



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

1959 · 50 · 2009

FIFTH SECTION

CASE OF NESTEROVA v. UKRAINE

(Application no. 10792/04)

JUDGMENT

STRASBOURG

28 May 2009

FINAL

28/08/2009

This judgment may be subject to editorial revision.

In the case of Nesterova v. Ukraine,

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

Peer Lorenzen, *President*,

Karel Jungwiert,

Renate Jaeger,

Mark Villiger,

Isabelle Berro-Lefèvre,

Zdravka Kalaydjieva, *judges*,

Stanislav Shevchuk, *ad hoc judge*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 5 May 2009,

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

PROCEDURE

1. The case originated in an application (no. 10792/04) 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, Ms Olena Pavlivna Nesterova (“the applicant”), on 21 February 2004.

2. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev.

3. On 30 April 2008 the President of the Fifth Section decided to give notice of the applicant’s complaint under Article 6 § 1 of the Convention of excessive length of the first set of proceedings to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 3).

THE FACTS**THE CIRCUMSTANCES OF THE CASE**

4. The applicant was born in 1950 and lives in Kyiv, Ukraine.

A. First set of proceedings

5. The applicant had worked at a joint stock company, V., since 1968. On 4 November 1996 she was dismissed.

1. Trial and appeal

6. On 29 November 1996 the applicant instituted proceedings in the Starokyivsky District Court of Kyiv against V., seeking reinstatement and payment of salary arrears still owed to her following her allegedly unlawful dismissal.

7. On 28 January 1998 the court rejected the applicant's claim as unsubstantiated.

8. On 18 March 1998 the Kyiv City Court (since June 2001 the Kyiv City Court of Appeal), noting the lower court's failure to examine the important pieces of evidence, quashed the judgment and remitted the case for fresh consideration.

9. Of the eleven hearings held between 29 November 1996 and 18 March 1998 two were adjourned due to the applicant's or her lawyer's failure to appear before the court; four hearings were adjourned due to the defendant's failure to appear before the court. Furthermore, on 19 May 1997 the defendant requested the court to schedule the next hearing after 1 August 1997 since its representative was on holiday; that request was granted and the next hearing was scheduled for 22 October 1997.

2. Retrial and appeal

10. In April 1998 the case was transferred to the Moskovsky District Court of Kyiv (since October 2001 the Golosiyisky District Court of Kyiv, "the District Court").

11. Two hearings scheduled for 4 and 25 June 1998 were adjourned at the applicant's requests as she was hiring a lawyer and the latter was subsequently engaged in other court proceedings.

12. On 12 January 1999 the applicant lodged an additional claim, seeking payment of salary arrears allegedly owed to her for 1992-96.

13. On an unspecified date the applicant requested the court to order a forensic technical examination and to exempt her from payment of its costs. On 20 April 1999 the District Court allowed the applicant's first-mentioned request, ordered the forensic technical examination and stayed the proceedings; apparently the court did not allow the applicant's request to exempt her from payment of the costs of the forensic examination. Subsequently the applicant requested the court to stay the forensic examination as she had appealed against the decision of 20 April 1999. It is not clear when the applicant's appeal was examined and what was the result thereof. The court resumed the proceedings on 10 August 1999.

14. At the end of September 1999 the applicant requested the District Court to order a new forensic examination and to order the Ministry of Justice of Ukraine to bear the costs. Following the court's refusal, the applicant requested the Ministry of Justice of Ukraine to grant money for the forensic examination at issue and requested the District Court to stay the

proceedings pending examination of her first-mentioned request by the Ministry. The proceedings resumed on 16 December 1999.

15. From 5 September 2000 to 8 January 2001 the proceedings were stayed at the applicant's request as she had requested the local prosecutor to institute criminal proceedings against the head of the defendant company.

16. On 14 and 28 January 2002 the applicant lodged additional claims, seeking to have the amount of her salary established and to be compensated for her allegedly impaired honour and dignity.

17. On 11 March 2002 the Golosiyisky District Court of Kyiv found against the applicant. The latter appealed.

18. From 29 May to 17 July 2002 the proceedings were stayed as the applicant's complaint was pending before the Kyiv City Department of Justice.

19. On 24 July 2002 the Kyiv City Court of Appeal quashed this judgment and remitted the case for a fresh consideration on the ground that the lower court had failed to examine all the applicant's claims.

20. Of the sixty hearings held between April 1998 and 24 July 2002 fifteen (including all hearings between 7 June and 8 October 2001) were adjourned due to the defendant's failure to appear before the court. Furthermore, from 17 July 1998 to 6 October 1998 no hearing took place as the defendant's representative was on holiday. Additionally to the above sixty hearings, eight scheduled hearings were cancelled because the judge was considering another case or the hearing was scheduled for a day which was subsequently identified as a holiday.

