Grondrechten

45

Onterechte aangifte van euthanasie door arts; ontslag van arts gerechtvaardigd

Europees Hof voor de Rechten van de Mens
16 februari 2021, nr. 23922/19,
ECLI:CE:ECHR:2021:0216JUD002392219
(Kjølbro (president), Bošnjak, Pejchal, Kūris, Lubarda, Ranzoni, Koskelo)
Noot prof. mr. A.C. Hendriks

Ontslag van arts wegens het goed bedoeld maar ongefundeerd doen van aangifte van euthanasie door collega rechtmatig. Arts had zorgen nader moeten verifiëren. Geen schending van vrijheid van meningsuiting gelet op belangen van ziekenhuis en collega-arts.

[EVRM art. 10]

Klager was algemeen arts en internist op de afdeling interne geneeskunde in het Nationaal Ziekenhuis van Liechtenstein. In die hoedanigheid merkte hij op dat vier patiënten om het leven waren gekomen na toediening van morfine door dr. H. Volgens klager waren deze personen overleden als gevolg van 'euthanasie'. Klager deed hiervan aangifte bij de politie. De politie deed verschillende onderzoeken, die veel media-aandacht kregen. Het handelen van dr. H werd niet onrechtmatig geacht, een uitkomst die door een extern onderzoek werd bevestigd. Klager werd geschorst en een maand later op staande voet ontslagen, omdat hij geen gebruik had gemaakt van het klachtensysteem van het ziekenhuis. Er volgde nog een strafrechtelijk onderzoek naar het handelen van dr. H en van klager, maar die werden beide gestaakt.
Klager vorderde dat het ontslag teniet werd gedaan en schadevergoeding ten bedrage van CHF 600.000 van het ziekenhuis. De rechtbank concludeerde dat het ziekenhuis klager niet langer in goed vertrouwen te werk kon stellen. In beroep kreeg klager een gedeeltelijke schadevergoeding, maar het Hoogste Gerecht van Liechtenstein wees de schadevergoeding wederom af. Het overwoog hierbij dat klager zich weliswaar als klokkenluider beschouwde, maar dat hij zijn zorgen niet eerst intern had geverifieerd alvorens hiermee naar buiten te treden.
Het EHRM overwoog dat inperkingen van de meningsvrijheid alleen in bepaalde situaties zijn toegestaan en dan onder meer nodig moeten zijn in een democratische samenleving en proportioneel gelet op een legitiem doel. Met de nationale rechter is het Hof van oordeel dat klager zijn informatie eerst beter had moeten verifiëren alvorens daarmee naar buiten te treden, gelet op de ernst van de beschuldigingen. Het EHRM deed geen uitspraak over de vraag of klager verplicht was zijn zorgen eerst binnen het ziekenhuis aanhangig te maken, maar merkte op dat de informatie die klager had geopenbaard enorme publieke belangstelling opriep. Het EHRM overwoog dat klager geen oneigenlijke motieven had om de zaak aanhangig te maken, maar oordeelt dat het ontslag gerechtvaardigd was gelet op het effect van de aangifte op de reputatie van het ziekenhuis en andere ziekenhuismedewerkers. De inbreuk op de rechten van klager waren proportioneel en leverde geen schending op van art. 10 EVRM.

Gawlik
tegen
Liechtenstein.

The facts
(...)

I. The events leading to the applicant's dismissal
5. The applicant is a doctor specialised in general and internal medicine. From 1 June 2013 he was employed as deputy chief physician of the department for internal medicine at the Liechtenstein National Hospital (*Liechtensteinisches Landesspital*), a registered Liechtenstein public law foundation. He worked under a contract of indefinite duration which could be terminated with six months' notice. His direct superior was Dr H., chief physician of the said department.
6. On 9 september 2014 the applicant did some research in the electronic medical files of the hospital. He found information showing that four patients had died in the hospital following the administration of morphine. He concluded from notes made in these files that Dr H., who had trea-

ted these patients, had practised active euthanasia.
7. On the same day the applicant met with the President of the Control Committee of the Liechtenstein Parliament (the "Parliamentary Control Committee"), Mr M., on the latter's initiative, following several anonymous complaints about deficiencies in quality in the Liechtenstein National Hospital. On that occasion, the applicant voiced suspicions that Dr H. had practised active euthanasia.
8. On 11 september 2014 the applicant, on Mr M.'s advice, lodged a criminal complaint against Dr H. with the Public Prosecutor's Office which instituted proceedings against Dr H. on suspicion, *inter alia*, of killing on request and participation in another person's suicide.
9. On 18 september 2014 the police seized the paper medical files of the four patients concerned at the Liechtenstein National Hospital and questioned Dr H.
10. On 19 september 2014 the applicant, following further research in the hospital's electronic medical files, informed the Public Prosecutor's Office that he suspected that Dr H. had practised active euthanasia on six additional patients. He was questioned by the police on the same day. He supported his suspicions by the fact that according to the electronic files, the death of these patients had occurred shortly after the start of the treatment with morphine, that morphine had been given even without an indication that the patients suffered from pain, that the treatment had been called "supportive therapy" or "supportive measures", and having regard to the medication administered. He stressed that the aim of his statement was to avert damage to patients of the hospital.
11. At the time of the events, the Liechtenstein National Hospital had a body to which irregularities could be reported anonymously via an online form, the Critical Incident Reporting System (CIRS). While initially Dr H. alone had been the person examining and acting upon such reports, this task had been entrusted to a group of three persons (not including Dr H.) since summer 2014 at the latest. It is unclear when this change in responsibilities was communicated within the hospital. The applicant did not contact this body.
12. On 19, 22 and 24 september 2014 the vice-president of the hospital's foundation board drew up three reports on the request of the foundation board regarding the treatment of the ten patients in question. Having examined the patients' paper files and having questioned Dr H., he concluded that all patients had been in a palliative situation under the WHO's standards and that there had not been any mistake regarding the morphine administered. He considered that the applicant had failed to take into account the pain or difficulty in breathing of the patients concerned, which had made necessary the treatment in question. If the applicant had read the patients' paper files, which alone, as had been known at the time, had contained complete information regarding the patients' condition and treatment and to which he had had access, he would have realised immediately that his suspicions of active euthanasia were clearly unfounded.
13. On 26 september 2014 the applicant was suspended from office.
14. On 2 October 2014 the applicant made a written statement setting out his position to the National Hospital on the latter's request. He explained that he had done some research in the electronic files of several patients who had died in the past weeks following an indication by a doctor working in the hospital that recently there had been an unusual rise in deaths of patients in the hospital. In his view, the ten patients concerned had clearly not been treated *lege artis*. After thorough reflection, he had decided to inform the Public Prosecutor's Office in order to protect the patients and the hospital and to comply with his own ethical convictions and the provisions of the Physicians' Act (*Ärztegesetz*; see paragraph 36 below). As he was convinced that there had been criminal offences, as he had not expected the matter to be investigated properly within the hospital and in view of the urgency of the situation, he had not contacted an internal body of the hospital prior to lodging a criminal complaint with the Public Prosecutor's Office.
15. In a report received by the National Hospital on 15 October 2014 a Swiss external medical expert in palliative medicine commissioned by the Hospital, N., having studied the medical paper files of the patients concerned and having heard Dr H., concluded that no active euthanasia had been practised on the ten patients in question. The expert considered that the patients' palliative treatment had been necessary and justified as they had been at the end of their lives. They had died as a result of their illnesses and not as a result of their

