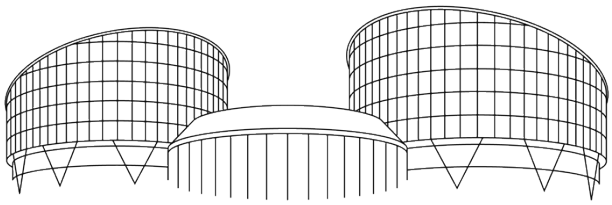

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 28369/07
by Vesna BALENOVIĆ
against Croatia

The European Court of Human Rights (First Section), sitting on 30 September 2010 as a Chamber composed of:

Christos Rozakis, *President,*
Nina Vajić,
Anatoly Kovler,
Elisabeth Steiner,
Khanlar Hajiyev,
Giorgio Malinverni,
George Nicolaou, *judges,*

and André Wampach, *Deputy Section Registrar,*

Having regard to the above application lodged on 9 March 2007,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mrs Vesna Balenović, who is of dual Croatian and Slovenian nationality, was born in 1954 and lives in Zagreb. The Croatian Government ("the Government") were represented by their Agent, Mrs Š. Stažnik. The Government of Slovenia, having been informed of their

right to intervene (Article 36 § 1 of the Convention and Rule 44 § 2 (a) of the Rules of Court), did not avail themselves of this right.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

The applicant had been working for the joint-stock company INA – Industrija nafte d.d. (hereinafter "INA" or "the company") from 17 June 1983 until 18 April 2001, when she was dismissed. INA was founded in 1963 and is the national oil company of Croatia. Until 17 July 2003 the State was its sole stockholder. At present 47% of INA's stocks are owned by the Hungarian oil and gas company MOL, 44% by the Republic of Croatia (represented by the Croatian Government) and 8% by various institutional and private investors.

1. The applicant's employment dispute and her criminal complaint

(a) The events leading to the applicant's dismissal

On 1 January 2001 the applicant was promoted and assigned to the job of project manager in the office of Ž.V., a member of INA's management board and its executive director for oil refining and trade.

In the course of her work the applicant analysed issues relating to losses of petrol during transport from refineries to petrol stations. She came to the conclusion that in 2000 the value of petrol lost during transport was 25,872,208.97 Croatian kunas (HRK), of which only HRK 5,056,818.86 had been compensated by the hauliers. Her findings suggested that the relevant persons in INA had shown considerable laxity as regards claiming compensation for the remaining losses. On the basis of her findings, the applicant prepared a report entitled "Road Haulage Claims during 2000 in the Logistics Sector" (*Reklamacije u magistralnom transportu u toku 2000. godine u Službi logistike*).

On 19 January 2001 the applicant informed her immediate superior Ž.V. of her findings and gave him a copy of the above-mentioned report.

On 20 January 2001 INA issued a public call for tenders for haulage services by publishing in daily newspapers an "Invitation for Bids for selection of the most competitive Bidders for annual road transport of petroleum derivates by tank trucks."

On 22 January 2001 the applicant sent a letter to INA's general director, T.D., and asked for a meeting. She indicated that she would like to discuss issues relating to petrol losses during transport and attached a copy of her above-mentioned report. According to the Government, T.D. had prepared a report for the supervisory board on the losses incurred during transport and as early as 23 January 2001 the supervisory board had decided that all

unjustified losses should be covered by a unilateral set-off. The set-off had taken place and the losses had been covered by summer 2001.

Since the applicant received no reply to her letter of 22 January 2001, on 29 January 2001 she sent a letter to the chairman of INA's supervisory board, S.L. She met him on 8 February 2001 and discussed the issues raised in her letter to T.D. The applicant also asked S.L. to revoke the public call for tenders of 20 January 2001 for external haulage services. She suggested that, instead of outsourcing haulage services, INA should have developed its own. Given that, according to the company's balance sheet in 2000, INA had paid HRK 149,105,944.37 to various hauliers, the applicant calculated that the company could take out a loan and buy or lease 232 new vehicles – a number equal to the number of vehicles used by the outside hauliers – and repay the loan in two years. According to the applicant, S.L. considered her findings regarding the petrol losses valid but refused to do anything to revoke the above-mentioned public call for tenders. According to the Government, S.L. copied the documents received from the applicant and gave them to internal control to investigate.

On 9 February 2001 the applicant again wrote to S.L. She sent him a copy of her report concerning the petrol lost during transport and again asked him to revoke the public call for tenders of 20 January 2001.

On 12 February 2001 the applicant wrote another letter to the general director T.D. Adducing the same reasons as in her letter to S.L. of 9 February 2001, she invited him to revoke the above-mentioned public call for tenders of 20 January 2001 for external haulage services. The applicant also referred to her previous letter of 22 January 2001, which had remained unanswered, and the issues raised therein. She again asked for a meeting.

On 13 February 2001 the applicant submitted her own bid in response to the public call for tenders for external haulage services. In so doing she asked the Commission for Public Tenders to change the business strategy of hiring external haulage companies and to accept her idea of developing INA's own vehicle fleet.

On 3 April 2001 the daily newspaper *Slobodna Dalmacija* published an article entitled "[S.L.] covers up a crime within INA worth 40 million [German] marks" (*[S.L.] prešućuje kriminal u Ini težak 40 milijuna maraka*). The article suggested that INA should build up its own vehicle fleet instead of engaging outside hauliers. It was submitted that, according to the company's balance sheet, in 2000 INA had paid HRK 149,105,944.37 to various haulage companies and argued that instead of doing so it could have taken out a loan and bought or leased 232 road tankers. After repaying the loan in two years, over the following seven years INA would, by using its own vehicle fleet, have been earning 70,000,000 German marks (DEM) per year. In addition, this would have created 500 new jobs and resolved the problem of INA's redundant employees. The article also relied on the applicant's findings concerning the petrol lost during transport between

refineries and petrol stations. It mentioned that the value of the lost petrol was HRK 25,872,208.97, of which only HRK 5,056,818.86 had been reclaimed from the hauliers, and stated that INA's management had done nothing or very little in order to obtain compensation for the remaining losses. The article also stated that T.D. and S.L. had turned a deaf ear to the warning by the applicant about the company's detrimental business policy. Finally, the article stated that there would be further articles on the subject.

On the same page an article entitled "The problems started when I discovered manipulations" (*Problemi su počeli kad sam otkrila manipulacije*) was published, containing an interview with the applicant in which she raised her concerns about INA's business policy. The relevant part of the article reads as follows:

"**The problems started when I discovered manipulations ...**

I was amazed and surprised when I found out that, in spite of the information on accumulated losses, INA had published a new call for tenders for hiring external hauliers...

... Mrs Balenović spent months systematically compiling data on haulage costs within INA. What she discovered seemed to her of such enormity and significance that she attempted to discuss it with the leading figure of the national oil company, [T.D.]. When she realised that within INA nobody understood what she was saying, she sought the assistance of the Deputy Prime Minister and chairman of INA's supervisory board, [S.L.] She also turned to [I.D.], adviser to the President of the Republic, who said that her discovery was chilling. Her colleagues in the tenders commission for the selection of external companies for road haulage said that she had discovered some amazing things, but they would have to proceed as ordered by the bosses. Thus, Mrs Balenović found herself transferred from an area about which she knew a great deal, or even everything, to a fine-sounding job in another sector, in which she had no experience.

Why did you decide to go public with the details of the INA's call for tenders for hiring external haulage companies?

I have been working in INA's transport sector for 19 years and understand all the problems in that part of the company. During all these years, I have been monitoring and analysing business results in the field of transport. I felt terrible when I realised that INA had the production and the market, but no haulage to link these two sectors. Since all analyses show a trend of generating loss, while, at the same time, some simulations of potential business activities show that it would be much better to run business in a different way, that is, with our own vehicle fleet, I tried to demonstrate this to the company's management. Since those people did not show the slightest interest in what I was saying, and even started ignoring or marginalising me, I decided to make the only move possible which would ensure that what I was advocating would not remain at the bottom of someone's drawer.

