



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

FIFTH SECTION

DECISION

Application no. 32783/08
FIRMA EDV FÜR SIE, EFS ELEKTRONISCHE
DATENVERARBEITUNG DIENSTLEISTUNGS GMBH
against Germany

The European Court of Human Rights (Fifth Section), sitting on 2 September 2014 as a Committee composed of:

Boštjan M. Zupančič, *President*,

Angelika Nußberger,

Vincent A. De Gaetano, *judges*,

and Stephen Phillips, *Deputy Section Registrar*,

Having regard to the above application lodged on 7 July 2008,

Having deliberated, decides as follows:

THE FACTS

1. The applicant company, *Firma EDV für Sie, Efs Elektronische Datenverarbeitung Dienstleistungs GmbH*, is a company with limited liability whose seat is in Marktheidenfeld, Germany. It was represented before the Court by Mr C. Sailer, a lawyer practising in Marktheidenfeld.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant company, may be summarised as follows.

1. Background to the case

3. The applicant company was a software enterprise that provided customer service for a database widely used by German medical practitioners. It distributed this software to, and maintained it for, about 400 medical offices in Bavaria.

4. On 16 May 1997 the Medical Tribune, a journal for medical professionals, published an article warning of a technical security leak and exposing the applicant company as a “Company of Christ” (*Christusbetrieb*) closely tied to a religious community called *Universelles Leben* (“Universal Life”). It claimed that although *Universelles Leben* did not control the applicant company formally, it did so by informal means, as all employees as well as the management were, by their religious beliefs, affiliated to *Universelles Leben*. The article cited negative statements concerning *Universelles Leben* made by the representative for sect-related issues of the Bavarian Protestant-Lutheran Church.

5. On 18 May 1997 the representative of the Bavarian Protestant-Lutheran Church issued a press release entitled “Security Leak in Software for Medical Practices – Patient Data Accessible to Psycho-Sect *Universelles Leben*”. He warned of the “at least conceivable danger” that the applicant company might abuse its access to patient data and use it for the purposes of the religious community *Universelles Leben*. He also referred to the unusual views of *Universelles Leben* concerning the treatment of illnesses that favours the application of “cosmic rays” over medicine.

6. On 20 May 1997 the representative of the Bavarian Protestant-Lutheran Church gave an interview to an independent Bavarian radio station, confirming that he saw a risk to data security, but explicitly stating that neither he nor the Medical Tribune had alleged that the applicant company had abused its access to patient data in the past. Nonetheless, he considered the applicant company a “Company of Christ” tied to *Universelles Leben* and a “dubious organisation” in view of its unusual views on the treatment of illnesses and called on practitioners to reconsider giving it access to patient data. A representative of the applicant company was also heard, via an audio recording, in which he rejected all allegations and called the representative of the Protestant Church a “public liar”.

7. Subsequently, the issue was taken up by various regional and national newspapers, which repeated the fear expressed in the press release as regards the possibility of a security leak.

8. On 29 May 1997 the company that had licensed the applicant company to distribute and provide customer service for its software terminated their contract, citing the critical press.

9. Having thereby lost its main source of income, the applicant company discontinued its business on 31 December 1997.

2. Proceedings before the domestic courts

10. The applicant company instituted proceedings seeking a “cease-and-desist” order (*Unterlassungsanordnung*) before the Munich Administrative Court. On 11 November 1998 the applicant company withdrew part of its claim when the Administrative Court declared that the

statements of the Bavarian Protestant-Lutheran Church had violated the personality rights (*Allgemeines Persönlichkeitsrecht*) of the applicant company.

11. On 4 June 1999 the Bavarian Administrative Court of Appeal quashed the judgment of the lower court on appeal, arguing that civil proceedings on damages were meanwhile pending and that those took precedence over administrative proceedings.

12. The Federal Administrative Court upheld that decision on 12 July 2000.

13. On 9 May 2001 the Munich Regional Court rejected the applicant company's claim for damages and a cease-and-desist order under Article 823 § 1 of the Civil Code (see paragraph 17 below). It held that neither the applicant company's personality rights nor its rights concerning its business (*Recht am eingerichteten und ausgeübten Gewerbebetrieb*) had been violated by the Bavarian Protestant-Lutheran Church's representative.