treatment. They had been given morphine in order to treat their pain and difficulty in breathing and not to end their lives. The expert noted that some of the morphine doses prescribed – especially those "without upper limit" – may not have been necessary, but such doses had never been administered in practice.
16. On 17 October 2014 the director of the National Hospital dismissed the applicant without notice. He considered that owing to the applicant's severe fault, the relationship of trust with him had been destroyed irretrievably. He argued that the applicant had failed to raise his allegations of active euthanasia and quality flaws with the hospital's competent internal bodies prior to raising them externally with the President of the Parliamentary Control Committee and with the Public Prosecutor's Office. The applicant had been obliged to inform Dr H., or at least the director of the hospital or a member of the foundation board with whom he had a normal relationship, of his allegations. Furthermore, the applicant's allegations of euthanasia had been considered as clearly unfounded by the external expert commissioned by the hospital.
17. The Liechtenstein newspapers and radio repeatedly reported on the suspicions of active euthanasia at the Liechtenstein National Hospital and the criminal investigations against Dr H. in this respect.

II. The outcome of the criminal investigation proceedings against Dr H. and against the applicant
18. The investigating judge in the criminal proceedings against Dr H. had also commissioned an external expert practising in Austria, L. In his report dated 30 October 2014, received by the investigating judge on 11 december 2014, the expert, having regard to the medical paper files of the patients in question, came to the conclusion that Dr H. had not practised active euthanasia. The patients had been given morphine only as necessitated by their palliative situation and this treatment had not caused the patients' death. Doubts regarding such palliative medical treatment and ethical decisions taken in that context could be excluded by a better documentation of the treatment in the future.
19. On 15 december 2014 the criminal proceedings against Dr H. were discontinued.
20. On 15 december 2016 criminal proceedings instituted against the applicant for having deliberately cast wrong suspicions of a criminal offence on another person by his allegations that Dr H. had practised active euthanasia were equally discontinued.

III. The proceedings before the domestic Courts

A. Proceedings before the Regional Court
21. On 28 november 2014 the applicant brought an action against the Liechtenstein National Hospital for payment of some 600,000 Swiss francs (CHF) in compensation for the loss of salary and further pecuniary and non-pecuniary damage. He claimed that his dismissal without notice had been unlawful. There had been no important reason for his dismissal as lodging a criminal complaint against Dr H. had been justified in view of the concrete suspicions of active euthanasia and the gravity of the offence concerned.
22. On 29 August 2017 the Regional Court dismissed the applicant's action. It found that the applicant's dismissal without notice had been justified under Article 1173a § 53 (1) and (2) of the Civil Code (see paragraph 35 below). The court considered, in essence, that there had been an important reason for the employing hospital to terminate the employment contract. As the applicant had failed to sufficiently verify his unfounded suspicions of active euthanasia in the patients' medical paper files and to signal his suspicions within the hospital prior to informing external bodies thereof, the continuation of the employment relationship by the hospital could no longer be expected in good faith.

B. Proceedings before the Court of Appeal
23. On 10 January 2018 the Court of Appeal, allowing an appeal lodged by the applicant, quashed the Regional Court's judgment. It ordered the defendant hospital to pay the applicant CHF 125,000 in salary arrears and remitted the remainder of the case to the Regional Court for a fresh consideration of the applicant's compensation claims. The Court of Appeal found that the applicant's dismissal without notice had not been justified. The disclosure of irregularities to third persons was covered by the right to freedom of expression and could justify a dismissal only if it was coupled with a serious breach of the duty of loyalty. However, there was no such serious breach in the present case.

24. The Court of Appeal argued that the institution of proceedings against Dr H. by the Public Prosecutor's Office confirmed that the applicant's suspicions had not been unfounded. In view of the severity of the offence at issue, contacting external bodies such as the Parliamentary Control Committee or the Public Prosecutor's Office, which were both under a duty of confidentiality, had not been disproportionate. The fact that the applicant had reported directly to the Public Prosecutor's Office did not raise an issue in this respect. The court further agreed with the applicant that in the circumstances of the case, reporting the issue to Dr H. in the context of the internal mechanism to report irregularities had not been a suitable approach.

C. Proceedings before the Supreme Court

25. On 4 May 2018 the Supreme Court, allowing the defendant hospital's appeal on points of law, quashed the Court of Appeal's judgment. It dismissed the applicant's claim for payment of CHF 125,000 in salary arrears in a partial judgment and remitted the remainder of the case to the Court of Appeal in a partial decision for it to dismiss the applicant's action in that regard.

26. The Supreme Court considered that the applicant's dismissal without notice had been lawful. It stressed that the applicant, a senior employee, had only consulted the electronic medical files, which he had known to be incomplete, although he could have consulted the paper files at any moment. If he had done so, he would have recognised immediately that his suspicions were clearly unfounded. He had thus failed to verify his serious and unjustified allegations before disclosing them to third persons and before lodging a criminal complaint. This conduct amounted to a serious breach of trust in relation to his employer which justified his dismissal without notice.

D. Proceedings before the Constitutional Court

27. On 4 June 2018 the applicant lodged a complaint with the Constitutional Court against the partial judgment and partial decision of the Supreme Court. He argued that his dismissal had breached, in particular, his right to freedom of expression under the Constitution and Article 10 of the Convention. Reporting his suspicions of active euthanasia to external bodies had been justified whistle-blowing.

28. On 3 september 2018 the Constitutional Court found that the applicant's constitutional complaint was admissible as the Supreme Court had taken a final stance on the applicant's action, but dismissed the complaint on the merits (file no. StGH 2018/74).

29. The right to freedom of expression applied in the relationship between the applicant and the Liechtenstein National Hospital. While the hospital was a State institution, the applicant's dismissal was not an act of public authority, but was governed by private law. The right to freedom of expression nevertheless applied indirectly in their relationship (*indirekte Drittwirkung*).

30. The Constitutional Court accepted that the applicant regarded himself as a whistle-blower. Having regard to the criteria developed, *inter alia*, by the European Court of Human Rights in the case of *Heinisch v. Germany* (no. 28274/08, ECHR 2011 (extracts)) on freedom of expression in the context of whistle-blowing, the Constitutional Court found that the applicant's right to freedom of expression had not been violated by his dismissal without notice. It recognised that there was a considerable public interest in medical treatment which was in accordance with the state of the art in a public hospital. Moreover, the civil courts had not found that the applicant had acted out of personal motives.

