FIFTH SECTION

CASE OF HEINISCH v. GERMANY

(Application no. 28274/08)

JUDGMENT

STRASBOURG

21 July 2011

FINAL

21/10/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Heinisch v. Germany,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Dean Spielmann, *President,*
Karel Jungwiert,
Boštjan M. Zupančič,
Mark Villiger,
Isabelle Berro-Lefèvre,
Ann Power,
Angelika Nußberger, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 21 June 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 28274/08) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Ms Brigitte Heinisch ("the applicant"), on 9 June 2008.

2. The applicant was represented by Mr B. Hopmann, a lawyer practising in Berlin. The German Government ("the Government") were represented by their Agent, Mrs A. Wittling-Vogel, *Ministerialdirigentin*, of the Federal Ministry of Justice.

3. The applicant alleged, in particular, that her dismissal without notice from her employment as a geriatric nurse on the ground that she had brought a criminal complaint against her employer alleging deficiencies in the institutional care provided, and the refusal of the domestic courts in the ensuing proceedings to order her reinstatement had infringed her right to freedom of expression.

4. On 15 December 2009 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. The applicant and the Government each filed observations on the admissibility and merits of the application. In addition, third-party submissions were received from Vereinte Dienstleistungsgewerkschaft (ver.di), a trade union representing employees in the service sector, including nursing services, which had been granted leave by the President to intervene in the written proceedings (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court) and which were represented by Mr F. Bsirske, Chairman of its Managing Board, and Mr G. Herzberg, Deputy Chairman. The parties replied to those third-party submissions (Rule 44 § 6).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1961 and lives in Berlin. She had been working as a geriatric nurse for Vivantes Netzwerk für Gesundheit GmbH (hereinafter referred to as "Vivantes"), a limited liability company specialising in health care, geriatrics and assistance to the elderly which is majority-owned by the Land of Berlin, from 16 September 2000 until 9 February 2005, when she was dismissed.

A. The events leading to the applicant's dismissal

7. Since January 2002 the applicant had been working in a nursing home for the elderly operated by Vivantes, where the patients were partly bedridden, disoriented, and generally dependent on special assistance. In 2002 the Medical Review Board of the health insurance fund (*Medizinischer*

Dienst der Krankenkassen, hereinafter referred to as "MDK") established serious shortcomings in the daily care provided there, caused by a shortage of staff.

8. Between 24 January 2003 and 19 October 2004 the applicant and her colleagues regularly indicated to the management that they were overburdened due to the staff shortage and therefore had difficulties carrying out their duties. They specified the deficiencies in the care provided and also mentioned that services were not properly documented. In a notification dated 18 May 2003 the applicant further mentioned that she was no longer in a position to assume responsibility for the shortcomings in care resulting from staff shortages. From 19 May 2003 onwards the applicant moreover repeatedly fell ill and was partly unable to work. One medical certificate stated that this was the result of overworking.

9. In November 2003, following a further inspection, the MDK, established serious shortcomings in the care provided, *inter alia*, an insufficient number of staff, insufficient standards and unsatisfactory care as well as inadequate documentation of care, and therefore threatened to terminate the service agreement with the applicant's employer. Subsequently, restructuring took place.

10. Following a number of further notifications to her superiors explaining the situation, in particular in October 2004, the applicant again fell ill and finally consulted a lawyer.

11. In a letter dated 9 November 2004 the applicant's legal counsel wrote to the Vivantes management. He pointed out that on account of the lack of staff the patients' hygienic care (*ausreichende hygienische Grundversorgung*) could not be guaranteed any more. He also requested the management to stipulate how they intended to avoid criminal responsibility – also for the staff – and how they intended to ensure that sufficient care could be taken of the patients. He pointed out to the management that only then could they avoid a criminal complaint or a public discussion of the situation, with all its negative implications. He gave the management until 22 November 2004 to respond.

12. On 18 November 2004 the MDK again visited the premises without prior notice. It was subsequently in dispute between the parties whether the MDK had in fact established that the situation as regards the personnel, although difficult, was not critical.

13. On 22 November 2004 the management rejected the applicant's accusations.

14. On 7 December 2004 the applicant's lawyer lodged a criminal complaint against Vivantes on account of aggravated fraud and requested the public prosecutor to examine the circumstances of the case under all its relevant legal aspects. He specified that the complaint also served the purpose of avoiding criminal responsibility for the applicant herself, following her numerous complaints to Vivantes, which had not brought any improvement in the care provided. It was argued that, owing to the lack of staff and insufficient standards, her employer knowingly failed to provide the high quality care announced in its advertisements and hence did not provide the services paid for and was putting the patients at risk. He also alleged that Vivantes had systematically tried to cover up the existing problems and urged staff to falsify reports of services rendered. The applicant's complaint referred to the report produced by the MDK following their visit in 2003, and stated that she would be willing to attest to the bad conditions at the nursing home. It further included statements by the applicant concerning overworking and referred to a protocol drawn up at a team meeting advising Vivantes staff, in order to avoid disciplinary consequences, not to disclose staff shortages and time pressure to patients and their relatives. The criminal complaint included the following passage:

> "The company Vivantes GmbH, which has financial difficulties and is aware of this, has deceived family members, because the care provided does not correspond to or justify the fees paid in any way. Vivantes GmbH is therefore enriching itself and accepts the insufficiency of the medical and hygienic care. ... This demonstrates how it systematically – including by intimidating staff – tries to cover up existing problems. Staff are requested to draw up reports of care provided which do not reflect the way such care was actually given ... Similar problems exist in other institutions; therefore considerable damage is at issue."

15. On 10 December 2004 the applicant's lawyer also addressed the board of directors of the applicant's employer and stated that the nursing home lacked staff and failed to meet hygiene standards.

16. On 5 January 2005 the Berlin Public Prosecutor's Office discontinued the preliminary investigations against Vivantes pursuant to Article 170 (2) of the Code of Criminal Procedure (*Strafprozessordnung* - see "Relevant domestic law and practice" below).

