

SOCIAL MEDIA IN THE WORKPLACE IN THE CZECH REPUBLIC, POLAND AND SLOVAKIA

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Abstract: *This paper deals with legislation and case law regulating social media in the workplace. It analyzes mainly privacy's limits for selection procedures, working time and dismissals in three Central European states, such as the Czech Republic, Poland or Slovakia. Although there are common general principles like an employees' first and last task is to render services on behalf of his/her employer and do not misuse employer's devices to private purposes courts' decision varies. Alike action is considered in one state to be legal, in another illegal.*

Keywords: *Labour Law, Employees' Tort, Termination of Employment Relationship, Social Media*

1. INTRODUCTION

The spread of a technology through a Czech, Polish and Slovak society and industry has finally brought social media¹ sites in the workplace. Not surprisingly, one spends more than third of a day at the workplace. Therefore, it is understandable that during this time, but especially during brake time, one will inevitably deal with private or family matters. These days, most people who are of working age have some kind of online presence, whether it takes the form of a personal Twitter feed, MySpace, LinkedIn account, Facebook page, or posted comments and reviews on products, news articles, company websites, or other people's social media pages.² Another example is online communication. With the prevalence of social media, it's getting harder and harder to separate personal and professional lives. Almost everything is shared online, even privately, will be public.

Although social media can be a valuable tool for businesses³ it also causes serious problems on the job. Both legislature and employers are faced with the need to develop social media policies that allow society and companies to reap the positive benefits of social media use while minimizing the negative effects. Problems occur when employees abuse work internet access for personal use during work hours. Employers must decide if the use of social media outweighs the potential for negative impacts. There are already individuals lost a job because of posts or comments on social networking sites. Employees who have been "Facebook fired"⁴ are mainly U.S. cases.

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¹ Social media include various online technology tools that enable people to communicate easily via the internet to share information and resources. These tools can encompass text, audio, video, images, podcasts, and other multimedia communications.

² Accepted by the Supreme Court of the Czech Republic in decision 29 January 2014, file number 4 Tdo 16/2014.

³ A benefit of social media in the workplace is that it can be utilized as a public relations tool for companies. It allows a measure of transparency to the company through posts, blogs and pictures and makes the company easier to relate to for the average consumer. Companies can use social media to gather mailing lists, distribute sale and special offer information, showcase product pictures and post positive media reviews. Use of social media for work is a very inexpensive, often free, way to promote the business to a wide audience.

The growing use of social media has transformed the way multi-national businesses operate and has raised important questions as to the boundaries of the employer-employee relationship.⁵ This article explains the ins and outs of off-duty conduct and employees' rights under Czech, Polish and Slovak laws, and specific rules for certain types of private, off-duty activities. Although⁶ regulations on privacy are more strict and protective (first section of this Article) almost the same dismiss cases can be found also in all three countries.⁷ Social media has become a world issue. The extent to which an employer can use social media in recruitment (second section of this Article) as well as control an employee's use of social media (both in and outside of the workplace), and the repercussions for employers and employees where social media is misused (third section of this article), can vary from country to country, but there is a common shape followed in all three countries. Due to the fact that the chosen topic is much of comparison, we will apply the same pattern and provide respective information on chosen national laws and case law altogether.

2. LEGAL FRAMEWORK

Partly due to shared history and close legal tradition (especially between Czechs and Slovaks who established in 1918 a common state), partly because of both international obligations⁸ and the level of harmonisation with EU-law all three Central European countries react in respective regulations alike. Privacy is protected on constitutional level in Article 10 of the Czech Charter of Fundamental Rights and Freedoms,⁹ Articles 19 and 21 of the Slovak Constitution¹⁰ and also in Article 10 of the Charter,¹¹ and Articles 47 and 51 of the Polish Constitution.¹² Czech, Polish and Slovak Labour Law is codified. Therefore, most suitable provisions are contained in respective national labour codes. In two of three countries, Poland and Slovakia, is the protection of privacy declared to be a part of fundamental principles that govern Labour Law – Article 11 of the Slovak Labour Code¹³ and

⁴ See Report on social media cases released by the Acting General Counsel. Read more:

<https://www.nlr.gov/news-outreach/news-story/acting-general-counsel-releases-report-social-media-cases>.