During this period the applicant challenged the judges in charge of her case at least five times and the case was transferred to other judges. She also challenged the court minutes several times (in particular, she successively challenged the court minutes of 25 February and 7 and 25 March 2002, but to no avail).

3. Second retrial and appeals

21. On 2 August 2002 the District Court took over the case.

22. On 23 April 2003 the applicant lodged an additional claim, seeking certain social payments from the defendant.

23. On 27 May 2003 the Golosiyisky District Court of Kyiv rejected the applicant's claim.

24. On 22 August 2003 the Kyiv City Court of Appeal upheld the judgment. The applicant appealed in cassation.

25. From 27 October 2003 to 31 March 2004 the courts determined whether the applicant's appeals in cassation were admissible. Eventually this matter was determined in favour of the applicant.

26. On 26 September 2005 the Supreme Court of Ukraine upheld the judgment of 27 May 2003.

27. Of the nineteen hearings held between 2 August 2002 and 26 September 2005 four were adjourned due to the defendant's failure to appear before the District Court. On nine occasions the applicant challenged the records of the court hearings but mostly to no avail.

28. In February 2007 the applicant requested the Supreme Court of Ukraine to review her case under the extraordinary review procedure. On 25 July 2007 the court rejected the applicant's request.

B. Second set of proceedings

29. Following her dismissal, on 17 July 1998 the applicant was excluded from the list of persons awaiting improvement of their living conditions, administered by the relevant municipal authority (companies which invest in the construction of apartments are permitted to include their employees on this list if certain conditions are fulfilled).

30. In August 2004 the applicant instituted proceedings in the Pechersky District Court of Kyiv against the Kyiv City State Administration, the Pecherska District State Administration of Kyiv and V., requesting the defendants to provide her with an apartment.

31. On 26 January 2005 the court rejected her claims. It found, in particular, that inclusion on the list was conditional on having a contract of employment with the particular companies and, as the applicant had been dismissed from V., she was no longer eligible to be on that list. According to the applicant, her representative, R., was not summoned and, despite of her request for an adjournment, the court hearing was held in her presence only.

32. On 1 June 2005 the Kyiv City Court of Appeal upheld this judgment. As regards the applicant's complaint about the court hearing in the absence of her representative, the court noted that the applicant had failed to submit to the first-instance court the power of attorney in respect of R. According to the applicant, she had submitted a copy of that document.

33. On 14 August 2007 the Donetsk Regional Court of Appeal, sitting as a court of cassation, rejected the applicant's appeal in cassation.

C. Third set of proceedings

34. On an unspecified date the applicant instituted another set of proceedings in the Pechersky District Court of Kyiv against V., seeking her reinstatement on the aforesaid list of persons. It appears from the materials submitted by the applicant that her application was unsuccessful. On 13 November 2006 the Supreme Court of Ukraine rejected the applicant's request for leave to appeal in cassation.

THE LAW

I. LENGTH OF THE FIRST SET OF PROCEEDINGS

35. The applicant complained that the length of the first set of proceedings had been incompatible with the “reasonable time” requirement laid down in Article 6 § 1 of the Convention, which reads as follows:

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

36. The period to be taken into consideration began only on 11 September 1997, when the recognition by Ukraine of the right of individual petition took effect. However, in assessing the reasonableness of the time that elapsed after that date, account must be taken of the state of proceedings at the time.

The period in question ended on 26 September 2005. The ensuing proceedings shall not be taken into account as the extraordinary review procedure is not a remedy within the meaning of Article 35 § 1 of the Convention (see *Kozak v. Ukraine* (dec.), no. 21291/02, 17 December 2002). The period in question thus lasted eight years and seventeen days at three levels of jurisdiction.

A. Admissibility

37. The Court notes that this complaint 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

38. The Government submitted that the applicant herself caused considerable delays in the proceedings at issue by challenging the judges and court minutes, failing to attend court hearings, requesting additional pieces of evidence or summoning additional witnesses, modifying her claims and so on. They also maintained that the conduct of the defendant was not imputable to the respondent State. In sum they concluded that the domestic judicial authorities were acting with due diligence in the present case.

39. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake

for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII). The Court reiterates that special diligence is necessary in employment disputes (see *Ruotolo v. Italy*, 27 February 1992, § 17, Series A no. 230-D).

