SUMMARY

2016/31 Supreme Court: employer cannot dismiss employee for exercising freedom of speech (SL)

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Summary

The employee, a public servant, criticised her employer's director in an email that she sent all of her co-workers. The email made its way into a newspaper. She was dismissed. She challenged her dismissal successfully: the Supreme Court, weighing the employee's right to freedom of speech against the employer's right to protect its reputation and business interests, held the dismissal to be unfounded.

Facts

The plaintiff in this case was a public servant. She was employed by a public agency. In late December 2010, she sent her employer's 'council', a governing board within the agency, a proposal to dismiss the director. On 9 January 2011, she sent the same proposal via email, with "repressive authority" in the subject heading, to all of her co-workers, without copying in management. It accused the director of (i) negligence in the handling and supervising of public funds; (ii) failure to implement correct public procurement procedures; (iii) violating labour legislation; (iv) abusing sick leave; etc. The proposal containing the alleged irregularities was also forwarded to a newspaper, which published the document.

It is not known who forwarded the document to the newspaper. It has not been proven that it was done by the employee directly.

The employee challenged her dismissal in court but was unsuccessful in two instances, despite invoking her fundamental human right to freedom of speech. Both courts took the view that the employee had violated her contractual obligations, in particular the prohibition of harmful actions,

Article 35 of the Slovenian Employment Relationship Act.

The prohibition of harmful actions also stemmed from the employment agreement itself and the Code of behaviour for civil servants, the latter requiring loyalty of employees towards their employer.

The case reached the Supreme Court. It overturned the judgments of the lower courts by establishing the unlawfulness of the termination of the employment agreement for cause.

Judgment

Despite the damaged reputation and authority of the director (and, consequently, the employer), the Supreme Court ruled in favour of the plaintiff, basing its reasoning on freedom of speech, a fundamental human right. The Supreme Court's ruling mainly relied on previous judgments of the European Court of Human Rights (ECtHR), categorically emphasising that freedom of expression constitutes one of the essential cornerstones of a democratic society and one of the basic conditions for its development and for the self-fulfilment of each individual. The protection applies not only to information or ideas that are favourably received or regarded as inoffensive or neutral, but also to those that offend, shock or disturb, whereby the restrictions on freedom of speech must be construed strictly, and the need for any limitation must be established convincingly.

For example, the case of Langner – v – Germany (application no. 14464/11).

Each encroachment upon freedom of expression must have a basis in law. This was satisfied in the present case, as the dismissal was based on the prohibition of harmful actions under Slovenian employment law.

See footnote 2. The legal basis can also be found in the Act on Civil Servants, which prohibits civil servants from engaging in any physical, verbal or non-verbal conduct or behaviour which is based on any personal circumstances or creates an intimidating, hostile, degrading, humiliating or offensive work environment for the person and violates his or her dignity.

The Supreme Court concluded that the defendant had disproportionately interfered with the plaintiff's freedom of speech by terminating her employment agreement.

Commentary

The statutory prohibition against harmful actions by the employee is somewhat vague and hence should be interpreted on a case by case basis. In order to protect freedom of speech in the workplace, we believe that the prohibition should be interpreted restrictively. As the Supreme Court concluded, the dismissal the employee was a disproportionate measure in relation to the severity of the infringement. The employee's criticism of management did not constitute a harmful action since it was not objectively offensive or malicious and therefore the employer did not have justified grounds to dismiss the employee for cause.

Reputational damage caused by the use of offensive language, especially when caused by civil servants and conducted publicly, represents a serious form of misbehaviour. However, employees cannot be deprived of their right to express their opinion (including lambasting the work of their superiors) on this account. Termination of the employment relationship should remain ultima ratio. As a less coercive measure, employers may impose disciplinary sanctions and/or claim compensation for harm caused. However, in the case at hand, it is questionable whether such milder measures would be condoned by the Supreme Court. Irrespective of the gravity of the infringement, a disciplinary sanction or a claim for damages requires there to be culpability. The employer would thus still need to establish fault and if it is unable to do so, it has no right to take measures under employment law against the employee.

The situation might have been different if the employment contract had included a secrecy clause. Besides the prohibition against harmful actions, employees are also required by law to keep business secrets confidential. For such a clause to be enforceable, the employer would need to clearly define what constituted a business secret. However, since the Supreme Court based its judgment on the public interest as the prevailing criteria, it remains doubtful whether freedom of expression could be justifiably restricted in this case.

If the email had been sent directly to the press, the court would no doubt have had to consider the matter quite carefully and would probably have taken into account the fact that alternative options could have been used prior to publication in that way.

This case was not a whistleblower case, but it could have been. The protection of whistleblowers in Slovenia is captured under various pieces of legislation. For example, the Integrity and Prevention of Corruption Act ('IPCA') and the Banking Act both explicitly provide for the protection of whistleblowers. The Banking Act also stipulates an obligation on the banks to establish a system for notifying breaches. Under the IPCA, which could

potentially have been relevant to this case, anyone can notify a competent authority about behaviour in public bodies which it believes could indicate corruption, without prejudice to the right of the whistleblower to notify the public of such behaviour. Information on the whistleblower remains confidential even after the competent authority have concluded its investigation. If whistleblowers are exposed to retaliatory measures or adverse consequences because of having blown the whistle, they have a right under the IPCA to request reimbursement of unlawfully caused damage from the employer.

Comments from other jurisdictions

The Netherlands (Amber Zwanenburg, Erasmus University Rotterdam): If a Dutch civil servant had sent a critical email such as that at issue in this case directly to all staff and a newspaper, I anticipate that a Dutch court would have been less lenient. It would almost certainly have drawn more attention to the fact that the author of the email servant had never attempted to have her allegation examined internally with her line manager and/or higher management. Judgments of the European Court of Human Rights (ECtHR)

ECtHR 21 July 2011, application no. 28274/08 (Heinisch v. Germany).

Resolution 1729 (2010), Protection of “whistle-blowers”, 6.2.3.

Case law shows that Dutch courts attach considerable importance to this principle, although it does not consider the principle to be absolute and in isolation, for the reason that in some cases internal channels could reasonably be expected not to function properly given the nature of the problem raised.

Dutch Supreme Court 26 October 2012, ECLI:NL:HR:2012:BW9244.

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Parties: Not disclosed

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