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

COURT (CHAMBER)

CASE OF NIDERÖST-HUBER v. SWITZERLAND

(Application no. 18990/91)

JUDGMENT

STRASBOURG

18 February 1997

In the case of Nideröst-Huber v. Switzerland[1],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court B[2], as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,
Mr Thór VILHJÁLMSSON,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr J. DE MEYER,
Mr N. VALTICOS,
Mr R. PEKKANEN,
Mr L. WILDHABER,
Mr K. JUNGWIERT,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 28 September 1996 and 27 January 1997,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 8 December 1995 and by the Swiss Government ("the Government") on 20 February 1996, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 18990/91) against the Swiss Confederation lodged with the Commission under Article 25 (art. 25) by a Swiss national, Mr Armin Nideröst-Huber, on 17 October 1991.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Switzerland recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Articles 45, 47 and 48 (art. 45, art. 47, art. 48). The object of the

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[1] The case is numbered 104/1995/610/698. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[2] Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning the States bound by Protocol No. 9 (P9).

request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 of the Convention (art. 6-1).

2. In response to the enquiry made in accordance with Rule 35 para. 3 (d) of Rules of Court B, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 31).

3. The Chamber to be constituted included ex officio Mr L. Wildhaber, the elected judge of Swiss nationality (Article 43 of the Convention) (art. 43), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 para. 4 (b)). On 21 February 1996, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr R. Macdonald, Mr C. Russo, Mr J. De Meyer, Mr N. Valticos, Mr R. Pekkanen and Mr K. Jungwiert (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43).

4. As President of the Chamber (Rule 21 para. 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 39 para. 1 and 40). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 26 July 1996 and the applicant's memorial on 29 July. On 7 August 1996 the Commission produced various documents requested by the Registrar on the instructions of the President of the Chamber.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 24 September 1996. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr P. BOILLAT, Head of the European Law and International Affairs Section, Federal Office of Justice, *Agent*,

Mr A. VON KESSEL, European Law and International Affairs Section, Federal Office of Justice,

Mr J.-M. PIGUET, Service for the Revision of the Federal Judicature Act, Federal Office of Justice, *Advisers*;

(b) for the Commission

Mr N. BRATZA, *Delegate*;

(c) for the applicant

Mr M. ZIEGLER, Rechtsanwalt (lawyer) practising in Lachen, *Counsel*,

Ms H. MARTY, Rechtsanwaltin (lawyer) practising in Lachen, *Adviser*.

The Court heard addresses by Mr Bratza, Mr Ziegler and Mr Boillat.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

6. Mr Armin Nideröst-Huber is a Swiss citizen born in 1940 and resident in Rickenbach (Switzerland).

7. On 9 December 1985 he was dismissed without notice from the posts of chairman (Verwaltungsratspräsident) and managing director (Geschäftsführer) of a family-run public limited company (Aktiengesellschaft) incorporated under Swiss law, following a change of majority among the shareholders.

8. On 29 July 1986 he brought proceedings against the company seeking arrears of salary and a severance payment (Abgangsentschädigung). The Schwyz District Court (Bezirksgericht) gave judgment against him on 22 September 1988.

9. On 19 June 1990 the Schwyz Cantonal Court (Kantonsgericht) dismissed an appeal (Berufung) by the applicant. Endorsing the reasons of the lower court, it held that the applicant's dismissal had been justified because in the conflict between Mr Nideröst-Huber and the minority shareholders he had neglected the interests of the company in favour of his own. As a result, the new majority no longer trusted him to manage the company honestly.

10. The applicant then applied to the Federal Court by means of an appeal (Berufung) lodged with the Cantonal Court on 12 October 1990. The Cantonal Court transmitted the appeal to the Federal Court on 22 October together with the case file and one page of observations (Stellungnahme zur Berufung), which were not communicated to the applicant. In these observations it argued that the appeal should be dismissed and refuted some of the grounds of appeal, emphasising, inter alia, that Mr Nideröst-Huber's dismissal had been the legitimate consequence of his intractable and unlawful conduct over a number of years at the head of the firm.