The best option

What was the exact reaction of your superiors when you tried to acquaint them with the results of your analyses and ideas?

I showed the first indicators to [Ž.V.], a member of the management board and Executive Director for Refining and Trade. As long as my communications were

verbal, reactions were positive. I would even say I was encouraged to carry on with what I had started. That was in August last year. [Ž.V.] then said that he would not allow another call for tenders for hiring external haulage contractors to be issued, but would rather advocate development of [INA's] own fleet. Everything I told him, I visually illustrated to him as well. That means I showed him how many road tankers INA could buy for the sum paid annually to haulage contractors. It was about 100 completely new road tankers, fitted out to the most stringent ecological standards. Unfortunately, all this remained at the verbal level, and the idea of purchasing our own fleet was not developed further. Instead of issuing a call for tenders for the purchase of road tankers, on 20 January 2001 another call for tenders was published for hiring external haulage contractors for road haulage.

What did you do when you saw that the call for tenders which [Ž.V.] had said would not be published was in fact published?

I was amazed and surprised. I had at least expected that someone would invite me for a discussion, so that we could again examine together which option would be the best and the most economical for the company.

Why did they change from being enthusiastic to ignoring you?

My proposals were obviously sound and indicated that normal costs had mostly been exceeded during the time of the former management. The problems began when I insisted that my ideas should also be implemented in the areas for which the present management bears the responsibility. I showed them clearly that we had practically commenced tilting at windmills, since in some sectors we were analysing excessive costs in the past, which were still being generated today to a greater extent.

Purchase of road tankers

Is it not unusual for an employee of INA to submit a bid in response to a public call for tenders for hiring external haulage contractors, especially because you do not have the required road tankers available?

Of course I did not have that number of road tankers. I submitted the bid solely to demonstrate that INA could itself acquire the required number of vehicles. The deadline for repayment of loans to business banks would not have been longer than three years. Since it was stated in the call for tenders that vehicles up to ten years old were required, it was clear that in the subsequent seven years, after repayment of the loan, the road tankers would only earn money. We are talking about 232 tankers. If you parked them one behind the other, the line would be three kilometres long. I waited for fifty minutes, until the call for tenders closed, and then, seeing that it was not going to be revoked, as I had asked the chairman of INA's management board [T.D.] and the chairman of the supervisory board and the Deputy Prime Minister of Croatia, S.L., to do, I decided to submit a bid which would indicate the detrimental effects of hiring external haulage contractors for road haulage.

How did the Deputy Prime Minister of Croatia, S.L., react when you showed him your analyses?

He said that it seemed that I had collected the data very meticulously and that they were frightening. Then I asked him what he intended to do about the public call for tenders, and he answered that it would have to go ahead. What he thought about the work I had done, the results of which I had shown him, is best illustrated by the fact that he drew my attention to a job advertisement which the Government had published for, as was written there, 'educated, capable and ambitious people'. He emphasised

that my business reports were a good example of how economic crimes could be detected."

On 4 April 2001 *Slobodna Dalmacija* published another article, entitled "INA: 25 million kunas evaporated between refineries and petrol stations" (*INA: Od rafinerije do benzinskih crpki isparilo 25 milijuna kuna*). Alongside it a smaller article was published entitled: "500 new jobs lost – What Vesna Balenović proposed in her analysis, but INA did not accept" (*Propalo 500 novih radnih mjesta – Što je u svojoj analizi predložila Vesna Balenović, a INA nije prihvatila*). Both articles presented, *inter alia*, the contents of the letters the applicant had sent to T.D. and S.L. about the need and justification for developing INA's own vehicle fleet.

On 5 and 6 April 2001 *Slobodna Dalmacija* continued to write about INA's business policy in articles entitled "INA loses 348 thousand kunas daily" (*INA dnevno gubi 348 tisuća kuna*) and "INA loses money on hauliers" (*INA gubi novac na prijevoznicima*). On 6 April 2001 the reaction of the management of INA was also published under the headline: "Lower costs with others' road tankers" (*Manji troškovi s tuđim cisternama*), which stated that the use of external hauliers was the usual practice in the oil industry, and that an independent auditing company, Arthur Andersen, had established that this option was cheaper for INA.

In an article entitled: "Private hauliers are earning 20 thousand (German) marks per month – Vesna Balenović presents new evidence of fraud within INA" (*Privatni prijevoznici zarađuju mjesečno 20 tisuća maraka – Vesna Balenović iznijela nove dokaze o malverzacijama u INI*), published in *Slobodna Dalmacija* on 7 April 2001, the applicant openly accused INA's management for the first time of corruption and nepotism. In particular, she submitted that members of the management had had a personal interest in maintaining the current state of affairs, in which haulage services were being outsourced to the detriment of the company, because they were either receiving a commission from the hauliers or were personally involved in providing haulage services through their relatives. The article reads as follows:

"VESNA BALENOVIĆ PRESENTS NEW EVIDENCE OF FRAUD WITHIN INA

Private hauliers are earning 20 thousand [German] marks per month

Individuals in INA's management structure are involved in a private business of transporting oil, and so are some high-ranking State officials. INA has already lost more than 25 million kunas through various machinations

'Private hauliers providing services to transport oil derivatives for INA are in collusion with INA's management, and therefore it suits all of them that this kind of public call for tenders, which has now been issued, goes ahead and is implemented', Vesna Balenović, INA's expert for economic affairs, told journalists on Friday. Balenović's claims concerning INA's economically unsound decision to hire private hauliers instead of acquiring their own road tankers to transport fuel have been published during the past few days in a series of articles in this newspaper.

Balenović remains firmly of the opinion that private hauliers are paying the management hefty fees for their part in transporting derivatives for INA, claiming that a single public call for tenders 'brings in ten million marks in such fees'.

Balenović goes even further in her accusations, claiming that some individuals in INA's management structure are involved in a private business of transporting oil, and she has even gone so far as to state that some high-ranking State officials were also involved.

'This does not come as a surprise if I tell you that a private haulier, in order to cover the complete costs of transporting derivatives, which include all road tankers' maintenance costs, the driver's salary and other expenses, spends around 65,907 kunas, while his net profit is between 20 and 25 thousand marks a month', claims Balenović, backing up her claims with a large number of documents.

'A private haulier working for a large global oil company like Shell will make enough money to purchase a new road tanker in about five years, while our private hauliers transporting oil for INA manage to do the same in a year. From this it is quite clear that INA is paying its hauliers too much, and that large amounts of money are flowing', said Balenović, backing up her words by documents from which it can clearly be seen that during 2000 INA paid private hauliers around 153 million kunas.

Balenović suggests that if INA decided to transport derivatives using its own road tankers, along with keeping part of the profit which private hauliers are now putting in their pockets, the company would be able to use loans to purchase 232 completely new, high-quality road tankers, and pay them off within two years.

She claims that a notorious theft of fuel is also going on within INA. The managers and transport organisers, in collusion with private hauliers, are holding back [the enforcement of] claims for losses during transport, so that after three years, when the statutory limitation period elapses, hauliers can not longer be liable for them.

'Through such machinations, INA has already permanently lost more than 25 million kunas', said Balenović. She then produced a series of documents which, according to her words, prove that fuel theft is also being carried out during transport by INA's own road tankers."

Lastly, on 11 April 2001 *Slobodna Dalmacija* published an article entitled: "Private hauliers damaged INA to the tune of twenty million kunas" (*Privatni prijevoznici oštetili su Inu za dvadeset milijuna kuna*) in which the business policy of INA was again called into question, as was the objectivity of the findings of the auditing company Arthur Andersen.

