Nr. 1 Palomo Sánchez e.a./Spain

Europees Hof voor de Rechten van de Mens 12 september 2011
(Applications nos. 28955/06, 28957/06, 28959/06 and 28964/06)

In the case of Palomo Sánchez and Others v. Spain,
The European Court of Human Rights, sitting as a Grand Chamber composed of: [...],
Having deliberated in private on 8 December 2010 and on 29 June 2011,
Delivers the following judgment, which was adopted on the last mentioned date:

PROCEDURE

[...]

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicants live in Barcelona.

11. They were employed as deliverymen by the company P., against which they brought several sets of proceedings in employment tribunals. The applicants sought to secure recognition by the employer of their special salaried-worker status, as confirmed by judgments of 2 May and 30 December 1995 of the High Court of Justice of Catalonia, in order to be covered by the corresponding social-security regime. Representatives of a committee of non-salaried delivery staff in the company P. had testified against them in those proceedings.

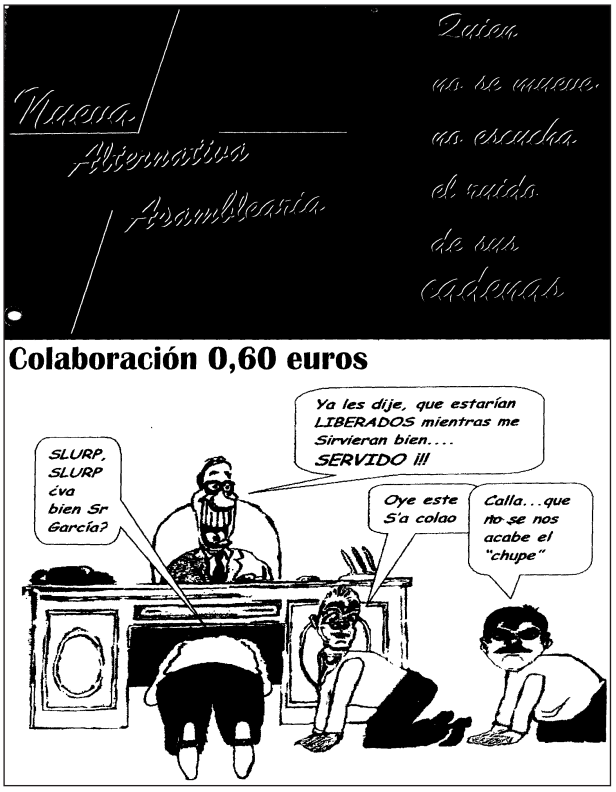
12. On 21 May 2001 the applicants set up the trade union N.A.A. (Nueva alternativa asamblearia) to defend their interests and those of the other delivery staff who were under pressure from the company P. to renounce their claim to salaried status. The applicants joined the union's executive committee. On 3 August 2001 the applicants informed the company P. of the setting-up of a branch of the trade union inside the company, of its composition, and of their appointment as members of the executive committee of that workplace branch. Juan Manuel Palomo Sánchez was the trade-union representative, Mr Francisco Antonio Fernández Olmo the treasurer, Mr Agustín Alvarez Lecegui the press and communications officer and Mr Francisco José María Blanco Balbas the organisation officer. No changes concerning the appointment of the union members or their duties have taken place since the union was formed.

13. The trade union N.A.A. published a monthly newsletter. The March 2002 (sic) issue reported on the judgment of 2 April 2002 of Barcelona Employment Tribunal no. 13, which had partly upheld the applicants' claims, ordering the company P. to pay them certain sums in respect of salaries owed to them.

On the cover of the newsletter, a cartoon with speech bubbles showed a caricature of the human resources manager, G., sitting behind a desk under which a person on all fours could be seen from behind, together with, to one side, A. and B., also employees of the company P. and representatives of a committee of its non-salaried delivery workers, who were watching the scene while waiting to take their turn to satisfy the manager. Inside the newsletter were two articles which vehemently denounced the fact that those two individuals had testified in favour of the company P. in proceedings that the applicants had brought against their employer. The newsletter was distributed among the workers and displayed on the notice board of the trade union N.A.A. that was located on the company's premises.

14. On 3 June 2002 the company notified the applicants of their dismissal on grounds of serious misconduct, namely for impugning the reputations of G., A. and B., under Article 54 §§ 1 and 2 (c) of the Labour Regulations, which provide for the termination of a contract of employment where an employee is guilty of serious and negligent failure to perform his or her contractual obligations.

15. The applicants challenged that decision before Employment Tribunal no. 17 of Barcelona, which, in a judgment of 8 November 2002, dismissed their claims and found that the dismissals were justified, in accordance with Article 54 §§ 1 et 2 (c) of the Labour Regulations. The tribunal took the view that the company's decision to dismiss the applicants had been based on a genuine and serious cause, namely the publication and display on a notice board inside the company of



a cartoon with speech bubbles and two articles which were offensive and impugned the dignity of the persons concerned. The first article, entitled 'Whose witnesses? Theirs, of course', contained caricatures of A. and B., showing them gagged by a handkerchief tied behind their heads, and the text underneath read as follows:

> *We knew who they were and how they behaved, but we didn't know how far they were prepared to go in order to hold onto their seats and cushy jobs without doing anything.*
> *As employees of P. we earn our living by selling goods in the street. A. and B. earn theirs by selling the workers in the courts. Not content with doing this simply by signing agreements that go against the collective interest, they've now gone a step further – they rob and steal with total impunity, in broad daylight, with the confidence of men who feel totally untouchable. They play at being gods.*
> *[...] but they, the chairman and secretary of the staff representatives, agreed, just like guard-dogs, to roll over and frolic in return for a pat on the back by their master. [...]*

The tribunal noted that the text was a response to what had happened during proceedings brought by the applicants before Employment Tribunal no. 13 of Barcelona, in which A. and B. had appeared as witnesses against the applicants' interests and in favour of their employer.

The article entitled 'When you've rented out your arse you can't shit when you please', read as follows:

> *If you belong to a works council and you have to sign agreements with your employers that will never be honoured, just to keep you quiet, and agree to changes that only benefit their cronies, and to pay-cuts and various work-charts, then you've swapped your dignity for an armchair, [and] you have the dubious merit of achieving the same level of infamy as politicians and policemen. You see, you shut up and you shrewdly agree to all sorts of shenanigans. When you've rented out your arse, you can't shit when you please. If you're a despicable 'professional trade-unionist' and you've thus sold your soul to the union, you'll never have a surge of sincerity, because your status would be threatened. You say what the union tells you to say, and as the unions are 'condoms' on freedom, your lips are sealed just like your anal sphincter, because you've rented out your arse and you can't shit when you please.*
> *You can see the injustices meted out on your colleagues, the totally irrational way of dealing with their problems and the constant persecution to which they are subjected, but say nothing, for fear of drawing attention to yourself. Once upon a time, in the old days, you were a rebel who criticised the system – you would curse conventionalism and rant against the rules and regulations. You were caustic, dynamic, cutting, impulsive, jovial. But a couple of favours received have gradually cooled your fiery temperament, stoked your self-*

esteem and put the dampers on your feelings. From time to time you have a pang of nostalgia and you would like to fart, but your sphincter is sealed, because you've rented out your arse and can't shit when you please.
You're fed up with your work, pissed off, anxious, stressed and in despair, because of the longer working hours and the responsibilities, products, promotions and pressures. You could work anywhere, do anything without having to get up at the time others go to bed. You could break everything up, tear it to pieces, crush and demolish it all [...] but your hands are tied by credits, IOUs and debts. You are crushed by your new SUV, your children's after-school activities, and the twenty-five year mortgage on your semi-detached house. And you let yourself be humiliated, you swallow your pride, you shut up and you accept, because when you've rented out your arse, you can't shit when you please.

The newsletter was distributed to staff and displayed on the trade union's notice board on the company's premises.

The Employment Tribunal observed at the outset that the cause of the dismissal was the content of the newsletter and not the applicants' trade-union membership. It referred in its judgment to the exercise of the right to freedom of expression in the context of labour relations and to the fact that it was not unlimited. It found that the limits to this right had to be interpreted in accordance with the principle of good faith, which in labour relations had to involve respect for the interests of the employer and the minimum requirements of co-existence in a professional environment. The judgment reiterated the Constitutional Court's case-law to the effect that the right to respect for freedom of expression was subject to limits derived from labour relations, since the contract of employment created a series of rights and reciprocal obligations that circumscribed the exercise of the right to respect for freedom of expression. For that reason, certain manifestations of this right that might be legitimate in other contexts were not legitimate in the context of labour relations, even though the requirement to act in good faith did not always imply a duty of loyalty to the point of subjecting the worker to the employer's interests.

As to the newsletter's content, the tribunal took the view that the cartoon and speech bubbles on the cover, together with the articles inside, were offensive and exceeded the limits of freedom of expression and information, impugning the honour and dignity of the human resources manager and of delivery men A. and B., and damaging the image of the company P. Lastly, it noted that the dismissal could not be declared null and void, since it was based on serious misconduct as provided for by law, and found that the applicants' fundamental rights had not been breached.

16. The applicants appealed. In a judgment of 7 May 2003 the High Court of Justice of Catalonia upheld the judgment under appeal in so far as it concerned the applicants.

The court referred, among other things, to the limits imposed by the principle of good faith between parties to a contract of employment and to the necessary balance that judicial decisions had to strike between a worker's obligations under the contract and his freedom of expression. The balancing exercise had to enable it to be determined whether or not the reaction of the company that dismissed the employee was legitimate. For the court, the publication of the offending drawing and articles had clearly been harmful to the dignity of the persons concerned and had overstepped the limits of admissible criticism, as the exercise of freedom of expression did not justify the use of insulting, offensive or vexatious expressions that went beyond the legitimate exercise of the right to criticise and clearly impugned the respectability of the persons concerned. The company P. had, moreover, duly shown that the applicants' dismissal was not a measure of reprisal or punishment, but was based on a genuine, serious and sufficient cause for deciding to terminate their contracts of employment.

17. The applicants lodged an appeal on points of law, seeking harmonisation of the relevant case-law. In a decision of 11 March 2004 the Supreme Court dismissed their appeal on the ground that the decision produced for purposes of comparison, namely a judgment of the High Court of Justice of Madrid of 31 July 1992, was not pertinent.