17. By a letter dated 19 January 2005 the nursing home dismissed the applicant on account of her repeated illness with effect as of 31 March 2005. The applicant challenged the dismissal before the Berlin Labour Court (file No. 35 Ca 3077/05).

18. Subsequently, the applicant contacted friends and also her trade union, Vereinte Dienstleistungsgewerkschaft (ver.di). On 27 January 2005 they issued a leaflet headed as follows:

> "Vivantes wants to intimidate colleagues!!
> Not with us!
> Immediate withdrawal of the dismissal of our colleague Brigitte who used to work at Vivantes Forum for Senior Citizens
> Call for the foundation of a non-party solidarity group"

The leaflet also stated that the applicant had lodged a criminal complaint which had not resulted, however, in a criminal investigation and that she had been dismissed on account of her illness. It further stated as follows:

> "Let's answer back at last ... The insanity that private operators, together with the Berlin SPD/PDS senate, are destroying our manpower out of greed ... Vivantes flagrantly takes advantage of our social commitment. ... This is more than just a dismissal! This is a political disciplinary measure taken in order to gag those employed ..."

19. On 31 January 2005 the applicant sent one leaflet by fax to the residential accommodation, where it was distributed. Only then did Vivantes become aware of the applicant's criminal complaint.

20. On 1 February 2005 the applicant's employer gave her the opportunity to make a statement regarding the leaflet which, however, the applicant declined to do. On 4 February 2005 Vivantes informed the works council that it intended to dismiss the applicant without notice. On 8 February 2005 the works council declared that it would not agree to the applicant's dismissal.

21. On 9 February 2005 the applicant's employer dismissed her without notice, alternatively by 31 March 2005, on suspicion of having initiated the production and dissemination of the leaflet.

22. A new leaflet reporting on this dismissal was subsequently issued; in addition, the situation was reported in a TV programme and in two articles published in different newspapers.

23. On 21 February 2005 the preliminary investigation proceedings against Vivantes were resumed by the Berlin Public Prosecutor's Office at the applicant's request.

24. On 25 February 2005 the applicant lodged a claim against her dismissal without notice of 9 February 2005 with the Berlin Labour Court (file no. 39 Ca 4775/05).

25. On 25 April 2005 the applicant's former employer issued a further dismissal. The applicant's claim of 25 February 2005 was then extended accordingly.

26. On 12 May 2005 the applicant was heard as a witness by the public prosecution in the preliminary investigation proceedings against Vivantes. The preliminary proceedings were again discontinued on 26 May 2005 in accordance with Article 170 (2) of the Code of Criminal Procedure.

B. Civil proceedings following the applicant's dismissal without notice

27. By a judgment of 3 August 2005 (file No. 39 Ca 4775/05) the Berlin Labour Court (*Arbeitsgericht*) established that the employment contract had not been terminated by the dismissal of 9 February 2005 since it could not be justified under Article 626 of the German Civil Code (*Bürgerliches Gesetzbuch*) or section 1 § 1 of the Unfair Dismissal Act (*Kündigungsschutzgesetz* - see "Relevant domestic law and practice" below). In this respect it found that the leaflet – the content of which was attributable to the applicant, since she transmitted it to her employer without any further declaration – was covered by her right to freedom of expression and did not amount to a breach of her duties under the employment contract. Although it was polemical, it had been based on objective grounds and had not upset the "working climate" in the nursing home.

28. Following a hearing on 28 March 2006 the Berlin Labour Court of Appeal (*Landesarbeitsgericht*), by a judgment of the same date, quashed the judgment of the Labour Court and found that the dismissal of 9 February 2005 had been lawful as the applicant's criminal complaint had provided a "compelling reason" for the termination of the employment relationship without notice as required under Article 626 (1) of the Civil Code and had made continuation of the employment relationship unacceptable. It found that the applicant had frivolously based the criminal complaint on facts that she could not prove in the course of the proceedings since, in particular, her

mere reference to the lack of staff was not sufficient to enable her to claim fraud, and since the applicant had further failed to specify the alleged instruction to falsify reports – which could also be seen from the fact that the public prosecutor had not opened an investigation. The Labour Court of Appeal further held that the criminal complaint amounted to a disproportionate reaction to the denial of Vivantes to recognise shortcomings as regards personnel, since the applicant had never attempted to have her allegation of fraud examined internally and since, moreover, she had intended to put undue pressure on her employer by provoking a public discussion of the issue. It also pointed out that the nursing home was under the supervision of the MDK, which had carried out a further inspection there on 18 November 2004, shortly before the applicant had lodged her complaint. She could have awaited the outcome of that visit and therefore her criminal complaint had been unnecessary. The court, referring also to the principles established by the Federal Labour Court in its relevant case-law (see "Relevant domestic law and practice" below) concluded that the applicant had not been acting within her constitutional rights but had breached her duty of loyalty towards her employer.

29. On 6 June 2007 the Federal Labour Court (*Bundesarbeitsgericht*) dismissed the applicant's appeal against the refusal for leave to appeal on points of law.

30. By a decision of 6 December 2007, which was served on the applicant on 12 December 2007, the Federal Constitutional Court refused to admit her constitutional complaint for adjudication without stating further reasons.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. Relevant domestic law and practice

1. Dismissal of an employee for having lodged a criminal complaint against the employer

31. Apart from specific legislation with respect to civil servants exposing suspected cases of corruption, German law does not contain general provisions governing the disclosure of deficiencies in enterprises or institutions, such as illegal conduct on the part of the employer, by an employee (so-called whistle-blowing) and discussions on related draft legislation have for the time being not produced any results.

(a) The relevant provisions of the German Civil Code and the Unfair Dismissal Act

32. In the absence of such specific legislation, an extraordinary dismissal of an employee for having lodged a criminal complaint against his or her employer may be based on Article 626 (1) of the Civil Code, which provides that an employment relationship may be terminated by either party to the contract without complying with a notice period for a "compelling reason" ("*wichtiger Grund*"). Facts must be present on the basis of which the party giving notice cannot reasonably be expected to continue the employment until the end of the notice period or to the agreed end of that relationship, taking all circumstances of the individual case into account and weighing up the interests of both parties to the contract.

