HUMAN RIGHTS AND THE EMPLOYMENT RELATION
THE RIGHT TO FREEDOM OF EXPRESSION AT WORK

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ARTICLE 10 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.

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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Introduction

In the 1930s the French philosopher Simone Weil worked in a factory for some time. It was not so much the heavy and monotonous work that troubled her, but the fact that she had been completely silenced: «Comme si quelqu’un répétait à l’oreille de minute en minute, sans qu’on puisse rien répondre : “tu n’est rien ici. Tu ne comptes pas. Tu es là pour plier, tout subir et te taire”».

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2 Ghent University

Meanwhile social relations and labour law have evolved, and it has been recognised that employees can invoke fundamental rights within the labour environment, in their relation with the employer. Since the European Court of Human Rights (ECtHR) made clear « that Article 10 applies also to the workplace », the right to freedom of expression of employees is no longer disputed.

Article 10 ECHR was, *ab initio*, written with regard to the relationship between citizens and public authorities, as it sets out the right to freedom of expression « without interference by public authority ». Meanwhile the ECtHR has made it clear that Article 10 ECHR can also be applied in private legal relationships and it has repeatedly assessed interferences by private persons in the light of Article 10 § 2 ECHR. The case law of the ECtHR shows that freedom of speech pursuant to Article 10 ECHR applies both to civil servants, as employees of public authorities, and to employees in the private sector. In *Heinisch v. Germany* the Court stated: « The Court recalls (...) that in a number of cases involving freedom of expression of civil or public servants, it has held

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6 However, each time this is referred to as a matter of indirect horizontal effect because the challenged interference with the freedom of expression and information by a national public authority or judicial body was maintained. See: Fuentes Bobo v. Spain Application No. 39293/98, 29 February 2000; Özgür Gündem v. Turkey Application No. 23144/99, 16 March 2000; Appleby a.o. v. the United Kingdom Application No. 44306/98, 6 May 2003; Verein gegen Tierfabriken VGT v. Switzerland Application No. 24699/94, 28 June 2001; De Diego Nafria v. Spain Application No. 46833/99, 14 March 2002; Verein gegen Tierfabriken VGT (n° 2) v. Switzerland Application No. 32772/02, 4 October 2007; Verein gegen Tierfabriken Schweiz (VGT) (n° 2) v. Switzerland Application No. 32772/02, 30 June 2009; Khursid Mustafa and Tarzibachi v. Sweden Application No. 23883/06, 16 December 2008; Wojtas-Kaleta v. Poland Application No. 20436/02, 16 July 2009; Heinisch v. Germany Application No. 28274/08, 21 July 2011; Palomo Sánchez a.o. v. Spain Application Nos. 28955/06, 28957/06, 28959/06, 28964/06, 12 September 2011 and Vellutini and Michel v. France Application No. 32820/09, 6 October 2011.

that Article 10 applied to the workplace in general (...). It has further found that Article 10 of the Convention also applies when the relations between employer and employee are governed, as in the case at hand, by private law and that the State has a positive obligation to protect the right to freedom of expression even in the sphere of relations between individuals (...)8.

The crucial issue is to know where the limits and restrictions of the employee’s right to freedom of expression are to be situated, as the exercise of this freedom carries with it « duties and responsibilities » (Article 10 § 2 ECHR). The decisive question that is to be answered in concrete cases is whether an interference by the employer in the employee’s right to freedom of expression is to be considered « necessary in a democratic society ».

In other words: when is there « a pressing social need » justifying an interference with the employee’s right to freedom of expression?

The jurisprudence of the ECtHR shows that in many countries in Europe employers have indeed interfered with the right of freedom of expression of their employees. Interference with the employee’s freedom of expression can take place in different forms, such as a refusal of promotion, all kinds of disciplinary measures, non-renewal or termination of an employment contract or an immediate dismissal for serious misconduct9. For a diversity of reasons employers have interfered with their employees’ freedom of expression, for instance because some expressions or speech was considered defamatory or insulting or because employees had been dishonestly criticising the employer, the management or other employees10. In other cases the employee has made

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8 Heinisch v. Germany Application No. 28274/08, 21 July 2011 at § 44.

10 Obviously, Article 10 ECHR is not applicable in cases where it is not sufficiently clear that the employee has been sanctioned for the expression of his or her opinions, but has been dismissed or disciplinary sanctioned for another reason. In Jokšas v. Lithuania the Court could not conclude with certainty that the applicant was punished for the expression of his opinions. The Government had argued that the termination of his military service was discharged in accordance with the domestic law for having reached retirement age, and not because of the criticism he had expressed in an article in
sensitive, confidential or secret information public or has tarnished the reputation of the employer or his/her firm by publishing inappropriate statements, pictures or videos. Some speech amounted to hate speech, sexism, incitement to discrimination or contained political statements the employer disapproved to be associated with.

In some cases a termination of an employment contract or a dismissal for serious misconduct because of the exercise of the freedom of expression by an employee became part itself of a robust public debate, such a recently in Belgium in the case of Barbara Van Dyck\textsuperscript{11}. Barbara Van Dyck, a researcher working at the Catholic University of Leuven (KU Leuven) was dismissed as a consequence of her participation in a demonstration against an open field GMO experiment at Ghent University and especially because of some of her statements during a TV interview commenting the demonstration\textsuperscript{12}. The dismissal followed on her refusal to comply with the request of her employer to distance herself explicitly from the Field Liberation Mouvement (FLM) and the partial destruction of the scientific experiment, as about 20 % of the experiment with GMO’s had been destroyed by some FLM-activists and participants of the demonstration. After Barbara Van Dyck had introduced her case before a newspaper. The Court found indeed that the applicant’s discharge from professional military service once he had reached retirement age did not amount to an interference with the exercise of his right to freedom of expression : Jokšas v. Lithuania Application No. 25330/07, 12 November 2013, at § 74. In Harabin v. Slovakia the Court also came to the conclusion that « the disciplinary offence of which the applicant was accused and found guilty did not involve any statements or views expressed by him in the context of a public debate or in the media ». As a result the disputed measure did not amount to an interference with the exercise of the applicant’s right to freedom of expression as guaranteed by Article 10 of the Convention : Harabin v. Slovakia Application No. 58688/11, 20 November 2012, at § 151-153.

\textsuperscript{11} For a notorious recent case in France, see the conflict between the journalist Patrick Poivre d’Arvor (PPDA) and his former employer TF1 : Cass. 4 January 2014, n° 12-27.284 P + B.

\textsuperscript{12} Notice that in the ECtHR’s case law the link between Article 10 and Article 11 ECHR (freedom of peaceful assembly association) is manifest. The Court has repeatedly pointed out that « one of the aims of freedom of assembly is to secure a forum for public debate and the open expression of protest. The protection of the expression of personal opinions, secured by Article 10, is one of the objectives of the freedom of peaceful assembly enshrined in Article 11 » : Galstyan v. Armenia Application No. 26986/03, 15 November 2007 ; Ashughyan v. Armenia Application No. 33268/0 , 17 July 2008 ; Éva Molnár v. Hungary Application No. 10346/05, 7 October 2008 ; Kasparov a.o. v. Russia Application No. 21613/07, 3 October 2013 and Kudrevičius a.o. v. Lithuania Application No. 37553/05, 26 November 2013. General Comment No. 34 of the UN Human Rights Committee (CCPR/ G/GC/34, 12 September 2011) also emphasises this relationship : « Among the other articles that contain guarantees for freedom of opinion and/or expression, are articles 18, 17, 25 and 27. The freedoms of opinion and expression form a basis for the full enjoyment of a wide range of other human rights. For instance, freedom of expression is integral to the enjoyment of the rights to freedom of assembly and association, (…). »
the Labour Court, after massive protest from within the academic world and especially after the election of a new chancellor (Rector) of the Catholic University of Louvain, her employer decided to offer Barbara van Dyck a new labour contract. In a common statement (December 2013) the new Rector of the Catholic University of Louvain, Rik Torfs, and Barbara Van Dyck announced that the legal proceedings regarding Van Dyck’s dismissal had been stopped and that Van Dyck could start working at the university again as a researcher from 1st. January 2014 onwards. Torfs and Van Dyck expressed their common opinion that employees of the Catholic University of Louvain, like all citizens, have the right to freedom of expression as guaranteed by Article 10 ECHR. In the declaration is it emphasised that the right of freedom of expression of one’s ideas and convictions cannot be restricted because one becomes a staff member of the university. However, when expressing their personal convictions members of the academic community have also the duty to show respect for the opinions and the work of others, including the respect for the non-violence principle.

