R. Ó Fathaigh, "Case-note: Palomo Sánchez v. Spain", *European Human Rights Cases*, (2011) Issue 11.

Europees Hof voor de Rechten vans de Mens
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(Bratza (President), Lorenzen, Tulkens, Steiner, Thór Björgvinsson, Jočienė, Šikuta, Popović, Ziemele, Berro-Lefèvre, Hirvelä, López Guerra, Trajkovska, Bianku, Karakaş, Vučinić en Pardalos)
Noot R. Ó Fathaigh

[EVRM art. 10, 11]

Vrijheid van meningsuiting. Vakbondsvrijheid. Uitingen door vakbondsleden. Belediging.

De klagers zijn leden van het bestuur van een vakbond die zijn ontslagen na de publicatie van een nieuwsbrief door de vakbond. De nieuwsbrief berichtte over een recente uitspraak van een arbeidsrechter in een zaak tegen hun werkgever, die voor de klagers succesvol was geweest. Op de omslag van de nieuwsbrief stond een cartoon waarin medewerkers die tegen de vakbond hadden getuigd bij de rechtbank, waren afgebeeld als wachtend op hun beurt om een lid van het management seksueel te bevredigen. De nieuwsbrief bevatte daarnaast twee artikelen over het onderwerp, waaronder een met de titel "When you've rented out your arse you can't shit when you please". De artikelen bekritiseerden de betreffende medewerkers en het management in vulgaire en grove bewoordingen. De nieuwsbrief werd verspreid onder de medewerkers en werd opgehangen op het prikbord van de vakbond. Vervolgens werden de klagers ontslagen wegens wangedrag, met als reden dat de nieuwsbrief de reputatie had aangetast van degenen die op de cartoon waren afgebeeld. De Spaanse rechters billijkten de ontslagbeslissing met de redenering dat de vrijheid van meningsuiting geen recht omvat om anderen te beledigen.
Voor het Hof stellen de klagers dat de Spaanse rechters tekort zijn geschoten in de naleving van hun positieve verplichtingen om de vrijheid van meningsuiting en de vakbondsvrijheid te beschermen, zoals die voortvloeien uit art. 10 en 11 EVRM. De derde kamer van het EHRM oordeelde eerder dat in deze zaak geen sprake was van een schending van art. 10 en 11 EVRM, waarbij rechter Power een afwijkende mening gaf. Vervolgens werd de zaak doorverwezen naar de Grote Kamer.
De Grote Kamer is het eens met de nationale rechters dat de cartoon en de artikelen beledigend zijn en dat zij de reputatie kunnen beschadigen van degenen die erop zijn afgebeeld. De Grote Kamer verwijst op dit punt naar de beschuldiging van schanddaden ("infamy") jegens de werknemers van het bedrijf, en naar het verlagen van deze medewerkers alsof zij hun collega's zouden hebben 'verkocht' en hun waardigheid tekort zouden hebben gedaan ("denouncing them for 'selling' the other workers and for forfeiting their dignity"). De Grote Kamer beschrijft deze beschuldigingen als tergend en beschadigend ("vexatious and injurious terms"). De Grote Kamer vindt dat er een duidelijk onderscheid moet worden gemaakt tussen kritiek en belediging, waarbij de laatste vorm van expressie een begrenzing van de vrijheid van meningsuiting kan rechtvaardigen. In dit verband verwijst het Hof naar het uitgangspunt, geformuleerd door het ILO-Comité voor Verenigingsvrijheid, dat vakbonden bij het geven van hun mening de grenzen van het betamelijke in acht moeten nemen en zich moeten onthouden van het bezigen van beledigende taal. De Grote Kamer concludeert dat de beslissing van de nationale rechters dat de

klagers de grenzen van de aanvaardbare kritiek hebben overschreden, niet als ongegrond kan worden aangemerkt en dat deze beslissing een redelijke basis heeft in de feiten van de voorgelegde zaak. Tot slot spreekt de Grote Kamer zich nog uit over de vraag of de sancties, in de vorm van ontslag, voldoende proportioneel waren. De Grote Kamer merkt in dit verband op dat de cartoon en de artikelen gepubliceerd zijn in het kader van een arbeidsgeschil en dat daarmee sprake was van een bijdrage aan een onderwerp van algemeen belang voor de medewerkers van het bedrijf. Niettemin oordeelt de Grote Kamer dat dit belang niet het gebruik van beledigende cartoons en uitingen kan rechtvaardigen. De Grote Kamer overweegt daartoe dat het gebruik van grove belediging in een professionele omgeving een bijzonder ernstige vorm van wangedrag vormt die strenge sancties kan rechtvaardigen. Om die reden is het ontslag niet kennelijk disproportioneel. Het Hof oordeelt dan ook dat de nationale rechters niet tekort zijn geschoten in hun positieve verplichtingen onder art. 10 EVRM, gelezen in het licht van art. 11 EVRM (12-5).

