SUMMARY

2015/15 “Secret” Facebook posting justified dismissal (PT)

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private and the content of the posts personal.

Facts

This case concerns an employee of a company engaged in security services, in particular, the surveillance of individuals and goods. The employee was a designated trade union delegate within the company.

The employee created a "secret" Facebook group (named "Employees of [X company]"). The group consisted of 140 members, all employees and former employees of the company. The employee was one of the administrators of the group, meaning that any member who wanted access to the Facebook account had to direct a request to him. The aim of the group was to discuss the company's activities and working conditions. Discussions were, however, conducted in an improper way, because the employee made several posts about procedures and working conditions, strikes and other matters that were offensive and insulting to the company, the employee's immediate superiors and his colleagues. The judgment does not reveal whether the employee used company equipment to make his posts, or whether the company had a policy regarding the use of its computer equipment and/or the use of Facebook in relation to company information.

The employer found out about the existence of the group and the postings. How it found out is not known. It initiated disciplinary proceedings against the employee and these eventually led to his dismissal.

The employee brought a case before the court, seeking reinstatement and payment of salary from the date of dismissal until the final judgment. He based his defence on (i) the right to privacy as part of his 'personality rights' and (ii) his statutory protection as a trade union representative. This case report does not go into the latter aspect, as this is not what makes this case noteworthy[1].

Judgment

Requested to rule on the matter, the Court of Appeal of Porto analysed the protection given by the Portuguese legal system to an individual's personality rights within an employment relationship and concluded that employees cannot prevent employees from, for example, being members of a social network. Nor can it decide that a particular type of group is not acceptable, for example, based on its level of privacy? So, employers can't ban membership of a group on principle.

The court performed its analysis solely on the basis of Portuguese law, without making

reference to the European Convention on Human Rights and Fundamental Freedoms, the EU data protection rules or any other international instrument.

The Court considered that the "secret" character of the group created on Facebook was substantially compromised by the fact that the social network included a large number of members (140). Moreover, the members, despite being described as "friends", were not necessarily so and might easily decide to disclose the content of the "secret" group to third parties. There was no close relationship of trust amongst the group members to justify any expectation that the secrecy of the group would not be breached.

The Court of Appeal considered that it was not acceptable that the group did not place any limits on its own freedom of expression, given that the posts were about the organisation and internal life of a company. In other words, the Court would have expected the members of the group to self-regulate their form of expression to some extent.

The Court considered that there could be *"no expectation that the circle established by the "Employees of [X company]" would be private and closed, there being no indication that the relationship established between its members was based on a minimum of trust, such that it could be expected that its privacy would not be breached by members' disclosing what was posted within the group"* and that therefore the content displayed on Facebook was subject to the disciplinary power of the employer, which was within the normal operation of the company.

With regard to the employee's dismissal, the Court considered that the falsehoods in the posts and their insulting nature could have created division and negativity amongst the employees as a whole and could have harmed the company's reputation. It concluded that there had been a serious breach of the employment duties and this gave rise to justifiable doubts about the future of the employment relationship.

Commentary

Under Portuguese law, the employer and the employee should respect each other's personality rights, which include the right to privacy and protection against access to and disclosure of details of their personal life, family life, emotional and sexual life, state of health and political and religious beliefs.

Also, by Portuguese law, the confidentiality of contents of an employee's personal messages should not be breached, despite the employer's right to have a policy on the use of the company's electronic resources (e.g. email).The law is generally interpreted strictly, notably by the Portuguese Personal Data Protection Authority.

This decision may therefore be something of a milestone in Portuguese jurisprudence, because for the first time a higher Court has found that the employee has waived his right to privacy on Facebook by publishing within a group of 140 members, most of whom the employee did not know well enough to trust.

