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

FIRST SECTION

DECISION

Application no. 6718/13
Bojana VUKELIĆ
against Croatia

The European Court of Human Rights (First Section), sitting on 12 December 2017 as a Committee composed of:

Kristina Pardalos, *President,*
Ksenija Turković,
Pauliine Koskelo, *judges,*

and Renata Degener, *Deputy Section Registrar,*

Having regard to the above application lodged on 27 December 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 Bojana Vukelić, is a Croatian national who was born in 1949 and lives in Zagreb. She was represented before the Court by Mr R. Pelicarić, a lawyer practising in Zagreb.

2. The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

A. The circumstances of the case

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

4. The applicant has been working as a research assistant at the I.R.B. research institute since 1977. On 6 February 2002 the applicant's employer gave her notice of "dismissal due to wrongful conduct by the worker with an offer to conclude a new employment contract" (*otkaz ugovora o radu*

zbog skrivljenog ponašanja radnika s ponudom izmijenjenog ugovora). The offer was for a less senior position with a lower salary because she had failed to obtain a doctoral degree (PhD) within the prescribed deadline.

5. The applicant agreed to sign a new contract but at the same time she brought a civil action against her employer contesting its decision to terminate her previous contract. She also sought to be reinstated to her previous position and to be awarded arrears of pay.

6. On 8 February 2007 the Zagreb Municipal Court (*Općinski građanski sud u Zagrebu*) dismissed the applicant's claim as unfounded. Upon an appeal by the applicant, the Zagreb County Court (*Županijski sud u Zagrebu*) upheld the first-instance judgment.

7. A subsequent appeal on points of law by the applicant (*revizija*) was declared inadmissible by the Supreme Court (*Vrhovni sud Republike Hrvatske*) on 14 April 2010 on the grounds that her employment had not been actually terminated as she had concluded a new contract with the same employer. That gave rise to the dismissal of her appeal on points of law as incompatible *ratione materiae*. The court relied on section 382(1)(2) of the Civil Procedure Act.

8. On 26 May 2010 the applicant lodged a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*). She complained that the Supreme Court had wrongly found that a dispute concerning a situation where an employer had terminated an employment contract and simultaneously offered an employee a new one was not the kind of dispute referred to in section 382(1)(2) of the Civil Procedure Act. She also argued that the Supreme Court had not taken into account section 115(1) of the Labour Act, which provided that its provisions referring to dismissal from work were also applicable to a situation where an employer terminated an employment contract and at the same time offered an employee a new one with different conditions. In the applicant's view, the Supreme Court had deprived her of her right of access to that court itself.

9. On 5 July 2012 the Constitutional Court declared the complaint inadmissible as manifestly ill-founded. The relevant part of the decision reads as follows:

> "The constitutional complaint is not an ordinary or extraordinary legal remedy in the system of domestic remedies. It is a special constitutional and legal remedy for the protection of human rights in specific cases. Therefore, it is not enough in a constitutional complaint to raise violations that were made due to allegedly unlawful acts committed by a competent body or a court in judicial proceedings.
>
> ...
>
> Not a single relevant constitutional or legal issue was raised as being in dispute in the constitutional complaint, while the alleged existence of a violation of the said constitutional rights is not explained in detail.

The person making the constitutional complaint has not demonstrated that the Supreme Court, when deciding [upon the applicant's appeal on points of law] did not respect the constitutional provisions on human rights and fundamental freedoms, or that its interpretation of the relevant law was arbitrary."

B. Relevant domestic law and practice

1. The Civil Procedure Act

10. The relevant provision of the Civil Procedure Act (*Zakon o parničnom postupku,* Official Gazette nos. 53/1991, 91/1992, 112/1999, 81/2001, 117/2003, 88/2005, 84/2008, 96/2008 and 123/2008), as in force at the material time, provided:

Section 382

"(1) Parties may lodge an appeal on points of law against a second-instance judgment:

...

2. if the judgment was rendered in a dispute on the existence of an employment contract, or against the termination of a contract of employment or to establish the existence of an employment contract;

..."

11. The relevant provision of the Labour Act (*Zakon o radu,* Official Gazette no. 149/2009), as in force at the material time, provided:

Section 115

"(1) The provisions of this Act applicable to dismissal are also applicable to cases when an employer terminates a contract of employment and simultaneously offers to conclude a contract employment under different terms with the employee ('dismissal accompanied by an offer to alter the terms of the employment contract').

