EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2018/4 Racist “liking” on Facebook may justify dismissal for serious misconduct (BE)

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Facts

The Claimant had been employed as accountant since 26 March 2002 by a non-profit making organisation (the ‘Respondent’) responsible for revamping and promoting the city centre of an unnamed Belgian city.

In 2013, the Respondent noticed that the Claimant had published internet links on his

Facebook wall referring to 'la quenelle' (a controversial gesture with racist connotations, regarded as a reference to the Hitler salute) and to the French artist Dieudonné (who had been found guilty of racial hate speech more than once).

After a meeting with the president and vice-president of the Respondent, the Claimant made the following pledge:

"I firmly and irrevocably commit, until the end of my career with [the Respondent] [...]not to publish humour likely to shock the public or give a false image of [the Respondent] on social media or any by other means of communication, such as the internet, orally or in writing by other means."

On 3 April 2014, the director of the Respondent noticed that the Claimant had liked some posts from the 'quenelliers parisiens' on his Facebook wall. By registered letter of 18 June 2014, the board of the Respondent dismissed the Claimant for serious misconduct.

On 7 July 2014, the Claimant filed a claim against the Respondent before the Labour Tribunal of Liège. The Tribunal sentenced the Respondent to pay an indemnity in lieu of notice to the Claimant, as it considered that the formal condition of notification that is required for a valid dismissal for serious misconduct had not been fulfilled. The Respondent appealed the decision before the Labour Court of Liège.

Judgment

Having established that the formal requirements for the dismissal for serious misconduct were met, the Labour Court analysed the serious misconduct itself.

The Labour Court stated that the Claimant had 'liked' links on Facebook that referred to 'Quenellier' movements, that is, groups of an openly anti-Semitic nature. Liking those groups on Facebook demonstrates, said the Labour Court, either adhesion or, at the very least, interest in their ideas or racist humour. Moreover, the word 'like' shows that the Claimant is not only interested by the posts, but appreciates them.

The Labour Court also referred in its ruling to the written commitment of the Claimant to avoid any communication likely to run counter to public opinion or to give a false impression of the Respondent on social media. The Labour Court accepted that when the Claimant 'liked' a website on his Facebook page, the website itself did not appear on his profile. However, when the Claimant 'liked' such a website, the Court felt he was indicating his adhesion to what they had published and that this was at least partially in contravention of his commitment.

Although the Claimant was entitled to freedom of expression, in the Court's view, he was not entitled to abuse it to harm the reputation of the Respondent, which was a not-for-profit organisation whose purpose was social integration. No such organisation could tolerate discriminatory and racist behaviour by one of its employees.

The Labour Court considered that the Claimant had committed serious misconduct for failing to respect the Respondent's reasonable instructions and because his behaviour represented a risk to the reputation of the Respondent, which was a not-for-profit organisation involved in social integration projects with people from diverse backgrounds.

Commentary

Racist 'likes' on Facebook may justify dismissal for serious misconduct, says the Labour Court of Liège in this interesting case. This case is in line with a previous decision of the Labour Tribunal of Namur of 10 January 2011, which held that racist or xenophobic comments on Facebook are, in principle, good cause for dismissal.

More generally, this case also confirms settled case law according to which, facts relating to a person's private life may justify his or her dismissal for serious misconduct if they are of such a nature as to definitively and irrevocably break the bond of trust between employer and employee.

However, the case at hand goes further, because, to the author's knowledge, this is the first time that a simple 'like' on Facebook has been assessed in relation to a dismissal decision. Past decisions dealt with comments on Facebook written by the employee – which could be directly attributed to their author. The Labour Court therefore considered that 'liking' a racist post by another could be considered as a limited form of publication in itself. In this case, the Claimant had already promised not to post racist views. By 'liking' a racist website on Facebook, the Claimant was showing interest in and sympathy for the ideas promoted on that website, according to the Court, and this could have harmed the reputation of the Respondent.

It is striking that the Labour Court did not assess the case from the viewpoint of Article 8 of the European Convention on Human Rights ('ECHR') on the right to respect for private and family life. Should we infer from this that by posting a 'like' on Facebook the Claimant had waived any protection of his private life? Not necessarily. It seems that the right to privacy could not be invoked by the Claimant because the director of the Respondent had accessed the Facebook wall of the Claimant lawfully – most probably as a friend or because of the public nature of his profile. Had the profile been private, Article 8 ECHR would have come to the forefront.