14. Balancing the rights of the applicant company against the Church's rights to freedom of expression and freedom of religion, the Regional Court considered that the allegations of fact had been accurate, in particular, the part of the press release and interview referring to the "access" *Universelles Leben* had to patient data. The Regional Court conceded that the negative depiction of *Universelles Leben* could have had a negative impact on the applicant company's business. However, *Universelles Leben* had not been subject to unmerited or abusive criticism. The statement had been accompanied by an explicit statement to the effect that there had been no indication of an abuse by the applicant company of its access to patient data so far. The Protestant Church had been entitled to criticize the applicant company, which was under the *de facto* control of another religious community. Referring to an earlier judgment of the Bavarian Administrative Court of Appeal, the Regional Court took into account that members of *Universelles Leben* were not allowed to have a substantial income from sources other than the group's "Companies of Christ". Members were supposed to surrender any personal assets for the common good of the group. The Protestant Church therefore had no reason to separate strictly the personal religious beliefs of the employees and management, and the company. Their being bound so closely to *Universelles Leben* exacerbated the security risk.

15. On 8 February 2002 the Munich Court of Appeal upheld the judgment, confirming its reasoning. Additionally, it emphasised in the balancing of interests that the Bavarian Protestant-Lutheran Church had not pursued its own economic interests by their statements. Rather, they had spoken about a topic of substantial public interest, which concerned about 400 medical practices in Bavaria. It noted in that context that the applicant company had not contested in substance the statements made by the Bavarian Protestant-Lutheran Church on its views, or those of *Universelles*

Leben, on medical treatment. It also noted that the Bavarian Protestant-Lutheran Church's representative had not initiated the public debate, but had reacted to another publication. Lastly, the Court of Appeal noted that the effects of the press release had been severely negative for the applicant company. However, this had been the result of a debate, rather than pressure of any kind on the medical practices and patients concerned.

16. On 18 December 2007 the applicant company's constitutional complaint was rejected without reasons by the Federal Constitutional Court (file no. 1 BvR 198/03).

B. Relevant domestic law

17. The relevant provisions of the German Civil Code read as follows:

Article 823

“(1) Anyone who, intentionally or negligently, unlawfully harms the life, body, health, freedom, property or other right of another person is liable to compensate the other party for the damage.

(2) The same liability applies to a person who commits a breach of a statute that is intended to protect another person ...”

Article 1004

“(1) If ownership is interfered with by means other than removal or retention of possession, the owner may require the person causing the interference to remove it. If further interferences are to be feared, the owner may seek a prohibitory injunction.”

According to the consistent case-law of the German civil courts, Article 823 §§ 1 and 2 in conjunction with Article 1004 (in analogous application) of the Civil Code grants anyone – natural and legal persons alike – whose personality rights are concretely at risk a right to apply for a cease-and-desist order.

COMPLAINTS

18. The applicant company invoked Articles 8 and 9 of the Convention and Article 1 of Protocol No. 1, complaining that by exposing the religious affiliation of its employees and management, and questioning their reliability on those grounds, the Bavarian Protestant-Lutheran Church had tarnished the applicant's reputation and ruined its economic foundation. Without any evidence, the Bavarian Protestant-Lutheran Church had suggested to the public that the applicant company's potential access to patients' medical data constituted a security risk. Moreover, the applicant company claimed that, as a juridical entity, it could assert its rights under

Article 8 and 9 of the Convention in so far as the religion of its employees and management had been rendered public.

THE LAW

A. Alleged violation of Article 8 of the Convention

19. The applicant company complained that its reputation had been tarnished by the statements of a representative of the Bavarian Protestant-Lutheran Church. The Court considers that this part of the application falls to be examined in the first place under Article 8 of the Convention, which reads as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

1. Applicability of Article 8

20. The question arises whether Article 8, under its “private life” limb, is applicable in this case, in which a legal person – the applicant company – complained of an alleged violation of its reputation.

21. The Court recalls that the private-life aspect of Article 8 of the Convention encompasses a natural person’s reputation (see *Axel Springer AG v. Germany* [GC], no. 39954/08, § 82, 7 February 2012). Regarding legal persons, the Court has consistently held that a legal person’s business premises (see *Buck v. Germany*, no. 41604/98, § 31, ECHR 2005-IV with further references, and *Niemietz v. Germany*, 16 December 1992, §§ 29-31, Series A no. 251-B) and its correspondence (see *Wieser and Bicos Beteiligungen GmbH v. Austria*, no. 74336/01, §§ 43-45, ECHR 2007-IV) fall under the ambit of Article 8. The Court has further held that the protection of a company’s reputation may be the legitimate aim of a restriction under Article 10 § 2 of the Convention (see *Heinisch v. Germany*, no. 28274/08, § 64, ECHR 2011 (extracts), and *Steel and Morris v. the United Kingdom*, no. 68416/01, § 94, ECHR 2005-II).