Palomo Sánchez
tegen
Spanje

NOOT

1. The importance of the Grand Chamber judgment in *Palomo Sánchez v. Spain* cannot be overstated, with the Court holding that trade union expression in the context of a labour dispute must not involve insulting or offensive expression. Such a limiting principle on freedom of expression garnered considerable controversy within the Court: five judges dissented, with the tone of the dissenting opinion providing a rare insight into the level of division within the Court on the issues involved.

2. The dissent accused the majority of "speculation" and "ignorance" of trade union activity, and to giving certain issues "scant consideration". Moreover, in the Chamber judgment, the dissenting judge described the level of supervision exercised by the Court as "minimal in the extreme". Such judicial sentiments were echoed in the critical academic commentary following the Chamber judgment (see D. Voorhoof and J. Englebert, "La liberté d'expression syndicale mise à mal par la Cour européene des droits de l'homme", *Revue trimestrielle des droits de l'homme*, no. 2010/83, 743).

3. This was the first time the European Court considered the issue of trade union freedom of expression, and it proceeded on the novel basis of considering it under Article 10 ECHR, read in the light of freedom of association under Article 11. It is worth noting in this regard that the Chamber had considered Article 11 did not apply as the dismissals had not been due to union membership. The Grand Chamber used the opportunity to lay down a number of fundamental principles: it is of the view that trade union expression must include the right to seek to improve the situation of workers, and freedom of expression is a *conditio sin qua non* for the development of trade unions. In addition, national authorities are required to ensure that disproportionate penalties do not dissuade trade unions from seeking to express and defence their interests.

4. However, there are a number of fundamental criticisms which may be levelled at the Grand Chamber majority in concluding that there had been no violation of the right to freedom of expression, read in the light of Article 11.

5. The first criticism relates to the level of scrutiny exercised by the Court in examining the cartoon and articles with regard to Article 10 jurisprudence. The most curious aspect of this scrutiny is the fact that the Court ignored the applicants' submission that the cartoon was to be viewed as a caricature, with the articles being satirical and ironic. Not only did the Spanish government seek to rebut this point, even the dissenting judge in the Chamber judgment had specifically addressed this point. The Grand Chamber crassly decided to ignore the submission, and failed to consider the seminal case on satire, art and insult, namely *Vereinigung Bildender Künstler v. Austria* (ECtHR 25 January 2007, no. 68354/01, *EHRC* 2007/47, case-note J.H. Gerards), which the Spanish government also sought to distinguish.

6. The Court in *Vereinigung Bildender Künstler* held that satire is a form of artistic expression and social commentary, and by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate (*ibid*, § 33). Given the title of the articles and the nature of the cartoon in the union newsletter, the Court in *Palomo Sánchez* may be severely criticised for failing to even consider the submission on caricature and satire, and leaves the legitimacy of this judgment open to serious question.

7. A second criticism, and perhaps the most significant, is the reliance the Court places upon principles supposedly established by the Committee on Freedom of Association of the International Labour Organisation (hereinafter "ILO Committee"). The Court cited the Fifth Edition of the Digest (2006) of decisions of the ILO Committee as authority for the proposition that when expressing their opinions, trade unions should respect the limits of propriety and refrain from the use of insulting language (*Palomo Sánchez*, *supra*, § 67), and as further authority for the proposition the use of offensive cartoons or expression cannot be justified in the context of labour relations, even where the matter is of general interest (*ibid*, § 73).

8. However, there are serious difficulties with relying upon the ILO Committee.
Firstly, when one examines the authority upon which the ILO Committee principles are based, certain difficulties are evident. The ILO Committee case which is supposedly authority for the principle that "trade union organisations should respect the limits of propriety and refrain from the use of insulting language" is a complaint against Chile (309th Report, Case No. 1945). The case concerned *criminal* proceedings for "contempt of authority" initiated against a number of trade union members for shouting slogans from the Senate gallery during a debate in the Chilean Senate. In response to the complaint, the ILO Committee merely recalled that trade unions should respect the limits of propriety and refrain from using insulting language (*ibid*, § 67), and due to the limited nature of the ILO Committee complaint mechanism, it only requested the Chilean government to keep it informed of the matter. It is clear that the ILO Committee was not laying down a fundamental limiting principle of freedom of expression that trade unions *cannot* engage in offensive or insulting expression, but was merely noting that such language in this context was not advisable.

9. Therefore, it seems quite unreasonable for the European Court to stretch this remark into a fully fledged limiting principle, and utilising it to effectively bar trade unions from using offensive expression. This is even more so given that the facts in the complaint could not be more far removed from those in *Palomo Sánchez*.

10. Secondly, if the European Court was serious about relying upon ILO Committee authority, it should have referred to a complaint against Honduras (122th Report, Case No. 619) which was directly on point to that in *Palomo Sánchez*. The case concerned the dismissal of a number of executive members of a trade union for sending a memorandum to management which accused them of "illegal threats, acts of constraint and shameful acts" in forcing them to leave the union, remarks which were held to be insulting expression.

11. The ILO Committee in this case considered that the language used by the employees was in their capacity as trade union officials on the occasion of a labour dispute (when violent language is not infrequently employed by both sides), and not by the employees in the course of their work against their employer (*ibid*, § 96).

