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Freedom of expression and the termination of employment contracts

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1. Introduction

Freedom of expression is widely regarded as a principal right of the European Convention on Human Rights (ECHR). Enshrined in Art 10, it is considered of 'fundamental significance for the well-functioning of the democratic process'[1]. As the European Court of Human Rights (ECtHR) phrases it, being able to speak your mind freely 'constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment'[2].

While a wide range of case law exists at the European level, the specific ramifications of Art 10 ECHR in connection with Labour Law have not yet been comprehensively elaborated. Due to the close and ongoing relationship of the main parties involved, employment contracts invoke a distinct set of interests relating directly to freedom of expression. On the one hand, employers naturally wish for their employees to represent the enterprise's interests and views. Accordingly, the ECtHR has emphasized in *Kudeshkina/RUS* that employees owe their employer a duty of loyalty, reserve and discretion.[3] On the other hand, due to the ongoing employment relationship and the detailed insights into the workplace, employees likely have informed and definite opinions about the workplace that may also be of interest to the public. In addition, employees might express opinions that are not or not directly related to the workplace but that the employer wishes to regulate nonetheless, such as political statements, hate speech or discriminatory remarks. These opposing interests of the

[1] *van Rijn, A.*, Chapter 14. Freedom of Expression, in *van Dijk, P.; van Hoof, F.; van Rijn, A.; Zwaak, L.* (eds.), Theory and Practice of the European Convention on Human Rights[5] (2018) 765. Cf. *Verpeaux, M.,* Freedom of expression (2010) 9, 11; *Grabenwarter, C.*, European Convention on Human Rights: Commentary (2014) Art 10 m.n. 28.

[2] ECtHR 19.1.2006, *United Macedonian Organisation Ilinden*/BUL, No. 59491/00, m.n. 60; cf. *Daiber, B.*, in *Meyer-Ladewig, J., Nettesheim, M., von Raumer, S.* (eds.), Europäische Menschenrechtskonvention. Handkommentar[4] (2017) Art 10 m.n. 1.

[3] ECtHR 26.2.2009, *Kudeshkina*/RUS, No. 29492/05, m.n. 85.

parties involved may lead to conflicts during the course of the employment relationship. In order to illustrate the specific problems connected to freedom of expression in the workplace, I would like to invoke a recent decision by the Austrian Supreme Court[4]:

During the COVID-19 crisis, the Austrian government implemented a series of restrictions, starting with the obligation to wear a face mask in public and culminating, in the Spring of 2021, with the introduction of compulsory vaccinations against COVID-19. In the case at hand, the claimant, a female physician who worked as a public health officer for the Land Burgenland – one of Austria's nine provinces – publicly spoke out against these measures at a demonstration. During this 'incendiary speech', as it was described by local news reports, the claimant protested firmly against all government measures and appealed to the public not to get vaccinated. This speech was filmed and posted online, in addition, several regional media reported on it. As a result, the public health officer was dismissed from her position. Seeking to have her dismissal declared invalid, the physician argued that her speech was protected under Art 10 ECHR, the dismissal, therefore, constituting a violation of her fundamental right to freedom of expression. The case ultimately went before the Austrian Supreme Court, which confirmed the dismissal. Interestingly, the Austrian Supreme Court did not examine the alleged breach of Art 10 ECHR in detail, stating that these arguments were not to be addressed as the claimant had already announced that she intended to behave unlawfully.

As has already been mentioned above, the very nature of an employment contract leads to the fact that the two parties usually involved in a dispute over freedom of expression, the 'censor' and the 'speaker', are bound together legally.[5] When it comes to terminating an employment contract, the parties involved are bound by the principles of private law. This means that if employers seek to dismiss an employee, they must balance their reasons for doing so against the employee's interest in keeping his/her job. A dismissal will be considered lawful in the presence of a just cause, tipping the scales towards the employer's reasons for ending the employment relationship and, as a result, outweighing the employee's interests. I'm interested in exploring whether invoking Art 10 ECHR could change the balancing of interests, and potentially lead to a situation where a dismissal that might initially be considered justified may no longer be so.

[4] Austrian Supreme Court 30.8.2022, 8 ObA 44/22m, Aktuelles Recht zum Dienstverhältnis (ARD) 6829/12/2022.
[5] *Estlund, C.*, Freedom of Expression in the Workplace, in *Stone, A./Schauer, F.* (eds.), The Oxford Handbook of Freedom of Speech (2021) 411.

To explore this research question, the article will be structured in the following way: First, a quick overview of Art 10 ECHR and its main contents will be provided. Next, I will examine whether these principles can also be applied to the context of Labor Law and what specific problems need to be taken into account when freedom of expression is invoked in the context of an employment relationship. Thirdly, it will be demonstrated how the Austrian Supreme Court has solved the case of the public health officer introduced above and if his reasonings are in accordance with the case law of the ECtHR. Finally, I will conclude by summarizing the key findings.

