2023/5

Dismissal of a teacher as a consequence of publishing a book: infringement of right to freedom of expression? (NL)

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Summary

The Dutch Supreme Court has found that a dismissal related to the publication of a book interfered with the employee's freedom of expression as there was a causal link between the publication of the book and the termination request.

Facts

The employee in this case was a teacher in a vocational college. She was on a permanent contract. She informed her manager that she was planning to write a book describing her experience with the new 'personalised education' method that she was instructed to use. Her manager, and his higher-up managers, replied that they had no objection, as long as she respected certain principles, including respect for the privacy of her colleagues. When the book came out, management was not amused. Although the book was fictional, many of the characters were easily recognizable. This caused unrest and friction with several colleagues. The teacher was suspended and, after an attempt at mediation failed, the employer applied to the court for termination of her contract. [Note: under Dutch law, the so-called 'preventive dismissal system' applies; an employer can only terminate a contract by (in this case) requesting the court to terminate it. The court will grant a request for termination if it is satisfied that certain requirements have been met, such as that the working relationship between the parties has broken down and cannot reasonably continue]. The first instance court granted the request and awarded the teacher the standard termination compensation. The judgment was criticized in the press and questions were asked in parliament regarding teachers' freedom to express their opinion. Parliament even adopted a motion to the effect that teachers must be free to join the public debate on teaching methods without fearing for their job.

On appeal, the judgment was confirmed, except that the teacher was awarded additional compensation in the amount of EUR 40,000 on the ground that management failed to take adequate steps after the publication of the book had caused unrest among the staff. In the opinion of the Court of Appeal, the employer's application to terminate the teacher's contract was not in reaction to the expression of a critical opinion, but in reaction to the unrest that the book's contents had caused among the staff. The teacher appealed to the Supreme Court, which set aside the judgment of the Court of Appeal.

I have summarized the elements of this case which I find most interesting, leaving out the other elements (such as the fact that the teacher was a member of the works council, thereby enjoying additional dismissal protection).

Advocate-General's opinion

The Advocate-General of the Supreme Court (the 'A-G') addressed the issue in a number of steps:

- Can the teacher claim freedom of expression?
- Did the employer interfere with the exercise of her right to freedom of expression?
- Was that right subject to a permissible restriction?
- Was the teacher a whistleblower?
- Was the book unlawful (tortious)?

The right to freedom of expression is stipulated in the Dutch constitution and, more relevantly, in Article 10 of the European Convention on Human Rights (ECHR):

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 and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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doi: 10.5553/EELC/187791072023008001006

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, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Although this Article 10 ECHR was designed to apply in the 'vertical' relationship between the State and its subjects, the European Court of Human Rights (ECtHR) has held that it applies equally in the 'horizontal' relationship between private parties. The A-G referenced a number of ECtHR judgments to this effect, including *Lombardi Vallauri – v – Italy*, in which a university lecturer was not reappointed after he had expressed views contrary to Catholic doctrine. The ECtHR held that the lecturer in that case could invoke Article 10 ECHR.[1]

As for the question of whether the employer infringed the teacher's right, the A-G referenced a number of ECtHR judgments in which that Court held that there is an infringement, not only where publication of an opinion is prohibited, but also where it is sanctioned. Even a light form of sanction can be sufficient to constitute an infringement. However, in order to be able to claim under Article 10 ECHR, there must be a causal relationship between the sanction and the exercise of the freedom of expression. An example where this causal relationship was at issue is the case of *Baka – v – Hungary*.[2] The case concerned the President of the Hungarian Supreme Court, Baka, whose mandate was terminated prematurely after he had criticized certain planned legislative reforms affecting the judiciary. The question was whether this termination was to be seen as interference in Baka's right to freedom of expression. The ECtHR held:

> In the Court's view, having regard to the sequence of events in their entirety, rather than as separate and distinct incidents, there is prima facie evidence of a causal link between the applicant's exercise of his freedom of expression and the termination of his mandate.
> (…)
> The Court is of the view that once there is prima facie evidence in favour of the applicant's version of the events and the existence of a causal link, the burden of proof should shift to the Government.

Applying this reasoning to the case at hand, the A-G argued that the unrest caused by the book's contents cannot be separated from the book's publication. The publication is an essential link in the causality chain that led to the application for termination of the teacher's contract. Absent the publication, there would have been no termination.