33. Section 1 (1) of the Unfair Dismissal Act provides that termination of an employment relationship by the employer is unlawful if it is socially unjustified. According to section 1(2) of the Act, a termination shall be socially unjustified unless it is, *inter alia*, based on grounds relating to the employee himself or to his conduct or in the event that the continuation of the employment relationship would conflict with compelling requirements for the operation of the enterprise.

(b) Case-law of the Federal Constitutional Court and Federal Labour Court

34. In a decision of 2 July 2001 (file No. 1 BvR 2049/00) the Federal Constitutional Court dealt with a case where an employee, at the request of the public prosecutor, had given evidence and handed over documents in preliminary criminal investigations that had been instituted *ex officio* against his employer. The Federal Constitutional Court held that in accordance with the rule of law the discharge of a citizen's duty to give evidence in criminal investigations could not in itself entail disadvantages under civil law. The Federal Constitutional Court further pointed out in an obiter dictum that even in the event that an employee reported the employer to the public prosecution

authorities on his or her own initiative, the rule of law required that such exercise of a citizen's right could, as a rule, not justify a dismissal without notice from an employment relationship, unless the employee had knowingly or frivolously reported incorrect information.

35. In the light of the Federal Constitutional Court's case-law, the Federal Labour Court, in a judgment of 3 July 2003 (file No. 2 AZR 235/02), further elaborated on the relation between an employee's duty of loyalty towards the employer and the exercise of his or her constitutionally guaranteed rights. It reiterated that in reporting a criminal offence an employee had recourse to a means to implement the law that was not only sanctioned by the legal order but also called for under the Constitution. An employee who exercised that right in good faith could therefore not sustain disadvantages in the event that the underlying allegations proved wrong or could not be clarified in the course of the ensuing proceedings. It held that, however, taking into consideration the employee's duty of loyalty, a [criminal] complaint lodged by an employee must not constitute a disproportionate reaction in response to the employer's conduct. Indications of a disproportionate reaction by the complainant employee could be the justification of the complaint, the motivation of the person filing the complaint or the failure to previously point out the deficiencies complained of internally within the enterprise. In this context the employee's motives to file the complaint were of particular significance. A complaint that was filed solely to cause damage to the employer or to "wear him or her down" could constitute a disproportionate reaction depending on the charges underlying the complaint. As regards the possibility of a previous internal clarification of the allegations, the court stated that it had to be determined in each individual case whether such an approach could be reasonably expected from the employee. It would not be expected if the latter obtained knowledge of an offence of which the failure to report would result in him or herself becoming liable to criminal prosecution or in the event of serious criminal offences and offences committed by the employer himself. In addition, previous internal clarification of the matter was not required if redress could not legitimately be expected. If the employer failed to remedy an unlawful practice even though the employee had previously drawn his attention to that practice, the latter was no longer bound by a duty of loyalty towards his employer.

2. The Code of Criminal Procedure

36. Article 170 of the Code of Criminal Procedure provides for the following outcomes of investigation proceedings:

> "(1) If the investigations offer sufficient reason for bringing public charges, the public prosecution office shall submit a bill of indictment to the competent court.
>
> (2) In all other cases the public prosecution office shall terminate the proceedings. The public prosecutor shall notify the accused thereof if he was examined as such or a warrant of arrest was issued against him; the same shall apply if he requested such notice or if there is a particular interest in notifying him."

B. Relevant international law and practice

37. In its Resolution 1729 (2010) on "The protection of "whistle-blowers"" the Parliamentary Assembly of the Council of Europe stressed the importance of "whistle-blowing" – concerned individuals sounding the alarm in order to stop wrongdoings that place fellow human beings at risk – as an opportunity to strengthen accountability, and bolster the fight against corruption and mismanagement, both in the public and private sectors. It invited all member States to review their legislation concerning the protection of "whistle-blowers", keeping in mind the following guiding principles:

> 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;
>
> 6.1.2. the legislation should therefore cover both public and private sector whistle-blowers ..., and
>
> 6.1.3. it should codify relevant issues in the following areas of law:
>
> 6.1.3.1. employment law – in particular protection against unfair dismissals and other forms of employment-related retaliation; ...

6.2.2. This legislation should protect anyone who, in good faith, makes use of existing internal whistle-blowing channels from any form of retaliation (unfair dismissal, harassment or any other punitive or discriminatory treatment).

6.2.3. Where internal channels either do not exist, have not functioned properly or could reasonably be expected not to function properly given the nature of the problem raised by the whistle-blower, external whistle-blowing, including through the media, should likewise be protected.

6.2.4. Any whistle-blower shall be considered as having acted in good faith provided he or she had reasonable grounds to believe that the information disclosed was true, even if it later turns out that this was not the case, and provided he or she did not pursue any unlawful or unethical objectives."

The above guidelines were also referred to in the Parliamentary Assembly's related Recommendation 1916 (2010).

38. Article 24 of the Revised European Social Charter reads as follows:

"With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise: ...

a) the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service; ...

The Appendix to Article 24 specifies :

"3 For the purpose of this article the following, in particular, shall not constitute valid reasons for termination of employment: ...

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 administrative authorities; ..."

Article 24 of the Revised European Social Charter has been ratified by 24 of the Council of Europe's member States. Germany has signed but not yet ratified the Revised European Social Charter.

39. Article 5 of the Termination of Employment Convention of the International Labour Organisation (ILO Convention No. 158 of 22 June 1982) stipulates:

"The following, inter alia, shall not constitute valid reasons for termination: ...

(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 administrative authorities; ...".

Germany has not ratified ILO Convention No. 158.

40. A number of other international instruments address the protection of whistle-blowers in specific contexts, in particular the fight against corruption, such as the Council of Europe's Criminal Law Convention on Corruption and Civil Law Convention on Corruption or the United Nations Convention against Corruption.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

41. The applicant complained that her dismissal without notice on the ground that she had lodged a criminal complaint against her employer and the refusal of the domestic courts in the ensuing proceedings to order her reinstatement infringed her right to freedom of expression as provided in Article 10 of the Convention, which reads as follows:

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

A. Admissibility

42. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Whether there was an interference

43. The Court observes at the outset that it was not disputed between the parties 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 Convention. It was also common ground between the parties that the resulting dismissal of the applicant and the related decisions of the domestic courts amounted to an interference with the applicant's right to freedom of expression.

