

[TRANSLATION]

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## THE FACTS

The applicant, Mr Jürgen Petersen, is a German national who was born in 1946 and lives in Berlin. He was represented before the Court by Mr H. Meyer-Dulheuer, a lawyer practising in Berlin.

### A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

#### 1. Background to the case

The applicant is a history graduate (*Diplomhistoriker*) who obtained his degree in 1971 and had been a lecturer in modern history at Humboldt University in Berlin, in the German Democratic Republic (“the GDR”), since 1988.

He obtained his teaching certificate (*Lehrbefähigung*) and the qualification *Doctor Scientiae* after writing two theses, which were not published.

The first thesis was completed in 1978 and was entitled “The creation of a State-monopolised research and development policy in the FRG (Federal Republic of Germany), particularly in the 1950s. A study of the relationship between scientific and technological research and development in the non-university civilian sphere and its military use in the FRG from a historical perspective. Selected problems and facts” (“*Herausbildung einer staatsmonopolistisch orientierten Forschungs- und Entwicklungspolitik in der BRD, insbesondere in den fünfziger Jahren. Eine Studie zum Verhältnis von ziviler ausseruniversitärer wissenschaftlich-technischer Forschung und Entwicklung und militärischer Nutzung in der BRD in historischer Sicht. Ausgewählte Probleme und Fakten*”).

The second was completed in 1986 and was entitled “The CDU [*Christlich Demokratische Union* – the Christian Democratic party in the FRG] and the conception of the social market economy from 1945 to 1949. The influence of neo-liberal ideas on the development of the programme of economic restoration in the western zones” (“*Die CDU und die Konzeption der sozialen Marktwirtschaft 1945-1949. Zum Einfluss neoliberaler Vorstellungen auf die Entwicklung der restaurativen Wirtschaftsprogrammatik in den Westzonen*”).

After the reunification of Germany, and in accordance with the relevant provisions of the Treaty of 31 August 1990 on German Unification (*Einigungsvertrag* – Articles 13 and 20 § 1 taken together with Article 1 §§ 1-3 of Annex I, Chapter XIX, Subject A, Section III – see “Relevant domestic law and practice” below), the applicant was incorporated into the civil service of the *Land* of Berlin and worked in the fields of philosophy and history at the Institute of History, Humboldt University, Berlin.

#### 2. Proceedings before the Structure and Appointments Board of Humboldt University, Berlin

After reunification, in order to carry out the necessary restructuring and rationalisation of the university’s staffing arrangements, structure and appointments boards (*Struktur- und Berufungskommissionen*) were set up. The purpose of the Structure and Appointments Board

for the history department was to draw up opinions for the university's Central Personnel Committee (*Zentrale Personalkommission*) as to whether the department's researchers should have their contracts of employment renewed.

On 15 November 1991 the Structure and Appointments Board for the history department – comprising three university lecturers from outside the GDR, three lecturers from Humboldt University, a research assistant and a student from the university – interviewed the applicant.

Six members of the Board were present at the interview, two of the lecturers from Humboldt University being absent.

On 14 February 1992 the Board, by four votes with two abstentions, recommended to the Humboldt University management that the applicant be dismissed.

On 17 February 1992 Mr Schulze, a lecturer in the history faculty of Bochum University and a member of the Board, submitted the final version of his expert assessment of the applicant's professional qualifications, which was based entirely on the two theses written by the applicant during the time of the GDR. Mr Schulze considered that the first thesis owed more to political analysis than to historical research. The second thesis, in his opinion, did not contribute anything new to contemporary understanding of its subject matter: the early history of the CDU and its economic ideas. In particular, the thesis did not include a comparison with the relevant literature published in the FRG – an essential component of a study of that nature – and merely cited the publications in question.

The expert concluded that, in view of the fact that the theses concerned a very narrow aspect of the post-war history of the FRG, that the applicant had published scarcely anything else in the meantime and that his unpublished work did not provide any convincing evidence of his ability to produce critical work as a historian, the applicant's continued employment in the civil service was unjustifiable (*nicht vertretbar*) on account of his lack of professional qualifications.

In a letter of 19 February 1992 the Chairman of the Board recommended to the Rector of Humboldt University that the applicant be dismissed on the ground of his lack of professional qualifications.

On 7 January 1993, following a further interview with the applicant and a process of written consultation, the Board, now chaired by Mr Schulze, confirmed its previous vote.