40. Concerning the question of complexity of the present dispute, the Court observes that it concerned a number of employment issues raised by the applicant following her dismissal. In particular, the applicant sought reinstatement at work, establishment of her salary rate, payment of salary arrears and certain social payment allegedly owed to her, and compensation for her allegedly impaired honour and dignity (see paragraphs 6, 12, 16 and 22 above). Although the court was required to examine quite an extensive amount of documentary evidence and had to summon certain witnesses, the issues before the court were not complicated enough to cause an extensive prolongation of the consideration of the applicant's case. Therefore, the Court concludes that the subject matter of the litigation at issue could not be considered particularly complex.

41. The Court accepts the Government's argument that there were certain delays attributable to the applicant herself (see paragraphs 11, 13-15, 18, 20 *in fine* and 27 above). In total these delays protracted the impugned proceedings to one year and six months approximately. As to the applicant's numerous requests, the Court recalls that it is the role of the domestic courts to manage their proceedings so that they are expeditious and effective (see, for example, *Scordino v. Italy (no. 1)*, [GC], no. 36813/97, § 183, ECHR 2006-...).

42. The Court further observes that although from 27 October 2003 to 31 March 2004 the courts determined whether the applicant's appeals in cassation were admissible, this period of delay cannot be imputed to the applicant as eventually this matter was determined in her favour. Accordingly, it was the erroneous application of law by domestic courts which caused that delay.

43. As regards the Government's contention that they were not responsible for the delays caused by the defendant, the Court observes that it is for the domestic authorities to constrain the abusive and dilatory conduct of a party to civil proceedings. In fact the defendant's failure to attend court hearings on numerous occasions significantly protracted the proceedings at issue (see paragraphs 9, 20 and 27 above). Although the courts had at their disposal ample machinery to ensure the defendant's presence in the courtroom, there is no indication that they took any measures to sanction the defendant's failure to appear or to consider the case in its absence (see, *mutatis mutandis*, *Smirnova v. Ukraine*, no. 36655/02, §§ 53 and 69, 8 November 2005). Therefore, this cannot be considered as exonerating the respondent State.

44. In addition, the Court notes that certain delays were caused due to the judge's failure to schedule properly the hearings in the case at hand (see

paragraph 20 above). The Court further considers that the protracted length of the proceedings was also caused by the repeated re-examination of the case (see paragraphs 8 and 19 above). The Court observes that, since remittal is usually ordered because of errors committed by lower courts, the repetition of such orders within one set of proceedings discloses a serious deficiency in the judicial system (see *Wierciszewska v. Poland*, no. 41431/98, § 46, 25 November 2003).

45. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see *Frydlender*, cited above, and *Efimenko v. Ukraine*, no. 55870/00, § 58, 18 July 2006).

46. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the “reasonable time” requirement.

There has accordingly been a breach of Article 6 § 1.

II. OTHER ALLEGED VIOLATIONS

47. The applicant further challenged the refusal to review her case in the first set of proceedings. She also complained that the first-instance court had failed to notify her representative of the date of the hearing before it in the second set of proceedings, and that she had not had access to the Supreme Court as a result of its refusal of 13 November 2006 to hear her appeal in cassation (third set of proceedings).

In her letter of 15 December 2007 the applicant, referring to Articles 6 § 1 and 13 of the Convention, challenged the outcome of the first set of proceedings. She also contended that the courts had not been impartial when examining her case in those proceedings.

48. Having carefully considered the applicant’s submissions in the light of all the material in its possession, the Court finds that, in so far as the matters complained of are within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

49. It follows that this part of the application must be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

50. 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

51. The applicant claimed 315,317.64 euros (EUR) in respect of pecuniary damage (the price of an apartment and the amount of salary arrears allegedly owed to her) and EUR 40,000 in respect of non-pecuniary damage.

52. The Government contested these claims.

53. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it considers that the applicant must have sustained non-pecuniary damage. Ruling on an equitable basis, it awards her EUR 800 under that head.

B. Costs and expenses

54. The applicant also claimed EUR 29.20 for costs and expenses incurred before the domestic courts and the Court. In support she provided the copies of relevant postal vouchers amounting in total to 111.84 Ukrainian hryvnias (UAH)¹ and a bill in the amount of UAH 80 issued by her lawyer in 1997.

55. The Government left the matter to the Court’s discretion.

56. 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 information in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the sum of EUR 10 for the proceedings before the Court.

C. Default interest

57. 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.

¹ About EUR 11.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 6 § 1 of the Convention concerning the excessive length of the first set of proceedings admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 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, EUR 800 (eight hundred euros) in respect of non-pecuniary damage and EUR 10 (ten euros) in respect of costs and expenses, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
 - (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 28 May 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President