⁵ Compare MATEJKA, J. K oprávnění zaměstnavatele kontrolovat práci zaměstnance pomocí moderních technologií. *Právo a zaměstnání*, 2003, No. 5, pp. 7–16.

⁶ Read more: http://www.rozhlas.cz/zpravy/politika/_zprava/kvuli-komentari-na-socialni-siti-muze-clovek-ztratit-praci-nebo-skoncit-u-soudu--1391992 (Cited 15 October 2014).

⁷ See Supreme Court of the Czech Republic decision 22 July 2014, file number 4 Tdo 815/2014.

⁸ Concerning the European legal system, the right to respect one's private and family life is embedded mainly in Article 8 of the European Convention on Human Rights.

⁹ Charter of Fundamental Rights and Freedoms was adopted as an appendix of the statute No. 23/1991 Collection. Regarding the extraordinary situation during 1992, when the Charter's predecessor in the Czech Republic was abolished, the Charter was declared again on 16 December 1992 as a component of the Czech constitutional order (Manifestation No. 2/1993 Coll.). The Charter was amended by Act No. 162/1998 Coll. In fact, the Charter has the same legal effect as the Czech Constitution.

¹⁰ Act No. 460/1992 Collection as amended.

¹¹ The same Charter of Fundamental Rights and Freedoms that was adopted as an appendix of the statute No. 23/1991 Collection. In the Slovak Republic, it has never been amended.

¹² The Constitution of the Republic of Poland (Polish: *Konstytucja Rzeczypospolitej Polskiej*) was adopted by the National Assembly of Poland on 2 April 1997, approved by a national referendum on 25 May 1997. The Constitution has been amended once – the amendment was passed by the Sejm on 8th September 2006.

¹³ Act No. 311/2001 Collection as amended.

Article 11(1) of the Polish Labour Code.¹⁴ Being declared the fundamental principle of Labour law shall stress its privacy in both countries. Although the Czech Republic is bound by the same international agreements like Poland and Slovakia the legislature did not proclaimed employee's privacy to be so important. It enabled the Czech Supreme Court¹⁵ to have ruled on positively on secret monitoring of an employee, even so, it happened in collision with Article 316 of the Czech Labour Code,¹⁶ which set forth rules compatible with Polish or Slovak.

Because of human dignity, which is inevitable involved, national civil codes provide a second layer of protection: Article 81 of the Czech Civil Code,¹⁷ Articles 11 of the Slovak Civil Code and Article 23 and 24 of the Polish Civil Code.¹⁸ Regulations contained in the civil codes are, however, considered to be general and their application is superseded by special regulations provided by public laws on data protection:¹⁹ Act No. 101/2000 Collection as amended in the Czech Republic, the Act of 29 August 1997 on the Protection of Personal Data in Poland²⁰ and Act No. 122/2013 Coll. on protection of personal data and on changing and amending of other acts in the Slovak Republic.

Said laws grant an employee protection of his/her privacy in the workplace. Employers shall respect employees' dignity and their human rights. Even so, an employee's primary goal is to meet his/her statutory obligations. Being hired to render services and paid in return throughout his/her employment relationship he/she is obliged to perform dependent work. Allowing employees to access social media profiles online during work hours can be a distraction. Employees may lose valuable work time playing games, talking to friends and updating their own personal profiles.

Therefore, the law provides a clear rule to keep employees away from the distraction of social media networks. In accordance with Article 301 of the Czech Labour Code, Article 81 of the Slovak Labour Code, and Article 100 of the Polish Labour Code an employee has to work responsibly and properly, to be at the workplace at the beginning of working time, to utilise the working time for assigned work, to leave only after the termination of the working time, to protect the employer's property against damage, loss, destruction and abuse, and not to act in contradiction to the justified interests of the employer. In short, an employee shall work and not to relax during working time. In regards to cited provisions, there is no need to issue bylaws, which would specify and implement a social media policy, in order to limit the use of company property for personal internet media.²¹

¹⁴ Act from 26 June 1974 as amended in Polish Dz.U. 1974 Nr 24 poz. 141. To the history of Article 11(1) of the Polish Labour Code, Liszcz, T.: *Prawo pracy*, 5th Edition, Warszawa 2008, LexisNexis, p. 82–85.