11. The company submitted a defence (Berufungsantwort) on 12 December 1990. This was communicated to Mr Nideröst-Huber.

12. On 1 March 1991 the Federal Court dismissed the appeal, holding that the Cantonal Court had rightly ruled that the applicant's dismissal without notice was justified, since he had abused his majority shareholding in the company in order to serve his personal interests, systematically disregarding those of the minority shareholders, even in breach of binding judicial decisions; the new majority had therefore been justified in dismissing him forthwith.

13. The judgment was served on the applicant on 30 April 1991. On the same day he asked the Federal Court to supply him with a copy of the

Cantonal Court's observations (see paragraph 10 above). He obtained this on 2 May 1991.

II. RELEVANT DOMESTIC LAW

14. Section 56 of the Federal Judicature Act of 16 December 1943 provides:

> "The cantonal authority shall immediately inform the respondent of the grounds of appeal, even if the appeal appears to be out of time, and shall transmit to the Federal Court, within one week, the documents whereby the appeal has been lodged, a copy of the final decision and the preliminary decisions which have preceded it, the complete file and, where appropriate, its own observations. It shall also inform the Federal Court of the date on which the impugned decision was notified, the date on which the appeal reached it or on which it was posted and the date on which it was communicated to the respondent."

PROCEEDINGS BEFORE THE COMMISSION

15. In his application to the Commission of 17 October 1991 (no. 18990/91) Mr Nideröst-Huber complained that, contrary to Article 6 para. 1 of the Convention (art. 6-1), he had not received a copy of the observations sent by the Schwyz Cantonal Court to the Federal Court and had therefore been deprived of the opportunity to comment on them before the Federal Court gave judgment.

16. The Commission declared the application admissible on 17 January 1995. In its report of 23 October 1995 (Article 31) (art. 31), it expressed the opinion by twenty-six votes to four that there had been a violation of Article 6 para. 1 (art. 6-1). The full text of the Commission's opinion and of the two dissenting opinions contained in the report is reproduced as an annex to this judgment[3]

FINAL SUBMISSIONS TO THE COURT

17. In their memorial the Government requested the Court "to hold that Switzerland has not violated the European Convention on Human Rights in respect of the matters which gave rise to Mr Nideröst-Huber's application".

18. The applicant asked the Court "to hold that there has been a violation of Article 6 para. 1 of the Convention (art. 6-1)".

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[3] Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1997-I), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 OF THE CONVENTION (art. 6-1)

19. Mr Nideröst-Huber alleged a violation of Article 6 para. 1 of the Convention (art. 6-1), which provides:

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

He submitted that, in spite of an express request, the Federal Court had not sent him the observations of the Schwyz Cantonal Court before it gave judgment, and had thus made it completely impossible for him to inspect them and, if need be, to comment on them in due course. It had been all the more needful for these observations to be sent to him, however, because they expanded on the impugned judgment and because the Federal Court had evidently reproduced certain passages from them in its judgment. In short, the principle of equality of arms and the right to a fair trial had been infringed.

20. The Government maintained that the observations in question contained nothing which had not already been said explicitly and in greater detail in the Cantonal Court’s judgment of 19 June 1990. If they had included important new arguments which the Federal Court wished to take into consideration, it would have had to organise a further exchange of pleadings or order a hearing for oral argument, but it had not done so.

The sole purpose of the possibility provided for in section 56 of the Federal Judicature Act (see paragraph 14 above) was to save time in Federal Court proceedings by enabling the cantonal courts to defend their judgments against criticisms that had been made of them. Under no circumstances could the cantonal courts take advantage of this as an opportunity to expand on their decisions.

In the present case the fact that the observations were not sent to Mr Nideröst-Huber had not affected the outcome in any way, since the respondent company had not received a copy either. Even if copies had been sent, this could only have been for information purposes, since the content of the observations did not call for any response from the parties, who had already had every opportunity to present their cases - the applicant when he lodged the appeal and the company when it submitted a defence.

In short, when considered in the light of the proceedings as a whole, the fact that the applicant was not sent a copy of the observations had not detrimentally affected his position in any way.

21. The Commission found no infringement of the principle of equality of arms. On the other hand, it took the view that the failure to send the

applicant a copy of the observations and the fact that it had been impossible for him to comment on them in due course had infringed the right to a fair trial for the purposes of Article 6 para. 1 (art. 6-1).

