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

FOURTH SECTION

DECISION

Application no. 77265/12
Alicija CUDAK
against Lithuania

The European Court of Human Rights (Fourth Section), sitting on 23 April 2019 as a Chamber composed of:

Jon Fridrik Kjølbro, *President,*
Faris Vehabović,
Egidijus Kūris,
Carlo Ranzoni,
Georges Ravarani,
Marko Bošnjak,
Péter Paczolay, *judges,*

and Andrea Tamietti, *Deputy Section Registrar,*

Having regard to the above application lodged on 29 November 2012,

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

1. The applicant, Ms Alicija Cudak, is a Lithuanian national who was born in 1961 and lives in Vilnius. She was represented before the Court by Mr K. Uczkiewicz, a lawyer practising in Wrocław.

2. The Lithuanian Government ("the Government") were represented by their Agent, Ms K. Bubnytė-Širmenė.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

A. The circumstances of the case

1. The applicant's dismissal

3. In 1994 the applicant was recruited by the embassy of the Republic of Poland in Vilnius (hereinafter "the Polish embassy" or "the embassy") to the post of secretary and switchboard operator (*korespondentė-telefonistė*).

4. On 29 March and 14 June 1999 the applicant informed the Polish ambassador that a male colleague – a senior diplomatic official, B.M. – was sexually harassing her. On 31 August 1999 she also made a note about B.M.'s behaviour on a document concerning her salary. According to the applicant, the ambassador did not address her allegations and the sexual harassment continued. In September 1999 she lodged a complaint with the Equal Opportunities Ombudsperson (see paragraph 9 below).

5. The applicant submitted that she had fallen ill because of the tension she was experiencing at work. She was on sick leave from 1 September until 19 November 1999. On 29 October 1999 she arrived at the embassy in order to submit her sick-leave certificate and collect sickness allowance but was not allowed to enter the embassy building. On that same day she sent the certificate to the embassy by registered post, stating that she had not been allowed to enter the building. She again arrived at the embassy on 17 November 1999 and was allowed to enter and collect the allowance, but was then made to leave by a senior staff member and a guard.

6. On 20 November 1999 the applicant sent a letter to the ambassador asking that she be dismissed on the grounds provided by Article 30 of the Law on the Employment Contract (see paragraph 43 below). According to the applicant, she asked to be dismissed because she felt that she would no longer be able to work at the embassy because of the tense relations between her and her colleagues.

7. On 22 and 23 November 1999 the applicant arrived at the embassy but was again refused entry. On 26 November 1999 she wrote another letter to the ambassador, informing her of the incidents.

8. On 2 December 1999 the Polish embassy informed the applicant that she had been dismissed, with effect from 22 November 1999, because of her unauthorised absence from work from 22 until 29 November 1999, as provided by Article 29 § 1 (10) of the Law on the Employment Contract (see paragraph 42 below).

9. On 15 February 2000 the Equal Opportunities Ombudsperson's Office issued a report concerning the applicant's complaint regarding sexual harassment (see paragraph 4 above). Having interviewed the applicant, her sister, her doctors and the embassy staff, and having received a written explanation from the Polish ambassador, the Ombudsperson's Office concluded that B.M. had sexually harassed the applicant. It informed the relevant department of the Ministry of Foreign Affairs of its findings.

2. The Court's judgment in the first case

10. In December 1999 the applicant lodged a civil claim against the Polish embassy, arguing that her dismissal for unauthorised absence from work had been unlawful. She stated that she did not wish to be reinstated in her previous job because the working conditions at the embassy would be intolerable. She therefore asked to be awarded monetary compensation for unlawful dismissal. However, the courts discontinued the proceedings without examining the merits of the applicant's claim because the Polish embassy claimed immunity from the jurisdiction of Lithuanian courts.

11. The applicant then lodged an application with the European Court of Human Rights, complaining of a violation of her right of access to a court. On 23 March 2010 the Court issued its judgment in *Cudak v. Lithuania* ([GC], no. 15869/02, ECHR 2010), in which it found a violation of Article 6 § 1 of the Convention. The Court concluded that the Lithuanian courts, by upholding an objection based on State immunity and by declining jurisdiction to hear the applicant's claim, had failed "to preserve a reasonable relationship of proportionality, overstepped their margin of appreciation and thus impaired the very essence of the applicant's right of access to a court" (ibid., §§ 60-75). The applicant was awarded 10,000 euros (EUR) in respect of pecuniary and non-pecuniary damage (ibid., § 79). The Court also stated that, where, as in that case, an individual had been the victim of proceedings that had entailed breaches of the requirements of Article 6 of the Convention, a retrial or the reopening of the case, if he or she so requested, represented in principle an appropriate way of redressing the violation (ibid.).

3. Reopened civil proceedings before domestic courts

12. Following the Court's judgment (see paragraph 11 above), in June 2010 the applicant asked the Supreme Court to reopen the civil proceedings that she had instituted against the Polish embassy (see paragraph 10 above).

13. In September 2010 the applicant sent to the Supreme Court a new claim, in which she submitted that the sexual harassment at work and the embassy's failure to address her allegations had caused her grave psychological harm. The applicant reiterated that she did not wish to be reinstated in her previous job because the working conditions at the Polish embassy would be intolerable. She asked the court to find that her dismissal for unauthorised absence from work had been unlawful and to award her compensation amounting to twelve times her monthly salary, as provided by Article 42 of the Law on the Employment Contract (see paragraph 46 below). She also claimed 200,000 Lithuanian litai (LTL – approximately EUR 57,920) in respect of non-pecuniary damage.

