

Case note: Swiss Federal Tribunal

Tribunal misses crucial opportunity to enforce international standards



In May 2010, the Swiss Federal Tribunal confirmed its earlier stance on the International Covenant on Economic, Social and Cultural Rights – namely that the Covenant is “generally not directly applicable” but merely “directed at the legislative branch.”

The case centred on the issue of remuneration for public holidays. The case was brought by a French teacher against a foundation for adult learning in Geneva. The teacher asked for retroactive remuneration for public holidays, something that was not foreseen by her employment agreement based on hourly wages. Swiss case law distinguishes those working with agreements based on hourly rates and those hired with monthly salaries. Those working with hourly rates generally only get paid for the time they actually work, while those with monthly wages usually get the same monthly payment whether or not there were public holidays in that month.

The appeals tribunal in Geneva ruled in favour of the teacher and held in November 2009 that Article 7(d) of the International Covenant on Economic, Social and Cultural Rights gives rise to a justiciable right to remuneration for public holidays, including for workers who are employed on hourly rates.

The decision was appealed by the employer. The Swiss Federal Tribunal concluded that workers paid hourly rates generally do not have an entitlement to paid holidays, with the exception of 1 August (the constitutionally enshrined national holiday). The plaintiff argued that an obligation to remunerate public holidays for all categories of workers follows from Article 7(d) of the Covenant, ratified by Switzerland. The Tribunal deferred to the legislative branch by emphasising its earlier jurisprudence stating that the provisions of the Covenant are “programmatic” and do “in principle not give rise to justiciable rights.” The Tribunal, however, admitted

that it was not excluded that “one or the other” provisions of the Covenant could be considered to be directly applicable. According to the Tribunal, the right to form and adhere to trade unions would be such exceptions, but the Tribunal does not justify this selection.

With the judgment the tribunal has missed yet another opportunity to engage with Covenant rights. The decision of the Tribunal simply hinges upon a myth; it continues to assume that

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Covenant provisions are inherently incapable of being subjected to the scrutiny of a court of law – an assumption that has been refuted time and time again by the UN Committee on Economic, Social and Cultural Rights, including in its General Comment No. 9 on domestic application of the Covenant, as well as developments at the national, regional and international adjudicative levels.

Even more surprisingly, the Tribunal cites Matthew Craven’s seminal study on the Covenant to provide support for the argument that the right to just and favourable conditions of work depends on the legislative branch.²¹ On a practical level, it is certainly true that sound and implemented legislation is a primary means to protect Covenant rights, but Craven most clearly does not support the Tribunal’s view that in the absence of such legislation, the Covenant

obligates judges to simply defer to the legislative branch.

Instead of restating old misconceptions, the Tribunal could have applied the provision without necessarily finding a violation. For instance, there is an argument to be made that Article 7(d) of the Covenant does not prescribe how exactly the remuneration arrangements must be structured for workers paid by hourly wages. It is conceivable that the Covenant obligation is complied with even if authorities allow that some workers are paid by an hourly lump sum negotiable between the concerned parties, considering that this hourly wage takes into account compensation of public holidays in a fair way. The rationale is that such an arrangement is more flexible and administratively easier, especially if the job is not a main occupation or for a limited duration. Provided they are also non-discriminatory, such arrangements could be in conformity with the Covenant. The real question may then have been whether the teacher, who worked nearly full-time for the same employer, could be considered to have been remunerated for public holidays by her hourly wage arrangement. Rather than engaging with the individual aspects of the Covenant provision at hand, the Swiss Federal Tribunal preferred to repeat old misconceptions on the so-called exclusively ‘programmatic’ nature of the Covenant. The decision of the Federal Tribunal has already made clear that much work remains to be done to overcome a very outdated approach to economic, social and cultural rights. ■

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²¹ See Matthew Craven, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* (Oxford: Oxford University Press 1995).