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Whistleblower protection for journalist who alarmed public opinion about censorship on TV

by Dirk Voorhoof (UGent)

A recent judgment of the European Court of Human Rights once more illustrates the need of a strict scrutiny by the Strasbourg Court in order to keep up the standards of media freedom and the right of freedom of expression and information in European pluralistic democracies. In the judgment of *Matúz v. Hungary* the European Court confirms the importance of whistleblower protection, *in casu* for a journalist who alarmed public opinion about censorship within the public broadcasting organisation in Hungary.

The facts and domestic proceedings

The case concerns the dismissal of a television journalist, Gábor Matúz, working for the State television company *Magyar Televízió Zrt.*, after having revealed several censoring interventions by one of his superiors. At the material time Matúz was also the chairman of the Trade Union of Public Service Broadcasters (*Közszolgálati Műsorkészítők Szakszervezete*). He was in charge, as editor-in-chief and presenter, of a periodical cultural programme called *Éjjeli menedék* (Night Shelter) which involved interviews with various figures of cultural life. Matúz contacted the television company's president and send a letter to its board, informing them that the cultural director's conduct in modifying and cutting certain contents of *Éjjeli menedék* amounted to censorship. Short time later an article appeared in the online version of a Hungarian daily (*Magyar Nemzet Online*), containing the editor-in-chief's letter as well as a statement of *Magyar Elektronikus Újságírók Szövetsége* (Hungarian Union of Electronic Journalists), inviting the board to end censorship in the television company. Few months later Matúz published a book entitled "*Az antifasiszta és a hungarista – Titkok a Magyar Televízióból*" (The Antifascist and the Hungarista - Secrets from the Hungarian Television), containing detailed documentary evidence of censorship exercised in the State television company. It called on the readers to decide whether the documents indicated the cultural director's legitimate exercise of his supervisory functions or an interference with the broadcaster's freedom of expression. Short time later the television company dismissed Matúz with immediate effect. The reason for the summary dismissal was that, by publishing the book in question, Matúz had breached the confidentiality clause contained in his labour contract.

Matúz challenged his dismissal in court, but he remained unsuccessful in his legal action in Hungary. After exhausting all national remedies, he lodged a complaint in Strasbourg, arguing a violation of his

rights under Article 10 of the Convention. He submitted that as a journalist and chairman of the trade union at the public television broadcaster he had the right and obligation to inform the public about alleged censorship at the national television company. The Hungarian Government referred mainly to the work contract between the TV Company and Matúz, which bound the journalist to professional confidentiality. According to the labour contract staff members of the TV Company were prohibited to reveal any information acquired in connection to their position the disclosure of which would be prejudicial to either the employer or any other person. The fact that Matúz was the chairman of a trade union had not exempted him from complying with the obligations flowing from the employment contract. By publishing the impugned book without prior authorisation and by revealing confidential information in that book, Matúz had breached his duties, leading to his summary – and justified – dismissal.

The Court's judgment

The Court accepts that the legitimate aim pursued by the impugned measure was the prevention of the disclosure of confidential information as well as “the protection of the reputation or rights of others” within the meaning of Article 10 § 2. Once more the central question is whether the interference was “necessary in a democratic society”.

The Court refers to its standard case law on freedom of expression and journalistic reporting in matters of public interest, and also observes that the present case bears a certain resemblance to the cases *Fuentes Bobo v. Spain* (29 February 2000, Case No. 39293/98) and *Wojtas-Kaleta v. Poland* (16 July 2009, Case No. 20436/02) in which it found violations of Article 10 in respect of journalists who had publicly criticised the public television broadcaster's management. The Court clarifies that this case raises the problem of how the limits of loyalty of journalists working for public service broadcast companies should be delineated and, in consequence, what restrictions can be imposed on them in public debate. In this context the Court is also mindful that employees owe to their employer a duty of loyalty, reserve and discretion. Where the right to freedom of expression of a person bound by professional confidentiality is being balanced against the right of employers to manage their staff, the relevant criteria have been laid down in the Court's case-law since its Grand Chamber judgment in the case of *Guja v. Moldova* (12 February 2008, Case No. 14277/04, §§ 74-78). These criteria are : (a) public interest involved in the disclosed information; (b) authenticity of the information disclosed; (c) the damage, if any, suffered by the authority as a result of the disclosure in question; (d) the motive behind the actions of the reporting employee; (e) whether, in the light of duty of discretion owed by an employee toward his or her employer, the information was made public as a last resort, following disclosure to a superior or other competent body; and (f) severity of the sanction imposed (par. 34).

In line with its jurisprudence in other whistleblower cases such as *Kudeshkina v. Russia* (26 February 2009, Case No. 29492/05), *Heinisch v. Germany* (ECtHR 21 July 2011, Case No. 28274/08), *Sosinowska v. Poland* (18 October 2011, Case No. 10247/09) and *Bucur and Toma v. Romania* (8 January 2013, Case No. 40238/02), the Court emphasises that the content of the book essentially concerned a matter of public interest. It considers that, having regard to the role played by journalists in society and to their responsibilities to contribute to and encourage public debate, the obligation of discretion and confidentiality constraints cannot be said to apply with equal force to journalists, given that it is in the nature of their functions to impart information and ideas (par. 39). The Court

confirms that it was not in dispute that the documents published by Matúz were authentic and that his comments had some factual basis. Although the Court refers to “the potential damage to the television company’s reputation which the book might have caused” (par. 42) the substance of the allegations uttered by Matúz had already been made accessible through an online publication and was known to a number of people. The Court also notes that the journalist had included the confidential documents in the book with no other intention than to corroborate his arguments on censorship, and that there was no appearance of any gratuitous personal attack, either (par. 46). Furthermore, the decision to make the impugned information and documents public was based on the experience that neither his complaint to the president of the television company nor the editor-in-chief’s letter to the board had prompted any response. Hence the Court “is satisfied that the publication of the book took place only after the applicant had felt prevented from remedying the perceived interference with his journalistic work within the television company itself – that is, for want of any effective alternative channel” (par. 47). The Court also notes that “a rather severe sanction was imposed on the applicant”, namely the termination of his employment with immediate effect (par. 48).