14. On 16 September 2010 the Supreme Court reopened the proceedings. On 7 October 2010 it quashed the decisions previously adopted in those proceedings (see paragraph 10 above) and remitted the case for fresh examination before the first-instance court.

(a) Proceedings before the Vilnius Regional Court

15. On 15 February 2011 the applicant lodged a revised civil claim. In that claim she asked to be reinstated in her previous job at the Polish embassy, in accordance with Article 42 of the Law on the Employment Contract (see paragraph 44 below), submitting that the individuals who had been responsible for the tense working conditions no longer worked at the embassy. She furthermore submitted that since her dismissal she had been unemployed because she had had to participate in court proceedings in Lithuania and in Strasbourg, and because her dismissal for unauthorised absence from work had damaged her professional reputation. The applicant therefore claimed her average monthly salary for the entire period of her forced absence from work (see paragraph 45 below) – from 22 November 1999 (the date of her dismissal) until 31 January 2011 – amounting in total to LTL 257,357 (approximately EUR 74,536). She also claimed her average monthly salary (LTL 1,930 (approximately EUR 560)) for each month from the adoption of the court's decision to its complete execution, plus interest in the amount of LTL 21,787 (approximately EUR 6,310). Lastly, she stated that she reserved the right to lodge a separate claim against the Polish embassy in respect of non-pecuniary damage.

16. In its reply to the applicant's claim the Polish embassy argued that the applicant had been lawfully dismissed for her unauthorised absence from work and that there was no evidence that she had been denied entry to the embassy, as she had claimed (see paragraphs 5 and 7 above). It furthermore submitted that there was no indication that the embassy had in any way "justified" sexual harassment against the applicant, and the Ombudsperson's conclusions had not yet been issued at the time of her dismissal (see paragraphs 8 and 9 above), which meant that the dismissal had not been related to the sexual harassment allegations. The embassy also opposed the applicant's reinstatement, submitting that the requirements for the job of a secretary and switchboard operator had changed – candidates now had to have university education and speak English, and the applicant did not meet those requirements.

17. On 13 May 2011 the Vilnius Regional Court dismissed the applicant's claim. It firstly held that the applicant had not proved that she had arrived at the embassy on 22 and 23 November 1999 (see paragraph 7 above), whereas the visitors' registration books provided by the Polish embassy contained no record of her presence at the embassy on those days; the court therefore concluded that the applicant had in fact failed to come to work. It furthermore held that, even though the applicant had indeed

suffered sexual harassment, that fact could not have justified her unauthorised absence from work. In the court's view, the embassy had not tolerated sexual harassment and had taken appropriate measures in response to the applicant's complaints – it had been indicated in the Ombudsperson's report (see paragraph 9 above) that the ambassador had spoken to B.M. and ordered him to refrain from engaging in non-professional behaviour; the ambassador had also publicly apologised to the applicant and offered to transfer her to a different position. The court furthermore observed that the applicant in her letters to the ambassador (see paragraphs 4 and 7 above) had expressed discontent with the behaviour of various embassy staff, including the ambassador, and had at times expressed herself in an unprofessional manner. It therefore considered that the tense atmosphere at work had been caused by the applicant and not by any actions on the part of the embassy. The court lastly observed that the applicant herself had asked to be dismissed (see paragraph 6 above), so in view of her request and her failure to come to work without any important reasons, the embassy's decision to dismiss her had been lawful.

(b) Proceedings before the Court of Appeal

18. The applicant appealed against the decision of the Vilnius Regional Court. She submitted that the fact that sexual harassment had taken place had been proven and had not been disputed, but that the Polish ambassador's actions (see paragraph 17 above) could only be regarded as an attempt to "gloss over" the situation rather than resolve it. She submitted that the ambassador had been aware of the applicant's allegations at the time of her dismissal, and as there were no other reasons why the applicant might have been unable to continue working at the embassy, her dismissal must have been related to her complaints about sexual harassment. The applicant furthermore submitted that there were no grounds to doubt her statements that she had been refused entry to the embassy on several occasions (see paragraphs 5 and 7 above), and the evidence provided by the embassy (see paragraph 17 above) could not be considered reliable. She therefore argued that she had arrived at work as required but that even if she had not, her absence would have been justified by the trauma which she had suffered as a result of the sexual harassment.

19. The Polish embassy disputed the grounds for the applicant's appeal and asked the appellate court to uphold the Vilnius Regional Court's decision.

20. On 11 November 2011 the Court of Appeal quashed the lower court's decision. At the outset it observed that obtaining evidence in the case was difficult, since the impugned events had taken place twelve years previously and the individuals involved in them no longer worked at the Polish embassy or even no longer lived in Lithuania. It then noted that the Ombudsperson's report, which had concluded that the applicant had been a

victim of sexual harassment at work (see paragraph 9 above), had not been disputed. Furthermore, from the material collected by the Ombudsperson it was evident that the Polish embassy had not denied that sexual harassment had occurred – according to the written explanation provided by the ambassador to the Ombudsperson (see paragraph 9 above), even B.M. himself had not denied the applicant's allegations but he had considered his behaviour to have been a "joke". In the court's view, at first the embassy had taken adequate measures to address the sexual harassment – the ambassador had told B.M. to cease his inappropriate behaviour and had offered to transfer the applicant to a different position. However, the court took note of the applicant's submissions that the sexual harassment had continued after that and that she had not been given any concrete offers of a different position; it found no reason to doubt those submissions.

