**Hypothetical case no. 1 - Freedom of Expression and the Whistleblower Directive**

Ana is a trainee judge from Yuland, a small country from Central and Eastern Europe, member of the EU since 2004. From September 2023, she has been employed at the Civil Department of District court of Justville, the second largest city of Yuland. She has been working as a judicial assistant, drafting judgments, orders and other decisions of the court, and performing various other activities supporting the work of judges at the court. Apart from that, she was tasked with the allocation of mediators to civil, commercial, employment and family cases, heard by the District court of Justville. The mediators are allocated to cases, in which the parties do not come to an agreement on the preferred mediator. These cases represented more than 90% of all cases of mediation.

Mediation is an important alternative dispute resolution mechanism in Yuland, a country struggling with substantive judicial backlog. Parties are encouraged to make use of mediation by lower court fees and invitations the court service sends to the parties by default. Mediators are legal experts, mostly judges and attorneys. They receive an award for their work based on the number of mediation meetings, their duration, the complexity of the case / the pecuniary value of the dispute, and an additional award for securing the settlement of the dispute. The awards for mediators have recently been increased, as one of a series of measures aimed at combating judicial backlog.

On a rainy Monday morning, 11 March 2024, when Ana arrived at work, she found an envelope with her name in her mailbox. It contained a document with a list of numbers and identifiers of open cases. She quickly understood that these were cases, to which she was required to allocate mediators. The document was downloaded from an intranet portal, to which all the employees of courts in Yuland had access. Based on the phases individual procedures were in, the portal automatically generated a list of cases to which the mediators had to be allocated. Normally, Ana would log into the portal and download that list by herself once a week, and then allocate mediators. This time somebody has done the job for her.

Ana was deeply troubled by the document. She knew somebody from her court wanted to impact the allocation of mediators but was afraid to report it to the superiors out of fear of reprisal. She heard that there are obscure networks at the court and was afraid that even telling a colleague could expose her to serious inconvenience. As a newcomer, struggling to grasp the relations within her workplace, she decided to wait what the following weeks will bring.

Next Monday morning, a new envelope was waiting for her in the mailbox. This continued for two months. Ana quickly realised that a suspicious pattern. The names to whom the cases with a high pecuniary value of the dispute, meaning a high award for the mediator, were allocated, were repeating, with some exceptions. These cases were allocated to 15 individuals, 8 attorneys and 7 judges, working in different parts of Yuland. She suspected that a network is relying on an insider from her court to ensure they will be allocated the most profitable mediation cases.

The practice continued in the coming weeks and Ana felt she is involuntary becoming a part of an organised criminal group. She was aware she is the one ultimately responsible for the allocation of mediators. She did not know what to do. On the one hand, she was afraid to report the misconduct to the president of the Court or the court secretary who was the designated person in cases of various kinds of emergency in the workplace. On the other hand, she feared that others outside the group would discover the secret interference in allocation of mediators. In this case, she would be one of the main suspects. The situation started to affect her health and private life. She had trouble sleeping and was often filling sick. She fell ill and upon her return to work, she realised nobody allocated the mediators for the past week. At that point, she was convinced – somebody is using her to cover his own wrongdoings. After talking once again to her family and friends about the situation, she decided to put an end to the painful circumstance she found herself in. She filed a report, whatever the consequences.

In the report, she sent under Articles 10 and 11 of the Whistleblowers protection Act to the Anti-Corruption Commission of Yuland, she very honestly and thoroughly described the situation at the court. She explained how the procedure worked before the interference in allocation started:

*“Under the Mediation in Civil and Commercial Matters Act, the allocation of mediators is done by using randomisation, taking into account the specialisation of mediators. I had a list of mediators, from which I had to choose the mediators. The informal rule was to assign mediators alphabetically, except in cases, which required highly specialised knowledge. Here the alphabetical order only served as a criterion to choose among those mediators, possessing the required specialised knowledge. […]”*

She attached the scans of documents she has been receiving in her mailbox to the report.