¹⁵ Decision 16 August 2012, file number 21 Cdo 1771/2011.

¹⁶ Act No. 262/2006 Collection as amended.

¹⁷ Act No. 89/2012 Collection.

¹⁸ Act on 23 April 1964, as amended, Dz.U. 1964 Nr 16 poz. 93.

¹⁹ See MÉSZÁROS, P. *Civilnoprávny rozmer ochrany osobných údajov*. In: BARANCOVA, H. (ed.). *Monitorovanie zamestnancov a právo na sukromný život*. Bratislava 2010, p. 110 or FLOREK, L. (ed.). *Kodeks pracy. Komentarz*. 5th Edition. Warszawa 2009, Lex and Wolters Kluwer business, p. 88.

²⁰ Unified text: *Journal of Laws* of 2002 No. 101 item 926 with amendments.

²¹ Nevertheless, it is difficult to conclude if employers may forbid employees to use their personal cellphones or bring their own laptops to the workplace.

3. RECRUITMENT

While there are generally no prohibitions on an employer using social media to conduct pre-employment or other checks, there have been numerous reports of employers going so far as to require applicants to provide their passwords so that prospective employers can view their private use of social media.²² International employers should remain mindful, however, that Czech, Polish and Slovak laws impose strict parameters for acceptable searches. In these countries, employers may collect personal data on job-seekers only where these relate to the qualifications and professional experience of future employees and data that may be significant for the work that these job-seekers are expected to carry out.²³ Such rules are laid down in Section 12 of the Czech Act on Employment or in the Article 11 of the Labour Code. Intending to stress its importance, the Slovak legislature set forth basic rules in said Article that is placed in the Section titled the Fundamental Principles.

If the potential employer decides to collect job seekers data over the Internet (for example through his official website or by e-mail), he should implement technical and organisational measures to protect them, appropriately to the risks and category of data being protected. Potential employer needs to have regard not only to data privacy principles but he/she must also not discriminate against individuals on the basis of information obtained. Thus, he/she cannot require disclosing personal data marital status, on children or on planned children, sexual orientation, previous wages, religion, beliefs, political preferences and so on. Article 12 of the Czech Act on Employment entitles a job-seeker to require that the employer explains necessity of any required personal data in the selection procedure.

4. MONITORING THE PERSONAL USE OF THE INTERNET

Monitoring employees' use of social media raises further considerations for an employer as it will need to comply with a potentially wide range of legislation in the applicable jurisdiction. All three countries have very strict legislation governing monitoring. Therefore, it is significantly easier to restrict access to certain websites as part of its IT policy²⁴ than to monitor an employee's use of social media. The general position is that employers may not, without serious reasons, violate employees' privacy in the workplace and common areas of the employer's premises.²⁵

²² To recent Polish practise see <http://antyweb.pl/ukryj-przed-pracodawca-kim-jestes-kilka-slow-o-powaznych-profilach-na-facebooku/> (Cited 14 October 2014). Czech practise is accessible here <http://byznys.ihned.cz/c1-62838440-firmy-vylouci-tretinu-uchazecu-o-praci-kvuli-nevhodnemu-obsahu-na-socialnich-sitich> (Cited: 15 October 2014).

²³ In said countries, pre-employment checks are likely to be permissible if made using business-related networks such as LinkedIn, but pose greater data privacy risks if made using social media platforms such as Facebook. Nevertheless, there is still not representative case law. See FLOREK, L. (ed.). *Kodeks pracy. Komentarz*. 5th Edition. Warszawa, Lex and Wolters Kluwer business, 2009, p. 90.

²⁴ There is not recognised employees' right to the internet in Czech, Polish or Slovak legal tradition.

²⁵ Article 316 of the Czech Labour Code, Article 23 I point 5 of the Polish Act of 29 August 1997 or Article 11 of the Slovak Labour Code (Fundamental Principles). From case law compare the Polish Supreme Court decision 25 July 2003, file number I PK 330/2002.

