Judgment
of the Kúria
acting as a court of cassation

Case number: Mfv.I.10.061/2017/4.

Members of the Chamber: Dr. Blanka Tallián, President of the Chamber,

Dr. Zsuzsanna Mészárosné Szabó, Judge Rapporteur,

Dr. Edit Hajdu, Judge,

Applicants: first applicant

second applicant

third applicant

fourth applicant

fifth applicant

Representative of the applicants:

Dr. Éva Peti, attorney-at-law

Defendant:

Representative of the defendant:

Dr. Ernő Máté, attorney-at-law

Subject-matter of the litigation: Repeal of a written warning

Appellant for review: Defendant

Name of the court of second instance and Number of the final decision:

Kaposvári Törvényszék (Regionall Court of Kaposvár), 2.Mf.21.232/2016/3.

Name of the court of first instance and Number of the decision:

Kaposvári Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court of Kaposvár), 3.M.414/2015/12/II.

Operative part of the judgement

The Kúria (Supreme Court) confirms Judgment No. 2.Mf.21.232/2016/3. of the General Court of Kaposvár.

It orders the defendant to pay each applicant - within 15 days - the sum of HUF 10,000 (ten thousand forint) plus HUF 2700 (two thousand seven hundred forint) VAT as costs of the review procedure.

It orders the defendant to pay the State - in a special request - HUF 70,000 (seventy thousand forint) as fees for the review procedure.

No further appeal shall lie against this judgment.

S t a t e m e n t o f r e a s o n s

The facts giving rise to the dispute

[1] The applicants have been employed as bus drivers over a long period by the defendant and its predecessor. They are members of the X trade union.

[2] On 21st September 2015, the trade union organised a so called 'black T-shirt demonstration' in order to force the employer to negotiate the three-year wage development programme with the trade unions. The call for a demonstration was publicised on the noticeboard in the workplace of the applicants.

[3] On 15th September 2015, the CEO of the defendant issued an instruction concerning the requirements towards employees to wear uniform or working clothes when turning up for work. Notwithstanding the fact that the content of these instructions was known to the employees, before 21st September 2015, they participated in the announced demonstration wearing black T-shirts.

[4] On 5th October 2015 the defendant gave a written warning to the applicants. According to his reasoning, they appeared in the workplace on 21st September 2015 to perform work in black outerwear, which was then reported by the dispatcher and the bus station manager to the employer. The applicants were aware of the CEO's uniform instructions and its purpose, since their attention was drawn to the fact that they shall comply with these rules. Even so, they wore black clothing, failing to comply with the rules, which amounted to a wrongful breach of essential obligations resulting from the employment relationship.

The applicants' claims and the defendant's defence

[5] In their claim, the applicants sought the withdrawal of the written warning, and an order that the defendant shall pay the litigation costs.

[6] According to their argument, the employer failed to discuss the instruction with the workers' representatives, and the rule was only adopted in reaction to the call for a demonstration. The defendant gave these instructions, to wear light coloured shirts or polo shirts merely in order to prevent the black T-shirt demonstration, to intimidate the employees, to prevent the workers' freedom of expression and infringing the prohibition of abuses of rights. They argued that the measures adopted by the employer were contrary to the principle of equal treatment.

[7] The defendant requested that the actions should be dismissed. He is of the opinion that he did not abuse his rights by giving out instructions, but did not challenge the fact that the trade unions had a right of opinion regarding the instructions; he did not invite them to do so, therefore the trade union did not have the possibility to submit its opinion.

The judgements at first and second instance

[8] The Kaposvári Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court of Kaposvár) repealed the written warnings by its judgment No. 3.M.414/2015/12/II. and

ordered the defendant to pay the litigation costs. It also ordered the defendant to pay the court fees.

[9] In its judgment, the court of first instance referred to sections 52 (1) and 279 (3) of Act I of 2012 on the Labour Code and to the Defendant's collective agreements.

[10] According to annex 6 of the collective agreement, employees are entitled to the allocation of uniforms if they deal directly with the travelling public, such as, in particular, bus drivers... Annex 6 (2) lists women's and men's clothing. In accordance with Point 5, the allocation amounts to HUF 38,012 /year/person, while according to Point 6, the items of clothing allocated for the reference year shall become the property of the employee on 31st December of the given year.

[11] The applicants were not provided with uniforms, and the defendant admitted not having paid any allocations for uniforms or working clothes until the day of the demonstration.

[12] According to Point III(1) of the instructions, in cases where the employer, for reasons aligned with the interests of the company, is unable to provide the required clothes, uniform or working clothes in accordance with the legal provisions in force or the collective agreements, and the employee is obliged to wear his own clothes: it is allowed and accepted that employees wear clothes already owned by them, until a further allocation. According to Point 4, long sleeve shirts, short sleeve shirts or Polo shirts shall be of a single light colour.

[13] According to section 52 (1) c) of the Labour Code, the defendant, due to the employment relationship, had authority to prescribe the working clothes to wear, since the bus drivers are dealing directly with travelling public. The applicants were aware of the instructions, therefore they had to comply with these rules and wear their own uniforms (their own property) or appear in clothing in line with Point 4 of the instructions.