The case of Barbara Van Dyck is a perfect illustration of the recognition of the employee’s freedom of expression under Article 10 ECHR, while at the same time the « contours » or limitations of the right to freedom of expression situated in an employment relation may often be unclear or even very controversial. In this specific case the academic freedom of speech was an essential element to take into consideration. At earlier occasions the European Court of Human Rights in Kazakov v. Russia Application No. 78/0, 8 December 2008 at § 9 stated: « to make someone retract his or her own opinion by acknowledging his or her own wrongness is a doubtful form of redress and does not appear to be “necessary” ».  

13 Common Declaration by Rik Torfs en Barbara Van Dyck : « Rik Torfs, rector van de KU Leuven, en Barbara Van Dyck hebben beslist de juridische procedures te beëindigen die naar aanleiding van het ontslag van Barbara lopende waren tussen haarzelf en de universiteit. Rector Rik Torfs en Barbara Van Dyck delen de overtuiging dat medewerkers van de KU Leuven zoals alle burgers het recht hebben om, in overeenstemming met artikel 10 van het Europees Verdrag voor de Rechten van de Mens, vrij voor hun meningen en overtuigingen uit te komen. Het feit dat iemand personeelslid van de universiteit wordt mag dit recht niet beperken, integendeel. Universitaire medewerkers, en zij in het bijzonder, hebben wel de plicht om bij het opkomen voor hun overtuiging steeds respect op te brengen voor de zienswijze en het werk van anderen. In die optiek is geweldloosheid een basisprincipe. Rector Rik Torfs deelt ook mee dat Barbara Van Dyck opnieuw in dienst treedt bij de KU Leuven ». See http://nieuws.kuleuven.be/node/12682. See also http://sciencescitoyennes.org/contre-le-licenciement-de-la-chercheuse-et-activiste-barbara-van-dyck/ and http://threerottenpotatoes.wordpress.com/. Forcing employees to distance themselves explicitly from certain points of view or opinions is anyhow a form of interference with the right of freedom of expression that is very hard to justify.

14 The Charter of the Fundamental Rights of the European Union devotes special attention to this specific aspect of the right of freedom of expression. Whereas in Article 11 of the Charter freedom of
Rights emphasised « the importance of academic freedom, which comprises the academics' freedom to express freely their opinion about the institution or system in which they work and freedom to distribute knowledge and truth without restriction ». The Court in Sorguç v. Turkey made clear that one cannot expect academics to restrict themselves to harmless or innocent statements. In the context of the scientific debate and the academic freedom of expression no unreasonable restrictions should be imposed: « (…) it would be particularly unreasonable to restrict freedom of expression only to generally accepted ideas ».

In many cases before the ECtHR Article 10 has shown to create an added value to the freedom of expression in the employment relation, as the ECtHR at several occasions found a violation of the right to freedom of expression of the employee or the civil servant, such as in Vogt v Germany17, Wille v Liechtenstein18, Fuentes Bobo v Spain19, Raichinov v Bulgaria20, Wojtas-Kaleta v Poland21 and Heinisch v Germany22. The final outcome of these cases demonstrates that Article 10 ECHR has helped to create an extra layer of protection of the employees’ right to freedom of expression. Indeed the findings of violations of Article 10 in these cases revealed an obvious lack of guarantees and protection of employees and civil servants at the domestic level, when exercising their right to freedom of expression.


15 Sorguç v. Turkey Application No. 17089/03, 23 June 2009 at § 35. See also Lombardi Vallauri v. Italy Application No. 39128/05, 20 October 2009 at § 43.

16 Hertel v. Switzerland Application No. 25181/94, ECtHR 25 August 1998. See also Wille v. Liechtenstein Application No. 28396/95, 28 October 1999 and Boldea v. Romania Application No. 19997/02, 15 February 2007. See however also Bruno Gollnisch v. France Application No. 48135/08, decision of 7 June 2011, in which the Court upheld the dismissal of a university lecturer, because of denial of the holocaust.


18 Wille v. Liechtenstein Application No. 28396/95, 28 October 1999.


22 Heinisch v. Germany Application No. 28274/08, 11 July 2011.
This paper summarizes some of the findings of the analysis of our study published in the book of Filip Dorssement, Klaus Lörcher and Isabelle Schömann (eds.), *The European Convention of Human Rights and the Employment Relation*. The paper focusses (1) on the use of social media and the employment relation, (2) the specific relevance of the right to freedom of expression for members of a labour union under Article 10 ECHR and (3) the protection of whistle-blowers as a recent and important dimension of the protection of the employee’s right to freedom of expression under Article 10 ECHR.

1. Employees and the (social) media

Some recent developments are undoubtedly influencing the employment relationship and the application of the employee’s right to freedom of expression. As a result of the low threshold of the digital media employees can express themselves through Twitter, Facebook, personal blogs and other social media. Sometimes this occurs in ways which the employer considers to be inappropriate and which may even lead to dismissal of the employee for breach of the duty of loyalty. Furthermore, opinions expressed by employees may be unlawful or liable to punishment, thus provoking or justifying a reaction by the employer. The increased access and use of media and internet offering quasi-unlimited (technical) possibilities for free speech to anyone, at any time, at any place, has indeed also affected the employment relation.

An employer may take exception to an employee who launches racist, insulting or sexist messages through Facebook or Twitter, in a newspaper’s readers’ letter forum or on a weblog23. A well-known example is that of the French journalist Pierre Salviac who, one day after the French presidential elections on 6 May 2012 lost his job at RTL after an insulting and sexist tweet about female journalists24.

In Belgium an employee was fired because on the public part of his Facebook page he systematically criticised the state of affairs in the listed company where


24 On the occasion of the election of François Hollande as president, Salviac twittered : « À toutes mes consœurs je dis : baissez utile vous avez une chance de vous retrouver première Dame de France », making an allusion to the fact that political journalist Valérie Trierweiler as Hollande’s partner was going to be the new First Lady of France : X, « Le journaliste Pierre Salviac licencié après un tweet injurieux sur Valérie Trierweiler », Le Monde, 9 May 2012.
he worked as a business development manager. The Leuven Labour Tribunal pointed out « that if an employee uses a social website and identifies himself as a staff member of his employer(...) he has to refrain from acts and statements that are disloyal to or harmful for the company ». To determine whether or not public statements by an employee can be designated as unacceptable from the employer’s perspective, it is necessary to look at « the content and style of the public statements ». In this case the tribunal held that the employee’s critical comments, given his position, the nature and tone of the criticism and the frequency thereof could be qualified as an offence against the « elementary loyalty which rendered any further cooperation impossible ». Therefore the dismissal for serious misconduct because of the critical statements on Facebook was justified. The judgment has been confirmed by the Brussels Labour Court on 3 September 2013. The Labour Court emphasized that the comments posted on the publicly accessible part of the Facebook-pages of the employee, criticising the employer and his policy, made any further cooperation between the employee and the employer immediately and definitively impossible.

