SUPREME COURT'S JUDGMENT

delivered in Stockholm on 20 November 2024

Case no.
B 6856-23

PARTIES

Appellant

1. HW

Counsel and Public Defender: Lawyer SK

2. SJ

Counsel and Public Defender: Attorney LG

Respondent

Prosecutor General
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THE MATTER

Violation of the Act on Protection for Informants in Certain Private Enterprises

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RULING APPEALED

Judgment of the Svea Court of Appeal of 8 September 2023 in case B 13370-22

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JUDGMENT

The Supreme Court affirms the judgment of the Court of Appeal.

SK shall receive compensation from public funds for the defence of HW in the Supreme Court of SEK 10,332. That amount relates to work. HW shall reimburse the State for this cost.

LG shall receive compensation from public funds for the defence of SJ in the Supreme Court of SEK 18,557. Of that amount, SEK 14,845 relates to work and SEK 3,712 relates to value added tax. SJ shall reimburse the State for this cost.

CLAIMS IN THE SUPREME COURT, ETC.

HW has requested that the Supreme Court dismiss the charge or, alternatively, reduce the sentence.

SJ has requested that the Supreme Court dismiss the charge.

The Prosecutor General has opposed modification of the judgment of the Court of Appeal.

The Supreme Court has granted leave to appeal as set out in para. 7.

REASONS FOR THE JUDGMENT

Background

1. In spring 2020, following the outbreak of the COVID-19 pandemic, SC was working as a care assistant at a care home for older people in Stockholm. The home was ran by the company Attendo on behalf of Stockholm Municipality. SC was critical of how the company was handling the pandemic. She therefore spoke to a few managers about the matter and also tried to contact the company's CEO. She also expressed her criticism in a video on Youtube and in an article in the newspaper Expressen, for which she had been interviewed in her own name.

2. Some time later, SC was called to a meeting by HW, who was a regional manager at Attendo. In the meeting notification, it was stated that the meeting was to be held in response to the comments SC had made regarding the company's handling of COVID-19. SC attended the meeting and HW and SC's immediate manager and the HR specialist SJ attended from the company's side.

3. During the meeting, SC was given a document entitled "written reprimand". It stated that she had breached her obligations under her individual employment contract by being disloyal to Attendo by making certain false statements that had harmed the company. It further stated that the employer regarded her actions as misconduct according to the terms of her employment contract and would not accept her continuing to act in the same way. It was also apparent that Attendo took the incident very seriously and expected that the conduct would not be repeated. The company recalled that a breach of the employment contract could ultimately lead to dismissal or summary dismissal under the Employment Protection Act.

4. HW and SJ were charged with breaching the Act on Protection for Informants in Certain Private Enterprises (2017:151). The charge was that, in violation of SC's right to exercise her freedom of expression, they had taken action against her after she made a statement in the newspaper Expressen about perceived shortcomings in Attendo's operations. The action taken by HW and SJ consisted in issuing SC with a written reprimand, which was comparable to a disciplinary sanction or similar sanction.

5. The District Court convicted HW and SJ as charged and sentenced them to day fines.

6. The Court of Appeal affirmed the District Court’s judgment. The Court of Appeal found that the Act on Protection for Informants in Certain Private Enterprises was applicable in respect of Attendo’s activities at the care home and that both HW and SJ were acting as operator within the meaning of the law. In light of what had occurred at the meeting, the Court of Appeal concluded that the written reprimand was issued, at least in part, because of the statements SC made to Expressen regarding shortcomings she found in the care services provided. HW and SJ had thereby intentionally breached the ban on reprisals laid down in the Act. The Court of Appeal further assessed the measure concerned to be so punitive that, in any case, the written reprimand amounted to a measure similar to a disciplinary sanction.

7. The Supreme Court has granted leave to appeal based on the Court of Appeal’s finding that HW and SJ intentionally took action in breach of Section 4, first paragraph, point 2, of the Act on Protection for Informants in Certain Private Enterprises, i.e. in breach of the ban on reprisals.

What is at issue in the case

8. At issue in the case is what is required in order for a deliberate action, taken in breach of the ban on reprisals, to be considered to constitute the imposition of a disciplinary sanction or a similar measure and thus an action that is criminally punishable under Section 6 of the Act on Protection for Informants in Certain Private Enterprises.

