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**NATIONAL REPORTS**
**Topic 1**

# *"Impact on Information Technologies (IT) on industrial and employment relations" – review of national case law*

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and
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## Australia

**IMPACT OF INFORMATION TECHNOLOGIES ON INDUSTRIAL LAW AND EMPLOYMENT RELATIONS**

**Improper Use of Email System**

**Introduction**

In August 2013, a majority of the Full Bench of the Fair Work Commission in *B, C and D v Australian Postal Corporation T/A Australia Post* [1] held that the dismissal of three employees of Australia Post was harsh, unjust and unreasonable. The Full Bench's decision garnered significant public interest given the subject matter of the dismissals; namely, the access and distribution of pornographic material on the Australia Post IT system.

The majority went to pains to emphasise that their decision was not intended to act as an endorsement of any such behaviours, nor to detract or systematically weaken the enforcement of access policies enacted by employers, but to address the particular merits or circumstances of the case against the established dismissal laws.[2]

[1] *B, C and D v Australian Postal Corporation T/A Australia Post* [2013] FWCFB 6191.
[2] Ibid, 121.

**Applicable Law**

Part 3-2 of the *Fair Work Act 2009 (Cth)* (the FW Act) encompasses Australian Federal law with respect to Unfair Dismissal. Section 387 of the FW Act relevantly provides:

> **"387 Criteria for considering harshness etc.**
>
> In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:
>
> (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
>
> (h) any other matters that the FWC considers relevant."

**History of Valid Reason**

The majority, Vice President Lawler and Commissioner Cribb, first outlined the jurisprudential development of the concept of "valid reason" and its relation to the overarching test of "harsh, unjust and unreasonable", concluding at [21 and 22]:

> "[21] Section 387 specifies a range of matters that must be considered in each case. Section 387(h) requires consideration of "any other matters that FWA considers relevant". In any given case, there will be a range of matters, beyond those specified in s.387(a) to (g), that rationally bear upon whether the dismissal is "harsh, unjust or unreasonable" and thus are "relevant matters" that must be considered pursuant to s.387(h).
> "[22] Often it will not make any difference to the ultimate outcome whether a particular circumstance is considered pursuant to s.387(a) in determining whether there is a valid reason, or as a relevant matter pursuant to s.387(h), leading to the ultimate determination of whether the dismissal was "harsh, unjust or unreasonable". However, in some cases it may matter greatly. That will tend to be so when the particular misconduct, shorn of the personal circumstances of the employee and the broader context beyond the particular acts or omissions that are said to constitute the misconduct, is clearly a matter that a reasonable employer is entitled to take seriously. This is such a case."

**Previous Case Law – *Queensland Rail v Wake* [3] and *Budlong v NCR Australia Pty Ltd* [4]**

The majority, at some length, discussed the facts and reasoning of two previous decisions concerning similar subject matter. First, *Queensland Rail v Wake*, a 2006 decision of the then Australian Industrial Relations Commission, which (to the time of this case) acted as the formative case on pornography-related dismissals. In that case, Queensland Rail had appealed to a Full Bench of the AIRC, against a previous decision of a single commissioner to reinstate an employee who had been dismissed due to series of alleged breaches of Queensland Rail's electronic communication system's policy. The appeal was upheld, and the employee's dismissal stood. [5]

[3] *Queensland Rail v Wake* [2006] AIRC 663.
[4] *Budlong v NCR Australia Pty Ltd* [2006] NSWIRComm 288.
[5] *Queensland Rail v Wake* [2006] AIRC 663, 24.

The significance of this particular case is its focus on the development of a comprehensive policy by the employer to address use of its IT system. Underlying such steps was an explicit recognition of a cultural (in the context of the workplace) issue with pornographic and other impropriate material and the employees. The majority in the present case makes significant reference to the facts in the *Wake* case, outlining the steps taken by QR over period of more than 3 years, from November 2002 to October 2005, which encompassed: [6]

- Videos shown to each employee regarding appropriate use of QR's computer systems;
- Electronic documents and legal notices and that had to be read, and electronically acknowledged both on a one-off occasion, and every time employees logged on to the system, respectively;
- Union circulars distributed to all members regarding the use of the communication system;
- Amnesty periods, designed to allow employees the opportunity to delete material from their computers without penalty;
- Weekly updates and reminders by newsletter;
- Continued union consultation and support;
- Further electronic materials and compulsory acknowledgment of detailed notices giving information about QR's practices regarding inappropriate materials on the communications system;
- Notices contained within payslips.

The Full Bench in *Wake* and the majority in the present decision highlighted the basic principles of determination in dismissal matters must be decided on the facts and circumstances of the case. In the facts of *Wake,* the employer made significant, consistent and sustained developments and employee notification of the IT policies, which in turn provided a substantial basis for termination in the circumstance of non-compliance with the stated policy. [7] The employee's period of service (27 weeks) was not a sufficient ground to render the dismissal unfair.

The majority also referenced the decision of the Full Bench of the Industrial Commission of NSW in *Budlong v NCR Australia Pty Ltd* [8], endorsing the analysis of the Full Bench in *Wake* in part, stating:

> "[32] The Full Bench of the Industrial Relations Commission of NSW read [*Wake*] in a similar way in *Budlong v NCR Australia Pty Limited* [2006] NSWIRComm 288:
>
> "64 More recently, the Full Bench of the Australian Industrial Relations Commission considered an appeal involving the dismissal of an employee for breaching his employer's policy prohibiting the use of its electronic communications system for the purpose of storing and transmitting sexually related, pornographic or violent images: *Queensland Rail v Wake*. The Full Bench in that case upheld the appeal by the employer from the decision at first instance where the Commissioner found the dismissal was harsh.
>
> 65 It is apparent from the decision in *Queensland Rail* that the employer was far more diligent in seeking to eliminate use of its computer system by employees for storing and transmitting pornographic material than NCR was in this case and that the respondent

[6] *B, C and D v Australian Postal Corporation T/A Australia Post* [2013] FWCFB 6191, 25-27.
[7] *B, C and D v Australian Postal Corporation T/A Australia Post* [2013] FWCFB 6191, 28.
[8] Budlong v NCR Australia Pty Limited [2006] NSWIRComm 288.

employee continued to ignore numerous directions and warnings. Moreover, there was an explicit warning that:

> [A]n employee's employment with QR would be terminated if it was found after investigation that they deliberately created, copied, accessed, stored, downloaded or forwarded pornographic or sexually explicit material using QR's electronic communication systems.

66 As the Full Bench observed at [17]:

In this case the Appellant went to great lengths to alert employees to the policy and to warn them that breaches would lead to dismissal. Despite this the employee breached the policy on a number of occasions in a substantial way.

67 *Queensland Rail* is also distinguishable from the present case by the fact that no question of culture or inequality of treatment was involved and the issue for the Full Bench revolved around no more than that which was summarised at [22]:

> The Appellant, rightly in our view, made sustained efforts over a number of years to make employees aware of its policy and the consequences of breaching the policy. Despite those efforts and repeated warnings the employee breached the policy in a substantial way and on a number of occasions.