12. Had the European Court applied the foregoing passage, in particular that the principle that "violent language" is frequently used in labour dispute, and distinguished expression by employees in their capacity as trade union members and employees in their capacity as employees criticising a company, the majority conclusion in *Palomo Sánchez* would have been quite unjustifiable. Thus, it may be reasonably asserted that the European Court selectively cited ILO Committee principles, neglecting to fully consider its jurisprudence.

13. The third criticism relates to the Court citing *Skałka v. Poland* (ECtHR 27 May 2003, no. 43425/98, *EHRC* 2003/59, case-note E. Geurink, § 34) as authority for proposition that there is a clear distinction between criticism and insult and that the latter may, in principle, justify sanctions. *Skałka* concerned a conviction for insulting a court, and the Court in *Palomo Sánchez* curiously omits referring to the second limiting part of the paragraph cited in *Skałka*, which reads, "If the sole intent of any form expression is to insult a court, or member of that court, an appropriate punishment would not, in principle, constitute a violation of Article 10" (*ibid*, § 34).

14. It is important to note that the Court in *Skałka* stated that the "sole intent" must be to insult in order to justify restricting such expression. It is reasonable to assume that had the Court in *Palomo Sánchez* applied this limiting principle to a cartoon and article with such a ridiculous title as "When you've rented out your arse you can't shit when you please", it would be difficult to hold that the "sole intent" was to insult. Moreover, *Skałka* was premised on the protection of the authority of the judiciary, and maintaining confidence in the courts, and was not elaborating upon a general principle concerning insulting expression more widely.

15. Again, it is odd that the Grand Chamber decided to omit the limiting part of the principle in *Skałka*, and is further evidence for the correctness of assertion made in the dissent that the majority were demonstrating an intent to place trade union expression at a low level and to treat it restrictively (*Palomo Sanchez*, dissenting opinion, § 11).

16. A final criticism relates to the consideration the Court gives to the severe sanctions imposed on the applicants, namely dismissal. The dissent rightly cited the judgment in *Fuentos Bobo v. Spain* (ECtHR 29 February 2000, no. 39293/98, *EHRC* 2000/34, case-note J.H. Gerards) as authority for the proposition that less severe sanctions other than dismissal should have been considered. However, there is also the seminal Grand Chamber judgment in *Guja v. Moldova* (ECtHR 12 February 2008 (GC), no. 14277/04, *EHRC* 2008/67, case-note E. Geurink) which found that dismissal was the heaviest sanction, and other less severe penalties should have been considered (*ibid*, § 95). The Court in *Guja* also recognised the chilling effect of severe sanctions such as dismissal.

17. The Court in *Palomo Sánchez* ignored any consideration of the chilling effect dismissal would have on trade union expression more generally, as trade unions will be deterred from engaging in legitimate harsh criticism lest dismissal result. The approach of the Court in this regard is all the more questionable when one considers two Chamber judgments which were delivered in the days subsequent to *Palomo Sánchez*.

18. In *Şişman v. Turkey* (ECtHR 27 September 2011, no. 1305/05) a Chamber of the Court held that the sanctioning, in the form of salary reductions, of a number of trade union members for displaying union posters on office walls rather than on the union notice board was a violation of Article 11 of the European Convention. Importantly, the Court held that the sanctions, however minimal, were capable of having a chilling effect on union members from engaging freely in their union activities (*ibid*, § 8).

19. Moreover, in *Vellutini and Michel v. France* (ECtHR 6 October 2011, no. 32820/09) another Chamber of the Court held that the conviction of two senior members of a trade union for defamation of a mayor following statements published in a union leaflet was a violation of Article 10 of the European Convention. The Court placed particular emphasis of the fact that the statements were made by the applicants in their capacity as union members (*ibid*, § 32), and recalled that the right to freedom of expression is one of the key ways to ensure the enjoyment of the right to freedom of association. The Court held that the fines and conviction were a disproportionate sanction.

20. All things considered, the judgment in *Palomo Sánchez* represents a retrograde step in terms of freedom of expression generally. At the heart of the case is the clear distinction between employees *as union members* engaging in critical expression, and employees *in their capacity as employees* engaging in critical expression. The former is trade union expression, while the latter is not. The minority admonish the Court for paying "scant attention" to this fact, with the minority being of the view that trade union expression warrants a high degree of protection, whereby the Court's jurisprudence applicable to media freedom should be fully extended to trade unions due to their role as "watchdogs" for workers' interests (*Palomo Sánchez, supra*, dissenting opinion, § 7).

21. The judgment in *Palomo Sánchez* unfortunately continues a trend of recent Grand Chamber judgments restrictively interpreting freedom of expression (see, for example, *Lindon, Otchakovsky-Laurens and July v. France*, ECtHR 22 October 2007 (GC), no. 21279/02, *EHRC* 2007/144, case-note J.H. Gerards and *Stoll v. Switzerland*, ECtHR 10 December 2007 (GC), no.

69698/01, *EHRC* 2008/23, case-notes H.C.K. Senden and H.L. Janssen). However, given the Chamber judgments in *Şişman* and *Vellutini and Michel*, the broader impact of *Palomo Sánchez* may be somewhat tempered.

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