harmed the reputation of the company and she was the director of the company. The Supreme Court had found that those statements had played an important role in making the continuation of her employment impossible and that the grounds for the dismissal was to be found in section 107(1) of the Labour Act. The ECtHR accepted that the interference with Ms Marunic's rights was lawful and that it pursued the legitimate aim of protecting the reputation or rights of others, namely the business reputation and interests of the company.

The only remaining question was whether the interference was "necessary in a democratic society". The Government had argued that this requirement should be viewed in light of the criteria it had developed in its case-law concerning freedom of expression in the workplace. These were:
- the motive behind the actions of the employee;
- the accuracy of the information disclosed;
- the availability of other effective, but more discreet means of remedying the wrongdoing that the reporting employee intended to uncover;
- the damage suffered by the employer;
- the public interest involved in the disclosed information.

The Court, however, considered that the case at hand was different from its previous case-law in one crucial respect. The Court could not ignore the fact that Ms Marunic made her statements only after being criticised in the media by the chairman of the company's General Meeting. It is true that "a duty of loyalty, reserve and discretion" normally prevents employees from publicly criticising the work of their employers. However, in the present case it was another officer of the company, namely the chairman of the company's General Meeting, who had gone to the media first and publicly criticised her. The ECtHR considered that in those circumstances she could not be expected to have remained silent and not defend her reputation. Such an expectation would overstretch her duty of loyalty, contrary to Article 10 of the Convention – whereby the right to freedom of expression would protect against unreasonable demands of loyalty by the employer.

This meant that several of the criteria relied on by the Government concerning freedom of expression in the workplace were either inapplicable or of limited relevance. In particular, since the right of reply is the right to defend oneself against public criticism in the forum in which the criticism was published, the ECtHR was not persuaded by the Government's arguments that the Ms Marunic could have used other effective, but more discreet ways of protecting her reputation. Further, as regards the harm suffered by the company, the ECtHR accepted that her statements could have been harmful to the reputation of the company. As regards the level of public interest in the disclosed information, the ECtHR reiterated that the right of reply not only protects the reputation of the person exercising it, but also ensures a plurality of opinions in matters of general interest. The way a municipal public utility company is operated is a matter of general interest to the local community and the ECtHR therefore agreed with Ms Marunic that what she said in reply was also of public interest.

The ECtHR considered that Ms Marunic's statement implying that the company had been unlawfully charging for parking because the land might belong to someone else was a subjective judgment with sufficient basis in fact that it was reasonable for her to argue it. The Court considered that it had been important for her to make that argument in order to defend her professional reputation against what she saw as groundless criticism by the mayor. She was trying to clarify that the company had not been stagnating because of any unsound business decisions on her part, but because of unresolved property issues that the municipality should have dealt with.

Accordingly, the ECtHR found that the interference with Ms Marunic's freedom of expression – in the form of her summary dismissal – was not 'necessary in a democratic society' for the protection of the business reputation and rights of the company. Therefore, there had been a violation of Article 10 of the Convention.

ECtHR 26 January 2017, application no. 42788/06, Right to fair hearing and right to respect for private and family life

Surikov – v – Ukraine, Ukrainian case

Summary

Violation of Article 8 (right to respect for private and family life) in the case of retention and disclosure of an employee's mental-health data and its use in deciding on employees' applications for promotion.

Facts

The applicant, Mr Mikhail Mikhaylovich Surikov, is a Ukrainian national, born in 1962 and living in Simferopol. The case concerned the refusal by Mr Surikov's employer (a state-owned company) to promote him on the basis that he had been declared unfit for military service in 1981 for mental health reasons. Mr Surikov began working at the Tavrida State Publishing House in

doi: 10.5553/EELC/187791072017002002024

August 1990. In 1997 he asked the director of Tavrida to place him on a reserve list for promotion to an engineering position, in line with his qualifications. Having received no reply, in 2000 he applied again and was refused.