68 It may be thought from certain observations by the Full Bench that decisions about whether an employer was entitled to terminate the employment of an employee who transmits and stores pornographic material on the employer's electronic communication system would be determined according to the nature of the pornography involved (eg "hard core"), or how sexually explicit the material was, or the level of violence portrayed: see [17], [18], [22]. We do not believe such an interpretation is open but if that were the basis upon which the Australian Commission were to approach such matters we should indicate we do not, with respect, agree with it. Our approach is summed up at [18]-[21] and [83] of this judgment. As the Full Bench stated in *Hollingsworth v Commissioner of Police (No 2)* (1999) 88 IR 282 at 344, the former Commission in Court Session was not "a court of morals but one of law". That sentiment applies equally to this Commission.

69 That the Full Bench in *Queensland Rail* was not setting up a test based on the nature of the pornography involved is supported by the view it expressed that, whilst its decisions should support employers who were striving to stop inappropriate email traffic (see [3] and [21]), it also made it clear its support was "subject always to considerations of fairness". Further, we note what the Full Bench stated at [23]:

> Although in this case we have decided not to interfere with the application of that policy, it ought not be assumed that the Commission would uphold the employer's right to apply the sanction of termination in all cases of deliberate breach regardless of the circumstances. As s.652 of the Act makes clear, in determining whether a termination of employment is harsh, unjust or unreasonable the Commission is required to take a range of matters into account. In addition the statutory provisions are intended to ensure a "fair go

all round": s.635(2). In the proper exercise of its functions the Commission must exercise its own judgment. Whatever sanction the employer's policy prescribes, the Commission must decide whether the termination is harsh, unjust or unreasonable."

**IT Activity as Valid Grounds for Dismissal**

The validity of a breach of policy, in particular IT policy, as a reason for dismissal is developed at some length by the majority in this decision. Approaching the question initially from a perspective of what constitutes a valid reason for dismissal, validity is principally established to be reasonably assessed from the perspective of an employer, based on a "sound, defensible or well founded" belief of acts that constitute the alleged misconduct,[9] (albeit in the context of a legislative confine where matters such as proportionality were considered within the ambit of valid reason.[10]) However, as put by the majority

> "it remains a bedrock principle in unfair dismissal jurisprudence of the Commission that a dismissal may be "harsh, unjust or unreasonable" notwithstanding the existence of a "valid reason" for the dismissal" That principle reflects the approach of the High Court in *Victoria v Commonwealth* and is consequence of the reality that in any given case there may be "relevant matters" that *do not* bear upon whether there was a "valid reason" for the dismissal but *do* bear upon whether the dismissal was "harsh, unjust or unreasonable". [11]

In simple terms, a finding of non-compliance with policy and procedures resulting in dismissal while valid, may still be considered to be harsh, unjust and unreasonable, once the circumstances of the particular case are established.[12]

With respect to workplace policy, as stated by the majority, it is a well-established principle that a failure to comply with any lawful and reasonable policy is a breach of a fundamental tenant of an employment contract.[13] In the context of IT Policy, it is similarly well established that enacting such restrictions and guidelines on the use of a company's IT system is a reasonable policy: [14]

> "● Limiting legal liability to other employees, clients, customers or other third parties, especially in relation to harassment. A reasonable employer will take steps to suppress conduct that it knows may cause offence to others.
>
> ● The employer is entitled to ensure that its resources, including its IT resources, are devoted solely to work purposes (and such reasonable personal use as it chooses to permit as owner or legal controller of its IT infrastructure). An employer can be legitimately concerned to prevent the diversion of its resources and the costs associated with such

[9] Per Northrop J, *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371.
[10] *B, C and D v Australian Postal Corporation T/A Australia Post* [2013] FWCFB 6191, 17.
[11] Ibid, 41.
[12] *Kangan Batman TAFE v Hart* [2005] , Ross VP, Kaufman SDP and Foggo C at para [51]; *Fearnley v Tenix Defence Systems Pty Ltd* [2000] Print S6238, Ross VP, Polites SDP and Smith C (Fearnley) at [61]); *Atfield v Jupiters Ltd* (2003) 124 IR 217 (Jupiters) at [12]-[13].
[13] *B, C and D v Australian Postal Corporation T/A Australia Post* [2013] FWCFB 6191, 36.
[14] Ibid, 37.

activity. Of course, the monetary and time cost involved in sending an email is very small. However, the wasting of work time by an employee accessing ('surfing') such material may be significant.

● Preventing reputational damage to the employer being identified to third parties or the public as tolerating such material or such misconduct. "

A unique characteristic of a breach of IT policy, as the majority notes, is that the question of whether a breach occurred is usually without question, with computer records often indicating unequivocally any breaches of the policy. Such a breach then needs to be considered within the spectrum of trivial, minor, technical or serious.[15] In circumstances where dismissal is held to be an appropriate consequence, while the validity of such an action can be readily identified, whether such dismissal is harsh, unjust or unreasonable becomes a matter of central issue; wherein consideration and weight need to be given to factors such as:

- The gravity of breach of the IT Policy (ie. Storing vs. Sending Pornographic materials/the nature of materials furnished); [16]
- Factors subjective to the particular employee; [17] and
- The formulation, implementation, dissemination and enforcement of polices. [18]

**Facts**

Mr B, C, and D were all (and still are – per decision on remedy [19]) employees of Australia Post, located at the Dandenong Letter Centre, at the time of the incident. Each admitted to sending numerous emails:

- Mr B – 6 emails to his home address and one email to one address of one person within Australia Post, and emails from his home address to work colleagues at Australia Post email addresses, the contents of which included one video attachment depicting an extreme act;
- Mr C – sent 11 emails;
- Mr D – multiple emails from his home computer, without using an Australia Post log on, to groups which included work friends at their Australia Post email addresses.

The majority raised the interesting issue, whether Mr D's conduct, in sending emails from a personal, home email address to recipients with Australia Post email addresses is 'using' the email system in a manner that is a contravention of the IT Policy.[20] It was held that such distribution of material to Australian Post email addresses is contrary to the employer's good faith policy, and the employee's "duty of good faith and fidelity", and accordingly he should have reasonably considered that such action, in using the email service in any fashion would not be approved by the employer. However, there was no finding that this constituted a breach of the IT Policy. [21]

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[15] *B, C and D v Australian Postal Corporation T/A Australia Post* [2013] FWCFB 6191, 62.
[16] Ibid, 60.
[17] Ibid.
[18] Ibid,61
[19] *B, C and D v Australian Postal Corporation T/A Australia Post* [2013] FWC 9293.
[20] *B, C and D v Australian Postal Corporation T/A Australia Post* [2013] FWCFB 6191, 86.
[21] Ibid.

There was an immediate admission of the conduct in the first instance by each of the parties. The Commission, in the first instance, found that the dismissals of Mr C and Mr D were not harsh, unjust or reasonable, but that Mr B's was because Australia Post was found to have distinguished between sending and receiving emails using the Australia Post IT system. The one email that Mr B had sent was to a work colleague at that person's request. However, in so finding, the Commissioner held that Mr B's reinstatement was not a viable option, and awarded compensation.

Australia Post Policy

Australia Post, at the time of the incident, had recently installed a software filter on the email system. This system monitored both incoming and outgoing traffic, and had the ability to recognise and flag emails that were likely to contain pornographic material.[22]

Through only a partial search of the email system, the filter identified a considerable level of pornographic material in the Dandenong Letter Centre system. In all, disciplinary proceedings were instituted in respect of approximately 40 employees, with varying penalties imposed.