The ban on reprisals and punishability under the fundamental laws

9. The Freedom of the Press Act and Fundamental Law on Freedom of Expression contain provisions on the freedom to communicate information, i.e. the freedom of everyone to communicate information on any subject whatsoever for the purpose of publishing it in constitutionally protected media. The freedom to communicate information is protected by, inter alia, a ban on reprisals. Pursuant to that ban, an authority or other public body may not take action against a person for exercising his or her right to freedom of the press or freedom of expression in a constitutionally protected medium or for contributing to such exercise. The ban on reprisals partially carries criminal penalties. A fine or imprisonment for up to one year is imposed on a person who, through deliberate intent, intervenes in breach of the ban on reprisals, if the said action constitutes summary dismissal, notice of termination, imposition of a disciplinary sanction or a similar measure. (See Chapter 1, Section 7, Chapter 3, Sections 6 and 7, first paragraph, point 5, of the Freedom of the Press Act and Chapter 1, Section 10, Chapter 2, Sections 6 and 7, first paragraph, point 4, of the Fundamental Law on Freedom of Expression.)

10. Express and uniform regulation of the ban on reprisals was introduced into the fundamental laws in 2011. As is apparent, the ban is broad in scope. The ban gives expression to the principle that representatives of public authorities may not do anything that could

discourage public servants from exercising their freedom of the press and freedom of expression. It therefore covers a wide range of actions, such as reprimands, ostracism, removal from duties, non-payment of salary increases, disciplinary sanctions, dismissals and summary dismissals. The intention was that acts which were banned under the previous practice of the Parliamentary Ombudsman and the Chancellor of Justice would be covered by the ban introduced into the fundamental laws, and that the precise delimitation of what was not allowed would continue to be determined in practice. At the same time, uniform provisions making some violations of the ban on reprisals subject to criminal penalties were also introduced. (See Government Bill 2009/10:81, p. 38–41.)

11. In the government inquiry which formed the basis for the legislation, one of several alternative proposals was that the criminal sphere of the ban should be limited by expressly listing the measures summary dismissal, notice of termination and disciplinary sanctions. Disciplinary sanctions referred to warnings and deductions from pay, using a comparison with Section 15 of Public Employment Act (1994:260). (See SOU 2009:14, p. 256–259.)

12. In the government proposal, it was stated that it was sufficient that only the most serious infringements could give rise to criminal liability, i.e. summary dismissal, notice of termination and imposition of a disciplinary sanction. Providing an express list directly in the legislation, as proposed by the committee as an alternative, was therefore considered an appropriate solution. However, as retaliatory measures could encompass many kinds of actions, the government did not view it as possible to exhaustively specify the criminally punishable measures in the penal provisions. There were other comparable serious retaliatory measures, such as certain cases of removal from duties and the non-payment of salary increases, which ought to be covered too. In order to include such measures, the penal provision

should state that measures similar to those listed could also give rise to criminal liability if they were taken for reprisal purposes. At the end of the list, the words “a similar measure” were therefore added. (See aforementioned Government Bill, p. 42 and p. 64.)

The Act on Protection for Informants in Certain Private Enterprises

13. The Act on Protection for Informants in Certain Private Enterprises was introduced in 2017. It applies to professionally run private enterprises operating in schools, healthcare and social care, which are to some extent financed by public funding. The law gives employees, among others, of such enterprises the right to communicate information about the enterprise for publication in media covered by the Freedom of the Press Act or the Fundamental Law on Freedom of Expression. (See Sections 1 and 2 and Section 4, first paragraph, point 1.)

14. In relation to their employees, operators are subject to the ban in both the Freedom of the Press Act and the Fundamental Law on Freedom of Expression on taking action against the exercise or abuse of freedom of the press or freedom of expression, i.e. the ban on reprisals. Anyone who intentionally takes action in breach of the ban on reprisals, where the action taken constitutes summary dismissal, notice of termination, imposition of a disciplinary sanction or a similar measure, is sentenced to a fine or imprisonment for a maximum of one year. (See Section 4, first paragraph, point 2, and Section 6.)

15. The background to the law is the fact that activities that have historically been conducted under public management have increasingly been carried out by private operators. As employees of private operators do not, as a general rule, have the right to communicate information about their employer’s activities to the media in the way that public employees have, the public's ability to gain insight into publicly funded activities, and thus to

scrutinise how tax funds are used, is reduced. The purpose of the Act is to enhance the possibility of such transparency and scrutiny by introducing informant protection for employees of certain publicly funded private enterprises, which, as far as possible, corresponds to the protection for public sector employees. (Cf. Government Bill 2016/17:31, p. 15–20.)

16. The Act is therefore modelled on the constitutional protection for informants laid down in the fundamental laws. It provides, through references to the Freedom of the Press Act and the Fundamental Law on Freedom of Expression, protection that corresponds to the constitutional protection against reprisals for those who use their freedom to communicate information. The ban on reprisals, which is partly subject to criminal sanctions, also corresponds to the scope of the constitutional ban, since the wording is the same. The preparatory works therefore refer to and repeat statements from the preparatory works to the corresponding provisions in the fundamental laws. The preparatory works to the fundamental laws are thus also relevant for the application of the corresponding provisions in the Act on Protection for Informants in Certain Private Enterprises. (Cf. aforementioned Government Bill, pp. 19–20 and 46–47.)