2. Freedom of expression

Art 10 Para 1 ECHR guarantees the right to freedom of expression, which includes the freedom to **receive and impart opinions, pieces of information and ideas.** It is widely considered that all forms of communication between people[6] initially fall within the scope of the provision. In this context, communication comprises not only freedom of expression itself but also other fundamental rights such as freedom of information, freedom of communication via mass media, and specific parts of the freedom of artistic and academic expression.[7] For Austria, specifically, *C. Bezemek*[8] describes that the Austrian Constitutional Court examines whether a certain act contains 'communicative content', i.e., whether the said act has a symbolic quality. This symbolic character of a certain expression depends on a number of different factors, starting with the intention of the speaker to convey a meaning, the so-called 'mens communicativa'. Secondly, communication requires a potential recipient for whom the medial potential inherent in the act can unfold. Lastly, communication is determined by the environment or context in which it is set. Only the entire context in which a specific act is performed makes it possible to appreciate it as communicative and to approach the meaning conveyed in it. Focusing explicitly on freedom of expression, Art 10 ECHR guarantees the active right of the speaker to communicate news and ideas to other

[6] *Grabenwarter, C.*, European Convention on Human Rights Art 10 m.n. 4; *Grabenwarter, C./Pabel, K.*, Europäische Menschenrechtskonvention[7] (2021) § 23 m.n. 2.
[7] *Grabenwarter, C.*, European Convention on Human Rights Art 10 m.n. 1; cf. *Verpeaux, M.*, Freedom of expression 37.
[8] *Bezemek, C.,* Freie Meinungsäußerung. Strukturfragen des Schutzgegenstandes im Rechtsvergleich zwischen dem Ersten Zusatz zur US Verfassung und Artikel 10 der Europäischen Menschenrechtskonvention (2015) 275 et seq.

people,[9] irrespective of their 'intellectual value'[10]. Art 10 ECHR, therefore, does not limit itself to only favorably received statements, but also includes those that may offend, shock, or disturb the state or parts of the population.[11]

At times, the doctrine disputes possible limits of the scope of protection of Art 10 ECHR, specifically, whether hate speech[12] should also be included. In a recommendation of Ministers,[13] hate speech has been defined as all types of expression that incite, promote, spread or justify violence, hatred or discrimination against a person or group of persons, or that denigrates them, because of their real or attributed personal characteristics or status such as 'race', color, language, nationality, national or ethnic origin, age, disability, sex, gender identity, and sexual orientation. When examining existing case law regarding hate speech it becomes apparent that the limits of Art 10 ECHR are not clear-cut. In some instances, for example with the denial of the holocaust, the ECtHR has excluded hate speech from the scope of Art 10 altogether.[14] Then, we have case law where the Court confirmed hate speech to be protected by Art 10, but at the same time cited a violation of Art 17 ECHR.[15] Lastly, the ECtHR has at times found hate speech to be protected by Art 10 Para 1, only to exclude them later at the level of justification.[16] With anti-democratic speech, the tendency is similar: the Court either excludes these statements from the scope of Art 10 due to a violation of Art 17 ECHR or includes them initially, only to consequently consider possible restrictions as justified.[17] In my opinion, even statements that are hostile to democracy lie within the scope of Art 10 ECHR. An initial exclusion from the scope of Art 10 is not necessary to protect democratic minimum standards or individual legal positions of the victims that may be

[9] *Grabenwarter C.; Frank, S.,* B-VG. Bundes-Verfassungsgesetz und Grundrechte (2020) Art 10 ECHR m.n. 2; *Bezemek, C.,* in *Holoubek, M.; Lienbacher, G.* (eds.), GRC-Kommentar. Charta der Grundrechte der Europäischen Union[2] (2019) Art 11 m.n. 6.

[10] *Hofstätter, C.,* in *Kahl, A.; Khakzadeh, L.; Schmid, S.* (eds.), Kommentar zum Bundesverfassungsrecht B-VG und Grundrechte (2021) Art 10 ECHR m.n. 12; *van Rijn, A.*, in *van Dijk, P.; van Hoof, F.; van Rijn, A.; Zwaak, L.*, Theory and Practice of the European Convention on Human Rights[5] 767.

[11] ECtHR 7.12.1976, *Handyside/*UK, No.5493/72, m.n. 49.

[12] *Harel, A.,* Hate Speech, in *Stone, A./Schauer, F.* (eds.), The Oxford Handbook of Freedom of Speech (2021) 455.

[13] Appendix to Recommendation CM/Rec(2022)16 of the Committee of Ministers to member States on combating hate speech, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a67955, last accessed 1.5.2023.

[14] I.e. ECtHR 24.6.2003, *Garaudy/*FRA, No. 65831/01; 13.12.2005, *Witzsch* 2/GER, No. 7485/03; 16.6.2015, *Delfi AS/*EST, No. 64569/09.

[15] ECtHR 15.1.2009, *Orban*/FRA, No. 20985/05; 20.10.2015, *M'Bala M'Bala*/FRA, No. 25239/13.

[16] For instance ECtHR 20.4.1999, *Witzsch*/GER, No. 41448/98; 16.1.1996, *Rebhandel*/AUT, No. 24398/94; 6.9.1995, *Remer*/GER, No. 25096/94.