The Labour Court also deems that the freedom of expression of the Claimant was lawfully limited, so as to protect the corporate image of the Respondent. This finding is acceptable in principle, but would have benefitted from closer examination of the circumstances of the case from the viewpoint of Article 10 ECHR.

For the European Court of Human Rights: “freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 [ECHR], it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’. This means, amongst other things, that every ‘formality’, ‘condition’, ‘restriction’ or ‘penalty’ imposed in this sphere must be proportionate to the legitimate aim pursued.” (Handyside – v – the United Kingdom, judgment of 7 December 1976, § 49; underlining by the author).

When dealing with cases concerning incitement to hatred and freedom of expression, the European Court of Human Rights uses two approaches provided for by the ECHR:

to exclude comments that amount to hate speech and negate the fundamental values of the ECHR from its protection, as provided by Article 17 (prohibition of abuse of rights); and

to set restrictions on the protection, as provided by Article 10(2) of the ECHR (this approach is adopted where the speech, although it is hate speech, is not apt to destroy the fundamental values espoused in the ECHR).

The Labour Court should have clarified which approach it intended to follow and justify it based on the facts of the case, taking into account that the Claimant did not criticize either his employer or any of his colleagues, as is more usually the case with dismissals for serious misconduct based on excessive use of freedom of expression. Nor does it seem that the Claimant did the posting of ‘likes’ on his Facebook wall from the workplace – which might also have given rise to dismissal for serious misconduct.

The only effect of the racist ‘likes’ of the Claimant on the Respondent seems to have been that

the corporate image of the latter could have been impacted by association with the opinions of the Claimant. Protecting the corporate image of a company is a valid justification for restricting fundamental freedoms, as the European Court of Human Rights recognized in the Eweida case (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10, judgment of 15 January 2013) and the European Court of Justice found in the Achbita case (Case C-157/15, judgment of 14 March 2017). However, it is doubtful that protecting the image of a company against the potential risk of association with racist comments on Facebook would pass the test of proportionality if this risk was not substantiated to some extent at least.

Unfortunately, there is no discussion about whether the Facebook profile of the Claimant was public (open to all), semi-public (open to friends of friends) or private (friends only). Nor do we know whether the Claimant had a lot of friends or if, amongst his friends, there were many colleagues or clients of the Respondent. All these elements would have been important in assessing the risk of harm to the Respondent.

Comments from other jurisdictions

United Kingdom (Bethan Carney, Lewis Silkin LLP): I am not aware of any cases in the UK where a dismissal for merely 'liking' a Facebook post (as distinct from posting or commenting on a post) has been upheld as a fair dismissal for serious misconduct. At first glance, to dismiss for such a reason would seem disproportionate. However, it is possible that a UK tribunal would reach a similar decision on this set of facts. It is significant both that the posts 'liked' were openly anti-Semitic and that the claimant had previously been warned about making offensive and racist publications on social media and had undertaken not to do so again. A UK court would also take into account the fact that the respondent was a not-for profit organisation involved in social integration projects and so its reputation could be significantly damaged by such actions. A UK court would consider the claimant's right to freedom of expression set out in Article 10 of the European Convention on Human Rights. It would balance this right against the damage that might be done by the claimant's action to the rights and reputation of the respondent (Article 10.2 ECHR). Whether or not the dismissal was fair would rest upon how far the claimant's actions in 'liking' the post could be said to affect his employer and the employment relationship. As in Belgium, whether or not the profile was private or open to all would be relevant when considering this question.

Finland (Janne Nurminen, Roschier Attorneys Ltd.): The question of what an employee can and cannot say or do on social media has received a lot of attention in Finland over the past few years. Up until now however, the discussion has largely circled around employees' posts and comments in which the employee criticises the employer. There has also been some discussion on the possible consequences of an employee's racist behaviour on social media. In

general, the limits of what kind of social media behaviour constitutes grounds for a warning or dismissal are unclear. Based on the few court cases and judicial articles about this, we think that if this case occurred in Finland, a court would at least consider the how much publicity the like received, the nature of the employee's work (e.g. representing the employer in front of clients or the general public) and the position of the employee in the organisation, as well as whether or not the employee had disclosed the name of the employer in his or her profile or previous posts.

Subject: Freedom of expression, unfair dismissal

Parties: Mr L. – v – ASBL L.

Court: Court du Travail de Liège (Labour Court of Liège)

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