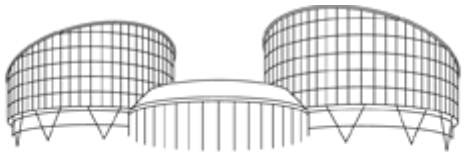

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF OGNEVENKO v. RUSSIA

(Application no. 44873/09)

JUDGMENT

STRASBOURG

20 November 2018

FINAL

06/05/2019

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Ognevenko v. Russia,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:
Vincent A. De Gaetano, *President,*
Dmitry Dedov,

Pere Pastor Vilanova,
Alena Poláčková,
Georgios A. Serghides,
Jolien Schukking,
María Elósegui, *judges,*
and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 16 October 2018,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 44873/09) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Aleksey Anatolyevich Ognevenko ("the applicant"), on 28 July 2009.

2. The applicant was represented by the Centre for Social and Labour Rights, a law firm based in Moscow. The Russian Government ("the Government") were represented initially by Mr G. Matyushkin, the Representative of the Russian Federation to the European Court of Human Rights, and then by his successor in that office, Mr M. Galperin.

3. The applicant complained under Article 11 of the Convention about his dismissal from Russian Railways for participation in a strike organised by his trade union.

4. On 17 January 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1972 and lives in Zheleznodorozhnyy, Moscow Region.

6. The applicant was a locomotive driver with Russian Railways in the Moscow Region. He was a member of one of the railway workers' trade unions, Rosprofzhel ("the trade union").

7. On 7 April 2008 the trade union entered into negotiations with Russian Railways, seeking a general pay raise and the introduction of long-service bonuses for the relevant staff. As the negotiations failed, the trade union decided to organise a strike. On 25 April 2008 the trade union committee decided that the staff of Russian Railways in two suburban Moscow sectors should participate in the strike as from 4 a.m. on 28 April 2008. The trade union committee's decision referred to minimum services which would be provided during the strike, although the parties have not made any submissions in this regard.

8. Russian Railways did not apply to the courts for the strike to be declared unlawful. On 28 April 2008 the applicant took part in the strike. He came to work but refused to take up his duties. The strike caused delays in circulation of the trains in the sector where the applicant worked.

9. On 9 July 2008 the applicant was dismissed for two breaches of disciplinary rules. The first breach ascribed to him had had no relation to his trade union activities. (A year previously, on 8 June 2007, the applicant had been officially reprimanded for having stopped the train 50 metres after the platform). The second breach was the applicant's refusal to take up his duties during the strike on 28 April 2008.

10. The applicant complained to a court that he should not have been dismissed for having participated in the strike organised by his trade union.

11. On 19 August 2008 the case was heard by the Meschanskiy District Court of Moscow ("the District Court"). The court confirmed the lawfulness of the applicant's dismissal for a repeated failure to properly perform his professional duties. Regarding the applicant's participation in the strike, the court relied on the Railway Acts of 1995 and 2003 (Articles 17 and 26 (2) respectively – see paragraphs 15 and 17 below). The Acts prohibited strikes of railway workers responsible, *inter alia*, for the circulation of trains, shunting, and services to passengers. The court stressed that those limitations were aimed at securing safety on the railway and that railway workers were subjected to stricter disciplinary rules than workers in other sectors of industry. The applicant was a locomotive driver; therefore, his work was directly linked to the circulation of trains, shunting, and the provision of services to passengers. The District Court concluded that the applicant had been precluded from participating in the strike. Relying on a report dated 29 April 2008 issued by the Moscow Interregional Transport Prosecutor's Office, the District Court furthermore noted that the strike had caused a number of cancelled and delayed trains which had resulted in "massive violations of the rights and lawful interests of citizens, leading to their belated arrival at their workplaces and educational institutions, at medical facilities providing health care, [and] for long-distance trains, bus runs and flights". The strike had also "contributed to the mass gathering of people on railway platforms, which [had] directly threatened their safety". Given the above and the applicant's earlier transgression, his dismissal had been justified. The District Court did not discuss the question of whether advance notice of the strike had been given or other issues related to the lawfulness of the strike of 28 April 2008.

12. On 29 January 2009, following an appeal by the applicant, the Moscow City Court confirmed the judgment of 19 August 2008.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution of Russia (of 1993)

13. The relevant provisions are as follows:

Article 17

"... 3. The exercise of human and civil rights and freedoms shall not violate the rights and freedoms of other people.

Article 30

1. Everyone shall have the right to association, including the right to create trade unions for the protection of his or her interests. ..."

Article 37

"... 4. The right to individual and collective labour disputes [involving] the use of methods to resolve them which are established by federal law, including the right to strike, shall be recognised."

Article 55

"... 3. Human and civil rights and freedoms may be limited by federal law only to the extent necessary for the protection of the basis of the constitutional regime [or] the morality, health, rights and lawful interests of other people, [or] to secure the defence of the country and State security."

B. Labour Code of Russia (of 2001)

14. The relevant provisions read as follows:

Article 21. Main rights and duties of the employee

"An employee shall have the right to:

... resolve individual and collective labour disputes, including the right to strike, in accordance with the procedure set by the present Code [and] other federal laws; ..."

Article 81. Discontinuation of a labour contract at the employer's initiative

"A labour contract may be discontinued by the employer in cases of:

...

5) the repeated failure by an employee to fulfil labour duties without justifiable reasons if he has already been reprimanded; ..."

Article 401. Conciliation procedures

"The order to resolve a collective labour dispute consists of the following stages: examination of the collective labour dispute by a conciliation commission, examination of a collective labour dispute with the participation of a mediator and (or) in a labour arbitration. ...

No party to a collective labour dispute has the right to avoid participating in conciliation procedures. ..."

Article 409. Right to strike

"In accordance with Article 37 of the Constitution of the Russian Federation, the right of workers to strike as a means of resolving collective labour disputes is recognised. ..."

Article 410

"... The employer must be notified in writing about the beginning of a forthcoming strike not later than ten calendar days beforehand. ..."

Article 413. Unlawful strikes

"In accordance with Article 55 of the Constitution of the Russian Federation, strikes shall be considered unlawful and prohibited:

a) during periods when martial law, a state of emergency, or special measures are declared in accordance with legislation on emergency situations; within the organisations and bodies of the Armed Forces of the Russian Federation [and] other military, militarised and other organisations ... directly involved in national defence, national security, emergency life-saving, search-and-rescue [and] fire-fighting operations and the prevention or management of natural disasters and emergencies; in law enforcement agencies; and in organisations ... directly involved in servicing especially hazardous types of industrial works or equipment and emergency and urgent medical assistance centres;

b) in organisations ... directly related to the provision of essential services to the population (energy supply, heating and heat supply, water supply, gas supply, air, rail, and water

transportation, communications, and hospitals) in cases where strikes would threaten national defence, State security, and the lives and health of people. ...

The right to strike may be restricted by federal law.

During a collective labour dispute, a strike shall be unlawful if it was declared in disregard of the time-limits, procedures, and requirements stipulated in the present Code.

The decision to declare a strike unlawful shall be made by the supreme court of a republic, territory or region, a court of a city of federal importance, or a court of an autonomous region or district, upon a petition by an employer or prosecutor.

The court decision shall be made known to the workers through the body leading the strike, which shall be required to immediately inform the strike participants of the court's decision.

Once it becomes effective, a court decision to declare a strike unlawful shall be subject to immediate execution. Workers shall be required to halt the strike and resume work no later than the day after a copy of the above-mentioned court decision is served on the body leading the strike.

If there exists a direct threat to people's lives and health, a court shall be entitled to postpone an imminent strike for a period of up to thirty days, or to suspend one that has begun for that same period. ..."

Article 414. Guarantees and the legal position of workers when a strike is held

"A worker's participation in a strike may not be considered a violation of labour discipline and grounds for terminating his labour contract, with the exception of instances of a failure to fulfil the obligation to halt a strike in accordance with Part 6 of Article 413 of this Code.