18. Relying on Article 24 (right to a fair hearing) of the Constitution, and on Articles 20 and 28 taken together (freedom of expression and association), the applicants lodged an amparo appeal with the Constitutional Court. In a decision of 11 January 2006, served on 13 January 2006, that court found the appeal inadmissible for lack of constitutional content. The decision reads as follows:

[...] Firstly [...]]there is not enough evidence to show that the [appellants'] dismissal was an act of reprisal on the part of the respondent company because of the judicial proceedings they had brought against it to assert their rights [...] Secondly, as to the [alleged] interference with trade-union freedom guaranteed by Article 28 of the Constitution (this complaint incorporating the appellants' complaint under Article 14 of the Convention in so far as they alleged discrimination on trade-union grounds), this is inadmissible as [the appellants] have not provided sufficient evidence to show that the company's action was intended to restrict, hamper or prevent the exercise of their right to freedom of association, on account of their union membership or activities in a trade union. In line with what this court has repeatedly said, such evidence does not consist of a mere allegation of a constitutional violation but must be sufficient for it to be inferred that the violation could have been constituted [...] which is not the case here, since the circumstances alleged do not give rise to any suspicion as to the potential violation in question. In their allegations, the appellants have simply expressed their disagreement with the decisions rendered by the courts below, which found in decisions giving reasons and not being manifestly unreasonable that they had committed the acts of which the company had accused them in their letters of dismissal.
Thirdly, there has not been a breach of Article 28 § 1 of the Constitution taken together with Article 20 § 1 (a), in the form of an infringement of the appellants' right to freedom of expression in the context of their union activity, since this fundamental right does not encompass any right to insult others. As the Court held recently in judgment no. 39/2005 of 28 February (legal ground 4), reiterating its case-law, although the Constitution does not prohibit the use of hurtful, embarrassing or vituperative expressions in every circumstance, the constitutional protection afforded by Article 20 § 1 (a) of the Constitution does not, however, extend to absolutely vexatious expressions which, taking into account the actual circumstances of the case and regardless of their veracity or lack of veracity, are offensive or defamatory and are not pertinent for the purpose of conveying the opinions or information in question. The application of that jurisprudence to the present case leads the Court to the conclusion that the appellants' right to freedom of expression has not been infringed, since they used that right in an excessive manner by means of value judgments expressed through cartoons and comments that were offensive and humiliating for the persons concerned and impugned their honour and reputation. [Those cartoons and comments] were not necessary for others to form an opinion about the facts of which the appellants wished to complain, and were therefore gratuitous and not necessary for the exercise of freedom of expression in a trade-union context.

II. RELEVANT DOMESTIC LAW

[...]

III. RELEVANT INTERNATIONAL INSTRUMENTS AND PRACTICE

A. International Labour Organisation

21. On 23 June 1971 the General Conference of the International Labour Organisation (ILO) adopted Recommendation No. 143 concerning workers' representatives, of which Point 15 reads as follows:

(1) Workers' representatives acting on behalf of a trade union should be authorised to post trade union notices on the premises of the undertaking in a place or places agreed on with the management and to which the workers have easy access.
(2) The management should permit workers' representatives acting on behalf of a trade union to distribute news sheets, pamphlets, publications and other documents of the union among the workers of the undertaking.
(3) The union notices and documents referred to in this Paragraph should relate to normal trade union activities and their posting and distribution should not prejudice the orderly operation and tidiness of the undertaking.

22. At its 54th session, in June 1970, the International Labour Conference adopted a Resolution concerning trade union rights and their relation to civil liberties. The Conference explicitly listed the fundamental rights essential for the exercise of freedom of association, in particular: (a) the right to freedom and security of person and freedom from arbitrary arrest and detention; freedom of opinion and expression and in particular freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers; (c) freedom of assembly; (d) the right to a fair trial by an independent and impartial tribunal; and (e) the right to protection of the property of trade unions.

23. In 1994 the ILO published a report entitled 'Freedom of association and collective bargaining: Trade union rights and civil liberties'. The relevant passages of that report read as follows:

Part I. Freedom of association and protection of the right to organize

Chapter II. Trade union rights and civil liberties

Introduction

[...]
24. The Declaration of Philadelphia [...] officially acknowledged the relationship between civil liberties and trade union rights by proclaiming in article I(b) that freedom of expression and of association are essential to sustained progress and referring in article II(a) to the fundamental rights which are an inseparable part of human dignity. Since then, this relationship has been repeatedly affirmed and highlighted, both by the ILO's supervisory bodies and in the Conventions, Recommendations and resolutions adopted by the International Labour Conference.
[...]
27. The information available, in particular on the nature of the complaints submitted to the Committee on Freedom of Association, shows that the main difficulties encountered by trade union organizations and their leaders and members relate to basic rights, in particular to the right to security of the person, freedom of assembly, freedom of opinion and expression, as well as the right to protection of trade union property and premises.
[...]

Freedom of opinion and expression

38. Another essential aspect of trade union rights is the right to express opinions through the press or otherwise. The full exercise of trade union rights calls for a free flow of information, opinions and ideas, and workers, employers and their organizations should enjoy freedom of opinion and expression at their meetings, in their publications, and in the course of their other activities. In cases in which the issue of a trade union publication is subject to the granting of a licence, mandatory licensing should not be subject to the mere discretion of licensing authorities, nor should it be used as a means of imposing prior restraint on the subject-matter of publications; in addition any application for such a licence should be dealt with promptly. [...] Measures of administrative control – for example, the withdrawal of a licence granted to a trade union newspaper, the control of printing plants and equipment, or the control of paper supply – should be subject to prompt and independent judicial review.

39. An important aspect of freedom of expression is the freedom of speech of delegates of workers' and employers' organizations meetings, conferences and reunions, and in particular to the International Labour Conference.
[...]
43. The Committee considers that the guarantees set out in the international labour Conventions, in particular those relating to freedom of association, can only be effective if the civil and political rights enshrined in the Universal Declaration of Human Rights and other international instruments, notably the International Covenant on Civil and Political Rights, are genuinely recognized and protected. These intangible and universal principles, the importance of which the Committee wishes to emphasize particularly on the occasion of the 75th anniversary of the creation of the ILO and the 50th anniversary of the Declaration of Philadelphia, should constitute the common ideal to which all peoples and all nations aspire.

24. The fifth edition (revised) of the Digest of decisions and principles of the Committee on Freedom of Association of the Governing Body of the International Labour Office, published in 2006, contains a summary of the principles formulated by that Committee in the context of individual or collective complaints concerning alleged violations of trade union rights. The general principles concerning freedom of opinion and expression include the following:

154. The full exercise of trade union rights calls for a free flow of information, opinions and ideas, and to this end workers, employers and their organizations should enjoy freedom of opinion and expression at their meetings, in their publications and in the course of other trade union activities. Nevertheless, in expressing their opinions, trade union organizations should respect the limits of propriety and refrain from the use of insulting language. (See the 1996 Digest, para. 152; 304th Report, Case No. 1850, para. 210; 306th Report, Case No. 1885, para. 140; 309th Report, Case No. 1945, para. 67; 324th Report, Case No. 2014, para. 925; and 336th Report, Case No. 2340, para. 652.)

155. The right to express opinions through the press or otherwise is an essential aspect of trade union rights. (See the 1996 Digest, para. 153; 299th Report, Case No. 1640/1646, para. 150; 302nd Report, Case No. 1817, para. 324; 324th Report, Case No. 2065, para. 131; 327th Report, Case No. 2147, para. 865; 328th Report, Case No. 1961, para. 42; 332nd Report, Case No. 2090, para. 354; and 333rd Report, Case No. 2272, para. 539.)

156. The right to express opinions without previous authorization through the press is one of the essential elements of the rights of occupational organizations. (See the 1996 Digest, para. 154.)

157. The freedom of expression which should be enjoyed by trade unions and their leaders should also be guaranteed when they wish to criticize the government's economic and social policy. (See the 1996 Digest, para. 155.)
[...]
163. The prohibition of the placing of posters stating the point of view of a central trade union organization is an unacceptable restriction on trade union activities. (See the 1996 Digest, para. 467.)
[...]
166. The publication and distribution of news and information of general or special interest to trade unions and their members constitutes a legitimate trade union activity and the application of measures designed to control publication and means of information may involve serious interference by administrative authorities with this activity. In such cases, the exercise of administrative authority should be subject to judicial review at the earliest possible moment. (See the 1996 Digest, para. 161; 320th Report, Case No. 2031, para. 172; and 327th Report, Case No. 1787, para. 341.)
[...]
168. While the imposition of general censorship is primarily a matter that relates to civil liberties rather than to trade union rights, the censorship of the press during an industrial dispute may have a direct effect on the conduct of the dispute and may prejudice the parties by not allowing the true facts surrounding the dispute to become known. (See the 1996 Digest, para. 163.)

169. When issuing their publications, trade union organizations should have regard, in the interests of the development of the trade union movement, to the principles enunciated by the International Labour Conference at its 35th Session (1952) for the protection of the freedom and independence of the trade union movement and the safeguarding of its fundamental task, which is to ensure the social and economic well-being of all workers. (See the 1996 Digest, para. 165.)

170. In a case in which a trade union newspaper, in its allusions and accusations against the government, seemed to have exceeded the admissible limits of controversy, the Committee pointed out that trade union publications should refrain from extravagance of language. The primary role of publications of this type should be to deal with matters essentially relating to the defence and furtherance of the interests of the unions' members in particular and with labour questions in general. The Committee, nevertheless, recognized that it is difficult to draw a clear distinction between what is political and what is strictly trade union in character. It pointed out that these two notions overlap, and it is inevitable and sometimes normal for trade union publications to take a stand on questions having political aspects, as well as on strictly economic or social questions. (See the 1996 Digest, para. 166.)

B. Inter-American Court of Human Rights

25. The American Convention has a special additional protocol concerning economic, social and cultural rights, the 'Protocol of San Salvador'. Adopted and opened for signature on 17 November 1988, it entered into force on 16 November 1999. Article 8 of that Protocol, entitled 'Trade Union Rights' reads as follows:

1. The States Parties shall ensure:
a. The right of workers to organize trade unions and to join the union of their choice for the purpose of protecting and promoting their interests. As an extension of that right, the States Parties shall permit trade unions to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international trade union organizations and to affiliate with that of their choice. The States Parties shall also permit trade unions, federations and confederations to function freely;
b. The right to strike.
2. The exercise of the rights set forth above may be subject only to restrictions established by law, provided that such restrictions are characteristic of a democratic society and necessary for safeguarding public order or for protecting public health or morals or the rights and freedoms of others. Members of the armed forces and the police and of other essential public services shall be subject to limitations and restrictions established by law.
3. No one may be compelled to belong to a trade union.

26. In its Advisory Opinion OC-5/85, the Inter-American Court emphasised the fundamental nature of freedom of expression for the existence of a democratic society, stressing among other things that freedom of expression was a sine qua non for the development of trade unions. It found as follows (paragraph 70 of the Opinion):

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a conditio sine qua non for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.

