EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2012/55
 Facebook posting not covered by right to free speech (NL)

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A Facebook message to one’s ‘friends’ can lead to dismissal.

Facts

This case concerns a 37 year old employee of the “Blokker” supermarket chain. He worked in a warehouse on a fixed-term contract. On 13 January 2012, he asked his boss for an advance on his salary. His request was turned down, whereupon he posted a message on his Facebook account in which he criticised his employer. His employer found out about this and warned him not to repeat his behaviour.

On 2 February 2012, the employee again posted a message on Facebook. It was extremely insulting both for his employer and for his boss in particular. Although the message had been posted on the employee’s private Facebook account and could only be read by his ‘friends’, his employer found out the same day, having been informed by one of those ‘friends’, a colleague. The employee was dismissed summarily.

Blokker was unsure whether, if challenged, the dismissal would stand up in court. It therefore applied to the court for conditional termination of the parties’ employment agreement.[1]

Judgment

The employee invoked his constitutional right to free speech. He said he had removed the posting from his Facebook page soon after his dismissal.

The court held that the employee had insulted his employer in a manner that had nothing to do with free speech. The court added that employees' right to free speech is limited by their duty of care towards their employer.

The court went on to note that the private nature of Facebook and of a person's Facebook 'friends' is relative. In this instance, one of those 'friends' had informed the employer. Moreover, any of the individuals who received the posting could have forwarded it to others.

In view of the fact that the original warning was given less than three weeks before, the court found the summary dismissal to be justified and granted the employer's application for conditional termination.

Commentary

In the early days of Internet, the Data Protection Agency used to advise employers and employees "to treat online the same as offline". In other words, if you need to assess the privacy-law aspects of an online event, you should compare it to the nearest equivalent offline situation. For example, if an employee is caught watching pornography on his computer during working hours, that should be compared to reading Playboy. Similarly, if an employer intercepts incoming email, that should be compared to the employer opening a letter addressed to the employee.

Clearly, this advice is no longer very helpful. One cannot compare a Facebook posting or other message on the Internet to, for example, a remark made by someone to his friends in a pub. Had the employee in the case reported above said the same things about his employer and his boss verbally to a group of friends, rather than expressing his feelings in writing on Facebook, the outcome of the case may not have been the same.

The right balance between an employee's right to free speech and his duty to refrain from making harmful public pronouncements on his employer depends on a number of variables, such as (a) the degree of harmfulness; (b) the (potential) size of his audience; (c) the method of communication; and (d) the relationship between the employee and his audience.

Taking the following offline examples:

1° Employee moans about his work load (variable (a)) to one colleague (variable (b)), verbally (variable (c)), the colleague being someone he trusts to keep the information confidential (variable (d)). If the colleague passes the information on to another colleague, who informs management, that clearly would not be a cause for dismissal.

2° During a dinner party (c), employee informs three (b) of his friends, not being co-

employees (d), that his boss is ruining the company (a); if one of these friends tips off a local journalist, that could possibly be a more serious situation than in the previous example.

3° Employee types an unfounded and inflammatory notice (a), which he pins on the notice board in the staff canteen (c), where all employees (b) as well as visitors (d) can read it. This situation comes close to that in the ECtHR's judgments in Fuentes Bobo (ECtHR 29 February 2000 appl. No. 39293/98) and Palomo Sanchez (ECtHR 12 September 2011 appl. No. 28955/06).

The three examples above are all offline examples. They pose problems that are difficult enough, but modern media add an extra dimension because (i) the audience is unlimited in size, (ii) that audience is easily reached (a simple posting, typed in a matter of minutes in the privacy of one's home, can 'go viral') and (iii) in many cases the posting cannot be removed and goes on existing uncontrollably for ever, in contrast to the spoken word, that is fleeting. Moreover, where in a verbal conversation a remark is made within a context and with a certain tone of voice (sarcasm, for example), a message posted on Facebook can easily be taken out of context and/or lose relevant nuance. It is artificial to argue that a Facebook message that is sent only to 'friends' reaches no more than a select group, in a similar way to offline example 2 above. A Facebook posting, however limited the list of addressees, almost by definition risks creating a situation similar to offline example 3.

