. The Court held

⁵⁸ Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183/1, art 1(1).

⁵⁹ Ibid art 3(a).

⁶⁰ Annika Rosin, ‘Precariousness of Trainees Working in the Framework of a Traineeship Agreement’ (2016) 32 Int J Comp Lab L & Indust Rel 131.

⁶¹ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L299/9.

⁶² Case C-428/09, *Syndicale Solidaires Isère v Premier ministre and Others* [2010] ECR I-09961.

that, for the purposes of applying the WTD, the concept of a ‘worker’ has an EU meaning, referring to the concept of ‘worker’ applied in free movement cases.⁶³

In *Fenoll v Centre d’aide par le travail ‘La Jouvene’ and APEI*⁶⁴ the CJEU was asked to interpret the concept of ‘worker’ for the purposes of WTD article 7 and ECFR article 31(2). The CJEU found that ‘as regards the application of Directive 2003/88, the concept of a “worker” may not be interpreted differently according to the law of Member States but has an autonomous meaning specific to EU law’. The Court linked the concept of ‘worker’ used in the WTD to the definition of ‘worker’ in the ECFR by stating that ‘that finding applies also with regard to the interpretation of the term “worker” within the meaning of Article 7 of Directive 2003/88 and of Article 31(2) of the Charter, in order that the uniform scope of the right of workers to paid leave *rationae personae* may be ensured’.

Therefore, the concept of ‘worker’ used in the WTD parallels the definition of ‘worker’ in the ECFR. In this regard the ECFR does not straightforwardly improve trainees’ labour rights, because if they are classified as ‘workers’ they already enjoy the protection of the WTD.

However, as Hunt notes, regarding particular labour rights as fundamental can lead to a more extensive reading of existing measures.⁶⁵ For example in *The Queen v BECTU*⁶⁶ the Court examined the question of short-term workers’ rights to annual leave and ruled that Directive 93/104 did not allow a member state to adopt national rules under which a worker does not begin to accrue rights to paid annual leave before completing a minimum period of 13 weeks’ employment with the same employer. The Court held that the assumption that a short-term worker has been able to take an adequate period of rest before entering into a new employment relationship does not necessarily hold true in the case of workers employed on a succession of short-term contracts.⁶⁷

Although the CJEU did not mention the ECFR in the ruling, Advocate General Tizziano read the relevant provisions of the directive in the light of fundamental rights. He stated that, ‘in proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored; ... the Charter provides us with the most reliable and definitive

⁶³ See also Rosin, ‘Precariousness of Trainees’ (n 60) 156.

⁶⁴ Case C-316/13, *Fenoll v Centre d’aide par le travail ‘La Jouvene’ and APEI* (CJEU, 26 March 2015).

⁶⁵ Jo Hunt, ‘Fair and Just Working Conditions’ in Tamara Hervey and Jeff Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective* (Hart 2003).

⁶⁶ Case C-173/99, *The Queen v BECTU* [2001] ECR I-4881.

⁶⁷ *Ibid* para 63.

confirmation of the fact that the right to paid annual leave constitutes a fundamental right'.⁶⁸

Since traineeships are temporary, the decision in *BECTU* also influences the labour rights of trainees. According to *BECTU*, the limited duration of a traineeship should not be a basis for denying trainees' right to annual paid leave. If the traineeship is organized during a period of study or in between academic study periods, and it is impossible to grant the leave, the employer should pay an allowance for the unused leave at the end of the traineeship.⁶⁹

Although trainees may not benefit from the broader personal scope of article 31(2), they can benefit from the more extensive reading of existing legislation. Not allowing national limitations to the entitlement to leave seems to be largely based on the argument that there is a fundamental right in question. However, the CJEU and Advocate General returning to a purposive interpretation of the WTD makes this conclusion questionable. The promising start to interpreting secondary legislation in the light of fundamental rights has also been followed by the case law returning to a purposive interpretation. According to O'Connor, this shows that the ECFR has had a neutral impact on the interpretation of the directive. He also finds that the purposive approach has not always led to employee-protective interpretations.⁷⁰ Hence, the influence of ECFR article 31(2) on trainees seems to depend on the willingness of the CJEU to interpret the rights contained in the WTD more from a fundamental than a purposive viewpoint.

17.5 CONCLUSION

The adoption of the ECFR conferred fundamental right status on several important labour rights. Ideally it could counterbalance the increasing flexibility of labour law as well as promote the labour protection of the expanding group of atypical workers. Among others, a growing number of trainees have been exempted from the scope of national labour laws. Having the same legal status as a treaty, the ECFR could be assumed to have a direct influence on the rights of trainees. Unfortunately, the application of the charter to trainees is complicated.

To begin with, the general limitations on the scope of the ECFR means it does not broaden the competence of the EU in the same manner as do the founding treaties. This means that additional labour rights found in the charter

⁶⁸ Case C-173/99, [2001] ECR I-4881, Opinion of AG Tizziano, para 28.

⁶⁹ Rosin, 'Precariousness of Trainees' (n 60) 157.

⁷⁰ Niall O'Connor, 'Interpreting Employment Legislation through a Fundamental Rights Lens: What's the Purpose?' (2017) 8 *Eur Lab LJ* 193.

rather than in secondary legislation are not directly enforceable. Also, not all provisions consist of directly applicable rights, but only principles that need further implementation by the EU or its member states.

If general limitations leave open some possibilities of improving trainees' labour rights, the application of concrete provisions to trainees brings forward more obstacles. First, the general scope of the labour rights in the ECFR is unclear, which makes it difficult to determine whether trainees are protected by the charter. Trainees are most likely to belong to its scope if the EU concept of 'worker' is used. However, in the case of traineeships, the concept of 'worker' is not always broader than that of 'employee'. To ensure that trainees are classified as 'workers', the CJEU should interpret the concept according to its substance, relying mainly on the subordination characteristic.

Second, although the ECFR appears to improve trainees' collective rights compared with national law by conferring on them the rights of association and collective bargaining and action, as well as reinforcing the content of the latter right, the general limitations to the application of the ECFR and the wording of article 28 can reduce this effect. The TFEU prevents the social policy power of EU from being used to lay down minimum standards concerning the right of association, the right to strike or the right to impose lock-outs. Also ECFR article 28 makes the right of collective bargaining conditional upon its conformity with existing EU law and national laws and practices.

Third, ECFR article 31 aims to ensure fair and just working conditions, which has potential to improve the protection of the health and safety of trainees and set limitations on their working time. Bringing trainees into the scope of directives regulating health and safety requires a genuinely broad interpretation of the concept of 'worker'. Trainees could also benefit from a more extensive reading of the WTD. For example, the CJEU has forbidden national limitations on the entitlement to leave in case of temporary employment, based on the argument that this right is regarded as fundamental. However, the Court's return to a purposive interpretation might reduce this effect.

In conclusion, the influence of the ECFR on the labour rights of trainees is limited but existent. The charter could be a useful tool for the CJEU to broaden the personal scope of secondary EU legislation, and to contest national limitations to the application of fundamental labour rights. If EU and national labour law provisions are consciously interpreted in the light of fundamental rights, the rights of trainees will be slightly improved.