IV. ELEMENTS OF COMPARATIVE LAW

27. Comparative law research has shown that the disciplinary powers of employers in the member States of the Council of Europe are very diverse. There is a convergence of legal systems among the thirty-five countries examined: they all provide for and organise employees' freedom of expression and trade-union freedom, usually by means of norms of constitutional value, or where that is not the case, by legislative regulations. Employees serving as representatives benefit from special protection to help them discharge their duties. The regulations in all countries, in order to reconcile the exercise of this right with the essential rights and freedoms of others, fix rules providing for penalties in cases of abuse of the right to freedom of expression. The powers vested in employers allow, if necessary, for the exercise of disciplinary action against an employee or staff member whose conduct can be characterised as improper exercise of his freedom of expression. The case-law in such matters is consistent and shows that there is a systematic examination of proportionality between the dismissal and the conduct on which it is based.

28. The domestic-law instruments provide for the punishment of any conduct by an employee that is capable of infringing the rights and freedoms of others.
The relevant rules may, firstly, be laid down by a Criminal Code, or by provisions concerning the possibility of bringing an action to establish liability. In most cases, criminal notions such as defamation, damage to honour or reputation or insults will enable the person claiming to be a victim of such infringement to bring proceedings to establish the liability of the person who made the comments at issue.
Rules in Labour Codes or norms applicable to public servants will also govern the exercise of freedom of expression of staff members, and if necessary provide for the punishment of any abuse. Similar limitations may be imposed on public officials, whether or not they have 'civil servant' status.

29. Disciplinary authority is one of the essential prerogatives of the employer, whether private or public. In this connection employers have a broad discretion to impose the sanction that they consider the best adapted to the accusations against the employee; the scale of possible sanctions encompasses the power to dismiss a person who has seriously compromised the interests of the company or the public service. In parallel, this power of dismissal is accompanied by a prohibition on dismissing employees on grounds relating to trade union activity. A measure of dismissal may be based on misconduct or on a legitimate ground. In the first case it relates to a given – identified – form of conduct. In the second, the conduct is considered in general terms.

30. The proportionality of a measure of dismissal in relation to the conduct of the employee concerned underlies all the legislation analysed.

31. The applicable law in the States examined shows that any abuse of the freedom of expression afforded to employees or public servants is always regarded as a reprehensible fact capable of justifying disciplinary measures that could go as far as dismissal. For that purpose, factual elements of an objective nature are taken into account, such as: (i) the seriousness of the misconduct; (ii) the characterisation of the comments, the extent of their publication, and also certain subjective elements. The latter include the personal situation of the employee, any abuse of freedom of expression and the question whether the conduct falls outside 'normal' trade union activity.

32. In all the countries studied, the general rules are clear and allow the employee's right to freedom of expression to be balanced against the rights and prerogatives of the employer. Their implementation is more problematic, since a restriction on a fundamental right can only be accepted if, having regard to the measure decided, it is proportionate to the aim pursued. Only through a case-by-case approach is it possible to grasp the substance of the jurisprudential solution adopted in each type of situation.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION, READ IN THE LIGHT OF ARTICLE 11

33. The applicants, who are members of the executive committee of the trade union N.A.A., complained that they had been dismissed on account of the content of the union's newsletter of March 2002. They claimed that the company P. had not verified their individual level of participation and personal responsibility. They alleged that they had been dismissed by way of reprisal for the union's demands and that the allegedly offensive content of the newsletter had served as a pretext. They took the view that the cartoons and two articles in question had not overstepped the limits of admissible criticism under Article 10 of the Convention, because the impugned expressions had been used in a jocular spirit and not with any intent to insult.

The applicants relied on Articles 10 and 11 of the Convention, which read as follows:

Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority [...]
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society [...] for the protection of health or morals, for the protection of the reputation or rights of others [...]

Article 11

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society [...] for the protection of health or morals or for the protection of the rights and freedoms of others [...]

A. The Chamber judgment

34. In its judgment of 8 December 2009, after reiterating that freedom of expression constituted one of the essential foundations of a democratic society, the Chamber indicated that such freedom was subject to exceptions, which had to be construed strictly; and the necessity of any exception had to be justified by a pressing social need. In the present case, the interference had been 'prescribed by law' and pursued a legitimate aim, namely the protection of the reputation or rights of others. In order to ascertain whether that interference had been necessary in a democratic society, the Court had to refer to the particular context of the dispute, in which proceedings had been brought by the applicants against their employer in the employment courts. Whilst taking the view that if a trade union was unable to express its ideas freely it would become meaningless and pointless, the Chamber noted in the present case that the Spanish courts had balanced the conflicting interests, in the light of domestic law, and had concluded that the applicants had transgressed the permissible limits of the right to criticise. The decisions given by the domestic courts could not therefore be regarded as unreasonable or arbitrary. Accordingly, the Chamber found that there had been no violation of Article 10 of the Convention. In addition, it took the view that no separate question arose under Article 11 of the Convention.

B. The parties' submissions

1. The applicants

35. The applicants pointed out that their employer, the company P., had refused to recognise them as salaried workers and to calculate the corresponding social-security contributions, even though that status had been acknowledged by the courts. They took the view that the Chamber had failed to take sufficiently into consideration their trade union's long and complex dispute with their employer and with an association of non-salaried deliverymen created and supported by the company, to which the two witnesses mentioned in the union newsletter belonged.

36. The applicants submitted that from April 2001, after the workers belonging to the union N.A.A. had refused to waive the rights recognised by the courts, the company P. had decided to punish them by

way of a substantial pay cut. They thus took the view that the trade-union newsletter that gave rise to the present case had to be seen in its context, namely one of harassment and systematic pressure by the employer and the association of non-salaried workers that it had created, in order to prevent the proliferation of workers' demands and to persuade them to waive their judicially recognised rights. The applicants alleged that P.'s head of human resources had tried to buy the services of certain trade-union members in order to persuade other deliverymen to refrain from asserting their rights. The human resources manager had allegedly offered them cash in return for those services, and the association of non-salaried deliverymen, to which witnesses A. and B. belonged, had thus become the employer's accomplice. The final result was not only the dismissal without compensation of the applicants, the only salaried deliverymen who had not waived their rights, but also the disbanding of the trade union. The applicants took the view that there had therefore been a violation of the freedoms enshrined in Articles 10 and 11 of the Convention.

37. The applicants argued that the cartoon on the cover of the trade-union newsletter, like the two impugned articles, was intended to be critical and to provide information about the salary demands before the employment tribunal and about the conduct of the members of the association of non-salaried deliverymen. The use of a satirical drawing and expressions, which might have been regarded as crude or shocking, had in no way referred to the personal or private sphere of the persons in question, but to their role in the dispute at issue. There had been no personal attack in the burlesque and clearly ironical tone employed, inspired as it was by an animus jocandi, not an animus iniurandi.

38. The applicants pointed out that the articles and drawings were not signed and concerned a debate in exclusively employment and trade-union matters, conducted via the union's medium of communication. It was thus arbitrary to consider that its members had all been personally responsible for this publication, resulting in either disciplinary liability of a collective nature or a patently illegal action, requiring the dissolution of the trade union within the company by dismissing its founder members in breach of Article 11 of the Convention.

39. The applicants noted, lastly, that even if it were argued that the criticisms in the union newsletter had impugned the fundamental right of others to their honour and reputation, the imposition of a penalty such as dismissal went beyond the legitimate protection of that right and was disproportionate to the aim pursued.

2. The Government

(a) Facts

40. The Government pointed out, in response to the applicants' claims in their request for referral to the Grand Chamber, that the 'union trusties' criticised in the newsletter were not workers whom the employer had 'released from the obligation to work' in exchange for 'conduct favourable to the company' and stressed that they were not financed by the employer and that the granting of time off without loss of wages for representatives to discharge their union duties was a statutory requirement (under Article 68 of the Labour Regulations).

(b) Complaint under Article 10 of the Convention

41. The Government accepted that interference with freedom of expression could also occur in the context of a relationship under private law; however, in that case there was no direct interference by the State with the applicants' freedom of expression but, potentially, a failure to discharge its positive obligations to protect that freedom.

42. The Government pointed out that the possibility of terminating a contract of employment in the event of attacks on the employer or workers was prescribed by law and pursued a legitimate aim: the protection of the reputation of others. The Spanish courts had considered that the applicants had gone beyond the limits inherent in the exercise of their freedom of expression, to the extent of damaging the reputation of the employer and of other workers. The comments had not been published in the media but in the confined environment of a company, and concerned individuals working there, namely the human resources manager and work colleagues, that is to say persons with no public duties. The extent of acceptable criticism when directed against a private individual was narrower than that directed against authorities or public institutions (contrast Dink v. Turkey, nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, § 133, ECHR 2010 [...]). That context had aggravated the damage caused by the newsletter to the reputations of the persons concerned, since all its potential addressees knew the individuals who were criticised or caricatured.

43. The applicants had expressed themselves via a written medium (not in the context of a verbal and spontaneous exchange of opinions) with a general circulation inside the company, using the union newsletter and notice-board. It was therefore a well thought-out act on the part of the applicants, who had been fully aware of the consequences of their actions and the manner in which the reputation of others could be harmed.

44. As regards the content of the applicants' comments, the Government argued that there had been no opinion or analysis dealing with matters of general interest (contrast Fuentes Bobo v. Spain, no. 39293/98, 29 February 2000) but, as in the case of De Diego Nafría v. Spain (no. 46833/99, 14 March 2002), the comments had been made in the context of a strictly professional dispute with the company for which the applicants worked. Moreover, they had not contributed to a debate on union policy or matters affecting all the workers in the company, but had been expressed in reaction to those who had testified against the applicants in judicial proceedings in which they had legitimately asserted their individual rights.

45. The Spanish courts had taken the view that any legitimate criticism the document may have contained had been expressed through coarse insults, pejoratively suggesting that the persons concerned had given 'sexual favours' in return for another type of favour, and describing them as 'thieves'. In Lindon, Otchakovsky-Laurens and July v. France ([GC], nos. 21279/02 and 36448/02, ECHR 2007 XI), the Court had found that freedom of expression did not protect similar comments concerning a public figure in politics; this was all the more true where the comments concerned private individuals.

46. As regards the caricatures, the present case was materially different from that of Vereinigung Bildender Künstler v. Austria (no. 68354/01, ECHR 2007 II). Here there was no formation of a democratic public opinion expressed through art, but remarks in the context of employer-employee relations.

47. The Government took the view, relying on Constantinescu v. Romania (no. 28871/95, §§ 72-75, ECHR 2000 VIII), that the existence of damage to the reputation of others, in the exercise by the applicants of their freedom of expression, could not be regarded as justified by their union activity. The restrictions on freedom of expression under Article 10 § 2 were also applicable to union representatives.

48. The Government observed that the nature and severity of the punishment was also to be taken into account in assessing the proportionality of the interference under Article 10 of the Convention. In the Diego Nafria judgment, cited above, the Court had considered that, even though a dismissal had serious consequences for the employment relationship of a worker who had overstepped the acceptable limits of criticism, in assessing the proportionality of the interference it was necessary to take into account all the circumstances of the particular case. In the present case, the Spanish courts had assessed direct damage caused to the reputation of the persons mentioned in the union newsletter, through coarse and insulting comments and images. Even if the applicants' opinions could be regarded as legitimate, they had been expressed in a gratuitously offensive manner, being in written form and deliberate.