22. The Court considers, firstly, that in itself the filing of observations like those in the present case is not incompatible with the requirements of a fair trial, even though it is a practice seldom encountered in the member States of the Council of Europe. In the present case only the fact that the observations were not communicated to the applicant raised any problem.

23. The principle of equality of arms - one of the elements of the broader concept of fair trial - requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent (see, among other authorities, the Ankerl v. Switzerland judgment of 23 October 1996, Reports of Judgments and Decisions 1996-V, pp. 1567-68, para. 38).

In the present case the Cantonal Court's observations were not communicated to either of the parties to the dispute before the Federal Court, namely the applicant and the respondent company. As for the Cantonal Court, which is an independent tribunal, it cannot be regarded as the opponent of either of the parties. Accordingly, no infringement of equality of arms has been established.

24. However, the concept of fair trial also implies in principle the right for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed (see the Lobo Machado v. Portugal and Vermeulen v. Belgium judgments of 20 February 1996, Reports 1996-I, p. 206, para. 31, and p. 234, para. 33, respectively).

25. The Government argued that this rule applied to cases where, as in the above-mentioned Lobo Machado and Vermeulen cases and the case of Bulut v. Austria (judgment of 22 February 1996, Reports 1996-II), an authority had taken the initiative of submitting arguments or observations intended to advise or influence a court. But in the present case the Cantonal Court had merely replied to the criticisms of its judgment that had been made in the appeal. In doing so it had not made any points which were not already part of the impugned decision.

26. The Court notes that even though the observations in issue ran to only one page they nevertheless constituted a reasoned opinion on the merits of the appeal, and explicitly called for it to be dismissed. As the Delegate of the Commission observed, they were therefore manifestly aimed at influencing the Federal Court's decision.

27. In that connection, the effect they actually had on the decision is of little consequence. In any event, as the observations came from an independent tribunal which, furthermore, had a thorough knowledge of the file, having previously considered the merits of the case, it is unlikely that the Federal Court would have paid them no heed. It was therefore all the

more needful to give the applicant an opportunity to comment on them if he wished to do so.

28. It is also of little consequence that the case concerned civil litigation, where the national authorities, as the Government rightly pointed out, enjoy greater latitude than in the criminal sphere (see the Dombo Beheer B.V. v. the Netherlands judgment of 27 October 1993, Series A no. 274, p. 19, para. 32, and the Levages Prestations Services v. France judgment of 23 October 1996, Reports 1996-V, p. 1544, para. 46). According to the above-mentioned Lobo Machado and Vermeulen judgments, on this point the requirements derived from the right to adversarial proceedings are the same in both civil and criminal cases (p. 206, para. 31, and p. 234, para. 33, respectively).

29. Nor is the position altered when, in the opinion of the courts concerned, the observations do not present any fact or argument which has not already appeared in the impugned decision. Only the parties to a dispute may properly decide whether this is the case; it is for them to say whether or not a document calls for their comments. What is particularly at stake here is litigants' confidence in the workings of justice, which is based on, inter alia, the knowledge that they have had the opportunity to express their views on every document in the file.

30. No doubt the filing of observations like those in issue in the present case is calculated to save time and expedite the proceedings. As its case-law bears out, the Court attaches great importance to that objective, which does not, however, justify disregarding such a fundamental principle as the right to adversarial proceedings. In fact, Article 6 para. 1 (art. 6-1) is intended above all to secure the interests of the parties and those of the proper administration of justice (see, mutatis mutandis, the Acquaviva v. France judgment of 21 November 1995, Series A no. 333-A, p. 17, para. 66).

31. In the present case respect for the right to a fair trial, guaranteed by Article 6 para. 1 of the Convention (art. 6-1), required that Mr Nideröst-Huber be informed that the Cantonal Court had sent observations and that he be given the opportunity to comment on them.

Moreover, according to the Government's explanations at the hearing before the Court, that is indeed the normal practice of the Federal Court. It was not followed in this case.

32. There has accordingly been a breach of Article 6 para. 1 (art. 6-1).

II. APPLICATION OF ARTICLE 50 OF THE CONVENTION (art. 50)

33. Under Article 50 of the Convention (art. 50),

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or

measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

34. In respect of pecuniary damage Mr Nideröst-Huber claimed 8,500 Swiss francs (CHF) in compensation for the damages (Entschädigung) of CHF 5,000 which the Federal Court had ordered him to pay the respondent plus CHF 3,500 in interest. He further claimed CHF 3,000 for non-pecuniary damage.