21. The court furthermore observed that before her dismissal, the applicant had had the right to freely enter the embassy building. However, it was not disputed that when she had arrived at the embassy on 17 November 1999, she had faced obstacles in entering the building and had been allowed to enter her office only with the permission of a security guard (see paragraph 5 above). In the court's view, that proved that the applicant's presence at the embassy had not been welcome, and it considered that her allegations of being refused entry on later dates (see paragraphs 5 and 7 above) had not been refuted.

22. The court accepted that the applicant's request that she be dismissed (see paragraph 6 above) had been motivated by the sexual harassment which she had suffered at the embassy and which had caused her significant stress and serious health problems (see paragraph 5 above). It also observed that Article 30 of the Law on the Employment Contract, which the applicant had cited in her request to be dismissed (see paragraph 6 above), did not apply to employment in public institutions (see paragraph 43 below), and the embassy, being the stronger party in labour relations, should have informed the applicant that her request could not be granted and should have explained to her the proper legal ways of terminating her contract. In such circumstances, the court considered that the Polish embassy had failed to address the situation in a satisfactory manner and had issued an unjustified and hasty decision in dismissing the applicant. Accordingly, the applicant's dismissal under Article 29 § 1 (10) of the Law on the Employment Contract for unauthorised absence from work had been unlawful. The court changed the legal grounds for the applicant's dismissal to Article 28 of the Law on the Employment Contract – dismissal at the employee's request (see paragraph 41 below).

23. When determining the compensation to be awarded to the applicant, the court firstly emphasised that, according to the case-law of the Supreme Court, the amount of compensation had to be proportionate to the losses suffered by her as a result of the unlawful dismissal; any amount awarded

had to compensate her for those losses, while at the same time constituting a proportionately restrictive measure against the employer (see paragraph 51 below).

24. The court observed that in her initial claim lodged in 1999 and in her new claim lodged in 2010, the applicant had not asked for reinstatement in her previous job, in view of the intolerable working conditions at the Polish embassy (see paragraphs 10 and 13 above). She had later changed her position in the revised claim and had asked to be reinstated (see paragraph 15 above). The court pointed out that twelve years had passed since the applicant's dismissal and that, according to the Polish embassy, there were no vacant positions and the requirements for the job had changed (see paragraph 16 above). It therefore held that the applicant should not be reinstated but should instead be awarded compensation, in line with Article 42 § 3 of the Law on the Employment Contract (see paragraph 46 below).

25. The court awarded the applicant the maximum compensation provided by law – twelve times her average monthly salary (see paragraph 46 below), amounting to LTL 23,164 (approximately EUR 6,709). It also awarded her 5% annual interest from 1 July 2001 (the date of the entry into force of the new Civil Code, which provided such interest) until the date of the complete execution of the court's decision, as well as LTL 7,150 (approximately EUR 2,071) in legal costs.

(c) Proceedings before the Supreme Court

26. The Polish embassy lodged an appeal on points of law against the Court of Appeal's decision. It submitted that it had never acknowledged that sexual harassment had occurred – it had not been aware of the Ombudsperson's report until the reopened proceedings and thus had not been able to challenge it – and B.M. himself had considered his actions with regard to the applicant to have constituted a "joke" and not sexual harassment (see paragraph 20 above). It also submitted that it had taken sufficient measures to resolve the conflict and that there was no evidence that any harassment had continued after the ambassador's intervention (see paragraph 17 above). The embassy also disputed the link between the alleged sexual harassment and the applicant's health problems. It lastly submitted that the applicant had failed to prove that she had arrived at work on 22 and 23 November 1999, so her dismissal had been motivated by her unauthorised absence from work, and not any other factors.

27. The applicant also lodged an appeal on points of law. She submitted that the Court of Appeal had erred when refusing to reinstate her in her previous job. She submitted that in her initial claim, lodged in 1999, she had not asked to be reinstated because at that time the working environment at the embassy had been intolerable (see paragraph 10 above). However, she had changed her position in her revised claim (see paragraph 15 above)

because the factual situation had changed; there were thus no grounds provided in Article 42 § 3 of the Law on the Employment Contract, to refuse to reinstate her (see paragraph 46 below). The applicant furthermore submitted that reinstating her and compensating her for the entire period of her enforced absence from work would constitute the most suitable remedy, since during those twelve years she had been unable to find a job – her dismissal for unauthorised absence from work had damaged her professional reputation, and her health had deteriorated because of the sexual harassment. She also argued that, according to the Supreme Court's case-law, an employee who had been unlawfully dismissed had to be reinstated, irrespective of whether his or her previous job had changed or ceased to exist. Accordingly, the applicant asked to be reinstated, and reiterated her monetary claims, as presented in the revised claim (see paragraph 15 above and paragraphs 44 and 45 below).

28. In its reply to the applicant's appeal on points of law, the Polish embassy opposed her reinstatement, reiterating that twelve years had passed since her dismissal, during which time the requirements of her previous job had changed (see paragraph 16 above), and that there were no vacant positions at the embassy. It also argued that in 1999 the applicant had sent disrespectful letters to the Polish ambassador, which made her unsuitable for work at the embassy. It lastly submitted that the applicant had not proved that her inability to find another job had been related to her dismissal (see paragraph 27 above).