On 20 January 1993 the Central Personnel Committee of Humboldt University decided to refuse the applicant's application for incorporation and to terminate his contract of employment with effect from 30 June 1993 on the ground of his lack of professional qualifications.

On 7 April 1993, further to the Board's recommendation and after consulting the Staff Council, the Dean of Humboldt University dismissed the applicant with effect from 30 June 1993 under Article 20 of the Unification Treaty, taken together with Article 1 § 4 of Annex I, Chapter XIX, Subject A, Section III (see "Relevant domestic law and practice" below).

### 3. *Proceedings in the German courts*

In a judgment of 2 December 1993 the Berlin Labour Court (*Arbeitsgericht*) allowed an appeal by the applicant on the grounds, *inter alia*, that the Structure and Appointments Board had not been properly constituted, that the final version of the expert assessment had not been ready at the time of the vote and that Mr Schulze had acted both as an expert and as Chairman of the Board.

In a judgment of 13 June 1994 the Berlin Regional Labour Court (*Landesarbeitsgericht*) set aside the judgment at first instance and held that the applicant's dismissal had been justified under section 1(2) of the Unfair Dismissal Act (*Kündigungsschutzgesetz* – see "Relevant domestic law and practice" below), in that it was indisputable that he lacked the requisite professional qualifications.

The Regional Labour Court held that Humboldt University had concluded in a persuasive manner, on the basis of Mr Schulze's expert assessment and additional observations, that the applicant lacked the necessary professional qualifications. The fact that by 1994 the applicant had not published any other academic work to compensate for the shortcomings of his theses served as further justification for his dismissal. In that connection, the applicant's argument that he had been prevented from publishing academic work was not convincing, as he had not given any precise reasons for that assertion.

The Regional Labour Court also held that the proceedings before the Structure and Appointments Board had not infringed Berlin's Administrative Procedure Act (*Verwaltungsverfahrensgesetz*); moreover, the proceedings before the Board had been of a purely administrative and internal nature and had had no external consequences, as the Board was merely empowered to issue opinions. Accordingly, even if there had been procedural flaws, they would have been inconsequential.

On 27 October 1994 the Federal Labour Court (*Bundesarbeitsgericht*) refused to entertain an appeal on points of law by the applicant, on the ground that the ordinary courts' decisions had been consistent with its own case-law and with that of the Federal Constitutional Court (*Bundesverfassungsgericht*).

The applicant subsequently lodged a constitutional appeal with the Federal Constitutional Court. He argued, firstly, that the Law of 20 August 1992 on extension of the period of applicability for dismissal of civil servants under the Unification Treaty (*Gesetz zur Verlängerung der Kündigungsmöglichkeiten in der öffentlichen Verwaltung nach dem Einigungsvertrag* – see “Relevant domestic law and practice” below) was unconstitutional, because the civil servants concerned were entitled to expect those provisions to be subject to a time-limit. Secondly, he asserted that Article 1 § 4 of Annex I to the Unification Treaty should be construed as meaning that lecturers could be dismissed only if they had committed specific breaches of their duties (*konkrete Pflichtverletzungen*). The criteria established in the FRG could not be applied indiscriminately to work carried out on such a delicate topic in the GDR, and if Mr Schulze's criteria were applied, no historians from the GDR who had worked on the history of the FRG would satisfy them. The actual circumstances in which the applicant had carried out his academic work should have been taken into account. The Regional Labour Court, he argued, should not have been allowed to base its decision solely on the expert assessment produced by the opposing party, as the applicant had thereby been denied any opportunity to state his case. The same was true of the proceedings before the Structure and Appointments Board.

In a judgment of 8 July 1997, and after holding a hearing on 11 and 12 March 1997, the Federal Constitutional Court dismissed the applicant's appeal and held that the decisions appealed against had not infringed his freedom to engage in an occupation (*Berufsfreiheit*) or his academic freedom (*Wissenschaftsfreiheit*).

The Federal Constitutional Court held that there had been interference with the applicant's freedom to engage in an occupation, but that the interference had been in accordance with the Constitution. Firstly, it had been prescribed by law, as it had been based on the relevant provision of the Unification Treaty and on the Law on the extension of the period of applicability for dismissal of civil servants, enactments which were guided by the public interest and observed the principle of proportionality. In the instant case an extension of the period of applicability had been necessary on account of the numerous practical difficulties encountered in the administration of staff. Secondly, the ordinary courts' interpretation of the provision in question had not infringed the applicant's fundamental rights. The provision was also applicable to university lecturers, as scrutiny of their academic ability pursued a public-interest aim. The conditions in which academics had worked in the GDR had been so different

from those in the FRG that the qualifications awarded in the GDR were not sufficiently meaningful (*nicht hinreichend aussagekräftig*).