Regarding the punishability of imposing a disciplinary sanction etc.

17. The imposition of a disciplinary sanction or a similar measure is, as is provided, an unauthorised retaliatory measure that carries a criminal penalty under Section 6 of the Act on Protection for Informants in Certain Private Enterprises, a provision which corresponds to the partially criminal ban on reprisals under the fundamental laws. However, it does not specify what is to be regarded as the imposition of a disciplinary sanction.

18. In view of the statements regarding the term “disciplinary sanction” in the preparatory works to the corresponding constitutional criminal provision and the comparison made with Section 15 of the Public

Employment Act (see para. 11), the starting point is that a warning may constitute the imposition of a disciplinary sanction under Section 6 of the Act on Protection for Informants in Certain Private Enterprises, i.e. an act that may carry a criminal penalty.

19. In employment law, a distinction is made between different types of warnings, primarily because in this area, a warning may potentially need to be used in the context of a future dismissal of the employee and this must not conflict with other employment law rules (cf., for example, Labour Court judgment AD 2018 no. 34). It is, therefore, a matter of classifying the warning in question, taking into account the objectives of the relevant employment law. However, these objectives are not directly relevant to the delimitation of the criminal sphere of the ban on reprisals contained in the laws protecting informants, as other considerations apply here. The precise prerequisites for the issuing of a warning to be considered to constitute the imposition of a disciplinary sanction under the partially criminal ban on reprisals cannot therefore be derived from employment law. The interpretation must instead – as always within the limits set by the principle of legality – be based on the purpose of the penal provision on the ban on reprisals.

20. An important delimitation of the criminal sphere is that the wording aims to criminalise only the most serious cases of the broad ban on reprisals. This could be grounds for considering that a warning that is not linked to any additional measure with a more tangible impact on the employee's working conditions, such as a relocation or a withdrawal of duties, would not meet the requirements for constituting an act of a criminal nature. At the same time, a warning – depending on how it is formulated and how it is given – can be just as strong a retaliation as a measure that affects an employee's working conditions more tangibly.

21. The above confirms the stated starting point that the issuing of a warning, if given due to the employee exercising or abusing their freedom to communicate information and thus in breach of the ban on reprisals, may constitute a criminally punishable act in the form of imposition of a disciplinary sanction. However, in order to constitute such a criminal offence, it must be required that the warning typically, i.e. regardless of how it is perceived by the employee in an individual case, expresses that the employer takes the employee's exercising of their freedom to communicate information seriously and carries a strikingly firm message.

22. The precise message, irrespective of how the message is classified in the individual case, will therefore be decisive in this assessment. If the employer indicates that by exercising their freedom to communicate information an employee has committed serious misconduct and threatens to take serious action if the employee continues to exercise their freedom to communicate information, this typically means they are imposing a disciplinary sanction. Other circumstances that may increase the seriousness of the action include, for example, whether the message is given in writing, documented and kept by the employer and whether it is given by a senior manager.

The assessment in this case

23. The starting point for the Supreme Court's assessment is that HW and SJ intentionally took action in breach of the ban on reprisals when they issued SC with the written reprimand (see paras. 6 and 7).

24. The question for the Supreme Court is whether the issuing of the written reprimand is to be deemed a disciplinary sanction or similar measure pursuant to Section 6 of the Act on Protection for Informants in Certain Private Enterprises, and whether the issuing of the reprimand is therefore a criminal offence.

25. In the reprimand, it was stated that SC had breached the obligations in her employment contract by being disloyal on the basis of specific false statements that had harmed Attendo, that the company regarded what happened as misconduct according to the terms of her contract and that the company would not accept her continuing to act in this way. It was further stated that the company took the incident very seriously, that the employer expected that her conduct would not be repeated and that the company recalled in this context that a breach of the employment contract could ultimately lead to dismissal or summary dismissal. Overall, this means that the issuing of the warning carried a strikingly firm message. The fact the document was classified as a written reprimand and not as a warning does not affect this assessment. In addition, it was stated that the document would be kept in the SC's personal file for the duration of her employment and for some time thereafter, and it was distributed at a meeting attended by several managers, including a senior manager within the organisation.

26. Against this background, the issuing of the written reprimand is to be considered as a measure which constitutes the imposition of a disciplinary sanction under Section 6 of the Act on Protection for Informants in Certain Private Enterprises. This means that HW and SJ were guilty of taking action of a criminal nature in breach of the ban on reprisals.

27. The Supreme Court does not come to a different conclusion than the Court of Appeal as regards sentencing. The judgment of the Court of Appeal shall therefore be affirmed.

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Justices of the Supreme Court Dag Mattsson, Malin Bonthron, Eric M. Runesson (dissenting), Christine Lager (reporting Justice) and Anders Perklev (dissenting) participated in the ruling.
Judge referee: Henning Eriksson.