22. The Court further reiterates that in cases such as the present one in which a fair balance has to be struck between the conflicting rights of the applicant company and freedom of expression, the outcome of the application should not, in principle, vary according to whether it has been lodged with the Court under Article 10 of the Convention by the publisher

of the offending article or under Article 8 of the Convention by the person who was the subject of that article. Indeed, as a matter of principle those rights deserve equal respect (see *Axel Springer AG*, cited above, § 87, and *Mosley v. the United Kingdom*, no. 48009/08, § 111, 10 May 2011).

23. The Court considers that for the purposes of the present application, it may leave open the question whether the reputation of a company falls under the notion of private life under Article 8 § 1. Having regard to the foregoing principles, it will start on the assumption that Article 8 applies.

2. Positive obligations

24. In the present case, what is at issue is not an act by the State but the alleged inadequacy of the protection afforded by the domestic courts to the applicant company's reputation.

25. The Court therefore must examine whether a fair balance has been struck between the applicant company's right to respect for its private life and the right of the Bavarian Protestant-Lutheran Church to freedom of expression guaranteed under Article 10 of the Convention.

26. The essential criteria for balancing those interests are whether there was a contribution to a debate of general interest, how well known the person concerned was, the prior conduct of the person concerned and the content, form and consequences of the publication (see *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, §§ 108 et seq., ECHR 2012).

27. Another element of particular importance for the Court's determination is the distinction between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. However, even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive (see *Ferihumer v. Austria*, no. 30547/03, § 24, 1 February 2007).

28. The Court notes that the impugned statements of a representative of the Bavarian Protestant-Lutheran Church contributed to a debate of public interest, namely on data security in the sensitive area of medical data protection, and that the debate had been initiated by a prior publication unrelated to the Bavarian Protestant-Lutheran Church. The statements, in so far as they referred to the access *Universelles Leben* had to patient data, relied on facts which were, as established by the domestic courts, true. As to the statements concerning the danger of abuse, by *Universelles Leben*, of their access to patient data, a value judgment, that statement had a factual basis – the existing access to those data. Moreover, the representative of the Bavarian Protestant-Lutheran Church had made it clear that he did not allege that *Universelles Leben* had actually abused its data access. As to the

description of the applicant company as a “dubious organisation”, the Court considers that this negative value judgment had a sufficient factual basis in that it referred to a company under the *de facto* control of another religious community whose unusual views on medical treatment had not been contested in the proceedings before the domestic courts, and was not abusive. The domestic courts further took into account that the statements of the Bavarian Protestant-Lutheran Church representative had negative consequences on the business of the applicant company, which had to discontinue its business. However, they noted that this had been essentially the consequence of a public debate initiated already previously by third persons.

29. In view of the fact that the German courts considered all those factors and balanced them in a reasonable manner in the impugned decisions, they cannot be held to have overstepped their margin of appreciation as regards Article 8. Accordingly, the Court finds that the applicant company’s complaints do not disclose any appearance of a violation of Article 8 and must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

B. Alleged violation of Article 9 of the Convention

30. The applicant company complained that the publication of the religious affiliation of its employees had violated its rights under Article 9 of the Convention.

31. The Court reiterates that a legal entity such as a church or an ecclesiastical body may exercise the rights guaranteed by Article 9 of the Convention on behalf of its adherents (see *Cha’are Shalom Ve Tsedek v. France* [GC], no. 27417/95, § 72, ECHR 2000-VII). However, in the present case the applicant company is a legal person founded exclusively for business purposes and does not pursue any religious activities; on the contrary, it seeks to distance itself from the religious belief of its managers and employees.

32. Thus, the applicant company can neither exercise the rights of its employees guaranteed by Article 9, nor rely on a right of its own stemming from Article 9.

33. Having regard to the above considerations, the Court holds that this part of the application is incompatible *ratione personae* with the provisions of the Convention and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

C. Alleged violation of Article 1 of Protocol No. 1

34. The applicant company additionally complained that the statements at issue had ruined its business and therefore infringed its property rights.

The question as to whether a company's reputation and goodwill constitute "possessions" within the meaning of Article 1 of Protocol No. 1 and impose positive obligations on a Contracting State in circumstances such as these can be left open, since the balancing exercise required would not raise any separate issues from those under Article 8.

35. Therefore, the Court finds that the applicant company's complaints under Article 1 of Protocol No. 1 must also be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Stephen Phillips
Deputy Registrar

Boštjan M. Zupančič
President