Information Note on the Court's case-law No. 143

July 2011

## *Heinisch v. Germany* - 28274/08

Judgment 21.7.2011 [Section V]

# Article 10

### Article 10-1

### Freedom of expression

### Freedom to impart information

Dismissal of nurse for lodging a criminal complaint alleging shortcomings in care provided by private employer: *violation*

*Facts* – The applicant was employed as a geriatric nurse in a nursing home for a company which was majority-owned by the Berlin *Land*. Between January 2003 and October 2004 she and colleagues regularly indicated to the management that they were overburdened owing to a shortage of staff and that services were not being properly documented. Following an inspection, the medical review board of the health insurance fund noted serious shortcomings in the care provided, including an insufficient staff and unsatisfactory care and documentation of care. In November 2004 the applicant's legal counsel wrote to the company pointing out the staffing problems and enquiring how the company intended to avoid incurring criminal liability. When the company rejected the accusations, he lodged a criminal complaint alleging aggravated fraud in that the company had knowingly failed to provide the high quality care announced in its advertisements, had systematically tried to cover up the problems and had urged staff to falsify service reports. In January 2005 the public prosecutor's office discontinued the preliminary investigations it had opened. In the same month the applicant was dismissed with effect from 31 March on account of repeated absences through illness. A trade union and friends of the applicant subsequently circulated a leaflet denouncing her dismissal as a "political disciplinary measure taken in order to gag those employed" and mentioning the criminal complaint. The company, which had not previously been aware of the criminal complaint, then dismissed the applicant without notice, suspecting that she had initiated the production and dissemination of the leaflet. The domestic courts rejected the applicant's claims in respect of her dismissal after finding that her criminal complaint had provided a "compelling reason" for the termination of her employment relationship without notice.

*Law* – Article 10: It was common ground that the criminal complaint lodged by the applicant had to be regarded as whistle-blowing, within the ambit of Article 10, and that her resulting dismissal and the related decisions of the domestic courts had interfered with her right to freedom of expression. That interference was prescribed by law and pursued the legitimate aim of protecting the reputation and rights of others, namely the business reputation and interests of the applicant's employer.

As to the proportionality of the interference, the Court considered that the principles and criteria established in *Guja v. Moldova**, a case concerning a public-sector employee, also applied to private-law employment relationships and should be used to weigh the employee's right to signal illegal conduct or

wrongdoing on the part of his or her employer against the employer's right to protection of its reputation and commercial interests.

Given the particular vulnerability of elderly patients and the need to prevent abuse, the information disclosed was undeniably of public interest and so satisfied the first of the *Guja* criteria. As regards the second criterion, whether alternative channels could have been used to make the disclosure, by the time the applicant lodged the criminal complaint she had already informed her superiors numerous times that she was overburdened and had warned them that a criminal complaint was possible. It was true that the legal qualification of the employer's conduct as aggravated fraud was mentioned for the first time in the criminal complaint, but the applicant had already disclosed to her employer the factual circumstances on which that complaint was based and there was not sufficient evidence to counter her contention that further internal complaints would have been ineffective. As to the next criterion, whether the information disclosed was authentic, the applicant's allegations were not devoid of factual background (the medical review board had also criticised the same deficiencies) and there was nothing to establish that she had knowingly or frivolously reported incorrect information. The fact that the preliminary investigations were discontinued did not necessarily mean that the allegations underlying the criminal complaint were without factual basis or frivolous from the start. There was no reason to doubt that the applicant also satisfied the fourth criterion: acting in good faith. Even though there was a degree of exaggeration and generalisation in the formulation of her criminal complaint, her allegations were not entirely devoid of factual grounds and did not amount to a gratuitous personal attack on her employer. Further, having concluded that external reporting was necessary, she had not immediately gone to the media or disseminated flyers, but had instead sought the assistance and advice of a lawyer, with a view to lodging a criminal complaint. As regards the fifth criterion, the detriment caused to her employer, while the applicant's allegations had certainly been prejudicial to the company, the public interest in being informed about shortcomings in the provision of institutional care for the elderly by a State-owned company was so important that it outweighed the interest in protecting a company's business reputation and interests. Finally, as regards the severity of the sanction, the applicant had been given the heaviest penalty possible under labour law. Not only had this had negative repercussions on her career, it was also liable to have a serious chilling effect both on other company employees and on nursing-service employees generally, so discouraging reporting in a sphere in which patients were frequently not capable of defending their own rights and where members of the nursing staff would be the first to become aware of shortcomings in the provision of care.

The applicant's dismissal without notice had therefore been disproportionate and the domestic courts had failed to strike a fair balance between the need to protect the employer's reputation and the need to protect the applicant's right to freedom of expression.

*Conclusion*: violation (unanimously).

Article 41: EUR 10,000 in respect of non-pecuniary damage.

* *Guja v. Moldova* [GC], no. 14277/04, 12 February 2008, Information Note no. 105.

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