If employer have serious grounds for monitoring the most recommendable policy prior to the launch of the monitoring is composed of two three steps. Employers should (i) discuss the scope, manner, and duration of the monitoring mechanism with the employee representatives (or employees themselves if there are no representatives) prior to its introduction; (ii) inform the employees; and (iii) obtain their consent.²⁶

Regarding employees participation in social media, an employer may check the time spent on the internet, the nature of the websites browsed and the date and time of the browsing, but is restricted from monitoring the content of the visited page, chat or email communication, even if sent from a work email address (name@company) as this would be considered an invasion of privacy under Czech, Polish or Slovak law. In contrast to these countries, there is nothing comparable to a French doctrine that the internet use during working hours is presumed to be for professional purposes and so an employer can have almost unrestricted access to an employee's internet usage during working hours.

Oddly enough, there are some similarities between Czech and French court decisions. For example, according to the Czech Supreme Court's decision, an excessive use of social media during working hours can justify an employee's dismissal. The Czech Supreme Court held that an employee who had made an excessive use of the internet for non-professional reasons during office hours had committed an act of gross misconduct justifying immediate dismissal. To most practitioners disillusion, the Czech Supreme Court ruled so despite the fact that the employer monitored the later dismissed employee without he had been informed in advance.²⁷ In a personal interview, I was granted by all three justices to this case, they reasoned that the employee's behaviour was beyond any standard the Labour law lays down. This legal opinion was supported by another judgment in August 2014.²⁸ Despite the lack of court decisions, employees should use the internet reasonably and responsibly. Simply, they are certain fundamental duties on the employees' side we cannot waive such as one's duty to work during one's working hours.²⁹

In contrast, the Slovak Local Court in Bratislava while being confronted with almost the same critical facts ruled on differently; also Polish experts totally refuse secret monitoring.³⁰ This opinion has been supported by Polish administrative courts.³¹ In said Slovak case file number 14C/134/2009, an employer dismissed an employee for spending a considerable amount of working time on Facebook. The employee argued that she used Facebook for professional purposes as it was a more effective means of communicating with

²⁶ Although this requirement is not set forth in the law such a practise may mitigate legal consequences connected with the violation of employees' privacy. Compare See MĚSZÁROS, P. *Civilnoprávní rozmer ochrany osobních údajov*. BARANCOVA, H. (ed.). *Monitorovanie zamestnancov a právo na sukromný život*. Bratislava 2010, p. 114 and footnote number 171; MORÁVEK, J. *Kdy je možné evidovat přístup zaměstnance na internet a otevřít jeho e-mailovou poštu? Právo pro podnikání a zaměstnání*. 2010, No. 3, pp. 3–7; FLOREK, L. (ed.). *Kodeks pracy. Komentarz*. 5th Edition. Warszawa, Lex and Wolters Kluwer business, 2009; or the Polish Supreme Administrative Court decision 4 April 2003, file number II SA 2135/02, M. Prawn. 2003/10/435.

²⁷ Decision 16 August 2012, file number 21 Cdo 1771/2011.

²⁸ See Decision 7 August 2014, file number 21 Cdo 747/2013.

²⁹ Of course, it is clear that such monitoring had breached data privacy and the employer could be fined by the respective administrative agency.

³⁰ FLOREK, L. (ed.). *Kodeks pracy. Komentarz*. 5th Edition. Warszawa, Lex and Wolters Kluwer business, 2009.

³¹ See Wojewódzki Sąd Administracyjny w Warszawie file number II SA/Wa 453/12 and the Supreme Administrative Court's decision file number I OSK 2436/12.

contractors. While the employee was blamed to spend 102.97 hour looking at www pages without connection to performed work in said Czech case, here, the Slovak employee spent 31.5 hours searching on the internet.³² Surprisingly, these figures were completely of no importance. The court held that the dismissal was unlawful because the employee was never warned by the employer about the extent of permitted use of the internet. In another Slovakian case, an employee was dismissed for using the firm's email for personal communication and for chatting with other co-workers for a considerable part of the working day. As the employer had instituted internal guidelines which included restrictions on the use of the internet and the employer's right to monitor the employees, the court held that the dismissal was lawful.³³