The majority found that the evidence was that, although present, any IT use policy was not enforced in any reasonable way, with evidence that not only was there no response from manager or supervisor positions, there was evidence of persons in those positions involved in the transmission of emails containing the prohibited content. [23]

Discipline of other employees

Of the roughly 40 employees who were disciplined as a result of the findings from the Dandenong Letter Centre, there was a broad range of disciplinary action, ranging from dismissal to warnings and other lesser sanctions.

The evidence before the Commission (and seemingly approved by the Commission in the first instance) was that the severity of discipline correlated with the extent of the conduct; where sending emails (and the extent of volume sent and contents therein) constituted more serious offending, compared to merely receiving and storing the emails; a distinction seemingly drawn to "…protect the relevant interests of Australia Post and mitigate the objective risks by preventing the distribution, circulation and accumulation of the material giving rise to those risks."[24]

**Consideration of Full Bench**

The majority first addressed the validity of the dismissals in the context of breach of company policy, restating a well-established position in which knowingly breaching a reasonable company policy is valid grounds for dismissal. The majority, held that the Commission at first instance was in error, having failed to adequately consider with sufficient weight the validity of the dismissals in the context of:

- Breaches of Policy: The majority considered the substance of breaches to be "moderately serious, but certainly not in the most serious 'category'" and, but for the video as sent by Mr D, "no more salacious than material that might be viewed on free to air television almost any night of the week"[25]
- Service History: It was noted that each of the employees had significant periods of service, 17, 13 and 11 years respectively, and objectively considered it was "…hard to

[22] *B, C and D v Australian Postal Corporation T/A Australia Post* [2013] FWCFB 6191, 73.
[23] Ibid 100-101.
[24] Ibid, 79.
[25] Ibid 84.

see how the proper vindication of Australia Post's interests warranted the termination of such long serving employees without prior warning for sending such material to willing recipients given the prior culture of toleration at the DLC and the absence of any evidence of the material travelling beyond willing recipients or friends who were not offended." [26]

They then went on to consider factors raised in submissions that were not, in the view of the majority, substantially considered in the first instance.

- No harm or damage: The seriousness of the misconduct was examined in light of the absence of any evidence to suggest that the materials in question had been viewed by any other employees than the ones in question,[27] who were apparently willing to receive such material; the absence of any evidence to suggest that liability,[28] reputational harm,[29] or financial imposition or effect[30] was incurred by Australia Post as a result of the emails (and materials) being sent either within the Australia Post network or externally. This point was considered, in part, parallel with the below.
- Culture of acceptance: The majority, whilst acknowledging the considerable discussion regarding this point that was made in the first instance, held that rather than existing as a consideration that went to the question of validity of the reason behind dismissal action, any consideration of culture must be made in the context whether it (in combination with other factors) rendered it harsh to dismiss an employee without specific warning to enforcement of existing policy.[31] Specific reference to this underlying culture included: extraordinary amounts of traffic consisting of inappropriate material within the Dandenong Letter Centre[32]over a considerable period of time,[33] substantial evidence of management (by virtue of their inclusion in email chains) tolerance and acceptance of such behaviours, and lack of any disciplinary action taken.[34]
- Absence of Enforcement and Warnings: Relevant to the consideration of an implicit (or indeed explicit) culture existing at the Dandenong Letter Centre, the majority considered "…if Australia Post had taken steps to monitor compliance with its policy and manage its risk it would have discovered the existence of the culture at a much earlier time and could have taken the required 'active steps' required to bring home to employees that the policy would be enforced with serious breaches resulting in dismissal…".[35] However, upon the evidence before the Commission, there was no evidence of compliance monitoring within Dandenong Letter Centre,[36] and no measurable warning to indicate the seriousness of a breach of the IT policy.[37] While formal training was conducted, in which Mr B, C and D did participate, the present circumstances were distinguished from jurisprudence such as *Wake,* as Australia Post did not undertake any sustained or substantial training of its employees in order to

[26] *B, C and D v Australian Postal Corporation T/A Australia Post* [2013] FWCFB 6191, 85.
[27] Ibid 90.
[28] Ibid.
[29] Ibid 91.
[30] Ibid 92.
[31] Ibid 102.
[32] Ibid 94.
[33] Ibid 95.
[34] Ibid 100-101.
[35] Ibid, 101
[36] Ibid, 103
[37] Ibid, 104

clearly enunciate either the importance of the policy,[38] or the serious consequences of the breach of the policy (i.e. dismissal) that could result should the policy be breached by the employees.[39] The weight of such a finding, in respect of whether a dismissal is harsh, is emphasised by the majority. [40]

**Finding**

As a consequence of the findings of an underlying culture of acceptance, [41]and an absence of monitoring or warning, the majority found that the dismissals of Mr's B, C and D was harsh, and remitted the matter of remedy to the Vice President, who reinstated them all and awarded some compensation.

A perusal of the dissenting judgment suggests that there is ample scope for subjectivity in determining whether a dismissal for accessing and disseminating pornographic material using the employer's IT system is unfair.

**Use of Social Media**

Posting disparaging remarks about managerial employees led to the termination of a person's employment. In *Linfox Australia Pty Ltd v Glen Stutsel* [42] a full bench of Fair Work Australia dismissed an appeal by a the company against a decision of a single member who found that the dismissal of an employee who had posted disparaging, offensive and racist remarks about some of his managers on his Facebook page, was unfair and ordered his reinstatement.

The Commissioner at first instance had likened the postings, and subsequent posts by "Facebook friends" as akin to a conversation in a pub. The full bench did not accept this characterization, commenting at [26] that "the fact that the conversations were conducted in electronic form and on Facebook gave the comments a different characteristic and a potentially wider circulation than a pub discussion. Even if the comments were only accessible by the 170 Facebook 'friends' of the Applicant, this was a wide audience and one which included employees of the Company. Further, the nature of Facebook (and other such communications on the internet) means that the comments might easily be forwarded on to others, widening the audience for their publication. Unlike conversations in a pub or café, the Facebook conversations leave a permanent written record of statements and comments made by the participants, which can be read at any time into the future until they are taken down by the page owner."

The full bench considered that the Commissioner's finding that there was no valid reason for the dismissal was open to him and, that even had there been a valid reason, the termination was nevertheless harsh, unjust or unreasonable.

Of particular note was the fact that the employee, an older man, had limited understanding about Facebook communications.

There was no mention in either judgment of any policy that the employer might have had about the use of social media by employees in relation to work related matters. It seems likely that there was no such policy.

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[38] Ibid, 106
[39] Ibid, 108
[40] Ibid. See *Lane v Arrowcrest Group Pty Ltd* (1990) 27 FCR 427.
[41] Ibid, 111.
[42] *Linfox Australia Pty Ltd v Glen Stutsel* [2012] FWAFB 7097.