In this case the courts took the following specific characteristics into account: one, it concerned a listed company with a strict communication strategy which


the employees had to comply with; two, the employee’s position as a business development manager included important commercial responsibilities, and three, the timing of the employee’s critical comments on Facebook was crucial, notably at the moment when the company’s CEO tried to reassure the financial markets, a few hours after the presentation of the biannual results. The Labour Court also referred to the public character of the comments posted on the social media site and to the fact that the position of the employee in the firm contributed to the credibility of his comment. Furthermore the employee had not only reproduced or referred to press releases or newspaper articles about the employer’s firm, but he had also added his own critical comment reflecting his scepticism about the management of the firm. For all these reasons the dismissal for serious misconduct was considered justified and proportionate.

In the Netherlands too an employee’s statements on a Facebook page resulted in dismissal, transposed into termination of the employment contract by the Arnhem Court. In this case the employer took exception to the insulting and discriminating character of some of the statements directed at another employee and to complaints about the management. The court stated that the employee had acted «in a very reprehensible way» by expressing himself «in a very negative and discriminating manner» about a colleague. But as such these statements were not deemed to justify dismissal for serious misconduct, in particular because no prior warning had been given. According to the court there had not been any similar complaints before and it could not be assumed that the statements on Facebook «were the proverbial last straw». The judge could understand that the employer no longer wanted to employ the employee but considered immediate dismissal for serious misconduct to be premature. This is the reason why the court ruled for termination of the employment contract with a severance allowance for the employee. Another case in the Netherlands also led to the termination of the employment contract, in this instance without any severance pay. The judge held that the message the employee had placed on Facebook had insulted the employer «in a very rude manner». The judgment stated firmly: «This message has nothing whatever to do with freedom of expression. As a matter of fact this freedom is limited by the principles of due

28 The Labour Court, in line with the findings by the Tribunal, also considered that the employer had not interfered with the employee’s right of privacy, as the comments at issue were all published on the public part of the Facebook page of the employee: «Vermits aldus vast staat dat de door de heer X. op het prikbord van zijn Facebookpagina vermelde informatie en commentaar vrij toegankelijk is, kan hij zich wat deze door hem vrij toegankelijke gemaakte informatie niet beroepen op privacy».

care which the employee has to observe towards (the employer). As a good employee the employee should not have posted this message. It has been rightfully argued (...) that the employee acted in contravention of the obligation to behave as a good employee under Article 7:611 Civil Code ». Apologies after the event cannot dispel the reason for the dismissal for misconduct. The fact that the employee removed the insulting comments from his Facebook page after his employers « are of no avail to the employee. It is too little, too late to be of any use ». Furthermore, the fact that the employer had warned the employee beforehand that similar insulting statements on Facebook could be considered as a justified reason for terminating the employment contract was explicitly taken into account.

Sometimes the employer’s reaction had insufficient regard for the employee’s freedom of expression, particularly when critical comments fit in with a public debate on matters of interest for society. In France a professional football player was dismissed after a few critical remarks criticising both the coach and the management of his team. However, the French courts, and ultimately the Court of Cassation, emphasised that « sauf abus, le salarié jouit, dans l’entreprise et en dehors de celle-ci, de sa liberté d’expression, à laquelle seules des restrictions justifiées par la nature de la tâche à accomplir et proportionnées au but recherché peuvent être apportées ». The Court of Cassation pointed out that the persons concerned had already had a heated discussion, « une polémique médiatique », in the press, which meant that the employee had not abused his freedom of expression. The employer for his part did argue that « un joueur de football professionnel est tenu d’une obligation particulière de loyauté lui interdisant d’adopter un comportement de nature à discréditer l’autorité de l’entraîneur sur le groupe professionnel et, par suite, à déstabiliser ce dernier », but this argument was not decisive for the Court because it ignored in essence the employee’s freedom of expression. According to the Court of Cassation the Court of Appeal had rightfully decided « que le salarié n’avait pas abusé de sa liberté d’expression ».

31 Court of Cassation 28 April 2011, ESTAC v. Juan-Luis Montero, via www.juritravail.com/dossiers/liberte-d-expression-injures. Cass. soc., 28 avril 2011, n° 10-30.107 : « Mais attendu que, sauf abus, le salarié jouit, dans l’entreprise et en dehors de celle-ci, de sa liberté d’expression, à laquelle seules des restrictions justifiées par la nature de la tâche à accomplir et proportionnées au but recherché peuvent être apportées ; Et attendu, d’abord, que la cour d’appel a constaté, d’une part, que le joueur avait déclaré dans la presse que l’entraîneur manquait de cohérence et de diplomatie et salissait les joueurs pour laver sa responsabilité, alors que, de son côté, l’entraîneur avait affirmé que le joueur n’avait plus
So far only very few cases involving the use of social media or internet have reached the European Court of Human Rights. One case is about the dismissal of a social worker who was responsible for coaching sexual offenders during their probation. The dismissal followed after the employer had found out, through information and photographs on a website, that the employee was active within BDSM (Bondage, Domination and Sadomasochism) circles. The website contained photographs of the employee in the presence of half naked women and advertised BDSM events. Even though these practices in themselves were not liable to punishment, the employer considered it inappropriate that, given the specific nature of the employee’s job, the employee was involved in practices of this kind and publicised these through a website. The British courts and later the ECtHR acknowledged that the employee could indeed invoke the freedom of expression guaranteed by Article 10 ECHR, but held the view that in this case the dismissal did not imply a breach of the employee’s freedom of expression. The European Court highlighted « the sensitive nature of the applicant’s work with sex offenders » and the fact that public knowledge of the rather particular sexual activities of the applicant « could impair his ability to carry out his duties effectively ».

The Court’s considerations and references in Laurence Pay v. the United Kingdom illustrate that the contours of the right to freedom of expression differ according to the context in which this right is exercised. Actually, the influence of the context in determining the boundaries or limits of freedom of expression has turned out to be a basic characteristic of the manner in which, within the framework of the ECHR, the necessity or non-necessity of interferences with freedom of expression and information is appraised. In assessing the legitimacy of the employer’s inference with an employee’s freedom of expression a set of contextual elements are to be taken into account. Relevant criteria are for

Le niveau de ligue 1 et était très orgueilleux et égocentrique, et, d’autre part, que le président n’avait pu ou était incapable d’arrêter un lynchage médiatique ; que les propos reprochés s’inscrivant dans une polémique médiatique avec l’entraîneur, la cour d’appel a pu décider que le salarié n’avait pas abusé de sa liberté d’expression ». See also in Belgium the case of Stijn Stijnen, the goalkeeper of the national football team who was given the push by his team (Club Brugge) in February 2011, after a « smear campaign ‘through an internet forum on which both a number of teammates and the team management were heavily criticised: www.standaard.be/artikel/detail.aspx?artikelid=P236JNOT. Compare: Court of Cassation (France) 28 April 1988, Droit Social, 1988, p. 428 and Court of Cassation (France) 30 October 2002, Droit Social, 2003, p. 136.

32 Laurence Pay v. the United Kingdom Application No. 32792/05, decision of 16 September 2008.

instance the content of the statement or publication, the medium, the social context, the timing, the nature of the employee’s position, previous statements by the employee - sometimes in response to statements by the employer –, the manner in which the criticism was formulated, whether or not the information was confidential, the employee’s intentions, the impact of the statement or publication on the relationship with the employer or on the company’s reputation, the possible «chilling effect» ensuing from an employer’s interference with an employee’s freedom of expression and finally (and important) the nature of the interference or sanction.