[17] *Struth, A.*, Hassrede und Freiheit der Meinungsäußerung. Der Schutzbereich der Meinungsäußerungsfreiheit in Fällen demokratiefeindlicher Äußerungen nach der Europäischen Menschenrechtskonvention, dem Grundgesetz und der Charta der Grundrechte der Europäischen Union (2019) 91 ff, 105.

affected, as the "contentious" character of certain expressions will be sufficient to ultimately justify a restriction during the proportionality test.[18]

In addition, the doctrine[19] disagrees if the distinction between facts and value judgments already comes into play when considering the scope of Art 10, or whether this discussion should be postponed to the level of justifications. Due to the fact that Art 10 enjoys a very wide scope, I tend to agree with those voices that advocate that Art 10 should initially protect to both facts and value judgments alike, because, as a rule, problematic expressions of opinion can easily be eliminated later on at the level of justification.

To invoke Art 10 ECHR, the right to freedom of expression of the individual must be restricted in some way. As will be shown shortly, the right to freedom of expression is not absolute but is rather subject to a material reservation by law.[20] Generally speaking, an interference may either constitute a prohibition of some sort, which has a pre-emptive effect, or a sanction, which is typically imposed afterward,[21] i.e., in response to a certain behavior of the individual. For instance, according to the ECtHR, the dismissal of a public servant which is directly linked to opinions expressed constitutes a restriction of Art 10 ECHR.[22] Usually, a low intensity of interference is already sufficient to restrict the individual's right to freedom of expression.[23]

According to Art 10 Para 2 ECHR, restrictions to freedom of expression may be justified if

1. they are prescribed by law,
2. serve a legitimate aim, and
3. are necessary (i.e. proportionate).

These three steps are often referred to as the so-called 'proportionality test'.[24]

The first assessment criterion applied by the ECtHR is the lawfulness of the interference.[25] A restriction to freedom of expression is 'prescribed by law' if it is based on a (national) legal

[18] Cf. *Struth, A.*, Hassrede 431, similarly *Hofstätter,* C., in *Kahl, A.; Khakzadeh, L.; Schmid, S.,* B-VG, Art 10 EMRK m.n. 27; *Grabenwarter, C.*, European Convention on Human Rights Art 10 m.n. 7.
[19] *Grabenwarter, C.; Pabel, K.*, Europäische Menschenrechtskonvention[7] 400 f with further proofs; *Struth, A.,* Hassrede 187.
[20] *Hofstätter,* C., in *Kahl, A.; Khakzadeh, L.; Schmid, S.,* B-VG, Art 10 EMRK m.n. 24; *Harel, A.*, in *Stone, A./Schauer, F.*, The Oxford Handbook of Freedom of Speech 455; *Verpeaux, M.*, Freedom of expression 42.
[21] *Grabenwarter, C.*, European Convention on Human Rights Art 10 m.n. 16.
[22] ECtHR 26.9.1995, *Vogt*/GER, No. 17851/91, m.n. 44.
[23] ECtHR 23.9.1994 (GC), *Jersild*/DEN, No. 15890/89, m.n. 30 et seq.
[24] *Grabenwarter, C.*, European Convention on Human Rights Art 10 m.n. 21.
[25] Council of Europe/ECtHR, Guide on Article 10 of the European Convention on Human Rights (2022) 21.

provision. This means that the interference must be directly or indirectly traceable to a parliamentary act.[26] The legal provision must also be sufficiently precise as well as foreseeable.[27] Secondly, the ECtHR will assess the 'legitimacy of the aim pursued by the interference'.[28] Art 10 Para 2 ECHR lists several possible legitimate objectives. Therefore, a restriction to freedom of expression may be justified if it intends to

- protect national security, territorial integrity or public safety,
- prevent disorder or crime,
- protect health or morals,
- protect the reputation or rights of others,
- prevent the disclosure of information received in confidence, or
- maintain the authority and impartiality of judges.[29]

Finally, the Court will assess the 'necessity of the interference in a democratic society', i.e. if the restriction is proportionate to the legitimate aim pursued.[30] At this level, the different interests of the parties involved, the individual's right to freedom of expression and the censor's right to protect one of the legitimate objectives mentioned, will be weighed against each other.

The aforementioned distinction between facts and value judgments plays a central role during the proportionality test. The ECtHR emphasizes that the existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible to proof.[31] Since facts are amenable to proof, a false factual assertion is, in principle, not worthy of protection while true facts have to be weighed against the legitimate objectives mentioned above.[32] Value judgments, on the other hand, are not amenable to proof of truth; accordingly, the level of protection afforded by Art 10 ECHR is higher, and the reasons for restricting freedom of expression must be much more pronounced. When examining case law, the ECtHR strives to determine whether the value judgments are based on a sufficient factual basis. If value judgments are without any factual basis at all, they may be deemed excessive.[33]

