



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF TROFIMCHUK v. UKRAINE

(Application no. 4241/03)

JUDGMENT

STRASBOURG

28 October 2010

FINAL

28/01/2011

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

In the case of Trofimchuk v. Ukraine,

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

Peer Lorenzen, *President*,
Karel Jungwiert,
Rait Maruste,
Mark Villiger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Ganna Yudkivska, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 5 October 2010,

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

PROCEDURE

1. The case originated in an application (no. 4241/03) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian national, Mrs Yekaterina Afanasyevna Trofimchuk (“the applicant”), on 5 January 2003.

2. The applicant was represented by Mr S. Zautkin, a lawyer practising in Rivne. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev, of the Ministry of Justice.

3. On 31 May 2005 the Court declared the application partly inadmissible and decided to communicate to the Government both the complaint under Article 6 § 1 of the Convention of unfairness of the proceedings to which the applicant was a party and the complaint of a violation of Article 11 of the Convention. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1944 and lives in Rivne.

5. In 1980 the applicant began working as a boiler engine operator at Rivneteplokomunenergo, a municipal enterprise responsible for maintaining central heating in Rivne. In December 1998 a number of employees of

Rivneteplokomunenergo, including the applicant, were transferred to Komunenergiya, a new municipal heating provider founded by the Rivne Town Administration. Subsequently, Rivneteplokomunenergo ceased its activities, was declared bankrupt and liquidated.

6. Before March 1999 the applicant's work performance was generally positive. On 12 February 1999 she successfully passed tests on work safety when operating boilers.

7. According to the applicant, she and many of her colleagues had not received the salary due to them for the period of August-December 1998 during which they had worked at Rivneteplokomunenergo. In February 1999 a number of the Komunenergiya employees met to discuss possible solutions to that problem. They agreed to form a trade union at Komunenergiya and to organise a picket. Subsequently, the applicant discontinued her membership of a trade union which had existed at Komunenergiya since 1998 and informed the management of the company that a new trade union had been established by thirty-four employees of Komunenergiya.

8. According to the Government, the employees of Komunenergiya did not form a new trade union.

9. On 22 February 1999 the applicant and two other persons, allegedly acting on behalf of the Komunenergiya staff, gave a written notice to the Mayor of Rivne which read as follows:

“We, employees of Komunenergiya, inform you that at 7.30 a.m. on 3 March 1999 [we] will picket the management of Komunenergiya, which is located at ... [for the reason of] non-payment of salary from August 1998 to February 1999.”

10. On an unspecified date the Rivne Town Administration included the information about the picket in its register.

11. On 27 February 1999 an inspection party comprising several colleagues of the applicant, including her direct supervisor and the deputy director of Komunenergiya, visited various boiler rooms, one of which the applicant worked in, in order to check compliance with safety instructions. In relation to the applicant's room, the inspectors noted that certain pieces of the boiler equipment were broken or otherwise not functioning, that such malfunctioning had not been recorded in a special log kept by boiler operators, that certain parts of boiler equipment were not in place, and that there were unauthorised objects on the boiler and in the room. They concluded that the applicant did not comply with the relevant safety instructions. On those grounds, the management issued a reprimand to the applicant on 2 March 1999.

12. On 3 March 1999 the applicant and some seventy other persons took part in a picket in front of Komunenergiya's main office. They expressed concerns that the management of Komunenergiya did not ensure timely payment of salaries and that the director had misappropriated company funds.

13. On that day, the applicant was required to be at work at 8 a.m. but came to work at 10 a.m. The applicant's direct supervisor drew up a report concerning the applicant's two hour absence from work, noting that because of her absence the applicant's colleague had had to work for two more hours after the latter's night shift.

14. On 9 March 1999 Komunenergiya lodged a claim against the applicant and K. with the Rivne Court, asking the court to rule that the picket on 3 March 1999, which the company termed a strike, had been unlawful. Komunenergiya submitted that the strike had lasted for three hours, that about seventy persons had taken part in it, and that only three persons, including the applicant, had informed it of their participation in the strike by way of a written notice dated 22 February 1999. It alleged that the persons taking part in the strike had not been authorised to represent the interests of staff and that the demands of the strikers had not been approved by the staff or provided to the management in advance. A copy of the notice of 22 February 1999 was joined to the claim.