Having thus concluded that the teacher could claim under Article 10(1) ECHR and that her employer had infringed the teacher's right of free expression, the A-G then turned to the issue of whether the employer could claim exemption under Article 10(2). In particular, was the infringement justified by the need to protect the reputation or rights of others? The A-G began by paraphrasing the ECtHR's ruling in *Handyside – v – United Kingdom*:[3]

> 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-fulfillment. 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 that pluralism, tolerance and broadmindedness without which there is no democratic society.

The 'necessary in a democratic society' test is strict, and restrictions based on Article 10(2) ECHR must be well-reasoned, i.e. explained in a concrete manner. In particular, a court needs to examine whether the restriction at issue is prescribed by law and is proportionate to its aim, and whether there was not another, less adverse means of achieving that aim. This involves assessing all the circumstances of the case, such as its context, the importance of the publication, the nature and seriousness of the infringement, and the nature and severity of the sanction. The ECtHR has held that publications that would normally be permissible may not be so in the context of an employment contract. This is because as the ECtHR argued in *Herbai – v – Hungary*:[4]

> [I]n order to be fruitful, labour relations must be based on mutual trust. 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.

In *Herbai – v – Hungary*, the ECtHR also explained how to apply the necessity test, in particular with regard to

1. ECtHR 20 October 2009, application 39128/05 (*Lombardi Vallauri – v – Italy*).
2. ECtHR 23 June 2016, application 20261/12 (*Baka – v – Hungary*). Similar case and findings in ECtHR 19 October 2021, application 40072/13 (*Miroslava Todorova – v – Bulgaria*).
3. ECtHR 7 December 1976, application 5493/72 (*Handyside – v – United Kingdom*).
4. ECtHR 5 November 2019, application 11608/15 (*Herbai – v – Hungary*). See also ECtHR 12 September 2011, application 28955/06 (*Palomo Sanchez*).

 doi: 10.5553/EELC/187791072023008001006

the factors concerning nature of the speech, motives of the author, damage to the employer and severity of the sanction imposed.
In conclusion, the A-G advised the Supreme Court to strike down the Court of Appeal's judgment on the ground that (1) there was a causal relationship between the publication of the book (i.e. the exercise of free speech) and the application for termination of the contract, and (2) the Court of Appeal had failed to examine adequately, and applying the *Herbai – v – Hungary* test, whether the employer's infringement of the teacher's right of free expression met the requirements of Article 10 ECHR.

Supreme Court's decision

I have summarized the A-G's opinion at some length because the Supreme Court followed it, approving it explicitly. It ordered a retrial of the case. What happens next depends on the decision of the court to which the case has been remanded. In theory, that court can order the teacher to be reinstated, with back pay, but it is more likely that she will be awarded (further?) compensation.

Commentary

1. Freedom of expression, so the ECtHR ruled almost a half century ago (see above), "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". The recent case reports on the cases *Mackereth* (EELC 2022/33) and *Forstater* (EELC 2022/34) concerning expressions of gender-critical belief, are such clear examples that there is no need to dwell on this aspect of the case.
2. The aspect that interests me more is that of causality. In Dutch practice, a 'seriously broken-down working relationship' is frequently the ground for applying to the court for a contract termination. Employees do not often defend their case by arguing that the breakdown was caused by their exercise, or by a violation, of a fundamental right. In *Baka – v – Hungary*, the ECtHR applied to a freedom of expression case the 'burden of proof shift' doctrine which we know so well from the equal treatment directives. That said, it should be noted that the ECtHR took pain to explain that it has not abandoned the general rules of evidence, noting:

   Having regard to the facts of the present case and the nature of the allegations made, the Court considers that this issue should be examined in the light of the general principles emerging from its case law on the assessment of evidence. It reiterates in this connection that in assessing evidence, it has adopted the standard of proof 'beyond reasonable doubt'. However, it has never been its purpose to borrow the approach of the national legal systems which use that standard. The Court's role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof.