[14] The applicants could not argue that uniforms were part of their own property or that uniforms were not provided by the defendant or, again, that the defendant had not paid an allocation for clothes as provided for in section 51 (2) of the Labour Code. Pursuant to this provision, the employer shall reimburse the costs the employee reasonably incurs in connection with performing work. In this regard, if costs incurred by the employees in relation to uniforms owned by them or clothing acquired by the employees, the employer shall reimburse these costs upon request.

[15] The court of first instance, referring to section 12 of the Labour Code did not consider the infringement of the principle of equal treatment well founded.

[16] The court of first instance also referred to the prohibition of abuse of rights laid down in section 7 (1) of the Labour Code. It stated that the defendant, when imposing penalties on the applicants for not appearing in clothes in compliance with the instructions, abused his rights as referred to in section 7 (1) of the Labour Code and in the collective agreements.

[17] The defendant exercised his rights appropriately, but the content of these measures was contrary to section 7 (1) of the Labour Code. The applicants are members of the trade union that organised – with the knowledge of the defendant – for 21st September 2015, a

demonstration for wage settlement purposes, in a way that, beside the employees, the travelling public should learn about it. The participants in the demonstration expressed their opinion by wearing black outerwear, showing their consent to starting wage settlement negotiations.

[18] The defendant tried to suppress the opinion of the employees by giving them a written warning that, although legitimate in form, still amounts to abuse of rights, since his true intention was to prevent the travelling public from learning the opinion of the employees.

[19] The General Court of Kaposvár seized upon the appeal of the defendant, upheld the judgment of the court of first instance in his sentence No. 2.Mf.21.232/2016/3, and ordered the defendant to pay the costs of the applicants, plus the balance of the court fees.

[20] According to the reasoning in the judgment of second instance, the employees employed as bus drivers normally come into direct contact with the travelling public during their work; besides, they were aware of the instructions of the CEO. Therefore, they were obliged to comply with those instructions. The applicants, in breach of this duty, wore black shirts to work on 21st September 2015.

[21] *In accordance with Point 28 of the applicable Collective Agreement and section 56 (1) of Labour Code, the defendant was entitled to give a written warning for failure to comply with the rules agreed upon, when appearing for work in clothes not meeting the instructions.*

[22] *The court of first instance correctly concluded that the employer did not discriminate against the applicants compared to other staff (section 12 of the Labour Code).*

[23] With reference to section 7 (1) of the Labour Code, the court of second instance stated that the applicants were members of the trade union that organised – with the knowledge of the defendant – for 21st September 2015 a demonstration in order to enforce wage settlement in such a way that, beside the employees, the travelling public would learn about it. The applicants participating in the demonstration expressed their opinion by wearing black T-shirts, showing their consent to the initiative of the trade union.

[24] The defendant tried to suppress the opinion of the employees by giving them a written warning, legitimate in form, although his true intention was to prevent the travelling public from learning the opinion of the applicants.

[25] Whether or not the CEO's instructions on working cloths were adopted lawfully is not relevant, since the subject-matter of this litigation does not require the assessment of the lawfulness or validity of the CEO's instructions.

The application of the defendant for judicial review and the counter-application of the applicants

[26] As to the content of the application for judicial review, the defendant sought dismissal of the actions. He relied on the infringement of the legal provisions of section 221 (1) of the Code of Civil Procedure and of section 7 (1) of the Labour Code.

[27] According to the defendant, his intention to suppress the expression of their opinion is

only shown – repeatedly stated – in the submissions of the applicants. The court did not give any reasons for the basis on which it established the intentions of the instructions described above.

[28] The subject-matter of the litigation is not the assessment of their validity or the examination of the circumstances of adopting the employer's instructions, but the assessment of the lawfulness of the measures taken by the employer for applying those instructions.

[29] The judgment does not contain any reasoning which would show the unlawfulness of the measures. Logically, the objective presumed by the judgment could no longer be reached through applying the instructions and giving out written warnings, while at that point the applicants and other employees wearing black T-shirts had already expressed their opinion.

[30] Even by accepting the unilateral statements of the applicants, the judgment could merely state that the defendant abused his rights by adopting the rules, which was not a matter to be ascertained, nor the circumstances of adoption, by the court.

[31] The judgment intends to lift this logical contradiction by establishing the abuse of rights in relation to the written warnings, dedicated to suppressing the expression of opinions, although this objective, after having expressed the opinion in the given form, is redundant; it cannot lead to suppressing the expression of opinions.

[32] In their counter-application for review, the applicants seek the final judgment to be upheld and the defendant ordered to pay the costs of litigation.

[33] In their view, the judgments of the first and second instances are in accordance with the provisions of section 221 of the Code of Civil Procedure, since they provide legal reasoning and references to the underlying legal provisions.

[34] The court stated that the applicants are members of the trade union that organised – with the knowledge of the defendant –a demonstration for 21st September 2015 in order to enforce negotiations on the three-year wage settlement programme, in such a way that, beside the employees, the travelling public should learn about it. It was well known at that time that wearing a black T-shirt meant discontent, a way of expressing protest, capable of achieving that the travelling public became aware of the opinion of these employees.