15. The parties did not provide information concerning the outcome of Komunenergiya's claim.

16. On 10 March 1999 the applicant was dismissed from work for systematic breach of her duties of employment (Article 40 § 3 of the Labour Code).

17. On 29 March 1999 the applicant instituted proceedings in the Rivne Court seeking reinstatement in her position at Komunenergiya and recovery of salary arrears. She argued that her dismissal had been unlawful and unfounded, and that the real reason for it had been the labour dispute between Komunenergiya's management and staff concerning non-payment of salary arrears.

18. In the course of the court hearings concerning her case, the applicant stated that she had not been responsible for the issues discovered at her workplace on 27 February 1999, that she had been absent from work on 3 March 1999 because she had participated in the picket, of which the local authorities had been duly informed, and that prior to the picket she had arranged with her colleague O. that he would replace her on that day. The applicant acknowledged that she had not informed her direct supervisor of her absence in advance.

19. The representatives of Komunenergiya denied that there had been a dispute between the applicant and the company's management and reiterated that the applicant had been dismissed for systematic breach of her duties of employment, in particular because of her failure to ensure the safe working conditions in the boiler room on 27 February 1999 and because of her unauthorised absence from work on 3 March 1999.

20. On 21 June 2000 the court rejected the applicant's claim, finding that she had committed serious violations of work regulations during the short period of time she had worked at Komunenergiya. In particular, it noted

that, according to the statements of the applicant's colleagues obtained during the court hearings and the documents submitted by Komunenergiya, the applicant had been responsible for the safety-related issues discovered on 27 February 1999 and that she had been absent from work for two hours on 3 March 1999 without informing management and her direct supervisor in advance. On these grounds, the court concluded that the applicant had been lawfully dismissed pursuant to Article 40 § 3 of the Labour Code.

21. The court also held that the applicant's submissions concerning a labour dispute between the management and staff were unsubstantiated, as Komunenergiya was not responsible for the non-payment of salary arrears due to the applicant for the period before she left Rivneteplokomunenergo in December 1998.

22. The applicant appealed against the judgment of the first-instance court and contested its findings of fact. She also stated that the management had been informed in advance of her participation in the picket on 3 March 1999, as on 22 February 1999 she had submitted a written notice to the local authorities.

23. On 11 September 2000 the Rivne Regional Court quashed the judgment of 21 June 2000 and remitted the case for fresh consideration. The Regional Court disagreed that the applicant's case concerned systematic breaches of her employment duties.

24. On 10 July 2001 the Rivne Court dismissed the applicant's claim on the same grounds as those given in its judgment of 21 June 2000.

25. By decisions of 3 January and 13 August 2002, the Rivne Court of Appeal and the Supreme Court of Ukraine, respectively, dismissed the applicant's appeals as unsubstantiated and upheld the findings of the first-instance court.

26. In its decision of 3 January 2002, the Rivne Court of Appeal noted that the applicant's allegation that she had been dismissed as a result of her participation in the picket on 3 March 1999 was unsubstantiated.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution of Ukraine

27. The relevant provisions of the Constitution read as follows:

Article 44

“Employees have the right to strike in order to protect their economic and social interests.

The procedure for exercising the right to strike shall be established by law, taking into account the need to ensure national security, the protection of health, and the rights and freedoms of other persons.

No one shall be forced to participate or to not participate in a strike.

A strike may only be prohibited on the basis of law.”

B. Labour Code of 1971

28. The relevant extracts from the Labour Code read as follows:

Article 40

Termination of employment on [employer's] initiative

“A labour contract of indefinite duration ... may be discontinued by [an employer] in the following cases:

...

(3) systematic and unjustified failure by an employee to fulfil his duties under the labour contract or staff regulations, if there were earlier disciplinary or public sanctions imposed on him ...”

Article 151

Cancellation of a disciplinary sanction

“If no new disciplinary sanction is imposed on an employee within a year of the imposition of a [previous] disciplinary sanction, he is considered to have not been subjected to a disciplinary sanction ...”

C. Resolution of Labour Disputes (Procedure) Act of 3 March 1998

29. The relevant extracts from the Act read as follows:

Section 3

Parties to a collective labour dispute

“Parties to a collective labour dispute are:

at an occupational level – employees (certain categories of employees) ... or a trade union, or another organisation authorised by employees [to represent their interests] and the owner of an enterprise ... or [the employer's] representative.

...