(b) The applicant's dismissal and the ensuing civil proceedings

On 18 April 2001 INA summarily dismissed (*izvanredni otkaz ugovora o radu*) the applicant from her job on account of her statements in the press. The relevant part of the decision reads as follows:

"[It has been] established that Vesna Balenović harmed the business reputation of INA by her unauthorised statements in the daily newspaper *Slobodna Dalmacija* on 3, 4, 5, 6, 7 and 11 April 2001 in which she came up with a series of inexpert analyses of the company's business policy and accusations against INA's ... management, and presented the manner in which INA runs its business in an extremely negative light.

Apart from the above, ... she made available to the public information on the course and content of preliminary negotiations on business cooperation, calculations of costs related to transactions involving [certain] goods and procurement of [certain] services through a public call for tenders, data on financial transactions and financial indicators, and data whose disclosure ... may be detrimental to the business interests of INA.

It was further established that Vesna Balenović did not obtain authorisation to take the documents out of INA's business premises or to convey them to other persons or present them in the media as she did.

It follows from the foregoing that Vesna Balenović, by acting in the manner described above, did not observe INA's [internal regulations] on business correspondence of 1 September 1998 or the [internal regulations] on business secrets of 27 February 1997, and thereby committed particularly serious breaches of the employment-related duties laid down in Rule 31 of [INA's internal employment regulations] (*Pravilnik o radu*):

- non-performance of employment-related duties;

- non-observance of instructions, decisions and other acts of the employer;

- non-observance of the law, other regulations and the collective agreement;

- disclosure of a business secret.

...

Given that because of the [above-] mentioned particularly serious breach of employment-related duties, the continuation of the employment relationship is no longer possible, a decision has been made as stated in the operative provisions."

On 2 May 2001 the applicant lodged a request for the protection of her employment-related rights (*zahtjev za zaštitu prava*) in respect of the decision to dismiss her. On 14 May 2001 INA dismissed the applicant's request.

On 23 May 2001 the applicant brought a civil action against INA in the Zagreb Municipal Court (*Općinski sud u Zagrebu*) challenging her dismissal. She sought reinstatement and salary arrears.

On 10 December 2002 the court delivered a judgment dismissing the applicant's action. The relevant part of that judgment reads as follows:

"... [T]he plaintiff considers that the dismissal was unlawful [*inter alia*] because:

- ...

- [she did not make the statements in the media] as the respondent's representative but as a citizen employed in a State-owned commercial company exercising her civil right and [discharging her civic] duty to protect, by appropriate statements in public, State property for the benefit of all the employees of the respondent and all Croatian citizens ...

...

In the opinion of this court, irrespective of whether the plaintiff disclosed a business secret or financial or other information which does not represent a business secret, she acted contrary to the interests of the employer ..., regardless of the employer's ownership structure and the accuracy of the published information, in that she made

extremely negative statements in the media, as a result of which she primarily harmed the reputation of the employer.

By making public statements in this way, the plaintiff acted contrary to the [internal regulations] on business correspondence in INA ..., Rule 7 of which provides that the authority to conduct business communications and correspondence and provide information to the media lies exclusively with the general director and the director of the sector of promotional activities ..., and Rule 10 of which provides that non-observance constitutes a breach of the employee's duty, with the resultant consequences. Each of the above-mentioned breaches is, in the opinion of this court, [in itself] a sufficient reason allowing the respondent to lawfully dismiss the plaintiff ... because [she] committed particularly serious breaches of employment-related duties, as a result of which, taking into account all the circumstances and the interests of both parties, the continuation of the employment relationship is no longer possible.

It is to be noted that this court cannot find a 'civic duty' in, or deriving from, any existing legal provision, apart from the Criminal Procedure Act, which provides that the plaintiff, as a citizen, must file a criminal complaint against the perpetrator if she considers that a criminal offence has been committed. The civic duty is thereby discharged and the competent State authorities then proceed with the investigation of the criminal offence and identification of the perpetrators. It is also to be noted that the Data Protection Act, in particular section 25, provides that revealing a business secret ... in a criminal complaint or when reporting an administrative offence to the competent authority or to the supervisory authority in the exercise of one's own employment-related rights – but not to the public – is not to be treated as disclosure of a business secret."

On 11 November 2003 the Zagreb County Court (*Županijski sud u Zagrebu*) dismissed an appeal by the applicant and upheld the judgment delivered at first instance. In particular, the County Court held that the relevant provisions of the Labour Act protected employees from dismissal only in cases where they turned to the State authorities with a view to enforcing their rights or reporting a suspicion of corruption, but not in cases where they sought to do so through the media. The relevant part of the County Court's judgment reads as follows:

"[The first-instance court] established that the plaintiff, in her public statements in the daily newspaper *Slobodna Dalmacija* on 3, 4, 5, 6, 7 and 11 April 2001, expressed a whole series of negative comments and serious but flippantly made allegations about the business activities and management of the respondent, and in doing so acted contrary to the interests of her employer, and jeopardised and harmed the business reputation of the respondent.

...

Here it has to be mentioned that the first-instance court did not examine whether the plaintiff's comments were made competently [i.e. expertly], because that is outside the scope of this labour dispute.

Those are questions relating to how a company runs its business, a matter within the exclusive competence of the management board, whereas the supervisory role is exercised by the supervisory board, and not an individual employee.

In this connection it has to be noted that under section 108(2) of the Labour Act, recourse by an employee to the [competent] executive authorities does not constitute a justified reason for [his or her] dismissal.

... [U]nder section 108(3), recourse by an employee to the competent State authorities on account of a reasonable suspicion of corruption, or the filing by an employee of a criminal complaint in good faith on the grounds of that suspicion, does not constitute a justified reason for dismissal.

... [I]t follows that the law protects an employee only when applying to the competent State authorities, and not in respect of the media ...

Hence, if the plaintiff wanted to inform the public of the existence of possible irregularities and illegalities in the respondent's operations, she could have done so by applying to the competent State authorities, which would then, pursuant to section 5 of the Media Act, be bound to make that information available to journalists...

...

Therefore, the first-instance court correctly established that the plaintiff's unauthorised statements in the press constituted ... an important fact justifying [her dismissal].

Lastly, the plaintiff also made publicly available various financial data, data concerning the course and content of preliminary negotiations on business cooperation etc., which are mentioned in the published articles, which she was not authorised to do, and in doing so seriously breached her employment-related duties within the meaning of Rule 31 of the respondent's [internal employment regulations]."

On 24 May 2005 the Supreme Court (*Vrhovni sud Republike Hrvatske*) dismissed a subsequent appeal by the applicant on points of law (*revizija*). The relevant part of the Supreme Court's judgment reads as follows:

"In the contested decision on summary dismissal of the plaintiff, ..., the respondent, as the employer, refers, as the justified reason for dismissal, to the statements by the plaintiff in the daily newspaper *Slobodna Dalmacija* on 3, 4, 5, 6, 7 and 11 April 2001.

It was established in the proceedings that in these statements the plaintiff made:

- extremely negative comments about the respondent's business activities and the management of resources,

- allegations of conduct such as manipulations and machinations in the respondent's business affairs, as well as the covering up of crime on the part of the respondent's administration and management.

The lower-instance courts found that this kind of behaviour on the part of the plaintiff constituted a justified reason for dismissal within the meaning of section 107, paragraph 1, of the Labour Act.

...

In this case, answering the following question of principle is of decisive importance: What are the repercussions of the public statements of an employee, in which extremely negative comments about the business activities and management of resources of an employer were made, both for the employment contract and for the

employment relationship between the employee and the employer? And also: What is the significance of the plaintiff's public statements in the present case?

It should be noted that, in principle, public statements of this kind by an employee may have repercussions for the employment relationship, as a particularly important fact, as a result of which, while taking into account all the circumstances and interests of both parties, the continuation of employment is not possible.