It shall be prohibited to apply disciplinary measures against workers who participate in a strike, with the exception of the cases stipulated in Part 6 of Article 413 of this Code. ..."

C. Federal Acts on Railway Transport (of 1995 and 2003)

15. Federal Law of 25 August 1995 no. 153-FZ "On the Federal Railway Transport" ("the 1995 Railway Act") was replaced by Federal Law of 10 January 2003 no. 17-FZ "On Railway Transport in Russia" ("the 2003 Railway Act"), with the exception of Article 17, which provides as follows:

"Work stoppage as a means of resolving collective labour disputes on the railway is not permitted.

Such work stoppages are a serious breach of labour discipline and are subject to disciplinary sanctions."

16. Article 17 of the 1995 Railway Act is to remain in force until the legislature adopt a federal law listing categories of railway workers prohibited from participating in strikes (Part 2 of Article 34 of the 2003 Railway Act).

17. The 2003 Railway Act provides as follows:

Article 1.
Fundamental principles regarding the functioning of railway transport in Russia

"1. Railway transport in Russia is an integral part of the unified transport system of Russia. Railway transport in Russia, in cooperation with organisations [providing] other means of transport, is called upon to ensure, in a timely and thorough manner, the needs of individuals, legal entities and the State in respect of railway transport services, to promote the development of the economy and to support the unity of Russia's economic territory. ...

3. The functioning of railway transport is based on the following principles:

the continuity of the work of the railway transport [services];

the accessibility, safety and quality of the provided services;

the development of competition and the achievement of a mature market in railway transport services;

the coherence of the functioning of the unified transport system of Russia. ..."

Article 26.
Labour discipline on public railway transport

"... 2. A strike as a means of resolving collective labour disputes by those workers ... whose activities are connected to the circulation of trains, shunting, [the provision of] services to passengers, and of freight services on the public railway service and [those] whose list of occupations is defined by federal law, is unlawful and prohibited."

D. Ruling of the Constitutional Court of Russia (of 2007)

18. On 8 February 2007 the Constitutional Court issued Ruling no. 275-О-П, which provided, where relevant, as follows:

"2. Article 37 § 4 of the Constitution of the Russian Federation recognises the right to [conduct] individual and collective labour disputes [involving] the use of methods to resolve them which are established by federal law, including the right to strike. A strike is thus considered as a means of resolving a collective labour dispute; the federal legislature has the right to determine when and under what conditions [a strike] is possible and when it is unacceptable, performing the necessary balancing exercise between the protection of the professional interests of employees and respect for the public interests to which the strike could cause damage.

The possibility to restrict the right to strike of certain categories of workers, taking into account the nature of their activities and the consequences of work stoppage [on their part], directly arises from Article 17 § 3 of the Constitution of the Russian Federation, which stipulates that the exercise of human and civil rights and freedoms should not violate the rights and freedoms of others, and Article 55 § 3 of the Constitution of the Russian Federation, under which human and civil rights and freedoms can be limited by federal law only to the extent that is necessary in order to protect the basis of the constitutional regime [or] the morality, health, rights and lawful interests of others, [or] to ensure the country's defence and State security.

Restrictions on the right to strike do not contravene the generally recognised principles and norms of international law. Thus, it follows from the provisions of the International Covenant on Economic, Social and Cultural Rights of 16 December 1966 (ratified by the USSR on 18 September 1973) that a prohibition on the right to strike is permissible in respect of members of the armed forces, police and the State administration (Article 8 § 2); in respect of other people restrictions are possible if they are necessary in a democratic society in the interests of State security or public order or for the protection of the rights and freedoms of others (Article 8 § 1 (c)). ...

3. Under Article 413 of the Labour Code of the Russian Federation [("the LC")], strikes are not allowed in organisations engaged in providing essential services to the population (electricity, heating and heat supply, water supply, gas supply, aviation, railway and water transport, communications, and hospitals) if [such] strikes threaten the country's defence and State security [or] the life and health of people (§ 1 (b)); the right to strike may be limited by federal law (§ 2).

While using the right provided by Article 413 § 2 [of the LC] in order to ensure the normal functioning of this sector of the economy, the federal legislature must at the same time comply with the criteria for restricting the right to strike, which are established in paragraph 1 of the same article and are based on the Constitution of the Russian Federation (Article 55 § 3) ...

Moreover, in the field of the regulation of labour relationships, the [LC] has priority; other federal laws containing labour-law norms should not contradict its provisions; specific rules reducing the level of guarantees available to employees and restricting their rights may be established only by this Code or in cases and in accordance with the procedure established by it (Articles 5 and 252).

Therefore, the federal legislature, introducing by a special law the restriction of railway workers' right to strike, is bound by the requirements of Article 413 §1 (b) of the [LC] and has the

right to ban a strike only when it threatens the country's defence and State security or the life and health of people.

4. Railway transport is an integral part of the unified transport system of the Russian Federation; it is one of the vital sectors of the economy of the country and its objective is, in cooperation with organisations of other means of transport, to meet, in a timely and thorough manner, the transportation needs of individuals, legal entities and the State, to create conditions for economic development and to ensure the unity of the Russian Federation's economic territory. The functioning of this mode of transport is based on the principles of the operational continuity, accessibility, safety and quality of the services provided, and the coherence of the functioning of the unified transport system of the Russian Federation (Article 1 of the [2003 Railway Act]). In addition, vehicles used on the railway are a source of higher potential danger.

Accordingly, any circumstances that could disrupt the normal functioning of railway transport affect both the interests of individuals and the State; this gives grounds for imposing restrictions on the exercise of the right to strike of certain categories of railway workers, a temporary work stoppage by whom may threaten the country's defence and State security, and the life and health of people.

5. Thus, Article 26 § 2 of the 2003 Railway Act, read together with Articles 5, 252 and 413 of the [LC], does not imply an unjustified restriction on the right to strike of ... locomotive personnel ... whose activities are related to the circulation of trains and shunting work, and therefore cannot be considered to contradict Articles 17 §3, 37 §4 and 55 §3 of the Constitution of the Russian Federation. ..."

III. RELEVANT INTERNATIONAL MATERIALS

A. International Covenant on Economic, Social and Cultural Rights (of 1966) ("ICESCR")

19. Article 8 of the ICESCR reads as relevant:

"1. The States Parties to the present Convention undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organisation concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

...

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State ..."

B. International Labour Organisation ("ILO") material

1. ILO principles concerning the right to strike

20. In its Digest of decisions and principles (fifth (revised) edition, 2006) the ILO Committee of Freedom of Association ("the CFA") stated as follows in the Section entitled "Right to strike" (the quotations below are provided without the references to specific cases):

"541. The Committee has stated on many occasions that strikes at the national level are legitimate in so far as they have economic and social objectives and not purely political ones; the prohibition of strikes could only be acceptable in the case of public servants exercising authority in the name

of the State or of workers in essential services in the strict sense of the term, i.e. services whose interruption could endanger the life, personal safety or health of the whole or part of the population.

...

587. The following do not constitute essential services in the strict sense of the term:

...

– transport generally;

...

– railway services;

...

592. By linking restrictions on strike action to interference with trade and commerce, a broad range of legitimate strike action could be impeded. While the economic impact of industrial action and its effect on trade and commerce may be regrettable, such consequences in and of themselves do not render a service "essential", and thus the right to strike should be maintained.

...

595. Where the right to strike is restricted or prohibited in certain essential undertakings or services, adequate protection should be given to the workers to compensate for the limitation thereby placed on their freedom of action with regard to disputes affecting such undertakings and services.

596. As regards the nature of appropriate guarantees in cases where restrictions are placed on the right to strike in essential services and public services ... should be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which awards, once made, are fully and promptly implemented.

...

621. The transportation of passengers and commercial goods is not an essential service in the strict sense of the term; however, this is a public service of primary importance where the requirement of a minimum service in the event of a strike can be justified.

...