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[26] *Mensching, C.,* in *Karpenstein, U./Mayer, F.* (eds.), Konvention zum Schutz der Menschenrechte und Grundfreiheiten. Kommentar[3] (2022) Art 10 m.n. 37.
[27] *Grabenwarter, C.*, European Convention on Human Rights Art 10 m.n. 23 et seq.
[28] Council of Europe/ECtHR, Guide on Article 10 of the European Convention on Human Rights 23.
[29] The Equality and Human Rights Commission, Article 10: Freedom of expression, https://www.equalityhumanrights.com/en/human-rights-act/article-10-freedom-expression, last accessed 1.5.2023.
[30] ECtHR 7.12.1976, *Handyside/*UK, No.5493/72; 10.12.2007, *Stoll*/SUI, No. 69698/01; 23.4.2015, *Morice*/FRA, No. 29369/10; 20.10.2015, *Pentikäinen*/FIN, No. 11882/10.
[31] Settled case law, starting with ECtHR 8.7.1986, *Lingens*/AUT, No. 9815/82; cf. *Grabenwarter, C.*, European Convention on Human Rights Art 10 m.n. 31.
[32] *Schrammel W.*, Die Freiheit der Meinungsäußerung im Arbeitsverhältnis, Medien und Recht (MR) 2013, 119.
[33] ECtHR 24.2.1997, *DeHaes and Gijsels*/BEL, No. 19953/92, m.n. 47.

However, this distinction between factual assertions and value judgments, while seemingly clear-cut,[34] causes considerable problems in practice. To better illustrate this, I would like to introduce two recent decisions by the Austrian Court of Administration. In both cases, the Court was called upon to decide whether critical statements expressed by members of the medical profession in connection with vaccinations were protected by the freedom of expression as laid out in Art 10 ECHR.

- In the first case, a physician openly criticized the Austrian vaccination plan in front of an audience during a presentation. Among other statements, he dismissed measles as a harmless childhood disease and advised the audience against vaccinations in general. As a result, he was fined € 1,000 by the disciplinary commission of the Medical Association for Styria and Carinthia and judged to reimburse the latter for the costs of the disciplinary proceedings. The Austrian Court of Administration[35] qualified the speech as a value judgment. While the Court recognized that the physician had presented the disadvantages and dangers of vaccinations in a subjective and untrue manner, the Court also noted that it had been recognizable to the audience that the physician was only expressing his own (medically unacknowledged) minority opinion. In addition, the physician had not violated any professional duties toward his own patients, since he gave the speech during a public conference, none of his patients being amongst that audience. Therefore, the Austrian Court of Administration found no direct connection between the opinions expressed and the exercise of the medical profession. As a result, the imposition of sanctions by the Medical Association was found unlawful.
- In the second case, another physician, this time a general practitioner and self-proclaimed 'teacher of self-healing', was fined by the disciplinary council of the Medical Association and was prohibited from practicing for two months. He had denied the existence of disease-causing viruses in a blog post on vaccination on his own website. Additionally, he expressed the opinion that vaccinations never protect against diseases and that not a single disease has ever disappeared due to vaccinations. The Austrian Court of Administration[36] found the sanctions imposed by the Medical Association to be rightful. In the opinion of the Court, the blog post solely served to draw the attention of the readers to the (homeopathic) practice of the physician, therefore, a connection to his professional practice resulted. Additionally, the incriminated statements did not correspond to the current state of knowledge of medicine. Therefore, the facts presented by the physician

[34] Cf. *Grabenwarter, C.*, European Convention on Human Rights Art 10 m.n. 31; *van Rijn, A.*, in *van Dijk, P.; van Hoof, F.; van Rijn, A.; Zwaak, L.*, Theory and Practice of the European Convention on Human Rights[5] 765.
[35] Austrian Court of Administration 9.10.2019, Ra 2019/09/0010, Recht der Medizin-Leitsätze (RdM-LS) 2020/30, 77.
[36] Austrian Court of Administration 28.10.2021, Ra 2019/09/0140, Newsletter Menschenrechte (NLMR) 2021, 573.

could be proven to be false and did, in consequence, not fall within the scope of Art 10 ECHR.

From these two cases, it becomes apparent that the Austrian Court of Administration primarily focuses on determining whether there is a connection between the statements in question and the practice of the medical profession. However, the distinction between facts and value judgments also plays an important role when it comes to reaching a decision. Finally, I would like to point out that in the past, the ECtHR has departed from the quite rigid classifications the Austrian Court of Administration has attempted, apparently focusing less on a clear distinction between facts and value judgments and more on the question if restrictions to freedom of expression were proportionate in regard to the objectives pursued.[37]

Finally, in terms of personal scope, Art 10 ECHR protects all persons who make use of one of the above-mentioned forms of communication.[38] Therefore, it may be invoked by both individual persons and legal entities, regardless of their status or function.[39] The only limitation of personal scope derives from Art 34 ECHR, which limits the term 'legal entities' to non-governmental organizations, such as associations or political parties. In the case of legal entities under public law, it is necessary to determine whether or not they possess governmental powers.[40]

In conclusion, I would like to quickly summarize the main contents of Art 10 ECHR. Firstly, it has been shown that Art 10 Para 1 ECHR offers a broad scope and protects all kinds of communication between people. Therefore, even offending, shocking or disturbing statements, including hate speech, are initially protected by the scope of the provision. Secondly, the right to freedom of expression has to be interfered with to a certain degree to be able to call upon the protection of Art 10. Thirdly, according to Art 10 Para 2 ECHR, it has to be determined whether this interference is also justified, i.e., prescribed by law, serving a legitimate objective and proportionate. In this paper, the system described above will be examined for its applicability to cases under Labour Law.