National proceedings

Mr Surikov appealed to the Central District Court of Simferopol, seeking to compel his employer to consider him for an engineering position. During the proceedings, Tavrida submitted that the refusal was connected to the state of Mr Surikov's mental health, in particular, that he had been declared unfit for military service in 1981. In 1997, the human resources department of the company had obtained a certificate confirming this from the military enlistment office.

Between 2000 and 2006, Mr Surikov was engaged in civil proceedings against Tavrida concerning the alleged unlawful collection, use, and dissemination of his personal health data. He also argued that the standardised grounds for his dismissal from military service in 1981 had not been specific enough to serve as a basis for the later refusal to promote him, and that in any case, the information was outdated. He complained that, if the company had doubts about his health, it should have asked him for a current medical certificate. His claims were unsuccessful at every level. In 2006, Mr Surikov brought civil proceedings against the director of Tavrida, the human resources officer, and his supervisor, challenging the lawfulness of their actions regarding the processing of his health data. His claim was unsuccessful, as were subsequent appeals to the Court of Appeal and the Supreme Court. Relying on Article 8 (right to respect for private and family life), Mr Surikov complained that his employer had arbitrarily collected, retained, and used sensitive and obsolete data concerning his mental health when considering his application for promotion, and had unlawfully disclosed this data (to his colleagues and in court).

ECtHR's findings

The Court noted that the information at stake concerned an indication that in 1981 Mr Surikov had been certified as suffering from a mental health related condition. By its very nature, such information was highly sensitive personal data and therefore fell within the ambit of Article 8. The Court therefore had to determine whether the processing of his health data constituted an unlawful breach of Article 8 of the Convention.

First, the Court examined whether there was an interference with Article 8 of the Convention. It noted that Tavrida was lawfully required to maintain a register of military duty of its employees and that it was in fulfilling this duty that it had collected the information that he had been declared unfit to serve in the military.

Second, the Court examined whether the interference was in accordance with the law and pursued a legitimate aim. As regards lawfulness, the collection and retention of the data was effected on the basis of section 34 of the Military Service Act and the provisions of Instruction no. 165. Use of this data for deciding on Mr Surikov's promotion was based on Articles 2 and 153 of the Labour Code. The Court noted that none of those provisions was expressly referred to in the domestic courts' judgments. However, the Court was prepared to accept that collection, storage, and other use of his mental health data had some basis in domestic law. As regards to whether interference pursued a legitimate aim, the Court considered that there could be various legitimate aims, such as the protection of national security, public safety, health, and the rights of others (particularly co-workers).

Third, the Court examined whether the interference was necessary in a democratic society. It noted that at the time of the events giving rise to the claim application, Ukraine was neither a member of the Data Protection Convention nor any other relevant international instrument. But at that time, Ukrainian national law contained a number of similar safeguards, including law protecting the confidentiality of medical information. As regards the power to collect and retain Mr Surikov's personal data, the Court considered that Ukrainian national law permitted long term storage of his health-related data and its disclosure and use for purposes unrelated to the original purpose of collection. The Court considered that such broad entitlement constituted a disproportionate interference with his right to respect for private life and it could therefore not be regarded necessary in a democratic society.

As regards the disclosure of Mr Surikov's data to third parties and its use it for deciding on promotion, the Court recognised that employers may have a legitimate interest in having information about employees' mental and physical health, particularly in the context of assigning new work to them. However, the collection and processing of the information must still be lawful and must strike a fair balance between the employer's interests and the privacy of the candidate for the job. The Court found that it was not clear that the domestic courts had analysed whether using the data to decide whether to promote the employee struck a fair balance between the employer's interests and his privacy concerns. This meant that the crux of his claim had been treated as outside the scope of what the courts needed to consider. They had therefore failed to provide sufficient reasons to explain the need for the interference he had complained about.