29. On 26 June 2012 the Supreme Court dismissed the appeals on points of law and upheld the appellate court's decision. It firstly emphasised that sexual harassment threatened the dignity of the person and other fundamental values and that, under the relevant law of the European Union, it constituted direct discrimination on the grounds of sex (see paragraph 53 below). The court stated that B.M.'s actions with regard to the applicant – demanding sexual relations from her, calling her at home, talking about intimate subjects in her presence, and slapping her in the face – met the definition of sexual harassment; furthermore, B.M. had been hierarchically superior to the applicant, as provided in the Law on Equal Opportunities for Women and Men, as worded at the material time (see paragraph 36 below). The court emphasised that it was irrelevant that B.M. himself considered his actions to have been a "joke" (see paragraphs 17 and 26 above) because it was unnecessary for the harasser to deem his actions to constitute sexual harassment in order for such harassment to exist.

30. The Supreme Court furthermore stated that, under the domestic and European Union law on discrimination, once a claimant provided prima facie evidence that he or she had been discriminated against, the burden of proof shifted to the respondent, who had to prove that discrimination had not occurred (see paragraphs 37 and 53 below). It considered that the applicant had provided sufficient evidence that she had suffered sexual

harassment, so the burden of proof had shifted to the Polish embassy, but the latter had failed to refute the applicant's allegations. The court also considered that, after the applicant had informed the ambassador of B.M.'s actions, the embassy had failed to improve the situation – on the contrary, according to the case material, when the applicant had arrived at the embassy on 17 November 1999 (see paragraph 5 above), a security guard had informed B.M. of her presence, and when she had gone to her office, the guard had followed her. The court observed that in her letters to the ambassador the applicant had informed her of the problems that she was facing at work (see paragraphs 4 and 7 above), but the ambassador had failed to take appropriate action and had instead dismissed the applicant. Accordingly, the court upheld the conclusion that the applicant's dismissal had been unlawful.

31. The court then emphasised that when determining the appropriate remedy for a violation of an employee's rights, a court had to act in accordance with the general principles of justice, reasonableness and fairness. The purpose of reinstating an employee was to restore the situation that had existed before the unlawful dismissal; it was important that such a reinstatement be ordered promptly, because with the passage of time the relevant working conditions might substantially change or the position might cease to exist. Accordingly, the court considered that reinstatement could not be applied unconditionally, because various objective factors – organisational, technical and other – might make it impossible or might lead to costs that would be disproportionate to the violation committed. In such circumstances, the court deciding a labour dispute could refuse to order reinstatement and instead award monetary compensation, in accordance with Article 42 § 3 of the Law on the Employment Contract (see paragraph 46 below).

32. Turning to the circumstances of the case, the court observed that in her initial claim the applicant had not asked to be reinstated (see paragraph 10 above), that twelve years had passed since her dismissal, and that the information provided by the Polish embassy indicated that there were no vacant positions and that the requirements in respect of the applicant's previous job had changed (see paragraphs 16 and 28 above). The court therefore concluded that conditions did not favour the applicant's reinstatement. It also noted that, in line with the Code of Civil Procedure, a court deciding a labour dispute had the right to go beyond the scope of the claim in question or to apply a different legal remedy than the one requested by the claimant (see paragraphs 39 and 40 below). Accordingly, the Supreme Court ruled that monetary compensation was the most appropriate remedy in the applicant's case and that the appellate court had correctly determined the amount of the compensation to be awarded to her (see paragraph 25 above). The applicant was additionally awarded LTL 3,592 (approximately EUR 1,040) in legal costs.

4. Resolution of the Committee of Ministers regarding the applicant's first case before the Court

33. The Committee of Ministers in its resolution CM/ResDH(2016)194 of 6 September 2016, having examined the information provided by the Lithuanian Government indicating the measures adopted in order to give effect to the Court's judgment in the applicant's first case (see paragraph 11 above), decided to close the examination thereof.

B. Relevant domestic law and practice

1. Constitution

34. Article 29 of the Constitution provides that all persons shall be equal before the law, courts, and other State institutions and officials. Human rights may not be restricted and no one may be granted any privileges on the grounds of gender, race, nationality, language, origin, social status, belief, convictions, or views.

35. Article 30 provides that anyone whose constitutional rights or freedoms have been violated has the right to apply to a court and that compensation in respect of pecuniary and non-pecuniary damage inflicted upon a person shall be established by law.

2. Law on Equal Opportunities for Women and Men

36. The Law on Equal Opportunities for Women and Men entered into force on 1 March 1999. At the material time, Article 2 § 3 thereof defined sexual harassment as offensive verbal or physical behaviour of a sexual nature directed against an individual who was hierarchically inferior to or otherwise dependent on the harasser.

37. On 13 July 2004 the Law was amended by adding Article $2^{(1)}$ (Article 3 since 1 January 2017), which provides that courts or other authorities with jurisdiction to examine complaints concerning discrimination – including discrimination on the basis of sex – shall presume that direct or indirect discrimination has occurred, and the burden of proof shall be shifted to the individual or institution complained against, which will have to show that the principle of equal treatment has not been breached.

38. On 5 July 2005 the definition of sexual harassment provided by the Law (see paragraph 36 above) was amended. Article 2 § 6 defines sexual harassment as undesired and insulting spoken, written or physical behaviour of a sexual nature aimed at, or having the effect of, violating the dignity of the individual concerned, in particular by creating a threatening, hostile, humiliating or offensive environment.

3. Code of Civil Procedure

39. Article 417 of the Code of Civil Procedure, in force since 6 April 2002, provides that in cases brought by employees, a court, taking into account the circumstances of the case in question, may go beyond the scope of the claim that has been lodged – it may grant more than what the employee has asked, and it may decide on issues which have not been raised but which are directly related to the subject and the basis of the lodged claim.