Finally, the Court observes that the domestic courts found that the mere fact that Matúz had published the book was sufficient to conclude that he had acted to his employer’s detriment, while also finding that he had breached his contractual obligations. Hence, the domestic courts paid no heed to the journalist’s argument that he had been exercising his freedom of expression in the public interest. Moreover, the Supreme Court’s judgment explicitly stated that the subject matter of the case was limited to an employment dispute and did not concern the applicant’s fundamental rights. Such an approach shows neglect to the right of freedom of expression by the Hungarian domestic courts who did not even examine whether and how the subject matter of Matúz’s book and the context of its publication could have affected the permissible scope of restriction on his freedom of expression (par. 49).

The Court concludes:

“1. Being mindful of the importance of the right to freedom of expression on matters of general interest, of the applicant’s professional obligations and responsibilities as a journalist on the one hand, and of the duties and responsibilities of employees towards their employers on the other, and having weighed the different interests involved in the case, the Court concludes that the interference with the applicant’s right to freedom of expression was not “necessary in a democratic society”.

Accordingly, the Court unanimously finds that there has been a violation of Article 10 of the Convention.

Comments

In the Grand Chamber judgment in *Guja v. Moldova*, the Court recognized the need of protection of whistleblowers by Article 10 of the Convention. The Court noted in its Grand Chamber judgment of 12 February 2008: *“that a civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulgation or publication corresponds to a strong public interest. The Court thus considers that the signaling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. This may be called for where the employee or civil servant concerned is the only person, or*

part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large”.

Although disclosures by whistleblowers should be made in the first place to the person’s superior or other competent authority or body, the Court accepted that when such a practice is clearly impractical, the information could, as a last resort, be disclosed to the public. The Court held that the dismissal of a civil servant for leaking confidential information to the press was in breach of Article 10 of the Convention, also referring to the serious chilling effect of a dismissal for other civil servants or employees, discouraging them from reporting any misconduct.

The Court’s case law shows that in cases where information is published on alleged corruption, fraud or illegal activities in which politicians, civil servants or public institutions are involved, journalists, publishers, media and NGOs can count on the highest standards of protection of freedom of expression. The Court has emphasized that “in a democratic state governed by the rule of law the use of improper methods by public authority is precisely the kind of issue about which the public has the right to be informed” (ECtHR 22 November 2007, Case No. 64752/01, *Voskuil v. The Netherlands*). Defamation laws and proceedings cannot be justified if their purpose or effect is to prevent legitimate criticism of public officials or the exposure of official wrongdoing or corruption. A right to sue in defamation for the reputation of officials could easily be abused and might prevent free and open debate on matters of public interest or scrutiny of the spending of public money (ECtHR 9 June 2009, Case No. 17095/03, *Cihan Öztürk v. Turkey*). In *Matúz v. Hungary* the Court confirms the severe character of a dismissal or immediate termination of employment in a case of (legitimate) whistleblowing on a matter public interest.

That is also the message of the recent Committee of Ministers’ Recommendation CM/Rec(2014)7 on the protection of whistleblowers. Recommendation CM/Rec(2014)7 of 30 April 2014 recognises “that individuals who report or disclose information on threats or harm to the public interest (“whistle-blowers”) can contribute to strengthening transparency and democratic accountability” and it refers explicitly to the right of freedom of expression and information guaranteed by Article 10 ECHR. Therefore it is recommended that member States should have in place: “a normative, institutional and judicial framework to protect individuals who, in the context of their work-based relationship, report or disclose information on threats or harm to the public interest”.

In order to fulfill this mission, the national framework in the member states should foster an environment that encourages reporting or disclosure in an open manner and individuals should feel safe to freely raise public interest concerns. It is recommended that “clear channels should be put in place for public interest reporting and disclosures and recourse to them should be facilitated through appropriate measures”.

The Court’s judgment in *Matúz v. Hungary* undoubtedly contributes to further raising awareness about the lack of protection of whistleblowers in many states in Europe. Recommendation CM/Rec(2014)7 of 30 April 2014 to the member states requesting to take action for stimulating, facilitating and protecting whistleblowing is aiming to implement at the national level a higher threshold of protection of public interest whistleblowing, in line with the European Court’s case law (Committee of Ministers, Recommendation CM/Rec(2014)7 on the protection of whistle-blowers, 30 April 2014, <https://wcd.coe.int/ViewDoc.jsp?id=2188855&Site=CM>).

ECtHR (2nd Chamber) 21 October 2014, Matúz v. Hungary, Application no. 73571/10)

See also D. VOORHOOF and P. HUMBLET, “Human Rights and the Employment Relation. The Right to Freedom of Expression at Work”, in X., *Proceedings of the International Conference on the European Convention on Human Rights and the Employment Relation, Actes du Colloque “La convention européenne des droits de l’homme et la relation de travail”*, CNRS and Strasbourg University, 30-31 January 2014, 33 p. (e-publi), http://europa-cnrs.unistra.fr/fileadmin/upload/DUN/europe_en_mutation/Documents/e-publi/E-publi_CEDH_et_la_relation_au_travail_-_D_Voorhoof_P_Humblert_v0-1.pdf
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