The Court concluded that there had been a breach of Article 8 in connection with the retention and disclosure

of the employee's mental-health data and its use for deciding whether to promote him.

doi: 10.5553/EELC/187791072017002002024

List of national correspondents

Country	Name	Website
Austria	Andreas Tinhofer, MOSATI Rechtsanwälte	www.mosati.at
Belgium	Chris van Olmen, Van Olmen & Wynant	www.vow.be
Bulgaria	Kalina Tchakarova, Djingov, Gouginski, Kyutchukov & Velichkov	www.dgkv.com
Croatia	Dina Vlahov, Schoenherr Attorneys at Law	www.schoenherr.eu
Cyprus	George Z. Georgiou, Georgiou & Associates	www.georgezgeorgiou.com
Denmark	Christian K. Clasen, Norrbom Vinding	www.norrbomvinding.com
Finland	Janne Nurminen, Roschier	www.roschier.com
France	Claire Toumieux, Allen & Overy	www.allenovery.com
Germany	Paul Schreiner, Luther Rechtsanwaltgesellschaft	www.luther-lawfirm.com
Greece	Effie Mitsopoulou, Kyriakides Georgopoulos	www.kgdi.gr
Hungary	Gabriella Ormai, CMS Cameron McKenna	www.cms-cmck.com
Ireland	Orla O'Leary, Mason Hayes & Curran	www.mhc.ie
Italy	Caterina Rucci, Bird & Bird	www.twobirds.com
Latvia	Andis Burkevics, Sorainen	www.sorainen.com
Lithuania	Inga Klimašauskienė, Glimstedt	www.glimstedt.lt
Luxembourg	Michel Molitor, Molitor	www.molitorlegal.lu
Malta	Matthew Brincat, Ganado Advocates	www.ganadoadvocates.com
Netherlands	Zef Even, SteensmaEven	www.steensmaeven.com
Norway	André Istad Johansen, Advokatfirmaet Selmer	www.selmer.no
Poland	Marcin Wujczyk, Ksiazek & Bigaj	www.ksiazeklegal.pl
Portugal	César Sá Esteves, SRS Advogados	www.srslegal.pt
Romania	Andreea Suciu, S.P.R.L. Menzer & Bachmann-Noerr	www.noerr.com
Slovakia	Gabriel Havrilla, Legal Counsels	www.legalcounsels.sk
Slovenia	Petra Smolnikar, Petra Smolnikar Law	www.petrasmolnikarlaw.eu
Spain	Sonia Cortés, Abdón Pedrajas & Molero	www.abdonpedrajas.com
United Kingdom	James Davies, Lewis Silkin	www.lewissilkin.com

Members of the Academic Board

Country	Name	University
Austria	Dr. Erika Kovacs	Vienna University of Economics and Business
Belgium	Prof. Dr. Marc de Vos	University of Ghent
Czech Republic	Dr. iur. Petr Hůrka, PhD	Charles University – Prague
Finland	Prof. Niklas Bruun	University of Helsinki
France	Prof. Jean-Philippe Lhernould	Université de Nantes
Germany	Prof. Dr. Gregor Thüsing, LL.M (Harvard)	Universität Bonn
Italy	Dr. Luca Calcaterra	Università Suor Orsola Benincasa, Naples
Ireland	Prof. Anthony Kerr	University College Dublin
Lithuania	Daiva Petrylaite	Vilnius University
Luxembourg	Luca Ratti	University of Luxembourg
Netherlands	Prof. Ruben Houweling	Erasmus University Rotterdam
Norway	Prof. Stein Evju	University of Oslo
Poland	Prof. Dr. hab. Andrzej Marian Świątkowski	Jesuit University
Slovakia	Andrej Poruban	Comenius University, Bratislava
Spain	Prof. Eduardo Gonzalez Biedma	Universidad de Sevilla
United Kingdom	Prof. Catherine Barnard	University of Cambridge (Trinity College)