35. The Government asked the Court to refuse these claims, arguing that it was not for the Court to retry the case in the place of the Swiss authorities.

36. The Delegate of the Commission referred to the Court's decisions on this issue in the above-mentioned Lobo Machado and Vermeulen cases.

37. The Court notes that there is no causal connection between the violation complained of and the pecuniary damage alleged; it cannot speculate as to what the outcome of the case would have been if the proceedings had been compatible with the requirements of Article 6 para. 1 (art. 6-1).

As for non-pecuniary damage, the Court considers that it is sufficiently compensated for by the finding of a breach of Article 6 para. 1 (art. 6-1).

B. Costs and expenses

38. Mr Nideröst-Huber also requested CHF 18,500 in respect of the costs and expenses he had incurred through the proceedings in the Federal Court (CHF 7,725) and later before the Convention institutions (CHF 10,775).

39. The Delegate of the Commission referred to the above-mentioned Vermeulen and Bulut judgments.

40. The Court observes that, according to its case-law, to be awarded costs and expenses the injured party must have incurred them in order to seek prevention or rectification of a violation of the Convention, to have the same established by the Commission and later by the Court and to obtain redress therefor. It must also be shown that the costs were actually and necessarily incurred and that they are reasonable as to quantum (see, among other authorities, the Philis v. Greece (no. 1) judgment of 27 August 1991, Series A no. 209, p. 25, para. 74).

It notes that the costs relating to the proceedings in the Federal Court could not have been incurred in order to prevent or rectify a violation affecting the proceedings in that very court. It accordingly accepts the Government's submission that it should refuse this part of the claim.

With regard to the costs incurred for Mr Nideröst-Huber's representation in Strasbourg, the Court awards the sum claimed, namely CHF 10,775.

C. Default interest

41. According to the information available to the Court, the statutory rate of interest applicable in Switzerland at the date of adoption of the present judgment is 5% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a breach of Article 6 para. 1 of the Convention (art. 6-1);

2. Holds that the present judgment constitutes sufficient just satisfaction in respect of any non-pecuniary damage suffered;

3. Holds
(a) that the respondent State is to pay the applicant, within three months, 10,775 (ten thousand seven hundred and seventy-five) Swiss francs for costs and expenses;
(b) that simple interest at an annual rate of 5% shall be payable from the expiry of the above-mentioned three months until settlement;

4. Dismisses the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 18 February 1997.

Rudolf BERNHARDT
President

Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 55 para. 2 of Rules of Court B, the concurring opinion of Mr De Meyer is annexed to this judgment.

R.B.
H.P.

CONCURRING OPINION OF JUDGE DE MEYER

(Translation)

In this case it would have been sufficient to note that the right to a fair trial necessarily (and not just "in principle") implies, for the parties to a trial, the right to "have knowledge of and comment on all evidence adduced or observations filed"[1], and that this right had therefore been manifestly infringed, in that no copy of the observations sent to the Federal Court by the Cantonal Court had been supplied to Mr Nideröst-Huber[2].

We did not have to spend time replying to the unconvincing arguments by which it was sought to justify what happened in this case.

In the expatiatory remarks which we felt obliged to make in reply to these arguments we were thus led to say some things that it would have been better for us not to have said.

Firstly, it is not at all certain that in this area Contracting States enjoy "greater latitude" in civil cases "than in the criminal sphere"[3]. The fact that this assertion has been made, and - be it said - without sufficient justification, in earlier judgments is no reason to repeat it yet again here.

Moreover, it was completely unnecessary to concede that "the filing of observations like those in issue in the present case is calculated to save time and expedite the proceedings"[4]. We had already shown sufficient (and perhaps too much) understanding by accepting that, "in itself", it was "not incompatible with the requirements of a fair trial"[5].

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[1] See paragraph 24 of the judgment.
[2] See paragraph 10 of the judgment.
[3] See paragraph 28 of the judgment.
[4] See paragraph 30 of the judgment.
[5] See paragraph 22 of the judgment.