44. The Court recalls in this context that in a number of cases involving freedom of expression of civil or public servants, it has held that Article 10 applied to the workplace in general (see, for example, *Kudeshkina v. Russia*, no. 29492/05, § 85, 26 February 2009, and *Vogt v. Germany*, 26 September 1995, § 53, Series A no. 323). 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 (see *Fuentes Bobo v. Spain*, no. 39293/98, § 38, 29 February 2000).

45. The Court therefore considers that the applicant's dismissal, as confirmed by the German courts, on account of her criminal complaint against her employer constituted an interference with her right to freedom of expression, as guaranteed by Article 10 § 1 of the Convention.

46. Such interference will constitute a breach of Article 10 unless it is "prescribed by law", pursues a legitimate aim under its paragraph 2 and is "necessary in a democratic society" for the achievement of such aim.

2. Whether the interference was "prescribed by law" and pursued a legitimate aim

47. The applicant, while conceding that a termination without notice of an employment relationship pursuant to Article 626 (1) of the Civil Code could pursue the legitimate aim of protecting the reputation or rights of others, namely, the business reputation and interests of Vivantes, argued that the said provision did not contain any criteria for a lawful dismissal in the event of whistle-blowing on the part of an employee. The related decisions of the Federal Constitutional Court of 2 July 2001 and the Federal Labour Court of 3 July 2003 (see "Relevant domestic law and practice" above) did not amount to comprehensive and established case-law in this regard. The conditions for a dismissal without notice on the ground that an employee has filed a criminal complaint against his or her employer were not sufficiently foreseeable and the resulting interference with the applicant's right to freedom of expression had thus not been "prescribed by law" within the meaning of Article 10 § 2.

48. The Court notes in this respect that Article 626 (1) of the Civil Code allows the termination of an employment contract with immediate effect by either party if a "compelling reason" renders the continuation of the employment relationship unacceptable to the party giving notice. It further observes that pursuant to the decision of the domestic courts in the present case as well as the aforementioned leading decisions of the Federal Constitutional Court and the Federal Labour Code referred to by the parties a criminal complaint against an employer may justify a dismissal under the said provision in the event that it amounts to a "significant breach" of the employee's duty of loyalty. While the domestic courts have to assess whether such a significant breach of an employee's duty has occurred in the light of the circumstances of each particular case, the Court considers that it is nevertheless foreseeable for an employee that a criminal complaint against his or her employer may in principle constitute a compelling ground for a dismissal without notice under the said provision. The Court reiterates in this context that domestic legislation cannot be expected in any

case to provide for every eventuality and the mere fact that a legal provision is capable of more than one construction does not mean that it does not meet the requirement implied in the notion "prescribed by law" (see *Vogt v. Germany*, 26 September 1995, § 48, Series A no. 323).

49. The Court therefore shares the Government's view that the interference with the applicant's right to freedom of expression was "prescribed by law". It further notes that there was no dispute between the parties that the interference pursued the legitimate aim of protecting the reputation and rights of others, namely, the business reputation and interests of Vivantes (see *Steel and Morris v. the United Kingdom*, no. 68416/01, § 94, ECHR 2005-II).

50. The Court must therefore examine whether the interference was "necessary in a democratic society", in particular, whether there was a proportionate relationship between the interference and the aim pursued.

3. Whether the interference was necessary in a democratic society

(a) The parties'submissions

(i) The Government

51. The Government argued that the interference with the applicant's right to freedom of expression in the case at hand had been justified under paragraph 2 of Article 10 since her dismissal without notice had been a necessary and proportionate means to protect the reputation and rights of her employer.

52. In their assessment of the situation the domestic courts had, *inter alia*, taken into consideration that the applicant had not previously raised her allegation that the documentation in connection with the care provided had been falsified internally with her employer. She had neither mentioned such a practice nor accused her employer of fraud either in her repeated notifications to the latter pointing out the shortcomings in the services rendered or in the letter sent by her counsel to the Vivantes management on 9 November 2004. The allegations of fraud had been made for the first time in her criminal complaint of 7 December 2004.

53. The domestic courts had further considered that the applicant had frivolously based her criminal complaint on facts that could not be demonstrated in the ensuing proceedings. Her complaint had lacked sufficiently concrete information to enable a verification of her allegations and the competent public prosecution authorities therefore had discontinued the preliminary investigations for lack of an initial suspicion (*Anfangsverdacht*). When the public prosecution authorities, following resumption of the preliminary proceedings at the applicant's request, questioned the latter as a witness, she had refused to further specify her allegations or to name additional witnesses. The preliminary investigations had thus again been discontinued. In the proceedings concerning her dismissal before the labour courts, the applicant had also failed to substantiate her allegations that personnel had been asked to document services that had not actually been rendered. Due to the global nature of the applicant's allegations and her refusal to further substantiate her accusations it had been impossible to assess their veracity and the domestic courts had thus not abused their discretion when calling into question the authenticity of the applicant's allegations.

54. The Government finally argued that when lodging the criminal complaint against her employer the applicant had not acted in good faith and in the public interest with a view to disclosing a criminal offence. Her motive behind the criminal complaint had rather been to denounce the alleged shortage of personnel and put additional pressure on her employer by involving the public. The applicant had been aware that Vivantes was subject to inspections by the Berlin Inspectorate for Residential Homes as well as to checks by an independent supervisory body, the MDK, and that in view of these checks a criminal complaint about an alleged staff shortage and resulting deficiencies in care was unnecessary. In particular, she could have waited for the MDK to issue a report following its visit carried out on 18 November 2004 before filing her criminal complaint. The motives behind her actions were also illustrated by the polemic way in which her criminal complaint had been phrased and the fact that following her dismissal she had disseminated flyers in which she complained of the alleged avarice of her employer. Furthermore, her lawyer's letter of 9 November 2004 announcing to the Vivantes management that a criminal complaint and a "certainly unpleasant

public discussion" could be avoided only if the employer took steps to remedy the staff shortages also showed that she intended to put pressure on her employer.