49. The Government therefore concluded that the interference in question had been justified by the pursuit of a legitimate aim that was proportionate to that aim.

(c) Complaint under Article 11 of the Convention

50. In the Government's submission, this complaint lacked separate substance and had to be examined jointly with the Article 10 complaint. In reality, the applicants seemed to be arguing that the expressions which had led to the termination of their contracts of employment had to be assessed in the context of their union activities. The right to form or join a trade union had not, however, been affected by the employer's decision, confirmed by the courts; what had to be examined in this case was the extent of or limits to union representatives' freedom of expression.

51. The freedom recognised in Article 11 of the Convention imposed positive obligations of protection on the State, including those relating to the possibility of expressing personal opinions. However, a breach of those positive obligations would exist only where freedom of association was affected (see, in particular, Gustafsson v. Sweden, 25 April 1996, § 52, Reports of Judgments and Decisions 1996 II). The applicants had not proved that the purpose of the dismissal decision had been to take reprisals against a particular trade union as opposed to others. The offending newsletter had simply criticised the testimony of certain union representatives in disputes that had affected the applicants individually, and had compared that testimony to sexual favours or theft. There had thus been no violation of the right to freedom of association but there was an issue concerning the extent of and limits to union representatives' freedom of expression that had to be examined only under Article 10 of the Convention.

C. The Court's assessment

1. Provision applicable to the present case

52. The Court notes from the outset that the facts of the present case are such that the question of freedom of expression is closely related to that of freedom of association in a trade-union context. It reiterates in this connection that the protection of personal opinions, as secured by Article 10, is one of the objectives of freedom of assembly and association as enshrined in Article 11 (see Ezelin v. France, 26 April 1991, § 37, Series A no. 202, and Barraco v. France, no. 31684/05, § 27, ECHR 2009 [...]). The parties have, moreover, submitted arguments in respect of both of those provisions.

It should be noted, however, that the applicants' complaint mainly concerns their dismissal for having, as members of the executive committee of a trade union, published and displayed the articles and cartoons in question. In addition, the domestic courts did not find it established that the applicants had been dismissed as a result of belonging to that trade union. The courts referred to the exercise of the right to freedom of expression in the context of labour relations and noted that this right was not unlimited, on account of the specific features of labour relations that had to be taken into consideration. Furthermore, the High Court of Justice of Catalonia found that the dismissal of two other salaried deliverymen had been in breach of Article 54 §§ 1 and 2 (c) of the Labour Regulations, because they had been on sick leave at the time of the publication and distribution of the newsletter in question. This meant that they could not be regarded as having participated in the publication and distribution of the newsletter, or therefore, as being jointly liable for the damage caused thereby to the dignity of the persons concerned. The Employment Tribunal incidentally took note of the fact that they were still members of the trade union in question (see paragraph 15 above). This confirms that the applicants' trade union membership did not play a decisive role in their dismissal.

The Court therefore finds it more appropriate to examine the facts under Article 10, which will nevertheless be interpreted in the light of Article 11 (see Women On Waves and Others v. Portugal, no. 31276/05, § 28, ECHR 2009 [...] (extracts)).

2. Compliance with Article 10 of the Convention, read in the light of Article 11

(a) General principles in matters of freedom of expression

53. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, among other authorities, Lindon, Otchakovsky-Laurens and July, cited above). Moreover, Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed (see De Haes and Gijsels v. Belgium, 24 February 1997, § 48, Reports 1997 I).

54. Account must nevertheless be taken of the need to strike the right balance between the various interests involved. Because of their direct, continuous contact with the realities of the country, a State's courts are in a better position than an international court to determine how, at a given time, the right balance can be struck. For this reason, in matters under Article 10 of the Convention, the Contracting States have a certain margin of appreciation in assessing the necessity and scope of any interference in the freedom of expression protected by that Article (see Tammer v. Estonia, no. 41205/98, § 60, ECHR 2001 I, and Pedersen and Baadsgaard v. Denmark [GC], no. 49017/99, § 68, ECHR 2004 XI), in particular when a balance has to be struck between conflicting private interests.

55. However, that margin goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court (see, mutatis mutandis, Peck v. the United Kingdom, no. 44647/98, § 77, ECHR 2003 I, and Karhuvaara and Iltalehti v. Finland, no. 53678/00, § 38, ECHR 2004 X). The Court's task in exercising its supervisory function is not to take the place of the national authorities but rather to review, in the light of the case as a whole, whether the decisions they have taken pursuant to their power of appreciation can be reconciled with the Convention provisions relied upon (see Bladet Tromsø and Stensaas v. Norway [GC], no. 21980/93, § 60, ECHR 1999 III; Petrenco v. Moldova, no. 20928/05, § 54, 30 March 2010; Polanco Torres and Movilla Polanco v. Spain, no. 34147/06, § 41, 21 September 2010; and Petrov v. Bulgaria (dec.), no. 27103/04, 2 November 2010).

56. The Court takes the view that the members of a trade union must be able to express to their employer their demands by which they seek to improve the situation of workers in their company. In this respect, the Court notes that the Inter-American Court of Human Rights, in its Advisory Opinion OC-5/85193, emphasised that freedom of expression was 'a conditio sine qua non for the development of [...] trade unions' (see paragraph 26 above; see also paragraph 24 and in particular point 155 cited therein). A trade union that does not have the possibility of expressing its ideas freely in this connection would indeed be deprived of an essential means of action. Consequently, for the purpose of guaranteeing the meaningful and effective nature of trade union rights, the national authorities must ensure that disproportionate penalties do not dissuade trade union representatives from seeking to express and defend their members' interests. Trade-union expression may take the form of news sheets, pamphlets, publications and other documents of the trade union whose distribution by workers' representatives acting on behalf of a trade union must therefore be authorised by the management, as stated by the General Conference of the International Labour Organisation in its Recommendation No. 143 of 23 June 1971 (see paragraph 21 above).

57. In the present case, the Spanish courts were required to balance the applicants' right to freedom of expression, as guaranteed by Article 10 of the Convention, against the right to honour and dignity of Mr G., Mr A. and Mr B. (see paragraphs 15-18 above) in the context of an employment relationship. Article 10 of the Convention does not guarantee an unlimited freedom of expression and the protection of the reputation or rights of others, in the present case the reputation of the persons targeted in the drawings and texts at issue, constitutes a legitimate aim permitting a restriction of that freedom of expression. If the reasoning of the domestic courts' decisions concerning the limits of freedom of expression in cases involving a person's reputation is sufficient and consistent with the criteria established by the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (see MGN Limited v. the United Kingdom, no. 39401/04, §§ 150 and 155, 18 January 2011).

(b) Positive obligations of the respondent State under Article 10 of the Convention, read in the light of Article 11

58. The Court observes that, under Article 1 of the Convention, the Contracting Parties 'shall secure to everyone within their jurisdiction the rights and freedoms defined in [...] [the] Convention'. As the Court found in the case of Marckx v. Belgium (13 June 1979, § 31, Series A no. 31; see also Young, James and Webster v. the United Kingdom, 13 August 1981, § 49, Series A no. 44), in addition to the primarily negative undertaking of a State to abstain from interference in the rights guaranteed by the Convention, 'there may be positive obligations inherent' in those rights.

59. This is also the case for freedom of expression, of which the genuine and effective exercise does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals. In certain cases the State has a positive obligation to protect the right to freedom of expression, even against interference by private persons (see Fuentes

Bobo, cited above, § 38; Özgür Gündem v. Turkey, no. 23144/93, §§ 42-46, ECHR 2000 III; and Dink, cited above, § 106).

60. In the present case, the measure complained of by the applicants, namely their dismissal, was not taken by a State authority but by a private company. Following the publication of the trade-union newsletter of March 2002 and the expressions contained therein, the disciplinary measure of dismissal for serious misconduct was taken against the applicants by their employer (see paragraph 14 above) and confirmed by the domestic courts. The applicants' dismissal was not the result of direct intervention by the national authorities. The responsibility of the authorities would nevertheless be engaged if the facts complained of stemmed from a failure on their part to secure to the applicants the enjoyment of the right enshrined in Article 10 of the Convention (see, mutatis mutandis, Gustafsson, cited above, § 45).

61. In those circumstances, the Court finds that it is appropriate to examine the present applications in terms of the positive obligations of the respondent State under Article 10, in the light of Article 11. The Court will therefore ascertain whether, in the present case, the Spanish judicial authorities, in dismissing the applicants' claims, adequately secured their right to freedom of expression in the context of labour relations.

62. Whilst the boundary between the State's positive and negative obligations under the Convention does not lend itself to precise definition, the applicable principles are, nonetheless, similar. In both contexts regard must be had in particular to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, subject in any event to the margin of appreciation enjoyed by the State (see Karhuvaara and Iltalehti, cited above, § 42).

(c) Application of those principles to the present case

63. As the Court noted above (see paragraph 61 above), the principal question in the present case is whether the respondent State was required to guarantee respect for the applicants' freedom of expression by annulling their dismissal. The Court's task is therefore to determine whether, in the light of the case as a whole, the sanction imposed on the applicants was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it were 'relevant and sufficient' (see Fuentes Bobo, cited above, § 44).

(i) Whether the applicants' comments could be regarded as harmful to the reputation of others

64. The Court observes that the domestic courts examined whether the fundamental rights relied upon by the applicants had been breached; if there had been a breach, their dismissals would have been declared null and void. The courts observed that there had been no interference with the right to trade-union freedom, since the dismissals had been the result of the actual content of the offending newsletter and not the applicants' membership of the union N.A.A.

65. Moreover, the domestic courts referred to the exercise of the right to freedom of expression in the context of labour relations and noted that this right was not unlimited; the specific features of labour relations had to be taken into account. Barcelona Employment Tribunal no. 17 thus found that the cartoon and speech bubbles on the cover of the union newsletter, together with the articles inside it, were offensive and impugned the respectability of the persons concerned, as they overstepped the limits of freedom of expression and information, damaging the honour and dignity of the human resources manager and two workers, and tarnishing the image of the company P. (see paragraph 15 above).

66. To arrive at that conclusion, Barcelona Employment Tribunal no. 17 carried out a detailed analysis of the facts in dispute and, in particular, the context in which the applicants had published the newsletter. The Court does not see any reason to call into question the findings thus made by the domestic courts to the effect that the drawing and two articles in question were offensive and capable of harming the reputation of others.