However, it would appear that the company subsequently introduced such a policy because, in *Pearson v Linfox Pty Ltd* [43] the Fair Work Commission, as the tribunal is now called, held that the dismissal of an employee who refused to sign an acknowledgment that he had read and understood Linfox's social media policy was not unfair and dismissed his claim.
Of particular significance is the reason that Mr Pearson gave for his refusal and the company's response: [44]

> **"[45]** The next issue concerns Mr Pearson's failure to sign the appropriate acknowledgement following completion of training he received in regard to Linfox's social media policy. Mr Pearson received one-on-one training because he failed to sign an acknowledgement he had previously attended a group training session. After attending the training Mr Pearson crossed out the word "understand" where the acknowledgement stated, "I _____ have read and understand ....", and in the signature space wrote "refused to sign." Mr Pearson said he refused to sign because the policy sought to constrain his actions outside of working hours, and this was in breach of various rights individuals are protected by. The first point to note in this context is that the acknowledgement he was asked to sign did not actually commit him to abide by the policy; it simply required him to acknowledge he had read and understood it.
>
> **[46]** Secondly, Linfox's desire to have a policy in place about the use of social media by employees can be understood. The evidence indicated it had been criticised in other proceedings for not having done so. Further, in an employment context the establishment of a social media policy is clearly a legitimate exercise in acting to protect the reputation and security of a business. It also serves a useful purpose by making clear to employees what is expected of them. Gone is the time (if it ever existed) where an employee might claim posts on social media are intended to be for private consumption only. An employer is also entitled to have a policy in place making clear excessive use of social media at work may have consequences for employees.
>
> **[47]** In terms of Mr Pearson's complaint that the policy sought to constrain him whilst not at work it is not my role to be sitting in judgement about whether the policy is in breach of his individual rights or other statutes and conventions. Mr Pearson is apparently pursuing those matters elsewhere. However, it is difficult to see how a social media policy designed to protect an employer's reputation and the security of the business could operate in an "at work" context only. I accept that there are many situations in which an employer has no right to seek to restrict or regulate an employee's activities away from work. However, in the context of the use of social media, and a policy intended to protect the reputation and security of a business, it is difficult to see how such a policy could operate in this constrained way. Is it suggested that an employer can have a policy in place that seeks to prevent employees from damaging the business's reputation or stopping them from releasing confidential information while at work, but leaving them free to pursue these activities outside of working hours? This would be an impractical approach and clearly there are some obligations employees accept as part of their employment relationship that have application whether they are at work or involved in activities outside of working hours.

[43] *Pearson v Linfox Pty Ltd* [2014] FWC 446.
[44] Ibid, 45-48.

**[48]** I am satisfied in all the circumstances that what Linfox was asking of Mr Pearson in terms of his acknowledgement of its social media policy was neither unlawful or [sic] unreasonable. It was accordingly entitled to take the action it did in response to his refusal to do so."

**New Frontiers?**

Another use of social media that might find its way into the FWC is cyber bullying. The FWC has recently been given jurisdiction to deal with bullying claims, even those extending beyond alleged bullying by an employer. Its jurisdiction is limited to making an order that bullying cease, in the event that the claim is unable to be settled. The jurisprudence is in its infancy, but no doubt cyber bullying will fall to be considered.

## Belgium

**Koen Mestdagh, Judge, Labour Chamber of the Court of Cassation**

"Information technology (IT)" covers a broad range of issues. Our aim is to discuss questions relating to IT in a broad sense, including social network (use of Facebook – both "open" and closed groups), blogs, Instagram etc.
We kindly ask the national reporters to present relevant case law on any topic within the following two main areas:

1. Individual labour law – this covers all phases of the employment and the individual employment relationship:
    - Use of IT in the hiring process (for instance "googling", performing background checks etc.)
    - Use of IT during employment (monitoring, control measures, use of email, control of mailboxes, including private mailboxes, sms etc.). Restrictions on private use of IT and IT activity outside the work place (for instance on social networks).
    - IT activity as ground for termination of employment / in connection with dismissal.

2. Collective labour law – inter alia, use of Facebook, blogs, sms etc. in connection with industrial action, for instance in connection with a demand for collective agreement.

To the extent that there are restrictions in your jurisdiction on the use of information derived from social media as evidence in legal proceedings, you may include comments on this.

Most jurisdictions will be bound by, inter alia, the Data Protection Directive (95/46/EC). The European Convention on Human Rights and the right to privacy is also relevant to the discussion. We assume that legislation implementing the applicable international rules is in place in each jurisdiction – and that such rules are broadly similar for all (most) of us.

It is therefore not necessary to describe these rules in your report unless there are special matters applicable to your jurisdiction.
We ask each country to present one (or a few) cases within the two main areas mentioned above. Please give a brief summary of each case and describe why you consider it to be of

particular interest to our topic. If the judgment is available in English or a Scandinavian language (or if a translation is available), this may be included in the report.
Based on the cases that you present, we hope to facilitate an interesting and stimulating discussion which may form the basis for a more detailed report on the issues raised.
***
The applicable international rules on the right to privacy are implemented in Belgium by several instruments of material law. For an overview I can refer to the Belgian report "Questionnaire on Privacy" presented to the 17th ECLJ meeting in Slovenia on 12 June 2009.
For this presentation I will just point to a specific instrument regarding privacy on the work floor. For the benefit of the employers and employees, the social partners have made an attempt to clarify the rights and principles relating to privacy in a national collective labour agreement: the CLA n° 81 concluded within the National Labour Council on 26 April 2002 on the protection of the privacy of the employees in relation with control of electronic on-line communication. The CLA n° 81 has been declared universally applicable by Royal Decree, thus its provisions imperatively apply to all employers and all employees. This CLA determines how the principles of finality, proportionality and transparency of the Data Protection Act need to be applied to the control of employee on-line communications.
The agreement states that the employer shall only control on-line communications data of his employees for the prevention of illegal activities, activities contrary to good manners, or activities that may harm the dignity of another person, for the protection of the confidential information and interests of the company, for ensuring safety and proper technical functioning of the network, or for controlling the compliance with the company's ICT-use regulations (article 5). In the latter case, the employer is not entitled to immediately identify the employee who does not respect the ICT policy, but shall first launch an information campaign stating that breaches have been spotted and that upon repetition thereof, the employee(s) concerned will be identified and sanctioned. The employee, however, is entitled to a hearing by the employer before sanctions are taken (articles 16 and 17). In any case, the employer installing a system to control on-line communications data has to inform the working council or the employees on all aspects of the control (articles 7 and 8).

All IT related cases reported in the Belgian juridical literature deal with the same subject: IT activity as ground for dismissal without notice for a compelling reason, with the employee claiming that the evidence presented by the employer was obtained illegally and thus can't be used. The following two cases are representative.
a) Labour Court of Brussels, 3 September 2013, *RW* 2013-14, 1586
O, a publicly traded company, discovered that its employee D, a senior staff member (business development director for Japan), had put links to articles in the press on the financial results of O, together with personal comment, on his Facebook page. O further discovered that D had for several months been making very sceptical remarks on the management of O and the reliability of the financial announcements made by O. D had not restricted access to his comments to his Facebook friends.
O, that was in need of additional investments, saw this *"undermining"* social network activity as a ground for dismissal without notice for a compelling reason. D contested his dismissal, claiming that he hadn't written anything that was not publicly known, that other staff members as well as members of the management had done the same, that O already knew of this for a long time and that his social network activity was done in his free time. In court proceedings D also claimed that O got the evidence of his social network activity from his Facebook page in violation of his right to privacy and of article 124 of the Act of 13 June 2005

on electronic communication and that the presented evidence therefore couldn't be taken into consideration.
The Labour Court considered that D's right to privacy wasn't violated since he was aware that anyone could have access to the data on the public part of his Facebook page and therefore could not expect that non-friends wouldn't peruse his posts and use this knowledge. The Court further considered that O indeed had violated article 124 of the Act of 13 June 2005 since O wilfully had perused information sent by electronic communication that wasn't destined for O personally. The Court then decided that the *"illegally"* obtained evidence nevertheless could be used by O to prove the invoked ground for dismissal. It considered that the violated rule isn't required on pain of nullity, that the committed irregularity didn't affect the reliability of the evidence and that it didn't compromise the right to a fair trial, thus making an application of the so-called *"Antigoon doctrine"* developed by the Court of Cassation in criminal matters. Finally the Court decided that D was rightfully dismissed without notice. Considering that D as a senior staff member should have refrained from publicly criticizing O's economic policies, the more it could endanger O's share value on the stock exchange, the Labour Court accepted that D's social network activity offered a compelling reason for dismissal.