31. The Constitutional Court noted, however, that the applicant had failed to test his suspicions regarding the practice of active euthanasia arising from the electronic medical files by verifying the paper files of the patients concerned. Had he done so, he would have realised immediately that his suspicions – which could be considered comprehensible having regard to the electronic files alone – were clearly unfounded. In the light of the gravity of the allegations and the consequences for all concerned by them in the event that these allegations became public, the applicant had been obliged to proceed to such verification, even more as he had known that the electronic files had been incomplete. The applicant had therefore acted irresponsibly. Therefore, his right to freedom of expression had not been breached.

32. The Constitutional Court, just as the Supreme Court, could thus leave open whether the applicant, prior to raising his allegations externally, should have attempted to raise them internally, notably with the director of the hospital.

33. The judgment was served on the applicant's counsel on 7 november 2018.

Relevant legal framework and practice

I. Relevant domestic law

A. Provisions of the Civil Code
34. Article 1173a of the Civil Code (*Allgemeines bürgerliches Gesetzbuch*) lays down rules on employment contracts. Paragraph 4 of that Article, in so far as relevant, provides:
"(1) The employee must carry out the work entrusted to him diligently and must respect the employer's legitimate interests loyally."
35. Article 1173a § 53 of the Civil Code contains rules on the termination of employment contracts without notice for important reasons. In so far as relevant, it provides:
"(1) For important reasons, both the employer and the employee may terminate an employment relationship at any time without notice;...
(2) An important reason exists, in particular, where, in the circumstances, a continuation of the employment relationship cannot be expected any longer in good faith from the party terminating the relationship."

B. Provision of the Physicians' Act
36. The Physicians' Act (*Ärztegesetz*) of 22 October 2003 lays down rules on physicians' exercise of their profession. Article 20 of that Act, on notification duties, in so far as relevant, provides:
"(1) Physicians are obliged to notify the Office of Public Health (*Amt für Gesundheit*) or directly the Public Health Service (*amtsärztlicher Dienst*) of findings made in the exercise of their profession which give rise to suspicions that a criminal offence resulted in a person's death or serious bodily injury..."

II. Relevant international law and practice

A. Resolution 1729 (2010) of the Parliamentary Assembly of the Council of Europe on the protection of "whistle-blowers"
37. In its Resolution 1729 (2010) on the protection of "whistle-blowers", adopted on 29 april 2010, the Parliamentary Assembly of the Council of Europe (PACE) stressed the importance of "whistle-blowing" – concerned individuals sounding an alarm in order to stop wrongdoings that place fellow human beings at risk – notably as an opportunity to strengthen accountability in both the public and private sectors (see point 1 of the Resolution). It invited all member States to review their legislation concerning the protection of whistle-blowers, keeping in mind the following guiding principles:
"(...)
6.1.1. the definition of protected disclosures shall include all bona fide warnings against various types of unlawful acts, including all serious human rights violations which affect or threaten the life, health, liberty and any other legitimate interests of individuals as subjects of public administration or taxpayers, or as shareholders, employees or customers of private companies;
6.1.2. the legislation should therefore cover both public and private sector whistle-blowers..., and
6.1.3. it should codify relevant issues in the following areas of law:
6.1.3.1. employment law – in particular protection against unfair dismissals and other forms of employment-related retaliation;...
(...)
6.2.2. This legislation should protect anyone who, in good faith, makes use of existing internal whistle-blowing channels from any form of retaliation (unfair dismissal, harassment or any other punitive or discriminatory treatment).
6.2.3. Where internal channels either do not exist, have not functioned properly or could reasonably be expected not to function properly given the nature of the problem raised by the whistle-blower, external whistle-blowing, including through the media, should likewise be protected.
6.2.4. Any whistle-blower shall be considered as having acted in good faith provided he or she had reasonable grounds to believe that the information disclosed was true, even if it later turns out that this was not the case, and provided he or she did not pursue any unlawful or unethical objectives."
38. The above guidelines were also referred to in the Parliamentary Assembly's related Recommendation 1916 (2010) adopted on the same day, recommending, *inter alia*, that the Committee of Ministers draw up a set of guidelines for the protection of whistle-blowers (point 2.1).

B. Recommendation CM/Rec(2014)7 of the Committee of Ministers of the Council of Europe on the protection of whistleblowers

39. On 30 april 2014, at the 1198th meeting of the Ministers' Deputies, the Committee of Ministers of the Council of Europe adopted Recommendation CM/Rec(2014)7 to member States on the protection of whistleblowers. The Committee of Ministers took note, in particular, of Resolution 1729 (2010) of the Parliamentary Assembly (see paragraph 37 above). It recommended that member States have in place a normative, institutional and judicial framework to protect individuals who, in the context of their work-based relationship, report or disclose information on threats or harm to the public interest. The appendix to the Recommendation sets out a series of principles to guide member States in the protection of such "whistleblowers".

40. The Appendix to Recommendation CM/Rec(2014)7 provides, in particular:

"*IV. Channels for reporting and disclosures*

(...)

13. Clear channels should be put in place for public interest reporting and disclosures and recourse to them should be facilitated through appropriate measures.

14. The channels for reporting and disclosures comprise:

– reports within an organisation or enterprise (including to persons designated to receive reports in confidence);

– reports to relevant public regulatory bodies, law enforcement agencies and supervisory bodies;

– disclosures to the public, for example to a journalist or a member of parliament.

The individual circumstances of each case will determine the most appropriate channel."

(...)

VII. Protection against retaliation

21. Whistleblowers should be protected against retaliation of any form, whether directly or indirectly, by their employer and by persons working for or acting on behalf of the employer. Forms of such retaliation might include dismissal, suspension, demotion, loss of promotion opportunities, punitive transfers and reductions in or deductions of wages, harassment or other punitive or discriminatory treatment.

22. Protection should not be lost solely on the basis that the individual making the report or disclosure was mistaken as to its import or that the perceived threat to the public interest has not materialised, provided he or she had reasonable grounds to believe in its accuracy.

(...)

24. Where an employer has put in place an internal reporting system, and the whistleblower has made a disclosure to the public without resorting to the system, this may be taken into consideration when deciding on the remedies or level of protection to afford to the whistleblower."

C. Further Council of Europe texts and other international instruments

41. The Parliamentary Assembly recalled its Resolution 1729 (2010) in subsequent texts on whistle-blowing, notably in Resolution 2060 (2015) and Recommendation 2073 (2015) on improving the protection of whistle-blowers, both adopted by the Parliamentary Assembly on 23 June 2015, and in Resolution 2300 (2019) and Recommendation 2162 (2019) on improving the protection of whistle-blowers all over Europe, both adopted on 1 October 2019.

42. Further Council of Europe and other international instruments relevant in this field are referred to in *Heinisch* (cited above, §§ 38-40).