A body authorised by employees to represent [their interests] shall be the only authorised representative of employees during the time such a dispute exists.”

Section 17

Strike

“A strike is a temporary, collective and voluntary cessation of work by employees (non-appearance at work, breach of labour duties) ... with the aim of resolution of a collective labour dispute.

Striking shall be an extreme means of resolution of a collective labour dispute (when all other possibilities [of such resolution] have been exhausted) if [the employer] refuses to allow the claims of employees or of a body authorised by them, or of a trade union, or of an association of trade unions or of a body authorised by them.”

Section 18

The right to strike

“Pursuant to Article 44 of the Constitution of Ukraine employees have the right to strike in order to protect their economic and social interests.

The procedure for exercising the right to strike is established by this Act.

A strike may be commenced if conciliatory procedures have not led to the settlement of a collective labour dispute or if [the employer] avoids conciliatory procedures or does not comply with an agreement reached in the course of the resolution of a collective labour dispute.”

Section 19

Decision to announce a strike

“A decision to announce a strike at an enterprise shall be taken by the majority of employees at a general assembly (conference) of employees or by two-thirds of delegates to the conference ... upon a request of a trade union or another association of employees, authorised, in accordance with section 3 of this Act, to represent the interests of employees. Minutes must be drawn up reflecting such a decision.

...

No one shall be forced to participate or to not participate in a strike.

A body (person) leading a strike shall inform [the employer] no later than seven days before the commencement of a strike, or no later than fifteen days if the decision to strike concerns a non-stop work process.

The owner or his representative shall inform, as soon as possible, suppliers, consumers, transport organisations, and other interested enterprises ... about the employees' decision to announce a strike.

A body (person) leading a strike shall determine [the place of the strike] in agreement with the owner or his representative.

If an assembly, meeting, or a picket takes place outside the enterprise, the body (person) leading the strike shall inform the local authority no later than three days before it takes place.”

Section 23

Decision declaring a strike unlawful

“An application by [the employer] seeking to have a strike declared unlawful shall be considered by a court.

[It] must be considered by a court ... within seven days.

A court's judgment declaring a strike unlawful obliges persons taking part in the strike to adopt a decision discontinuing or cancelling the announced strike, and [it obliges] employees [to return to work] no later than the next day after the body (person) leading the strike is served with a copy of the court's judgment.

Section 27

Guarantees for employees during a strike

“Employees' participation in a strike, with the exception of strikes declared unlawful by a court, shall not be considered as a violation of work discipline and may not serve as a ground for disciplinary action...”

Section 28

Consequences of employees' participation in a strike

“Organisation of, or participation in, a strike declared unlawful by a court shall constitute a violation of work discipline.

Employees shall not be remunerated for the time during which they take part in a strike.

The time during which an employee takes part in a strike declared unlawful by a court shall not be included in the [period of his] general and uninterrupted length of service.”

D. Resolution no. 9 of the Plenary Supreme Court of 6 November 1992 concerning courts' practice of consideration of labour disputes

30. The relevant extracts from the Resolution of the Plenary Supreme Court read as follows:

“23. An employee may be dismissed pursuant to Article 40 § 3 [of the Labour Code] for an offence committed at work only after disciplinary or public sanctions for unjustified breach of his duties under the labour contract or staff regulations have been imposed on him.

In such cases, only the disciplinary sanctions which are envisaged by law and are still in force ... (Article 151 [of the Labour Code]) shall be taken into account...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

31. The applicant complained that she had been dismissed from work because of her involvement in the creation of a new trade union at Komunenergiya and for her participation in the picket on 3 March 1999. She relied on Article 11 of the Convention, which reads as follows:

“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

A. Admissibility

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

B. Merits

33. The applicant submitted that there had been a violation of Article 11 of the Convention on account of her dismissal from work in March 1999.

34. The Government contended that there had been no interference with the applicant's right to freedom of assembly and association and that accordingly there had been no violation of Article 11 § 1 of the Convention. In particular, the Government maintained that the applicant had not belonged to a trade union. At the material time, there had only been one trade union at Komunenergiya and the applicant had withdrawn from that union in February 1999. The Government further submitted that the applicant had been dismissed for her repeated breach of her duties of

employment and not because of the alleged labour dispute between the management and employees of Komunenergiya. According to the Government, the picket on 3 March 1999 had not been related to the applicant's work at Komunenergiya. Rather, it concerned a dispute which she had had with Rivneteplokomunenergo. Despite the fact that it had been held in front of the Komunenergiya office, the picket had been actually directed against the management of Rivneteplokomunenergo.