628. Responsibility for declaring a strike illegal should not lie with the government, but with an independent body which has the confidence of the parties involved.

...

666. The use of extremely serious measures, such as dismissal of workers for having participated in a strike and refusal to re-employ them, implies a serious risk of abuse and constitutes a violation of freedom of association."

2. Relevant case-law in respect of Russia

21. In its Report no. 333, March 2004, on case no. 2251 the CFA found in respect of Russia as follows:

"993. ... The Committee recalls that the right to strike may be restricted or prohibited: (1) in the public service only for public servants exercising authority in the name of the state; (2) in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population); and (3) in the event of an acute national emergency [see Digest, op. cit., paras. 526 and 527]. ... As concerns the abovementioned categories of workers, who, according to the relevant federal laws, cannot recourse to a strike action, the Committee notes that the list includes employees of railway, which does not constitute essential services in the strict sense of the term. The Committee therefore requests the Government to amend its legislation so as to ensure that railway employees ... enjoy the right to strike."

22. The ILO Committee of Experts on the Application of Conventions and Recommendations ("the CEACR") similarly reiterated in respect of Russia that the

right to strike may be restricted or prohibited only in respect of public servants exercising authority in the name of the State and in essential services in the strict sense of the term – that is to say services whose interruption would endanger the life, personal safety or health of the whole or part of the population.

23. The CEACR also reminded Russia that railway transport did not constitute an essential service in the strict sense of the term whereby strikes could be prohibited and that instead, a negotiated minimum service could be established. It continues to request Russia to ensure that railway workers can exercise the right to strike.

C. European Social Charter (revised version of 1995)

1. General principles concerning the right to strike

24. The relevant provisions read as follows:

Article 6 – The right to bargain collectively

"With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties ...

... recognise:

4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike. ..."

Article G – Restrictions

"The rights and principles set forth in Part I when effectively realised, and their effective exercise, as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals. ..."

Appendix to the Social Charter
Article 6, paragraph 4

"It is understood that each Contracting Party may, in so far as it is concerned, regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms of Article G."

2. Relevant case law of the European Committee of Social Rights ("the ECSR")

25. In its Digest of the case-law of 1 September 2008, the ECSR stated in the Section "Interpretation of the different provisions" as follows (the quotation below is provided without the footnotes, which contain references to specific cases):

3. Specific restrictions to the right to strike

"The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.

i. Restrictions related to essential services/sectors

Prohibiting strikes in sectors which are essential to the community is deemed to serve a legitimate purpose since strikes in these sectors could pose a threat to public interest, national security and/or public health. However, simply banning strikes even in essential sectors – particularly when they are extensively defined, i.e. "energy" or "health" – is not deemed proportionate to the specific

requirements of each sector. At most, the introduction of a minimum service requirement in these sectors might be considered in conformity with Article 6 § 4. ..."

26. On 5 December 2014 the European Committee of Social Rights reiterated the above principles in its conclusions on the situation in Russia as regards collective action (2014/def/RUS).

D. PACE Resolutions

27. PACE Resolution 2033 (2015) "Protection of the right to bargain collectively, including the right to strike", adopted on 28 January 2015, reads, where relevant, as follows:

"1. ... The rights to organise, to bargain collectively and to strike – all essential components of this dialogue – are not only democratic principles underlying modern economic processes, but fundamental rights enshrined in the European Convention on Human Rights (ETS No. 5) and the European Social Charter (revised) (ETS No. 163).

...

7. The Assembly therefore calls on the member States to take the following measures to uphold the highest standards of democracy and good governance in the socio-economic sphere:

7.1. protect and strengthen the rights to organise, to bargain collectively and to strike ..."

28. PACE Resolution 2146 (2017) on "Reinforcing social dialogue as an instrument for stability and decreasing social and economic inequalities", adopted on 25 January 2017, provides, where relevant, as follows:

"5. ... the Assembly calls on member States to: ...

...

5.4. keep legal limitations on the right to collective bargaining and the right to strike to the strict minimum, as provided for by well-established ILO and European standards; ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

29. The applicant complained that his dismissal for his participation in a strike had been in breach of Article 11 of the Convention, which reads as follows:

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

A. Admissibility

30. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It furthermore notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *Submissions of the parties*

(a) The Government

31. The Government submitted that the right to freedom of association was not absolute and might be subject to restrictions, as provided by Article 11 § 2 of the Convention. They reiterated that, in accordance with the norms and principles of public international law, the right to strike could also be restricted. For instance, Article 8 § 2 of the ICESCR (see paragraph 19 above) allowed the banning of strikes by members of the police, army and State administration, and permitted restrictions on the right to strike of other people when it was necessary in a democratic society.

32. The Government furthermore submitted that the right to strike was recognised under the Russian Constitution (see paragraph 13 above) and under other legislation, such as the Labour Code. This right might be restricted by federal law in order to balance the conflicts with the public interest. Russian federal laws restricted the right to strike, depending on the nature of the activities of certain categories of occupations. Thus, the right to strike of workers of organisations directly engaged in providing essential services to the population (electricity, heating and heat supply, water supply, gas supply, aviation, rail and water transport, communications, and hospitals) might be restricted, but only if such strikes would threaten the national defence and security, life and health of people.

33. In particular, Article 26 § 2 of the 2003 Railway Act prohibited participation in strikes by public railway transport workers whose activities were related to the circulation of trains and shunting work, as well as the provision of services to passengers and of freight services. The Constitutional Court of Russia had declared that the above provision did not contravene the Russian Constitution (see paragraph 18 above). Specifically, the Constitutional Court had held that railway transport formed an integral part of the complex, interconnected transport system of the country and that railway transport bolstered the economy and ensured the needs of people, legal entities and the State. Accordingly, any circumstances capable of disrupting the normal functioning of railway transport could affect the interests of the people and the State and thus, justified the restrictions on the right to strike of certain categories of railway workers on whose part a temporary work stoppage could threaten the country's defence and State security, and the life and health of people.

34. On the basis of the above the Government concluded that the Russian legislation prohibiting strikes by railway workers had a legitimate aim. In particular, the ban on the right to strike of public railway transport service workers whose activities were connected with the circulation of trains, shunting, and the provision of services to passengers and of freight services sought to protect the health, rights and freedoms of other people.

35. The Government furthermore submitted that the legal provisions regulating the right to strike complied with the Court's "quality of law" criterion in that they were clear, precise and foreseeable.

36. Under Article 1 § 3 of the 2003 Railway Act the functioning of railway transport was based on the principles of accessibility, safety and quality of services (see paragraph 17 above). Transport workers had to comply with higher requirements in respect of their professional duties because breaches of discipline in

respect of railway transport endangered the life and health of people, the safe circulation of trains and of shunting work, and the preservation of freight, luggage and other possessions, and also led to breaches of contract. In view of the above, Article 26 § 2 of the 2003 Railway Act declared strikes by railway workers whose activities were related to the circulation of trains, shunting, and the provision of services to passengers and of freight services on the public railway transport service, and whose occupations were defined by federal law, to be unlawful and prohibited.

37. The Government drew the Court's attention to the fact that Article 26 § 2 of the 2003 Railway Act prohibited strikes not by all railway workers, but only by certain categories – in particular those whose activities related to the circulation of trains, shunting, and the provision of services to passengers and of freight services on the public railway transport service. The Government conceded that there was still no federal law listing the exact categories of those railway workers whose right to strike was prohibited. However, they claimed that it was obvious that the applicant's occupation (that of locomotive driver) was related to the circulation of trains, shunting and the provision of services to passengers and that his participation in the strike had thus been unlawful and prohibited.

38. The Government claimed that the reason why the applicant had been dismissed had been not his participation in the strike, but his failure to perform his work duties. Under Article 81 § 5 of the Labour Code, if a worker deliberately failed or improperly fulfilled his or her professional duties and such failure happened more than once, his contract could be terminated. The applicant had worked as a locomotive driver and his job had been directly related to the circulation of trains, shunting and the provision of services to passengers. Despite the existing ban on his participating in a strike, the applicant had participated in it and had thus not performed his professional duties. As he had committed an earlier transgression, his dismissal after his second failure to perform his professional duties had been lawful.