In this particular case, the aforementioned statements by the plaintiff evidently damaged the reputation of the respondent, since an employer whose leadership structures tolerate and encourage criminal activities certainly cannot have a good reputation and be trusted in the business world. Therefore, this kind of behaviour on the part of the plaintiff has significant repercussions for the employment relationship between the parties and gives the employer a justified reason for termination of the employment contract, within the meaning of section 107(1) of the Labour Act. This precisely, having regard to the given circumstances, constitutes a particularly important fact, as a result of which the continuation of employment is not possible.

... In the present case, the depiction of the employer's business activities in an extremely negative light in the media by the employee constitutes a particularly important fact of this kind, which gives the employer a justified reason for termination of the employment contract.

The plaintiff's reliance on her 'civic duty' is unfounded. In this regard the assessment of the second-instance court to the effect that the plaintiff could realise her 'intention to prevent damage and protect the property of the respondent' only by turning to, and lodging a complaint with, the competent State authorities, which would have resulted in that information being available to the press and other media – and could not have served as a reason for dismissal – is correct."

The applicant then lodged a constitutional complaint against the Supreme Court's judgment, alleging infringements of her constitutional rights to equality, equality before the law, work and freedom of expression.

On 18 October 2006 the Constitutional Court (*Ustavni sud Republike Hrvatske*) dismissed the applicant's constitutional complaint. It served its decision on her representative on 6 November 2006. Replying to the applicant's argument that she had been dismissed despite the fact that she had merely been discharging her statutory duty to report criminal offences, the court noted that the applicant had filed her criminal complaint (see below) only after she had made the statements in question to the media. It further held:

"As regards the complainant's criticism directed against the part of the first-instance judgment referring to the notion of a 'civic duty', the Constitutional Court points out that the part of the reasoning in which the first-instance court notes that 'this court cannot find a civic duty in, or deriving from, any existing legal provision, apart from the Criminal Procedure Act ...' is [rather] unfortunately worded. This does not, however, affect the validity of that court's legal view regarding the 'civic duty' of the complainant as an employee, according to which the complainant – if she considered that her employer had committed a criminal offence – should, as a citizen, have filed a criminal complaint against the perpetrator, whereupon the competent State authorities would have proceeded to investigate the criminal offence and identify the perpetrators.

...

The Constitutional Court notes that the complainant justifies her conduct towards the employer (that is, her statements in the media), for which the employer dismissed her, by claiming that 'she expressed her personal opinions primarily as a citizen', and as an employee in the part where she objected to the 'appropriation of State property'.

The Constitutional Court notes in this connection that a breach of an employee's duties towards an employer cannot be justified by the right to express a personal opinion in the manner presented by the complainant in her constitutional complaint."

(c) Proceedings following the applicant's criminal complaint

The applicant submitted that, before making her statements in the media, in the period between 8 and 14 February 2001 she had reported the irregularities she had noticed to the Zagreb police authorities, in particular to a certain Inspector J.P.

On 9 May 2001 the applicant filed a criminal complaint with the Zagreb Municipal State Attorney's Office (*Općinsko državno odvjetništvo u Zagrebu*) against several INA executives. In particular, the applicant accused the chairman of the supervisory board, S.L., the chairman of the management board (that is, the company's general director), T.D., members of the management board Ž.V. and M.V.U., the director of wholesale trade and logistics, M.B., and the director and assistant director of retail trade, D.P. and S.M., of several criminal offences such as business misfeasance, abuse of authority in business operations and conclusion of a prejudicial contract. In doing so she repeated, in substance, her criticism concerning INA's business policy in the field of haulage raised in her previous statements to the press.

On 22 September 2004 the State Attorney's Office dismissed the applicant's criminal complaint. As to the applicant's accusations that outsourcing haulage services instead of developing its own vehicle fleet was detrimental to the company and amounted to a criminal offence, the State Attorney replied that it was for INA's management to decide which business policy to adopt and found no elements of criminal liability in the existing policy, adding that the applicant's allegations simply represented her own views concerning INA's business strategy. As regards the applicant's claims concerning losses of petrol during transport from refineries to petrol stations and the alleged negligence in claiming compensation for those losses from the hauliers, the State Attorney found that they had occurred in the period before July 2000, when the director of wholesale trade and logistics had been Mr D.K. After the accused M.B. had become the director of that sector the situation had improved significantly. The relevant part of the State Attorney's decision reads as follows:

"... as regards the reported individual [M.B.], who became Director of the Logistics Sector on 21 July 2000, it was established that during his term of office, INA's claims against hauliers for losses [in transport] had been settled through a set-off with freight, that is to say that the majority of claims from the previous period were successfully

settled by a mutual set-off, while the amounts which were not settled in that way were subject to default interest rates. This is confirmed by the report of the Sector for Internal Audit and Control, and by other documentation collected, from which it follows that the problems concerning recovery of claims for losses [during transport] had been identified as early as 1997, although these in fact dated back to 1993, and that the problems culminated in 1998 and 1999, and at the same time, it has been established that from 2000 onwards these problems started to be resolved.

...

On the basis of all the above, it is indisputable that the actions of ... [M.B.], or the actions of any other responsible persons within INA, ..., do not correspond to the [statutory] description of a criminal offence [defined in] Article 339 of the Criminal Code, or of any other criminal offence prosecutable automatically.

As regards the remainder of the criminal complaint by Vesna Balenović, relating to the above-mentioned actions of ... the entire management of INA, it has been established that these allegations were unfounded.

Mrs Vesna Balenović, who filed the criminal complaint, does not provide evidence or facts giving rise to a reasonable suspicion that criminal offences had been committed, but rather submits arguments for, and explains her concept of, the strategic development and business policy of INA. It is to be noted that a business policy of a commercial company cannot give rise to criminal liability in respect of its management, under the Commercial Companies Act.

...

Therefore, the allegations in the criminal complaint – that INA hired external hauliers instead of investing in its own vehicle fleet – represent the complainant's vision of the development strategy of INA, rather than a description of the actions of the reported individuals, which [might amount to criminal offences]. In this connection, it is to be noted that from the document enclosed with the file outlining the development strategy of INA, which was prepared by the auditing company Arthur Andersen, it follows that, ..., INA should hire reputable hauliers for transporting derivatives, rationalise the network in order to support the wholesale and retail sectors, etc. Therefore, [hiring external hauliers] was a business decision which did not [amount to] any criminal offence.

...

Having regard to all the above, I consider that:

- ...

- as regards the reported criminal offence provided for in Article 291 of the Criminal Code (misfeasance in business operations), it has been established, as mentioned above, that the problems of unpaid claims for losses in transport dated back to 1993 (according to the Report of the Sector for Internal Audit and Control). Therefore, the reported individuals cannot in any way be responsible for that [situation] because they joined INA in 2000. [What is more,] it has been established in this connection that from that time on they had taken numerous measures with a view to improving the situation in the transport [sector], and made the further engagement of hauliers conditional upon the set-off of earlier debts and thereby managed to settle more than two-thirds of earlier unpaid claims.

- as regards the alleged commission of criminal offences provided for in Articles 292 and 294 of the Criminal Code, it should be emphasised that it has not

been established that any legal entity had obtained an unlawful pecuniary gain at INA's expense, which is a statutory element of the criminal offence defined in Article 292 (abuse of authority in business operations). Nor has it been established that contracts – which the reported individuals had [allegedly] concluded and which they had [allegedly] known to be detrimental to INA – existed, which is a statutory element of the criminal offence defined in Article 294 of the Criminal Code (concluding a prejudicial contract).

Having regard to all the above, the criminal complaint should be dismissed, ... and [this] decision delivered to the supervisory board of INA, given the fact that the criminal complaint was filed against members of INA's management board, so that the injured party may exercise the statutory right to take over the prosecution should it still consider that the actions of the reported individuals amount to the above-mentioned criminal offences."

The applicant then attempted to take over the prosecution as the injured party (*oštećenik kao tužitelj*) and on 5 November 2004 lodged a request with the investigating judge of the Zagreb County Court, asking him to open an investigation in respect of the persons designated as the accused in her criminal complaint. On 12 June 2007 the investigating judge declared her request inadmissible, finding that she was not authorised to lodge such a request because it was INA and not her who was the injured party.