35. The Court reiterates that Article 11 of the Convention protects the rights to freedom of peaceful assembly and to freedom of association with others from arbitrary, unlawful and unjustified restrictions. The term "restrictions" in paragraph 2 of Article 11 of the Convention is not limited to bans and refusals to authorise the exercise of Convention rights, but also embraces punitive measures taken after such rights have been exercised, including various disciplinary measures (see *Ezelin v. France*, 26 April 1991, § 39, Series A no. 202; *Vogt v. Germany*, 26 September 1995, § 65, Series A no. 323; *Maestri v. Italy* [GC], no. 39748/98, § 26, ECHR 2004-I; and *Sergey Kuznetsov v. Russia*, no. 10877/04, § 35, 23 October 2008).

36. The Court observes that the present case concerns the applicant's allegation that the disciplinary sanction (the dismissal) imposed on her in March 1999 constituted a restriction of her rights to freedom of peaceful assembly and to freedom of association with others, contrary to Article 11 of the Convention. The Court notes that the applicant's allegation is two-fold. Firstly, according to the applicant, she was victimised by her former employer for her involvement in the creation of a trade union. Secondly, she was disciplined as a result of her participation in a picket against the management of Komunenergiya on 3 March 1999.

37. As regards the first aspect of the applicant's complaint under Article 11 of the Convention, the Court notes that whether a new trade union was formed at Komunenergiya in February 1999 has remained unclear. Even assuming that such a trade union was formed, the case contains no evidence of the applicant's involvement either in its creation or its activities. On the whole, the Court considers that the applicant failed to demonstrate that she had been prevented by her former employer from forming or participating in a trade union or otherwise restricted in the exercise of the right to freedom of association (compare with *Young, James and Webster v. the United Kingdom*, 13 August 1981, Series A no. 44, and *Danilenkov and Others v. Russia*, no. 67336/01, ECHR 2009-... (extracts)).

38. Turning to the second aspect of the applicant's complaint under Article 11 of the Convention, the Court observes that the parties do not dispute that the applicant's absence from work on 3 March 1999, one of the grounds for her dismissal, was the direct result of her participation in the picket on 3 March 1999. Despite the Government's submissions to the contrary, the Court notes that the picket was directed against the management of Komunenergiya. The question of the extent of that

company's responsibility for the alleged non-payment of salary arrears is irrelevant for the examination of this part of the case.

39. The Court further notes that the applicant's participation in the picket constituted the exercise of the right to peaceful assembly and therefore fell within the scope of Article 11 of the Convention. Although she was not disciplined *de jure* for the exercise of this right, the Court considers that, having regard to the fact that the picket was directed against the management of her then employer and concerned work-related issues, divorcing the applicant's participation in the picket from its consequences, namely her two-hour absence from work, would be too formalistic and contrary to the principle of practical and effective application of the Convention (see, *mutatis mutandis*, *Christian Democratic People's Party v. Moldova* (no. 2), no. 25196/04, § 25, 2 February 2010). Accordingly, the Court holds that there was an interference with the applicant's right to freedom of peaceful assembly and that it must be determined whether the interference was justified.

40. In this context, the Court reiterates that an interference will constitute a breach of Article 11 unless it is "prescribed by law," pursues one or more legitimate aims under paragraph 2 and is "necessary in a democratic society" for the achievement of those aims (see *Sergey Kuznetsov*, cited above, § 37).

41. The Court observes that the applicant challenged the lawfulness of her dismissal before the domestic courts, arguing *inter alia* that she should not have been disciplined for her absence from work on 3 March 1999.

42. The courts dismissed the applicant's claims, finding that the dismissal was in accordance with the domestic labour law. Although the courts' findings concerning the applicant's above argument somewhat lacked precision and clarity, their position appears to be that the applicant's absence on 3 March 1999 had had no acceptable justification and thus constituted a violation of work discipline. The Court does not discern sufficient grounds to disagree with the courts' application of the relevant domestic law to the circumstances of the applicant's case.

43. The Court also notes that Ukrainian law provides for the right to strike, one of the means available to resolve labour disputes and which entails temporary cessation of work, and establishes the procedure in accordance with which this right is to be exercised. The procedure envisages certain guarantees to employees, including immunity from disciplinary action taken on the basis of participation in a lawful strike.

