



## INFORMATIVE NOTE No. 36/2016

### A CLAIM FOR DAMAGE CAUSED DURING A STRIKE REQUIRES VERIFICATION THAT THE CIVILLY LIABLE PARTY ACTIVELY PARTICIPATED IN THE EVENTS

The Plenary Meeting of the Constitutional Court (TC) has partly granted constitutional protection to a citizen who was ordered to pay indemnification of 816.82€ due to being held civilly liable for personal injury and material damage caused to a pub owner during a day-long general strike. The Court has partly upheld the punishment for material damage caused by the picket's violence (aimed at "*closing down the pub*"), for which the plaintiff is liable. On the other hand, the Plenary Meeting has annulled part of the punishment for personal injury, in the absence of "*material authorship*" of the appellant in the attack and of "*any reason for its commission*"; the Court considers, here, that the fundamental right to strike has been breached (Art. 28.2 Spanish Constitution (CE)). The Chairman, Francisco Pérez de los Cobos, acted as Reporting Judge. A joint particular vote was issued by the Vice President, Adela Asua, and Judge Fernando Valdés Dal-Ré; particular votes were also issued by Judges Encarnación Roca and Juan Antonio Xiol.

According to the challenged judgment, delivered by a First Instance Court in Albacete, the events took place during the general strike held on 29 September 2010, when the pub owner was attacked by an unspecified number of people, belonging to a picket led by the now applicant of constitutional protection. The Judge ordered him to pay as a civilly liable party: 255.82€ as personal injury and 561€ as lost profit due to closure of the pub. The appellant claims that this punishment is restrictive of his right to strike and, furthermore, has deterrent effects in the leadership of pickets in future strikes.

Further to constitutional case-law, the right to strike "*includes the right to distribute information about the strike- "peaceful" advertising- but cannot justify duress, threats or violence in order to achieve this purpose, as it is necessary to uphold the freedom of those workers who decide not to strike*".

In this specific case, affirms the Plenary Meeting, it has been proven that physical attacks and insults were used to close down the work place, i.e. conduct that may not be protected by the fundamental right to strike, consequently entailing civil liability for the damage caused. The core of this constitutional debate is who should be held civilly liable, a point not subject to any specific rule in strike regulations.

After recalling that it is not the Court's job to review how the ordinary judge has appraised the evidence, the judgment separately examines the allocation of civil liability for personal injury and for material damage.

In relation to the first, it is a proven fact that "*the pub owner was attacked by unspecified members of a picket*" and that the appellant was the person who "*holding a loudspeaker,*

*directed and mobilised the group*". It has not been proven, however, that the latter actively participated in the attack or that there were reasons for its commission, which is why his punishment was based on *"his acquiescence or consent of the harmful act"*.

In this case, the Plenary Meeting considers that the attribution of civil liability has breached the right to strike given that, *"in the absence of a legal provision"* on how to allocate civil liability, the need to uphold this right requires that the courts *"carefully examine any personal and individualised conduct (...) when producing the harmful act"*. *"Status as a member or leader, even, of a picket is not per se sufficient and constitutionally valid to be able to attribute such liability"*, it adds.

Civil liability for material damage (lost profit due to closure of the pub) is allocated to the plaintiff due to the *"connection"* that the instance court ascertained between his conduct and *"closure of the pub"*. In effect, according to the factual description included in the challenged resolution, the latter *"insulted"* and used expressions that *"at all times encouraged closure of the pub in question (where, furthermore, remains of firecrackers and broken glass were found), at all cost, when the apparent pub owner... intended to keep it open to the public"*.

This type of behaviour is also excluded from the protected scope of the right to strike, which does not include *"the possibility of limiting third party decision-making capacity by using violence or moral pressure entailing intimidation or duress, given that other constitutionally protected assets should be upheld, such as the freedom of employment, the freedom of enterprise and personal dignity and a right to moral integrity"*.

In this case, unlike in the case of civil liability allocated for personal injury, the punishment did not restrict the plaintiff's right to strike because *"the harmful conduct in question is not only outside the scope of protection of said fundamental right, but is also covered by the doctrine of estoppel, on the part of the applicant for protection"*.

Consequently, the Plenary Meeting has repealed the judgment as regards the attribution to the plaintiff of civil liability for personal injury, but upholds it as regards material damage.

In their particular vote, the Vice President Adela Asua and Judge Fernando Valdés consider that the appeal for constitutional protection should have been upheld in its entirety. In their opinion, the constitutional judgment presumes uncritically that the pub was closed down due to the applicant's *"own acts"* [estoppel], charging him with the harmful act with no other grounds than his directive position or leadership of the picket, forgetting that when allocating civil liability each agent's personal and individualised conduct should be taken into account, that such conduct should be analysed in the context of the conflict in question, and that explaining the conflict underlying the strike is not unrelated to the law but is a primary expression thereof. Otherwise, in their opinion, there would be discouraging effects and a negative impact on the effectiveness of the collective self-protection measure enshrined in Art. 28.2 CE.

Judge Roca, on the other hand, believes that the challenged judgment should have been upheld in its entirety. She disagrees with the judgment's reasoning because, in her opinion, in the absence of laws regulating the right to strike, the Spanish Civil Code should have been applied, specifically the *"extraordinary joint and several liability"* principle, whereby liability for the damage caused by an unspecified member of a group may be attributed *"to*

*any one of them, or to them all equally or by shares*". In this case, the appellant's punishment did not restrict his right to strike "*because he in fact exercised this right in an abusive manner*"; otherwise, "*an unlimited exercise of the right to strike would be acknowledged, as well as indemnity with respect to its harmful consequences*".

In his vote, Judge Xiol agrees with the first part of the judgment, which upholds the constitutional protection due to the appellant's position as a picket leader being insufficient for him to be held liable for personal injury. In his opinion, this same doctrine should have applied to the allocation of civil liability for material damage.

Madrid, 28 April 2016.