67. In this connection it should be noted that the applicants expressed themselves through a cartoon showing the human resources manager, G., sitting behind a desk under which a person on all fours could be seen from behind, together with A. and B., workers' representatives, who were watching the scene while waiting to take their turn to satisfy the manager. The accompanying speech bubbles were sufficiently explicit. As to the two articles (see paragraph 15 above), they contained explicit accusations of 'infamy' against A. and B., denouncing them for 'selling' the other workers and for forfeiting their dignity in order to keep their posts. The accusations were expressed in vexatious and injurious terms for the persons concerned. The Court reiterates that a clear distinction must be made between criticism and insult and that the latter may, in principle, justify sanctions (see, mutatis mutandis, Skałka v. Poland, no. 43425/98, § 34, 27 May 2003). The Court further refers to the general principles concerning freedom of opinion and expression in the fifth edition (revised) of the Digest of decisions and principles of the Committee on Freedom of Association of the Governing Body of the International Labour Office, and in particular point 154 according to which 'in expressing their opinions, trade union organizations should respect the limits of propriety and refrain from the use of insulting language' (see paragraph 24 above).

68. In the light of the foregoing, the Court takes the view that the grounds given by the domestic courts were consistent with the legitimate aim of protecting the reputation of the individuals targeted by the cartoon and texts in question, and that the courts' conclusion that the applicants had overstepped the limits of admissible criticism in labour relations cannot be regarded as unfounded or devoid of a reasonable basis in fact.

(ii) Whether the sanction of dismissal was proportionate to the degree of seriousness of the impugned remarks

69. It remains to be ascertained whether the sanction imposed on the applicants by their employer, namely their dismissal, was proportionate in relation to the circumstances of the case.

70. In addressing this question, the Court will take particular account of the wording used in the cartoon and articles in question and of the professional context in which they appeared.

71. The Court first notes that the impugned remarks were expressed in a particular context. Proceedings had been brought in the employment tribunals by the applicants, members of a trade union, against their employer. In those proceedings the non-salaried deliverymen, A. and B., had testified in favour of the company P. and therefore against the applicants (see paragraph 11 above). The cartoon and articles were thus published in the newsletter of the trade-union workplace branch to which the applicants belonged, in the context of a dispute between the applicants and the company P. Nevertheless, they did contain criticism and accusations, not directly against the company but against the two non-salaried deliverymen and the human resources manager. The Court reiterates in this connection that the extent of acceptable criticism is narrower as regards private individuals than as regards politicians or civil servants acting in the exercise of their duties (contrast Lingens v. Austria, 8 July 1986, § 42, Series A no. 103, and Nikula v. Finland, no. 31611/96, § 48, ECHR 2002 II).

72. The Court does not share the Government's view that the content of the impugned articles did not concern any matter of general interest (see paragraph 44 above). The publication at issue took place in the context of a labour dispute inside the company to which the applicants had presented certain demands. The primary role of publications of this type 'should be to deal with matters essentially relating to the defence and furtherance of the interests of the unions' members in particular and with labour questions in general' (see paragraph 24 above, in particular point 170 of the International Labour Office Digest cited). The debate was therefore not a purely private one; it was at least a matter of general interest for the workers of the company P. (see, mutatis mutandis, Fressoz and Roire v. France [GC], no. 29183/95, § 50, ECHR 1999 I, and Boldea v. Romania, no. 19997/02, § 57, ECHR 2007 II).

73. That being said, the existence of such a matter cannot justify the use of offensive cartoons or expressions, even in the context of labour relations (see paragraph 24 above, point 154 of the Digest cited). Moreover, the remarks did not constitute an instantaneous and ill-considered reaction, in the context of a rapid and spontaneous oral exchange, as is the case with verbal exaggeration. On the contrary, they were written assertions, published in a quite lucid manner and displayed publicly on the premises of the company P. (compare De Diego Nafria, cited above, § 41).

74. The domestic courts took all these factors into account in dealing with the action brought by the applicants. They carried out an

in-depth examination of the circumstances of the case and a detailed balancing of the competing interests at stake, taking into account the limits of the right to freedom of expression and the reciprocal rights and obligations specific to employment contracts and the professional environment. They endorsed the penalties imposed by the employer, finding that they were not disproportionate to the legitimate aim pursued, namely the protection of the reputation of Mr G., Mr A. and Mr B. in such a context. They further found that the conduct in question had not directly fallen within the applicants' trade union activity but had, on the contrary, offended against the principle of good faith in labour relations and had fallen short of the minimum requirements for coexistence in a professional environment (see paragraph 15 above). Lastly, the courts made extensive reference in the present case to the Constitutional Court's case-law concerning the right to freedom of expression in labour relations and establishing that it was not unlimited. In the Court's opinion, the conclusions reached by the domestic courts cannot be regarded as unreasonable. In this connection, it notes that, in addition to being insulting, the cartoon and texts in issue were intended more as an attack on colleagues for testifying before the courts than as a means of promoting trade union action vis-à-vis the employer.

75. Moreover, an examination of the comparative-law material available to the Court reveals that employers generally enjoy broad discretion in determining the sanction that is best adapted to accusations against an employee; the scale of possible sanctions encompasses the power to dismiss a person who has seriously compromised the interests of the company. In the countries examined, the domestic legislation seeks to reconcile the employee's right to freedom of expression with the employer's rights and prerogatives, requiring in particular that a dismissal measure be proportionate to the conduct of the employee against whom it is taken (see paragraphs 27 and 30-31 above). The homogeneity of European legal systems in this area is a relevant factor in balancing the various rights and interests at stake in the present case.

76. The Court observes that, in order to be fruitful, labour relations must be based on mutual trust. As the Employment Tribunal rightly found, even if the requirement to act in good faith in the context of an employment contract does 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 may be legitimate in other contexts are not legitimate in that of labour relations (see, mutatis mutandis, Vogt v. Germany, 26 September 1995, §§ 51 and 59, Series A no. 323). Moreover, an attack on the respectability of individuals by using grossly insulting or offensive expressions in the professional environment is, on account of its disruptive effects, a particularly serious form of misconduct capable of justifying severe sanctions.

77. This leads the Court to find that, in the particular circumstances of the present case, the measure of dismissal taken against the applicants was not a manifestly disproportionate or excessive sanction capable of requiring the State to afford redress by annulling it or by replacing it with a more lenient measure.

(iii) Conclusion

78. In those circumstances, the Court finds that the respondent State has not failed to fulfil its obligations in respect of the applicants under Article 10 of the Convention, read in the light of Article 11.

79. Accordingly, there has been no violation of Article 10, read in the light of Article 11.

FOR THESE REASONS, THE COURT

Holds, by twelve votes to five, that there has been no violation of Article 10 of the Convention, read in the light of Article 11.
Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 12 September 2011.
Vincent Berger, Jurisconsult
Nicolas Bratza, President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Tulkens, David Thór Björgvinsson, Jočienė, Popovič and Vučinič is annexed to this judgment.

JOINT DISSENTING OPINION OF JUDGES TULKENS, DAVÍD THÓR BJÖRGVINSSON, JOČIENĖ, POPOVIĆ AND VUČINIĆ

(Translation)

1. We do not share the majority's decision to the effect that there has not been, in the present case, a violation of Article 10 of the Convention, read in the light of Article 11. Through the specific circumstances of this case, some major questions of principle are raised in terms of the substance and extent of freedom of expression in the context of labour relations and the freedom of expression of trade unions.

2. We will first briefly summarise the facts, as they are important for an understanding of the scope and significance of the issues.

The applicants were employed as delivery workers for an industrial bakery company. They had brought proceedings against that company before employment tribunals seeking recognition of their status as salaried workers (rather than self-employed or non-salaried delivery workers), in order to be covered by the corresponding social-security regime. Representatives of a committee of non-salaried delivery workers in the company had testified against the applicants in those proceedings. In 2001 the applicants set up the trade union N.A.A. (Nueva alternativa asamblearia) to defend their interests and those of the other delivery staff who were under pressure from the company to renounce their claim to salaried status, which had been acknowledged by the employment tribunals. The applicants were not trade-union representatives, in view of the fact that at the time of the dismissals there had not been any elections in the company since 1991, but they were on the executive board of the trade union N.A.A. and the first applicant was a trade-union officer.

The May 2002 issue of the trade union's newsletter reported on a judgment given in April 2002 by Barcelona Employment Tribunal no. 13, which had upheld the applicants' claims, ordering the company to pay them certain sums in respect of salaries owed to them. The cover of the newsletter showed a satirical caricature of the company's human resources manager receiving sexual gratification in return for favours granted to certain workers. The newsletter contained two articles that virulently criticised two individuals who worked for the same company but represented a committee of non-salaried workers, accusing them of 'selling the other workers and forfeiting their dignity in order to keep their posts'.

On 3 June 2002 the applicants were summarily dismissed on grounds of serious misconduct, namely for impugning the reputations of the individuals in question, under Article 54 § 1 of the Labour Regulations, which provided for the termination of a contract of employment where an employee was guilty of serious and negligent failure to perform his or her contractual obligations. Under Article 54 § 2 (c) serious misconduct was constituted by '[v]erbal or physical attacks on the employer or persons working in the company, or members of their families living with them'. Their trade union N.A.A. was also disbanded.

3. The Court rightly observes from the outset that 'the facts of the present case are such that the question of freedom of expression is closely related to that of freedom of association in a trade-union context' (paragraph 52 of the judgment, first sub-paragraph). However, it subsequently follows a different course and brushes aside, somewhat artificially, the trade union dimension of the case. It endorses the position of the domestic courts, which 'did not find it established that the applicants had been dismissed as a result of belonging to that trade union' and confirms, albeit with a slight nuance, 'that the applicants' trade union membership did not play a decisive role in their dismissal' (ibid., second sub-paragraph).

4. The Court thus chooses to examine the case mainly from the angle of Article 10 of the Convention, even though it explains that this provision will be interpreted in the light of Article 11. However, the approach thus announced proves in practice to be illusory, or even theoretical. Both in assessing the facts and in balancing the interests at stake, the majority give scant consideration to the fact that the applicants were members of a trade union, or that they were expressing professional and employment-related claims. In addition, the dispute in question lay at the very heart of a debate concerning trade union freedom, since the dispute was not only between a trade union and an employer, but also between two trade unions.

5. The right to trade union freedom cannot be dissociated from the right to freedom of expression and information. Moreover, in turn,

trade union freedom of expression is unanimously regarded as an essential and indispensible aspect of the right of association, it being a prerequisite to the fulfilment of the goals of associations and trade unions, as is quite clear from the documents of the International Labour Organisation and the case-law of the Inter-American Court of Human Rights cited by the Grand Chamber as relevant material (paragraphs 21 et seq. of the judgment). As M. O'Boyle has commented, 'freedom of speech can be seen as the oxygen which gives associative rights their vitality'. We share the view that 'since trade unions play an important role, in that they express and defend ideas of public interest in professional and employment-related matters, their freedom to put forward opinions warrants a high degree of protection'.

6. Whilst it is not submitted that the cause of the dismissals lay in the applicants' trade union membership, there is no doubt that the cartoon and impugned articles in the union newsletter had a trade union connotation and thus had to be assessed in the light of the ongoing industrial dispute in the company and the context in which they had been published.