b) Labour Court of Ghent, Bruges section, 28 June 2010 (not published)
During the setup of an important update for the company's plant in Turkey, the network infrastructure of the employer appeared to be saturated and working abnormally slow. When searching for the cause of this problem it appeared that employee A was at that moment downloading movies and they had to cut him of the internet to be able to continue the process. Subsequently the employer had the history of A's internet traffic examined. He discovered that in the period from November 2006 till April 2007 A had on several days been surfing during several hours to the most diverse and *'frivolous'* websites that had nothing to do with his work. As a result, A was dismissed without notice for a compelling reason.
Since the employer hadn't entirely followed the procedure laid down by CLA n° 81, A contested his dismissal and asked the Court to disregard the *'illegally'* obtained evidence presented by the employer.
The Court considered that an employer has the right to control if his employees are effectively working during working hours and don't make abuse of their PC, laptop or smart phone to surf or mail for private reasons, but that the ability to control and sanction is limited. It further considered that article 14 of CLA n° 81 only allows the control of electronic communication data if the requirements by the principles of finality, transparency and proportionality are fulfilled. The Court then extensively examined if these requirements were fulfilled and came to the conclusion that the procedure followed by the employer lacked transparency since no preliminary warning was given before querying A's surfing history. The overview of A's surfing behaviour therefore had been obtained irregularly. The Court nevertheless decided that there is no reason to exclude the presented evidence. It also made an application of the so-called *"Antigoon doctrine"* and considered that the unfulfilled obligation wasn't required on pain of nullity, that the committed irregularity didn't affect the reliability of the evidence and that there was no reason to accept that the right to a fair trial was compromised by it.
The report in which this case is related doesn't say whether the Labour Court accepted that A was rightfully dismissed without notice for a compelling reason on basis of his IT activity, but I assume the Court did.

## Denmark

**Jytte Scharling, Vice-president of the Labour Court of Denmark**

"Information technology (IT)" covers a broad range of issues. Our aim is to discuss questions relating to IT in a broad sense, including social network (use of Facebook – both "open" and closed groups), blogs, Instagram etc.
We kindly ask the national reporters to present relevant case law on any topic within the following two main areas:

3. Individual labour law – this covers all phases of the employment and the individual employment relationship:
    - Use of IT in the hiring process (for instance "googling", performing background checks etc.)
    - Use of IT during employment (monitoring, control measures, use of email, control of mailboxes, including private mailboxes, sms etc.). Restrictions on private use of IT and IT activity outside the work place (for instance on social networks).
    - IT activity as ground for termination of employment / in connection with dismissal.
        - The Industrial Arbitration Tribunal's decision of 11 September 2013, case FV2013.0022 – Bank employee's posting on Facebook not sufficient ground for dismissal. The employee – a bank assistant – posted a text after a very busy last banking day of the year. The text was critical towards bank customers, who waited until the last banking day of the year to make tax-deductible deposits. The Facebookprofile was private with 125 "friends". She of her own initiative deleted the text after a few days.

        - The Industrial Arbitration Tribunal's decision of 15 September 2010, case FV 2010.129 – Employee's postings on Facebook were disloyal to the employer. Sufficient ground for dismissal, but not for summary dismissal. The employee – a guard in a security firm – who was dissatisfied with her working conditions, posted negative comments on the security firm on her Facebook profile. The profile was private, but she knew, that some of her "friends" were persons in the security branch, and at least one was employed by a competitor to the firm.

2. Collective labour law – inter alia, use of Facebook, blogs, sms etc. in connection with industrial action, for instance in connection with a demand for collective agreement.
   The Labour Court's decision of 29 November 2012 in case AR2012.0341 – e-mails to guests seen eating in a restaurant against which industrial action was ongoing were not lawful.
   To the extent that there are restrictions in your jurisdiction on the use of information derived from social media as evidence in legal proceedings, you may include comments on this.

Most jurisdictions will be bound by, inter alia, the Data Protection Directive (95/46/EC). The European Convention on Human Rights and the right to privacy is also relevant to the discussion. We assume that legislation implementing the applicable international rules is in place in each jurisdiction – and that such rules are broadly similar for all (most) of us.

It is therefore not necessary to describe these rules in your report unless there are special matters applicable to your jurisdiction.
We ask each country to present one (or a few) cases within the two main areas mentioned above. Please give a brief summary of each case and describe why you consider it to be of particular interest to our topic. If the judgment is available in English or a Scandinavian language (or if a translation is available), this may be included in the report.
Based on the cases that you present, we hope to facilitate an interesting and stimulating discussion which may form the basis for a more detailed report on the issues raised.

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**Arbejdsrettens dom af 29. november 2012**

**i sag nr. AR2012.0341:** Kristelig Arbejdsgiverforening for Restaurant Vejlegården ApS (advokat Anders Schmidt) *mod* Landsorganisationen i Danmark for Fagligt Fælles Forbund (advokat Pernille Leidersdorff-Ernst)

*Dommere: Lene Pagter Kristensen, Thomas Rørdam (retsformand), Poul Dahl Jensen, jf. arbejds- retslovens § 8, stk. 1 og 2*.

**Uoverensstemmelsen**

Sagen, der er indbragt for Arbejdsretten ved klageskrift af 23. maj 2012, angår, om en af Fagligt Fælles Forbund varslet og iværksat hovedkonflikt mod Restaurant Vejlegården ApS og nogle sym- patikonflikter, der er iværksat til støtte for hovedkonflikten, er lovlige.

**Påstande**

Klager, Kristelig Arbejdsgiverforening for Restaurant Vejlegården ApS, har principalt nedlagt på- stand om, at indklagede skal anerkende, at det samlede omfang af den iværksatte hovedkonflikt og de iværksatte sympatikonflikter ikke er proportionalt henset til, at klager allerede er dækket af en overenskomst mellem en landsdækkende lønmodtager- og arbejdsgiverorganisation, og at sympati- konflikterne derfor er ulovlige.

Klager har subsidiært påstået indklagede dømt til at anerkende, at den iværksatte hovedkonflikt er ulovlig, idet sympatikonflikterne i væsentlig grad er baseret på ulovlige kampskridt, og at indklage- de som følge heraf er afskåret fra at understøtte et overenskomstkrav med hoved- og sympatikon- flikter i en af Arbejdsretten fastsat "fredningsperiode".

Klager har mere subsidiært påstået indklagede dømt til at anerkende, at de iværksatte sympatikon- flikter omfattende
1) kundehenvendelser og opfordringer til kundeboykot og/eller

2) postomdeling og/eller

3) affaldsbortskaffelse er ulovlige.