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[37] ECtHR 21.3.2000, *Wabl*/AUT, No. 24773/94, m.n. 36; 27.2.2001, *Jerusalem*/AUT, No. 26958/95, m.n. 44; 26.2.2002, *Unabhängige Initiative Informationsvielfalt*/AUT, No. 28525/95, m.n. 46.

[38] *Grabenwarter, C.*, European Convention on Human Rights Art 10 m.n. 4.

[39] *van Rijn, A.*, in *van Dijk, P.; van Hoof, F.; van Rijn, A.; Zwaak, L.*, Theory and Practice of the European Convention on Human Rights[5] 767; *Mensching, C.,* in *Karpenstein, U./Mayer, F.*, Konvention zum Schutz der Menschenrechte und Grundfreiheiten[3] Art 10 m.n. 5.

[40] *Mensching, C.,* in *Karpenstein, U./Mayer, F.*, Konvention zum Schutz der Menschenrechte und Grundfreiheiten[3] Art 10 m.n. 6.

3. Freedom of expression in the workplace

The principles established in the previous chapter also apply in the workplace.[41] Therefore, for an employee to invoke Art 10 ECHR, the expression in question must lie within the general scope of the provision and the restriction of the employee's expression must be prescribed by law, serve a legitimate aim and be proportionate.[42] However, freedom of expression in the workplace gives rise to a specific set of questions that shall be examined in the next chapter.

3.1 Scope

It needs to be examined which specific types of expressions in the workplace fall within the scope of Art 10 ECHR. As already discussed above, the scope of Art 10 has to be drawn as broad as possible in order to reach its objective, which is to effectively contribute to the well-functioning of the democratic process. Therefore, most, if not all, types of employee expression should initially fall within the meaning of Art 10 Para 2 ECHR.

Firstly, freedom of expression protects communication that is directed toward a target audience. However, the number of people present to hear the opinion expressed is irrelevant. Therefore, freedom of expression protects communication (only) between co-workers, as well as expressions voiced to a public audience, for example during a demonstration. In the same way, the method of communication chosen by the employee does not impact the scope of Art 10 ECHR. Therefore, it does not matter if the employee speaks to another co-worker, publishes a comment in an online forum or sends a written letter to his employer.

Secondly, it is initially irrelevant if the expressed opinion is work-related or off-duty. However, it may be said that ultimately 'an employee's speech that is unrelated to the employment – that is unrelated in time (off-duty), place (outside the workplace) and subject matter'[43] – will enjoy stronger protection under Art 10 ECHR. This means that employees will have to accept greater restrictions when expressing opinions concerning their employer's

[41] *Schrammel, W.*, MR 2013, 120.
[42] *Grabenwarter, C.*, Arbeitsrecht und Menschenrechtskonvention, in *Brameshuber, E.*; *Friedrich, M.; Karl, B.* (eds.), Festschrift für Franz Marhold (2020) 526 (532 f).
[43] *Estlund, C.*, in *Stone, A./Schauer, F.*, The Oxford Handbook of Freedom of Speech 418.

interests. An example could be if the employee reveals classified information that is generally not known outside the company, such as a secret formula for a soft drink or an online search engine's search algorithm. In these cases, Art 10 ECHR may offer initial protection, but the employer's reaction to the employee's infidelity will likely be justified by Art 10 Para 2.

Some typical examples of employee expression that have been found to be particularly controversial, but fall within the scope of Art 10 Para 1 ECHR, include

- voicing opinions different from those of the employer, such as an employee communicating his own political opinions or worldviews in a work environment that strives to remain neutral,
- expressions that oppose the employer's favoured political views and candidates, as well as
- disclosing dangerous and/or illegal activities of the employer (whistleblowing).[44]

Naturally, this only means that opinions expressed on these subjects will face the proportionality test laid out in Art 10 Para 2 ECHR. Therefore, the specific circumstances of the individual case must be taken into account to conclusively decide if a person may call upon the protection of Art 10 ECHR.

In contrast, the question of whether hate speech (that is abusive speech that targets members of certain groups, usually minority groups)[45] also falls within the scope of Art 10 ECHR is much more difficult to answer. As has been pointed out above, the ECtHR does not provide a conclusive answer for these types of expressions. Within Austrian media coverage, a very poignant example is the so-called 'flamethrower case". In 2015, a 17-year-old apprentice working for Porsche Holding Salzburg was dismissed after commenting underneath a picture posted by a local fire department on a social media platform. The picture depicted a young refugee girl being sprayed by water cannons in the summer heat. The apprentice's comment expressed a wish that the water cannons be turned into flame throwers to deter refugees from coming to Austria.[46] In my opinion, it would be appropriate to initially consider such comments within the scope of Art 10 ECHR, therefore the apprentice would be able to invoke Art 10. However, any sanctions adopted by the employer or the state to sanction this

[44] *Estlund, C.*, in *Stone, A./Schauer, F.*, The Oxford Handbook of Freedom of Speech 412.
[45] *Harel, A.*, in *Stone, A./Schauer, F.*, The Oxford Handbook of Freedom of Speech 455.
[46] Cf. https://www.derstandard.at/story/2000019660633/porsche-entlaesst-lehrling-nach-hassposting-auf-facebook, last accessed 15.9.2023.

completely unacceptable behavior toward other human beings would naturally be justified during the course of the proportionality test.

