EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

ECtHR 12 February 2008, (Guja – v – Moldova), Application no. 14277/04 and ECtHR 6 October 2011, (Vellutine and Michel – v – France), Application no. 32820/09, Fundamental rights, Whistleblowing, Unions

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at the governmental level. The ECtHR disagreed with the decision of the Moldova Supreme Court but the applicability of this decision may be limited to the unique circumstances existing in Moldova, namely the weakness of the rule of law in that country.</p> <p>In Vellutine, the ECtHR consider the application of free speech in the context of a dispute between a trade union and a publically elected official. The Court had previously placed limits on the language that could be used during a labour dispute (Sanchez v Spain). However, in the context of a dispute involving an elected official greater latitude was permitted. The ECtHR disagreed with the Cours de Cassation that the use of defamatory words was not protected by Article 10.</p>

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disagreed with the *Cours de Cassation* that the use of defamatory words was not protected by Article 10.

Facts

In *Guja*, the head of the press office of the Prosecutor General's office released two letters to the press showing that there was political interference in their work. The release of the letters took place against the background of public concern with levels of corruption in Moldova, which had been identified in a recent speech by the President.

Four police officers arrested ten persons in relation to the 2001 Parliamentary elections. The suspects were later released and they complained of ill treatment and illegal detention. A complaint was made to the public prosecutor's office and an investigation was commenced against the police officers.

The police officers, in turn, commenced a public campaign arguing that they should not be investigated for unlawful conduct and letters were written to a number of senior public figures. The four police officers asserted that the complaints against them were politically motivated. The result of these letters was that the Deputy Speaker of the Moldovan Parliament (Mr Misin) wrote to the Public Prosecutor's Office in relation to the case; and this was followed by a letter from the Ministry of the Interior. The Public Prosecutor gave the impression that he had succumbed to political pressure.

Consequently, Mr Guja sent copies of these two letters to a newspaper. He was dismissed from his post on 3 March 2003 and he sought reinstatement. On 16 September 2003, the Court of Appeal rejected his appeal and the Supreme Court did the same on 26 November 2003, on the grounds that he had breached his duty of loyalty to his employer and failed to raise the issue internally. On 30 March 2004, Mr Guja lodged an application with the ECtHR.

In *Vellutine*, an employee had a dispute with the Mayor of the municipality of Vendays-Montalivet. The Mayor took action against the employee and went further: in two issues of the municipal newsletter he criticised the employee directly. As a consequence, the employee commenced an action against the Mayor.

Mr Vellutine was the President and Mr Michel the General Secretary, of the Municipal Police Officers Union (USPPM). The USPPM supported Mr Vellutine and released a political leaflet directly criticising the Mayor, describing him as a 'dictator', 'cultivating a cult of personality' and acting dishonestly.

The Mayor sued the trade union officials successful for defamation under the Act of 29 July

1881 on freedom of the press. The decision was confirmed by the Bordeaux Court of Appeal on 1 February 2008. On 9 December 2008, the matter was appealed but the *Cour de Cassation* held the appeal non-admissible. On 5 June 2009, the Applicants lodged a complaint with the ECtHR.

ECtHR' s judgments in Guja and Velluntine:

In *Guja*, the ECtHR considered the political situation in Moldova and referred to the 2004 Report of the International Commission of Jurists which found that:

"*the rule of law suffers serious shortcomings that must be addressed. The ICJ/CIJL found that the breakdown in the separation of powers has again resulted in a judiciary that is largely submissive to the dictates of the Government. The practice of 'telephone justice' has returned. The executive is able to substantially influence judicial appointments through the Supreme Council of Magistracy that lacks independence. Beyond allegations of corruption, the Moldovan judiciary has substantially regressed in the last three years, resulting in court decisions that can pervert the course of justice when the interests of the Government are at stake.*"

In addition, the ECHR referred to reports from Freedom House and the Open Society Justice Initiative, as well as the United Nations Convention Against Corruption (in force 14 December 2005).

The ECtHR held that there was a violation of Article 10 notwithstanding the fact that Mr Guja was not the author of the letters. Article 10 was held to apply to the workplace in general and public servants in particular. Article 10 applied to the imparting of information even where an individual was not the author. Whilst, it was recognised that a public servant owed a strong duty of confidentiality to his or her employer, the situation in Moldova was such that the alternative - of reporting this political interference to his superiors - would have not been effective. In short, the only mechanism for drawing public attention to this political interference was to release the letters to the press.

The ECtHR noted that Mr Guja had acted in good faith and had released the documents to fight corruption. He did not receive any monies, nor was he acting as a result of a grievance against his employer. His dismissal was a disproportionate sanction that would discourage others from reporting or acting on misconduct.

In *Vellutine*, the ECtHR considered the fact that the applicants were trade union officials acting in connection with a labour dispute. Further, the Major had exposed himself to criticism by drawing attention to the case in the two municipal newsletters in which the individual employee had no opportunity to reply. However, whilst the ECtHR recognised the

applicability of laws of defamation within Article 10 for the "protection of the reputation and rights of others", its view was that those who had entered public life must accept that the limits of acceptable criticism were wider than those of a private individual.

Commentary

The ECtHR has applied Article 10 to whistleblowing and labour disputes in an expansive manner, to the effect that it is now clear that in such cases employees will be given considerable latitude.

In *Guja* the situation in Moldova was clearly worrying and the ECtHR has strengthened the right of civil servants and employees to report illegal conduct and wrongdoing at their place of work. A State entity or employer can avoid this outcome if it provides sufficient procedural safeguards to enable the employee to raise concerns and if it ensures that the procedures for handling such concerns are effective. However, once it has been established by the employee that there has been wrongdoing and that the employer is not inclined to remedy the position, any subsequent dismissal of the employee could only be regarded as punitive and, thus, disproportionate.

What makes this case unusual is that the breach of Article 10 was not in the context of a labour dispute, nor in the expression of a private opinion outside the employment context, but was based on the substantive employment of a civil servant - and a breach of Article 10 was found by adopting a political analysis of the country.

The case of *Vellutine* raises more complex problems. The Major had used the municipal newsletter to put his case and took advantage of his public position to disseminate his version of events. It would seem reasonable in this context that the trade union and the employee should be able to use the means available to them to counter his case.

It is well established in European jurisprudence that considerable latitude is given to the press in relation to an elected official. In this sense, the press has been held to be the "watchdog" of democracy. The ECtHR has accepted a degree of exaggeration and even provocation by the press, for example, in *Prager and Oberschlick v Austria* (1995). Elected officials have both greater rights of freedom of speech (see *Castell v Spain* (1992) and *Jerusalem v Austria* (2001)) and a susceptibility to personal attack (see *Lingers v Austria (1986)*).

However, this case must be near the limit by virtue of the extreme use of language of the trade union and the clear attempt to damage the re-election prospects of a politician. There would appear to be little merit in disagreeing with the French Courts, who are in a better position than the Strasbourg Court to balance the issues.

Creator: European Court of Human Rights (ECtHR)
Verdict at: 2011-10-06
Case number: 14277/04 and 32820/09