SUMMARY

2011/30 Visiting Facebook at work is a valid reason for termination (GR)

<p>In this first case in which a Greek court addressed the issue of an employee spending working time on Facebook, the court found that a summary dismissal was not disproportionate.</p>

Summary

In this first case in which a Greek court addressed the issue of an employee spending working time on Facebook, the court found that a summary dismissal was not disproportionate.

Facts

In 1989 the plaintiff was hired by Singapore Airlines as a booking and ticket sales employee. As of 2000 she handled only ticket reservations. During the entire period up to 2008 she was an excellent employee and had received bonuses on top of her salary for good performance.

In April 2009 an agreement was executed between the company and a group of 16 employees including the plaintiff. The agreement provided that their salaries would remain unchanged, i.e. that there would be no increases, in the 12 month period April 2009 to March 2010. The agreement was reached despite opposition by the plaintiff.

In May 2009 the General Manager sent the plaintiff a warning letter. The letter complained of poor performance, amongst other things, consisting of systematically coming in late for work, using the company's telephone lines for personal calls during working time, and using the Internet to visit irrelevant sites. On 29 April 2009 she had been caught visiting Facebook by the General Manager and the Sales Manager.

In a letter dated 25 May 2009 the General Manager warned the plaintiff that if she continued her unprofessional behaviour, the company would be left with no choice but to dismiss her without notice. The plaintiff replied by an email dated 4 June 2009, inviting the General

Manager to apologise in writing within ten days for his "insulting, defamatory and excessive letter", adding that if no such apology were made, she would interpret the General Manager's letter of 25 May as "an act of revenge" against the lawful exercise of her rights, both in respect of certain issues from the past and in respect of the salary freeze. The General Manager replied informing her that he considered the content of her letter as a continuation of her failure to act in accordance with the terms of her contract, including harming the company's interests, and for these reasons he proceeded to dismiss her on 18 June 2009.

The plaintiff filed a lawsuit claiming that her termination was abusive and therefore invalid, as it was based on revenge for her participation in the legal exercise of her employment rights. Furthermore, she claimed arrears of salary (€ 36,560 for the period from June 2009 to April 2010) as well as compensation for moral damages for insult amounting to

€ 250,000.

Judgment

The Athens First Instance Court rejected the plaintiff's claim, ruling that her dismissal was lawful and had been carried out for a serious and valid cause. The court based this ruling on testimonies and depositions by several witnesses that the plaintiff had made a habit of coming late to work, receiving personal phone calls from friends and relatives during working hours and calling them back on the company's telephone lines, thereby creating problems in the service to clients.

The court took into consideration the fact that the company had, in December 2008, sent an email to all its employees forbidding visiting sites such as Facebook, that were irrelevant to the job. Despite this, as former colleagues of the plaintiff testified, she visited Facebook on a daily basis in order to read and write comments and that, frequently, when customers called requesting reservations, she replied that the reservation system was out of order and that they should therefore call back later. She did this so that she would have more time available to visit Facebook.

The judgment concluded that the dismissal was not vengeful and was not based on the plaintiff's reaction to the salary freeze.

Commentary

This case attracted a great deal of publicity in Greece, because it was the first time that a court had ruled on the issue of use of social networking sites in employment.

The judgment is also interesting, because it elaborates on two fundamental principles of labour law, namely the principles of trust and proportionality. Trust must always exist between the parties to an employment relationship. In the case reported above the plaintiff's behaviour had caused her employer to lose trust in her, thereby making collaboration difficult.

The court rejected the plaintiff's argument that termination of her employment was a disproportionate reaction and therefore abusive, given her excellent performance during all the years since the beginning of her employment. Even an employee with 20 years of excellent performance can be dismissed. The court focused on the real motive for the termination, which was the deficient performance of duties by the plaintiff; the fact that any spirit of true cooperation had ceased to exist between the parties; and the employer's legitimate interests.

Comments from other jurisdictions

Austria (Andreas Tinhofer): This case would have most likely been decided in the same way in Austria, although no court decision is yet known to have dealt with the use of social media networks in the workplace. However, it is a well-established principle that employees must not spend a substantial amount of their working time pursuing private interests. This applies to private phone calls, along with any other form of communication, and use of the Internet which is not work-related. In such a situation a summary dismissal is lawful if the employee does not respect a prior warning to discontinue such conduct.

Czech Republic (Natasa Randlova): In the Czech Republic employees are not permitted to use the employer's equipment or other means necessary for performance of the work, including computers and telecommunication equipment, without the employer's written consent. The employer is entitled to enforce this restriction. In addition, an employee must use all of his working time to fulfil his obligations towards the employer. An employee who spends his or her working time on Facebook and uses the employer«s computers to do so, would certainly be considered to be in breach of the disciplinary rules. Whether or not the employee can be dismissed immediately, dismissed with notice or reprimanded, will depend on a number of factors, such as the employee's position (managerial or not); whether the employee has breached the rules in the past; whether damage was caused; and whether the employee breached the rules intentionally negligently. Immediate dismissal is an serious measure and should be used carefully. In the case reported above a more appropriate measure would have been to serve notice on the employee for systematic less serious breaches of discipline.

United Kingdom (Gemma Chubb): Despite the fact that there has been little relevant case law in the UK, the use of social media at work is becoming a hot topic amongst human resources specialists and employment lawyers. Employers are currently treading a difficult path in trying

to assess how much control they can or should exercise over employees' use of social media.

Using social media in a way which constitutes clear misconduct Ð for example, excessive use when the employee is supposed to be doing work for the employer Ð is no different from any other kind of bad behaviour. Provided the employer has clear standards that it has notified to employees, so that employees understand what is expected of them and the consequences of getting it wrong, dismissal is likely to be an appropriate response. In this case, the employer had sent an email forbidding employees from using Facebook and similar sites, so a UK court would probably find there were valid grounds for dismissal.

However, a UK employer would need to follow a different procedure in order to dismiss fairly. Once a permitted ground for termination is established, the employer still needs to show that it acted reasonably in dismissing the employee for the reason in question. The outcome largely depends on whether the employer followed the appropriate procedure, given the nature of the misconduct and how serious it was. In this case, the claimant seems to have been dismissed without notice and without a performance management procedure having been put in place. In the UK, that would only be appropriate for very serious misconduct. In other cases, the employer should investigate the matter and then hold a disciplinary meeting to discuss the matter with the employee and hear any explanation or mitigating circumstances. Following the meeting, the employer may issue a warning that if the behaviour does not improve, there may be further disciplinary proceedings and eventual dismissal. Normally, the employer would hold a second disciplinary hearing and give a final warning before resorting to dismissal would be appropriate. When an employee is dismissed in such circumstances, he or she should normally be given notice pay.

It is unlawful in the UK to dismiss someone for "blowing the whistle" on unlawful practices. So, if the pay freeze had been unlawful and the employee was dismissed for complaining about it "in revenge", that could be an unfair dismissal.

Subject: Unfair dismissal

Parties: AT Ð v Ð Singapore Airlines

Court: Athens Court of First Instance

Date: January 2011

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

Case number: 34/2011

Internet publication: http://lawdb.intrasoftnet.com/nomos/3_nomologia_rs.php

---

Creator: Athens Court of First Instance
Verdict at: 2011-01-31
Case number: 34/2011