SUMMARY

2013/32 Employee not liable to employer for insulting Facebook post (FR)

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Facts

A French law on press freedom dating from 1881 distinguishes between two types of insult: a severe insult (*diffamation*) and a milder insult (*injure*). Both types of insult can be committed either publicly or privately. The 1881 law deals only with publicly committed insults. Such insults are criminal offences (*délits*). Insulting in a manner that is not in the public domain is a lesser type of criminal offence (*contravention*) under the Criminal Code.

The defendant in this case was Maria-Rosa Veca. She was employed by a company called the *Agence du Palais*, that was managed by Ms Duputel.

Shortly before being dismissed, Ms Veca posted the following text on her MSN page: "Sarko [= *Sarkozy, the former French President*] should adopt a law exterminating pain-in-the-ass ('*chieuses*') managers like mine". Around the same time she posted some extremely crude and insulting texts about her boss on her Facebook account. When her employer found out about these texts, the company and Ms Duputel (joint plaintiffs) brought proceedings against

Ms Veca, claiming damages on account of public insult.

Ms Veca denied that the comments she had made about her boss were made publicly, given that those comments were only accessible for her Facebook and MSN 'friends'. The plaintiffs argued that Facebook and MSN posts are necessarily public, as anyone the person doing the posting accepts as a 'friend' can access the postings.

The court of first instance and the appellate court dismissed the claim. The claim on behalf of the company was declared to be outside the scope of the proceedings (*irrecevable*), as the insulting posts were aimed at Ms Duputel only. Ms Duputel's claim was rejected on the grounds that the posts were not made public. The plaintiffs appealed to the Civil Chamber of the Supreme Court (*Cour de cassation, chambre civile*).

Judgment

The Supreme Court confirmed both the dismissal of the company's claim and Ms Duputel's claim, inasmuch as it was based on the 1881 law. It noted that the messages posted on MSN and Facebook "were accessible only to a restricted number of persons authorised by the author", those persons constituting a closed community (*communauté d'interêts*).

However, the Supreme Court did criticise the appellate court for not investigating whether the posts constituted a non-public insult, in which case Ms Duputel could perhaps have claimed damages for injury to feelings.

Commentary

If there is no public insult when the audience is restricted, it follows that if the employee had chosen to send the messages to all her 'friends' and the 'friends' of those 'friends', the court would have taken into account the fact that the messages were made public. As a result, the messages would have been sent in breach of the law. Therefore, Internet users should be cautious about the publication criteria used when sending messages and be aware that in absence of specific criteria, a message is always considered public.

However, the judgment is not clear about the meaning of a "restricted number of persons authorised by the author". How many people does that add up to? It seems the average internet user has 210 'friends' on Facebook.

Further, even if there is no public insult because the message is posted to a limited number of people, an employee still may be convicted of a non-public insult, which is punishable by a fine.

Finally, insults posted by an employee may constitute an abuse of his or her freedom of speech and expose the employee to disciplinary sanctions.

The judgment was handed down by the Civil Chamber of the Supreme Court. So far, the Social Chamber of the Supreme Court has not ruled on the validity of disciplinary sanctions or dismissals based on messages published by an employee on Facebook. But many Courts of Appeal have had the occasion to rule on this subject and show themselves to be somewhat unfavourable towards employees.

Thus, with the exception of one Court of Appeal, the majority of courts consider that criticisms or offensive remarks published on social networks by an employee about employers may constitute a real and serious cause for dismissal. According to the judges, by posting a message on a 'friend's wall', the employee runs the risk of his message going viral. The 'friend' may have hundreds of 'friends' or may not have blocked access to his profile. Anyone belonging to Facebook could thus have access to the message. Therefore, even though the Social Chamber of the Supreme Court has not yet ruled, it seems quite clear that employees should use moderation and never forget that they have a legal obligation of loyalty to their employer.

If the employee wants to send a message privately, he or she has the option of using the individual mailbox on Facebook or the filters on the site to ensure the conversation remains strictly private.

As for organisations, prevention and information are more important than ever. Many employees are unaware that their comments on Facebook and their tweets could be read by anyone and everyone. For this reason, more and more organisations are putting in place internal codes governing the use of social media – and so reminding everyone of the boundaries between public and private space.

Subject: Freedom of speech

Parties: Ms Veca – v – Ms Duputel and Agence du Palais

Court: Cour de Cassation (Supreme Court)

Date: 10 April 2013

Case number: 11-19530

Creator: Cour de cassation (French Supreme Court)
Verdict at: 2013-04-10
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