The Federal Constitutional Court added that in the instant case the Regional Labour Court had taken sufficient account of the applicant's freedom in an occupation and of his academic freedom. It considered it normal that a lecturer's qualifications should be assessed on the basis of his or her academic publications. Furthermore, it held that the Regional Labour Court was not open to criticism for having based its decision on the expert assessment and on the lack of any subsequent academic publications by the applicant, either during the time of the GDR or between 1990 and 1994 in the FRG, to compensate for the shortcomings of his theses.

Lastly, the Federal Constitutional Court held that the applicant had had a fair hearing, seeing that the Regional Labour Court had undertaken a thorough examination of his professional qualifications. The fact that that court had not addressed all his arguments did not mean that it had not taken them into account. In any event, the applicant had not specified which of his arguments the Regional Labour Court had failed to take into account.

## **B. Relevant domestic law and practice**

Section 1(2) of the Unfair Dismissal Act provides:

“A dismissal shall be socially unjustified unless it is based on grounds relating to the employee himself or to his conduct...”

*“Sozial ungerechtfertigt ist die Kündigung, wenn sie nicht durch Gründe, die in der Person oder in dem Verhalten des Arbeitnehmers liegen ... bedingt ist.”*

Article 13 of the Treaty of 31 August 1990 on German Unification provides that the administrative bodies and other institutions of the civil service in the former territory of the GDR come under the authority of the government of the *Land* in which they are situated.

Article 20 § 1 of the Unification Treaty provides that persons who were members of the GDR civil service at the time of reunification are subject to the transitional provisions in Annex I.

Article 1 §§ 1-3 of Annex I to the Unification Treaty, Chapter XIX, Subject A, Section III, provides for the incorporation of civil servants from the GDR into the FRG civil service by means of the substitution of the federal authorities and the *Länder* of the FRG for the GDR authorities in the existing employment relationship.

As members of the GDR civil service belonged to an institution that did not satisfy the criteria of a State based on the rule of law, special provisions on dismissal were included in Article 1 §§ 4-6 of Annex I to the Unification Treaty, Chapter XIX, Subject A, Section III.

Thus, Article 1 § 4 of Annex I to the Unification Treaty, Chapter XIX, Subject A, Section III, provides:

“Ordinary dismissal [with notice] from the civil service is permissible if

(a) the employee does not satisfy the requirements on account of lack of professional qualifications or of personal aptitude, or if

(b) the employee is surplus to the employer's requirements...”

*“Die ordentliche Kündigung eines Arbeitsverhältnisses in der öffentlichen Verwaltung ist zulässig, wenn*

*der Arbeitnehmer wegen mangelnder fachlicher Qualifikation oder persönlicher Eignung den Anforderungen nicht entspricht oder wenn*

*der Arbeitnehmer wegen mangelnden Bedarfs nicht mehr verwendbar ist...*”

Those regulations were initially intended to apply for a period of two years, but the Law of 20 August 1992 on extension of the period of applicability for dismissal of civil servants under the Unification Treaty (*Gesetz zur Verlängerung der Kündigungsmöglichkeiten in der öffentlichen Verwaltung nach dem Einigungsvertrag*) extended their validity until 31 December 1993.

## **COMPLAINTS**

1. The applicant argued that his dismissal from the civil service after the reunification of Germany on account of the political opinions expressed in the two theses he had written as a modern-history lecturer in the GDR had infringed his right to freedom of expression as guaranteed by Article 10 of the Convention.

2. He also complained that his dismissal had amounted to discriminatory treatment in breach of Article 14 of the Convention taken together with Article 10.

3. Lastly, he submitted that he had not had a fair hearing within the meaning of Article 6 § 1 of the Convention.

## **THE LAW**

1. The applicant argued that his dismissal from the civil service after the reunification of Germany on account of the political opinions expressed in the two theses he had written as a modern-history lecturer in the GDR had infringed his right to freedom of expression as guaranteed by Article 10 of the Convention, which provides:

“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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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.”

