CONFERENCES AND REPORTS

The 29th Labour Law Symposium in Passau 2015 and its Results, with Czech Approach to Facebook-Posting[1]

The 29th Labour Law Symposium called "Termination of Employment: Old and New Issues" was organised in Passau, the Bavarian university city, in June 18–19, 2015. There were 220 participants at the symposium, mainly in-house lawyers, lawyers from employers' unions, trade unions, law firms, courts and universities from all parts of Germany. Czech participants were **Professor Petr Tröster**, **Associate Professor Věra Štangová** and **Jan Kalbheim**, DAAD lecturer (Deutscher Akademischer Austausch-Dienst). The symposium was held in the large ridotto hall of the City Theatre.

The symposium was opened and directed by **Professor Frank Maschmann** from the Regensburg University who has been organizing and moderating labour law symposia in Passau for four years. The programme offered eight main speeches delivered by a presiding judge and a retired judge of the Federal Labour Court, three university professors, a presiding judge from the Land Labour Court, a head of the human resources department and a head clerk of a firm, as well as two attorneys-at-law. All lectures and speeches, which will be mentioned in detail later, were followed by vivid expert discussions; the introduction of general regulation of minimum wages amounting to € 8.50 per hour in all branches and for all employees, effective as of January 1, 2015 was one of the topics.

Primarily, the symposium was designed for practicing lawyers. Termination of employment was the main topic. Prof. Maschmann stated in his opening paper that, having on mind the many thousands of lawsuits tried every year, all the controversial questions should have been effectively resolved. But such is not the case. Many new questions are being raised. Prof. Hromadka[2] wrote succinctly that "one is thinking only about the fact that the employee may 'clear the air' (Luft machen) by expressing discontent with his unpopular employer on Facebook, or about the fact that the employer wants to discover secret nooks of 'black sheep' among his employees by means of Facebook monitoring". In addition, new "players" in labour law have been coming, such as the Court of Justice of the European Union and the European Court for Human Rights, which without much regard to national perspectives apply their "scent marks" (Duftmarken)[3] in the law of termination according to Hromadka – and what else should they do with 28 EU member states and 47 states in the Council of Europe.

Professor Martin Franzen from Ludwig-Maximilians-Universität in Munich discussed the ensuing legal problems. In his speech "European law and the termination of employment in Germany" he focused on secondary law of the European Union, time limitation of employment, fixed-term employment contracts and on the Council Directive 1999/70/EC on fixed-term work, which in clause 5 (1) provides that the Member States must implement at least one of three measures for the prevention of abuse of fixed-term employment contracts or relationships. The measures are as follows:

(a) objective reasons justifying the renewal of such contracts or relationships;

[1] The present report was created under research project of Charles University in Prague PRVOUK 06 "Public law in context of Europeanisation and globalization".

[2] Compare *Streitfragen rund um die Kündigung* (*Controversial Questions of Termination of Employment*), Passauer Neue Presse of 24. 06. 2015.

[3] Ibid.

(b) the maximum total duration of such successive fixed-term employment contracts or relationships;
(c) the admissible number of renewals of such employments or relationships.

Prof. Franzen mentioned the termination of employment and focused on the prohibition of termination in certain areas:

a) the transfer of the business under Article 4 (1) of the Council Directive 2001/23/EC; this provision does not preclude dismissals for economic, technical or organizational reasons entailing changes in the workforce;
b) the protection of mothers under Article 10 of the Council Directive 92/85/EEC, namely the prohibition of dismissal of workers from the beginning of their pregnancy to the end of the maternity leave;
c) parental leave under Clause 5(4) of the Framework Agreement concerning the Council Directive 2010/18/EU; Member States shall take the required measures to protect employees against dismissal on the grounds of an application for, or exercising the right to, parental leave to ensure that workers can defend their right to parental leave.

Prof. Franzen presented several judgments of the Court of Justice of the European Union and demonstrated the protection against discriminatory dismissal on the CJEU decision C-354/13 of 18 December 2014 (Kaltoft). It was a case of a Danish citizen who was dismissed on the grounds of his disability; the court declared the dismissal unenforceable and the employer was found liable for damages.

The lecturer emphasized several decisions of the European Court for Human Rights. He praised the creativity of these courts which, in spite of rather minimal legal grounds in the law of termination of employment, claim more and more space for their decisions.

Prof. Franzen paid special attention to primary law of the European Union, namely the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human rights and Fundamental Freedoms.