55. The Government concluded that the domestic courts had examined the circumstances of the instant case and, relying on the aforementioned arguments, had struck a fair balance between the public interest in being informed about shortcomings in the sensitive area of care for the elderly on the one hand, and the protection of the public's trust in the provision of services in this area as well as the protection of the commercial interests and success of the operating service companies on the other, and had come to the conclusion that the latter prevailed in the present case. They further pointed out that the domestic courts had weighed the applicant's right to freedom of expression against her duty of loyalty towards her employer applying criteria that coincided with those established by the Court in the case of *Guja* (*Guja v. Moldova* [GC], no. 14277/04, §§ 69 - 78, ECHR 2008-...). The result of their assessment had thus fallen within the margin of appreciation enjoyed by the States in interfering with the right to freedom of expression.

(ii) The applicant

56. The applicant contested the Government's argument that her criminal complaint had been premature. She maintained that prior to filing the criminal complaint against Vivantes she had made continuous efforts over a period of over two years to inform the relevant departments within the enterprise of the existing deficiencies. Since all her attempts to draw the management's attention to the situation had been to no avail, she was led to assume that further internal complaints would not constitute an effective means with a view to investigating and remedying the shortcomings in the care provided. For this reason she had considered the criminal complaint as a last resort, also with a view to avoiding potential criminal liability herself. This had also been the reason her counsel had written to the Vivantes management on 9 November 2004 informing them of her intention to lodge a criminal complaint.

57. The applicant further contended that her criminal complaint had not been frivolous or unfounded. In her repeated pleas to Vivantes she had disclosed all the circumstances of the case that had been the foundation of her subsequent criminal complaint, including the fact that personnel had been asked to record services which had not actually been rendered in the manner documented. The deficiencies disclosed by her had also been the subject of criticism by the MDK, following its inspections in 2002 and 2003, when it had pointed out that staff shortages were at the origin of insufficient care. It had been her lawyer who had assessed such facts from a legal point of view when formulating the criminal complaint and qualifying them as constituting the criminal offence of fraud – an assessment that she was not competent to call into question. She had further substantiated her complaint to the extent possible in the subsequent proceedings while being mindful of the risk of incriminating herself and of retaliatory measures by Vivantes in the event that she disclosed further internal information about the enterprise.

58. The applicant submitted that her motive for filing the complaint had been the potential threat to the health of the particularly vulnerable patients as a result of the unsatisfactory working conditions in the nursing home – the question whether the accompanying documentation had been accurate had only been of subordinate significance to her. In her opinion the criminal complaint had not been unnecessary in view of the supervision carried out by the MDK, as pointed out by the Government, and she contested the argument that the true purpose of her complaint had been to put undue pressure on her employer. She argued in this connection that previous complaints by the MDK about the conditions in the nursing home had not brought about any change in working conditions there and therefore, in her opinion, a subsequent visit by the MDK could not have been considered as an effective alternative to remedy the shortcomings. In any event she would neither have had a right to be involved in such an inspection nor to be informed about its outcome.

59. The applicant further pointed out that her dismissal without notice had been the severest sanction possible, and could only be justified in the absence of less severe potential penalties. She maintained that on the other hand no concrete damage on the part of Vivantes as a consequence of her criminal complaint had been established.

60. The applicant concluded that her dismissal without notice had not been necessary for the protection of the reputation or rights of Vivantes and had thus been disproportionate. The domestic courts had not struck a fair balance between the considerable public interest in being informed about

shortcomings in the care for the elderly provided by a State-owned company on the one hand and the rights of the service provider on the other.

(iii) The Third party

61. The trade union ver.di provided information on the organisation of institutional care for the elderly in Germany as well as the working conditions of employees in this sector, which were frequently characterised by staff shortages resulting in a heavy workload and overtime for employees. In many nursing homes too many patients were assigned to individual members of care staff, who were therefore only in the position to provide basic care. Supervision of nursing homes was mainly carried out by the Medical Review Board of the health insurance fund on the basis of annual inspections. The latter was under no obligation to consult the staff employed in the nursing homes on the occasion of such visits. However, it was the employees who were the first to become aware of unsatisfactory conditions in the care provided. For this reason staff should be provided with effective means to draw attention to shortcomings in the provision of care and should be able to report breaches of the rights of patients without having to fear retaliatory measures by their employer.

(b) The Court's assessment

(i) The general principles applicable in this case

62. The fundamental principles underlying the assessment of whether an interference with the right to freedom of expression was proportionate are well established in the Court's case-law and have been summed up as follows (see, among other authorities, *Steel and Morris v. the United Kingdom*, no. 68416/01, § 87, ECHR 2005-II) :

"...

(ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10**.**

(iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient' ... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ..."

63. As regards the application of Article 10 of the Convention to the workplace, the Court has held that the signalling by an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. This may be called for in particular where the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large (see *Guja v. Moldova* [GC], no. 14277/04, § 72, ECHR 2008-...., and *Marchenko v. Ukraine*, no. 4063/04, § 46, 19 February 2009).

64. The Court is at the same time mindful that employees owe to their employer a duty of loyalty, reserve and discretion (see, for example, *Marchenko*, cited above, § 45). 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.

65. Consequently, in the light of this duty of loyalty and discretion, disclosure should be made in the first place to the person's superior or other competent authority or body. It is only where this is clearly impracticable that the information could, as a last resort, be disclosed to the public. In assessing whether the restriction on freedom of expression was proportionate, therefore, the Court must take into account whether the applicant had any other effective means of remedying the wrongdoing which he intended to uncover (see *Guja*, cited above, § 73).

66. The Court must also have regard to a number of other factors when assessing the proportionality of the interference in relation to the legitimate aim pursued. In the first place, particular attention shall be paid to the public interest involved in the disclosed information. The Court reiterates in this regard that there is little scope under Article 10 § 2 of the Convention for restrictions on debate on questions of public interest (see, among other authorities, *Stoll v. Switzerland* [GC], no. 69698/01, § 106, ECHR 2007-XIV).