The Government submitted as their main argument that the measure in issue had not amounted to interference but had fallen within the ambit of the right of recruitment to the civil service, a right that was not secured in the Convention. To ensure the same conditions of recruitment for everybody in accordance with Article 33 § 2 of the Basic Law, the legislature had made special provision in Annex I to the Unification Treaty for scrutiny of the professional qualifications of civil servants from the GDR. In the alternative, the Government submitted that if there had been any interference, it had been prescribed by law, had pursued the legitimate aims of preventing disorder and protecting the rights of others and had thus been necessary in a democratic society. The German courts had addressed all the applicant’s arguments and had taken due account of the particular circumstances of the reunification of Germany. The Berlin Regional Labour Court had given persuasive reasons as to why it had considered that the applicant did not possess the requisite professional qualifications. Furthermore, the applicant had consistently refused to submit a list of his publications –

published work being a generally accepted basis for an assessment of a university lecturer's professional ability – despite having had the opportunity to do so up to 1994.

The applicant, for his part, maintained that there had been interference by the German authorities with his right to freedom of expression, as his dismissal had ended an existing employment relationship (*beendete ein bestehendes Arbeitsverhältnis*). He asserted that the Unification Treaty was unfair and discriminated against citizens of the former GDR – a large number of whom had been dismissed from the civil service – in relation to those of the FRG. He argued that he had been the victim of a purge (*politische Säuberung*) and that the criticism of his work had simply served as a pretext for removing an awkward historian from a sensitive field of study. The interference had not been justified as it had been neither prescribed by law nor necessary in a democratic society for the achievement of any of the aims set forth in Article 10 § 2 of the Convention. Instead, his dismissal had been based on an expert assessment which had not been impartial but had reflected a political opinion opposed to the views he had expressed in his theses.

Lastly, he had been unable to submit any other publications by 1994 because he had been barred in November 1992 from carrying on his profession and because, according to legal precedent, only the circumstances prior to his dismissal could be taken into account.

The Court reiterates that as a general rule the guarantees in the Convention extend to civil servants (see, among other authorities, *Vogt v. Germany*, judgment of 26 September 1995, Series A no. 323, pp. 22-23, § 43). It follows that the applicant's status as a civil servant did not deprive him of the protection of Article 10.

In the instant case the Court notes that the applicant's dismissal from the civil service following reunification occurred in the general context of scrutiny of the ability of civil servants from the GDR – including university lecturers – who had been incorporated into the FRG civil service.

In this connection, the Court considers that a distinction should be drawn between the instant case and the *Vogt* case cited above, in which the applicant was dismissed for failing to comply with the duty of every civil servant to uphold the free democratic system (*freiheitlich demokratische Grundordnung*) within the meaning of the Basic Law, although her professional qualifications were beyond reproach.

In the instant case, the conclusion that the applicant lacked the requisite professional qualifications was based, in particular, on the assessment by the relevant authorities of two theses he had written in 1978 and 1986 as a modern-history lecturer in the GDR.

Even supposing that the measure in issue amounted to interference with the applicant's exercise of his right to freedom of expression, the interference was “prescribed by law”, pursued one or more legitimate aims under paragraph 2 and was “necessary in a democratic society” to achieve them.

As regards the question of lawfulness, the Court reiterates that the level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed. It is, moreover, primarily for the national authorities to interpret and apply domestic law (see *Vogt*, cited above, p. 24, § 48, and *Döring v. Germany* (dec.), no. 37595/97, ECHR 1999-VIII).

In the present case, the measure in issue was based on section 1(2) of the Unfair Dismissal Act, taken together with Article 1 § 4 of Annex I to the Unification Treaty (see “Relevant domestic law and practice” above), which provides expressly that a civil servant may be dismissed on such grounds as lack of professional qualifications.

Those provisions are precise and accessible to everyone, and the applicant, as a civil servant incorporated into the FRG civil service, must have expected his professional qualifications to be subject to scrutiny, as was the case for the majority of university lecturers

from the GDR. The interpretation of those provisions by the Berlin Regional Labour Court and the Federal Labour Court in the instant case does not, moreover, appear to have been arbitrary. Lastly, the Federal Labour Court and the Federal Constitutional Court gave a clear definition of the concept of aptitude for the civil service and of the criteria applicable in the examination of each individual case.

As regards the question of purpose, the Court considers that the measure in issue pursued a public-interest aim: it appeared legitimate for the FRG to carry out an *ex post facto* review of the professional qualifications of persons who had been incorporated into the civil service after reunification and had previously worked in quite different conditions, the aim of such a review being to assure the public of the quality of its officials.