A few days later (on 24 September 2014) the Court of Appeal of Lisbon delivered a judgment about a very similar issue. The Court was requested to rule on the case of an employee (a trade union delegate) who posted a text on his personal Facebook profile that was offensive to the reputation of his employer. He expressly asked all his Facebook 'friends' to share it on their pages and with their 'friends'. Disciplinary action was taken against him and this led to his dismissal for cause. In this case also, the Court considered that the content posted exceeded the employee's private domain and was therefore not protected by law. It felt that the comments posted were sufficiently offensive and serious to amount to the disciplinary offence of breach of the duty of courtesy and respect and that this had jeopardised the tranquillity of the work environment and the balance of the organisation to such an extent that it justified the dismissal for cause.

Bearing in mind that there is no specific legislation restricting use of or access to social media within the employment context (although Portuguese law and jurisprudence does allow for this to be restricted by company policies, provided these do not interfere with freedom of expression and conscience and the right to privacy), it is expected that Portuguese case law will have an important role to play in consolidating the rules concerning the use of social media by employees. The national courts are certainly now coming across instances of conflict between freedom of expression and the right to privacy, particularly in relation to the use of social media.

Comments from other jurisdictions

Poland (Marcin Wujczyk):There are no provisions in legislation regulating principals of using social media by employees. However, the Supreme Court repeatedly expressed the view on employee's duties of acting in the best interest of the employer It claimed that, i.a. "It raises no doubts, that remaining in employment relationship imposes on employee duties determined in the Art. 100 § 2 of the Polish Labour Code. Such duties include i.a. acting in the best interest of the employer and principles of social coexistence. If the employee exceeds the limits of allowed criticism towards the supervisor or bodies of the employer, then it is a clear example of a lack of loyalty, and regardless of duties assigned to the position occupied by the employee, it may be the reason for justified termination of an employment contract or termination of an employment contract without notice by fault of the employee. (...) even justified criticism towards the relations in a workplace shall remain within the law and characterized be a proper

form of statement (...)" (judgement of the Supreme Court of 16 November 2006, I PK 76/06, issued OSNP 2007, No. 21-22, item 312). Additionally, in the judgement of 1 October 1997 (I PKN 237/97, issued OSNAPiUS 1998, No. 14, item 420) the Supreme Court claimed that "One of the conditions for allowed criticism is to maintain a proper form of statement. Actions of a plaintiff, consisted of posting on an announcement wall some offending texts towards the bodies of a co-operative glaringly breached work as well as member duties, and principals of social coexistence adopted in our society".

Exceeding the limits of allowed criticism can be the reason of justified termination of an employment contract without notice by fault of the employee. As a justified reason for dismissal the Supreme Court considered in particular insulting a member of employee's body by the employee, presenting unfounded charges of committing a crime, disparaging and arrogant statements towards the representative of the employer, questioning the employer's competences and unfounded accusations of fraud in withholding payment advances and moving money across borders without application of bank system (judgement of 11 June 1997, I PKN 202/97, OSNAPiUS 1998, No. 10, item 297).

Under the Polish law criticism expressed towards 140 people (as it occurred in the Portuguese case), which contains insulting statements shall be understood as an improper form of statement. It is difficult to consider such statement as private domain, in particular if there is possibility of passing the information to other people. The employee should direct the critical statements to supervisors or adequate supervision bodies (e.g. work inspection or trade unions), but without making such statements a public (even if restricted to the large group) matter. Under no circumstances should criticism have insulting or accusing character. Therefore the Portuguese court rightly interpreted employee's duties concerning rights of worker to express critical statements towards employer actions.

Footnote

1 The Portuguese Labour Code provides that the dismissal of a trade union representative is presumed to be without just cause unless the employer proves otherwise. Jeopardising the regular functioning of the company by abusing his rights may be considered a serious breach of a trade union representative's duties and thus may (but need not in all cases) constitute just cause. In this case, the court held that some of the employee's Facebook posts far exceeded the boundaries of his right to freedom of expression.

Subject: Dismissal

Parties: Unknown

Court: Court of Appeal of Porto

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

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