On 18 June 2006 the applicant appealed against that decision to a panel of the Zagreb County Court.

On 5 July 2007 the panel of the Zagreb County Court dismissed the applicant's appeal and upheld the first-instance decision of 12 June 2007.

2. *Relevant facts concerning the friendly-settlement proceedings before the Court*

On 9 March 2007 the applicant lodged her application with the Court.

By letter of 18 March 2009 the applicant was informed that on 16 March 2009 the President of the First Section had decided to communicate the complaint concerning freedom of expression to the Government, who were invited to submit written observations on the admissibility and merits of the case. Enclosed was an information note in Croatian containing instructions to applicants on the proceedings after communication of an application to the Government. The relevant part of the information note reads as follows:

"**5. Friendly settlements:** The Government are also requested to indicate their position regarding a friendly settlement of your case and to submit any proposals they may wish to make in this regard (Rule 62). The same request will be made of you when you receive their observations. There is a requirement of strict confidentiality in respect of friendly settlement negotiations under Rule 62 § 2, and any proposals **or** submissions in this respect should be set out in a separate document, the contents of which **must not** be referred to in any submissions made in the context of the main proceedings."

By letter dated 25 May 2009 the Government informed the Court that they were interested in reaching a friendly settlement with the applicant in the present case.

By letter dated 8 July 2009 the Government informed the Court of their specific proposal with a view to securing a friendly settlement, and asked the Court to forward their proposal to the applicant.

By letter of 16 July 2009 the applicant was notified of the Government's proposal and invited to reply to it by 15 September 2009.

In their letter, dated 13 August 2009, the Government submitted that the applicant had not respected the confidentiality of friendly-settlement negotiations because on 6 August 2009 she had disclosed to the media the contents of the Government's friendly-settlement proposal. In support of their allegations, the Government enclosed a DVD containing the applicant's statements to Croatian Television and Nova TV on 6 August 2009, as well as copies of articles published in the daily newspapers *Jutarnji list*, *Večernji list*, *Slobodna Dalmacija* and *Novi list* on 7 August 2009 containing the applicant's statements to the press.

By letter of 27 August 2009 the Government's letter of 13 August 2009 was forwarded to the applicant, who was also requested to comment on it and submit an explanation for the alleged breach of the confidentiality of friendly-settlement proceedings.

By letter dated 11 September 2009 the applicant refused the Government's proposal for a friendly settlement. At the same time she rejected the Government's allegations that she had breached the confidentiality of friendly-settlement negotiations.

B. Relevant domestic law

1. The Criminal Procedure Act

The Criminal Procedure Act (*Zakon o kaznenom postupku*, Official Gazette nos. 110/1997, 27/1998 (corrigendum), 58/1999 and 112/1999), as in force at the material time, read, in its relevant part, as follows:

Section 172

"(1) Citizens shall report criminal offences subject to public prosecution.

(2) Cases in which failure to report a criminal offence constitutes a criminal offence shall be prescribed by law."

2. The Criminal Code

The Criminal Code (*Kazneni zakon*, Official Gazette nos. 110/1997 and 27/1998 (corrigendum)), as in force at the material time, read, in its relevant part, as follows:

Misfeasance in business operations

Article 291

"An officer of a legal entity in which he or she does not hold a majority share who, by knowingly violating the law or other regulations on business operations, manifestly conducts business recklessly and thereby causes considerable pecuniary damage to that legal entity shall be punished by a fine or by imprisonment not exceeding three years."

Abuse of authority in business operations

Article 292

"(1) An officer of a legal entity who, with the aim of acquiring unlawful pecuniary gain for his or her own legal entity or any other legal entity:

(i) creates or keeps illegal funds within the country or in a foreign State,

(ii) by drawing up false deeds, balance sheets, assessments or inventories or by other false presentation or concealment of facts misrepresents the state and flow of funds and success in business operations,

(iii) places the legal entity in a more favourable position by obtaining funds or other benefits which would not be granted to it under the existing regulations,

(iv) in discharging its obligations in respect of budgets or funds, withholds the levies due,

(v) uses the earmarked funds at his or her disposal contrary to their purpose,

(vi) in some other way seriously breaches the law or business rules concerning the use and management of assets,

shall be punished by a term of imprisonment of six months to five years.

(2) If a considerable pecuniary gain is acquired as a result of the criminal offence referred to in paragraph 1 of this Article and the perpetrator acted with intent to acquire such gain, he or she shall be punished by a term of imprisonment of one to eight years."

Concluding a prejudicial contract

Article 294

"(1) Anyone who, as a representative or agent of a legal entity in which he or she does not hold a majority share, concludes a contract which he or she knows to be prejudicial to the legal entity or concludes a contract in breach of authority, thereby causing damage to that legal entity, shall be punished by a term of imprisonment of six months to five years.

(2) If the perpetrator of the criminal offence referred to in paragraph 1 of this Article has accepted a bribe for so acting, he or she shall be punished by a term of imprisonment of one to ten years."

3. The Labour Act

The Labour Act (*Zakon o radu*, Official Gazette nos. 38/1995, 54/1995 (corrigendum), 65/1995 (corrigendum), 17/2001, 82/2001, 114/2003, 123/03, 142/03 (corrigendum), 30/2004 and 137/2004 (consolidated text)), reads, in its relevant part, as follows:

Basic rights and obligations arising from employment relationship

Section 3(1)

"The person who employs (hereinafter 'the employer') shall give a job to the employee and pay him or her for the work carried out, whereas the employee shall, pursuant to the employer's instructions given in accordance with the nature and the type of work, personally perform the job taken."

Duty to comply with employment regulations

Section 5(1)

"In the employment relationship the employer and the employee shall comply with the provisions of this Act and other statutes, international agreements concluded and ratified in accordance with the Constitution and published, other legislation, collective agreements and internal employment regulations."

Notice

Section 105

"An employer or an employee may give notice terminating the employment contract."

Regular notice

Section 106(1)

"An employer may give notice terminating an employment contract, subject to a prescribed or agreed notice period ('regular notice'), if he or she has a justified reason for doing so, in the following cases:

(i) if the need for performing a certain job ceases for economic, technological or organisational reasons ('notice due to business reasons'),

(ii) if the employee is not capable of duly performing his or her employment-related duties because of some permanent characteristics or abilities ('notice due to personal reasons'), or

(iii) if the employee breaches his or her employment-related duties ('notice due to the employee's misconduct')."

Summary notice

Section 107(1) and (2)

"(1) An employer or an employee has a justified reason to give notice terminating ... an employment contract, without an obligation to comply with the prescribed or

agreed notice period ('summary notice') if, because of a particularly serious breach of an employment-related duty or because of some other particularly important fact, taking into account all the circumstances and the interests of both contracting parties, continuation of the employment relationship is not possible.

(2) An employment contract may be terminated on summary notice only within fifteen days from the date when the person concerned found out about the fact on which the summary notice is based."

Unjustified reasons for dismissal

Section 108

"(1) ...

(2) Where an employee lodges an appeal or brings an action or takes part in proceedings against the employer for breach of statute, other legislation, a collective agreement or an internal regulation, and addresses the competent executive authorities, this shall not constitute a justified reason for dismissal.

(3) Where an employee addresses a bona fide complaint to the person in charge [of the relevant department] or files one with the competent State authorities on grounds of a reasonable suspicion of corruption, this shall not constitute a justified reason for dismissal."

COMPLAINTS

1. The applicant complained under Articles 9 and 10 of the Convention about her dismissal from her job and the refusal of the domestic courts in the ensuing civil proceedings to reinstate her.

2. She also complained under Article 14 of the Convention that she had been discriminated against for expressing her opinion.

3. The applicant further complained under Article 6 § 1 of the Convention about the outcome of the above-mentioned civil proceedings and the lack of impartiality of the Constitutional Court that had adjudicated the case at last instance.