DISSENTING OPINION

Justices Eric M. Runesson and Anders Perklev dissent and state the following.

In our view, the judgment of the Court of Appeal should be modified in such as way as to acquit HW and SJ of liability. Commencing from and including paragraph 18, the reasons for the judgment should read as follows.

18. Taking into account the fact that, according to the preparatory works to the corresponding constitutional criminal law provision, the term "disciplinary sanction" is derived from Section 15 of the Public Employment Act, the starting point is that the term includes deductions from pay and warnings.

19. An exact interpretation of the penalty provision requires account to be taken of the criminal law principle of legality. This principle is expressed in, inter alia, Chapter 2, Section 10, of the Instrument of Government, Chapter 1, Section 1, of the Swedish Criminal Code, and Article 7 of the European Convention on Human Rights. Primarily, this principle means that no one can be punished for an offence that was not criminal when it was committed. The principle of legality is usually considered to include a requirement of prescription by law, a prohibition of analogy and a prohibition against retroactive legislation. This principle acts as a guarantee of legal certainty by requiring legislation to ensure that individuals are able to foresee that they may be subject to criminal proceedings. This also entails a principle known as the prohibition of indeterminacy, which means a penalty must be clearly defined by law in reasonably definite terms; penal provisions must be comprehensible and sufficiently clear. (See "The Exchanged Driving Licence" NJA 2024, p. 208, para. 23.)

20. On this basis, some of the wording in Section 6 of the Act on Protection for Informants in Certain Private Enterprises is unfortunate. Clear definitions of summary dismissal and dismissal are found in employment legislation. It is also clear that a disciplinary sanction may take the form of a deduction from pay or a warning. Certain warnings, however, are not considered to be disciplinary sanctions in employment law, but instead are regarded as warnings under the Employment Protection Act (known as “LAS warnings”; LAS is the abbreviated name of the Act) (cf. Section 62 of the Employment (Co-Determination in the Workplace) Act (1976:580) and Labour Court judgment AD 2018 no 34). It is therefore difficult to determine what is meant by disciplinary sanction under Section 6. The fact that it also includes similar measures without specifying in what respect they should be similar to the forms of measures listed makes it all the more difficult to determine what falls within the criminal sphere.

21. To ensure predictability and legal certainty in general, the wording of a penal provision limits what the penal provision can cover. Nevertheless, the principle of legality does not prevent a penal provision from being interpreted in accordance with established principles; such interpretation must, however, be made with prudence. Interpretation can only be based to a very limited extent on general reasons of expediency, unless they are expressed in the text. (See “The Exchanged Driving Licence”, para. 24.)

22. For these reasons, there should be a strict interpretation of what may be considered to constitute a disciplinary sanction or similar measure. The most obvious approach is to start from the repressive and retrospective functions of summary dismissal, dismissal and imposition of a disciplinary sanction. All these measures are primarily a form of punishing the employee. Which of the measures are available to the employer in each individual case depends on the seriousness of the misbehaviour.

23. It is true that a disciplinary sanction that is imposed in the form of a warning has no immediate negative impact on the individual's employment conditions. The purpose of the sanction is to express a reaction to more serious misbehaviour without having to link it to any specific future consequence that will occur if the employee does not take note of the warning. It can therefore be used even if it is clear at the time of the warning that the misbehaviour will not be repeated.

24. Against this background, the term similar measure in Section 6 should be understood to mean measures that involve de facto interference with the employee's benefits or conditions of employment or that otherwise clearly have the character of retrospective punishment of wrongful behaviour. Such an interpretation is very much in line with the examples given in the preparatory works and the starting point that only the most serious cases of infringement of the ban on reprisals should be subject to criminal liability (cf. para. 12).

The assessment in this case

25. The starting point for the Supreme Court's assessment is that HW and SJ intentionally took action in breach of the ban on reprisals by issuing SC with a written reprimand (see paras. 6 and 7). According to the indictment, the reprimand was comparable to a disciplinary sanction or similar sanction.

26. The action taken was in the form of a written reprimand and was also communicated as such when it was given to SC. Although it is worded in clear and firm terms, it does not contain any elements that are intended to affect SC's working conditions. The reprimand was forward-looking in nature in the sense that it indicated the measures that could be taken if SC did not change her behaviour. The fact that the measure was aimed at

preventing her from exercising her freedom to communicate information is irrelevant to the assessment of whether the act falls within the criminal sphere, since that circumstance has already been used as a basis for finding that it is an unlawful reprisal under Section 4. In summary, the written reprimand cannot be considered to be of a nature that constitutes a disciplinary sanction or similar measure (cf. para. 23).

27. HW and SJ should therefore be acquitted of liability.

Outvoted on this issue, we otherwise agree with the majority.

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