The law

Alleged violation of Article 10 of the Convention

43. The applicant complained that his dismissal without notice from the National Hospital on account of the fact that he had lodged a criminal complaint for active euthanasia had breached his right to freedom of expression as provided in Article 10 of the Convention, which, in so far as relevant, reads as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. (...)

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in

confidence, or for maintaining the authority and impartiality of the judiciary."
44. The Government contested that view.

A. Admissibility
45. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. Whether there was an interference
46. In the applicant's submission, his dismissal without notice after he had raised suspicions externally that active euthanasia had been practised in the National Hospital constituted an interference with his right to freedom of expression under Article 10 of the Convention. The Government agreed that the dismissal had interfered with Article 10.
47. The Court reiterates that the protection of Article 10 extends to the workplace in general (see *Heinisch v. Germany*, no. 28274/08, § 44, ECHR 2011 (extracts) with further references; *Matúz v. Hungary*, no. 73571/10, § 26, 21 October 2014; and *Langner v. Germany*, no. 14464/11, § 39, 17 september 2015). In cases concerning freedom of expression of employees in State-owned or State-controlled companies or bodies, it recalled that Article 10 applied not only to employment relationships governed by public law, but also to those under private law. In addition, in certain cases, the State had a positive obligation to protect the right to freedom of expression even in the sphere of relations between individuals (see *Fuentes Bobo v. Spain*, no. 39293/98, § 38, 29 February 2000; *Heinisch*, cited above, § 44; and *Matúz*, cited above, § 26).
48. The Court notes that, on account of his statements regarding active euthanasia, the applicant was dismissed as a physician by the Liechtenstein National Hospital, a public law foundation; his employment relationship was governed by private law. The dismissal was subsequently endorsed, in particular, by the Liechtenstein Constitutional Court. The Court considers that in these circumstances, the measure in question constituted an interference by a State authority with the applicant's right to freedom of expression as guaranteed by Article 10 § 1 of the Convention (compare also *Fuentes Bobo*, cited above, § 38; *Heinisch*, cited above, § 45; and *Matúz*, cited above, § 27, in all of which the dismissal of an employee in a State-owned or controlled company whose employment relationship was governed by private law was addressed from the standpoint of an interference with the respective employee's rights).

2. Whether the interference was justified
49. Such interference will constitute a breach of Article 10 unless it is "prescribed by law", pursues a legitimate aim under its paragraph 2 and is "necessary in a democratic society" for the achievement of such aim.

(a) Interference "prescribed by law"
50. The Court observes that the applicant's dismissal was based on Article 1173a § 53 of the Civil Code (see paragraphs 22 and 35 above), which authorises the termination of employment contracts without notice for important reasons. It was thus "prescribed by law" for the purposes of Article 10 § 2. This is indeed uncontested by the parties.

(b) Legitimate aim
51. The Court notes that there was no dispute between the parties, and the Court agrees, that the interference pursued the legitimate aims of protecting the reputation and rights of others. It served to protect both the business reputation and interests of the employing National Hospital, including its interest in a professional work relationship based on mutual trust, and the reputation of the hospital's chief physician who was concerned by the applicant's allegations of euthanasia (compare also *Steel and Morris v. the United Kingdom*, no. 68416/01, § 94, ECHR 2005-II; *Heinisch*, cited above, § 49, and *Langner*, cited above, § 40).

(c) Necessity of the interference in a democratic society

(i) The parties' submissions

(1) The applicant
52. In the applicant's submission, his dismissal without notice had been disproportionate and thus not justified. He stressed, first, that the information given by him to the Public Prosecutor's Office regarding suspicions of active euthanasia

on seriously ill and defenceless patients had undoubtedly been of considerable public interest.
53. The applicant further took the view that he had verified sufficiently that the information he disclosed was accurate and reliable. He contested, in particular, that it would clearly have resulted from the paper version of the medical files of the patients concerned that his suspicions had been unfounded. Both the hospital and the investigating judge considered it necessary to consult an external expert on the question of whether there had been active euthanasia and one of the experts had found that there had been an insufficient documentation of the treatment in these files. Moreover, his employer would have noticed research in the paper files.
54. The public interest in a democratic society to be informed of potential irregularities in the treatment in a public hospital outweighed the hospital's business interests. The allegations contained in the criminal complaint lodged by him with the Public Prosecutor's Office had been detrimental to the National Hospital, but it had been the hospital itself which had informed the media and public thereof.
55. Moreover, the applicant argued that there had not been any effective internal channels for making the disclosure. He had not been obliged to report his suspicions to his superior, Dr H., who was directly concerned by them, as this would have resulted in his immediate dismissal. The director of the hospital was part of the hospital's management, together with Dr H. The hospital's foundation board, for its part, had not been responsible for employees' complaints of this kind. Likewise, he had not been obliged to turn to the hospital's internal complaint mechanism CIRS as he had not been informed that at the relevant time, it was no longer Dr H. himself who was responsible for dealing with the complaints received. Therefore, the only way to ensure effective investigations in the present case had been to contact an external body, the Public Prosecutor's Office, which had been independent of internal personal links and – just like the Parliamentary Control Committee – under a duty of confidentiality. Moreover, owing to the gravity of the suspicions, the fact that several patients had died shortly after the start of their morphine treatment and his position of deputy head of department potentially exposing him to criminal liability himself, it had been urgent to act.
56. The applicant stressed that he had been fully convinced that, having regard to the information contained in the electronic files which he considered to contain sufficient information, that there had been active euthanasia. He had therefore disclosed the information in good faith.
57. The applicant finally submitted that his dismissal without notice, being the harshest sanction under labour law, had also had the consequence that he had had to leave Liechtenstein with his family as he was to lose his residence permit as a result. Furthermore, he had had serious difficulties in finding new employment afterwards. This had a chilling effect on other hospital employees, discouraging them from disclosing irregularities.

(2) The Government
58. In the Government's view, the interference with the applicant's right to freedom of expression had been justified as it had been necessary to protect the reputation and the rights of the employing hospital and of the accused chief physician. The Government accepted that there was in principle an interest of the hospital's patients in the protection of their life and limb and also, generally, a public interest in information on whether the treatment in a public hospital was in accordance with the rules of the medical profession. However, it had to be taken into account in the present case that the applicant's allegations had been frivolous and unfounded.
59. The Government further submitted that, as had been confirmed by the domestic courts, the applicant had failed to verify in the paper medical files of the patients concerned that the information he had disclosed on the basis of elements discovered in the electronic files, which he knew to be incomplete, was accurate and reliable. The applicant had been able to do so at any time and would then have realised that his suspicions of active euthanasia were unfounded.
60. The public interest in having the information in question revealed did not outweigh the interest of the applicant's employer and of the chief physician concerned in the protection of their business and personal reputation, damaged as a result of the applicant's serious and unjustified allegations.
61. Several effective alternative channels for making the disclosure, obtaining an internal clarification of the allegations rapidly and remedying the alleged wrongdoing, would have been available to the applicant. He could have informed the direc-

tor or a member of the foundation board of the hospital. As had been demonstrated by the investigations done following the disclosure of the allegations by the applicant, there was nothing to indicate that they would not have investigated the allegations properly. Alternatively, the applicant could have complained anonymously via the Hospital's Critical Incident Reporting System (CIRS). The filing of the criminal complaint against Dr H. had disregarded the internal official channel of reporting irregularities.