After three months, the Anti-Corruption Commission notified her, explaining that her case is under scrutiny, but the Commission needs more time due to a high inflow of reports. Another three months passed. She decided to telephone to the Commission. After multiple attempts, she finally managed to reach the person handling her report. The Commission employee rudely explained that the Commission is flooded with reports of alleged high-profile corruption and that her complaint cannot be prioritised given the less serious nature of misconduct. The employee could not specify when the case would be examined as this was dependent on the inflow of other reports.

Ana was disappointed and felt abandoned by the legal system of Yuland. After further reflection, she decided to report the situation to the media. She wrote to the most renewed daily newspaper in Yuland. She met with a journalist, covering the judiciary, and agreed to report the practice, provided she would be able to use a pseudonym, that she would be allowed to read and approve the text, before the article is published, and that the focus will not be on her story but on the illegal practice.

On 15 December 2024, the article entitled “Cherry-Picking the Profitable: On Allocation of Mediators in Courts of Yuland” appeared in the newspaper. The article generated further media reporting and many social media posts. It was written in such way that it was not possible to identify Ana as the source of information. The article mentioned the names and professions of mediators concerned. Ana decided to reveal these, as she felt it would have been unfair to cast a bad light on all mediators and mediation as an ADR measure, due to illegal enterprise of the few. Even though the article did not mention the exact District Court, Ana was aware that the president of Justville District court will check the allocation at her court and will quickly realise that the illegal practice took place there.

President of the Justville District Court summoned Ana to her office the next day, on 16 December. Ana told her the whole story. The president of the court was upset as she knew the media will soon find out about the court and swarm her with questions and requests for explanations. She wanted to know why Ana did not report the affair internally. Ana explained that she did not know who was involved in the illegal practice and wanted to avoid retaliation. The president insisted that the right way to proceed would be to talk to her, her secretary (a specially designated person for internal reporting) or somebody else from the court, and that she should have thought of the public trust in the judiciary, which will significantly deteriorate due to her reckless behaviour. Ana disagreed and explained this was the only way for her to avoid being potentially prosecuted for corruption. The president of the court did not want to hear anything from Ana and finished the conversation with: “Well, good luck, hero!” Ana slammed the door and ran to her office.

Ana has been going through tough times at the Justville District Court. The president and some other colleagues did not want to talk to her and gave her the impression that her presence was undesirable.

The president of the court decided to initiate disciplinary proceedings against Ana before Public Sector Disciplinary Court for “diminishing the public trust in the judiciary”. The president argued that Ana should have reported the affair internally, and that there was no reason to report it to the media. The president felt that the disciplinary proceedings are necessary to prevent further deterioration of public image of the judiciary by potential future careless “whistleblowers”. Public Sector Disciplinary Court agreed with the court president and imposed a 3-month 20% salary decrease. Ana appealed to the Supreme Court of Yuland, claiming that the procedure itself and the sanction constituted an unlawful reprisal under the Whistleblowers protection Act and was contrary to Article 31 of the Charter of Fundamental Rights of the EU. Relying on Article 41 of the Charter, she also argued she was not able to present her views before the disciplinary procedure was initiated and that the Public Sector Disciplinary Court merely reiterated the arguments adduced by the court president and summarily rejected her claims without any real consideration.

Imagine you are a judge of the Supreme Court of Yuland, hearing Ana’s case.

Questions:

1. Does Ana qualify as Whistleblower under Article 6(1) of the Whistleblower Protection Act? If Ana were a judge, would she qualify as Whistleblower under Article 6(1) of the Whistleblower Protection Act? What about under Article 4 of Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (the Whistleblower Directive)? In your country, do judges qualify as whistleblowers under the legislation, transposing the Whistleblower’s directive?
2. Did the measures taken in the aftermath of the publication of the article in the newspaper constitute reprisals under Article 19 of the Whistleblower Protection Act? Discuss each measure.
3. Ana claims that she had “*reasonable grounds to believe that the reporting or public disclosure of such information was necessary for revealing a breach*” pursuant to Article 21(6) of the Whistleblowers Protection Act and that the Supreme Court of Yuland should dismiss the case. The Supreme Court of Yuland does not know how to interpret Article 21 (6). Can the court seek assistance from the CJEU, given the fact that according to Article 2 of the Whistleblower Directive), the material scope of the Directive does not cover the area of judiciary? In replying to this question, please note the following jurisprudence of the CJEU: C-28/95, Leur-Bloem, 17 July 1997, paras. 32–34; Case C-338/14, Quenon v. Beobank & Metlife Insurance, 3 December 2015, paras. 16–18 and the references contained therein.
4. In her submissions before the Supreme Court of Yuland, Ana relies on the Articles 31 and 41 of the EU Charter of Fundamental Rights. Does the Charter apply in the case at hand? Why/why not? In answering this question, please note CJEU, C-206/13, Siragusa,6 March 2014, para. 25, C-40/11, Lida, 8 November 2012, para. 79, and consult FRA Handbook - Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level, p. 51-53, available at: <https://fra.europa.eu/en/publication/2018/applying-charter-fundamental-rights-european-union-law-and-policymaking-national>.

In the meantime, official criminal investigation into the alleged interference in the allocation of mediators found that an organised group of lawyers and judges relied on one of the registrars of the Justville District court to work as proxy. The registrar prepared the list of cases to be allocated and handed it over to one of the group members. After the group has made the selection, the registrar’s task was to secretly put their selection in Ana’s mailbox. The official investigation led to indictment of the members of the group, except for two judges for which the inquiry could not find enough evidence linking them to the organised group. The charges against them were therefore dropped soon after the initiation of the investigation. They were allocated to “profitable” cases more often than other mediators, but less often than the reminder of the group.

One of the judges was furious and could not understand why Ana decided to reveal his name to the media. His personal and professional reputation sharply declined. He decided to sue Ana for defamation. In the defamation proceedings, he alleged that he appeared on Ana’s list, and later in the media, due to her careless analysis of the documentation. In the case of doubt, she should have denounced less people. In any case, he claimed that giving full names and professions to the media was entirely inappropriate and unnecessary. Ana relied on Article 21 of the Whistleblower Protection Act, claiming that the provision absolves her of any liability for the act of Whistleblowing. The affected judge relied on Articles 21 (3) and 21 (6) of the Whistleblowers protection Act, claiming that Ana did not have “reasonable grounds to believe that the reporting or public disclosure of such information was necessary for revealing a breach.”

Imagine you are the first instance judge, who hears the defamation case.

Questions:

1. What are the competing interests at stake? Which interests would you give precedence in this case and why?
2. Confident that the CJEU has jurisdiction, you decide to stay the proceedings and refer question(s) for preliminary ruling Article 267 of the TFEU. You are not sure how to interpret Article 21 of the of the Whistleblower Directive, which conditions protection of whistleblowers upon existence of “reasonable grounds to believe that the reporting or public disclosure of such information was necessary for revealing a breach.” How would you frame the question(s)?

Her whistleblowing experience made her more sensitive about this topic. She became a supporter of the global Pirate Party movement and even a member of the Pirate Party of Yuland, an extra-parliamentary party, winning 0,5% of votes in the last general elections. She felt that this is the only party that genuinely supports policies for protection of Whistleblowers. She supported other policies of the Pirate party, including the idea to do away with copyright. On her private Facebook account, she started to share lectures and podcasts supporting the idea. She even appeared at the rally of Pirate party supporters and had a speech advocating the abandonment of copyright. Among other, she said: “The time has come that we, as a society, stop supporting big tech and the copyright-based industry. It is time for civil disobedience.”

One of the employees at the Justville District court showed her speech and Facebook posts to the court president. The court president decided to initiate disciplinary proceedings against Ana for publicly diminishing the impartial image of the judiciary. The president argued that Ana openly advocated the breach of copyright and thus publicly called for the disregard of the binding legal order. She also publicly appeared at the rally of a political party, which was contrary to the principle of neutrality, required from civil servants, employed in the public sector. Such duty of neutrality is even more important for those working within the judiciary, an independent branch of power. In the disciplinary proceedings before the Public Sector Disciplinary Court, Ana was facing different potential sanctions, including the termination of her employment contract.