39. The Government reminded the Court that the examination of particular circumstances and the assessment of evidence was primarily a task for the national courts and that the Court could only review those courts' decisions from the perspective of the Convention. They considered that the national courts had properly examined and reasonably dismissed the applicant's objections relating to both of the incidents that had served as the basis for his dismissal.

40. The Government also noted that the national courts had verified the proportionality of the penalty imposed (dismissal) to the applicant's transgressions. According to the report of 29 April 2008 issued by the Moscow Interregional Transport Prosecutor's Office, the applicant's "refusal to perform his work duties [had] resulted in massive violations of the rights and lawful interests of citizens, leading to their belated arrival at their workplaces and educational institutions, at medical facilities providing health care, [and] for long-distance trains, bus runs and flights". Moreover, he had contributed to the mass gathering of people on railway platforms, which [had] directly threatened their safety".

41. Moreover, the Government argued that the applicant had participated in an "action" which was not a strike *de jure*. The applicant's trade union did not represent all Russian Railways workers in Moscow and was not entitled to submit claims to their employer on behalf of all the workers. Thus, the employer's refusal to comply with the trade union's demands could not be considered as constituting a collective labour dispute. Consequently, the action organised by the trade union on 28 April 2008 in the

Moscow section of Russian Railways, could not be deemed to have constituted a strike under the Labour Code.

42. Given all the above considerations, the Government considered that the State had fulfilled its positive obligations and that the State's interference with the applicant's rights under Article 11 of the Convention had been based on law, had pursued a legitimate aim and had been proportionate to the offence committed and necessary in a democratic society for protection of the health, rights and freedoms of other people.

(b) The applicant

(i) Existence of interference

43. The applicant claimed that his dismissal from work for participation in the strike had constituted an interference with his rights under Article 11 of the Convention (see *Karaçay v. Turkey*, no. 6615/03, § 28, 27 March 2007, and *Enerji Yapı-Yol Sen v. Turkey*, no. 68959/01, § 24, 21 April 2009).

44. The applicant asserted that the State had the positive obligation to secure to him the effective enjoyment of the rights guaranteed under Article 11 of the Convention (see *Wilson, National Union of Journalists and Others v. the United Kingdom*, nos. 30668/96 and 2 others, § 41, ECHR 2002-V, and *Gustafsson v. Sweden*, 25 April 1996, § 45, *Reports of Judgments and Decisions* 1996-II). He considered, in particular, that it was the authorities' primary obligation to enact legislation governing the effective execution of railway employees' right to strike. However, Parliament had failed to enact a federal law listing those categories of railway workers who were prohibited from participating in strikes under Article 26 § 2 of the 2003 Railway Act.

(ii) Prohibition of the right to strike for certain categories of railway workers is incompatible with Article 11 of the Convention

45. The applicant reiterated that the Court had held – for instance, in *National Union of Belgian Police v. Belgium* (27 October 1975, § 39, Series A no. 19) – that the Convention safeguarded freedom to protect the occupational interests of trade union members by engaging in trade union action, the conduct and development of which the Contracting States had to both permit and make possible. Article 11 of the Convention nevertheless left each State a free choice as to the means to be used towards this end. The granting of the right to strike represented without a doubt one of the most important of these means, but there were others. Such a right, which was not expressly enshrined in Article 11 of the Convention, might be subject under national law to regulation of a kind that limited its exercise in certain instances (see, for instance, *Schmidt and Dahlström v. Sweden*, 6 February 1976, § 36, Series A no. 21).

46. The applicant disagreed that the prohibition on participating in strikes for certain categories of railway workers was compatible with Article 11 of the Convention. He alleged that the right to strike could be restricted, but not completely prohibited. Furthermore, such restrictions had to be "prescribed by law", pursue a "legitimate aim" and be "necessary in a democratic society", as provided by Article 11 § 2 of the Convention and Article 8 § 1 (a) and (d) and § 2 of the ICESCR. The applicant argued that (in violation of Article 26 § 2 of the 2003 Railway Act) no federal law had specified for which categories of railway workers strikes were prohibited and unlawful. In any event, the applicant asserted that the right to strike of the railway workers and locomotive drivers could not be restricted to such an extent as to impose a blanket prohibition (see *Hirst v. the United Kingdom (no. 2)* [GC],

no. 74025/01, § 82, ECHR 2005-IX). The applicant submitted that the Russian courts should have examined the particular circumstances of his case, such as specific nature of his duties (see, for instance, *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 107, 12 November 2008), whether his participation in the strike had indeed affected the railway traffic and whether it had been possible to replace him by other workers not participating in the strike.

(iii) The interference was not prescribed by law and had no legitimate aim

47. With reference to the Court's principles set out in *Enerji Yapi-Yol Sen* (cited above, § 26) the applicant claimed that the interference with his rights under Article 11 had not been prescribed by law. In particular, Article 55 § 3 of the Russian Constitution (see paragraph 13 above) stipulated that constitutional rights could be restricted only by federal law to the extent necessary to protect the constitutional regime or the morality, health or the rights or interests of others. While the right to strike was a constitutional right set out in Article 37 of the Russian Constitution, no federal law provided an exact list of those categories of railway workers whose right to strike was prohibited. As no such federal law existed, any sanctions or penalties for participation in strikes applied to locomotive drivers (including the applicant) had no legal basis and were arbitrary.

48. The applicant furthermore asserted that the strike of 28 April 2008 had been organised in compliance with the requirements of Article 413 of the LC. In particular, he claimed that the strike had been lawful under Article 413 § 1 because it had not threatened the country's defence and State security or the life and health of people. The applicant could not agree with the Government that any circumstances affecting regular train circulation and infringing someone's interests would necessarily threaten the country's defence, State security or the life and health of people and would thus justify a ban on certain categories of railway workers' right to strike. The applicant alleged that the Russian authorities had failed to demonstrate and provide any solid evidence of the alleged threat to the country's defence, State security, or the life and health of people posed by strikes by locomotive drivers in general and by the strike of 28 April 2008 in particular. As regards the latter, the applicant noted that the strike of 28 April 2008 had started at 4 a.m. By the time the applicant had arrived at his place of work at 10.30 a.m., the locomotive drivers participating in the strike had been already replaced by replacement drivers. Thus, the applicant believed that his participation in the strike had not affected railway traffic, as traffic controllers had had an opportunity to replace him with other workers.

49. The applicant also stressed that the employer could have contested the lawfulness of the strike before a court, as required by Article 413 of the LC, but failed to do so.

50. He thus concluded that the strike itself and his participation in it had been lawful and that his dismissal had consequently not been in accordance with the law.

51. On the basis of the lack of any evidence of the alleged threat to the country's defence, State security or the life and health of people posed by strikes, the applicant also considered that the restriction on his right to strike had had no legitimate aim.

(iv) The interference was not necessary in a democratic society

52. The applicant reiterated that the test of necessity in a democratic society required the Court to determine whether the interference complained

of had corresponded to a “pressing social need”, whether it had been proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it had been relevant and sufficient (see, for instance, *Federation of Offshore Workers’ Trade Unions and Others v. Norway* (dec.), no. 38190/97, ECHR 2002-VI). The applicant considered that his dismissal from work had not been proportionate to his participation in a lawful strike. He also relied on the ILO CFA’s case-law to the effect that no one should be penalised for participating in a strike action.

53. The applicant thus considered that his dismissal for participation in a lawful strike had violated Article 11 of the Convention.

2. The Court’s assessment

(a) General principles

54. The Court reiterates that Article 11 § 1 presents trade union freedom as one form or a special aspect of freedom of association (see *National Union of Belgian Police*, cited above, § 38; *Swedish Engine Drivers’ Union v. Sweden*, judgment of 6 February 1976, § 39, Series A no. 20; *Tüm Haber Sen and Çınar v. Turkey*, no. 28602/95, § 28, ECHR 2006-II; and *Demir and Baykara*, cited above, § 109).