The emergence of social media like Facebook and Twitter, blogs and websites has undoubtedly enlarged the possibilities for employees to express, divulge or impart their opinions and ideas. Posting comments on social media however increases the likelihood of the employer being informed about the opinions expressed by the employees. The format and spontaneity of online communication also increases the risk of emotional, rash language which tends to acquire a much more offensive bearing outside the context of the social media. At previous occasions the ECtHR took into account the spontaneous character of offensive, defamatory or insulting speech as one of the characteristics leading finally to the conclusion of a violation in the applicant’s right of freedom of expression. However, the employers and quite often the domestic courts as well appear to have little regard for the particular context of social media and its spontaneous language. It is to be expected that this specific characteristic of


35 Fuentes Bobo v. Spain Application No. 39293/98, 29 February 2000 and Gündüz v. Turkey Application No. 35071/97, 4 December 2003, at § 49, in which the Court pointed out « that the applicant’s statements were made orally during a live television broadcast, so that he had no possibility of reformulating, refining or retracting them before they were made public ». See also Raichinov v. Bulgaria Application No. 47579/99, 20 April 2006 and Boldea v. Romania Application No. 19997/02, 15 February 2007.

36 See, eg M. Picq, « Facebook et les salariés : Vie privée, liberté d’expression et humour », Revue des droits et des libertés fondamentaux, 2011, Chron. No. 11, webu2.upmf-grenoble.fr/dlf?p= 927 : « Plus que sur tout autre support écrit, l’auteur de messages sur Facebook a la sensation de l’éphémère, attaché à l’oral alors même que l’écrit en assure la pérennité. Est donc née la sensation que ce qui est écrit n’est pas gravé dans le marbre et ne peut finalement n’avoir que peu d’échos ou de portée. De ce fait, est implicitement autorisée une liberté de ton, souvent ornée de signes pour indiquer notamment l’absence de sérieux dans les propos. C’est cette spécificité du langage par internet que les juges refusent de reconnaître. C’est finalement méconnaître cette modalité émergente de discussion » and K. Rosier, « Réflexions sur le droit au respect de la vie privée et la liberté d’expression
many online-messages and social media communication will be assessed in a more pertinent way in the future jurisprudence applying Article 10 ECHR.

2. Freedom of expression and trade union freedom

The European Court of Human Rights has repeatedly referred to the connection between the (individual) freedom of expression and the collective exercise thereof through protests, pickets, demonstrations or associations. When it concerns freedom of expression of employees this right will be enhanced even more when opinions are expressed or statements are made in the context of trade union activities (Nilsen and Johnson v. Norway and Vellutini and Michel v. France). The European Court’s case law in some of its judgments however seems not to give pertinent or sufficient weight to this dimension of the right to freedom of expression as part of trade union activities (Palomo Sánchez a.o. v. Spain and Szima v. Hungary).

Nilsen and Johnson v. Norway

As early as 1999 the Court has recognised the importance of the right of freedom of expression for members of a trade union in Nilsen and Johnson v. Norway, in connection with the rights guaranteed under Article 11 of the Convention (right of peaceful assembly and of association). The Court stated that « a particular feature of the present case is that the applicants were sanctioned in respect of statements they had made as representatives of police associations in response to certain reports publicising allegations of police misconduct. While there can be no doubt that any restrictions placed on the right to impart and receive information on arguable allegations of police misconduct call for a strict scrutiny on the part of the Court (...) , the same must apply to speech aimed at countering such allegations since it forms part of the same debate. This is especially the case where, as here, the statements in question have been made by elected representatives of professional associations in response to allegations calling into question the practices and integrity of the profession. Indeed, it should be recalled that the right to freedom of expression under
Article 10 is one of the principal means of securing effective enjoyment of the right to freedom of assembly and association as enshrined in Article 11\[^{37}\].

**Vellutini and Michel v. France**

The case of *Vellutini and Michel v. France* concerned trade unionists who had distributed leaflets with insulting and defamatory content, criticising the mayor of a municipality who had an ongoing dispute with a union member over disciplinary sanctions\[^{38}\]. The mayor brought proceedings against the trade unionists before the criminal court, which found them guilty of « public defamation against a citizen holding public office » and imposed fines, after ruling their evidence inadmissible. In addition, they were ordered to pay EUR 2,500 each in damages to the civil party, and to publish extracts of the judgment in the local newspaper and the full judgment on the union’s website.

Relying on Articles 10 and 11 ECHR the applicants complained that they were convicted of public defamation of a person holding public office on the basis of statements made in their capacity as trade union officials. In the judgment of the ECtHR account is taken of the fact that the comments were not aimed at the mayor in his personal capacity, but toward his mayoral functions. The mayor had simply been criticized in connection with his duties as head of the municipal police, and no allegations of a private nature had been made against him. The Court also found that the impugned remarks had been made in the context of a debate of general interest and had a sufficient factual basis\[^{39}\]. The Court emphasised indeed that the applicants’ remarks had been made in response to the mayor’s accusations about the professional and personal conduct of a member of their union. In that context, as for any individual who took part in a public debate, a degree of exaggeration, or even provocation, with the use of somewhat immoderate language, was permitted. Moreover, the Court took the view that the impugned remarks had not been offensive or hurtful to a degree that went beyond the framework of trade union discourse\[^{40}\]. The Court therefore


\[^{38}\] *Vellutini and Michel v. France* Application No. 32820/09, 6 October 2011. See also *Heinisch v. Germany* Application No. 28274/08, 21 July 2011, a case in which the labour union was involved in the distribution of leaflets reporting and criticising the shortcomings in the management of the health care institution Heinisch was employed in (see infra).


\[^{40}\] The Court also observed that there is a difference between the writings of a journalist and those of a trade unionist. One cannot expect them to have the same accuracy/impartiality (§ 41).
found that the interference with the applicants’ right to freedom of expression, in their capacity as trade union officials, had not been necessary in a democratic society and it concluded that there had been a violation of Article 10.41

\textit{Aguilera Jiménez a.o. v. Spain and Palomo Sánchez a.o. v. Spain}

In \textit{Aguilera Jiménez a.o. v. Spain}42 the focus was on insults that had been uttered in a publication of a trade union.43 The cover of a monthly information bulletin showed a drawing with a somewhat obscene caricature of the companies’ HR manager and some employees. Although the cartoon did not depict the act itself, it suggested that the employees were offering or were waiting for offering sexual services to the HR manager. In the magazine itself two articles with a crude and vulgar overtone had been included, referring in essence to a recent court decision that partly upheld a claim by the labour union against the company. The magazine was distributed among the employees and pinned up on the notice board, located inside the company’s premises. In a response to this the members of the trade union’s executive committee were dismissed for serious misconduct. In this case the European Court sets rather great store by the opinion of the national judges. They confine themselves to stating that unlike in the case of \textit{Fuentes Bobo v. Spain} the drawing and the articles were not made on the spur of the moment, but well-considered actions. According to the European Court the Spanish courts had analysed in detail the events complained of, and had concluded that, on account of their seriousness and tone, the drawing and articles amounted to personal attacks that were offensive, intemperate, gratuitous and in no way necessary for the legitimate defence of the applicants’ interests. Hence the applicants had exceeded the acceptable limits of the rights of criticism. Therefore the Court could find no reason to qualify their dismissal as unjustified.

41 See also \textit{Karademirci a.o. v. Turkey} Application Nos. 37096/97 and 37101/97, 25 January 2005, a case in which members of a medical trade union were convicted because they had failed to ask prior permission from the public prosecutor before contacting the press. According to the ECHR the trade union members could not have foreseen that their press statements fell under the scope of a regulation regarding pamphlets. The Court found a violation of Article 10.

42 \textit{Aguilera Jiménez a.o. v. Spain} Application Nos. 28389/06, 28955/06, 28957/06, 28959/06, 28961/06, 28964/06, 8 December 2009.