62. The fact that the applicant had neither verified his suspicions nor contacted an internal body first also showed that he had not acted in good faith.

63. The dismissal without notice of the applicant in these circumstances did not have a chilling effect on other employees of the hospital or in the health sector more generally. The employer's immediate investigations following the disclosure of the information by the applicant rather encouraged these persons to contact internal bodies regarding suspicions of irregularities first.

(ii) The Court's assessment

(1) Relevant principles

64. The general principles for the assessment of whether an interference with the right to freedom of expression was "necessary in a democratic society" have been set out in numerous judgments (see, *inter alia*, *Steel and Morris*, cited above, § 87; *Guja v. Moldova* [GC], no. 14277/04, § 69, ECHR 2008; and *Heinisch*, cited above, § 62). In essence, the Court's task is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. It has to determine whether the interference complained of was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'. In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts.

65. As regards the application of Article 10 of the Convention to the workplace, the Court has held that the signalling by an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. This may be called for in particular where the employee concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large (see *Guja*, cited above, § 72; *Marchenko v. Ukraine*, no. 4063/04, § 46, 19 February 2009; and *Langner*, cited above, § 44). The Court is at the same time mindful that employees owe to their employer a duty of loyalty, reserve and discretion (see, for example, *Guja*, cited above, § 70; *Marchenko*, cited above, § 45; *Heinisch*, cited above, § 64; and *Matúz*, cited above, § 32).

66. When assessing, in this context, the proportionality of the interference with an employee's right to freedom of expression in relation to the legitimate aim pursued, the Court, in its case-law (see, in particular, *Guja*, cited above, §§ 73-78; *Heinisch*, cited above, §§ 64-70; *Bucur and Toma v. Romania*, no. 40238/02, § 93, 8 January 2013; and *Matúz*, cited above, § 34), has had regard to the following six criteria.

67. In the first place, particular attention shall be paid to the public interest involved in the disclosed information. There is little scope under Article 10 § 2 of the Convention for restrictions on debate on questions of public interest (see, among other authorities, *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV; and *Stoll v. Switzerland* [GC], no. 69698/01, § 106, ECHR 2007-V).

68. The second factor relevant in this balancing exercise is the authenticity of the information disclosed. The Court reiterates in this context that freedom of expression carries with it duties and responsibilities and any person who chooses to disclose information must carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable – in particular if the person concerned owes a duty of discretion and loyalty to his or her employer and there is question of attacking the reputation of private individuals (see *Handyside v. the United Kingdom*, 7 december 1976, § 49, Series A no. 24; and Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 65, ECHR 1999-III).

69. Third, on the other side of the scales, the Court must weigh the damage, if any, suffered by the employer as a result of the disclosure in question and assess whether such damage outweighed the interest of the public in having the information revealed (see *Guja*, cited above, § 76).

70. Fourth, the Court needs to determine whether, in the light of the duty of discretion owed by an employee towards his or her employer, the information was made public as a last resort, following disclosure to a superior or other competent body (see *Matúz*, cited above, § 34) unless it is clearly impracticable to disclose the information to a superior or other competent authority (see *Marchenko*, cited above, § 46). The Court must take into account in this context whether any other effective means of remedying the wrongdoing which the employee intended to uncover were available to him or her (see *Marchenko*, cited above, § 46).
71. Fifth, the motive behind the actions of the reporting employee is another determining factor in deciding whether a particular disclosure should be protected or not. For instance, an act motivated by a personal grievance or personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection (see*Kudeshkina v. Russia*, no. 29492/05, § 95, 26 February 2009). It is important to establish that, in making the disclosure, the individual acted in good faith and in the belief that the information was true, that it was in the public interest to disclose it and that no other, more discreet means of remedying the wrongdoing was available to him or her (see *Guja*, cited above, § 77).
72. Lastly, in connection with the review of the proportionality of the interference in relation to the legitimate aim pursued, a careful analysis of the severity of the sanction, in particular the penalty imposed on the employee and its consequences, is required (see *Fuentes Bobo*, cited above, § 49).

(2) Application of these principles to the present case

– Public interest in the disclosed information
73. In determining whether, in the light of the above principles, the dismissal without notice of the applicant was "necessary in a democratic society" in the circumstances of the present case, the Court notes at the outset that the Constitutional Court, in its assessment of the applicant's complaint, had regard to the above-mentioned criteria developed in the Court's case-law (see paragraphs 30-32 above). In reviewing, under Article 10, the domestic court's decision, the Court observes that the Constitutional Court recognised that there was considerable public interest in medical treatment in a public hospital which was in accordance with the state of the art. The Court considers that the information disclosed by the applicant, namely the suspicion that a chief physician currently working at the Liechtenstein National Hospital had repeatedly practised active euthanasia, concerned suspicions of the commission of serious offences, namely the killing of several vulnerable and defenceless patients, in a public hospital, as well as a risk of repetition of such offences. It agrees that this information was as such of considerable public interest.

– Authenticity / veracity of the information disclosed
74. As regards the authenticity, in the sense of veracity, of the information disclosed by the applicant, the Court cannot but note, however, that the Supreme Court and the Constitutional Court, in particular, found that the suspicions of active euthanasia which the applicant had reported to the Public Prosecutor's Office had been clearly unfounded. The Court observes that the assessment that no active euthanasia had been practised was shared, in particular, by the two external medical experts, N. and L., who had been asked by the Liechtenstein National Hospital and the Public Prosecutor's Office respectively to examine this question on the basis of the medical paper files (see paragraphs 15 and 18 above). While the Court does not overlook that the applicant contested that his suspicions were clearly unfounded, it cannot but note that he did not consult all patients' paper files. Despite the fact that expert L. saw some room for improvement in the documentation in these files, both external experts concluded without any reservations that the patients in question had received necessary and justified palliative treatment. The domestic courts, in finding on the basis of these reports that the information disclosed by the applicant was clearly wrong and thus did not have a sufficient factual basis, therefore relied on an acceptable assessment of the relevant facts.
75. The Court would stress that information disclosed by whistle-blowers may also be covered by the right to freedom of expression under certain circumstances where the information in question subsequently proved wrong or could not be proven correct. It recalls, in particular, that it cannot reasonably be expected of a person having

lodged a criminal complaint in good faith to anticipate whether the investigations will lead to an indictment or will be discontinued (see *Heinisch*, cited above, § 80). However, in these circumstances the person concerned must have complied with the duty to carefully verify, to the extent permitted by the circumstances, that the information is accurate and reliable (compare *Guja*, cited above, § 75, and *Heinisch*, cited above, § 67).