Indklagede, Landsorganisationen i Danmark for Fagligt Fælles Forbund, har påstået frifindelse.

**Sagsfremstilling**

Hovedkonflikten samt anvendelse af bannere og løbesedler og kundehenvendelser mv.

Den 1. november 2011 overtog Restaurant Vejlegården ApS forpagtningen af Restaurant Vejlegår- den. Selskabet er ejet af Amin Skov, som også driver restauranten. Kort efter overtagelsen blev Amin Skov kontaktet af Fagligt Fælles Forbund (3F), Vejle, som ønskede overenskomst med sel- skabet om restauranten. Amin Skov ønskede imidlertid ikke at indgå overenskomst med 3F, da sel- skabet som medlem af Kristelig Arbejdsgiverforening allerede var forpligtet af overenskomsten mellem Kristelig Arbejdsgiverforening og Kristelig Fagforening.

Da der ikke kunne opnås enighed, iværksatte 3F den 19. marts 2012 hovedkonflikt i form af strejke og blokade mod restauranten med henblik på at opnå overenskomst.

Ved klageskrift af 21. marts 2012 til Arbejdsretten nedlagde klager bl.a. påstand om, at indklagede skulle anerkende, at 3F, Vejle, havde anvendt ulovlige kampmidler ved brug af bannere og løbesed- ler, og at 3F skulle undlade at opfordre kunder til at boykotte restauranten.

Bannerne, som blev anvendt af 3F's blokadevagter foran restauranten, havde følgende tekst:

"GÅ BARE VIDERE! Restaurant Vejlegården ønsker ikke at indgå overenskomst" Af løbesedlerne, som blev omdelt ved restauranten, fremgik bl.a.:
"Vi opfordrer til at man i stedet går på overenskomstdækkede spisesteder. Se liste på bagsi- den."

På bagsiden af løbesedlen var en liste over en lang række spisesteder i Vejle, som 3F har overens- komst med.

Den 22. marts 2012 blev der afholdt møde i Arbejdsretten om disse kampskridt. Det fremgår af Arbejdsrettens retsbog, at indklagede erklærede, at afdelingen var villig til at fjerne bannerne og at undlade fortsat at udlevere løbesedlerne. Klager tilkendegav at ville hæve sagen, hvis erklæringen blev efterlevet.

Ved klageskrift af 27. marts 2012 indbragte klager på ny sagen for Arbejdsretten i anledning af, at

3F var gået over til at anvende nye bannere, som efter klagers opfattelse også var udtryk for et ulov- ligt kampskridt.

Teksten på de nye bannere var:

”GOD SMAG I MUNDEN”

og videre

”Hvis du ser OK mærket, kan du føle dig sikker på, at der er ordnede forhold for de ansatte”
Den 29. marts 2012 blev der afholdt nyt retsmøde i Arbejdsretten. 3F oplyste, at man ikke længere anvendte banneret, og at man var gået over til at anvende et banner med teksten:

”3F ønsker at indgå overenskomst med Vejlegården”

Klager havde ingen indvendinger mod dette banner, forudsat at det ikke blev anvendt på restauran- tens område.

Den 11. maj 2012 blev en madanmeldelse, hvor restauranten fik 2 af 6 mulige stjerner, bragt i Vejle

Amts Folkeblad med overskriften:

”Når det kun handler om maden...
Vejlegården er Trekantsområdets for tiden mest omtalt spisested – maden er imidlertid ikke noget at skrive hjem om…”

Anmeldelsen blev af 3F anvendt som forside til en løbeseddel, som i tiden herefter, bl.a. den 22. maj 2012, blev sat på restaurantgæsters bilruder med bl.a. følgende tekst på bagsiden:

”Restaurant Vejlegården ønsker ikke ordentlige løn- og aftaleforhold for deres ansatte

Du finder spisesteder med overenskomst på www.3f.dk/spisesteder”

3F anvendte et banner med tilsvarende ordlyd på sin bygning, der ligger lige ved siden af restauran- ten.

Den 15. maj 2012 sendte 3F en mail til en restaurantgæst med følgende ordlyd:

”Hej

I dag holdt der en vogn fra jeres virksomhed ved Restaurant Vejlegården, Toldbodvej 13, Vej- le og to mand var inde og spise på restauranten.

Restauranten er omfattet af en – meget medieomtalt – konflikt med 3F, grundet at forpagteren Amin S Bardbegi har opsagt HORESTA/3F overenskomsten og til gengæld indført en såkaldt kristelig overenskomst, der stiller de ansatte ringere på samtlige punkter.

Vi vil gerne vide om besøget skal tages som udtryk for at jeres virksomhed har taget stilling i den verserende konflikt og i således støtter restaurant Vejlegården.

Med venlig hilsen
Henning L Troelsen"

Senere samme dag blev mailen besvaret. I svaret hedder det bl.a.:

"Hej Henning jeg syntes at i er nogle vat pikke at stå der og være til grin for medlemmers penge og desuden er det meget dårligt at man ikke kan gå ind og spise uden at i skal genere en. Jeg syntes at i skulle lave noget fornuftigt i stedet for at en flok arbejdsledige skal have ekstra for at stå der. Jeg bakker jer ikke op."

3F svarede hertil den 16. maj 2012:

"Hej

Tak for svar.
Så ved vi jo hvor vi har din virksomhed!"

Den 7. juni 2012 modtog endnu en restaurantgæst en mail fra 3F med en tekst svarende til teksten i mailen af 15. maj 2012.

<u>Postudbringning</u>

Den 3. april 2012 meddelte LO Restaurant Vejlegården og Dansk Arbejdsgiverforening, at LO og

3F havde besluttet at iværksætte en sympatikonflikt fra og med den 13. april 2012, således at intet medlem af 3F beskæftiget hos medlemmer af DIO-I måtte udføre bl.a. arbejde, der hidrører fra eller er bestemt for virksomheden. Sympatikonflikten trådte i kraft som varslet og medførte bl.a., at der ikke blev udbragt post til restauranten.

Af en artikel bragt i Jyllandsposten den 16. august 2012 fremgår bl.a.:

"*Postboykot er ulovlig*
*Det er ulovligt, når Post Danmark ikke bringer post ud til Vejlegården, siger ekspert.*

Ledelsen i Post Danmark bryder postloven i den faglige konflikt omkring Restaurant Vejlegården. Det fastslår Claus Haagen Jensen, professor og cand.jur. på Copenhagen Business School, CBS.

Restauranten har ikke modtaget post siden midten af april, fordi postbude organiseret i 3F indgår i sympatikonflikten mod Vejlegården, efter at ejeren har opsagt en overenskomst med 3F for restaurantens ansatte.

'Postloven siger klart, at man har krav på at få posten bragt ud,' siger Claus Haagen.

*Afviser kritik*

Post Danmark ønsker ikke at stille op til interview, men via presseafdelingen siger ledelsen:

'Vi overholder spillereglerne på arbejdsmarkedet som medlem af DI, og så har vi ikke mere at sige om det.'

Det er Trafikstyrelsens pligt at sikre, at Post Danmark overholder postloven. Styrelsen har dog ikke tænkt sig at gribe ind.

'Når der er tale om en lovligt varslet konflikt, er vi ude i en force majeure-situation.' siger Thorbjørn Ancker, kommunikationschef i Trafikstyrelsen.