The conditions laid down in the Unification Treaty to that end were the logical counterbalance to the wholesale incorporation of civil servants from the GDR into the FRG civil service, and were given practical expression by the individual vetting carried out after reunification.

The measure in dispute therefore pursued the legitimate aims of preventing disorder and protecting the rights of others.

Nevertheless, it was plainly of some seriousness, since the applicant was dismissed from the civil service and lost his job.

Furthermore, the theses written by the applicant during the time of the GDR were necessarily steeped in the ideological climate prevailing in that State, and it would in all probability have been impossible for the applicant, in such a delicate field as that of modern history at the time of the Cold War, to publish work that conflicted with the official political line of the GDR at the time. That said, it is also legitimate that in reviewing the professional qualifications of a university lecturer employed to teach students in the FRG, the relevant German authorities should have based their decision on his previous publications as a historian and that, in the light of the subjects dealt with, their assessment should also have contained a political element.

The Court further notes that the applicant was able to appeal against his dismissal by the administrative authorities to the German courts, which re-examined his professional qualifications in the light of the relevant legislation in force. Their conclusion, moreover, was based not only on the two theses written during the time of the GDR but also on the absence of any subsequent academic publications, even after reunification, that might have compensated for the shortcomings of the theses. Those were the main factors which led the German courts to conclude that the applicant lacked the requisite professional qualifications.

In addition, the Federal Constitutional Court, after holding a hearing, undertook a thorough examination of whether the interference in issue had infringed the applicant's fundamental rights as regards freedom to engage in an occupation and academic freedom.

The Court accordingly considers that the penalty imposed on the applicant, although severe, must be viewed in relation to the general interest of German society, regard being had to the exceptional historical context in which he was incorporated into the FRG civil service and to the conditions set forth in the Unification Treaty, of which he must have been aware.

In the light of all those factors, especially the exceptional circumstances relating to the reunification of Germany, the Court considers that, in so far as there was any interference, it was not disproportionate to the legitimate aim pursued, regard being had to the State's margin of appreciation in such matters.

It follows that this complaint is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

2. The applicant also complained that the decision in issue had infringed his right to equality of treatment and had therefore breached Article 14 of the Convention taken together with Article 10. Article 14 provides:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Having regard to its line of reasoning under Article 10 of the Convention, the Court considers that no separate issue arises under Article 14.

It follows that this complaint is likewise manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

3. Lastly, the applicant argued that he had not had a fair hearing within the meaning of Article 6 § 1 of the Convention, the relevant part of which provides:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law...”

The applicant submitted that neither the Berlin Regional Labour Court nor the Federal Constitutional Court had taken into account all the objections he had raised as to the relevance of the criticism levelled against his theses by the expert appointed by Humboldt University, Berlin, such criticism having in fact been purely ideological in nature.

The Court reiterates at the outset that disputes concerning teachers, and therefore *a fortiori* university lecturers, belonging to the public service fall within the scope of Article 6 § 1 (see *Pellegrin v. France* [GC], no. 28541/95, ECHR 1999-VIII).

It further point outs that, according to Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. Moreover, while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts (see *Schenk v. Switzerland*, judgment of 12 July 1988, Series A no. 140, p. 29, §§ 45-46, and *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I). Lastly, although Article 6 § 1 obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument (see *García Ruiz*, cited above, § 26).

In the instant case, as the Court held above, it should be noted that the applicant had the opportunity to challenge the administrative authorities' decision in adversarial proceedings before the German courts, and to submit, at the various stages of the proceedings, any arguments he considered relevant to his case. Moreover, the German courts re-examined the applicant's professional qualifications in the light of the relevant legislation in force, basing their conclusions not only on the two theses written during the time of the GDR but also on the absence of any subsequent academic publications, even after reunification, which might have compensated for the shortcomings of those theses.

Furthermore, the Federal Constitutional Court carried out a detailed examination of the question whether the interference in issue had infringed the applicant's fundamental rights and his right to a fair hearing, applying principles similar to those established by the Court's case-law.

In conclusion, the Court considers that, taken as a whole, the proceedings in issue were fair for the purposes of Article 6 § 1 of the Convention.

It follows that this complaint is likewise manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

For these reasons, the Court, by a majority,

*Declares* the application inadmissible.