67. The second factor relevant to this balancing exercise is the authenticity of the information disclosed. It is open to the competent State authorities to adopt measures intended to respond appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith (see *Castells v. Spain*, 23 April 1992, § 46, Series A no. 236). Moreover, freedom of expression carries with it duties and responsibilities and any person who chooses to disclose information must carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable (see *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 65, ECHR 1999-III).

68. On the other hand, the Court must weigh the damage, if any, suffered by the employer as a result of the disclosure in question and assess whether such damage outweighed the interest of the public in having the information revealed (see *Guja*, cited above, § 76).

69. The motive behind the actions of the reporting employee is another determinant factor in deciding whether a particular disclosure should be protected or not. For instance, an act motivated by a personal grievance or personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection. It is important to establish that, in making the disclosure, the individual acted in good faith and in the belief that the information was true, that it was in the public interest to disclose it and that no other, more discreet means of remedying the wrongdoing was available to him or her (see *Guja*, cited above, § 77).

70. Finally, in connection with the review of the proportionality of the interference in relation to the legitimate aim pursued, a careful analysis of the penalty imposed on the applicant and its consequences is required (see *Fuentes Bobo*, cited above, § 49).

(ii) Application of the above principles in the present case

(α) The public interest in the disclosed information

71. Turning to the circumstances of the present case, the Court notes that the information disclosed by the applicant was undeniably of public interest. In societies with an ever growing part of their elderly population being subject to institutional care, and taking into account the particular vulnerability of the patients concerned, who often may not be in a position to draw attention to shortcomings in the care rendered on their own initiative, the dissemination of information about the quality or deficiencies of such care is of vital importance with a view to preventing abuse. This is even more evident when institutional care is provided by a State-owned company, where the confidence of the public in an adequate provision of vital care services by the State is at stake.

(β) Whether the applicant had alternative channels for making the disclosure

72. As regards the availability of alternative channels for making the disclosure and obtaining an internal clarification of the allegations, the Court notes that the applicant not only indicated, on numerous occasions between January 2003 and October 2004, to her superiors that she was overburdened, but also averted the management to a possible criminal complaint through her counsel by letter of 9 November 2004. While it is true that the legal qualification of the employer's conduct as aggravated fraud was mentioned for the first time in the criminal complaint of 7 December 2004 drafted by the applicant's lawyer, the Court observes that the applicant had nevertheless disclosed

the factual circumstances on which her subsequent criminal complaint were based – including the fact that services had not been properly documented – in her previous notifications to her employer. It further notes that the criminal complaint requested the public prosecution authorities to examine the circumstances of the case as described in the criminal complaint under all relevant legal aspects and that the latter was thus not necessarily limited to fraud.

73. The Court refers in this context to the aforementioned decision of the Federal Labour Court of 3 July 2003 (see "Relevant domestic law and practice" above) stating that seeking a previous internal clarification of the allegations could not be reasonably expected of an employee if the latter obtained knowledge of an offence of which the failure to report would result in him or herself being liable to criminal prosecution. In addition, previous internal clarification of the matter was not required if redress could not legitimately be expected. If the employer failed to remedy an unlawful practice even though the employee had previously drawn his attention to that practice, the latter was no longer bound by a duty of loyalty towards his employer. The Court further notes that similar reasoning is reflected in the Parliamentary Assembly's guiding principles on the protection of whistle-blowers (see "Relevant international law and practice" above) stipulating that where internal channels could not reasonably be expected to function properly, external whistle-blowing should be protected.

74. The Court finds that these considerations also apply in the case at hand. The applicant was of the opinion that none of her previous complaints to her employer had contributed to an amelioration of the employment and care situation in the nursing home. She also indicated to her employer that one of her concerns was that failure to report the deficiencies in the care provided would render her liable to criminal prosecution. The Court therefore considers that it has not been presented with sufficient evidence to counter the applicant's submission that any further internal complaints would not have constituted an effective means with a view to investigating and remedying the shortcomings in the care provided.

75. The Court also notes that German law does not provide for a particular enforcement mechanism with a view to investigating a whistle-blower's complaint and to seeking corrective action from the employer.

76. In the light of the foregoing, the Court considers that in circumstances such as those in the present case external reporting by means of a criminal complaint could be justified.

(γ) The authenticity of the disclosed information

77. Another factor relevant to the balancing exercise is the authenticity of the information disclosed. The Court reiterates in this context that freedom of expression carries with it duties and responsibilities and any person who chooses to disclose information must carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable – in particular if, as in the present case, the person owes a duty of discretion and loyalty to her employer (see *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24, and *Haseldine v. the United Kingdom,* no. 18957/91, Commission decision of 13 May 1992, Decisions and Reports (DR) 73, pp. 225 and 231*)*.

78. The Court notes in this context that the Federal Constitutional Court had pointed out in its decision of 1 July 2001 that even in the event that an employee reported the employer to the public prosecution authorities on his or her own initiative, the rule of law required that such exercise of a citizen's right could, as a rule, not justify a dismissal without notice from an employment relationship, unless the employee had knowingly or frivolously reported incorrect information (file No. 1 BvR 2049/00). The Berlin Labour Court of Appeal indeed found in the case at hand that the applicant had based her criminal complaint frivolously on facts that could not be demonstrated in the resulting preliminary criminal and labour court proceedings.

79. However, the Court notes that the deficiencies disclosed by the applicant in her criminal complaint had not only been raised in her previous notifications to her employer but had also been the subject of criticism by the MDK following its inspections in 2002 and 2003 which had led it to point out that staff shortages were at the origin of insufficient care. The allegations made by the applicant were therefore not devoid of factual background and there is nothing to establish that she had knowingly or frivolously reported incorrect information. The factual information about the deficiencies in care was further supplemented by the applicant in written submissions to the labour

courts in the proceedings regarding her dismissal. Furthermore, the Court notes in this respect that according to the statement of facts in the Labour Court of Appeal's judgment of 28 March 2003 the applicant had, *inter alia*, alleged on the occasion of the court hearing on the same date that she and other staff members had been requested to supplement documentation on care provided, even though the documented services had not actually been rendered. In this connection she referred to the testimony of three of her colleagues.

