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Protection of the employer's reputation versus the employee's freedom of expression

by Stefan Stanev

Under certain circumstances, the circulation of information about the employer's activity can be considered a violation of employment regulations and a breach of the employee's duty of loyalty. The abuse of the employer's trust arises if the employee acts in a way that compromises the trust placed in him and discredits his/her employer with third parties, regardless of intent. The infringement can take different forms, but the distinctive trait is the violation of the trust between employee and employer, as well as the adverse consequences in terms of company competitiveness, effectiveness and reputation.

Rommelfanger v. Germany concerned a doctor who was dismissed from a Catholic hospital because of his personal views on abortion. The Human Rights Commission claimed that the requirement for the doctor to refrain from making any statements on abortion contradicting the Church's position is not unreasonable as this matter is of essential importance to the Church.
In another case, the Courts held that there is a positive obligation upon the state to protect freedom of expression from threats made by private parties. In *Fuentes Bobo v Spain*, the applicant was dismissed by a Spanish television company because of his criticism against the management. The ECtHR held that there was a violation of Article 10. It becomes clear from the cases above that we are faced with a need to strike a balance between the right to good reputation and the right to freedom of expression.

Although it is one of the fundamental principles upon which any democratic society is built, the right to freedom of expression is not absolute. The grounds for its restriction are listed in Paragraph 2 of Article 10 of the European Convention on Human Rights, which does not allow it to be used to violate certain rights and interests. In this context, the Court needs to assess both the right of the employee to freedom of expression and the right of the employer to protect reputation and, accordingly, whether the interference with the right to freedom of expression is balanced, pursues a legitimate aim and is proportionate to the protected interest. It is well- established that when there is a conflict between two rights protected by the Convention neither of them can neutralise the other in absolute terms. The two need to exist in harmony, depending on the facts in each case. This approach is followed even when a certain statement from the expression may be of public interest.

The foregoing makes it clear that the Court would not give precedence to freedom of expression in all cases, regardless of its importance for the establishment of democratic processes. However, in all cases the judges would analyse the words or statements that the applicant complains of. The essential question here is whether it is a factual statement or an evaluation (opinion, assessment).

Whereas facts can be confirmed, the truthfulness of evaluations cannot be ascertained. In order to determine whether a certain expression is a fact or an evaluation, the tribunal needs to review the full statement and ascertain the intent and goals which motivated the statement. The context in which the statement was made is also important. If the employee was discussing a topic of public interest, the ECtHR is more inclined to protect the right to freedom of expression. Conversely, if the employee intended to damage the good reputation of the employer through false statements, the Court would protect the right to a good reputation.

Even if a statement is an evaluation, the proportionality of the interference may depend on the existence of a sufficient factual basis for such an evaluation. It is possible to also conclude that it is clear that in the majority of cases strong language was used to describe a specific situation (*e.g.* in *Lingens v Austria*, the journalist used words such as "unworthy", "amoral" *etc*.). However, using strong, even offensive, language would not always provide grounds for giving precedence to the right to a good reputation. As has already been noted, the facts of the case, as well as the proportionality of the restriction, are essential. The Court would also take into consideration employee status. The factual inequality in the employment relationship gives the employer the ability to "censor" their employees in various ways – through pressure, imposing disciplinary sanctions *etc*. Faced with the threat of disciplinary sanctions for "damaging the good reputation of the employer", the employee would hardly dare publish or reveal information about working conditions in the company, salaries, *etc*. That is why the Strasbourg Court has shown a preference for making its own assessment of the statement in any given case.

The tendency of the Court to adopt a broad interpretation of the term "public interest", including to make its own assessment of the statement, undoubtedly strengthens the freedom of expression. It can be rightly argued that the nature of the professional activity of private parties is such that it justifies approximating them to public figures, who must accept wider margins of permissible criticism.

The following conclusions can be made from the aforementioned judgment (Heinish v. Germany). Under certain circumstances the notification by an employee of committed illegal activities or violations at the workplace can be used as defence. This defence would apply if the specific employee was the only person or part of a small group of people who are aware of what is happening at the workplace, and therefore in a position to defend the public interest. The Court would take into consideration other relevant factors, such as: the importance of the information, its truthfulness and the proportionality of the sanctions imposed on the employee.

Thus the truthful factual statement, in principle, would have to be accepted, and the threshold for a breach of the right to a reputation in this case would be met only when it makes it possible to make threats to harm the individual, which are not related to the interest in the dissemination of the truth. In the judgement issued for *Palomo Sanchez and others v Spain*, the Court arrived at the conclusion that when expressing an opinion one must observe the rules of acceptable behaviour and refrain from using offensive language. In this case, the importance of the public interests was not sufficient to change the nature of the statement, namely an attack on colleagues. To accept that any alert and any dissemination of information about the presence of irregularities in the organisation of a business made by an employee is a breach of the loyalty of the employee to his/her employer, means that the employee is made dependent and there is no equality

between the parties in the employment relationship. Nevertheless, all the facts of each case must be considered, insofar as a series of notifications about irregularities are made by workers and employees acting in bad faith. The case law of the Strasbourg Court can provide invaluable guidance to the courts as it represents to the greatest extent the accomplishments of the European doctrine in the area of Human Rights.

Stefan Stanev
Bulgarian Lawyers for Human Rights