The following speaker was **Professor Frank Bayreuther** from the University of Passau. The title of his lecture was "Termination of employment on the grounds of age and further work in old age". He stated at the beginning of his paper that "the admissibility of age limits became highly controversial after the effect of AGG law from the point of view of regulation of discrimination. However, the limits of old age in employment and collective contracts, as well as in company agreements, are admissible with respect to discrimination regulation if they follow the possibility of maintaining regular old age pension provided in social security law. It has been confirmed by the new wording of s. 41(3) of the SGB (Sozialgesetzbuch), part VI: 'Employment relationship shall terminate, without a notice of termination, at the end of the month in which the employee attains the regular limit of old age pension according to the statutory pension insurance'." Fixed-term employment contracts reaching over the pensionable age may be renewed under identical work conditions as often and for so long as one pleases. This situation, without any limits, does not conform to European law. However, concerns over Americanization of the situation, where people are still employed in their 90ies, are fully unjustified. Unlike in the USA, in the FRD there is obligatory old age pension insurance.

Professor Achim Schunder from Frankfurt on the Main concentrated on terminations on the grounds of illness which represent about 10 per cent of more than 200,000 terminations per year.[4] By means of company participatory management the law giver suggested the direction which the personnel policy should follow. Prevention is to be preferred to notice of termination. If an employee repeatedly leaves work because of an illness for a longer period of time, the employer or the entrepreneur face insistent organizational and economic problems. The final out-

[4] See also W. Hromadka, op.cit. sub 1.

come then is the termination of employment. Important legal aspects of dismissals on the grounds of an illness are the following: a breach of duties relevant for notice of termination resulting from inability to work caused by an illness, evidentially authentic medical reports supporting inability to work and their significance as well as the issues of interpretation and proving, the possibility to terminate employment of seriously handicapped employees for health reasons, especially with respect to current judgments of the Federal Labour Court in cases of HIV without symptoms defined as handicaps, avoiding formal mistakes in terminations on the grounds of an illness and other slips.

Dr. Steffen Burr, an attorney from Öhringen, presented a very topical speech "Termination due to malign Facebook-Posting" which is a new phenomenon. In his opinion social media captured our everyday long time ago. Facebook has more than a billion of users round the world which makes it the most frequently attended social network. As the most favourite social network it prepares a technological innovation which will facilitate the recognition of its users' faces in almost any photograph. The software should not help to infringe privacy on Facebook, but it should serve as its protection. If Facebook recognizes the face of a specific person on one of 400 million snaps which are daily uploaded there, an automatic warning will be sent to such person and she or he can decide to have their face removed from the picture. Besides positive messages, however, there are postings which may grossly invade the rights of third persons. Increasingly, labour law has been facing the question how much such expressions on social media can justify the notice, and it has to find the sharp division line between the freedom of expression of the employee and personal rights and the freedom to carry out business of the employer.

No one protests against a few clear words said about his or her own employer by an employee justly relying on confidentiality of the conversation. Not even an unexpected breach of confidentiality by the partner in conversation constitutes a reason for notice. But Facebook –Posting is a different matter. Information is permanently placed on the net and spread massively. **Professor Wolfgang Hromadka**[5], referring to Dr. Steffen Burr, states that "each Facebook user has on average 190 'friends' who have 'friendly' Internet connections with other people. Confidentiality is extremely rare. Caution in statements that are defamatory or damage reputation, disclose company or business secrets, criticise one's employer and his products or call to boycott, has been weakened."

Let me make a short digression to Czech mass media. In their article "Facebook v. Privacy of the Europeans"[6] Aleš Černý and Jan Brož write that apparently, the largest social network Facebook has successfully assumed the position of 'No. 1 ferret on the Internet'. Its critics have been encouraged by several European courts in recent months. For example, a court in Belgium decided in favour of the local office for the protection of personal data. The court called on Facebook to stop following users who do not have their own account on Facebook and only visited the sites. Facebook used small files called cookies to collect internet traces left by its "non-users".

The Belgian court imposed a penalty on the American company amounting to a quarter of a million Euros (6.7 million CZK) for each day the company would continue in this practice. It is by no means an amount that would destroy Facebook. According to quarterly results published recently, net earnings of the company amount to 242 million per day. Facebook has not changed its cookies policy. Its representatives informed that the company would file an appeal against the decision. The Belgian case is not the only one where a European court ruled against the largest social network. The Court of Justice of the European Union took the side of the Austrian activist Max Schrems in October when it decided that European offices for the protection of personal data have the right to stop the transfer of data about their citizens to American servers. The CJEU decision imposes duties mainly on the Irish office for the protection of per-

[5] See footnote 1.
[6] Compare *Mladá fronta Dnes* of 14 November 2015, p. 11.

sonal data because all Facebook users outside of the USA and Canada provide their data to the Irish headquarters.