4. Lastly, the applicant complained that she had not had an effective remedy to protect her freedom of expression.

THE LAW

A. Alleged abuse of the right of application

The Government argued that, by disclosing the contents of their friendly-settlement proposal to the media, the applicant had breached the

confidentiality of friendly-settlement negotiations, in contravention of Article 38 § 2 of the Convention and Rule 62 § 2 of the Rules of Court, which, prior to the entry into force of Protocol No. 14 to the Convention on 1 June 2010, read as follows:

Article 38 of the Convention

"1. If the Court declares the application admissible, it shall

(a) ...;

(b) place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto.

2. Proceedings conducted under paragraph 1 (b) shall be confidential."

Rule 62 § 2 of the Rules

(Friendly settlement)

"In accordance with Article 38 § 2 of the Convention, the friendly-settlement negotiations shall be confidential and without prejudice to the parties' arguments in the contentious proceedings. No written or oral communication and no offer or concession made in the framework of the attempt to secure a friendly settlement may be referred to or relied on in the contentious proceedings."

1. The submissions of the parties

The Government argued that the applicant's conduct had been detrimental to the proper administration of justice and invited the Court to take steps it considered appropriate in the circumstances.

The applicant submitted that after having received the Government's friendly-settlement proposal she had been contacted by various media which had already obtained information on its contents from "reliable circles in the Government". She further argued that in all her statements to the media she had firmly stated that she respected the decision and recommendations of the Court and that she did not wish to comment on any information relating to a potential friendly settlement.

2. The Court's assessment

In the Court's view, the Government's arguments are to be treated, in substance, as a plea of inadmissibility on account of an abuse of the right of application (see *Lesnina Veletrgovina d.o.o. v. the former Yugoslav Republic of Macedonia* (dec.), no. 37619/04, 2 March 2010). In this connection the Court reiterates that, according to Article 38 § 2 of the Convention and Rule 62 § 2 of the Rules of Court, as worded prior to 1 June 2010, friendly-settlement negotiations are confidential. This rule is absolute and does not allow for an individual assessment of how much detail was disclosed (see *Lesnina Veletrgovina d.o.o.*, cited above). Noting the

importance of this principle, the Court further reiterates that it cannot be ruled out that a breach of the rule of confidentiality might, in certain circumstances, justify the conclusion that an application is inadmissible on the ground of an abuse of the right of application (see, for example, *Lesnina Veletrgovina d.o.o.*, cited above; *Miroļubovs and Others v. Latvia*, no. 798/05, § 68, 15 September 2009; *Benjocki and Others v. Serbia* (dec.), nos. 5958/07, 6561/07, 8093/07 and 9162/07, 15 December 2009; *Hadrabová v. the Czech Republic* (dec.), no. 42165/02, 25 September 2007; and *Popov v. Moldova*, *(no. 1)*, no. 74153/01, § 48, 18 January 2005).

Having regard to the facts as described above, and in the absence of any evidence to support the applicant's argument that various media had already obtained information on the contents of the Government's friendly-settlement proposal elsewhere before contacting her, the Court finds it established that it was the applicant who disclosed that information to the media.

The Court further notes that the information note in Croatian, enclosed together with the Court's letter of 16 March 2009, had made it clear that the nature of all friendly-settlement negotiations was strictly confidential. The applicant was therefore aware of this requirement and should have complied with it (see *Benjocki and Others*, cited above). As already noted above, the Court considers that the applicant has failed to advance any convincing reasons for not doing so.

In the Court's view the applicant's conduct therefore constitutes a breach of the rule of confidentiality. It considers, however, that it may leave open the issue whether, in the circumstances prevailing in the present case, such conduct must also be considered to represent an abuse of the right of application, because the application is in any event inadmissible for the reasons set out below.

B. Alleged violation of Article 10 of the Convention

The applicant complained under Articles 9 and 10 of the Convention that her dismissal from her job on account of her statements to the press, and the subsequent refusal of the domestic courts to reinstate her, had infringed her freedom of thought and freedom of expression. She relied on Articles 9 and 10 of the Convention.

The Government contested this argument.

The Court notes that the situation complained of concerns the right to impart information and ideas, that is, the expression of opinion in the media, which is protected by Article 10 of the Convention, and not the freedom of thought protected by Article 9. Therefore, this complaint falls to be examined solely under 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."

1. The submissions of the parties

(a) The Government

The Government first argued that the interference with the applicant's freedom of expression in the form of her dismissal had been lawful as it had been based on section 107(1) of the Labour Act, which provided for the possibility of summary notice in the event of a particularly serious breach of an employment-related duty. Furthermore, the domestic courts had established that the applicant had violated her obligations under the employment contract by disclosing to the public confidential business information concerning the company for which she had worked, and making a series of unfounded accusations against its management. In the Government's view, the interference had therefore pursued the legitimate aim of preventing the disclosure of confidential information and protecting the reputation and rights of others.

As to the proportionality of the interference, the Government, relying on the criteria set forth in the Court's judgment in *Guja v. Moldova* ([GC], no. 14277/04, ECHR 2008-...), argued that: (a) the information disclosed by the applicant had not revealed any illegal conduct or wrongdoing; (b) the applicant, before disclosing the information to the public, had not informed any competent authority of her findings and suspicions; (c) the information disclosed by the applicant was not of special public interest; (d) the applicant had deliberately publicised unfounded accusations; (e) the information disclosed had been particularly damaging; and (f) the applicant's public statements had been motivated by a personal grievance.

The Government first submitted that the scope of protection of civil servants or employees in the public sector who disclosed confidential information without authorisation was limited to signalling illegal conduct or wrongdoing. However, the information which the applicant had divulged in the present case had not disclosed any illegal conduct or wrongdoing. In particular, neither the policy adopted by INA's management to employ external hauliers, nor the alleged laxity as regards claiming HRK

25,872,208.97 from those hauliers for losses during transport, could be qualified as illegal, let alone criminal, conduct.

The Government also submitted that, before disclosing the information to the public, the applicant had not informed the competent authority, that is, the State Attorney's Office, of her suspicions. For the Government, it was evident that the applicant's serious accusations had first been made in public, and that only on 9 May 2001 – that is, after she had been dismissed – she had filed a criminal complaint with the State Attorney's Office, as the competent authority for prosecution of criminal offences.

The Government further argued that while a discussion about the business policy of a national oil company might be of some interest to the public, it did not fall within the category of "acts or omissions of government which must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion" (they referred to *Guja*, cited above, § 74). Therefore, in the Government's view, the applicant's public statements did not enjoy any special protection. In any event, the Government averred, the applicant had not limited herself to initiating a professional and well-argued discussion on the business policy of the State oil company. Rather, she had used her position to launch a media campaign against INA's management, which had culminated in open accusations that they had been involved in criminal activities.

The Government then submitted that the applicant had been dismissed after she had openly accused members of INA's management and high-ranking State officials of being involved in a private business of transporting oil, without any evidence. Although in her public statements she had referred to documents which she maintained could have proved her allegations, none of the documents which the applicant had later submitted to the State Attorney's Office in order to prove her suspicions that members of INA's management and the Deputy Prime Minister, S.L., had committed a criminal offence had supported her allegations either alone, or together with other documents which the police authorities had obtained. In the Government's view, it followed that the applicant's most serious accusations of involvement of the members of INA's management and State officials in criminal activities had not been made in good faith and that she had deliberately publicised unfounded accusations.

Furthermore, the Government asserted that the information disclosed by the applicant had been particularly damaging, seeing that at the time when she had disclosed the confidential information to the media, the privatisation process in respect of INA had just begun. Her frequent public statements had undoubtedly seriously harmed INA's business reputation at that sensitive moment. Moreover, her unfounded accusations of the involvement of high-ranking State officials in criminal activities within INA had been such that they could have seriously damaged the confidence of the public in the work of the democratically elected authorities.

