



Dismissal of geriatric nurse after bringing criminal complaint against employer for deficient care was unjustified

In today's Chamber judgment in the case [Heinisch v. Germany](#) (application no. 28274/08), which is not final¹, the European Court of Human Rights held, unanimously, that there had been:

A violation of Article 10 (freedom of expression) of the European Convention on Human Rights.

The case concerned the dismissal of a geriatric nurse after having brought a criminal complaint against her employer alleging deficiencies in the care provided.

Principal facts

The applicant, Brigitte Heinisch, is a German national who was born in 1961 and lives in Berlin. She was employed as a geriatric nurse by Vivantes Netzwerk für Gesundheit GmbH, a company specialising in health care and assistance to the elderly which is majority-owned by the Berlin *Land*. From January 2002, she worked in a nursing home for the elderly operated by the company, where patients were dependent on special assistance.

Between January 2003 and October 2004, Ms Heinisch and her colleagues regularly indicated to the management that they were overburdened due to staff shortage and thus had difficulties carrying out their duties; they further mentioned that services were not properly documented. From May 2003 onwards, Ms Heinisch repeatedly fell ill and was partly unable to work; one medical certificate stated that this was the result of overwork. Following an inspection of the nursing home, the medical review board of the health insurance fund, in November 2003, noted serious shortcomings in the care provided, including an insufficient number of staff and unsatisfactory care and documentation of care. In November 2004, Ms Heinisch's legal counsel, in a letter to the company's management, pointed out that, on account of the lack of staff patients' hygienic care could no longer be guaranteed and asked the management to stipulate how they intended to ensure sufficient care of patients.

The management having rejected those accusations, Ms Heinisch brought a criminal complaint through her counsel against the company in December 2004 alleging aggravated fraud. According to the complaint, owing to the lack of staff and insufficient standards, the company knowingly failed to provide the high quality care promised in its advertisements and therefore did not provide the services paid for and was putting the patients at risk. Ms Heinisch also alleged that the company had systematically tried to cover up those problems and had urged staff to falsify service reports. In January 2005,

¹ Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

the public prosecutor discontinued the preliminary investigations it had opened against the company.

Ms Heinisch was dismissed in January 2005 on account of her repeated illness with effect as of 31 March. Together with friends and supported by a trade union, she issued a leaflet which denounced the dismissal as a "political disciplinary measure taken in order to gag those employed" and mentioned the criminal complaint brought by her against the company. The company, which only then learned about that complaint, subsequently dismissed her without notice, on suspicion of having initiated the production and dissemination of the leaflet. Preliminary investigation proceedings against the company were resumed in February 2005 at Ms Heinisch's request, but discontinued again in May.

Ms Heinisch challenged her dismissal without notice before the Labour Court, which, in August 2005, found that it could not be justified, holding that the leaflet had been covered by her right to freedom of expression and that it had not amounted to a breach of her duties under the employment contract. The judgment was quashed by the Labour Court of Appeal in March 2006, however, holding that the dismissal had been lawful, as Ms Heinisch's criminal complaint had provided a "compelling reason" for the termination of the employment relationship without notice as provided by the Civil Code. That decision was upheld by the Federal Labour Court, and on 6 December 2007 the Federal Constitutional Court refused to admit Ms Heinisch's constitutional complaint.

Complaints, procedure and composition of the Court

Ms Heinisch complained that her dismissal and the courts' refusal to order her reinstatement violated Article 10.

The application was lodged with the European Court of Human Rights on 9 June 2008.

The trade union *Vereinigte Dienstleistungsgewerkschaft* (ver.di), representing employees in the service sector, was given leave to intervene in the proceedings as a third party and submitted written observations.

Judgment was given by a Chamber of seven, composed as follows:

Dean **Spielmann** (Luxembourg), *President*,
Karel **Jungwiert** (the Czech Republic),
Boštjan M. **Zupančič** (Slovenia),
Mark **Villiger** (Liechtenstein),
Isabelle **Berro-Lefèvre** (Monaco),
Ann **Power** (Ireland),
Angelika **Nußberger** (Germany), *Judges*,

and also Claudia **Westerdiek**, *Section Registrar*.

Decision of the Court

Article 10

It was undisputed between the parties that the criminal complaint lodged by Ms Heinisch had to be regarded as whistle-blowing – the disclosure of deficiencies in enterprises or institutions by an employee – which fell within the ambit of Article 10. It was also common ground that her dismissal, as confirmed by the domestic courts, amounted to an interference with her right to freedom of expression.

The Court shared the German Government's view that that interference had been "prescribed by law", as the German Civil Code allowed the termination of an employment contract with immediate effect by either party if a "compelling reason" rendered the continuation of the employment relationship unacceptable to the party giving notice. According to the relevant case-law of the German courts, a criminal complaint against an employer might justify a dismissal where it amounted to a significant breach of the employee's duty of loyalty. It was further undisputed that the dismissal had pursued the legitimate aim of protecting the business reputation and interests of Ms Heinisch's employer. It remained to be determined whether a fair balance had been struck by the domestic courts between those interests and her right under Article 10.

The Court noted that the information disclosed by Ms Heinisch about the alleged deficiencies in the care provided had undeniably been of public interest, in particular given that the patients concerned might not have been in a position to draw attention to those shortcomings on their own initiative. While the legal qualification of the employer's conduct as aggravated fraud was mentioned for the first time in the criminal complaint, Ms Heinisch had already disclosed the factual circumstances on which that complaint had been based – including the fact that services had not been properly documented – in her previous notifications to her employer. There was no evidence to counter her submission that further internal complaints would have been ineffective.

There was also no evidence to establish that Ms Heinisch had knowingly or frivolously reported incorrect information. Not only had she raised those concerns in her previous notifications to her employer but they had also been the subject of criticism by the health insurance fund's medical review board. It was true that the ensuing criminal proceedings had been discontinued. However, it could not be expected from a person lodging a criminal complaint to anticipate whether the investigations would lead to an indictment or would be terminated.

The Court had further no reasons to doubt that Ms Heinisch acted in good faith. It was not persuaded by the Government's argument that in view of the regular inspections, in particular by the medical review board, she should have been aware that a complaint was unnecessary, as in her experience previous complaints by the board about the conditions in the nursing home had not brought about any change.

Ms Heinisch's allegations had certainly been prejudicial to the company's business reputation and commercial interests. However, the Court found that 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 in a democratic society that it outweighed the interest in protecting the latter's business reputation and interests.

Finally, the heaviest sanction possible under labour law had been imposed on Ms Heinisch. It not only had negative repercussions on her career but it could also have had a serious chilling effect on other employees of the company and could have discouraged them from reporting any shortcomings in institutional care. In view of the media coverage, the sanction could even have had a chilling effect on other employees in the nursing service sector, which worked to the detriment of society as a whole. Ms Heinisch's dismissal without notice had therefore been a disproportionately severe sanction. The domestic courts had thus failed to strike a fair balance between the need to protect the employer's reputation and the need to protect Ms Heinisch's right to freedom of expression. There had accordingly been a violation of Article 10.

Article 41

Under Article 41 (just satisfaction) of the Convention, the Court held that Germany was to pay the applicant 10,000 euros (EUR) in respect of non-pecuniary damage and EUR 5,000 in respect of costs and expenses.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.