55. The words “for the protection of [one’s] interests” which appear in Article 11 § 1 are not redundant and the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible (see *National Union of Belgian Police*, cited above, § 39; *Swedish Engine Drivers’ Union*, cited above, § 40; and *Wilson, National Union of Journalists and Others*, cited above, § 42). A trade union must thus be free to strive for the protection of its members’ interests, and its individual members have a right, in order to protect their interests, that that trade union should be heard (see *National Union of Belgian Police*, cited above, §§ 39-40, and *Swedish Engine Drivers’ Union*, cited above, §§ 40-41). Another essential right of a trade union is the right to collectively bargain with an employer (see *Demir and Baykara*, cited above, § 154).

56. Article 11 of the Convention does not secure any particular treatment of trade unions or their members and leaves each State a free choice of the means to be used to secure a trade union’s freedom to protect the occupational interests of its members (see *National Union of Belgian Police*, cited above, §§ 38-39; *Swedish Engine Drivers’ Union*, cited above, §§ 39-40; *Wilson, National Union of Journalists and Others*, cited above, § 42; and *Tüm Haber Sen and Çınar*, cited above, § 28). The granting of a right to strike constitutes without any doubt one of the most important of such means (see *Schmidt and Dahlström*, cited above, § 36; *UNISON v. the United Kingdom* (dec.), no. 53574/99, ECHR 2002-I; and *Wilson, National Union of Journalists and Others*, cited above, § 45).

57. The Court has on several occasions held that strike action is protected by Article 11 (see *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, no. 31045/10, § 84, ECHR 2014, with further references).

58. The right to strike is not absolute and may be subject under national law to regulation of a kind that limits or conditions its exercise in certain instances (see *Schmidt and Dahlström*, cited above, § 36, and *Enerji Yapi-Yol Sen*, cited above, § 32).

59. Article 11 § 2 does not exclude any occupational group from its scope. At most, the national authorities are entitled to impose “lawful restrictions” on certain of their employees (see *Tüm Haber Sen and Çınar*, cited above, §§ 28-29; *Demir and*

Baykara, cited above, § 107, and *Sindicatul "Păstorul cel Bun" v. Romania* [GC], no. 2330/09, § 145, ECHR 2013 (extracts)). However, the restrictions imposed on the three groups mentioned in Article 11 § 2 are to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association (see *Tüm Haber Sen and Çınar*, cited above, § 35; see also *Adefdromil v. France*, no. 32191/09, § 55, 2 October 2014, and *Matelly v. France*, no. 10609/10, § 71, 2 October 2014). These restrictions should therefore be confined to the "exercise" and must not impair the very essence of the right to organise (see *Demir and Baykara*, cited above, § 97).

(b) Application of these principles to the present case

(i) whether there was an interference

60. The parties did not dispute the existence of an interference with the rights protected by Article 11 of the Convention. The Court sees no reason to hold otherwise.

61. As noted above, the right to strike is one of the means whereby a trade union may attempt to be heard and to bargain collectively in order to protect employees' interests, and strike action is clearly protected by Article 11 (see *National Union of Rail, Maritime and Transport Workers*, cited above). Furthermore, the term "restrictions" in paragraph 2 of Article 11 of the Convention is not limited to bans and refusals to authorise the exercise of Convention rights, but also embraces punitive measures taken after such rights have been exercised, including various disciplinary measures (see *Ezelin v. France*, 26 April 1991, § 39, Series A no. 202; *Maestri v. Italy* [GC], no. 39748/98, § 26, ECHR 2004-I; *Sergey Kuznetsov v. Russia*, no. 10877/04, § 35, 23 October 2008; and *Trofimchuk v. Ukraine*, no. 4241/03, § 35, 28 October 2010).

62. In the present case the applicant participated in the strike action organised by his trade union. For his participation in that strike the applicant was subjected to a disciplinary sanction, which, when taken together with an earlier transgression, resulted in his dismissal. Therefore, there was an interference with the applicant's rights, as guaranteed by Article 11 of the Convention.

(ii) whether the interference was justified

63. Article 11 § 2 of the Convention requires that restrictions on the freedom of association, such as a prohibition of the right to strike, must be "prescribed by law", pursue one or more legitimate aims and be "necessary in a democratic society" for the achievement of those aims (see *UNISON*, cited above; *Federation of Offshore Workers' Trade Unions and Others*, cited above; and *Demir and Baykara*, cited above, § 117).

(α) "Prescribed by law" and a legitimate aim

64. The Court notes the applicant's critique of the Russian legislation regulating the right to strike of railway workers. In particular, although Article 26 § 2 of the 2003 Railway Act refers to the list of occupations not allowed to strike, no such list has yet been adopted, as acknowledged by the Government (see paragraph 37 above). However, the Court also finds that the 2003 Railway Act specifies that until such list is adopted, Article 17 of the 1995 Railway Act is to remain in force (see paragraph 16 above), thus, it cannot be said that there is a gap in the legislation. When dealing with the applicant's case the national courts relied on both Articles 17 and 26 § 2 of the 1995 and 2003 Railway Acts

respectively. They interpreted those two provisions to the effect that all occupations (by contrast to only some, mentioned in the list) "connected to the circulation of trains, shunting and provision of services to passengers and of freight services on public railways", were prohibited from participation in strikes. The Court was not presented with the evidence of any contradictory application or diverging interpretations of the two provisions by public authorities or legal scholars, or of any alleged inconsistency with other laws (see, by contrast, *Veniamin Tymoshenko and Others v. Ukraine*, no. 48408/12, § 84, 2 October 2014).

65. The national courts' finding that the applicant's occupation of a locomotive driver fell within the category of activities "connected to the circulation of trains, shunting and provision of services to passengers and of freight services on public railways", does not appear unreasonable or arbitrary. The applicant himself did not claim otherwise before this Court or the national authorities. Thus, the Court concludes that the interference was "prescribed by law".

66. The Court also notes the applicant's argument that the blanket ban on the right to strike of certain categories of railway workers did not pursue a legitimate aim. However, the Court will assume that the interference pursued a legitimate aim, as the Government claimed, because it considers that in any event it was not "necessary in a democratic society", for the following reasons.

(β) "Necessary in a democratic society"

67. The test of necessity in a democratic society requires the Court to determine whether the interference complained of corresponded to a "pressing social need". In assessing whether such a "need" exists and what measures should be adopted to deal with it, States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts (see, for example, *Sidiropoulos and Others v. Greece*, 10 July 1998, § 40, *Reports* 1998-IV, and *Tüm Haber Sen and Çınar*, cited above, § 35).

68. The Court must also look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it were "relevant and sufficient". In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in the appropriate provision of the Convention and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see, for example, *Yazar and Others v. Turkey*, nos. 22723/93, 22724/93 and 22725/93, § 51, ECHR 2002-II, and *Demir and Baykara*, cited above, § 119).

69. The Court finally observes that the measures taken against the applicant resulted from the legislative prohibition of the right to strike to certain categories of railway workers. The Court reiterates that, in order to determine the proportionality of a general measure, it must primarily assess the legislative choices underlying it, regard being had to the quality of the parliamentary and judicial review of the necessity of the measure, and the risk of abuse if a general measure were to be relaxed. In doing so it will take into account its implementation in the applicants' concrete cases, which is illustrative of its impact in practice and is thus material to the measure's proportionality (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 108, ECHR 2013 (extracts) and the cases cited therein, and *Bayev and Others v. Russia*, nos. 67667/09 and 2 others, § 63, 20 June 2017). As a matter of principle, the more convincing the general justifications for the general measure are, the less

importance the Court will attach to its impact in the particular case (*Animal Defenders International*, cited above, § 109).