[35] The detailed assessment of the court in its judgment is in perfect line with the factual and circumstantial observations made in the proceedings. The sanction applied by the employer is liable to make the employees desist from expressing their opinion, thereby avoiding this opinion from being made known to the travelling public.

Decision and legal reasoning of the Kúria

[36] The application for judicial review is unfounded.

[37] On the basis of section 275 (2) of the Code of Civil Procedure, the Kúria shall examine the final and binding judgment within the limits of the application for review.

[38] The review application shall include the mandatory data required, which are closely interlinked, such as the procedural or substantive violation of law with reference to the provisions violated, and the reasons based on which the party seeks the adoption of a new decision or the decision to be set aside (section 272 (2) of the Code of Civil Procedure). These cumulative legal conditions are met when the party indicates on the one hand the provisions infringed, and on the other hand prescribes the content of the infringement, gives its legal position in detail, and thereby gives his reasons for alleging the breach of law (Opinion of the Civil Panel No. 1/2016 (II.15.)). The application for review indicates, as the breach of law, the provisions of section 7 of the Labour Code and of section 221 of the Code of Civil Procedure; as such, only these provisions were subject to review.

[39] According to the relevant facts, applicable in the review procedure, the applicants organised for the 21st September 2015 a so called 'black T-shirt demonstration' in order to enforce the wage settlement programme. After becoming aware of the demonstration, on 15th September 2015 the CEO adopted the instructions on wearing a uniform or working clothes, which provide for wearing light coloured shirts or shirts with a collar.

[40] The courts of both instances correctly stated that the assessment of the validity of the employer's instructions (rules) was not at issue; it could not even be examined in the proceedings. Concerning the circumstances of adoption, it could be evaluated whether or not the employer infringed its obligation to a normal exercise of rights (section 7 of the Labour Code). The possibility that it could be subject to assessment in the present proceedings was contested by the defendant without indicating any infringements of the law in that regard.

[41] The applicants consistently argued – and the defendant failed to disprove with judicial certainty – that the instructions were adopted specifically to prevent the employees from appearing in black T-shirts with the aim of making a demonstration. Beside the timing or the circumstances of adopting the instructions and their content, this is also suggested by the fact, not contested by the defendant, that the employer adopted these instructions without the mandatory negotiations with staff representative bodies. Concerning this point, the employer did not give reasons as to why the adoption of these rules became so urgent that he even failed to fulfil his obligations regarding the staff representative bodies.

[42] The applicants learnt the content of the instructions before the demonstration, which is not contested; nonetheless, they appeared in black clothing, which had a special meaning at that time in the public's understanding. The Constitutional Court stated in several decisions (e.g. Decision No. 3264/2016. (XII.14.), Points 21 and 22), in accordance with the settled case-law that instructions of the employer shall not impede fundamental rights, including the freedom of expression. The freedom of expression may only be limited in order to give effect to other fundamental rights or constitutional obligations, and only within the limits of necessity and proportionality. The employees willing to exercise their freedom of expression and therefore appearing in black T-shirts did not commit a severe breach of obligations by not complying with the inappropriately adopted instructions that could justify the written warnings.

[43] The defendant also alleged the infringement of section 221 of the Code of Civil Procedure

through the courts, although this could not be established. According to section 221 (1) of the Code of Civil Procedure, the reasoning of the judgment shall contain the presentation of the facts indicating the underlying evidence, references to the applied provisions of law, and the circumstances that the court held relevant for the assessment of evidence. It shall indicate the reasons for which the court held some facts as not proven, or for which it rejected the proposed measures of evidence. The extent of the obligation to state reasons depends on the nature of the case, although the statement of reasons shall demonstrate clearly which circumstances the court had found relevant for the assessment of evidence. The judgment contains all of these, therefore it is not unlawful.

[44] Having regard to all of the above, the Kúria upheld the final judgment with a partially modified statement of reasons according to section 275 (3) of the Code of Civil Procedure.

Content of the decision of principle

[45] *I. Employees appearing in the workplace wearing, for the purposes of demonstration, specific clothing – black T-shirts in the case in question – shall be seen as an expression of opinion.*

[46] *II. The freedom of expression may only be limited in order to give effect to other fundamental rights or constitutional obligations, and only within the limits of necessity and proportionality. The employees willing to exercises their freedom of expression, therefore appearing against the requirements in black shirts, did not commit a severe breach of obligations, by not complying with the inappropriately adopted instructions, that could justify the written warnings (section 7 Labour Code).*

Closing part

[47] The defendant's obligation to pay the litigation costs is based on section 78 (1) of the Code of Civil Procedure.

[48] The defendant shall pay the court fees for the review procedure according to section 13 of the applicable Decree 6/1986 (VI.26.) of the Ministry of Justice.

[49] The Kúria decided upon the application for a review without public hearing according to section 274 (1) of the Code of Civil Procedure.

Budapest, January 2018

Dr. Blanka Tallián (signed), President of the Chamber, dr. Zsuzsanna Mészárosné Szabó (signed), Judge Rapporteur, dr. Edit Hajdu (signed), Judge