Another interesting aspect is how Art 10 ECHR links to **other convention rights.** In particular, it has a close relationship with Art 11, the **freedom of association.** For a long time, both provisions were considered mutually exclusive. Therefore, if an employer sanctioned employees because they had joined a trade union, or because they chose to strike for better working conditions, these expressions were for a long time considered to be exempt from the scope of Art 10 because they (better) fit within the scope of Art 11 ECHR. However, the ECtHR recently recognized in *Straume/LAT*[47] that both provisions could be applied alongside each other. In the case at hand, an air traffic control officer working for a State-owned joint stock company became a trade union representative. In a letter addressed to the Minister of Transport, drawn up by the Trade Union and signed (amongst others) by the employee, the Trade Union addressed numerous problems regarding the training and working conditions of air traffic control officers, stating that these issues would affect flight safety in the future. In a direct reaction to the letter, the air traffic control officer was suspended, and, ultimately, she was refused entry to the premises of the company and the payment of her salary was terminated. The ECtHR pointed out that in view of the circumstances of the case, it should be 'examined under Article 11, interpreted in the light of Article 10'. While the Court found that the employee acted as a Trade Union representative, and thereby, in sending the letter, exercised her right to freedom of association, the phrasing 'in the light of Article 10' suggests that the level of protection guaranteed by Art 11 ECHR is strengthened by the right to freedom of expression enshrined in Art 10.[48]

Finally, it needs to be pointed out that the ECtHR has expressed that employees are generally obliged to loyalty, restraint and confidentiality toward the employer.[49] However, this phrasing does not imply that the ECtHR intends to exclude certain employee expressions from the scope of Art 10 altogether, this aspect rather has to be considered during the course of the proportionality test. Therefore, a measure adopted by the employer that is found to restrict their employee's freedom of expression may be justified if the employee in turn has violated their obligation to loyalty, restraint, and confidentiality.

[47] ECtHR 2.6.2022, *Straume*/LAT, No. 59402/14, m.n. 82.
[48] ECtHR 2.6.2022, *Straume*/LAT, No. 59402/14, m.n. 82.
[49] ECtHR 26.2.2009, *Kudeshkina*/RUS, No. 29492/05, m.n. 85.

3.2 Restriction

When referring to freedom of expression in the workplace, it needs to be considered what actions adopted by the employer as well as the state may qualify as a restriction. As already pointed out above, interferences may either take the form of a preventive measure or a retrospective sanction. That said, it seems clear that any sanction or prohibition regulated by Labour Law, starting with a verbal warning and culminating in the termination of the employment contract will automatically constitute a restriction to Art 10 ECHR.

However, on the level of justification, we also need to consider if the restriction adopted by the employer is "prescribed by law":

Art 10 directly addresses the state and therefore possesses a vertical effect. As a result, existing case law is primarily concerned with public employers. For instance, the ECtHR has found that in the case of civil servants, whose employer is the state itself, termination or dismissal as a reaction to expressed opinions of the employees in itself already constitutes the required restriction that is 'prescribed by law'.[50] In my opinion, this consideration equally applies to all cases in which the state (in Austria this also includes the *Länder*, i.e. the provinces) acts as the employer, irrespective of whether he is acting directly or through a private enterprise of which he holds the majority of the shares. Therefore, private enterprises which are state-owned as well as private entities performing public functions will be treated as if the state acted directly. As a consequence, this means that the right to freedom of expression can be directly invoked by the employee as soon as the public employer reacts to a voiced opinion with a sanction or preventively prohibits unwanted behavior. Similarly, any restriction adopted by the public employer automatically constitutes a restriction 'prescribed by law' as requested by Art 10 Para 2 ECHR.[51] In my opinion, this shifts the onus on the public employer. For example, in the case of *Vogt*/GER, the ECtHR stated that the termination of an employee as a result of critical comments about the employer is a particularly severe interference because, in addition to negative effects on the career of the employee concerned, such a termination deters other employees of the same employer and sometimes leads to the fact that employees do not disclose grievances.[52]

In contrast, private employers are not directly obliged by Art 10 ECHR. However, Art 10 is considered to also have a so-called indirect effect (*Drittwirkung*) and, as a result, may also be invoked in horizontal relations, i.e. where only private parties are involved. This is the

[50] ECtHR 26.9.1995, *Vogt*/GER, No. 17851/91, m.n. 44.
[51] Naturally, any restriction adopted by the public employer will have to adhere to the two other criteria described in Art 10 Para 2 ECHR to not constitute a breach of the fundamental right of freedom of expression.
[52] ECtHR 26.9.1995, *Vogt*/GER, No. 17851/91, m.n. 44.

case whenever a state has taken, or has failed to adopt certain measures to protect the individual to express their opinion.[53] Furthermore, Art 10 ECHR needs to be considered in the interpretation of private law provisions and is considered of particular in the concretization of general clauses such as § 879 ABGB and in filling gaps.[54]