70. The right to strike, which falls under the protection of Article 11 of the Convention, is an important aspect of the freedom of association and the right to form a trade union and for that trade union to be heard and to bargain collectively. The Court observes that these considerations find support in the relevant international instruments (see *Demir and Baykara*, cited above, §§ 76-84 and 85-86, on the Court's reliance on international instruments). The right to strike is recognised by supervisory bodies of the ILO as an indispensable corollary of the freedom of association (see *Enerji Yapı-Yol Sen*, cited above, § 24, and paragraph 20 above). Equally, the right to strike is provided by the European Social Charter (ibid.; see also paragraph 24 above). The Parliamentary Assembly of the Council of Europe has also reiterated the importance of the right to strike (see paragraphs 27-28 above).

71. As for the existence of a "pressing social need", the Government generally claimed that railway transport was an essential service and that certain categories of railway workers could be prohibited from participating in strikes if those strikes threatened the country's defence, State security or the life or health of people (see paragraph 32 above). Given the essential role of railway transport in bolstering the economy and other interests of people, the Government believed that any circumstances negatively affecting those interests justified the ban on the right to strike of certain categories of railway workers (see paragraph 33 above). Addressing in particular the strike of 28 April 2008, the Government referred to alleged delays in passengers and freight getting to their destinations and the dangerous accumulation of people on train platforms.

72. The Court will first address the assertion that it is necessary to prohibit certain categories of railway workers to strike because they provide essential services. The Court notes an apparent international consensus that, indeed, as in the case of "members of the armed forces, of the police or of the State administration", restrictions may also be imposed on the right to strike of workers providing essential services to the population (see, in particular, the ILO's position cited in paragraph 20 above (section 541 of the ILO's Digest of decisions and principles) and the ECSR's findings cited in paragraph 25 above). However, neither the ILO nor the ECSR consider transport in general, and railway transport in particular to constitute an essential service, an interruption of which could endanger the life or health of (a part of) the population (see section 587 of the ILO's Digest of decisions and principles, cited in paragraph 20 above; see also paragraph 23 above). The Court notes that both the ILO (see paragraphs 21-23 above) and the ECSR (see paragraph 26) have regularly criticised Russian legislation banning railway workers' right to strike. There is no reason for the Court to reject the existing international approach to the definition of an essential service and to consider the railway transport as such.

73. Second, even assuming that railway transport was an essential service, serious restrictions such as a complete ban on the right to strike in respect of certain categories of railway workers would still require solid evidence from the State to justify their necessity. While a work stoppage on railway transport obviously could lead to negative economic consequences, the Court cannot agree that these would be sufficient to justify a complete ban on certain categories of railway workers' right to strike; any strike implies certain economic losses, but it does not follow

that any strike could be prohibited for risk of those losses. The ILO also does not consider negative economic consequences to constitute a sufficient reason justifying a complete ban on the right to strike (see paragraph 20 above, section 592).

74. Finally, as for the particular circumstances of the strike of 28 April 2008, the Court finds that the Government did not substantiate any alleged damage caused by the delayed arrivals of passengers and freight. The Court notes, by contrast, the case of *Federation of Offshore Workers' Trade Unions and Others* (cited above), where the respondent Government made extensive submissions justifying its decision to stop an ongoing for thirty-six hours strike of workers on oil drilling platforms. In the latter case the Respondent Government showed estimated revenue losses for both private and State companies and the projected negative effects on tax collection and the State's financial commitments. It also relied on breaches of Norway's international contracts for gas and oil supply. Lastly, in the above-cited case the Court took into account the risk that a long work stoppage would constitute in respect of technical installations and, consequently, health, safety and the environment. No such information has been provided to the Court in the present case. As for the accumulation of people on train platforms, similarly, the Court has not been presented with any evidence to show that the regulation of passengers' access to train platforms was outside Russian Railways' control because of the strike.

75. The Court will further examine the quality of the national authorities' decision-making process underlying the ban on the railway workers' right to strike and the applicant's resulting dismissal.

76. The Court observes that the Government did not provide any information (for instance, regarding the relevant legislative history or parliamentary debates) which could have explained the general policy choice made by the federal legislature in favour of the ban on certain categories of railway workers' right to strike (contrast, *National Union of Rail, Maritime and Transport Workers*, cited above, §§ 89 and 99). The Government also did not show that they had ever assessed the risk of abuse if the prohibition on certain categories of railway workers' right to strike had been removed.

77. Equally, there is no information as to whether the Government have ever considered any alternatives to the ban on the right of certain categories of railway workers to strike. For instance, the ILO advises the States to require minimum services to be provided during a strike by its participants instead of banning strikes (see paragraph 20 above, section 621).

78. The Court has not been informed of any safeguards designed by the Government to compensate railway workers for their inability to participate in strike action. For example, the ILO requires conciliation and arbitration proceedings by way of such safeguards (see paragraph 20 above, section 596).

79. The circumstances of the strike of 28 April 2007 illustrate the above issues. After having their demands rejected, the applicant's trade union decided to declare a strike. The Government did not suggest that any other means such as conciliation or arbitration or else had been available to the trade union to protect their members' interests (see *Dilek and Others v. Turkey*, nos. 74611/01 and 2 others, § 72, 17 July 2007).

80. Furthermore, the applicant's trade union notified Russian Railways of the strike in advance (ibid., § 71) and provided minimum services on 28 April 2007. The Government did not contest that fact or the adequacy of those services.

81. The strike itself was not declared unlawful (see, for instance, *Karaçay*, cited above, § 36) either by a national court (see paragraph 11 *in fine* above) or another

independent authority (see section 628 of the ILO's Digest of decisions and principles, cited in paragraph 20 above). By joining it the applicant exercised his freedom of association. However, relying on the ban on the right to strike of certain categories of railway workers set by Russian law, the employer, Russian Railways, considered unlawful the applicant's abstention from work during the strike and fired him for a repeated failure to perform work duties.

82. When the applicant challenged his dismissal before the national courts, they had to confine their analysis to formal compliance with the relevant Russian laws and consequently could not balance the applicant's freedom of association with competing public interests (see paragraphs 11 and 12 above).

83. The Court finds that the applicant's participation in the strike action was considered as a breach of disciplinary rules which, when taken together with the previous transgression, resulted in the most severe penalty – dismissal (for a similar assessment, see section 666 of the ILO's Digest of decisions and principles, cited in paragraph 20 above). The Court has previously found that such sanctions inevitably had a "chilling effect" on trade union members taking part in industrial actions such as strikes to protect their professional interests (see *Ezelin*, cited above, § 53; *Karaçay*, cited above, § 36; and *Urcan and Others v. Turkey*, nos. 23018/04 and 10 others, § 34, 17 July 2008).

84. The Court concludes that the applicant's dismissal after participation in a strike action organised by his trade union which in his case, as a result of the legal prohibition for him to participate in strikes as he was a locomotive driver, led to a second failure to fulfil his labour duties, constituted a disproportionate restriction of the applicant's right to freedom of association. There has accordingly been a violation of Article 11 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

85. The applicant complained under Article 6 of the Convention that the court which examined his dismissal case had not had authority to declare the strike unlawful and thus that his case had not been heard by "a tribunal established by law". The Government contested that argument.

86. The Court finds that there is nothing to show (and the applicant does not so claim) that the national courts which examined the lawfulness of the applicant's dismissal had no authority in respect of that issue under Russian law. Furthermore, during the dismissal proceedings the national courts analysed the lawfulness of the applicant's participation in the strike of 28 April 2007 and not (as alleged by the applicant) the lawfulness of the strike as a whole. Therefore, this complaint is manifestly ill-founded and must be rejected, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

87. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

88. The applicant claimed 2,000 and 6,000 euros (EUR) in respect of pecuniary damage (salary lost during his period of unemployment) and non-pecuniary damage, respectively.

89. The Government submitted that the claims were unfounded as, in their view, there had been no violation of the applicant's rights. They considered that the sums claimed were, in any event, excessive.