40. Article 418 provides that where an employee has requested a court to apply one of alternative remedies provided for by law, the court, having found no grounds to grant that request, may decide, where such grounds exist, to apply on its own initiative a different legal remedy in order to protect the employee's rights or lawful interests.

4. Law on the Employment Contract

41. The Law on the Employment Contract was in force from 1 January 1992 until 1 January 2003. At the material time, Article 28 § 1 provided that an employee had the right to terminate an employment contract of an indefinite duration after giving the employer fourteen days' notice.

42. Article 29 § 1 (10) provided that an employer had the right to terminate an employment contract if the employee failed to come to work for an entire working day or shift without important reasons.

43. Article 30 provided that an employer, other than a State or municipal authority, had the right to terminate an employment contract for important reasons, other than those provided in the Law, upon the payment of monetary compensation calculated according to the employee's average monthly salary and the duration of his or her employment.

44. Article 42 § 1 provided that an employee who disagreed with his or her dismissal had the right to lodge a complaint with a court. If the court found that the dismissal had not had lawful grounds or had not followed the procedure established by law, it had to reinstate the employee in his or her previous job (*teismas grąžina jį į pirmesnįjį darbą*).

45. Article 42 § 2 provided that, when ordering the reinstatement of an unlawfully dismissed employee, a court had to award that employee the salary that he or she would have earned during the entire period of the forced absence from work.

46. Article 42 § 3 provided that if the unlawfully dismissed employee considered that upon reinstatement his or her working conditions would be unfavourable (*būtų sudarytos nepalankios sąlygos dirbti*), a court could, at the employee's request, decide not to order reinstatement but instead to award him or her monetary compensation of up to twelve times his or her monthly salary. In such instances, the employee would be considered as

having been dismissed in line with Article 28 of the Law (see paragraph 41 above).

5. Later developments in labour law

47. The Labour Code that was in force from 1 January 2003 until 1 July 2017 provided in Article 297 § 4 that if a court found that an unlawfully dismissed employee could not be reinstated in his or her previous job for economic, technological, organisational or other similar reasons or because upon reinstatement his or her working conditions might be unfavourable, it could decide not to order reinstatement and instead to award the employee monetary compensation corresponding to his or her average monthly salary for the entire period from the unlawful dismissal until the entry into force of the court's decision. The employee could also be awarded severance pay calculated in accordance with the Code.

48. The new Labour Code, in force since 1 July 2017, provides in Article 218 § 4 that if the body deciding a labour dispute finds that an unlawfully dismissed employee cannot be reinstated in his or her previous job because of economic, technological, organisational or other similar reasons or because upon reinstatement his or her working conditions might be unfavourable, or when the employer asks not to reinstate him or her, it may decide to award the employee monetary compensation corresponding to his or her average monthly salary for the period of the enforced absence from work, but not exceeding one year. In such a case, the employee will also be awarded compensation in the amount of his or her average monthly salary for every two years of employment, but not exceeding six times his or her average monthly salary. The employee may also be awarded compensation in respect of pecuniary and non-pecuniary damage.

6. Courts' practice

49. In its ruling no. 42 summarising the application of the Law on the Employment Contract in civil cases, adopted on 21 June 1996, the Senate of the Supreme Court held:

> "37. Compensation for the entire duration of forced absence from work, as provided in Article 42 § 2 of the Law on the Employment Contract, is awarded only when it is decided to reinstate the employee in his or her previous job ...
>
> If the employee is not reinstated but the dismissal is found to be unlawful, then at the request of the employee, he or she is to be awarded compensation in the amount of up to twelve times his or her average salary ...
>
> ...
>
> 38. If the employee states that upon reinstatement he or she would face unfavourable working conditions, the court may decide not to reinstate the employee and to apply Article 42 § 3 of the Law on the Employment Contract. In such cases, the date of the termination of the employment contract is considered to be the date on which the court decision enters into force ..."

50. In its ruling of 15 May 2006 in civil case no. 3K-3-333/2006, the Supreme Court held:

> "The court examining an employee's request to declare his or her dismissal unlawful has to verify whether there are grounds to [do so], and if so, which of the alternative legal remedies, provided in Article 297 §§ 3 and 4 of the Labour Code, should be applied. The court ... is not bound by the claim submitted by the employee. If it finds that there are no grounds to fully satisfy the claim which has been submitted, the court may, on its own initiative, where relevant grounds exist, apply a different legal remedy (Article 418 of the Code of Civil Procedure). If it determines that the employee cannot be reinstated in his or her previous job because of economic, technological, organisational or other similar reasons, it may change the subject matter the claim on its own initiative (Article 297 § 4 of the Labour Code). The court will examine the circumstances that are relevant for the application of that legal provision, irrespective of whether the parties to the case have based their claims or replies on [those circumstances]."

The Supreme Court reiterated the aforementioned principles in its ruling of 11 June 2007 in civil case no. 3K-3-231/2007.