Imagine you are a judge of the Public Sector Disciplinary Court hearing Ana’s case. In her written submissions to the court, Ana is relying on Article 21 (4) of the Whistleblower protection Act and on the Charter of Fundamental Rights.

Questions:

1. If Ana were a judge, in your opinion, would such behaviour be appropriate?
2. Ana is not a judge. Should different standards of freedom of expression and the duty of restraint apply to her situation? Why/why not.
3. Under Article 21 (4) of the Whistleblower Protection Act and Article 21 (5) of the Whistleblower Directive, any detriment to the Whistleblower is presumed to be made in retaliation for the report or the public disclosure. Provide arguments for the court president, showing that the measure was unrelated to the act of whistleblowing. What are the counter-arguments against this claim?

List of appendices:

* Appendix 1: Relevant national legislation
* Appendix 2: Whistleblower Directive - <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32019L1937>
* Appendix 3: Other relevant provisions of EU law

Appendix 1: Relevant national legislation

**Whistleblower Protection Act**

Chapter 1

General provisions

Article 1

(Content of the Law)

This Act, with a view to protecting the public interest, establishes the methods and procedures for reporting and dealing with breaches of regulations of which individuals become aware in the work environment, and for protecting individuals who report or publicly disclose information about a breach.

Article 2

(Transposition of a European Union Directive)

This Act transposes Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report infringements of Union law (OJ L 305, 26.11.2019, p. 17; hereinafter: Directive 2019/1937/EU) into the legal order of the Republic of Yuland.

Article 3

(Scope of application)

This Act shall apply to the reporting of any breaches of laws and regulations applicable in the Republic of Yuland (hereinafter referred to as "breach").

Article 5

(Definitions)

[…]

(4) ‘internal reporting’ means the oral or written communication of information on breaches within a legal entity in the private or public sector;

(5) ‘external reporting’ means the oral or written communication of information on breaches to the competent authorities;

(6) ‘public disclosure’ or ‘to publicly disclose’ means the making of information on breaches available in the public domain.

[…]

Chapter 2

Conditions for the protection of the applicant

Article 6

(Whistleblower and conditions for protection)

(1) A whistleblower is a natural person who reports or publicly discloses information about an infringement obtained in his or her working environment.

(2) A whistleblower shall be entitled to protection under this Act if he or she, on reasonable grounds, believed that the reported information about the infringement was true at the time of reporting and made an internal report under Article 7 of this Act, an external report under section 10 of this Act, or publicly disclosed information about the infringement under section 15 of this Act.

(3) A whistleblower shall not be entitled to protection under this Act if the whistleblower has made a notification two or more years after the cessation of the infringement.

(4) Intermediaries and related persons shall also be entitled to protection under this Act if it is likely that retaliatory measures have been or may be taken against them because of their association with the applicant.

(5) A whistleblower who has made an anonymous application but whose identity has subsequently been disclosed shall also be entitled to protection under this Act.

Chapter 4

External reporting

Article 10

(External reporting)

The whistleblower shall report information on breaches using the channels and procedures referred to in Articles 11 and 12, after having first reported through internal reporting channels, or by directly reporting through external reporting channels.

Article 11

(External Reporting Authorities)

The external application bodies shall be:

1. the Agency for Communications Networks and Services of the Republic of Yuland,

2. the Securities Market Agency,

3. the Public Agency for the Protection of Competition of the Republic of Yuland,

[…]

8. the State Audit Commission for the Audit of Public Procurement Procedures,

11. the Office of the Republic of Yuland for the Prevention of Money Laundering,

12. the Information Commissioner,

17. the Labour Inspectorate of the Republic of Yuland,

18. the Public Sector Inspectorate,

[…]

24. the Anti-Corruption Commission of Yuland.

