SUMMARY

2017/50 Limits on free speech that may defame an employer (CZ)

<p>The Czech Supreme Court has given guidance on the limits to employees’ free speech. Employees must not engage in any conduct, even outside working hours, that could actually or potentially damage their employer’s business. Any criticism of an employer must be based on facts and not be misleading or defamatory. Inappropriate or unjustified criticism may lead to immediate termination of employment.</p>

Summary

The Czech Supreme Court has given guidance on the limits to employees’ free speech. Employees must not engage in any conduct, even outside working hours, that could actually or potentially damage their employer’s business. Any criticism of an employer must be based on facts and not be misleading or defamatory. Inappropriate or unjustified criticism may lead to immediate termination of employment.

Facts

The defendant, a Czech media group, dismissed an employee, a reporter, with immediate effect on grounds of gross breach of duties.

One of the employee’s duties was to submit a daily plan for topics and stories to be covered in future. He refused to do so. Subsequently, the employee decided to hand in his notice, alleging this was due to television censorship that he believed existed. Instead, the employer suspended him.

The employee then gave an interview to a public website focused on television and digital broadcasting, describing the manner of his departure and the alleged television censorship. In

the interview, the employee compared the internal running of the media group to a totalitarian regime.

This prompted the employer to give the employee notice of immediate termination of his employment.

The employee brought an action for unfair dismissal and the case proceeded through the courts to the Czech Supreme Court. However, the employee was unable to prove to the Court's satisfaction that the television was being censored.

Judgment

The Court upheld the first instance court's ruling and held that the immediate termination of employment was based on valid grounds. The Court considered two main questions: (i) what employee behaviour is considered justified criticism of the employer and (ii) what kind of behaviour may justify immediate termination of employment?

In terms of (i), the Court stated that in line with well-established case law (though not directly related to employment), any unjustified interference with the employer's good reputation by means of criticism, may be a breach of the employee's statutory work obligation 'not to act in a way which is contrary to the employer's just interests'.

However, bearing in mind the constitutional right of free speech, the Court clarified that employees are not completely prevented from speaking out against employers provided the criticism is factual, precise and appropriate in terms of form and content and the way in which it is done. It should not go further than necessary for the employee to properly express their opinion. Criticism based on untrue or biased statements, containing unnecessarily insulting or abusive comments is not justifiable.

The Court held that while all constitutional rights are equal (e.g. freedom of speech and the right to protection of certain personal rights), this does not mean they cannot be limited. Freedom of speech is limited by the potential harm it can cause to another's personal rights e.g. their good reputation.

In terms of (ii), the Czech Labour Code states that an employee's behaviour must amount to a gross breach if employment is to be terminated immediately. When assessing the seriousness of the employee's breach, the courts take into account the employee's job title and seniority, his or her general work performance, any previous breaches of work duties and any actual or potential damage caused by these.

In the case at hand, the Court emphasised that the employee, being a reporter, must have been

aware that the interview he gave had the potential to damage the television station, its reputation and public perception of its objectivity. The Court also considered that the employee had breached a work duty by refusing to submit a plan of future coverage as instructed. The Court concluded that immediate termination was legitimate.

Commentary

With a growing number of social media platforms on which anyone can express their views, employers increasingly face challenging employee conduct in the name of freedom of speech. It is often difficult to assess whether the conduct actually harms the employer or whether it is within the employee's right to free speech.

The Court gave some guidance by drawing a distinction between legitimate criticism of the employer – which falls within an employee's right to free speech – and unjustified criticism. But it did not go as far as to draw a clear line between the two and so this will have to wait for further rulings.

The Czech Supreme Court decision is in line with case law from The European Court of Justice and the European Court of Human Rights. The European Courts have held that an employee's free speech may be restricted in order to protect an employer's reputation (Connolly – v – Commission). Nevertheless, employees who comment on matters of public interest as part of their job may publicly comment on their employer provided they are truthful and not defamatory (Wojtas-Kaleta – v – Poland). Lastly, employees are protected in cases of whistleblowing, that is, reporting information that shows the employer is acting illegally or unethically (Guja – v – Moldova).

Comments from other jurisdictions

Greece (Harry Karampelis, KG Law Firm): The Czech Supreme Court have provided useful and practical guidance on the limits of employees' free speech. The Court based its judgment on four basic arguments: (i) a general principle obligation, according to which employees are not allowed "to act in detriment to the employer's reasonable interests"; (ii) that any criticism against the employers' practices must be based on facts and be appropriate in terms of the form and content and form; (iii) that all constitutional rights are equal and thus equally protected when set against each other; and (iv) termination of an employment agreement for an employee's defamatory and/or insulting public behaviour against the employer must be justified and proportionate to the seriousness of the employee's breach and the circumstances of the case.