51. In its ruling of 4 October 2011 in civil case no. 3K-3-363/2011, the Supreme Court held:

> "Compensation for forced absence from work ... serves a social purpose – to compensate the employee for the material loss caused by the unlawful dismissal and to provide [him or her] with the means of subsistence [of which he or she has been deprived] as a result of the employer's unlawful actions ... [The amount thereof] cannot be inappropriate or deny its purpose, [which is] to afford compensation for what has been lost. In this light, the [Supreme Court] has stated numerous times that the amount of compensation has to be proportionate to the losses sustained by the aggrieved party (employee) ... and also constitute a proportionate restrictive measure against the employer ...
>
> Therefore, when a case raises the question of whether the amount of compensation ... corresponds to its object and purpose, as well as to the general principles of justice, equity and proportionality, then the court, taking into account the circumstances of the case, must determine whether a particular amount ... affords sufficient compensation for the losses sustained by the employee as a result of the unlawful dismissal and, at the same time, is not in conflict with the purpose provided by law, nor causes particularly grave consequences to the employer, which might infringe on the lawful interests of other employees (for example, in some cases disproportionately large payments may lead to the employer's insolvency, which would be damaging to other employees), or undermines the good faith of the parties to an employment relationship, or conflicts with the guarantees applicable to other employees ..."

C. Relevant international and European Union law

52. The relevant international law on the jurisdictional immunity of States in matters related to employment were summarised in *Cudak*, cited above, §§ 28-31 and 66-67.

53. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities

and equal treatment of men and women in matters of employment and occupation (recast) provides in the relevant parts:

Article 2. Definitions

"1. For the purposes of this Directive, the following definitions shall apply:

...

(d) 'sexual harassment': where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment;

...

2. For the purposes of this Directive, discrimination includes:

(a) harassment and sexual harassment, as well as any less favourable treatment based on a person's rejection of or submission to such conduct;

..."

Article 19. Burden of proof

"1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

..."

COMPLAINT

54. The applicant complained under Article 6 § 1 of the Convention that the domestic courts had failed to fully remedy the damage that she had suffered as a result of the actions of the Polish embassy. She submitted that reinstating her in her previous job would have been the most just solution but that the courts had not properly considered her arguments in that regard. Furthermore, she complained that the compensation awarded to her had been manifestly insufficient in the light of the actual damage that she had sustained as a result of the unlawful dismissal.

THE LAW

A. Whether the Court is prevented by Article 46 of the Convention from examining the complaints made in the present application

55. At the outset, the Court notes that the present application is a sequel to a previous application lodged by the same applicant in relation to civil proceedings concerning her dismissal from a job at the Polish embassy. In its judgment of 23 March 2010 concerning that application, the Court held that the Lithuanian courts, by upholding an objection based on State immunity and by declining jurisdiction to hear the applicant's claim, had breached her right of access to a court, as guaranteed under Article 6 § 1 of the Convention (see paragraph 11 above). Relying on that judgment, the applicant asked the Supreme Court to reopen the civil proceedings that she had instituted against the Polish embassy (see paragraph 12 above). In the reopened proceedings, which are the subject of her present application, the courts declared the applicant's dismissal unlawful but decided not to reinstate her in her previous job at the embassy and awarded her monetary compensation (see paragraph 32 above).

56. The Court must determine in the first place whether it is prevented by Article 46 of the Convention from dealing with the complaints made by the applicant in view of the distribution of powers effected by the Convention between the Committee of Ministers and the Court as regards the supervision of the execution of the Court's judgments (see *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, § 31, ECHR 2015, and the case-law cited therein).

57. In this connection, the Court reiterates that the question of compliance by the High Contracting Parties with the Court's judgments falls outside its jurisdiction if it is not raised within the context of the "infringement procedure" provided for in Article 46 §§ 4 and 5 of the Convention. Under Article 46 § 2, the Committee of Ministers is vested with the powers to supervise the execution of the Court's judgments and evaluate the measures taken by respondent States. However, the Committee of Ministers' role in the sphere of execution of the Court's judgments does not prevent the Court from examining a fresh application concerning measures taken by a respondent State in the execution of a judgment if that application contains relevant new information relating to issues undecided by the initial judgment (ibid., §§ 33-34, and the cases cited therein).

58. Turning to the circumstances of the present case, the Court observes that the Committee of Ministers in its resolution CM/ResDH(2016)194 of 6 September 2016 closed the examination of the applicant's first case (see paragraph 33 above). The Court notes that whereas the judgment of 23 March 2010 in the applicant's previous case concerned her right of access to a court, in the present application she raised complaints

concerning the fairness of the reopened court proceedings, which were chronologically subsequent to and distinct from the domestic proceedings impugned in the Court's aforementioned judgment. Her new grievances were related not to her right of access to a court but to the proceedings which took place once the access to a court had been granted and in which her claim was examined on the merits for the first time. The present application therefore concerns a situation distinct from that examined in the Court's judgment of 23 March 2010 and contains relevant new information relating to issues undecided by that judgment (see, *mutatis mutandis*, *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, §§ 54-56, 11 July 2017).

59. As a consequence, in the present case the "new issue" that the Court has authority to examine, without encroaching on the prerogatives of the respondent State and the Committee of Ministers under Article 46 of the Convention, concerns the alleged unfairness of the civil proceedings instituted by the applicant against the Polish embassy, which were reopened following the Court's judgment of 23 March 2010. Accordingly, the Court is not prevented by Article 46 of the Convention from examining the applicant's new complaint about the unfairness of those proceedings.

B. Complaint under Article 6 § 1 of the Convention

60. The applicant complained about the decision of the domestic courts not to reinstate her in her previous job at the Polish embassy and to award her monetary compensation, which she considered inadequate. 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 [a] ... tribunal ..."

1. The parties' submissions

(a) The applicant

61. The applicant submitted that in her revised claim she had clearly expressed the wish to be reinstated in her previous job (see paragraph 15 above). She argued that the domestic courts had failed to adequately examine that part of her claim and had failed to consider that reinstatement would have been the most just solution in her case – instead, the courts had chosen to defend the interests of the Polish embassy.