Lastly, the Government stressed that the applicant's public statements had been motivated by a personal grievance. The applicant had believed that INA should completely alter its business policy regarding transport of oil derivatives by developing its own vehicle fleet, instead of employing external hauliers. When she had realised that her proposals would not be accepted, she had disclosed certain confidential information in order to inform the public of her disagreement with INA's transport policy and promote her own views. The disclosure had had the single aim of supporting her view that the current policy was wrong. This was evident from her first interview published in *Slobodna Dalmacija* on 3 April 2001, and in particular from her reply to the question as to why she had decided to go public: "Since all analyses show a trend of generating loss, while, at the same time, some simulations of potential business activities show that it would be much better to do business in a different way, that is, with our own vehicle fleet ...". In this connection, the Government stressed that the protection afforded to "whistle-blowers" was limited to signalling illegal conduct or wrongdoing and did not cover unauthorised disclosure of confidential information for the purpose of criticising a certain business policy.

The Government further noted that, at first, the applicant's public statements had been limited to harsh criticism of INA's policy of employing external hauliers and to arguments in favour of the development of the company's own vehicle fleet. However, she had been deeply hurt by the fact that her superiors had not accepted her views. This was evident from the correspondence between the applicant and T.D. and S.L., as well as from the interview published on 3 April 2001 in *Slobodna Dalmacija*, in which the applicant had unambiguously mentioned personal dissatisfaction as the main reason for her public statements: "Since those people did not show the slightest interest in what I was saying, and even started ignoring or marginalising me, I decided to make the only move possible which would ensure that what I was advocating would not remain at the bottom of someone's drawer."

Moreover, the correspondence between the applicant and T.D. and S.L. showed that she had first suggested the development of INA's own vehicle fleet and then demanded, with an ultimatum, the annulment of a completely legal public call for tenders for external hauliers, and had eventually submitted her own bid to demonstrate that she had been right. All this showed that she had not been able to accept a business policy which had not corresponded to her ideas. Her resentment had led to personal intolerance towards the persons who had ignored her proposals, as a result of which she had accused them of crime. In particular, in the fifth article, published on 7 April 2001, the applicant had alleged that "individuals in INA's management structure [were] involved in a private business of transporting oil" and that "some high-ranking State officials were also involved".

Therefore, the applicant's public statements had not been motivated by a desire to reveal corruption and crime, but by her personal grievance and antagonism caused by the rejection of her ideas on the development of INA's transport policy for oil derivatives.

Taking all the above elements into consideration, the Government concluded that the applicant's public statements could not be characterised as genuine whistle-blowing, that is, signalling illegal conduct in the public sector. Therefore, the termination of her employment contract had not been in violation of Article 10 of the Convention.

(b) The applicant

The applicant first submitted that the information she had disclosed had not been confidential. She further maintained that INA had been constantly and systematically exposed to "tunnelling", whereby enormous amounts of money had been illegally siphoned from the company and transferred to the private accounts of unknown persons. The applicant submitted that, before disclosing the information to the public, she had indeed, with the utmost discretion, first informed her superiors within the company of her findings, and had then, after she had been pressurised and harassed because of those findings, turned to the competent State authorities. Only after no action had been taken upon her complaints, and because she had feared for her life and her family, had she informed the public. In those circumstances, the applicant found it difficult to accept the Government's argument that she had not revealed any illegal conduct or wrongdoing, that the information disclosed had not been of special public interest, that she had not informed the competent authorities of her findings before disclosing the information to the public and that she had deliberately publicised unfounded accusations.

As to the Government's argument that the information disclosed had been particularly harmful, the applicant replied that it had indeed been harmful for those whose criminal activities had been exposed. Apart from that, the information had been useful for anyone who wanted to protect State property, recover misappropriated funds, stop criminal activities and bring the perpetrators to justice.

The applicant considered inappropriate the Government's argument that her public statements had been motivated by a personal grievance and antagonism, because in a situation where her findings had directly implicated certain members of INA's management in criminal activities and where she had later been dismissed because of those findings, it had only been natural that a certain antagonism had existed. However, her actions had been exclusively motivated by her wish to protect State property, to put an end to criminal activities within INA, and to protect herself and her family.

2. The Court's assessment

(a) Whether there was interference

The Court notes at the outset 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 and that therefore civil servants in particular also enjoyed the right to freedom of expression (see, for example, *Guja v. Moldova* [GC], no. 14277/04, §§ 52 and 70, ECHR 2008-...; *Kudeshkina v. Russia*, no. 29492/05, § 86, 26 February 2009; and *Vogt v. Germany*, 26 September 1995, § 53, Series A no. 323).

However, the applicant in the present case was working for the national oil company of Croatia, of which the State was the sole stockholder at the time, but was not a civil servant. In this respect her status is therefore similar to the status of the applicants in the *Fuentes Bobo* and *Wojtas-Kaleta* cases, who both worked for State television companies but were not civil servants (see *Fuentes Bobo v. Spain*, no. 39293/98, 29 February 2000, and *Wojtas-Kaleta v. Poland*, no. 20436/02, § 42, 16 July 2009).

Nonetheless, the Court reiterates that Article 10 of the Convention also applies when the relations between employer and employee are governed by private law and that the State has a positive obligation to protect the right to freedom of expression (see *Fuentes Bobo*, cited above, § 10). It therefore considers that the applicant's dismissal on account of her statements to the press constituted interference with her right to freedom of expression, as guaranteed by Article 10 § 1 of the Convention (ibid.).

(b) Whether the interference was justified

(i) Lawfulness and legitimate aim

The Court notes that, according to the decision on the applicant's dismissal of 18 April 2001, she was dismissed: (a) because in her statements to the press she had criticised certain aspects of INA's business policy and made serious accusations against members of the company's management, thereby harming INA's business reputation; and (b) because she had allegedly disclosed information classified as a business secret.

The domestic courts considered her dismissal lawful regardless of whether the disclosed information had constituted a business secret or not. They found that the applicant's dismissal was valid because she had harmed the reputation of INA by her negative statements in the press and had acted contrary to the interests of her employer by disclosing certain inside information without authorisation. She had thereby committed a serious breach of an employment-related duty, which constituted a ground for summary notice under section 107(1) of the Labour Act.

The Court therefore accepts that the interference was prescribed by law and that it pursued legitimate aims as it intended to protect the reputation or

rights of others, namely the business reputation and interests of INA (see *Fuentes Bobo*, cited above, § 45; *De Diego Nafría v. Spain*, no. 46833/99, § 31, 14 March 2002; and *Jacubowski v. Germany*, 23 June 1994, § 25, Series A no. 291-A). That being so, the Court also considers that, contrary to the Government's view, the present case is, as regards the legitimate aim, to be distinguished from the case of *Guja v. Moldova* (cited above). In that case the applicant, a civil servant, was dismissed because he had publicly disclosed confidential information. For that reason, the Court was ready to accept that the legitimate aim pursued by the interference was the prevention of the disclosure of information received in confidence (see *Guja*, cited above, § 59), whereas in the present case the legitimate aims sought to be achieved by the applicant's dismissal were the protection of the reputation and the rights of others.

Seeing that the interference with the applicant's freedom of expression in the present case was lawful and pursued legitimate aims, the only question for the Court to determine is whether that interference was "necessary in a democratic society".

(ii) "Necessary in a democratic society"

The Court notes that in her statements to the press the applicant initially criticised INA's business policy of engaging external hauliers for transporting its oil derivatives and argued that its management had demonstrated considerable laxity as regards claiming compensation for losses incurred during transport of those derivatives. However, later on, in her statements of 7 April 2001, the applicant openly accused INA's management of fraud, alleging that members of the management, in collusion with hauliers, were siphoning money from the company by overpaying hauliers for their services and deliberately failing to enforce claims for losses during transport.