7. Admittedly, there has not yet been any specific Convention case-law associating trade union freedom, in terms of 'a right, in order to protect [its members'] interests, that the trade union should be heard', with freedom of expression. We believe, however, that the case-law applicable to freedom of expression in a media context may be applied, mutatis mutandis and with all the necessary precautions, to cases like the present one. A function similar to the 'watchdog' role of the press is performed by a trade union, which acts on behalf of the company's workers to protect their occupational and employment-related interests. In the Vides Aizsardzības Klubs v. Latvia judgment of 27 May 2004, the Court extended to environmental protection groups the privileged status afforded to the press. This was also the case for associations in the Mamère v. France judgment of 7 November 2006.

8. That being said, it is obvious that freedom of expression in general, like that of trade unions in particular, is not unlimited and is subject to the same limitations and restrictions as are necessary in a democratic society.

9. In the light of Article 10 of the Convention, the case must be examined in terms of the positive obligations that may have to be fulfilled by the respondent State in order to secure to the applicants the enjoyment of their right to freedom of expression, as the measure disputed by the applicants, namely their dismissal, was not taken by a governmental authority but by a private company. The question is whether the disciplinary sanction imposed on the applicants, namely dismissal for serious misconduct, leading to the immediate and final loss of their jobs, met a 'compelling social need' and was proportionate to the legitimate aim pursued and whether the reasons given by the domestic authorities to justify it were 'relevant and sufficient'. We do not believe so, although we acknowledge, as the legitimate aim, the need to protect the reputation or rights of others.

10. In balancing the right to freedom of expression with the right to honour and reputation of the individuals concerned, the Court uses, in their entirety and almost word for word, the findings of the domestic courts, which, without taking Article 10 of the Convention into account, took the view that the cartoon and articles in question were offensive and impugned the respectability of the individuals and company concerned (see paragraph 65 of the judgment). At no point does the Court examine in concreto whether the cartoon and articles overstepped the bounds of remarks that 'shock, offend and disturb' and that are protected by Article 10 of the Convention as an expression of pluralism, tolerance and broadmindedness, without which there is no democratic society. It is precisely when ideas shock and offend that freedom of expression is most precious.

11. As regards the cartoon on the newsletter's cover, it is a caricature, which, whilst being vulgar and tasteless in nature, should be taken for what it is – a satirical representation. In other cases the Court has recognised the satirical nature of an expression, publication or caricature. In refusing to take that nature into account in the present case, the judgment gives the curious impression of placing trade union freedom of expression at a lower level than that of artistic freedom and of treating it more restrictively.

12. Moreover, as to the content of the impugned texts, which are unquestionably crude and vulgar, it must be assessed in relation to the ongoing industrial dispute in the company. The harsh criticism did not relate to the intimacy of the individuals or to other rights pertaining to their private lives. It was directed exclusively at the role of certain colleagues in the industrial dispute and their professional attitude in the legal debate over the recognition of rights afforded by law to workers. It was in fact mainly for the promotion and protection of those rights that the trade union had been created. In this connection, we do not find that the criticism was such as to cause prejudice 'to personal enjoyment of the right to respect for private life' (see A. v. Norway, 9 April 2009, § 64). It is also noteworthy that there is no information in the file to suggest that the individuals concerned by the applicants' offending remarks brought any legal proceedings for libel or insults against the applicants, unlike the situation in Fuentes Bobo v. Spain.

The newsletter's cover thus referred to the fact that certain representatives of the association had testified in favour of the company and that, in exchange, they had received favours. The impugned article entitled 'Whose witnesses? Theirs, of course' addressed the same question, admittedly in ironic and excessive terms, alleging that the witnesses had failed in their duty to defend the interests of persons such as the members of the professional association of which they themselves were representatives.

13. In paragraph 74 of the judgment, to support its assessment, the Court notes that 'in addition to being insulting, the cartoon and texts in issue were intended more as an attack on colleagues for testifying before the courts than as a means of promoting trade union action vis-à-vis the employer'. Once again, the Court dissociates the impugned texts from their context, as the trade union action had precisely been triggered by the testimony in court of members of the other committee (see paragraph 2 above). Moreover, such an assertion – and it is questionable whether this actually falls within the Court's remit – amounts to speculation and reveals a certain ignorance, or even suspicion, of trade union action.

14. Like the Chamber, the Grand Chamber stresses the fact that the offending caricatures and articles 'did not constitute an instantaneous and ill-considered reaction, in the context of a rapid and spontaneous oral exchange, as is the case with verbal exaggeration. On the contrary, they were written assertions, published in a quite lucid manner and displayed publicly on the premises of the company P.' (see paragraph 73 of the judgment). This assessment then in fact allows the Court to distinguish the present case from its judgment in Fuentes Bobo v. Spain (29 February 2000), which concerned verbal remarks made during live radio broadcasts, without any possibility for the applicants to reformulate, rectify or even withdraw them before they were made public. The somewhat artificial nature of this distinction, precisely in the context of labour relations, may give reason to fear that the present judgment constitutes a step backwards in relation to the Fuentes Bobo judgment, concerning the dismissal of a journalist on account of harsh criticism during a radio programme, where the Court found that there had been a violation of Article 10 of the Convention in the context of an industrial dispute.

15. As to the seriousness of the sanction, the applicants received the maximum penalty provided for by the Labour Regulations, namely the final termination of their contracts of employment, without a notice period or any warning or compensation. This is undoubtedly the harshest possible sanction that can be imposed on workers, whereas other more lenient and more appropriate disciplinary sanctions could or should have been envisaged, as the Court recognised in the Fuentes Bobo judgment.

16. It should also be noted that the applicants were dismissed for serious and negligent failure to perform their contractual obligations, even though 'offences' committed in written form are not expressly mentioned in Article 54 § 2 of the Labour Regulations, which refers only to '[v]erbal or physical attacks on the employer or persons working in the company [...]' among the situations that may constitute non-performance of contract. In any event, the sanction imposed depended on the conduct in question being characterised by the employer as 'serious' and then on the employer's wish to terminate the applicants' contracts, since Article 54 § 1 of the Labour Regulations did not render dismissal mandatory for that kind of situation but only provided for it as a possibility.

17. The imposition of such a harsh sanction on trade union members, who were acting in their own names but also to defend the interests of other workers, is likely to have, generally speaking, a 'chilling effect' on the conduct of trade unionists and to encroach directly upon the raison d'être of a trade union. In this connection it is noteworthy that the mere threat of dismissal, involving loss of livelihood, has been

described in the Court's case-law as a very serious form of compulsion striking at the very substance of the freedom of association guaranteed by Article 11 (see Young, James and Webster v. the United Kingdom, 13 August 1981, § 55, Series A no. 44).

18. Lastly, the majority boldly assert that certain manifestations of the right to freedom of expression that may be legitimate in other contexts are not legitimate in that of labour relations. They continue as follows: 'Moreover, an attack on the respectability of individuals by using grossly insulting or offensive expressions in the professional environment is, on account of its disruptive effects, a particularly serious form of misconduct capable of justifying severe sanctions. This leads the Court to find that, in the particular circumstances of the present case, the measure of dismissal taken against the applicants was not a manifestly disproportionate or excessive sanction capable of requiring the State to afford redress by annulling it or by replacing it with a more lenient measure' (see paragraphs *76* and *77* of the judgment). We are puzzled by such an assertion.

Firstly, the argument of possible disruption in the workplace is one that has been traditionally used in order to justify greater protection of freedom of expression and not less protection. 'Many people, [...] economically dependent as they are upon their employer, hesitate to speak out not because they are afraid of getting arrested, but because they are afraid of being fired. And they are right.'

Furthermore, the Court once again overlooks the social dimension of the situation in adopting this singular position, which appears to us to be detached from the reality of the case. The applicants' summary and final dismissal for serious misconduct quite simply deprived them of their livelihood. In terms of proportionality, is it really reasonable today, with the widespread employment crisis affecting numerous countries and in terms of social peace, to compare the potentially disruptive effects of the impugned texts in the workplace with a measure of final dismissal, and thus increased job insecurity for the workers? We do not think so.

19. In conclusion, in view of the foregoing, the interrelationship between freedom of expression and freedom of association, the employment and professional context in which the facts occurred, the seriousness of the sanction, and its dissuasive effect and disproportionate nature, we believe that the interference in question did not meet a 'compelling social need', that it cannot be regarded as 'necessary in a democratic society' and that it appears manifestly disproportionate to the aims pursued. There has therefore been a violation of Article 10 of the Convention, read in the light of Article 11.

Noot

Dylan Griffiths

De heer Palomo Sánchez en zijn drie collega's Olmo, Lecegui en Blanco Balbas waren in dienst bij de Spaanse onderneming Panrico in de functie van bezorger. Zij hebben diverse procedures gevoerd tegen Panrico teneinde – als ik het goed begrijp – als verklaring van recht uitgesproken te krijgen dat zij de status van '*salaried worker*' hadden, hetgeen (onder meer) van belang was om verzekerd te zijn onder bepaalde sociale verzekeringswetten. In die procedures hebben A. en B., vertegenwoordigers van een comité van '*non-salaried delivery staff*' als getuigen verklaringen afgelegd die ongunstig waren voor de zaak van Palomo Sánchez c.s. Om hun belangen, en die van anderen in vergelijkbare posities, beter te kunnen behartigen hebben Palomo Sánchez c.s. op enig moment een vakbond opgericht: *Nueva Alernativa Asamblearia* (N.A.A.). Enkele maanden later deelden Palomo Sánchez c.s. de directie van Panrico mee dat zij binnen Panrico een afdeling van N.A.A. aan het opzetten waren en dat zij gevieren waren benoemd als leden van het '*executive committee*' van die afdeling.

N.A.A. publiceerde maandelijks een nieuwsbrief. Voorjaar 2002 werd in die nieuwsbrief verslag gedaan van een uitspraak van de rechtbank waarin de vorderingen van Palomo Sánchez c.s. gedeeltelijk waren toegewezen en Panrico werd veroordeeld tot (na)betaling van salaris. Op de omslag van de nieuwsbrief stond een cartoon waarin het hoofd personeelszaken van Panrico, de heer G., zittend achter zijn bureau werd afgebeeld. Onder het bureau was iemand te zien die zich op zijn handen en knieën bevond. Naast die persoon bevonden zich de hierboven genoemde A. en B., die in de procedure van Palomo Sánchez c.s. tegen Panrico voor Palomo Sánchez c.s. ongunstige verklaringen hadden afgelegd. A. en B. aanschouwden het tafereel, wachtend totdat zij aan de beurt zouden zijn om het hoofd personeelszaken te bevredigen. De nieuwsbrief bevatte verder twee artikelen waarin het optreden van A. en B. in krachtige bewoordingen werd veroordeeld:

> *As employees of Panrico we earn our living by selling goods in the street. A. en B. earn theirs by selling the workers in the courts. Not content with doing this simply by signing agreements that go against the collective interest, they've now gone a step further – they rob and steal with total impunity, in broad daylight, with the confidence of men who feel totally untouchable*'. En: *'[...] but they, the chairman and secretary of the staff representatives, agreed, just like guard-dogs, to roll over and frolic in return for a pat on the back by their master*'.