62. The applicant also submitted that compensation amounting to twelve times her monthly salary was derisory and did not even come close to compensating her for the actual damage that she had sustained during the period of more than ten years following her unlawful dismissal.

(b) The Government

63. The Government submitted that under domestic law, courts examining labour disputes had a more active role than in other types of cases – they were entitled to go beyond the scope of the claim and, in cases of unlawful dismissal, to apply a different legal remedy than the one requested by the claimant (see paragraphs 39, 40 and 50 above), and the Supreme Court in the applicant's case had explicitly invoked those powers (see paragraph 32 above). The Government also pointed out that both in her initial claim and in her new claim, which had been lodged after the Court's judgment of 23 March 2010 (see paragraph 11 above), the applicant had not asked to be reinstated (see paragraphs 10 and 13 above); this showed that she had for more than eleven years considered working conditions at the Polish embassy to be unfavourable to her.

64. In the Government's view, the courts that examined the applicant's case had rightfully taken into account the time that had passed since her dismissal (twelve years) and the submissions of the Polish embassy that there had been no vacant positions and that the requirements for the applicant's previous job had changed (see paragraphs 24 and 32 above). Furthermore, under the relevant international law, the Polish embassy was entitled to claim jurisdictional immunity in cases concerning, *inter alia*, the recruitment and reinstatement of employees (see paragraph 52 above); the applicant's reinstatement would thus have risked violating international law.

65. Lastly, they submitted that the Court of Appeal in the applicant's case had emphasised, with references to the case-law of the Supreme Court, that compensation had to be proportionate – it had to compensate the unlawfully dismissed employee for his or her losses, but also constitute a proportionate restrictive measure against the employer (see paragraph 23 above). The Government emphasised that compensation should not result in unjust enrichment for the employee, nor be seen as a punitive measure against the employer. They submitted that any damage that the applicant had sustained from the date of her dismissal until the adoption of the Court's judgment of 23 March 2010 (see paragraph 11 above) had already been compensated for, as in that case she had been awarded EUR 10,000 in respect of pecuniary and non-pecuniary damage. The Government argued that that award "must have been taken into consideration by the domestic courts" when deciding on the amount of compensation to be awarded to the applicant.

2. The Court's assessment

66. At the outset the Court observes that there is no dispute that the applicant suffered sexual harassment while working at the Polish embassy, that she complained about it to the ambassador but that the latter failed to adequately address the situation, that the embassy staff prevented the

applicant from entering her workplace and that she was then unlawfully dismissed for her failure to come to work. Those facts were established by the Equal Opportunities Ombudsperson (see paragraph 9 above) and by courts, which applied, *inter alia*, the relevant provisions of European Union law regarding sexual harassment (see paragraphs 20-22 and 29-30 above). Furthermore, although in the domestic proceedings the Polish embassy disputed the applicant's statements relating to certain factual circumstances of her dismissal – in particular, that on several occasions she had arrived at the embassy but had been denied entry (see paragraphs 5, 7, 16 and 26 above) – at that time those circumstances had already been established in the Court's judgment of 23 March 2010 (see *Cudak v. Lithuania* [GC], no. 15869/02, § 14, ECHR 2010). The Government in their submissions to the Court did not dispute any of the aforementioned findings.

67. After upholding the applicant's complaints of sexual harassment and ruling her dismissal from work unlawful, the domestic courts decided not to order her reinstatement in her previous job at the Polish embassy but instead awarded her monetary compensation amounting to twelve times her average monthly salary (LTL 23,164 – approximately EUR 6,709), plus 5% annual interest, for the period from 1 July 2001 until the date of the complete execution of the final court decision (see paragraphs 25 and 32 above). The applicant did not allege that the court proceedings had been unfair because of any procedural defects, and nor does the Court, in the light of all the material submitted to it by the parties, consider that to be the case. The applicant essentially complained about the outcome of those proceedings – firstly, the courts' refusal to reinstate her, and secondly, the allegedly inadequate amount of compensation.

68. In this connection, the Court reiterates that, according to its long-standing and established case-law, it is not for this Court to deal with alleged errors of law or fact committed by the national courts unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, among many other authorities, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I) – for instance, where it can, exceptionally, be said that they are constitutive of "unfairness" incompatible with Article 6 of the Convention. While this provision guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way in which evidence should be assessed, these being primarily matters for regulation by national law and the national courts. Normally, issues such as the weight attached by the national courts to certain items of evidence or to findings or assessments in issue before them for consideration are not for the Court to review. The Court should not act as a fourth instance and will not therefore question under Article 6 § 1 the judgment of the national courts, unless their findings can be regarded as arbitrary or manifestly unreasonable (see *Bochan (no. 2)*, cited above, § 61, and the case-law cited therein).

69. With those general principles in mind, the Court will firstly address the applicant's complaint about the courts' decision not to reinstate her in her previous job at the Polish embassy. Although in her first two claims the applicant did not ask to be reinstated (see paragraphs 10 and 13 above), she later changed her position and clearly expressed such a request in her revised and final claim (see paragraph 15 above). The Government in their submissions to the Court argued that, under the relevant international law, the Polish embassy was entitled to claim jurisdictional immunity in cases concerning the recruitment and reinstatement of employees (see paragraph 64 above); however, since the embassy did not advance that argument in the domestic proceedings, and nor did the courts rely on it, the Court is unable to take it into consideration.