The Court considers that it could be argued that the issues raised by the applicant were of legitimate public concern (see, *mutatis mutandis*, *Wojtas-Kaleta*, cited above, § 46, and *Fuentes Bobo*, cited above, § 48).

On the other hand, the Court also considers that at least part of the applicant's statements, in particular those containing allegations of fraud, were certainly prejudicial to INA's business interests and were harmful to its business reputation. In this respect the Court shares the view of the Supreme Court, as expressed in its judgment of 24 May 2005, that a company whose management tolerates and encourages criminal activities certainly cannot have a good reputation and be trusted in the business world. The Court is also mindful of the Government's argument that the applicant made her statements to the press at a sensitive moment when the privatisation process in respect of INA had just begun.

Therefore, in the instant case the applicant's freedom of expression, in particular her right to publicise her criticism of the business policy of the

national oil company, as well as to impart information on alleged irregularities within the company, and, more importantly, the right of the public to receive that information, must be weighed against the requirements of the protection of the reputation and the rights of others, that is, the business reputation and interests of INA.

The Court reiterates in this connection that Article 10 of the Convention does not guarantee wholly unrestricted freedom of expression and that the exercise of this freedom carries with it "duties and responsibilities". Therefore, whoever exercises that freedom owes "duties and responsibilities", the scope of which depends on his or her situation, the (technical) means he or she uses and the authenticity of the information disclosed to the public. Thus, in the present case there are three factors to be taken into account. The first concerns the applicant's situation as an employee, the second the nature of the means she used in making her statements (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) and the third the authenticity of the information disclosed (see *Wojtas-Kaleta*, cited above, § 50).

With regard to the first factor, the Court notes that the applicant was not a journalist – whose role is to inform and alert the public and impart information and ideas on matters of public concern – but an employee, who owes her employer a duty of loyalty, reserve and discretion (see, for example, *Wojtas-Kaleta*, cited above, § 43; *Guja*, cited above, § 70; and *Pay v. the United Kingdom* (dec.), no. 32792/05, 16 September 2008).

With regard to the second factor, the Court notes that the applicant, in expressing her opinions, used a means which has a broad and immediate impact, namely a daily national newspaper with wide circulation (see, *mutatis mutandis*, *Haseldine*, cited above).

With regard to the third factor relevant for the balancing exercise, the Court reiterates that it is open to the competent State authorities to adopt measures intended to react 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, and *Guja*, cited above, § 75). In such cases a distinction needs to be made between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof even though there must be a sufficient factual basis to support them, failing which they may be excessive (see, for example, *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 76, ECHR 2004-XI).

While the applicant's statements in part amounted to value judgments (in particular her initial criticism of INA's business policy in the field of transport), her allegations of fraud within INA, in the Court's view, contained specific allegations of fact, which as such were susceptible to

proof (see, for example, *McVicar v. the United Kingdom*, no. 46311/99, § 83, ECHR 2002-III, and *Steel and Morris v. the United Kingdom*, no. 68416/01, §§ 90 *in fine* and 94, ECHR 2005-II). What is more, the applicant's allegations appear quite serious as she, in fact, accused INA's management of "tunnelling", a form of white-collar crime endemic in transitional economies of Central Europe. Those allegations therefore required substantial justification, especially given that they were made in a high-circulation daily newspaper. In this connection the Court reiterates that the more serious the allegation is, the more solid the factual basis should be (see *Pedersen and Baadsgaard*, cited above, § 78 *in fine*).

The applicant, however, provided no evidence whatsoever in support of her allegations of criminal conduct on the part of INA's executives. This was confirmed by the State Attorney in its decision of 22 September 2004 whereby it dismissed the applicant's criminal complaint against named members of INA's management board and supervisory board. In particular, the State Attorney found that the applicant had not provided any evidence giving rise to a reasonable suspicion that the criminal offences defined in Article 292 (abuse of authority in business operations) and Article 294 (concluding a prejudicial contract) of the Criminal Code had been committed and that there was no proof that any unlawful pecuniary gain had otherwise been obtained at INA's expense.

The Court also considers it established that the applicant was motivated by a concern to publicise her own professional grievances rather than by her genuine concern for INA's business interests (see, *mutatis mutandis*, *Haseldine*, cited above). The content and the tone of her statements to the press, coupled with the lack of any factual basis for her most serious allegations (see, *mutatis mutandis*, *Morissens v. Belgium*, no. 11389/85, Commission decision of 3 May 1988, DR 56, pp. 127 and 136), suggest that they were a petulant reaction to the behaviour of INA's management, which ignored her business proposals. This finding is further corroborated by the fact that the applicant's serious accusations against certain members of INA's management were first made in the press, and that only on 9 May 2001 – that is, after she had been dismissed on that account – did she file a criminal complaint against them with the State Attorney's Office.

Therefore, even though the applicant's dismissal was a severe sanction for her behaviour (see *Guja*, cited above, § 95, and *Pay*, cited above), the above considerations are sufficient for the Court to conclude that the interference complained of was not disproportionate to the legitimate aim pursued and thus may be regarded as "necessary in a democratic society" within the meaning of paragraph 2 of Article 10 of the Convention.

It follows that this complaint is inadmissible under Article 35 § 3 as manifestly ill-founded and must be rejected pursuant to Article 35 § 4 of the Convention.

C. Alleged violation of Article 14 of the Convention in conjunction with Article 10

The applicant further complained that she had been discriminated against for expressing her opinions. She relied on Article 14 of the Convention, which reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Court refers to its above finding to the effect that the applicant's complaint under Article 10 of the Convention is inadmissible as manifestly ill-founded. The Court has found no reason to conclude that her dismissal was based on any discriminatory elements. It follows that her related complaint under Article 14 is also inadmissible under Article 35 § 3 as manifestly ill-founded and must be rejected pursuant to Article 35 § 4 of the Convention.

D. Alleged violations of Article 6 § 1 of the Convention

The applicant also complained about the outcome of the civil proceedings in her case and alleged that the Constitutional Court had lacked impartiality when examining her case. In particular, Judge A.R. – the former wife of I.R., who had been the Prime Minister of Croatia in the period between 31 January 2000 and 23 December 2003 – had sat on the panel of that court when it had examined her constitutional complaint. The applicant explained that her case had directly implicated the chairman of INA's supervisory board, S.L., who had also been the vice-president of I.R.'s cabinet at the relevant time and deputy leader of the Social Democratic Party, to which they had both belonged. She argued that in these circumstances Judge A.R. could not have remained impartial. She relied on Article 6 § 1 of the Convention, the relevant part of which reads:

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

The Court notes that the applicant complained about the outcome of the proceedings, which, unless it was arbitrary, the Court is unable to examine under Article 6 § 1 of the Convention. In the light of all the material in its possession, the Court considers that in the present case the applicant was able to submit her arguments before courts which offered the guarantees set forth in Article 6 § 1 of the Convention and which addressed those arguments in decisions that were duly reasoned and not arbitrary.

In particular, the Court considers that the relationship between the Constitutional Court judge A.R. and the president of INA's supervisory

board, S.L., to which the applicant referred, was so distant and remote that it could not justify her concern that the Constitutional Court lacked the impartiality required by Article 6 of the Convention. Moreover, the applicant provided no evidence to suggest, and there is no indication of, any personal bias on Judge A.R.'s part.

It follows that this complaint is inadmissible under Article 35 § 3 as manifestly ill-founded and must be rejected pursuant to Article 35 § 4 of the Convention.

E. Alleged violation of Article 13 of the Convention in conjunction with Article 10

Lastly, the applicant complained of the lack of an effective remedy in respect of her complaint under Article 10 of the Convention. She relied on Article 13 of the Convention, which reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Court refers to its above finding to the effect that the applicant's complaint under Article 10 of the Convention is inadmissible as manifestly ill-founded. It follows that her related complaint under Article 13 is also inadmissible under Article 35 § 3 as manifestly ill-founded and must be rejected pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

André Wampach
Deputy Registrar

Christos Rozakis
President