De nieuwsbrief werd verspreid onder het personeel van Panrico en opgehangen op het mededelingenbord van N.A.A. op het bedrijfsterrein.

Naar aanleiding van de nieuwsbrief zijn Palomo Sánchez c.s. door Panrico op staande voet ontslagen. Zij vechten het ontslag aan, maar het blijft overeind bij de Spaanse feitenrechters. Die zien weliswaar onder ogen dat het recht op vrije meningsuiting ook in de context van arbeidsrelaties bescherming verdient, maar overwegen dat dit recht begrensd wordt door de goede trouw, die in arbeidsverhoudingen meebrengt dat respect moet worden opgebracht voor de belangen van de werkgever en voor *'the minumum requirements of co-existence in a professional environment'*. In de nieuwsbrief hadden Palomo Sánchez c.s. deze grens overschreden door de eer en goede naam van A. en B. en van hoofd personeelszaken G. aan te tasten en de reputatie van hun werkgever Panrico te beschadigen. Palomo Sánchez c.s. bestrijden dit oordeel zowel bij de Spaanse Hoge Raad als bij het Constitutionele Hof, maar vangen bij beide colleges bot, waarop zij bij het EHRM klagen dat de Spaanse rechters de artikelen 10 en 11 EVRM geschonden hebben (vrijheid van meningsuiting respectievelijk vrijheid van vereniging, waaronder vakbondsvrijheid). Het hierboven afgedrukte arrest van de Grote Kamer van het EHRM volgt op een uitspraak van 8 december 2009 van de kamer. Een samenvatting van die uitspraak is in *Mediaforum* 2010-2 gepubliceerd, met een noot van D. Voorhoof (onder de naam *Aguilera Jiménez e.a./Spanje* – deze Aguilera Jiménez deed bij de Grote Kamer niet meer mee omdat zijn klacht, net als die van een collega, door de kamer al niet-ontvankelijk was geoordeeld). De noot van Voorhoof bevat een grote hoeveelheid jurisprudentie- en literatuurverwijzingen waarnaar ik de lezer op mijn beurt dankbaar verwijs.

Het EHRM stelt vast dat de klacht van Palomo Sánchez c.s. in hoofdzaak betrekking heeft op hun ontslag als gevolg van publicatie van de nieuwsbrief en oordeelt, in navolging van de Spaanse rechters, dat het vakbondslidmaatschap van Palomo Sánchez c.s. geen doorslaggevende rol heeft gespeeld bij de beslissing van Panrico om tot dat ontslag over te gaan. Het EHRM overweegt dan ook dat het de zaak zal beoordelen aan de hand van art. 10 EVRM, maar dat het deze bepaling zal interpreteren in het licht van art. 11 (r.o. 52).

Het EHRM stelt vast dat de kernvraag die voorligt is of de Spaanse rechters ter bescherming van het recht op vrije meningsuiting van Palomo Sánchez c.s. hadden moeten overgaan tot vernietiging van het ontslag op staande voet. Het EHRM dient daartoe te beoordelen of de sanctie van ontslag op staande voet noodzakelijk was ter bescherming van een legitiem doel en of de argumenten van de Spaanse rechters om het ontslag overeind te houden *'relevant and sufficient'* waren (r.o. 63). Het EHRM verwijst in dit verband naar zijn uitspraak in de zaak Fuentes Bobo, een andere 'Spaanse zaak' over het recht op vrije meningsuiting in het kader van een arbeidsverhouding (EHRM 29 februari 2000, *Mediaforum* 2000-9, nr. 53 m.nt. E. Verhulp). In die zaak ging het om een journalist die was ontslagen omdat hij in een radioprogramma stevige kritiek had geuit op zijn werkgever. Het EHRM oordeelde toen dat art. 10 EVRM geschonden was.

Het EHRM overweegt dat het ontslag een legitiem doel diende (in de zin van artikel 10 lid 2 EVRM), te weten bescherming van het recht van A., B. en G. om gevrijwaard te blijven van belediging. Het EHRM verwijst onder meer naar onderdeel 154 van *'The Digest of decisions and principles of the Committee on Freedom of Association of the Governing Body of the International Labour Office'*, dat bepaalt dat '*in expressing their opinions, trade union organisations should respect the limits of propriety and refrain from the use of insulting language*' (r.o. 67).

Blijft over de vraag of de sanctie van ontslag op staande voet in de omstandigheden van deze zaak noodzakelijk was in een democratische samenleving, waartoe het EHRM moet beoordelen of de sanctie in redelijke verhouding stond tot de ernst van de gewraakte uitingen

in de nieuwsbrief. De Grote Kamer van het EHRM is het niet met de kamer (en met de Spaanse rechters) eens dat de cartoon en de twee artikelen in de nieuwsbrief in het geheel geen kwestie van algemeen belang aan de orde stelden. Het onderwerp was immers niet alleen van belang voor Palomo Sánchez c.s. zelf, maar minst genomen ook voor de andere werknemers van Panrico (r.o. 72). Dat algemeen belang rechtvaardigt volgens het EHRM echter niet de publicatie van beledigende cartoons of artikelen, ook niet in de context van arbeidsverhoudingen. Daarbij overweegt het EHRM dat het hier niet ging om spontane – verbale – uitingen, maar om – kennelijk weloverwogen – schriftelijke aantijgingen (r.o. 73). Het EHRM overweegt dat arbeidsverhoudingen, om vruchtbaar te zijn, moeten worden gekenmerkt door wederzijds vertrouwen. '*As the employment tribunal rightly found, even if the requirement to act in good faith in the context of an employment contract does 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 may be legitimate in other contexts are not legitimate in that of labour relations. [...] Moreover, an attack on the respectability of individuals by using grossly insulting or offensive expressions in the professional environment is, on account of its disruptive effects, a particularly serious form of misconduct capable of justifying severe sanctions*' (r.o. 76).

Conclusie: het ontslag op staande voet was niet een zodanig disproportionele maatregel dat de Spaanse rechters deze op grond van art. 10 EVRM (gelezen in het licht van art. 11 EVRM) hadden moeten vernietigen dan wel vervangen door een minder vergaande maatregel (r.o. 77).[1]

Vijf van de zeventien rechters zijn het niet met dit oordeel eens. Hun '*dissenting opinion*', eveneens hierboven afgedrukt, is de moeite van het lezen waard. De kritiek van de dissenters is als volgt.

Het Hof overweegt weliswaar dat het art. 10 EVRM zal uitleggen in het licht van art. 11 EVRM, maar daar komt in de praktijk niets van terecht. In feite veegt het EHRM de vakbondsdimensie van de zaak van tafel door het oordeel van de Spaanse rechters over te nemen dat het ontslag geen verband hield met het vakbondslidmaatschap van Palomo Sánchez c.s. (alinea 3 van de dissenting opinion). De dissenters willen aannemen dat in dat vakbondslidmaatschap niet de directe aanleiding voor het ontslag gelegen was, maar stellen vast dat '*there is no doubt that the cartoon and the impugned articles in the union newsletter had a trade union connotation and thus had to be assessed in the light of the ongoing industrial dispute in the company and the context in which they had been published*' (alinea 6). De dissenters menen dat het Hof hierin aanleiding had moeten zien om deze zaak niet te beoordelen als een gewoon geschil tussen twee private partijen, met bijbehorende '*margin of appreciation*' voor de nationale rechter (vgl. r.o. 54 van het arrest), maar dat het Hof het oordeel van de Spaanse rechters, in plaats daarvan, net zo streng had moeten toetsen als het pleegt te doen in zaken die journalistieke uitingen betreffen. Immers: '*A function similar to the 'watchdog' role of the press is performed by a trade union, which acts on behalf of the company's workers to protect their occupational and employment-related interests*'. De dissenters verwijzen in dit verband onder meer naar *Vides Aizsardz bas Klubs/Letland* (EHRM 27 mei 2004, *Mediaforum* 2004-9, nr. 30, m.nt. A.J. Nieuwenhuis) waarin het EHRM de geprivilegieerde status van de pers uitbreidde naar de milieubeweging (alinea 7).[2]

De dissenters verwijten het Hof verder dat het niet in concreto heeft onderzocht of de cartoon en de artikelen '*overstepped the bounds of remarks that 'shock, offend and disturb' and that are protected by Article 10 of the Convention as an expression of pluralism, tolerance and broadmindedness, without which there is no democratic society*' (alinea 10).

Wat de cartoon betreft wijzen de dissenters erop dat het hier een karikatuur betreft. Ze noemen allerlei uitspraken waarin het Hof het satirische karakter van een uiting mede in aanmerking heeft genomen (zie voetnoot 6 bij de dissenting opinion). '*In refusing to take that nature into account in the present case, the judgement gives the curious impression of placing Trade Union freedom of expression at a lower level than that of artistic freedom and of treating it more restrictively*' (alinea 11).

De inhoud van de gewraakte uitingen is volgens de dissenters zonder meer grof en vulgair, maar die uitingen moeten wel gezien worden tegen de achtergrond van het langslepende conflict over de juridische positie van Palomo Sánchez c.s., en vergelijkbare medewerkers van Panrico. Dáár gingen de uitingen in de nieuwsbrief over, níet over het privé-leven van A. B. en G. De dissenters merken in dit verband op dat – anders dan in de *Fuentes Bobo* zaak – geen van genoemde drie rechtsmaatregelen heeft getroffen tegen Palomo Sánchez c.s. (alinea 12).

Het onderscheid dat het Hof maakt tussen spontane – verbale – uitingen (zoals in *Fuentes Bobo*) en geschreven uitingen, wordt door de dissenters kunstmatig genoemd, en doet hen de vrees uitspreken dat het Hof ten opzichte van *Fuentes Bobo* een stap terug heeft gedaan (alinea 14).

De dissenters vinden dus dat het Hof in zijn beoordeling van de ernst van de gewraakte uitingen de plank op een aantal plaatsen mis heeft geslagen. Hetzelfde geldt volgens de dissenters voor 's Hofs beoordeling van de proportionaliteit van de uitingsvrijheid beperkende maatregel. Ontslag op staande voet is immers '*undoubtedly the harshest possible sanction that can be imposed on workers [...]*' (alinea 15). De dissenters wijzen op het '*chilling effect*' van een dergelijke maatregel op het opereren van vakbondsleden (alinea 17). Het Hof heeft hier onvoldoende oog voor gehad: het heeft het belang van enkele individuen om niet beledigd te worden laten prevaleren boven het belang van Palomo Sánchez c.s. om in hun levensonderhoud te voorzien. Immers: '*The applicants' summary and final dismissal for serious misconduct quite simply deprived them of their livelihood. In terms of proportionality, is it really reasonable today, with the widespread employment crisis affecting numerous countries and in terms of social peace, to compare the potentially disruptive effects of the impugned texts in the workplace with a measure of final dismissal, and thus increased job insecurity for the workers? We do not think so*' (alinea 18).