76. The Court observes that the guiding principles developed by the PACE in its Resolution 1729 (2010) on the protection of "whistle-blowers" reflect the same approach, stating that "[a]ny whistle-blower shall be considered as having acted in good faith provided he or she had reasonable grounds to believe that the information disclosed was true, even if it later turns out that this was not the case..." (see point 6.2.4., cited in paragraph 37 above, and compare, *mutatis mutandis*, *Heinisch*, ibid., and *Bucur and Toma*, cited above, § 107). Likewise, the guiding principles in the Appendix to Recommendation CM/Rec(2014)7 on the protection of whistle-blowers provide that *"[p]rotection should not be lost solely on the basis that the individual making the report or disclosure was mistaken as to its import or that the perceived threat to the public interest has not materialised, provided he or she had reasonable grounds to believe in its accuracy*" (principle no. 22, cited in paragraph 40 above).

77. In the present case, the applicant, as stressed also by the Supreme Court and the Constitutional Court (see paragraphs 26 and 31 above), based his allegations of active euthanasia only on the information available in the electronic medical files which, as he had known as a doctor practising in the National Hospital, did not contain complete information on the patients' state of health. Comprehensive information in this respect was only available in the paper medical files which the applicant, however, did not consult. As the Supreme Court and the Constitutional Court determined, had he done so, he would have recognised immediately that his suspicions were clearly unfounded and he had therefore acted irresponsibly (see paragraphs 26 and 31 above). By reason of the duties and responsibilities inherent in the exercise of the freedom of expression (see paragraph 68 above), the safeguard afforded by Article 10 to whistle-blowers is subject to the proviso that they acted in order to disclose information that is accurate and reliable and in accordance with professional ethics (compare, *mutatis mutandis*, *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, §§ 87 and 109, 27 June 2017). This applies, in particular, if the person concerned, like the applicant in the present case as deputy chief physician and thus a high-ranking and highly qualified employee, owes a duty of loyalty and discretion to his or her employer.

78. The Court does not lose sight of the fact that the applicant, in the light of the interpretation he had made of the information in the electronic files, namely that active euthanasia had repeatedly been practised in the hospital and might continue being practised, must have concluded that it was very urgent to act in order to stop that practice. However, given that, as had been found by the domestic courts (see, in particular, paragraph 26 above), the applicant as a deputy chief physician, could have consulted the paper files at any moment, the Court considers that this verification would not have been very time-consuming. Having regard to the gravity of an allegation of active euthanasia the Court therefore agrees with the domestic courts' finding that the applicant was obliged to, but failed to proceed to such a verification (compare also, *mutatis mutandis*, *Medžlis Islamske Zajednice Brčko and Others*, cited above, § 115). He did not, therefore, carefully verify, to the extent permitted by the circumstances, that the information he disclosed was accurate and reliable.

– Detriment to the employer

79. As for the damage suffered notably by the employer as a result of the disclosure in question, the Court considers that the allegation of active euthanasia having been practised at a State-run hospital was certainly prejudicial to the employing hospital's business reputation and interests and to the public confidence in the provision of medical treatment in accordance with the state of the art in the only public hospital in Liechtenstein. It was further prejudicial to the personal and professional reputation of another staff member of that hospital, namely the chief physician concerned by the allegations. The Court observes in this context that the applicant initially did not voice his allegations in public, but disclosed them by lodging a criminal complaint, in particular, to the Public Prosecutor's Office, which was under a duty of confidentiality (see paragraph 24 above).

However, following the ensuing investigations including the seizure of the medical files at the National Hospital, the applicant's allegations became known to a larger public and were – quite predictably, given the gravity of the allegations – repeatedly discussed in the Liechtenstein media which risked increasing their prejudicial effect.
80. As shown above, there was as such a public interest in the revelation of information on suspicions of repeatedly practised active euthanasia in a public hospital. However, in the present case, in which the well-foundedness of that suspicion had not been sufficiently verified prior to its disclosure, the public interest in receiving such information cannot outweigh the employer's and chief physician's interest in the protection of their reputation.

– Existence of alternative channels for making the disclosure
81. As for the question whether the information in question was revealed to an external body as a last resort, the Court observes that both the Supreme Court and the Constitutional Court left open the question whether the applicant, prior to raising his suspicions externally, should have attempted to raise them internally (see paragraph 32 above). The Court, having regard to the circumstances of the case, the gravity of the acts at issue and its case-law (compare, in particular, *Bucur and Toma*, cited above, § 97), finds that the applicant could not be expected to first raise his suspicions with his superior Dr H., who was directly concerned by them. As for the internal reporting channel, the CIRS, the Court notes that it has not been shown that it had been communicated within the hospital that anonymous reports of irregularities via that system were no longer handled by Dr H. alone (see paragraph 11 above). Therefore, the applicant could legitimately proceed on the assumption that redress could not be obtained in this way either.
82. It remains to be determined whether the applicant should have raised his suspicions either with a member of the hospital's foundation board or with the hospital's director prior to lodging a criminal complaint. The Court notes that, in view of the normal professional relationship between the applicant and these bodies and the availability of medical expertise within the hospital, these instances appear to be effective alternative channels for disclosure, with the potential to remedy any irregularities rapidly. However, the Court does not overlook either that the offences which the applicant suspected his direct superior of were serious and that there was a possibility that he might himself be held liable in case of a failure to report such offences. It further takes note of the fact that the guiding principles in the Appendix to the Committee of Ministers' Recommendation CM/Rec(2014)7 on the protection of whistle-blowers do not establish an order of priority between the different channels of reporting and disclosure, stating that the individual circumstances of each case will determine the most appropriate channel (see principle no. 14, at paragraph 40 above). The Court considers, however, that in the circumstances of the case it can leave open the question whether the applicant was obliged to raise his suspicions with the said internal instances of the hospital.

– Applicant's motives for the disclosure
83. As to the applicant's motive for reporting his suspicions of active euthanasia, the Court observes that the domestic courts did not find that the applicant had acted out of personal motives (see paragraph 30 above). Having regard to the material before it, the Court does not have reasons to doubt that the applicant, in making the disclosure, acted in the belief that the information was true and that it was in the public interest to disclose it.

– Severity of the sanction
84. Finally, as regards the severity of the sanction imposed on the applicant, the Court observes that the applicant's dismissal without notice constituted the heaviest sanction possible under labour law (compare also *Guja*, cited above, § 95; *Heinisch*, cited above, § 91; and *Langner*, cited above, § 53). This sanction not only had negative repercussions on his professional career, it also led to the applicant and his family having to leave Liechtenstein as he was to lose his residence permit as a foreign national without employment. Having regard also to the media coverage regarding the suspicions of euthanasia in Liechtenstein, the sanction therefore must have had a certain chilling effect on other employees in the hospital and the health sector in general – at least as regards the direct disclosure to external bodies of suspicions of irregularities.