However, it has not always been clear if an employer's reaction to an expressed opinion of the employee can be qualified as a restriction 'prescribed by law', as it initially develops legal effects only within the employment relationship itself. In *Heinisch/GER*, the ECtHR considered that the employee's dismissal, 'as upheld by the German courts … constituted an interference with her right to freedom of expression'.[55] This phrasing has caused some authors to argue that 'a court decision in a conflict between private individuals is also considered as a measure of the state'[56]. In the case at hand, the employee, a geriatric nurse, had filed a criminal complaint against her employer alleging deficiencies in institutional care caused by a permanent shortage of staff. In the proceedings before the ECtHR, the claimant argued that the specific case of whistleblowing on the part of the employee was not mentioned as a criterion for a lawful dismissal in the national Labour Code and that as a consequence, her dismissal had not been 'prescribed by law' within the meaning of Art 10 Para 2 ECHR. The ECtHR noted that if the national Labour Code allows the justification of a dismissal where it amounts to a 'significant breach" of the employee's duty of loyalty, this is specific enough to constitute the requirement implied in the notion 'prescribed by law'. Therefore, as long as there is a legal basis for the sanction or prohibition adopted by the private employer, the legal provision in itself will qualify as the interference 'prescribed by law'. The confirmation of the dismissal by a national Labour Court, on the other hand, does not constitute an autonomous criterion.

3.3 Justification – proportionality

Lastly, it will be examined whether Art 10 ECHR offers the same level of protection to all types of employees, regardless of their profession. The ECtHR has noted that certain

[53] *van Rijn, A.*, in *van Dijk, P.; van Hoof, F.; van Rijn, A.; Zwaak, L.*, Theory and Practice of the European Convention on Human Rights[5] 777.
[54] *Kodek. G.*, in *Rummel, P./Lukas, M.* (eds.), Allgemeines bürgerliches Gesetzbuch[4] (2022) § 6 m.n. 159 et seq.
[55] ECtHR 21.7.2011, *Heinisch*/GER, No. 28274/08, m.n. 45.
[56] *Grabenwarter, C.*, in *Brameshuber, E.*; *Friedrich, M.; Karl, B.*, Festschrift für Franz Marhold 532.
van Rijn, A., in *van Dijk, P.; van Hoof, F.; van Rijn, A.; Zwaak, L.*, Theory and Practice of the European Convention on Human Rights[5] 777.

professional groups have a special responsibility, due to their position in society. As a result, these professions must accept greater interferences to their fundamental rights, specifically freedom of expression, than would be the case with a 'normal' employee. For instance, during the COVID-19 pandemic, the Austrian doctrine[57] assumed this to be the case for public servants primarily, but also employees in hospitals, pharmacies, or pharmaceutical companies. Therefore, if members of these professions criticize government measures to combat COVID-19 as excessive, or unreasonably disparage the impacts of infection with COVID-19 on the health of a patient,[58] their opinions might be initially protected by the Scope of Art 10 ECHR, but a sanction imposed by their employer will likely pass the proportionality test.

Speaking in more general terms, especially those professions that are particularly visible in the public eye have a special obligation to loyalty and confidentiality, so that even true information may only be disseminated in a moderate and appropriate form.[59] The ECtHR found this principle to apply to civil servants, as they are bound especially to loyalty, restraint, and secrecy.[60] Similarly, lawyers and judges are equally obliged to only express their opinions in a restrictive manner.[61] In addition, the ECtHR considers that the performance of public tasks by mixed-economy and state-owned enterprises is also a sector that will face greater restrictions to employees' freedom of expression as the protection of the public's trust in the provision of services in this area is essential for the functioning and economic well-being of the entire sector.[62]

Finally, the professional code of conduct of the liberal professions may also provide for greater restrictions on freedom of expression. This is especially relevant when liberal professionals or their employees wish to express opinions that may harm the reputation of the entire profession. For instance, medical practitioners will have to endure certain limitations to the freedom of expression due to their special relationship with patients based on trust, confidentiality, and confidence that the former will use all available knowledge and means for ensuring the well-being of the latter.[63]

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[57] *Gerhartl, A.*, Leugnen von Corona - arbeitsrechtliche Konsequenzen, Arbeits- und Sozialrechtliche Kartei (ASoK) 2020, 329 (333).
[58] *Gerhartl,* ASoK 2020, 330.
[59] ECtHR 9.7.2013, *DiGiovanni*/ITA, No. 51660/06, m.n. 51 et seq.
[60] Cf. ECtHR 26.2.2009, *Kudeshkina*/RUS, No. 29492/05, m.n. 85; 12.2.2008, *Guja*/MDA, No. 14277/04, m.n. 72.
[61] *Grabenwarter, C.*, European Convention on Human Rights Art 10 m.n. 35 et seq; for instance ECtHR 12.2.2008, *Guja*/MDA, No. 14277/04, m.n. 72 et seq; 26.9.1995, *Vogt*/GER, No. 17851/91, m.n. 44; 1.7.2008, *Lahr*/GER, No. 16912/05.
[62] ECtHR 21.7.2011, *Heinisch*/GER, No. 28274/08, m.n. 89.
[63] *Grabenwarter, C.*, European Convention on Human Rights Art 10 m.n. 34.

4. Solving the concrete case at hand

In this chapter, I would like to apply the principles laid out above to the case of the female physician who took part in a demonstration against COVID-19 and publicly criticized measures adopted by the Austrian Government to combat the disease.