Chapter 5

Public disclosures

Article 15

(Public disclosures)

1.   A person who makes a public disclosure shall qualify for protection under this Act if any of the following conditions is fulfilled:

(a) the person first reported internally and externally, or directly externally in accordance with Chapters 3 and 4, but no appropriate action was taken in response to the report within three months from the report; or

(b) the person has reasonable grounds to believe that:

1. the breach may constitute an imminent or manifest danger to the public interest, such as where there is an emergency situation or a risk of irreversible damage; or
2. in the case of external reporting, there is a risk of retaliation or there is a low prospect of the breach being effectively addressed, due to the particular circumstances of the case, such as those where evidence may be concealed or destroyed or where an authority may be in collusion with the perpetrator of the breach or involved in the breach.

Chapter 6

Protection measures

Article 19

(Prohibition of retaliation)

Any form of retaliation against whistleblowers, including threats of retaliation and attempts of retaliation is prohibited. Retaliation includes in particular:

1. suspension, lay-off, dismissal or equivalent measures;
2. demotion or withholding of promotion;
3. transfer of duties, change of location of place of work, reduction in wages, change in working hours;
4. withholding of training;
5. a negative performance assessment or employment reference;
6. discrimination, disadvantageous or unfair treatment;
7. coercion, intimidation, harassment or ostracism;
8. discrimination, disadvantageous or unfair treatment;
9. failure to convert a temporary employment contract into a permanent one, where the worker had legitimate expectations that he or she would be offered permanent employment;
10. harm, including to the person's reputation, particularly in social media, or financial loss, including loss of business and loss of income;
11. blacklisting on the basis of a sector or industry-wide informal or formal agreement, which may entail that the person will not, in the future, find employment in the sector or industry;
12. early termination or cancellation of a contract for goods or services;
13. cancellation of a licence or permit;
14. psychiatric or medical referrals.

Article 21

(Measures for protection against retaliation)

1.   Where whistleblowers report information on breaches or make a public disclosure in accordance with this Act they shall not be considered to have breached any restriction on disclosure of information and shall not incur liability of any kind in respect of such a report or public disclosure provided that they had reasonable grounds to believe that the reporting or public disclosure of such information was necessary for revealing a breach pursuant to this Act.

2.   Whistleblowers shall not incur liability in respect of the acquisition of or access to the information, which is reported or publicly disclosed, provided that such acquisition or access did not constitute a self-standing criminal offence. In the event of the acquisition or access constituting a self-standing criminal offence, criminal liability shall continue to be governed by the Criminal Code.

3.   Any other possible liability of reporting persons arising from acts or omissions which are unrelated to the reporting or public disclosure or which are not necessary for revealing a breach pursuant to this Act shall continue to be governed by applicable European Union or national legislation.

4.   In proceedings before a court or other authority relating to a detriment suffered by the reporting person, and subject to that person establishing that he or she reported or made a public disclosure and suffered a detriment, it shall be presumed that the detriment was made in retaliation for the report or the public disclosure. In such cases, it shall be for the person who has taken the detrimental measure to prove that that measure was based on duly justified grounds.

5.   Whistleblower may seek judicial redress before a competent court against the retaliation referred to in Article 19 of this Act. If the whistleblower proves in the interim relief proceedings that he has made a report prior to the retaliation, it shall be deemed that there is a risk that the enforcement of the claim will be prevented or substantially impeded.

6.   In legal proceedings, including for defamation, breach of copyright, breach of secrecy, breach of data protection rules, disclosure of trade secrets, or for compensation claims based on private, public, or on collective labour law, Whistleblowers shall not incur liability of any kind as a result of reports or public disclosures under this Act. Those persons shall have the right to rely on that reporting or public disclosure to seek dismissal of the case, if they had reasonable grounds to believe that the reporting or public disclosure was necessary for revealing a breach, pursuant to this Act.

**Appendix 2: Whistleblower Directive -** [**https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32019L1937**](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32019L1937)

**Appendix 3: Other relevant provisions of EU law**

Article 51 of the Charter:

*Field of application*

*1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are* ***implementing Union law****. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.*

*2. The* ***Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union****, or modify powers and tasks as defined in the Treaties.*