(iii) Conclusion
85. Having regard to the foregoing considerations, the Court concludes that the applicant did not act with improper motives. However, he raised suspicions of a serious offence with an external body without having carefully verified that the information he disclosed, which was as such of public interest, was accurate and reliable. The Court further observes that the domestic courts, having regard to the criteria developed in the Court's case-law, adduced relevant and sufficient reasons for their finding that, in these circumstances, the applicant's dismissal without notice, having regard to the prejudicial effect of the disclosure on the employer's and the other staff member's reputation, was justified. They struck a fair balance between the need to protect the employer's and the staff member's reputation and rights on the one hand and the need to protect the applicant's right to freedom of expression on the other.
86. The Court therefore concludes that the interference with the applicant's right to freedom of expression, in particular his right to impart information, was proportionate to the legitimate aim pursued and thus necessary in a democratic society.
87. There has accordingly been no violation of Article 10 of the Convention.

For these reasons, the Court, unanimously,
1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 10 of the Convention.

NOOT

1. Een arts die met goede intenties, maar uiteindelijk onterecht aangifte doet van het doden van patiënten door een collega-arts, kan op staande voet worden ontslagen. Dat is, kort samengevat, de conclusie uit bovenstaande uitspraak van het Europees Hof voor de Rechten van de Mens (Hof). Het Hof is met de nationale rechter van oordeel dat de arts zijn vermoedens van een strafbaar feit eerst beter had moeten onderzoeken, alvorens aangifte te doen. Een beroep van klager op de vrijheid van meningsuiting, in een poging zijn ontslag ongedaan te maken en schadevergoeding te krijgen van het ziekenhuis, helpt hem niet. In de gegeven omstandigheden wegen de belangen van het ziekenhuis en de collega-arts zwaarder dan de meningsuiting van klager. Kunnen we in Nederland lessen trekken uit deze zaak, zeker gelet op de gepropageerde openheid in de zorg? En in hoeverre moeten we in Nederland rekening houden met de reputatie van artsen en ziekenhuizen bij het naar buiten brengen van mogelijke misstanden? Een analyse, met aandacht voor de relevante jurisprudentie van het Hof.
2. Allereerst een opmerking over de in de uitspraak gebezigde terminologie. Volgens de Engelstalige versie van de uitspraak had klager aangifte gedaan van *active euthanasia*. Volgens het Franstalige persbericht van het Hof ging het om *euthanasie*. In Nederland spreken we bij het doden van patiënten zonder dat is voldaan aan de zorgvuldigheidseisen van de Wet toetsing levensbeëindiging al snel over moord. Zie daarover ook de uitspraken van de Hoge Raad in de zogenoemde *koffie-euthanasie*-zaak (HR 21 april 2020, ECLI:NL:HR:2020:712, «GJ» 2020/70, m.nt. Schalken en HR 21 april 2020, ECLI:NL:HR:2020:713, «GJ» 2020/71, m.nt. Hubben). Het gebruik van de term (actieve) euthanasie zegt bovenal iets over het algehele verbod van levensbeëindigend handelen in Liechtenstein en de overgrote meerderheid van de verdragsstaten van de Raad van Europa. Tot op heden zijn er slechts vier Europese landen waarin euthanasie en hulp bij zelfdoding niet onder alle omstandigheden zijn verboden: Nederland, België, Luxemburg en Spanje. Zwitserland kent een bijzondere strafuitsluitingsgrond voor hulp bij zelfdoding. Maar in alle andere Europese landen is levensbeëindigend handelen tot op heden altijd verboden en zorgen berichten over 'euthanasie' al snel voor publieke onrust. Dit verklaart waarom het Hof spreekt over actieve euthanasie, met aandacht voor de publieke repercussies van de aangifte door klager. Zelf zal ik hieronder over 'moord' spreken, omdat er volgens het Nederlands recht geen verdenking van euthanasie bestond bij het algeheel gebrek aan het voldoen aan de eisen van de Wtl.
3. Het recht op vrijheid van meningsuiting is één van de rechten die door het EVRM worden beschermd (art. 10 lid 1 EVRM). Volgens de tekst van het EVRM is dit geen absoluut recht; dit recht kan 'worden onderworpen aan bepaalde formaliteiten, voorwaarden, beperkingen of sancties (...) ter bescherming van de rechten en vrijheden van anderen' (art. 10 lid 2 EVRM). Uit de rechtspraak van het Hof blijkt dat de vrijheid van meningsui-

ting al snel kan botsen met het recht op goede naam en reputatie, zoals beschermd door het recht op privéleven (art. 8 EVRM). Hoe het Hof deze tegenstrijdige belangen afweegt, hangt af van de omstandigheden van het geval. Zo oordeelde het Hof in de zaak *Frankowicz* dat een arts ten onrechte een tuchtrechtelijke maatregel had gekregen, en dat daarmee sprake was van een schending van zijn vrijheid van meningsuiting, omdat hij in een medisch advies kritisch was over het handelen van een andere arts (EHRM 16 december 2008, nr. 53025/99, ECLI:CE:ECHR:2008:1216JUD005302599 (*Frankowicz/Polen*)). Ook in de zaak *Heinisch* oordeelde het Hof dat sprake was van een schending van de vrijheid van meningsuiting van een geriatrisch verpleegkundige. Betrokkene, Heinisch, had publiekelijk kritiek geuit op de gebrekkige zorg door haar werkgeefster (EHRM 21 juli 2011, nr. 28274/08, ECLI:CE:ECHR:2011:0721JUD002827408, «GJ» 2011/117, m.nt. Hendriks (*Heinisch/Duitsland*)). In de klachten ingediend door de antiabortusactivist Annen, die onder meer de namen en adressen van abortusartsen op internet had geplaatst, was het Hof met de nationale rechter van oordeel dat het recht op goede naam en reputatie van de artsen zwaarder moet wegen dan de vrijheid van meningsuiting van Annen (EHRM 20 september 2018, nr. 3682/10, 3687/10, 9765/10 en 70693/11, ECLI:CE:ECHR:2018:0920JUD000368210, «GJ» 2018/153, m.nt. Hendriks (*Annen/Duitsland* (nr. 2-5)). Ook in bovenstaande zaak oordeelt het Hof dat de goede naam en reputatie van het ziekenhuis en de collega-arts zwaarder moeten wegen dan het met goede intenties doen van aangifte door klager.

4. Dat het Hof tot deze laatste conclusie komt is enigszins verbazend. Anders dan mevrouw Heinisch, die publiekelijk kritiek had op haar werkgever, heeft klager in bovenstaande zaak aangifte gedaan maar zich – blijkens de uitspraak – niet publiekelijk uitgelaten over zijn verdenkingen. Dat er niettemin publiciteit kwam over de verdenkingen van moord, valt klager, zeker in een klein land als Liechtenstein bij een grote inzet van de politie, niet aan te rekenen. Niettemin verweet het ziekenhuis klager dat hij niet naar het Openbaar Ministerie had mogen stappen, zonder zijn vermoedens eerst intern te melden bij een soort veilig-meldencommissie. Volgens het ziekenhuis was hierdoor de arbeidsrelatie verstoord, zeker nadat bleek dat de vermoedens van klager ongefundeerd waren, en volgde er ontslag op staande voet. Het Hof neemt geen afstand van deze belangenafweging.