90. The Court considers that the applicant's claims for pecuniary and non-pecuniary damage are substantiated, reasonable and relate to the violation of the Convention found. Ruling on an equitable basis, it awards the applicant EUR 2,000 in respect of pecuniary damage and EUR 6,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on those amounts.

B. Costs and expenses

91. The applicant also claimed EUR 2,500 for the costs and expenses incurred before the Court.

92. The Government asserted that the applicant had not submitted any evidence that the claimed amounts had been actually incurred/paid. Thus, the applicant's claims of legal costs and expenses should be rejected as unsubstantiated.

93. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. The Court notes that the contract for legal services, concluded by the applicant in respect of his representation before the Court, created a legally enforceable obligation to pay the amounts arising under it (see, for instance, *Y.Y. v. Russia*, no. 40378/06, § 70, 23 February 2016). In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,500, covering costs for the proceedings before the Court, plus any tax that may be chargeable on that amount.

C. Default interest

94. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares*, by a majority, the complaint under Article 11 of the Convention about the applicant's dismissal admissible and the remainder of the application inadmissible;

2. *Holds*, by six votes to one, that there has been a violation of Article 11 of the Convention;

3. *Holds*, by six votes to one,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the

Convention, the following amounts, to be converted into the currency of the respondent State, at the rate applicable at the date of settlement:

(i) EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of pecuniary damage;

(ii) EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(iii) EUR 2,500 (two thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points.

Done in English, and notified in writing on 20 November 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen PhillipsVincent A. De Gaetano
RegistrarPresident

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Dedov is annexed to this judgment.

V.D.G.
J.S.P.

DISSENTING OPINION OF JUDGE DEDOV

1. With all due respect, I cannot agree with the conclusions of my colleagues. The present case reflects the most serious problem of the Court: when it presumes that the domestic authorities are not aware of European standards, it takes on an enlightenment role. This pedagogical function does not have anything to do with the concepts of the margin of appreciation or the principle of subsidiarity. The Court imposes certain standards in very controversial circumstances, and what is more important, the standards themselves are not clear because the Court occasionally invents them.

2. In the case of *Hirst v. the United Kingdom (no. 2)* (no. 74025/01, 6 October 2005), the Court found that the blanket ban on prisoners' participation in elections was contrary to the Convention. Notwithstanding widespread criticism, I agree with that conclusion because in the modern world a blanket ban or a complete ban (the term used in the present case) is an outdated legal approach. Therefore, a methodology based on the principle of proportionality should prevail.

3. Precisely with the help of the proportionality principle, the *Hirst* judgment contains another positive element – the gravity of the offence - which would be very helpful for the domestic authorities in order to strike a clear balance between private and public interests. The Court's own position regarding the protection of

prisoners' voting rights (although individual and fundamental) was not absolute, and the Court has demonstrated its respect for the margin of appreciation of the member State. But, surprisingly, after the *Hirst* judgment there was the case of *Söyler v Turkey* (no. 29411/07, 17 September 2013), where the Court refused to confirm the criterion used by the domestic authorities, namely whether or not the offence was committed intentionally, even though that criterion is usually applied in the domain of criminal law to assess the aggravating circumstances of a crime and it therefore influences the assessment of the gravity and nature of the offence in question.

4. In other cases, including cases against Russia, the Court has demonstrated much less care about the balancing of individual rights and public interests. In the case of *Bayev and Others v. Russia* (nos. 67667/09, 44092/12 and 56717/12, 20 June 2017), the Court endorsed the protection of sexual minorities to publicly express their opinion on sex-related issues in front of educational facilities, without taking into account the rights and freedoms of other groups of vulnerable persons like the parents and their children. By contrast, for the purposes of the balancing test, the domestic authorities had taken the prevailing interests of others into account when they imposed the administrative penalty (except in the case of the third applicant).

5. In the case of *Orlovskaya Iskra v. Russia* (no. 42911/08, 21 February 2017), the Court reminded the authorities that they were obliged to respect the role of the mass media during an election campaign, notwithstanding the fact that the impugned article neither provided neutral information to the public nor complied with the ethical standards of journalism. The article simply defamed and insulted an official who was the local leader of a political party at that time. The Court proposed that the individual could bring a defamation case against the applicant newspaper, but this would not release the authorities from protecting the newspaper. Thus, the Court disregarded the balancing test. Again, by contrast, for the purposes of the balancing test, the domestic authorities had taken the insulting nature of the publication and the lack of neutrality ("agitation against the candidate") into account when they imposed the administrative penalty.

6. In sum, the problems of the Court are of a dual nature: the Court assumes that the domestic authorities could not and/or did not apply the Convention standards because they were prevented from doing so by statutory provisions, even if the domestic courts had in fact struck a balance in order to protect the prevailing public interest within the scope of a legitimate aim. In such a situation (when the rights and freedoms of others are at stake) the Court does not always provide a clear criterion for the proportionality/balancing test. In the present case, in my view, the Court's assessment involves both problems, because the desire of the majority to impose general standards regarding the right to strike is in contradiction with a concrete situation. I must say that finding a violation of the Convention for pedagogical purposes is quite humiliating for the national authorities. The Court should be prudent, as much as possible, to be sure that the applicant is the only victim and that there are no other persons who could be regarded as victims as a result of his or her actions when the applicant exercised his fundamental rights and freedoms.

7. In the present case the Court criticises a "complete ban on the right to strike in respect of certain categories of railway workers" (paragraph 73 of the judgment). But if the ban concerns only certain categories of workers, then it is not complete for the trade union. Therefore, the railway union was not prohibited from calling the strike in principle. The majority's position is that the applicant's right was violated. However, the majority had to make a link between the applicant's right to associate and the union's right to strike. As a result, the Court has concluded that since the applicant did not have

an opportunity to strike, then his freedom of association was restricted. Indeed, this is a maximalist position because freedom of association does not cover every collective action.

8. For example, in the case of the *National Union of Rail, Maritime and Transport Workers v. the United Kingdom* (no. 31045/10, 8 April 2014, the "RMT" judgment), concerning the ban on secondary strike action, the Court found no violation because the ban was aimed at protecting the rights and freedoms of others potentially affected by the disruption, including the public. For that reason the Court considered that it did not have to decide whether the right to strike itself should be viewed as an essential element of freedom of association. Among other authorities, it is worth mentioning the judgment in the case of *Hrvatski Lijecnicki Sindikat v. Croatia*, where the Court concluded that strike action by medical personnel was protected only when a collective agreement was null and void. In the case of *Trade union in the factory "*4th November*" v. the former Yugoslav Republic of Macedonia* ((decision), no. 15557/10, 1 October 2015), the Court concluded that without peaceful negotiations, mediation and arbitration, which were obligatory before the strike, the latter was considered unlawful and the application was inadmissible. The above judgments confirm that, contrary to the conclusion of the Court in the present case, a strike is actually the most severe form of pressure which could be organised by employees against their employer; its application should be limited, so other more peaceful safeguards are preferable in this domain of economic activity, especially if it concerns the provision of public services or public safety.

9. In the present case the Court prefers not to discuss the legitimate aim, and it goes directly to the conclusion that the interference was disproportionate. The Court does not propose any criterion of proportionality; it prefers not to discuss the negative consequences of the strike, but to link the proportionality with the severity of punishment. I believe that such a methodology is wrong. The principal assessment should concentrate on the balancing test, and the severity issue must be used in exceptional cases. The Court concluded that dismissal was the most severe penalty (paragraph 83 of the judgment), but a refusal to exercise duties on railway transport which leads to damage to property or health is punished under Russian criminal law (Article 263 of the Criminal Code); a breach of the safety rules may lead to an administrative penalty under Article 11.15.1 of the Russian Code on Administrative Offences. Thus it was not the most severe punishment. I believe that the authorities did not overstep their margin of appreciation, because the dismissal was applied by national courts not only for the refusal to exercise the duties, but because the refusal led to negative consequences for the public.