43 The increased importance of and the applications through internet, including websites and social networks are true for trade union communication as well. See also K. Rosier, « Liberté d’expression du syndicat sur Internet : l’arrêt de la Cour de cassation française », \textit{Bulletin social et juridique}, 385, 2008, p. 6, www.fundp.ac.be/recherche/publications/page_view/65352/
In a dissenting opinion judge Power commented that the Court jumped to conclusions because the trade union context had not been taken into account: « One cannot and should not ignore the fact that the applicants were members of a recently formed trade union whose mandate was, presumably, to represent the views and protect the interests of its members. The publications were made within the context of an employment dispute. »

After this controversial chamber judgment the case was submitted to the Grand Chamber which expressed itself in a more nuanced manner, recognising explicitly this time the trade union context in this case. The Court in Palomo Sánchez a.o. v. Spain emphasised indeed that trade union freedom is only possible if there is freedom of expression: « 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” (...). 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. » The Grand Chamber also

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46 Palomo Sánchez a.o. v. Spain Application nos. 28955/06, 28957/06, 28959/06, 28964/06, 12 September 2011 at § 56.
agreed that the cartoon and articles were published in the context of a dispute that was not a private matter, but instead « a matter of general interest for the workers of the company47 ».

That being said the Court stated however that the existence of such a matter cannot justify the use of offensive cartoons or expressions, even in the context of labour relations. The Court even emphasised that certain manifestations of the right to freedom of expression that may be legitimate in other contexts are not legitimate in that of labour relations48. In this respect the Court referred to the Digest of the ILO which holds that trade unions too « should respect the limits of propriety and refrain from the use of insulting language49 ». The Court further considered that « 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 ».

The Grand Chamber, leaving a wide margin of appreciation to the domestic authorities in this case, referred to the findings by the Spanish courts that in addition to being insulting, the cartoon and texts in issue were intended more as an attack on colleagues than as a means of promoting trade union action vis-à-vis the employer. Moreover, the cartoon and the articles did not constitute an instantaneous and ill-considered reaction related to a dispute with the employer, 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 company50. Hence the Court took particular account of the very offensive character of the cartoon and the wording used in the articles in question, containing personal attacks on other employees and the human resources manager. This approach finally led to the finding by the Grand Chamber with a 12 to 5 majority that there had been no violation of Article 10 in this case, the dismissal of the employees involved being a proportionate interference with their freedom of expression as union labour activists.

47 Ibid. at § 72. It also recognised that « 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 », at § 71.
48 Ibid. at § 76.
49 Ibid. at § 67 and 76.
The joint dissenting opinion includes some interesting reflections. The dissenters observe that the criticism was not so much aimed at private persons but rather at persons within the corporate context. The dissenters emphasise that the cartoon whilst being vulgar and tasteless in nature, should be taken for what it is – a satirical representation. Even it was unquestionably crude and vulgar, the impugned cartoon and articles should have been assessed in relation to the ongoing industrial dispute between the labour union and the employer. The dissenting judges also refer to the chilling effect the dismissal of all members of the executive committee of a labour union may have on future criticism on the management: “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”. The dissenters cannot agree with the approach by the Court’s majority and they criticise the Grand Chamber’s judgment for overlooking the social dimension of the situation in this case. The dissenters state that “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.”

By focusing on the insulting, crude and vulgar language of the cartoon and the articles at issue the Grand Chamber obviously neglected not only the satirical character of the cartoon and the context of the trade union dispute, but also the seriousness of the sanction, the chilling effect and the obvious trade union dimension of the case. Still the question remains why it was « necessary » to


52 See the joint dissenting opinion in Palomo Sánchez a.o. v. Spain Application nos. 28955/06, 28957/06, 28959/06, 28964/06, 12 September 2011 at § 6, 11-12 and 17-19.
dismiss all members of the executive committee of the trade union, *de facto* eliminating this way the trade union’s activity in the company. Less restrictive measures could have been an option, in order to obtain a more fair balance between the employer’s right of reputation and the right of freedom of expression of the trade union in this case.

**Szima v. Hungary**

In another case statements published on a trade union’s website were at the heart of the matter. In *Szima v. Hungary* the European Court concluded that a criminal conviction of a leader of a police trade union for having posted critical and offensive comments on the Union’s website was to be considered necessary in a democratic society for the prevention of disorder or crime, and more precisely of preserving order in the armed forces. The Military Bench of the Budapest Court of Appeal held that the publication of the posted articles and statements on *Tettrekész’s* website had gone beyond the applicant’s freedom of expression, given the particularities of the armed body to which she belonged. In the Budapest court’s opinion, the views contained in the documents constituted one-sided criticism whose truthfulness could and should not be proven. In its judgment of 9 October 2012, the European Court shares the views of the Hungarian courts regarding the nature of the allegations and value-judgments expressed by the president of the police trade union, Ms Judit Szima. The Strasbourg Court accepts that the accusations of the senior police management of political bias and agenda, transgressions, unprofessionalism and nepotism were indeed capable of causing insubordination since they might discredit the legitimacy of police actions. The Court considers that some of the statements could be regarded as value-judgments, but that Szima did not provide any clear factual basis for those statements. The Court also observes that « it is true that she was barred from submitting evidence in the domestic proceedings – a matter of serious concern – however, in her attacks concerning the activities of police leadership, she failed to relate her offensive value judgments to facts ». The Court is of the opinion that Szima « has uttered, repeatedly, critical views about the manner in which police leaders managed the force, and accused them of disrespect of citizens and of serving political interests in general », and that these views « overstepped the mandate of a trade union leader, because they are not at all related to the protection of labour-related interests of trade union members. Therefore, those statements, being made outside the legitimate scope of trade union-related activities, must
be considered from the general perspective of freedom of expression rather than from the particular aspect of trade union-related expressions. The European Court considers that the reasons adduced by the national authorities to justify the criminal conviction of Szima are relevant and sufficient, especially in view of the relatively mild sanction imposed on the applicant – demotion and a fine – which cannot be regarded disproportionate in the circumstances. On the basis of these considerations the Court concludes, by six votes to one, that there has been no violation of Article 10 read in the light of Article 11 of the Convention.

As the sole dissent, the president of the Chamber, judge Tulkens, vehemently opposed against the reasoning by the Court in Szima v. Hungary. Tulkens refers to the finding by the Court’s majority that Szima’s critical remarks had overstepped the mandate of a trade union leader, because some of them were « not at all related to the protection of labour-related interests of trade union members ». Tulkens wonders whether the Court itself has not overstepped its mandate by casting this judgment on the role of a trade union leader and on the « legitimate » scope of trade-union activities. In finding, without any other explication or justification, that the offending remarks had been made « outside the legitimate scope of trade union-related activities », the majority dismissed, artificially in Tulkens’ view, the trade-union dimension of this case to focus it purely on the right to freedom of expression. The Court is also satisfied that the sanction was proportionate even though it recognized that several statements made by the applicant benefited from the heightened protection afforded to trade-union leaders or were « pure » value-judgments. Furthermore, whilst the fine may be regarded as lenient, the same cannot be said of lowering a police officer in rank. The majority of the Court seems to neglect the chilling effect such a sanction may have on trade union expression, as members of police labour unions will be deterred from engaging in legitimate harsh criticism on the management of the police force.

Looking at the final outcome of the judgment in Szima v. Hungary, it is striking to notice that the Court firmly took as its starting point 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. 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 » (§ 28). The way of reasoning by the Court which led to the acceptance of the findings by the domestic courts justifying the applicant’s conviction seems to neglect however the important principles the European Court itself said to apply. The judgment in Szima v. Hungary represents another retrograde step in terms of freedom of expression for leaders and members of trade unions.