80. As far as the ensuing preliminary criminal proceedings are concerned, the Court notes that it is primarily the task of the law enforcement authorities to investigate the veracity of allegations made within the scope of a criminal complaint and that it cannot reasonably be expected from a person having lodged such complaint in good faith to anticipate whether the investigations will lead to an indictment or will be terminated. The Court refers in this context to the aforementioned decision of the Federal Labour Court of 3 July 2003 in which the latter held that an employee who exercised his or her constitutionally guaranteed right to lodge a criminal complaint in good faith could not sustain disadvantages in the event that the underlying allegations proved wrong or could not be clarified in the course of the ensuing proceedings. It further observes that the Parliamentary Assembly's guiding principles are based on similar considerations, stating that a whistle-blower should be considered as having acted in good faith provided he or she had reasonable grounds to believe that the information disclosed was true, even if it later turned out that this was not the case, and provided he or she did not pursue any unlawful or unethical objectives.

81. The Court is not convinced by the Government's argument that the applicant's failure to further specify her allegations and to name additional witnesses in the course of the criminal investigations against Vivantes called into question the authenticity of her allegations made within the scope of the criminal complaint. The Court notes, as has been submitted by the applicant, that such conduct on her part may be explained by a fear of incriminating herself as well as the risk of being subject to retaliatory measures on the part of Vivantes in the event that she disclosed further internal information. In any event, the Court considers that although the lack of evidence may result in the preliminary investigations to be discontinued, this does not necessarily lead to the conclusion that the allegations underlying the criminal complaint had been without factual basis or frivolous at the outset.

(δ) Whether the applicant acted in good faith

82. The Court further notes that the applicant argued that her main motive for filing the criminal complaint had been the potential threat to the health of the particularly vulnerable patients resulting from the unsatisfactory working conditions in the nursing home, whereas the Government maintained that she had aimed to denounce the alleged shortage of personnel and put additional pressure on her employer by involving the public.

83. On the basis of the materials before it and even assuming that the amelioration of her own working conditions might have been an additional motive for her actions, the Court does not have reason to doubt that the applicant acted in good faith and in the belief that it was in the public interest to disclose the alleged wrongdoing on the part of her employer to the prosecution authorities and that no other, more discreet means of remedying the situation was available to her.

84. The Court is not persuaded by the Government's argument that in view of the regular inspections by the Berlin Inspectorate for Residential Homes as well as those carried out by the MDK, the applicant should have been aware that a criminal complaint was unnecessary and that she could have waited for the MDK to issue its report on its inspection of 18 November 2004 before submitting her criminal complaint. The Court notes in this respect that in the applicant's experience previous complaints by the MDK about the conditions in the nursing home had not brought about any change and she was therefore of the opinion that a further visit by the MDK could not be considered as an effective alternative to remedy the shortcomings and to avoid her own criminal liability. Following her numerous previous internal complaints with Vivantes, which had been to no avail, she apparently considered the criminal complaint to be a last resort to remedy the deficiencies in the care provided. The Court notes in this context that a report of a subsequent check carried out by the MDK in 2006 points out that deficiencies in care that had already been the subject of its reports in 2002, 2003 and 2004 persisted and required urgent action.

85. As regards the Government's submissions that the polemic formulation of the criminal

complaint was evidence that the applicant's true motive was to denounce her employer and put pressure on him, the Court considers that even if the applicant allowed herself a certain degree of exaggeration and generalisation, her allegations were not entirely devoid of factual grounds (see § 79 above) and did not amount to a gratuitous personal attack on her employer but rather constituted a description of the serious shortcomings in the functioning of the nursing home.

86. This finding is further corroborated by the fact that the applicant – once she had concluded that external reporting was necessary – did not have immediate recourse to the media or the dissemination of flyers in order to attain maximum public attention but chose to first have recourse to the public prosecution authorities with a view to initiating investigations (see, *by contrast, Balenovic v. Croatia,* (dec.), no. 28369/07, 30 September 2010). She sought assistance and advice of a lawyer who made a legal assessment of the facts as submitted by the applicant and formulated the criminal complaint accordingly. It was only following her ordinary dismissal on 19 January 2005 that she disseminated flyers in which she complained of the alleged avarice of her employer and made reference to her criminal complaint.

87. The foregoing considerations are sufficient to enable the Court to conclude that the applicant acted in good faith when submitting her criminal complaint against her employer.

(ε) The detriment to the employer

88. On the other hand, the Court also considers that the allegations underlying the applicant's criminal complaints, in particular those containing allegations of fraud, were certainly prejudicial to Vivante's business reputation and commercial interests.

89. It reiterates in this context that there is an interest in protecting the commercial success and viability of companies for the benefit of shareholders and employees, but also for the wider economic good (see *Steel and Morris v. the United Kingdom*, no. 68416/01, § 94, ECHR 2005-II). The Court finds it relevant to note in this context that in the case at hand the employer is a State-owned company providing, *inter alia*, services within the sector of institutional care for the elderly. While the Court accepts that State-owned companies also have an interest in commercial viability, it nevertheless points out that the protection of public confidence in the quality of the provision of vital public service by State-owned or administered companies is decisive for the functioning and economic good of the entire sector. For this reason the public shareholder itself has an interest in investigating and clarifying alleged deficiencies in this respect within the scope of an open public debate.

90. In the light of these considerations, the Court finds that the public interest in having information about shortcomings in the provision of institutional care for the elderly by a State-owned company is so important in a democratic society that it outweighs the interest in protecting the latter's business reputation and interests.