44. In the present case, the applicant engaged in a protest action against her employer which caused her to be absent from work for two hours. However, the applicant did not follow the procedure for a strike set out in Section 19 of the Resolution of Labour Disputes (Procedure) Act of 3 March 1998 (see paragraph 29 above) – nor did she argue that she had been prevented from doing so in any way. Moreover, the applicant did not

challenge the conformity of the procedure made available in domestic law to the requirements of Article 11 of the Convention.

45. In the light of the foregoing, the Court finds that the disciplinary sanction was lawfully imposed on the applicant and thus the interference was “prescribed by law” within the meaning of Article 11 § 2 of the Convention. The Court also considers that the interference pursued a “legitimate aim,” which was the protection of the rights of the applicant's former employer under domestic labour law.

46. The Court further observes that the notice given by the applicant to the local authorities on 22 February 1999 did not contain an indication of the planned duration of the picket, nor did it suggest that the applicant intended to strike or would otherwise be absent from work because of her participation in the picket. Due to the nature of the applicant's work responsibilities, her two-hour absence from work on 3 March 1999 and failure to give her direct supervisor advance notice of her absence resulted in serious disruption to workplace processes (see paragraphs 5 and 13 above). Even assuming that one of the applicant's colleagues agreed to replace her on the day, such action is not sufficient to demonstrate that the applicant took all necessary steps to ensure that she exercised her freedom of peaceful assembly in accordance with the due respect to the rights and interests of her employer.

47. In these circumstances, the Court finds that the disciplinary measure taken against the applicant was not disproportionate and thus that there has been no violation of Article 11 of the Convention.

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

48. The applicant complained of the unfairness of the proceedings concerning her dismissal and, in particular, challenged the domestic courts' assessment of the facts and alleged that they had disregarded her submissions that she was dismissed because of her active participation in the employees' labour dispute with the management of Komunenergiya. She invoked Article 6 § 1 of the Convention, which reads, in so far as relevant, as follows:

Article 6 § 1

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

49. The Government stated that the applicant had had a fair hearing of her case and that the final conclusions reached by the courts had been based on a correct assessment of the evidence before them.

50. The Court reiterates that the assessment of evidence is a matter for the domestic courts and that the Court shall not substitute its own view of

the facts for an assessment which has been reached in the course of domestic proceedings. Moreover, while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts (see *Dombo Beheer B.V. v. the Netherlands*, 27 October 1993, § 31, Series A no. 274).

51. Nevertheless, the Court must ascertain whether the proceedings, taken as a whole, were fair and whether the effects of domestic interpretation of facts and law were compatible with the Convention (see, for instance, *Platakou v. Greece*, no. 38460/97, § 37, ECHR 2001-I).

52. Turning to the circumstances of the present case, the Court notes that the applicant was dismissed from her position at Komunenergiya for systematic failure to fulfil her duties of employment. She challenged the lawfulness of her dismissal before the domestic courts, arguing in particular that the employer's decision had been unfounded and that she had been victimised for having opposed management in a labour dispute between staff and management.

53. The Court observes that in dealing with the applicant's case, the domestic courts heard a number of witnesses and examined various documents pertinent to both the disciplinary proceedings against her and the submissions of the parties. The applicant was given the possibility to comment on the evidence led and the submissions made by her former employer. In dismissing the applicant's claims, the courts gave reasons for their decisions which appear to be relevant and sufficient given the subject matter of the case.

54. Having regard to its findings under Article 11 of the Convention (see paragraphs 42-45 above), the Court discerns no appearance of unfairness or arbitrary decision making in the courts' refusal to examine the applicant's allegation of persecution by her employer in detail, as the courts clearly stated that it was wholly unsubstantiated. In this context, the Court reiterates that while Article 6 § 1 of the Convention obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument (see *García Ruiz v. Spain* [GC], no. 30544/96, § 26, ECHR 1999-I).

55. In the light of the foregoing, the Court finds that the proceedings in the applicant's case were, taken as a whole, fair and that this part of the application must therefore be rejected as manifestly ill-founded in accordance with Article 35 §§ 3 and 4 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 11 of the Convention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been no violation of Article 11 of the Convention.

Done in English, and notified in writing on 28 October 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President