3. Whistle-blowers

The most obvious impact of the application of Article 10 ECHR on the employees’ right to freedom of expression is reflected in the Court’s case law regarding the protection of whistle-blowers. Indeed while in most European countries there is no solid or effective protection of whistle-blowers, the ECtHR has tried (partly) to remedy this situation by securing whistle-blowers’ protection under Article 10 ECHR. In essence whistle-blowing refers to those who expose misconduct, or fraud, corruption, mismanagement of alleged dishonest or illegal activity within a company, an administration or private of public organisation. Whistle-blowers report integrity violations, expressing inevitably criticism on the employer, the company or the management. Very often they also breach a duty of confidence or an obligation of secrecy, especially when integrity violations are reported to journalists or to the media.

In a number of cases the employee or civil servant exposed wrongdoings or mismanagement, while simultaneously voicing his or her point of view, making it clearly a matter of expression of information, ideas and opinions. In its

54 Council of Europe, CDCJ (2012)9FIN, P. Stevenson and M. Levi, The protection of whistleblowers, A study on the feasibility of a legal instrument for the protection of whistleblowers, 2012 http://www.coe.int/t/DGHL/STANDARDSETTING/CDCj/Whistleblowers/CDCJ%20(2012)9E_Final.pdf. It is recommended in this study that States should « put in place, or improve, national laws on the protection of workers against retaliation in circumstances where they make a disclosure of information, whose disclosure is in the public interest, which comes to their attention through their work ».

55 R. Predota v. Austria Application No. 28962/95, decision of 18 January 2000 ; Fuentes Bobo v. Spain States put in place, or improve, national laws on the protection of workers against retaliation in circumstances where they make a disclosure of information, whose disclosure is in the public interest, which comes to their attention through their work Application No. 39293/98, 29 February 2000 ; De Diego Nafria v. Spain Application No. 46833/99, 14 March 2002 ; Marchenko v. Ukraine Application No. 4063/04, 19 February 2009 ; Bathellier v. France Application No. 49001/07, 12 October 2010 ; Poyraz v. Turkey Application No. 15966/06, 7 December 2010 and Stânciulescu v. Romania
judgment in *Guja v. Moldova* the Grand Chamber of the ECtHR went a step further and also considered the dismissal of a civil servant who had leaked information, more specifically, a letter to the press, to be an unlawful restriction of the right to freedom of expression\(^6\).

*Guja: criteria for whistle-blowing*\(^7\)

In Moldova two politicians, the Deputy Speaker of Parliament and the Deputy Minister of Internal Affairs have sent a letter to the Prosecutor-General urging him to drop all charges in a criminal investigation against four policemen. Guja, the head of the press department of the Prosecutors General’s Office sent a copy of this correspondence to a newspaper, revealing a clear example of political pressure on the judiciary. The letters were the basis for an article in which the two politicians were accused of interference with an ongoing criminal investigation. It soon became clear that Guja had leaked the letters to the press, and as a result a disciplinary procedure was started. Guja informed the Prosecutor General that he had leaked because of his belief that such action could help to oppose the unlawful pressure. Despite his noble intentions he was dismissed.

This case concerned a very specific situation, namely the exercise of the freedom of expression in relation to a case of political corruption. In its judgment the Court took account of the UN treaties ratified by Moldova and the Treaties of the Council of Europe that protect persons (including employees) who expose corruption. It is also interesting that ILO Convention No. 158 was quoted in this respect. Article 5 of this convention stipulates that « (c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent authorities » is no valid reason for the termination of a contract.

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Taking into account the fact that Guja was a civil servant, the principles put forward by the ECtHR in other judgments related to the right of freedom of expression of civil servants were, mutatis mutandis, applicable in this case. The Court does differentiate somewhat because this was a case of whistleblowing. The Court noted that « a civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulgence or publication corresponds to a strong public interest ». In certain circumstances exposure of wrongdoings has to be protected. This is for instance the case when the civil servant is the only one or one of the few persons who is aware of what happens in the workplace and he/she is the one best placed to reveal this. However, with a view to the duty of discretion, the employee’s superiors should be the first ones to be informed of this. Making the information public or imparting it to the press is only permitted as an ultimum remedium.

Therefore it was necessary to examine whether or not the information could have been communicated in another way in order to reveal and remedy the wrongdoing at issue. The Court imposed the condition that an internal duty to report also has to be an effective mechanism to remedy the wrongdoing that one wants to uncover: « In assessing whether the restriction on freedom of expression was proportionate, therefore, the Court must take into account whether there was available to the applicant any other effective means of remedying the wrongdoing which he intended to uncover ». In addition to this condition, there are some more factors to take into account: (1) a public interest must be at issue; (2) the information that has been leaked must be authentic and accurate; (3) the damage the information can produce and the public interest will have to be weighed up; (5) good faith must be the basis of the motives for uncovering the information; (6) and the sanction imposed must be proportionate.

Having regard to each of these criteria and factors the Court concluded that Guja’s dismissal amounted to a violation of his right to freedom of expression and especially his right to impart information. The Court phrased its conclusion as follows: « Being mindful of the importance of the right to freedom of expression on matters of general interest, of the right of civil servants and other
employees to report illegal conduct and wrongdoing at their place of work, the duties and responsibilities of employees towards their employers and the right of employers to manage their staff, and having weighed up the other different interests involved in the present case, the Court comes to the conclusion that the interference with the applicant’s right to freedom of expression, in particular his right to impart information, was not “necessary in a democratic society”. Accordingly, there has been a violation of Article 10 of the Convention.

Other whistle-blower cases in which the ECtHR found violations of Article 10

Since the Guja judgment whistle-blowing by civil servants, government officials and even by magistrates and employees of military intelligence agencies is effectively protected pursuant to Article 10 ECHR. The judgment in Kayasu v. Turkey concerned the disciplinary sanction and criminal conviction of a prosecutor who, as a citizen, had presented a petition to the Public Prosecutor’s Office of the State Security Court in which he accused two former high-ranking military officers of involvement in a military coup. The prosecutor had also leaked the text of the petition to the media, which subsequently reported on this. The Turkish authorities considered the text of the petition contrary to the professional duties of the prosecutor, discrediting the state institutions in an insulting way and damaging the reputation of high-ranking military officials. The European Court however pointed out that « le discours litigieux servait fondamentalement à démontrer un dysfonctionnement du régime démocratique ». Given the gravity of the sanctions, the Court concluded that the interference with the right of freedom of expression of Kayasu was a violation of Article 10 ECHR.

Kudeshkina v. Russia also concerned a form of whistle-blowing. In 2005 Olga Borisovna Kudeshkina lodged a complaint with the European Court in Strasbourg regarding her dismissal as a judge. After having served as a judge at the Moscow City Court for over 18 years she was dismissed from her post by a disciplinary council because of a number of statements she had made in the media. In public and in the media the judge had declared that she had been taken off a case concerning a large-scale affair of corruption and financial fraud. She made these statements in a period in which her mandate as a judge had been suspended, at her own request, because she was a candidate

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64 Kayasu v. Turkey Application Nos. 64119/00 and 76292/01, 13 November 2008.
65 Kudeshkina v. Russia Application No. 29492/05, 29 February 2009 at § 99.
for the parliamentary elections. In several interviews in the context of this campaign she had referred to manipulations and interventions by high-ranking officials, business people and politicians, who systematically put judges of the Moscow Court under pressure. In her campaign she advocated a thorough judicial reform with a view to a better performing and more independent judiciary. However, Kudeshkina was not elected for the « Duma ». Shortly after her reinstatement as a judge she was fired. The ECtHR held the view that Kudeshkina’s dismissal because of these public statements was a violation of Article 10 ECHR, for this guarantees everyone, including civil servants and magistrates, the right to freedom of expression. The judgment clarifies that the claim of a breach of professional confidentiality and dissemination of false information as a justification for the judge’s dismissal in this case is not convincing. On the contrary, Kudeshkina did not publicise concrete information about criminal proceedings in progress, and that the court’s chairwoman had removed her from an important case that was not under discussion. The ECtHR also held that Kudeshkina’s allegations could not be considered as personal, unfounded attacks on some judges or on the magistracy, but as relevant and fair comments on a matter of major public interest. The Court pointed out « that the applicant made the public criticism with regard to a highly sensitive matter, notably the conduct of various officials dealing with a large-scale corruption case in which she was sitting as a judge. Indeed, her interviews referred to a disconcerting state of affairs, and alleged that instances of pressure on judges were commonplace and that this problem had to be treated seriously if the judicial system was to maintain its independence and enjoy public confidence. There is no doubt that, in so doing, she raised a very important matter of public interest, which should be open to free debate in a democratic society. Her decision to make this information public was based on her personal experience and was taken only after she had been prevented from participating in the trial in her official capacity66 ». Although one could take some exception to the fierceness with which Kudeshkina had phrased her points of view, the Court held the view that her well-founded criticism contributed to an important societal debate: « However, even if the applicant allowed herself a certain degree of exaggeration and generalisation, characteristic of the pre-election agitation, her statements were not entirely devoid of any factual grounds […] and therefore were not to be regarded as a gratuitous personal attack but as