Firstly, it needs to be said that the views voiced by the public health officer fall within the scope of protection of Art 10 Para 1 ECHR. Admittedly, such statements may be difficult to comprehend and some contents are refutable, for example when the physician qualified the adopted measures as 'constructs of lies' of the government, accused the former of 'brainwashing' the population into submission, or assumed that some kind of 'radio radiation' will affect all those who end up getting vaccinated. At this point, it is not necessary to enter into a detailed discussion to agree that these statements cannot be classified as facts, as they are completely void of content that can be proven or disproven. Instead, the views expressed by the female physician must be classified as value judgments. However, as already shown above, the scope of protection of Art 10 ECHR is deliberately very broad, which is why critical or disturbing statements are also covered.

Secondly, it needs to be explored if the dismissal of the public health officer constitutes a restriction prescribed by law, as Art 10 Para 2 ECHR demands. Clearly, the dismissal can be classified as a sanction, i.e. a reaction of the employer to an unwanted behavior of the physician. The sanction also has to be qualified as a restriction 'prescribed by law', the basis of which is found in the Provincial Contractual Employees Act (Burgenländisches Landesvertragsbedienstetengesetz). The province of Burgenland, i.e. the state, is the employer in this case; accordingly, any sanction under Labour Law with which the employer reacts to an expression of opinion by its employees already constitutes state intervention.

Thus, it must be examined whether the interference in question can also be justified. The legitimate objective, in this case, is the performance of public duties, specifically the protection of collective health. As shown above, certain professions, first and foremost civil servants and judges, must experience more far-reaching restrictions on their right to freedom of expression simply because of their position as direct representatives of the state. Members of the medical profession also have a special social responsibility due to their prominent position in society. Moreover, as a public health officer, the claimant directly represents the state; accordingly, she has to put up with particularly strong restrictions on her freedom of expression. Those parts of her speech in which she calls upon the public to openly oppose

the government's measures adopted to combat COVID-19 are particularly likely to unsettle the public. There is also a direct connection with her professional practice, because, as a public health officer she is inevitably associated with this office by the public. In my opinion, the dismissal also constitutes an appropriate measure, since the public health officer clearly expresses through the content of her speech that she openly opposes the position of the state, her employer. A weighing of the fundamental rights of the public health officer to voice her opinions and the legitimate interest of the state will therefore clearly be in favor of the state. Thus, the right to freedom of expression must take a back seat, and the dismissal of the claimant will be qualified as justified.

In summary, the appearance of the physician at the public demonstration against COVID-19, paired with her incendiary speech in which she clearly opposed government measures adopted, can be classified as an expression that initially falls within the scope of Art 10 ECHR. However, the measures adopted by her employer, the Land Burgenland, constitute a restriction 'prescribed by law", which also serves a legitimate aim, the protection of public safety, and is proportionate. As a consequence, the Austrian Supreme Court rightly classified the dismissal of the physician as lawful.

5. Conclusion

The fundamental right of freedom of expression, as protected by Art 10 ECHR, is considered to be one of the central means to ensure the well-functioning of a democratic society. Therefore, its scope needs to be drawn as wide as possible in order to best achieve this objective. As a result, all forms of communication between humans are initially protected by Art 10 ECHR, regardless of their intellectual value or if the content of the communication is pleasurable or disturbing. In my opinion, even hate speech should be initially included.

If this kind of communication is interfered with, the ECtHR will examine whether the restriction is 'prescribed by law'. This means that any legal provision that aims to limit the free expression of individuals will automatically qualify as a restriction prescribed by law. Furthermore, if the employment relationship is set against the background of government employment, i.e., in the public administration, one of the actors, namely the employer, is directly equated to the state. Therefore, any interference brought upon the employee by the public employer will also constitute a restriction 'prescribed by law'.

The case law of the ECtHR clearly indicates that certain professions will have to accept greater interferences with their fundamental rights than others. While most of the case law concerns public servants and judges, the circumstances of the concrete case at hand indicate that this principle has to be extended to other professions as well. One profession that has been in the particular focus of the Austrian case law is the medical profession. Whilst the Austrian courts primarily base the decision on the matter if the opinion voiced can be linked to the professional practice of the physician concerned, the European case law does not take this fact into consideration. Rather, the ECtHR seems to focus heavily on the question of whether the statements may be qualified as facts or as value judgments. Summarising, I believe that members of the medical profession have to endure additional restrictions to their right of freedom of expression because of the role they play within a well-functioning society. Members of the public assume that physicians will use all available knowledge and means to ensure the well-being of patients, and therefore, will not willingly disseminate false information.

Two aspects can be identified as crucial in the case presented in the introduction. Firstly, as shown above, physicians are endowed with a certain responsibility toward the public. Secondly, the physician in question, being an employee of the *Land Burgenland*, also directly represented the state. Therefore, her decision to publicly criticize government measures adopted to battle COVID-19 can be qualified as capable of irritating or unsettling public opinion toward these measures. The state's special interest to prevent such situations will justify measures that will discourage public employees from voicing their concerns publicly. As a result, the dismissal of the physician can be qualified as in accordance with Art 10 ECHR.