Comments from other jurisdictions

Denmark (Mariann Norrbom): In Denmark, we have seen a few cases regarding Facebook postings. Case law has already established that an employee's duty of loyalty (and perhaps also duty of confidentiality) imposes some restrictions on the freedom of speech, but contrary to this case from The Netherlands freedom of speech has not been used as an argument in these Danish cases.

It was, however, argued that a Facebook posting can be limited in such a way that only the employee's friends are able to see the posting and, consequently, that Facebook postings are not covered by the duty of loyalty.

In one of the cases - which is somewhat similar to the Dutch case - the employee was dissatisfied with the employer, so she posted on Facebook that she "declared war" against her employer and that she looked forward to getting value for her union membership. The court found that these postings, which were clearly phrased in a negative way, could damage the employer's reputation. Based on the employee's duty of loyalty, the court held that the employee was not entitled to post these statements and, accordingly, that the employer was justified in dismissing her. In this case, it was a decisive factor that the employee knew that

some of her Facebook friends were customers, business partners and competitors of the employer. This is in line with the Dutch case.

The court also emphasized that the language on Facebook is very similar to spoken language, and this is the reason why it may easily be understood to be more offensive than intended. This is also in line with the Dutch commentary, stating that written text loses the nuance of the spoken word, which makes it almost impossible for the reader to interpret the meaning of the text.

Careless Facebook postings have recently resulted in a PR worker having to resign from her position with a governmental body. The PR worker posted that she loved the new tax reform in Denmark and that personally she was happy about the reform even though it was bad news for the poor. This is a good example of how something that was probably intended to be a private posting with an ironic undertone reflects back on the employer in a negative way.

There is no doubt that we will see more cases regarding the use of Facebook in the future, since many people do not realise that postings on Facebook are not considered private from a labour point of view.

Germany (Klaus Thönißen): In Germany several cases of this kind have come up as well. Obviously, it has become very popular to defame either an employer or co-worker via social networks.

Insults may justify dismissal under German employment law. The judicial opinions in Germany are very close to the one in the case at hand. The German courts also argue about the difference between insulting one's boss by telling a friend/co-worker or by posting it on Facebook. It seems that defamation on Facebook weighs heavier than insulting someone verbally. The reason for this is that "the internet doesn't forget", i.e. a Facebook post is permanent.

In October 2012 the Regional Labour Court of Hamm found that an insulting post on Facebook justified a dismissal without notice. In that case, the employee stated in the "about" section on his Facebook profile "works for oppressor of people and exploiter". Similarly, a District Labour Court in Duisburg found a dismissal without notice to have been lawful because an employee insulted his co-workers on Facebook. In that case the insults included expressions such as "ass- kissers" and "smart-asses".

Luxembourg (Michel Molitor): The question of whether malicious or insulting Facebook posts are covered by employees' right to free speech has not been yet come before the Luxembourg courts as far as we are aware. However, freedom of speech is not an absolute right also in

Luxembourg and does not prevent employers from taking disciplinary action against employees who have breached the mutual trust governing each working relationship. In any event, in the present case, the Luxembourg Labour Courts would probably have followed French case law, pursuant to which messages posted on a private Facebook account are considered as private correspondence and they would have declared the dismissal invalid.

United Kingdom (Richard Lister): The trend in the UK is also to regard Facebook communications as somewhat different from other forms of communication with friends. This is largely due to the ease with which a message can be sent to a large group of people, and the fact that the message can then be copied and passed on to others, meaning the author loses control over the information and it can quickly go "viral".

An employee's rights under the Human Rights Act 1998 do need to be taken into account in deciding whether a dismissal for Facebook activity is fair. A Facebook posting may engage an employee's right to free speech, but an employer's rights to protect both others' and its own reputation may override this right. An employee will only have privacy rights if he or she has a "reasonable expectation of privacy" in relation to use of Facebook, which is difficult to establish if the employee's page is publicly accessible and/or open to a wide range of 'friends'.

There have been a number of recent employment tribunal decisions which have found that dismissals of employees for inappropriate Facebook postings were fair. As in the case above, in some of these cases it was one of the employee's "friends" who had informed the employer about the posting. However, the fairness of such dismissals will still depend on the employer having clear rules about the use of social media, which have been communicated to employees. It will also depend on the seriousness of the comments for the employer and the likelihood of the information being seen by others: there have been cases where dismissals for use of social media have been found to be unfair for these reasons.

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