Panrico had voor een minder verstrekkende maatregel dan ontslag op staande voet moeten kiezen en de Spaanse rechters hadden het ontslag op staande voet dus niet overeind mogen houden. Het Hof had dan ook moeten oordelen dat art. 10 EVRM, gelezen in het licht van art. 11 EVRM, wel degelijk geschonden was.

Ik vind de dissenting opinion overtuigend. Zij laat de lezer echter wel in staat van lichte verwarring achter. Het is immers logisch, meen ik, dat een werkgever op de een of andere manier wil optreden tegen publicatie van zulke grove beledigingen aan het adres van collega's. Ik kan me voorstellen dat de dissenters – gelet op de artikelen 10 en 11 EVRM – een ontslag op staande voet te ver vinden gaan. In Nederland betekent een ontslag op staande voet (dat in rechte overeind blijft) niet alleen dat de arbeidsovereenkomst, en daarmee het recht op loon, per onmiddellijk ophoudt (en de werknemer zelfs schadeplichtig wordt jegens de werkgever, zie artikel 7:677 BW), maar óók dat de werknemer verwijtbaar werkloos zal worden geacht in de zin van de Werkloosheidswet en dus niet voor een WW-uitkering in aanmerking zal komen. Totdat een andere baan is gevonden inderdaad '*deprived of livelihood*' dus, een mogelijke aanspraak op een bijstandsuitkering daargelaten.

Maar wat had de werkgever dán kunnen doen? Welke minder vergaande maatregel staat de Nederlandse werkgever in een dergelijke situatie ter beschikking? Dat valt nogal tegen. De werkgever zou de werknemers kunnen schorsen, maar – ervan uitgaande dat de schorsing niet mag uitmonden in ontslag – schiet de werkgever hier weinig mee op. Tijdens de schorsing blijft het recht op loon bestaan (HR 21 maart 2003, *JAR* 2003/91) en het enkele weken later weer op de werkvloer moeten toelaten van de geschorste werknemer zal door menig werkgever als gezichtsverlies worden ervaren.

De werkgever zou ook een verzoek tot ontbinding van de arbeidsovereenkomst kunnen indienen bij de kantonrechter. (Dat is een minder vergaande maatregel dan een ontslag op staande voet, omdat de arbeidsovereenkomst hangende de procedure, een maand of twee, doorloopt, en de kantonrechter bij ontbinding een vergoeding kan toekennen). Enige kans van slagen zal een ontbindingsprocedure wel hebben, zelfs bij een kantonrechter die veel voelt voor de lijn van de dissenters, omdat een onherstelbare vertrouwensbreuk ook grond voor ontbinding kan zijn. Maar een kantonrechter die de vrije meningsuiting en vakbondsvrijheid hoog in het vaandel heeft zal toch geneigd zijn het verzoek af te wijzen, als de gewraakte uiting de enige oorzaak van de gestelde vertrouwensbreuk is (waarbij de kantonrechter in een casus als de onderhavige in zijn achterhoofd zal hebben dat

1 Zie voor een recente uitspraak waarin het EHRM wel van oordeel was dat een ontslag op staande voet een schending van art. 10 EVRM opleverde: *Heinisch/Duitsland*, EHRM 21 juli 2011.

2 Zie voor twee recente uitspraken waarin het EHRM wel concludeert tot schending van art. 11 EVRM: *Sisman/Turkije*, EHRM 27 september 2011 en *Vellutini en Michel/Frankrijk*, EHRM 6 oktober 2011 (tevens schending art. 10).

opzegging van de arbeidsovereenkomst van een vakbondslid wegens het verrichten van activiteiten ten behoeve van die vakbond verboden is – zie art. 7:670 lid 5 BW).

Een boete dan? Dat kan alleen als in de arbeidsovereenkomst uitdrukkelijk is afgesproken dat de werkgever een boete kan opleggen (art. 7:650 BW). Een dergelijk beding komt niet vaak voor. De 'waarde' ervan voor de werkgever is bovendien beperkt omdat de boete niet tot voordeel van de werkgever zelf mag strekken en de hoogte in beginsel niet meer mag bedragen dan een halve dag loon. De vraag lijkt me gerechtvaardigd of de werkgever in een geval als dat van Palomo Sánchez c.s. – ook al heeft hij een boetebeding in de arbeidsovereenkomst opgenomen – het volstaan met het uitdelen ervan recht vindt doen aan de ernst van de door de werknemer geschonden norm.

De enige andere 'maatregel' die ik kan verzinnen is het geven van een waarschuwing (of – zo de werkgever wil – een 'officiële waarschuwing', maar de toevoeging heeft juridisch geen enkele betekenis). Van een waarschuwing heeft de werknemer echter geen last, behalve in die zin dat deze in zijn personeelsdossier zal belanden, hetgeen een mogelijk *toekomstig* ontslag zou kunnen vergemakkelijken, en een reden zou kunnen vormen voor de werkgever om op het eerstvolgende in aanmerking komende moment af te zien van een periodieke salarisverhoging. Veel werkgevers zullen, geconfronteerd met een situatie zoals zich bij Panrico voordeed, dus ook van het geven van een waarschuwing vinden dat hiermee onvoldoende krachtig zou worden gereageerd op het vergrijp van de werknemers.

Onverdeeld aantrekkelijke alternatieven voor een ontslag op staande voet staan een werkgever zoals Panrico, in Nederland althans, dus niet ter beschikking.[3] Uit het arrest kan ik niet opmaken of de situatie in Spanje vergelijkbaar is. Uit hun opinie blijkt in ieder geval niet dat de dissenters serieus hebben stilgestaan bij mogelijke alternatieve maatregelen. Wat daar ook van zij: in de context van het Nederlandse arbeidsrecht zal het arrest van het EHRM werkgevers goed uitkomen. Werknemers doen er goed aan te hameren op de argumenten van de dissenters, en zo mogelijk te benadrukken dat veeleer van een '*Fuentes Bobo*-' dan van een '*Palomo Sánchez*-' situatie sprake is.

3 Een andere vraag is of Panrico zich niet had kunnen beperken tot het ontslag van slechts die werknemer(s) die verantwoordelijk was (waren) voor de cartoon en de artikelen. Juist ook het feit dat gekozen werd voor ontslag van de hele groep, en daarmee de facto voor eliminatie van deze voor Panrico storende vakbond, biedt grond voor twijfel aan de juistheid van 's Hofs oordeel dat het vakbondslidmaatschap van Paloma Sánchez geen doorslaggevende rol heeft gespeeld.

Nr. 2 Mercis en Bruna/Punt.nl

Gerechtshof Amsterdam 13 september 2011

Arrest in de zaak van:

1. de besloten vennootschap met beperkte aansprakelijkheid Mercis BV, gevestigd te Amsterdam,
2. Hendrik Magdalenus Bruna, wonende te Utrecht,
appellanten in het principaal hoger beroep, geïntimeerden in het incidenteel hoger beroep, advocaat: mr. R.S. le Poole te Amsterdam,

tegen

de besloten vennootschap met beperkte aansprakelijkheid Punt.nl BV, gevestigd te Den Haag, geïntimeerde in het principaal hoger beroep, appellante in het incidenteel hoger beroep, advocaat: mr. O.M.B.J. Volgenant te Amsterdam.

1. Het geding in hoger beroep

Principaal appellanten worden hierna tezamen Mercis c.s. genoemd en afzonderlijk Mercis respectievelijk (Dick) Bruna, principaal geïntimeerde wordt Punt.nl genoemd.

Bij dagvaarding van 15 januari 2010 zijn Mercis c.s. in hoger beroep gekomen van het vonnis dat de voorzieningenrechter in de rechtbank Amsterdam in het kort geding tussen partijen (Mercis c.s. als eisers en Punt.nl als gedaagde) onder zaaknummer/rolnummer 444877 / KG ZA 09-2617 heeft gewezen en dat is uitgesproken op 22 december 2009.

Mercis c.s. hebben bij memorie negen grieven voorgesteld, bescheiden in het geding gebracht en geconcludeerd, zakelijk samengevat, dat het hof het vonnis waarvan beroep zal vernietigen en hun vorderingen, zoals in de appeldagvaarding omschreven, geheel zal toewijzen, met veroordeling van Punt.nl op de voet van art. 1019h Rv in de volledige kosten van het geding in beide instanties, te vermeerderen met nakosten en wettelijke rente.

Daarop heeft Punt.nl geantwoord, de grieven bestreden en van haar kant – in incidenteel hoger beroep – eveneens appel ingesteld. Daarbij heeft zij dertien grieven voorgesteld, bescheiden in het geding gebracht en in beide appellen geconcludeerd dat het hof het vonnis waarvan beroep zal vernietigen voor zover daarbij de vorderingen van Mercis c.s. zijn toegewezen en, naar het hof verstaat, die vorderingen alsnog zal afwijzen, alsmede dat het hof dat vonnis voor het overige zal bekrachtigen, met veroordeling van Mercis c.s. in de volledige kosten van het geding in beide instanties.

Mercis c.s. hebben een akte genomen 'houdende vermeerdering eis, tevens houdende aanvullende producties', en daarbij hun eis vermeerderd en verdere bescheiden in het geding gebracht.

In het incidenteel hoger beroep hebben Mercis c.s. geantwoord, verdere bescheiden in het geding gebracht en geconcludeerd dat het hof de grieven in het incidenteel hoger beroep zal verwerpen en zal beslissen overeenkomstig de in de appeldagvaarding geformuleerde eis.

Punt.nl heeft vervolgens een akte genomen 'houdende bezwaar tegen de door appellanten nieuw aangevoerde grief'.

Bij rolbeschikking van 29 juni 2010 heeft het hof dit bezwaar van Punt.nl, opgevat als bezwaar tegen de vermeerdering van eis, gegrond verklaard.

Partijen hebben de zaak op 3 november 2010 doen bepleiten door hun bovengenoemde advocaten, Mercis c.s. tevens door mr. A. Bekema, advocaat te Amsterdam, aan de hand van door beide partijen overgelegde pleitnotities. Partijen hebben bij die gelegenheid elk nog bij akte aanvullende producties overgelegd, waaronder specificaties van proceskosten.

Ten slotte hebben partijen recht gevraagd op de stukken van beide instanties, waarvan de inhoud als hier ingevoegd wordt beschouwd.

2. Grieven

Voor de grieven in beide appellen verwijst het hof naar de desbetreffende memories.