66 Kudeshkina v. Russia Application No. 29492/05, 29 February 2009 at § 94.
a fair comment on a matter of great public importance\textsuperscript{67}. » Furthermore, the Court considered the dismissal of a judge with a track record of 18 years to be a disproportionate sanction, the more so because would no doubt make other magistrates shrink from expressing critical comments on the functioning of the judiciary and on justice policy in the future. Once again the Court pointed at the « chilling effect », as a result of which one may no longer dare to make a public statement for fear of punishment. It emphasised that such a « chilling effect » is detrimental to democracy and that Kudeshkina certainly had the right to raise public awareness for the matters she pointed out. The ECtHR’s message is clear : (Russian) magistrates who contribute to the debate about manipulation of the judiciary should be supported instead of being punished with dismissal.

Other judgments show that the Court does not want to put an excessive burden on the willingness to report (serious) wrongdoings or offences, especially not in situations in which only one or a few employees are informed\textsuperscript{68}. In Marchenko v. Ukraine, just like in Guja v. Moldova the Court emphasised that « the signalling of illegal conduct or wrongdoing in the public sector must be protected, in particular as only a small group of persons was aware of what was happening\textsuperscript{69} ». 

In Frankovicz v. Poland too the Court found a violation of Article 10 ECHR, this time following a disciplinary sanction of a doctor who in a medical report for a patient had made negative remarks about the treatment and care of the patient in a certain hospital. According to the Polish disciplinary authorities this amounted to a form of improper criticism of colleagues, which is contrary to medical deontology. In its response to the Polish government’s argument that a disciplinary sanction because of violation of professional ethics is not a matter that falls within the scope of the ECHR, the Court made it clear that « matters relating to professional practice are not removed from the protection of Article 10 of the Convention […]]. The Court thus considers that the applicant’s conviction and disciplinary sanction for having expressed a critical opinion on medical treatment received by a patient amounted to an interference with his right to freedom of expression ». The disciplinary sanction was provided for by law, but according to the Court a general prohibition for doctors with regard to criticising the medical practice of colleagues is too extreme a restriction of the right of

\textsuperscript{67} Kudeshkina v. Russia Application No. 29492/05, 29 February 2009 at § 95.

\textsuperscript{68} Juppala v. Finland Application No. 18620/03, 2 December 2008 and Marchenko v. Ukraine Application No. 4063/04, 19 February 2009.

\textsuperscript{69} Marchenko v. Ukraine Application No. 4063/04, 19 February 2009 at § 46.
freedom of expression of medical staff and of the right to information of patients, who after all may benefit from a « second opinion ». The Court particularly objected to the fact that the Polish authorities were in no way willing to examine the truthfulness of what was described in the report, which implied that any form of criticism of another doctor was forbidden : « Such a strict interpretation by the disciplinary courts of the domestic law as to ban any critical expression in the medical profession is not consonant with the right to freedom of expression ». This approach « risks discouraging medical practitioners from providing their patients with an objective view of their state of health and treatment received, which in turn could jeopardise the ultimate goal of the doctor’s profession - that is to protect the health and life of patient ». The Court added that the report was not a gratuitous personal attack on colleagues, but a report based on medical data regarding the medical treatment of a patient by another doctor, thus indicating that the report was related to a public concern. In these circumstances the disciplinary sanction of a reprimand because of the content of the contested report was not necessary in a democratic society and was to be considered as violating the doctor’s right to freedom of expression.

In the case of Sosinowska v. Poland the Court observed in a similar way that the reprimand imposed on a doctor by a Medical Court amounted to a violation of her right to freedom of expression. In a letter to the regional authorities Sosinowska had referred to concrete cases and provided detailed explanations as to why she was of the view that in the public hospital she was working the quality of medical care given to patients was open to criticism, also expressing her concern about the correctness of diagnostic and therapeutic decisions made by her superior. The Court found that the domestic authorities had failed to recognise that Sosinowska had been defending a socially justified interest, as she had produced a critical assessment, from a medical point of view, concerning issues of public interest.

Finally and most recently in Bucur and Thoma v. Romania the Court considered that the general interest in the disclosure of information revealing illegal activities within the Romanian Intelligence Services (RIS) was so important in a democratic society that it prevailed over the interest in maintaining public confidence in that institution. Applying the six Guja-criteria, the Court was

72 Sosinowska v. Poland Application No. 10247/09, 18 October 2011.
not convinced that a formal complaint to a Parliamentary Commission would have been an effective means of tackling the irregularities within RIS. It also observed that the information about the illegal telecommunication surveillance of journalists, politicians and business men that had been disclosed to the press affected the democratic foundations of the State. Hence it concerned very important issues for the political debate in a democratic society, in which public opinion had a legitimate interest. The fact that the data and information at issue were classified as « ultra-secret » was not a sufficient reason to interfere with the whistle-blower’s right in this case. The measures taken against Bucur also risked to have a chilling effect: « Non seulement cette sanction a eu des répercussions très négatives sur sa carrière, mais elle risquait également d’avoir un effet dissuasif sur d’autres agents du SRI et de les décourager de signaler des agissements ir réguliers. En outre, compte tenu de l’écho qu’a reçu l’affaire du requérant dans les médias, la sanction pouvait avoir un effet dissuasif non seulement sur les agents du SRI, mais aussi sur d’autres fonctionnaires et employés » (§ 119). The conviction of Bucur for the disclosure of information to the media about the illegal activities of RIS was considered as a violation of Article 10 ECHR. In its judgment the Court also relied on Resolution 1729(2010) of the Parliamentary Assembly of the Council of Europe on protecting whistle-blowers. The Court concluded: « Consciente de l’importance du droit à la liberté d’expression sur des questions d’intérêt général, du droit des fonctionnaires et des autres employés de signaler les conduites ou actes illicites constatés par eux sur leur lieu de travail, des devoirs et responsabilités des employés envers leurs employeurs et du droit de ceux-ci de gérer leur personnel, la Cour, après avoir pesé les divers autres intérêts ici en jeu, conclut que l’atteinte portée au droit à la liberté d’expression du premier requérant, en particulier à son droit de communiquer des informations, n’était pas “nécessaire dans une société démocratique”. Partant, il y a eu violation de l’article 10 de la Convention » (§ 120).

73 See infra.

74 Bucur and Toma v. Romania Application No. 40238/02, 8 January 2013, at § 11-112. Notice that in some other cases the ECtHR showed more respect for secret, classified military information: Pasko v. Russia Application No. 69519/01, 22 October 2009, at § 86-87. In this case the ECtHR failed to apply the Guja-criteria, while the information at issue concerned serious environmental issues, related to nuclear pollution.

