Information Note on the Court's case-law No. 144

August-September 2011

Palomo Sánchez and Others v. Spain [GC] - 28955/06, 28957/06, 28959/06 et al.

Judgment 12.9.2011 [GC]

Article 10

Article 10-1

Freedom of expression

Dismissal of trade-union members for publishing articles offending their colleagues: *no violation*

Facts – The applicants worked as delivery men for a company. After having brought several sets of proceedings before employment tribunals against their employer, in 2001 they set up a trade union and were members of its executive committee. The March 2002 issue of the union's monthly newsletter reported on a judgment of an employment tribunal which had partly upheld their claims. The cover page of the newsletter displayed a cartoon showing two employees of the company giving sexual gratification to the director of human resources. The employees were criticised in two articles, worded in vulgar language, for having testified in favour of the company during the proceedings brought by the applicants. The newsletter was distributed among the workers and displayed on the trade union's notice board on the company's premises. The applicants were dismissed for serious misconduct, namely for impugning the reputations of the two employees and the human resources director targeted in the newsletter. The applicants challenged that decision before the courts. The Employment Tribunal dismissed their complaints, finding that the dismissals were justified under the relevant provisions of the Labour Regulations. It held that the cartoon and the two articles were offensive and impugned the dignity of those concerned, and thus exceeded the limits of freedom of expression. Subsequent appeals by the applicants were unsuccessful.

In a judgment of 8 December 2009 (see Information Note no. 130, the case then being called *Aguilera Jiménez v. Spain*, nos. 28389/06 et al.), a Chamber of the Court found, by six votes to one, that there had been no violation of Article 10 of the Convention.

Law – Article 10 read in the light of Article 11: In the applicants' case the question of freedom of expression was closely related to that of freedom of association in a trade-union context. It was to be noted in this connection that the protection of personal opinions under Article 10 was one of the objectives of freedom of assembly and association as enshrined in Article 11. However, even though the complaint mainly concerned the applicants' dismissal for having, as members of the executive committee of a trade union, published and displayed the material in question, the Court found it more appropriate to examine the facts under Article 10, nevertheless read in the light of Article 11, on the ground that it had not been established that the applicants' trade union membership had played a decisive role in their dismissal.

The principal question was whether the respondent State was required to guarantee respect for the applicants' freedom of expression by annulling their dismissal. The domestic courts had noted that freedom of expression in the context of labour relations was not unlimited, the specific features of those relations having to be taken into account. To arrive at the conclusion that the cartoon and articles had been offensive to the people concerned, the employment tribunal had carried out a detailed analysis of the facts at issue and the context in which the applicants had published the newsletter. The Court saw no reason to call into question the domestic courts' findings that the content of the newsletter had been offensive and capable of harming the reputation of others. A clear distinction had to be made between criticism and insult and the latter might, in principle, justify sanctions. Accordingly, the grounds given by the domestic courts had been consistent with the legitimate aim of protecting the reputation of the individuals targeted by the cartoon and articles in question, and the conclusion that the applicants had overstepped the limits of admissible criticism in labour relations could not be regarded as unfounded or devoid of a reasonable basis in fact.

As to whether the sanction imposed on the applicants, namely their dismissal, was proportionate to the degree of seriousness of the content in question, the cartoon and articles had been published in the newsletter of the trade union workplace branch to which the applicants belonged, in the context of a dispute between them and the company. However, they included criticisms and accusations which were aimed not directly at the company but at two other employees and the human resources manager. The extent of acceptable criticism was narrower as regards private individuals than as regards politicians or civil servants acting in the exercise of their duties.

The Court did not share the Government's view that the content of the articles in question did not concern any matter of general interest. They had been published in the context of a labour dispute inside the company, to which the applicants had presented certain demands. The debate had therefore not been a purely private one; it had at least been a matter of general interest for the workers of the company. However, such a matter could not justify the use of offensive cartoons or expressions, even in the context of labour relations. The remarks had not been instantaneous and ill-considered reactions in the context of a rapid and spontaneous oral exchange, but written assertions, displayed publicly on the premises of the company. After a detailed balancing of the competing interests, with extensive reference to the Constitutional Court's case-law concerning the right to freedom of expression in labour relations, the domestic courts had endorsed the sanctions imposed by the employer and had found that the conduct in question had not directly fallen within the applicants' trade union activity but offended against the principle of good faith in labour relations. The Court agreed with the domestic courts that in order to be fruitful, labour relations had to be based on mutual trust. While that requirement did not imply an absolute duty of loyalty towards the employer or a duty of discretion to the point of subjecting the worker to the employer's interests, certain manifestations of the right to freedom of expression that might be legitimate in other contexts were not legitimate in that of labour relations. An attack on the respectability of individuals by using grossly insulting or offensive expressions in the professional environment was, on account of its disruptive effects, a particularly serious form of misconduct capable of justifying harsh sanctions.

In those circumstances, the applicants' dismissal had not been a manifestly disproportionate or excessive sanction requiring the State to afford redress by annulling it or replacing it with a more lenient measure.

Conclusion: no violation (twelve votes to five).