70. The Court observes that Article 42 of the Law on the Employment Contract, which was in force at the time of the applicant's dismissal, provided a limited possibility to refuse to reinstate an unlawfully dismissed employee: the only grounds for such refusal, explicitly provided by that Law, was the wish of the employee in question not to be reinstated (see paragraphs 44-46 and 49 above; compare and contrast the later labour laws referred to in paragraphs 47 and 48 above).

71. However, the Supreme Court in the applicant's case held that, under the Code of Civil Procedure, the court deciding a labour dispute had the right to go beyond the scope of the claim in question or to apply a different legal remedy than that requested by the claimant (see paragraph 32 above). The Court notes that at that time Articles 417 and 418 of that Code had already been applied by the Supreme Court in labour disputes, albeit concerning the application of labour laws enacted after the applicant's dismissal, to the effect that the reinstatement requested by dismissed employees was not ordered and monetary compensation was considered more appropriate in the respective circumstances (see paragraph 50 above). In the Court's view, the application of Articles 417 and 418 of the Code of Civil Procedure in the applicant's case and the assessment of whether her reinstatement was the most appropriate remedy in the circumstances, rather than ordering it automatically at her request, had not been unforeseeable to the applicant, and nor could it be regarded as arbitrary or manifestly unreasonable.

72. When determining the most appropriate remedy in the applicant's case, the Supreme Court emphasised that, in accordance with the general principles of justice, reasonableness and fairness, reinstatement could not be applied unconditionally because various objective factors – organisational, technical or otherwise – might make it impossible or might lead to costs that would be disproportionate to the violation committed (see paragraph 31 above). It decided not to reinstate the applicant in her previous job, in view of the fact that twelve years had passed since her dismissal, and that, according to the information provided by the Polish embassy, there were no

vacant positions and the requirements for the job had changed (see paragraph 32 above). Although in her appeal on points of law the applicant argued that, according to the Supreme Court's case-law, an employee who had been unlawfully dismissed had to be reinstated, irrespective of whether his or her previous job had changed or ceased to exist (see paragraph 27 above), in her submissions to the Court she neither reiterated that argument nor provided any references to such case-law.

73. In the Court's view, the grounds cited by the Supreme Court for not reinstating the applicant in her previous job were undoubtedly relevant. The Court cannot turn a blind eye to the long period of time – twelve years – which passed from her dismissal until the adoption of the final court decision, and shares the Supreme Court's position that it had been important for reinstatement to be ordered promptly, given that with the passage of time the relevant working conditions might substantially change or the position might cease to exist (see paragraph 31 above). It furthermore observes that in the domestic proceedings the Polish embassy consistently argued that the requirements in respect of the applicant's previous job (secretary and switchboard operator) had changed – candidates had to have had a university education and speak English, and the applicant did not meet those requirements (see paragraphs 16 and 28 above). The applicant did not argue, either before the domestic courts or before the Court, that she still met the requirements for the job of secretary and switchboard operator at the Polish embassy (see paragraphs 18, 27, 61 and 62 above).

74. In such circumstances, the Court considers that, even though the domestic courts' analysis of the actual possibility to reinstate the applicant in her previous job was rather cursory (see paragraphs 24 and 32 above), they cannot be reproached for accepting the embassy's submission that over the twelve years the requirements of that job had changed – especially since the applicant had not challenged that submission in any way. Accordingly, the Court sees no good reason to substitute its own views for those of the domestic courts and is satisfied that their decision not to reinstate the applicant in her previous job was not arbitrary or manifestly unreasonable.

75. The Court will next address the applicant's complaint that the monetary compensation awarded to her was inadequate. Article 42 § 3 of the Law on the Employment Contract provided that an unlawfully dismissed employee could be awarded monetary compensation of up to twelve times his or her monthly salary (see paragraph 46 above). The applicant was awarded the maximum amount provided by that Law – twelve times her average monthly salary, with 5% annual interest (see paragraph 25 above). The Government submitted that the courts, when determining the amount of compensation, must have taken into account the fact that the Court in its judgment of 23 March 2010 (see paragraph 11 above) had awarded the applicant EUR 10,000 in respect of pecuniary and non-pecuniary damage, and that she had thus already been partly compensated (see paragraph 65

above). However, the courts that examined the applicant's case did not explicitly cite that fact, and the Court is therefore unable to accept the Government's submission.

76. Be that as it may, in the Court's view, the amount awarded to the applicant – LTL 23,164 (approximately EUR 6,709), plus 5% annual interest for the period from 1 July 2001 until the date of the complete execution of the final court decision – cannot be considered derisory. Furthermore, the domestic law that was in force at the time of the applicant's unlawful dismissal did not entitle her to compensation higher than twelve times her average monthly salary (see paragraph 46 above), and the Court may not create a right for the applicant to receive compensation that was not provided in the domestic law (see *Tibet Menteş and Others v. Turkey*, nos. 57818/10 and 4 others, § 53, 24 October 2017, and the case-law cited above). It therefore considers that the decision of the domestic courts to award the applicant compensation in the maximum available amount under the domestic law was not arbitrary or manifestly unreasonable.

77. Accordingly, the Court concludes that the domestic proceedings in which the applicant was awarded monetary compensation for her unlawful dismissal from the Polish embassy do not disclose any appearance of a violation of Article 6 § 1 of the Convention. It follows that the application is manifestly ill-founded and must be declared inadmissible, in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 16 May 2019.

Andrea Tamietti
Deputy Registrar

Jon Fridrik Kjølbro
President