75 See infra.
Whistle-blowing in the private sector : Heinisch v. Germany

Ms Heinisch worked as a geriatric nurse in a home for the elderly. Because of a personnel shortage the patients could not be given the necessary care, which had also been observed by, inter alia, the inspectorate. Heinisch reported the shortcomings, first to the management of the health care institution, later to the justice department, but this was not acted upon. Her trade union became involved as well and distributed leaflets. In response to this she was brought to account and shortly afterwards she was dismissed.

The ECtHR based itself on the Guja case law, with one difference. Heinisch was not employed as a civil servant, but bound to the employer by an employment contract. Nonetheless, the Court applied, mutatis mutandis, the Guja rules. The Court stated : « While such duty of loyalty may be more pronounced in the event of civil servants and employees in the public sector as compared to employees in private-law employment relationships, the Court finds that it doubtlessly also constitutes a feature of the latter category of employment. It therefore shares the Government’s view that the principles and criteria established in the Court’s case law with a view to weighing an employee’s right to freedom of expression by signalling illegal conduct or wrongdoing on the part of his or her employer against the latter’s right to protection of its reputation and commercial interests also apply in the case at hand. The nature and extent of loyalty owed by an employee in a particular case has an impact on the weighing of the employee’s rights and the conflicting interests of the employer ».

There can be no doubt that employees in the private sector too have the right to uncover wrongdoings or reveal illegal conduct on the part of their employer. In such circumstances the right to freedom of expression and the right to impart information must be weighed against the right to a good name and reputation on the part of the employers and their commercial interests. For the rest the Guja test must be applied, on the basis of the following criteria and presentation of the questions :

77 At the time of the Guja judgment it was not completely certain whether those principles would also apply to employees in the private sector, see V. Junod, « La liberté d’expression du whistleblower », Revue trimestrielle de droits de l’homme, 2009, p. 240 ff.
78 Heinisch v. Germany Application No. 28274/08, 21 July 2011 at § 64.
1. Was it not possible for the employee or civil servant to call on his employer, department head or any other authority to disclose the wrongdoings and to remedy these?

2. Does the information relate to serious malpractice or a socially relevant issue?

3. Was the leaked information authentic, reliable and accurate?

4. What harm has been caused to the employer by leaking and making public internal, confidential documents?

5. What motivated the whistle-blower?

6. What kind of sanction was the whistle-blower subjected to and what are the consequences thereof?

In the view of the European Court the German courts that ruled on Heinisch’s complaint about her dismissal did not make a fair assessment in their approval of the dismissal decision. According to the Berlin Labour Tribunal Heinisch’s actions produced a « compelling reason » for dismissal within the meaning of German labour law, without giving much weight to the aspect of freedom of expression invoked by Heinisch. However, for the European Court was a fact that « the criminal complaint lodged by the applicant had to be regarded as whistle-blowing on the alleged unlawful conduct of the employer, which fell within the ambit of Article 10 of the Convention79 ». According to the Court the crucial question was whether Germany on the basis of the positive obligations attached to Article 10 ECHR sufficiently protected Heinisch’s interests vis-à-vis those of her employer. The judgment contains, in succession, an assessment of the general interest regarding the disclosed information, of the alternative ways for disclosure, of the accuracy of the statements, of Heinisch’s good faith, of the harm done to the employer and of the gravity of the sanction that was imposed. All things considered, the Court concluded, in an entirely similar fashion to the Guja judgment : « Being mindful of the importance of the right to freedom of expression on matters of general interest, of the right of employees to report illegal conduct and wrongdoing at their place of work, the duties and responsibilities of employees towards their employers and the right of employers to manage their staff, and having weighed up the other various interests involved in the present case, the Court comes to the conclusion that the interference with the applicant’s right to freedom of expression, in particular her right to impart information, was not “necessary in a democratic society”80 ». 

79 Heinisch v. Germany Application No. 28274/08, 21 July 2011 at § 43.

80 Heinisch v. Germany Application No. 28274/08, 21 July 2011 at § 93.
The Court unanimously ruled that Heinisch’s dismissal amounted to a violation of Article 10 ECHR.

**Whistle-blowing and the policy of the Council of Europe**

In line with the Court’s case law applying Article 10 in cases of whistle-blowing, the Parliamentary Assembly of the Council of Europe has highlighted the importance of whistle-blowing. Resolution 1729/2010 says: « The Parliamentary Assembly recognises the importance of whistle-blowers – concerned individuals who sound an alarm in order to stop wrongdoings that place fellow human beings at risk – as their actions provide an opportunity to strengthen accountability and bolster the fight against corruption and mismanagement, both in the public and private sectors. Potential whistle-blowers are often discouraged by the fear of reprisals, or the lack of follow-up given to their warnings, to the detriment of the public interest in effective management and the accountability of public affairs and private business. » The Resolution insists on protective mechanisms for whistle-blowers in accordance with a number of basic principles as developed in the case law of the ECtHR. The Resolution aims at « comprehensive legislation », with a wide scope of application for protected whistle-blowing, and this for civil servants as well as for employees in the private sector. A strong legal foundation for whistle-blowers is insisted upon, inter alia, in labour law, in order to prevent unjustified dismissal or other forms of retaliation in the domain of employment. More specifically the Resolution is very insistent that the legislation « should codify relevant issues in the following areas of law: (...) employment law – in particular protection against unfair dismissals and other forms of employment-related retaliation. » In a Recommendation of 2010 the

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82 « 6.1.1. the definition of protected disclosures shall include all bona fide warnings against various types of unlawful acts, including all serious human rights violations which affect or threaten the life, health, liberty and any other legitimate interests of individuals as subjects of public administration or taxpayers, or as shareholders, employees or customers of private companies », PACE Resolution 1729 (2010) on the protection of « whistle-blowers ».

83 « 6.1.2. the legislation should therefore cover both public and private sector whistle-blowers, including members of the armed forces and special services », PACE Resolution 1729 (2010) on the protection of "whistle-blowers".
Member States are invited to guarantee the protection of whistle-blowers and to develop mechanisms to protect them (more) appropriately. In a statement of 7 December 2011 the Committee of Ministers of the Council of Europe called for a better legal protection of whistle-blowing, including whistle-blowing through online media and new digital platforms. The Committee of Ministers points out that « people, notably civil society representatives, whistleblowers and human rights defenders, increasingly rely on social networks, blogging websites and other means of mass communication in aggregate to access and exchange information, publish content, interact, communicate and associate with each other. These platforms are becoming an integral part of the new media ecosystem. Although privately operated, they are a significant part of the public sphere through facilitating debate on issues of public interest; in some cases, they can fulfil, similar to traditional media, the role of a social “watchdog” and have demonstrated their usefulness in bringing positive real-life change. » Therefore, the Committee of Ministers urges that action be taken with a view to effective protection of whistle-blowers pursuant to Articles 10 and 11 ECHR. In the meantime, the jurisprudence by the ECtHR applying Article 10 in protecting whistle-blowers has contributed in an

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85 Declaration of the Committee of Ministers on the protection of freedom of expression and freedom of assembly and association with regard to privately operated Internet platforms and online service providers, 7 December 2011, https://wcd.coe.int/ViewDoc.jsp?id=1883671&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383. See also the draft recommendation on protecting whistle-blowers of the European Committee on Legal Co-operation (CDcj, 16-18 December 2013), recommending that member States have in place a normative, institutional and judicial framework to protect individuals who, in the context of their work-based relationship, report or disclose information on threats or harm to the public interest. The appendix to the recommendation sets out a series of principles to guide member States when reviewing their national laws or when introducing legislation and regulations or making amendments as may be necessary and appropriate in the context of their legal systems. The draft recommendation will be submitted to the Committee of Ministers with a view to its adoption, possibly end April 2014.
impressive way to the actual protection of individuals who in the context of their work-based relationship report or disclose information on threats or harm to the public interest, contributing to strengthening transparency and democratic accountability.