The above judgment should be more than welcomed by the legal community, since it draws a

line between the legitimate and unlawful criticism of an employer and deals with the sensitive matter of setting limits on the freedom of speech, when the latter collides with the protected rights of employers. The European Court of Human Rights has also issued several judgments in similar cases. An application concerning the dismissal of an employee of the Austrian federal railway company for criticizing his employer in leaflets and in a letter published in a magazine was examined by the Court in January 2000 (Predota – v – Austria, No. 28962/95, 18 January 2000). The Court's view was that the applicant had not been discussing issues of public interest and had publicly made harsh criticisms of his employer's services that were capable of damaging its reputation in its clients' eyes. The disciplinary penalty had therefore been necessary and proportionate to the aim pursued. The Court thus declared the application inadmissible. The Court also declared inadmissible an application concerning the applicants' dismissal for virulently criticizing an employer's workplace policy, and making offensive remarks about both colleagues and management (Rodica C|rstea and Veronica Grecu – v – Romania, No. 56326/00, 21 September and 12 October 2004). The dismissal was the culmination of a series of warnings from the employer, who had been deliberately taunted on several occasions. The applicants' dismissal was not found disproportionate given that their behaviour had destroyed the trust and loyalty underpinning any employment relationship.

In a similar case handled by our law firm on behalf of the employer, a leading company in the beverages sector, the Athens First Instance Multi Member Court issued a landmark decision (Judgment 217/2017 of the Athens Multi Member First Instance Court) prohibiting boycotting conducted by former and current employees and their unions against the company and its products. In particular, the employer, in its claim against the boycotters, argued that the boycotts irreparably damaged its trustworthiness and credibility,. The company sought, through a civil claim, to obtain an order prohibiting all such activities against its interests. The Court considered that acts of boycott are a form of action justified only if taken within the framework of a legitimate strike. However, on the facts, the Court found the boycott in question unlawful, as the relevant strikes had already been been found to be illegal and abusive. In addition, the boycotters were spreading false rumors about the company and its products, so as to persuade consumers to stop buying them. The Court reached its decision by balancing the conflicting rights involved (i.e. the right to freedom of expression, in the context of the right to freely exercise one's trade union rights versus the company's right to freely go about its business and maintain its reputation). In its decision, the Court applied the principle of proportionality and ruled in favour of the employer.

Both rights (freedom of expression and the right to go about one's business and maintain one's reputation) are equally protected by the Greek Constitution. Thus, where the two rights are in opposition, the judge must balance them based on the principle of proportionality and

the prohibition against abusive exercise of one's rights in a way that is detrimental to other. Other crucial factors are: (i) the context in which the criticism takes place (matters of public interest or not); (ii) whether criticism is an illegal act or omission under national law (e.g. defamation); and (iii) the consequences of the criticism as regards the employer's reputation.

Hopefully, there will be more court rulings in the future that help bring clarity as to the limits of the freedom of expression, as this is fundamental in the context of employment relationships.

United Kingdom (Bethan Carney, Lewis Silkin LLP): It is likely that the UK courts would have found it lawful to dismiss an employee in these circumstances also. The UK courts have long accepted that misconduct need not take place in the workplace to give grounds for a fair dismissal. In Thomson – v – Alloa Motor Co Ltd [1983] IRLR 403, it was held that the key question is whether the conduct in question pertains to the employment relationship. So, for example, it was found that it was fair to dismiss an employee for fighting with a colleague outside work about a personal matter because the conduct broke the employer's trust and made it impossible for the other employee to continue to work with him (Eggleton – v – Kerry Foods Ltd UKEAT 938/95). Damaging the employer's reputation is also potentially a fair reason for dismissal. This principle is, of course, particularly relevant now that employees have a platform on social media to disseminate their views widely about their employer. Employers should be reasonably robust and not dismiss employees just because they say something that does not put the employer in the best possible light. However, more senior employees will be held to a higher standard than junior employees. The question will usually be whether the conduct actually caused damage to the employer's reputation or was likely to cause such damage. In Whitam – v – Club 24 Ltd (t/a Ventura) ET 1810462/10 an employment tribunal held that the dismissal of an employee for making 'relatively minor' derogatory comments outside working hours about her workplace on Facebook was not fair. In contrast, in Crisp – v – Apple Retail (UK) Ltd ET 1500258/11 it was found to be fair to dismiss an employee who made derogatory comments about his employer on Facebook. It was particularly relevant in this case that the employer had made it clear in its policies that protecting its image and reputation was a 'core value'. Finally, a Northern Ireland Industrial Tribunal found that it was fair to dismiss an employee who made offensive comments about a fellow employee on his Facebook page. Although it did not bring the employer into disrepute, it was in breach of the employer's harassment policies and was sufficiently serious on its own to justify dismissal (Teggart – v – TeleTech UK Ltd NIIT 007904/11). When considering unfair dismissal cases of this sort, the courts will consider the employee's right to free expression contained in Article 10 of the European Convention on Human Rights. The right to free expression may be restricted 'for the protection of the reputation or rights of others'

provided the restriction is prescribed by law and necessary in a democratic society. In the case of defamatory comments, the employer's rights will almost certainly prevail. The UK also gives statutory protection to workers 'blowing the whistle' on wrongdoing but they must follow the correct procedure when they do so. Simply giving an interview to a website is unlikely to qualify for protection.

Subject: Limits on employees' free speech, summary dismissal

Parties: Mr J.P. and EMPRESSA MEDIA a.s.

Court: Nejvyšší soud (Czech Supreme Court)

Date: 20 March 2017

Case number: 21 Cdo 1043/2016

Internet publication:
http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/6C0F7BA5166E7805C12581290031091F?openDocument&Highlight=0,null,

---

Creator: Nejvyšší soud (Czech Supreme Court)
Verdict at: 2017-03-20
Case number: 21 Cdo 1043/2016