Men de arbejdsretlig spilleregler kendt som den danske model kan ikke overtrumfe dansk lov, siger Claus Haagen Jensen."

Den 22. august 2012 blev en artikel bragt i Vejle Amt Folkeblad med overskriften:

"Minister: Postboykot af Vejlegården i orden."

I artiklen er transportminister Henrik Dam Kristensen citeret for at udtale bl.a.:

"… at Post Danmark har informeret Restaurant Vejlegården om, at virksomheden kan hente sine forsendelser på det lokale posthus."

Transportministeren har i medfør af postlovens § 14 den 28. marts 2011 meddelt en individuel tilla- delse til postbefordring til Post Danmark A/S. Af tilladelsen fremgår bl.a.:

"*2. Befordringspligten Indland og Udland*

Post Danmark er forpligtet til at sikre postbefordring på dansk område af følgende indenlandske forsendelser og forsendelse fra udlandet, Færøerne og Grønland til adressater i Danmark samt forsendelser til udlandet, Færøerne og Grønland:

Befordringspligten omfatter indsamling ved postkasser og postbetjeningssteder, sortering, transport og omdeling af forsendelserne.

*2.2. Kvalitetskrav og kvalitetsmåling*

I forbindelse med de månedlige indrapporteringer kan Post Danmark anmode Trafikstyrelsen om at få godkendt tilfælde som force majeure ved dokumentation af en ekstremsituation. Eksempler på force majeure fremgår af Bilag 2.

*Bilag 2*

I tilfælde af force majeure indgår relevante testbreve ikke i kvalitetsmålingen. Force majeure kan f.eks. være følgende:

- Strømnedbrud
- Hel eller delvis lukning af (dele af) landet p.g.a. ekstreme vejrforhold, f.eks.

snestorm

- Lukning af broerne over Storebælt, Lillebælt eller Farøbroerne på grund af storm eller uheld."

Afhentning af affald

Den 29. maj 2012 blev sympatikonflikten udvidet til også at omfatte bortskaffelse af dagrenovation. Henning Troelsen sendte forinden en mail til de renovationsfirmaer, der bortskaffede dagrenovation fra restauranten, hvori det hedder:

"Hej

Vi ønsker hermed at informere jer om, at en af jeres kunder; Restaurant Vejlegården, Toldbodvej 13 B, 7100 Vejle, fra mandag den 29. maj 2012 er omfattet af sympatikonflikt.

3F Vejle har fra den 19. marts 2012 haft konflikt med virksomheden, som har opsagt sin 3F overenskomst og i stedet meldt sig i Kristelig Arbejdsgiverforening.

Dansk Arbejdsgiverforening har oprindelige protesteret imod at vores sympatikonflikter omfattede renovation, men valgte i fredags på baggrund af sine medlemsorganisationers melding ger, at acceptere at renovation omfattes af sympatikonflikten.

Vi forventer jo herefter at i tager dette til efterretning, og ophører med at betjene virksomhe- den."

Om morgenen den 29. maj 2012 sendte Henning Troelsen en mail til nogle kollegaer fra 3F, hvori det hedder:

"Hej med jer

Vi vil jo rigtig gerne have en effektiv sympatikonflikt imod Restaurant Vejlegården på renovationsområdet og vil gerne undgå at der går 14 dage med at køre det ind.
Den kan gøres effektiv, hvis vi fra starten er på dupperne og giver os et praj i samme sekund i ser en bil fra følgende renovationsfirmaer:

Meldgaard Miljø
SL Renovation, Brdr. Larsen
Lotra A/S

På forhånd tak.
Henning"

Restauranten er omfattet af Vejle Kommunes regulativ for erhvervsaffald gældende fra den 1. janu- ar 2012. Regulativets § 10 omhandler ordning for dagrenovationslignende affald, og i § 10.1 er det anført, at der ved dagrenovationslignende affald f.eks. forstås:

”Let fordærveligt affald som eksempelvis affald indeholdende animalsk eller lugtende affald affald som giver hygiejnemæssige problemer i form af lugt, fluer, skadedyr eller lignende affald som i sammensætning svarer til dagrenovation fra private husholdninger

Dagrenovationslignende affald omfatter f.eks. affald fra fortæring og velfærdsfaciliteter, madaffald fra spiserum/spisesteder, kantiner, storkøkkener, virksomhedskøkkener, delikatesseforretninger, let fordærveligt affald fra fødevarevirksomheder, grossister og lignende.”

Dagrenovationsordningen gælder efter regulativets § 10.2 for alle virksomheder i Vejle Kommune, hvor virksomheden frembringer dagrenovationslignende affald, og er i § 10.3 beskrevet således:

”Dagrenovationsordningen er en indsamlingsordning etableret som en henteordning. Enhver virksomhed, som frembringer dagrenovationslignende affald, er forpligtet til at frasortere dagrenovationslignende affald og håndtere det via kommunens indsamlingsordning for dagrenovationslignende affald.

Virksomheder må ikke håndtere dagrenovationslignende affald via virksomhedens andre affaldsordninger f.eks. småt forbrændingsegnede affald.”

Det fremgår af regulativets § 10.9, at beholdere til dagrenovationslignende affald tømmes en gang om ugen på en fast ugedag. Endvidere hedder det bl.a.:

”Hvis der forekommer perioder, hvor der ikke sker afhentning af dagrenovationslignende affald, f.eks. som følge af strejke eller vejrlig, kan kommunalbestyrelsen i stedet anvise affaldet opsamlet i sække for efterfølgende afhentning eller aflevering på genbrugspladserne i kommunen, uden der sker fradrag i renovationsgebyret.”

<u>Konfliktens omfang og betydning</u>

I et indslag offentliggjort den 24. april 2012 på YouTube hedder det bl.a.:

”*3F forøger omsætningen hos Vejlegården*

3F har i lang tid lavet blokader imod Vejlegården, da stedet ikke ønsker at indgå overenskomst med dem. Det har de gjort med KRIFA. Det viser sig dog, at den ’skade’ de vil påføre virksomheden har den modsatte effekt: Kunderne strømmer til!”

BT bragte den 22. juli 2012 en artikel, hvori det bl.a. hedder:

”*Saxo-boss håner 3F – uddeler gratis mad i Vejle*”

- Som antydet i rubrikannoncen vil jeg [Lars Seier Christensen, direktør for Saxo Bank] gerne invitere nogle venner på middag på Vejlegården, som fortjener alle gode menneskers støtte lige nu.
Så jeg har besluttet at give 250 middage væk. 100 af dem bliver til mine Facebook-venner efter først-til-mølle princippet. (Derudover inviterer jeg 100 LA-medlemmer og 50 LAU-medlemmer, men det håndterer de to organisationer selv).”

Af en artikel bragt af Horsens Folkeblad den 24. juli 2012 fremgår bl.a.:

”*Lokal gallerist fyldte Vejlegården på 80 sekunder*

Det tog kun 80 sekunder for galleriejer Erik Guldager at fylde 110 pladser til en støttefest for den meget omtalte Restaurant Vejlegården i Vejle.”

Af en artikel bragt af Politiken den 25. juli 2012 fremgår bl.a.:

”*Restaurant Vejlegården har oplevet større omsætning siden konflikten med 3F brød ud.*
…
’Vi kan mærke en stigning i dagens omsætning på 15 procent de dage, hvor det har ramt nyhederne massivt’, siger Amin Skov til politiken.dk.