(ζ) The severity of the sanction

91. Finally, the Court notes that the heaviest sanction possible under labour law was imposed on the applicant. This sanction not only had negative repercussions on the applicant's career but it could also have a serious chilling effect on other employees of Vivantes and discourage them from reporting any shortcomings in institutional care. Moreover, in view of the media coverage of the applicant's case, the sanction could have a chilling effect not only on employees of Vivantes but also on other employees in the nursing service sector. This chilling effect works to the detriment of society as a whole and also has to be taken into consideration when assessing the proportionality of, and thus the justification for, the sanctions imposed on the applicant, who, as the Court has held above, was entitled to bring the matter at issue to the public's attention (see *Kudeshkina v. Russia*, no. 29492/05, § 99, 26 February 2009). This is particularly true in the area of care for the elderly, where the patients are frequently not capable of defending their own rights and where members of the nursing staff will be the first to become aware of unsatisfactory conditions in the care provided and are thus best placed to act in the public interest by alerting the employer or the public at large.

92. Accordingly, it is the Court's assessment that the applicant's dismissal without notice in the case at hand was disproportionately severe.

(iii) Conclusion

93. 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".

94. The Court therefore considers that in the present case the domestic courts failed to strike a fair balance between the need to protect the employer's reputation and rights on the one hand and the need to protect the applicant's right to freedom of expression on the other.

95. There has accordingly been a violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

96. The applicant further complained that the proceedings before the labour courts regarding her dismissal were unfair. In her opinion, the employer should have been obliged to prove that her criminal complaint had been frivolously based on untruthful allegations and thus constituted a reason for a dismissal without notice pursuant to Article 626 § 1 of the German Civil Code. The Court of Appeal had, however, shifted the burden of proof in this respect to the applicant. She relied on Article 6 § 1 of the Convention, which reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

97. The Court has repeatedly held that Article 6 does not lay down any rules on the admissibility of evidence or the way it should be assessed. These are therefore primarily matters for regulation by national law and the national courts, which enjoy a wide margin of appreciation (see *Klasen v. Germany*, no. 75204/01, § 43, 5 October 2006). It notes that in the present case, the applicant, who was represented by counsel throughout the proceedings, had the benefit of adversarial proceedings and was at all stages able to submit, and indeed submitted, the arguments she considered relevant to the case. There is nothing to establish that the evaluation of the case by the domestic courts was arbitrary.

98. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

99. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

100. The applicant claimed 38,498.56 euros (EUR) in respect of incurred pecuniary damage and the additional amount of EUR 112,135.19 for future pecuniary damage. As regards pecuniary damage already incurred, the amount of EUR 33,730.12 represented the loss of salary following her dismissal without notice on 9 February 2005. Furthermore, since contributions to the supplementary company pension scheme for incapacity to work (*Betriebsrente für eine volle Erwerbsminderung*) had been discontinued following her dismissal in February 2005, the applicant argued that she had lost a monthly supplementary company pension in the amount of EUR 194.63 to which she would have been entitled as of 1 June 2008. Consequently, at the time of submission of her just satisfaction claims mid-June 2010, the accrued damage resulting from the loss of such monthly benefits since 1 June 2008 amounted to EUR 4,768.44. She further claimed that she would have been entitled to such monthly benefits until payment of her regular old-age pension as of 30 September 2028, resulting in future pecuniary damage in the amount of EUR 47,861.27 until such date. She finally argued that her monthly old-age pension entitlement as of July 2028 would have amounted to EUR 334,76. Assuming an average life expectancy of 83 years the loss of her pension entitlement for a period of

16 years (2028 until 2044) thus represented future pecuniary damage in the amount of EUR 64,273.92.

The applicant further claimed EUR 10,000 in respect of non-pecuniary damage, claiming that the lengthy proceedings before the domestic courts had caused her psychological stress and impaired her health.

101. The Government contested these claims. As regards the applicant's claims in respect of pecuniary damage the Government argued that there was nothing to establish that this damage had been caused by the alleged breach of the Convention which originated in the applicant's dismissal without notice of 9 February 2005. The Government pointed out that by a letter dated 19 January 2005, that is, prior to the applicant's dismissal without notice on 9 February 2005, she had already been given notice on account of her repeated illness with effect as of 31 March 2005. For this reason, a loss of income resulting from the dismissal without notice could only be claimed for the period from 9 February until 31 March 2005, the date on which her ordinary dismissal had become effective. However, during this period the applicant had received sickness benefits (*Krankengeld*) followed by a transitional allowance (*Übergangsgeld*) and had not actually suffered any pecuniary damage. The Government further submitted that the applicant's calculation with respect to her claim for loss of company pension benefits did not demonstrate how that claim could have its origin in an event which post-dated the termination of her employment relationship by ordinary dismissal with effect as of 31 March 2005.

102. As regards non-pecuniary damage, the Government, while leaving the matter to the Court's discretion, considered the amount claimed by the applicant to be excessive.

103. The Court notes that it is not disputed between the parties that the applicant's employment relationship ended as a consequence of her ordinary dismissal with effect as of 31 March 2005. It further observes that the applicant herself had submitted that she received sickness benefits or a transitional allowance for the period between 9 February and 31 March 2005, which compensated for her salary. The Court therefore finds that it has not been established that the applicant suffered pecuniary damage during the period from 9 February 2005 until 31 March 2005. It further does not discern any causal link between the violation found and pecuniary damage alleged for the periods after termination of the employment relationship by means of the ordinary dismissal with effect as of 31 March 2005. The Court therefore rejects the applicant's claim for pecuniary damage.

104. On the other hand, it considers that the applicant must have sustained non-pecuniary damage. Ruling on an equitable basis, it awards her EUR 10,000 under that head.

B. Costs and expenses

105. The applicant also claimed EUR 6,100 for the costs and expenses incurred before the Court.

106. The Government argued that this sum considerably exceeded the amounts usually awarded by the Court in respect of costs and expenses.

107. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 5,000 in respect of costs and expenses for the proceedings before the Court.

C. Default interest

108. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 10 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 10,000 (ten thousand euros) plus any tax that may be chargeable in respect of non-pecuniary damage; and

(ii) EUR 5,000 plus any tax that may be chargeable to the applicant in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 21 July 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek Dean Spielmann
Registrar President

HEINISCH v. GERMANY JUDGMENT