[NL] Court of Appeal upholds public broadcaster's editorial freedom to criticise public figures

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On 19 July 2022, the *Gerechtshof Arnhem-Leeuwarden* (Arnhem-Leeuwarden Court of Appeal) delivered an important judgment, upholding an earlier lower-court judgment on the media standards applicable to news and opinion websites operated by public broadcasters (see IRIS 2021-10/21). Notably, the Court upheld important principles on the freedom of public broadcasters to criticise public figures, and refused to order a rectification against a public broadcaster sought by a public figure over various online articles.

The case involved a well-known Dutch activist who campaigned against Covid-19 measures implemented by the Dutch government, and is director of a high-profile campaign group ("Stichting Viruswaarheid", "Virus Truth Foundation") which sued the Dutch government on a number of occasions over its Covid-19 measures. In 2021, the activist initiated legal proceedings against the public broadcaster BNN-VARA over its news and opinion website (Joop.nl), in particular over various online publications describing the activist as a "Corona denier" ("corona-ontkenner"), "virus madman" ("viruswaanzinnige"), and "cult leader" ("sekteleider"). The activist claimed that these descriptions, contained in news items on the broadcaster's website, were unlawful and sought removal of these terms from items already published, a ban on the use of the terms in future news items, and also sought a rectification. Notably, the activist had no issue with these terms being used in "opinion pieces" or cartoons, but specifically objected to their use in "news" items.

In October 2021, the *Rechtbank Midden-Nederland* (District Court of Midden-Nederland) rejected the activist's claim, and held that the broadcaster had no obligation to publish news items objectively or without value judgments, and that the statements at issue were not unlawful (see IRIS 2021-10/20). The activist appealed against this judgment, and on 19 July 2022, the Court of Appeal rejected the appeal. At the outset, the Court of Appeal noted that the case concerned a clash between fundamental rights, namely the broadcaster's freedom of expression under Article 10 of the European Convention of Human Rights (ECHR), and the claimant's right to protection of reputation under Article 8 ECHR. The Court then proceeded to examine the statements at issue. First, the Court emphasised that the public broadcaster's freedom of expression also implies "editorial freedom", even if it concerns news, and "regardless" of whether the

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broadcaster is “subsidised by the government”. Second, the Court held that the statements at issue were “value judgments”, and would only be unlawful if lacking a “sufficient factual basis”. In this regard, the Court held that in relation to (a) “virus madman”, there was a sufficient factual basis, given the link to the former name of the activist’s organisation (“Virus madness”); (b) “Corona denier” can be used in the media for not only people who literally deny the existence of the corona virus, but also for those who downplay its consequences, such as the activist; and (c) in relation to “cult leader”, Joop.nl did not use the qualification as a factual statement, but as an ironically intended exaggeration and provocation. Because the activist, as he admitted, has become the face of the protests against the Covid-19 measures and was seen by some as their hero or icon, and in that sense as their leader, the Court found the qualification within the “tone” of Joop.nl “not excessive”.

In conclusion, the Court of Appeal dismissed the claimant’s appeal, holding the statements at issue were not unlawful, and rejected the claimant’s view that the broadcaster had conducted a “smear campaign” against him.

Gerechtshof Arnhem-Leeuwarden, ECLI:NL:GHARL:2022:6127, 19 juli 2022

https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHARL:2022:6127

Arnhem-Leeuwarden Court of Appeal, ECLI:NL:GHARL:2022:6127, 19 July 2022

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