The article published on the Internet on 19 November 2015 with the heading "Firms introduce Internet surveillance. Comment on the net results in threat of notice" (the author: kah)[7] states among other things: "Social networks represent a brilliant means of promotion from the companies' perspective. They advertise their products and services and build their brands there. However, the employees occasionally interfere by unadvised publishing of opinions or revealing sensitive information." S. 316(1) of the Czech Labour Code provides that the employer's means of work, including computer technologies and other telecommunications equipment, may not be used for private purposes without employer's consent. "If an employee uses social networks, on his or her own mobile phone indeed, but during working hours, such conduct may constitute grounds for termination of employment," warns Petr Glogar, attorney-at-law at the international law firm PwC Legal.

The rules regulating what employees may or may not present about their work on social networks are an important part of the Social Media Policy. What is mostly prohibited? Primarily comments on the strategy of the company, on its closed business and economic results, know-how, patents and innovations. Then to disclose information which does not expose any company secrets, but can damage its credibility or reputation in the eyes of public and business partners. For example, sensitive information about the management, other employees, business partners, production processes.

Employees must know the definition and limits of what they can and cannot do. And which social media can be used or must not be used for communication at work. Generally, they are the media which can spread any information to the public, such as Facebook.

According to Petr Glogar it is necessary to warn employees that a breach of Social Media Policy can result in notice or immediate termination of employment. In more serious cases also to compensation of damage which the employee may have caused to the company.

What is prohibited for employers? Companies should monitor the observation of such regulation very carefully. The employer must neither examine the content of an e-mail or a contribution sent by an employee to a social medium, nor know in detail what content an employee searches on websites.

Thus the employer may monitor the number of e-mails or, in case of a suspicion, check whether they are of personal or business nature. The time spent on internet and the number and type of visited websites can also be monitored.

In the end the article says that the employer can certainly prohibit the use of Internet during working hours completely. But the practice shows that employees require larger or smaller access to internet to deal with their private matters in working hours. The employer should tolerate some degree of such activities and offer them as a type of benefit and motivation for employees. That much about the Czech perspective.

Judgments in labour cases in Germany respond with many reservations to admissibility of covert video surveillance and its use in court proceedings. **Dr. Mario Eylert**, presiding judge of the Federal Labour Court in Erfurt, explained in his contribution called "Notice after secret monitoring of an employee" that courts would like to avert damage caused to personal rights of an innocent person under all circumstances. Thus they require that a strong suspicion against a concrete employee exist and that all other means ("ultima ratio") be used before secret monitoring. The Federal Labour Court ruled that covert monitoring of employees in a postal department where losses of parcels were above standard was inadmissible, as mentioned by Wolfgang Hromadka[8].

[7] See http://finance.idnes.cz/social-media-policy-zamestnanci-a-komunikace-na-socialnich-sitich-p92-/podnikani.aspx?c=A151111_162741_podnikani_kho.

Christoph Schmitz-Scholemann from Erfurt, a retired judge of the Federal Labour Court, delivered a speech called "Restructuring" and stressed questions which arise in the process of restructuring. Schmitz-Scholemann described them as "waves of notices".

"The law regulating protection against notice of termination is based on the principle of business freedom, i.e. the employer determines how many employees are needed. He also decides whether work shall be performed by employees or outsourced … The importance of numbers of temporarily posted employees is often overestimated: it applies just to three per cent of employment relationships," states Wolfgang Hromadka.[9]

The following speaker was an attorney-at-law **Alexander Zumkeller**, **MBA**, the head of human resources department in ABB GmbH from Mannheim who delivered a speech called "Preparation of notice and the process of protection against notice". He emphasized how dramatic measure the notice is both for the dismissed person, his colleagues and the employer. That is why the ABB applies the principle "Reorganization instead of dismissals", wrote W. Hromadka.[10] Mediation is considered useful in these processes.

The last speaker at the symposium was **Christoph Tillmans** from Freiburg, president of the Land Labour Court of Baden-Württemberg, who delivered a speech called "Court cases and gimmicks in the process of protection against termination" and provided many examples from his practice. Everything begins by the attitude to notice. "The employer must prove not only that and when the notice was served on the employee, but if the employee denies it, the employer must also prove that the notice of termination really was in the envelope served," commented Wolfgang Hromadka.[11]

An interesting cultural programme was a part of the symposium: Missa Solemnis by Joseph Haydn was performed in St. Stephen's Cathedral in Passau. Participants were accepted in the Museum of Modern Art where the ceremony of awarding two prizes of the Theory and Practice of Labour Law Foundation for 2015 took place. The prize for science (subsidised with € 3,000) was granted to the private docent from Cologne on the Rhine, Dr. Clemens Höpfner for his habilitation dissertation called "Die Tarifgeltung im Arbeitsverhältnis" (Applicability of Collective Bargaining Contract in Employment Relationship). The prize for practical application was granted to the executives of Max Frank GmbH & Co KG in Leiblfing for their project improving the work-family balance; the prize was sponsored by Bavarian Unions of Employers in Metal and Electro Industry.

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[8] Ibid.
[9] Ibid.
[10] Ibid.
[11] Ibid.

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