5. Uit arbeidsrechtelijk en collegiaal oogpunt bezien is het zeker aan te bevelen om verdenkingen van moord eerst intern, en bij voorkeur vooraf met de 'verdachte' zelf, te bespreken. Maar of dit kan, hangt sterk af van de omstandigheden. Uit de uitspraak blijkt verder niets over de (werk) sfeer in het ziekenhuis en de sociale veiligheid. Natuurlijk is het weinig chique om evenmin de raad van bestuur vooraf in kennis te stellen van een aangifte. Niettemin is het doen van aangifte een bevoegdheid die iedereen toekomt (vgl. art. 161 Sv). Een raad van bestuur kan zijn medewerkers daarom niet verplichten om geen aangifte te doen, dan nadat een interne procedure is doorlopen. Alles bij elkaar begrijp ik het handelen van de raad van bestuur: de achteraf onterechte aangifte van klager had voor grote opschudding in en rond het ziekenhuis gezorgd en de werkverhoudingen binnen het ziekenhuis waren ernstig verstoord. Tegelijkertijd vrees ik dat die onrust ook was ontstaan, hoewel wellicht minder, als de aangifte wel juist was geweest. 'Klokkenluiders' die hun zorgen niet eerst intern bespreken kunnen niet altijd op begrip van collega's rekenen.

6. Het standpunt van de raad van bestuur in deze zaak kan worden doorgetrokken naar de Nederlandse situatie. Het doen van aangifte mag altijd, maar dient – zeker indien de aangifte betrekking heeft op een andere medewerker van dezelfde zorginstelling – uiterst zorgvuldig plaats te vinden. Het Hof neemt het klager kwalijk dat hij zijn vermoedens vooraf onvoldoende had geverifieerd; het ziekenhuis lijkt het klager bovenal kwalijk te nemen dat hij zijn klachten niet eerst intern had besproken. Beide bezwaren tegen de handelwijze van klager liggen feitelijk in elkaars verlengde. Als er een goede en veilige mogelijkheid bestaat om vermoedens van een ernstige misstand eerst intern te bespreken, dan heeft dat altijd de voorkeur. En alvorens naar buiten te treden met een aangifte van moord, wat feitelijk het geval was in deze zaak, moet de melder sterke aanwijzingen hebben van de juistheid van zijn vermoedens. Ziekenhuizen en artsen kunnen zich, mede vanwege hun beroepsgeheim, beperkt publiekelijk verdedigen tegen beschuldigingen van moord. Aldus kan de goede naam en reputatie van ziekenhuizen en artsen snel en

soms onomkeerbaar worden aangetast, zonder dat sprake is van *equality of arms*. Omgekeerd geldt dit overigens ook in het geval verdenkingen van moord wel juist blijken te zijn. Gedacht kan worden aan een Rotterdamse verzorger die werkzaamheden verrichtte in verschillende zorginstellingen. Hij werd verdacht van 'insulinemoorden' op bejaarde vrouwen met dementie. Die vermoedens bleken juist te zijn, aldus de rechtbank, en de rechtbank veroordeelde de verdachte tot twintig jaar gevangenisstraf en tbs met dwangverpleging (rb. Rotterdam 19 december 2019, ECLI:NL:RBROT:2019:10069). In de looptijd van de procedure zijn de betrokken zorginstellingen keer op keer genoemd in de media.
7. In het licht van bovenstaande uitspraak is het terecht dat de rechtbank begin dit jaar heeft bepaald dat de website en de domeinnaam zwartelijstartsen, geëxploiteerd door SIN-NL en Sofie Hankes, onrechtmatig is. Ook volgens het recht van het EVRM oordeelde de rechter juist dat het recht op eer en goede naam van de artsen en recht op vrijheid van gedaagden in het voordeel uitvalt van eerstgenoemd recht (rb. Midden-Nederland 8 januari 2021, ECLI:NL:RBMNE:2021:23, «GJ» 2021/46, m.nt. Van den Ende en Schroten). Niettemin moet ook de Nederlandse rechter in voorkomende gevallen beide rechten op zorgvuldige wijze tegen elkaar afwegen. Dit gaat er wel van uit dat de berichten verkondigd door een belangenorganisatie en natuurlijke persoon op enige wijze met feiten kunnen worden onderbouwd. Net als in het geval van klager in bovenstaande zaak, kan dat bij SIN-NL en Sofie Hankes ernstig worden betwijfeld.

prof. mr. A.C. Hendriks
hoogleraar gezondheidsrecht, Universiteit Leiden

Openbaarheid en privacy

46

Zwarte lijst artsen van SIN.NL onrechtmatig

Voorzieningenrechter Rechtbank Midden-Nederland zp Utrecht
8 januari 2021, nr. C/16/511941/KG ZA 20-581, ECLI:NL:RBMNE:2021:23
(mr. Messer)
Noot mr. T.A.M. van den Ende, mr. T.R. Schroten

Website. Zwarte lijst artsen. SIN.NL. Fundamentele rechten. Eer. Goede naam. Vrijheid van meningsuiting. Persoonsgegevens. Onrechtmatigheid. Belangenafweging.

[EVRM art. 8, 10; AVG art. 6 lid 1, 12, 14, 16, 17, 18, 21; BW art. 3:305a, 6:162; Auteurswet art. 21]

In dit kort geding staat de Stichting Stop Online Shaming (Stichting SOS) tegenover de Stichting Slachtoffers Iatrogene Nalatigheid-Nederland (SIN.nl) en haar oprichter. Het geschil gaat over de 'zwarte lijst artsen', raadpleegbaar via een website die is geregistreerd op naam van SIN.NL. Stichting SOS meent dat de website een digitale schandpaal is, die onrechtmatig is en in strijd met de Algemene Verordening Gegevensbescherming (AVG). Stichting SOS stelt diverse vorderingen in tegen SIN.NL en haar oprichter, welke er in de kern op neerkomen dat zij moeten stoppen met de zwarte lijst artsen en het doen van onrechtmatige uitlatingen over individuele artsen. De voorzieningenrechter dient een belangenafweging te maken tussen het recht op eer en goede naam van de artsen en het recht op vrijheid van meningsuiting (van de eigenaar/beheerder van de website en domeinnaam). Deze belangenafweging valt uit in het voordeel van het recht op eer en goede naam. Daartoe overweegt de voorzieningenrechter onder meer dat de kwalificatie 'zwarte lijst' in zijn algemeenheid door het publiek wordt geassocieerd met het niet (meer) mogen uitvoeren van werkzaamheden, waarmee de term 'zwarte lijst' op zichzelf al een zware beschuldi-