3. The case reported above demonstrates that, where an employer alleges that the working relationship has broken down, it is not sufficient to examine the nature, extent and duration of the breakdown. Its ultimate cause also needs examining. An example is a case where an employer declined to extend a fixed-term contract on the ground that the employee was alleged to have neglected her duties. The court accepted the neglect, but went on to examine its root cause, which was that she had been struggling with thyroid problems. Given that this medical condition qualified as a disability, the non-extension of contract was linked to disability. Therefore, the employer breached the employment contract and was ordered to pay compensation.[5]
4. Under EU and Dutch equal treatment law, there are two flavours of discrimination: direct and indirect. Where an employer applies for termination of an employment contract on the ground of a 'broken-down working relationship', and the employee argues that the breakdown was (ultimately) caused by a discriminatory criterion or practice, the employee is in effect arguing that the application discriminates *directly*. Consequently, the judge must make a choice: either there is direct discrimination, in which case (barring limited exceptions) the discrimination is not justifiable, and the application should be turned down, or there is *no* discrimination. Particularly where it is obvious to the judge that it is in everyone's interest for the parties to part ways, this can be a dilemma. The UK Equality Act 2010 has a third flavour, at least where handicap is concerned. The Act has a section dealing with unfavourable treatment "because of something arising in consequence of" a person's disability. The advantage of this 'third flavour' is that this type of discrimination can be justified. A fine example is the *City of York Council – v – Grosset* case reported in EELC 2018/24, where a teacher was dismissed for inappropriate behaviour. Under normal circumstances, his behaviour would have warranted dismissal; however, as it had arisen as a consequence of a disability (that was known to his employer), it was discriminatory (and, in that case, not justified).

5. Ktr Utrecht 27 March 2020 ECLI:NL:RBMNE:2020:6055.

doi: 10.5553/EELC/187791072023008001006

Comment from other jurisdiction

Germany (Kathy Just, Luther Rechtsanwaltsgesellschaft mbH): The tension between freedom of expression and the duty under the employment contract to take into account the legitimate interests of the employer, in particular the preservation of peace in the workplace, is also a recurring point of discussion before German Labour Courts. In Germany, however, this issue is not so much discussed under the aspect of possible discrimination due to sanctions, but rather which statements of an employee are covered by the scope of protection of their fundamental right to freedom of expression or freedom of art.

A few years ago, in a very similar case, a German Labour Court had to decide on the validity of an extraordinary dismissal of an employee without notice by the employer. The dismissal took place against the background of a book publication by the employee as a so-called office novel with the title 'he who fears hell does not know the office'. The book was a novel told from the first person perspective, and the employee highlighted in the preface that it was a purely fictional story. Much like in the case of the teacher, there had been unrest and disputes in the employer's company as a result of the publication of the book. However, the employee did not invoke his freedom of expression in this case, as the depictions in his book were an amalgamation of reality and fiction and thus, in his view, he had not made any statements of opinion on any of his colleagues or superiors. Unlike the case before the Dutch Supreme Court, the focus of the legal review here was thus not on freedom of expression, but rather on freedom of art. The Court examined whether the general right of personality of the colleagues – which is also derived from the German Basic Law – was violated due to the publication of the book. According to a decision of the Federal Constitutional Court (*Bundesverfassungsgericht*, 'BVerfG'), this requires an assessment of the novel's possible relation to reality. In this case, the Court came to the conclusion that the employee had not exceeded the limits on the question of violation of personal rights due to the blending of reality and fantasy in his novel-like portrayal. Against this background, the employee could not be accused of any breach of contractual duty, also with regard to the unrest in the company. If one were to evaluate the teacher's case according to German labour law, a detailed examination would have to be made as to whether the depictions in her book are covered by her right to freedom of expression or art, and this would have to be weighed up against the general right of personality of her colleagues. If the employee's freedom of expression or artistic freedom prevails in the context of this consideration, an extraordinary termination of the employment relationship is unlikely to be justified.

With regard to the unrest that arose in the company as a result of the publication of the book, similar aspects as in the Dutch proceedings would also have been discussed under German law. A dismissal on the grounds of pressure exerted by staff, i.e. if staff members demand the dismissal of a certain employee under threat of concrete disadvantages, would likely not have been justified in the case of the teacher. This is because the requirement that the employer must first use adequate steps to prevent discord between the employees would not be fulfilled in the present case. With regard to the disruption of the peace in the workplace, the German Federal Labour Court (*Bundesarbeitsgericht*, 'BAG') – similar to the Court of Appeal in the case of the teacher – sees a duty of the employer to mediate with regard to disputes between employees that may threaten the regular operation of the workplace.

Subject: Freedom of Expression, Unfair Dismissal
Parties: X – v – Stichting R.O.C. Nijmegen E.O
Court: *Hoge Raad* (Supreme Court)
Date: 7 October 2022
Internet publication: https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2022:1402

doi: 10.5553/EELC/187791072023008001006