10. What is more important is the balancing test. In paragraph 82 of the judgment the Court stresses that when the applicant challenged his dismissal before the national courts, they had to confine their analysis to formal compliance with the relevant Russian laws and consequently could not balance the applicant's freedom of association against competing public interests. I will argue that this statement was not based on the facts.

11. According to the case file documents, the trade union decided that all employees including locomotive drivers should participate in the strike, and it was not the applicant's own initiative. So it was the union which breached the law. The union, nonetheless, defended its leading role in the strike during further proceedings involving the administration and the parliamentary committee. The union did not agree with the decision to dismiss the applicant. The Court refers to the fact that the lawfulness of the strike was not challenged in the domestic courts, or before any other independent

authority (see paragraph 81 of the judgment), but this does not clarify whether it was lawful or not. I have the opposite impression from the case file documents. It is obvious, and it was stated by the domestic courts in their decisions within the dismissal proceedings, that the trade union declared the strike within a period shorter than that prescribed by the Labour Code and without preliminary recourse to conciliation or arbitration. Thus the strike could have been considered unlawful for other reasons. There was "another independent authority", namely the Working group of the State Duma on the resolution and analysis of collective labour conflicts. The group concluded that the strike was unlawful but the union shifted the burden of responsibility to its members.

12. The Court did not establish any proportionality criterion in the present case. I will try to do that now. Obviously, the staff of any means of transportation including underground, aviation or railway transport could be free to organise a strike, but some precautions should be taken: (1) advance notice is needed if the working regime is to be changed (cancellation of flights, etc.); (2) a transport strike cannot cancel all services – some means of transport (the most vital) should continue.

13. In the present case the majority refer to a minimum service that was supposed to be provided during the strike, but that service did not bear any relation to actual transportation because no locomotive driver appeared at work during the strike period. The majority mention that the Government did not dispute the existence of a minimum service, not having made any submissions in this regard (see paragraph 7 of the judgment). This looks like a cat and mouse game: the Government will always lose because of the uncertainty and unpredictability of the Court's reaction to their submissions. This is not acceptable in international relations. If the Court has not received the information which is critical for the decision, it should invite the parties to provide such information. The Court's procedure should not be equal to domestic adversary proceedings, where the result heavily depends on the quality of legal advice. The trade union committee's decision referred to minimum services during the strike on public transport, as set out in the Order of the Ministry of Transport, no. 12ts of 27 March 2003. Such a document does not exist. The issue is regulated by Order no. 197 of 7 October 2003. At the time of the event the Order did not contain any provisions regarding railway transport. Such provisions were included in the Order in 2009, i.e. after the impugned events. Under the applicable version, the safety and security concerns requiring a minimum service did not actually include transportation, only the maintenance of the railway infrastructure. It is not clear how to interpret the Order: whether after the consultations with the members of parliament, the Ministry of Transport positively reacted to the 2008 strike and in fact allowed the locomotive drivers to participate in a strike; or whether the minimum of safety services meant that some of the employees in charge, other than the locomotive drivers, could not participate in a strike, and the locomotive drivers were still banned from striking under the separate rules. Obviously, this issue should be clarified by the Government.

14. Let us return to the circumstances of the present case. The strike happened three days after the decision was taken. The Prosecutor's investigation came to the conclusion that the administration was not notified about the strike. The decision to declare the strike does not directly refer to the participation of locomotive drivers, so I conclude that the administration was not actually informed that those drivers would participate in the strike and therefore the administration had to cancel the trains or to find alternatives during the strike, not before it. Owing to such a short period of time, it is obvious that the administration was unable to react. The passengers were not duly informed. Those deficiencies were aggravated by the fact that the strike was conducted

in the morning. This period is vital for those who live in the suburbs of Moscow. Thousands of people use the trains to get to work. The railway system is also popular for travel within the territory of Moscow, at least for the first 4-5 stations, therefore Muscovites also use the trains for business purposes in the morning. It is worth mentioning that the majority of passengers do not have cars, so the train is the only means of transport for hundreds of thousands of people who live in Moscow or Kaluga oblasts and other regions to get to workplaces situated in Moscow.

15. The domestic courts did the balancing test taking into account the violation of the rights and freedoms of others as a result of the strike. The District Court clearly refers to the analysis of the proportionality of the restriction of the applicant's rights within the dismissal proceedings in its decision. The domestic courts analysed the circumstances of the strike, noting that the platforms were overcrowded and that this created a risk for life; the trains were cancelled or delayed. They stated that other safeguards like conciliation and arbitration set out in the Russian Labour Code were obligatory for the trade union to exhaust before the strike. The administration did not have any chance to use them, because the strike happened in a very short period of time. The courts found that neither the union nor the applicant took any measures to ensure that the nuisance for civil society would be limited to a minimum. The prosecutor made similar conclusions which served as a basis for the domestic courts' analysis of the proportionality.

16. Being badly organised, the action of the applicant and the union led to the disorder. Moreover, the applicant knew that his participation in the strike could come into conflict with the rights and freedoms of others. But he failed to demonstrate to domestic courts and to the Court that he personally or the union had taken the necessary measures, precautions and safeguards before the strike to minimise the negative consequences for the public.

17. It is very important that the Russian Constitutional Court referred to the rights and freedoms of others and applied the same international documents (see paragraph 18 of the judgment). The right to strike is not absolute, and it can be limited for the purposes set out in Article 11 § 2 of the Convention. If the legitimate aim relates to the public safety and essential public services then the protection of rights and freedoms of others (freedom of movement) is at stake and the State should thus be afforded a wide margin of appreciation. In the present case, in contrast, the Court has shifted to the general principle regarding the existence of a "pressing social need". Without taking into account the specificity of the present case, the Court provides that the States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it (see paragraph 67 of the judgment). However, the Court used a different approach in other cases when it took into account similar circumstances. For example, in the case of *Dubská and Krejzová v. the Czech Republic* [GC], nos. 28859/11 and 28473/12, 15 November 2016, the Court stated as follows:

> "179. A wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" (see *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 52 with further references, ECHR 2006-VI; *Shelley v. the United Kingdom* (dec.), no. 23800/06; 4 January 2008; and *Hristozov*, cited above, § 119)."

18. The Court took the view that the margin of appreciation to be afforded to the national authorities in that case had to be a wide one, and that the State had not

overstepped the margin of appreciation afforded to it as the prohibition of assistance by a health professional during a home birth had struck a fair balance between, on the one hand, the applicants' right to respect for their private life under Article 8 and, on the other, the interest of the State in protecting the health and safety of the child during and after delivery and that of the mother (see §§ 184-90 of the *Dubská* judgment). In the present case, the applicant's right to strike is in conflict with the freedom of movement of those who need railway transport to get to work in the morning and to get back home in the evening. The balancing of the conflicting rights inevitably leads to the limitation of the right to strike. The trade union failed to make the balancing itself, and it did not provide any chance for the administration to do so.

19. In the "RMT" judgment (cited above) regarding secondary strike action, the Court stressed that the breadth of the margin in cases such as the applicant's had to be assessed in the light of relevant factors such as the nature and extent of the impugned restriction, the aim pursued and the competing rights and interests of other individuals who were liable to suffer as a result of the unrestricted exercise of that right. The Court concluded that the margin should be wide. The Court also concluded that in their assessment of how the broader public interest would be best served in their country in the often charged political, social and economic context of industrial relations, the domestic legislative authorities had relied on reasons that were both relevant and sufficient for the purposes of Article 11.

20. The Court also observed that, although the legislative history of the United Kingdom pointed to the existence of conceivable alternatives to the ban, that was not decisive of the matter. For the question was not whether less restrictive rules should have been adopted or whether the State could establish that, without the prohibition, the legitimate aim would not have been achieved. It was rather whether, in adopting the general measure it did, the legislature had acted within the margin of appreciation afforded to it (see § 103 of the "RMT" judgment, cited above). I truly regret that in the present case the Court refused to make such an analysis and draw such a conclusion.