..."

2. The Constitutional Court's jurisprudence

12. In decisions nos. U-III-374/2008 of 27 October 2010, U-III-3256/2011of 1 December 2014 and U-III-3256/2005 of 8 July 2013, the Constitutional Court held that inconsistency in a court's case-law breached the principle of legal certainty and thus violated the constitutional right to a fair hearing. In all those cases the applicants clearly stated that the courts had departed from their previous case-law, thus violating their right to a fair hearing.

COMPLAINTS

13. The applicant complained under Article 6 § 1 and Article 13 of the Convention that her right to a fair hearing had been violated because the Supreme Court, contrary to its well established case-law in cases identical to hers, had refused to examine her appeal on points of law on the merits.

THE LAW

Article 6 § 1 of the Convention

14. The applicant complained under Article 6 § 1 and Article 13 of the Convention that her right to a fair hearing had been violated by the Supreme Court as it had found her appeal on points of law inadmissible *ratione materiae*. In particular, she argued that the impugned decision had been inconsistent with numerous judgments by the same court in cases identical to hers, concerning the same issue, and in which it had examined appeals on points of law on the merits. The complaint was communicated under Article 6 § 1 which, in so far as relevant, reads as follows:

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

1. The parties' arguments

15. The Government argued that the applicant had not exhausted domestic remedies because she had not raised any such grievance in her constitutional complaint. They argued that in her application before the Court the applicant had complained that the Supreme Court had declared her appeal on points of law inadmissible in a manner that was contrary to its own well-established case-law. Her application to the Court therefore was a complaint about a lack of legal certainty caused by inconsistent Supreme Court case-law, however, she had not made those arguments before the Constitutional Court. It had been the applicant's responsibility to state clearly and to substantiate the manner in which her human rights had been violated.

16. The applicant argued that by alleging that the Supreme Court had violated her right of access to a court in her constitutional complaint she had properly exhausted available domestic remedies. In that connection, she emphasised that her complaint before the Court was not about the inconsistent case-law, but about a violation of her right of access to the Supreme Court.

2. The Court's assessment

17. In accordance with Article 35 § 1 of the Convention, the Court may only deal with a matter after all domestic remedies have been exhausted. The purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right violations alleged against them before those allegations are submitted to the Court (see, for example, *Gherghina v. Romania* (dec.) [GC], no. 42219/07, § 84, 9 July 2015). Thus, a complaint submitted to the Court should first have been made to the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 72, 25 March 2014).

18. The Court has already held that, in respect of applications lodged against Croatia, applicants are in principle required to exhaust remedies before the domestic courts and ultimately to lodge a constitutional complaint (see *Mađer v. Croatia*, no. 56185/07, § 136, 21 June 2011).

19. The Court notes that on 25 May 2010 the applicant did lodge a constitutional complaint (see paragraph 6 above). In that complaint she argued that her right of access to the Supreme Court had been violated because it had wrongly interpreted certain provisions of domestic law. Before the Court, the applicant, in substance, raised the issue of legal certainty, arguing that the decision of the Supreme Court to declare her appeal on points of law inadmissible *ratione materiae*, thus depriving her of access to that court, had been inconsistent with its own earlier judgments in cases that were identical to hers (see paragraph 13 above). She did not raise that issue in her constitutional complaint at all, but instead complained about the court's interpretation of the law (see paragraph 8 above). In particular, the Court observes that her constitutional complaint did not mention the divergent approaches taken in identical situations by the same court, let alone point to any evidence of why the manner the Supreme Court had interpreted the relevant provisions concerning the admissibility of an appeal on points of law had allegedly been arbitrary or manifestly unreasonable.

20. The applicant therefore did not rely on the same grounds in her constitutional complaint and her application to the Court.

21. Taking into account the fact that the Convention mechanism is subsidiary to national systems for safeguarding human rights, and in view of the above considerations, the Court concludes that the applicant did not provide the Constitutional Court with a genuine opportunity to examine the same complaint she is now raising before the Court.

22. It follows that the Government's objection is upheld and the applicant's complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on on 11 January 2018.

Renata Degener
Deputy Registrar

Kristina Pardalos
President