5. NEGATIVE COMMENTS ON EMPLOYERS

Under the Czech Labour Code and the Slovak Labour Code, employees have an obligation to avoid any conflict with the legitimate interests of their employer. Nevertheless, there is no general duty sets forth to keep all work-related information confidential that covers all sorts of employees. It can be stipulated but it is not laid down in said Labour Codes. Where an employee breaches his/her duties by making comments that may be harmful to the employer or its clients, whether such breach occurs in or outside of the workplace, an employer may consider disciplinary action. Case law in the Czech Republic and Slovak Republic has already established that depending on the nature and severity of the negative comments made and the damage caused to the employer or employer's reputation, disciplinary action may be appropriate unless the employee proves they are truthful.³⁴ Unfortunately, there has never been decided any case where an employee had made such comments through social media.³⁵ Employers will, however, need to undertake assessments as to severity and damage before taking any disciplinary action.

Similarly, every Polish employee has an obligation of loyalty, requiring them to protect the goodwill of their employer. Nevertheless, employees may have his/her own opinion and may represent publicly even when it is a critique of his employer if they chose a proper form.³⁶ Employers in Poland may also take disciplinary action where the actions concerned are connected to the employee's work and breach specific rules of conduct set out by statute, the employment contract or the employer's internal regulations.

³² According to employer, she spent her working time on pages like www.facebook.com, www.hokejportal.sk, www.mailbook.com, www.ticketportal.sk, or www.nhltv.com.

³³ See KOTIRA, P. HORNACEK, V. *Kontrola e-mailovej komunikácie zamestnancov podľa právnych úprav ve vybraných členských štátov EÚ*. BARANCOVA, H. (ed.). *Monitorovanie zamestnancov a právo na súkromný život*. Bratislava 2010, pp. 127-144.

³⁴ This will be relevant where an employee makes negative comments about their employer, colleagues or customers/clients (whether they do so expressly by name or in such a way that the employer, colleagues, customers, or clients are readily identifiable).

³⁵ Of course, there are cases like other countries where, for example, a lover posted pictures of his partner (the Army officer) with sexual content on her private Facebook page and participated on her behalf in Facebook groups of a sexual nature. But in cases like this victims still get not used to claim compensations in civil courts. Perpetrators are penalized in criminal trails. See the Czech Supreme Court decision 22 July 2014, file number 3 T 30/2013.

CONCLUSION

Broadly speaking, there is little legislation directly governing the use of social media in the workplace in the Czech Republic, Poland or Slovakia and it is seen as an area which employers should regulate through the use of policies. Nevertheless, there are general principles and legal duties that remain to be applicable even in such circumstances. Employees' first and last task is to render services on behalf of his/her employer and do not misuse employer's devices to private purposes. In fact, we may not ignore the fact that sometimes there are necessary calls with one's partner or children. It is reasonable that during working time, but especially during break time, one has to deal with doctors, authorities or other institutions whose office hours are identical with hours of regular working day, as employees have simply no other choice. It can be also asserted that blog postings made outside of his/her employment are part of employees' freedom of expression, which right could freely be exercised by an individual unless they are false and made with the intention of harming the employer.

The slowly increasing volume of case law in this area illustrates the way in which human rights, data privacy, whistleblowing, and discrimination legislation impacts upon this issue. While employers may use social media to source information about employees, they must remain mindful of any parameters imposed by Czech, Polish and Slovak laws. Employers are best advised to put in place clear social media policies, ensure employees are made aware of these policies and obtain written consent from employees to any monitoring. To the contrary, they should never request job-seekers or employees to disclose user names and passwords in order to log in to private social media accounts in the presence of their (prospective) employer. As technology transforms our work and personal lives, these policies shall need to be flexible and reviewed regularly to keep up with the ever-changing social media landscape.

³⁶ The Polish Supreme Court decision 7 September 2000, file number 1 PKN 11/00, OSNAPiUS 2002, No. 6, point 139 or decision 21 February 1997, file number I PKN 9/97, OSNAPiUS 1997, No. 20, point 399.