Men tilføjer samtidig, at han i denne periode også har kørt et tilbud på stegt flæsk og persillesovs, hvilket normalt trækker mange mennesker til restauranten.”

I en artikel omtalt på hjemmesiden ”ekstrabladet.dk” den 27. juli 2012 er Claus Gilbert Clausen, mediebureauet MEC Danmark, refereret for at udtale bl.a.:

”Han vurderer med et konservativt bud, at omtalen omsat i annoncekroner, vil beløbe sig til langt over en million kroner i spalteplads. Dertil kommer, at der allerede er en målbar effekt ved de mange besøgende, der er rejst til Vejlegården for at spise på den kendte restaurant. Mange andre annoncekampagner har nærmest ingen effekt. Men her kan effekten ses.”

TV2 Nyhederne bragte den 1. august 2012 en omtale på hjemmesiden ”nyhederne.tv2.dk" af kon- flikten, hvor det hedder bl.a.:

”Restaurant Vejlegården og fagforbundet 3F har igennem længere tid været i totterne på hin- anden, fordi restauranten har tegnet overenskomst med Krifa frem for 3F.

Og opbakningen til Restaurant Vejlegården kommer ikke bag på stedets restaurantchef:

’Vi har fået rigtig mange gæster i huset de seneste mange uger, som kun er positive og glade og bakker os op. Vi er meget glade for den opbakning og sympati vi har fået. Det gæsterne bedst kan gøre, det er at komme og spise hos os. Det gør os glade og positive, og giver os mod på at fortsætte kampen lidt endnu,’ siger restaurantchefen til TV2 News.”

Samme dag skrev Politiken, at Liberal Alliance i protest mod 3F havde besluttet at flytte partiets sommergruppemøde til Vejlegården.

Af en artikel på hjemmesiden ”vejleamtsfolkeblad.dk” den 2. august 2012 hedder det bl.a.:

”*Øllet flyder gennem blokaden af Vejlegården*

3F’s forsøg på at bremse levering af øl og vand til Restaurant Vejlegården bliver forhindret af

uorganiserede.

Restaurant Vejlegården er klar til at skænke fadøl til Liberal Alliances politikere, når partiet fredag er færdig med deres sommergruppemøde.

Selvom fagforbundet 3F siden 13. april har forbudt LO medlemmer at levere øl og vand til restauranten som led i en sympatikonflikt mod Vejlegården, så har restauranten ingen problemer med at skaffe drikkevarer."

Af en artikel på hjemmesiden "denkorteavis.dk" den 5. august 2012 fremgår bl.a.:

"På Restaurant Vejlegården er restauratør Amin Skov Badrbeigi ikke et sekund i tvivl: al den reklame, som 3F har givet, kan simpelthen ikke købes for penge!"

Vejlegårdens revisor, HD, cand. merc. aud. Lone Vinge, er til brug for Arbejdsrettens behandling af sagen fremkommet med følgende økonomiske oplysninger om Vejlegården:

"Selskabet er stiftet pr. 1. november 2011, og har frem til 31. august 2012 – en periode på 10 måneders drift realiseret følgende:

| | |
|---|---|
| Omsætning | kr. 3.188.510 |
| Bruttofortjeneste | kr. 1.824.531 |
| Lønninger og andre personaleomkostninger | kr. 1.509.975 |
| Øvrige omkostninger | kr. 1.046.656 |
| Renter mv. | kr. 7.683 |
| Underskud af driften i perioden, i alt | kr. – 739.783 |

De oplyste tal baserer sig på den foreliggende saldobalance pr. 31. august 2012, som jeg har gennemgået og fundet korrekt.

Der er ikke tale om en revisionsmæssig gennemgang, og der er ikke foretaget samme dispositioner, som det måtte kunne forventes i forhold til aflæggelse af en årsrapport for selskabet."

Der er under sagen fremlagt en af 3F udarbejdet sammenligning pr. 1. marts 2012 af overenskom- sten mellem Kristelig Arbejdsgiverforening og Kristelig Fagforening og 3F's overenskomst med HORESTA. Sammenligningen omfatter 46 punkter. Sammenligningen har været gennemgået med Kristelig Arbejdsgiverforening, som er enig i det tekniske grundlag.

**Forklaringer**

Der er afgivet forklaring af Amin Skov, Karsten Høgild, Henning Troelsen og Bent Moos.

Amin Skov har forklaret blandt andet, at han indmeldte sig i Kristelig Arbejdsgiverforening umid- delbart efter, at han havde overtaget restauranten den 1. november 2011. Det betød, at restauranten blev omfattet af foreningens overenskomst med Kristelig Fagforening. Den 23.

november 2011 blev han kontaktet af Henning Troelsen, 3F i Vejle, og der blev aftalt et møde. På mødet viste det sig, at
3F ønskede en overenskomst med restauranten. Han afviste at indgå overenskomst med 3F med henvisning til, at restauranten allerede var overenskomstdækket. Henning Troelsen oplyste, at 3F ikke anerkendte overenskomsten, og at afvisningen af at indgå overenskomst med 3F ville få kon- sekvenser.

Konflikten har betydet, at restauranten ikke længere får øl og vand leveret fra Carlsberg. Restauran- ten får i stedet sine drikkevarer fra en række mindre leverandører og fra supermarkeder, som typisk er dyrere. Restauranten går endvidere glip af kampagnetilbud og bonus fra Carlsberg. Han vil anslå, at bonustabet udgør ca. 30.000 kr. på årsbasis. Også kødvarer, vin og gas må restauranten selv hen- te, hvilket betyder en merpris og en stor ulempe for restauranten. Restauranten er endvidere afskåret fra at reklamere i Vejle Amts Folkeblad på avisens spalter og må i stedet reklamere ved brug af

særskilte indstik i avisen, som er meget dyrere end sædvanlige avisannoncer. Det skyldes, at avis- trykkerne ikke må udføre trykkearbejde, hvis avisen indeholder annoncer fra restauranten.

3F er nabo til restauranten, og der har været blokadevagter med bannere på restaurantens område. Blokadevagterne har også delt løbesedler ud, herunder løbesedlen med madanmeldelsen, hvilket har været meget generende for driften. Den dårlige madanmeldelse skyldes utvivlsomt, at journalistens besøg på restauranten fandt sted, mens aktionerne mod restauranten var allermest effektive. Løbe- sedlerne er uddelt til forbipasserende, herunder gæster og mulige gæster til restauranten, og de er også blevet sat på biler, der holdt på restaurantens parkeringsplads. Han har fået at vide af flere gæ- ster, at de har modtaget mails svarende til den mail af 15. maj 2012, der er refereret i sagsfremstil- lingen, vedhæftet billede af deres bil, hvilket de har følt ubehageligt. Det er hans fornemmelse, at
3F systematisk har fotograferet biler på gule plader, der har holdt på restaurantens parkeringsplads. Gæsterne parkerer nu andre steder eller bliver helt væk. Det er et problem for restauranten, som ellers ofte bruges som møde- og frokoststed for håndværkere og forretningsfolk.

Han blev først bekendt med, at restauranten ikke fik post omdelt, da han blev kontaktet af en jour- nalist, som ønskede hans kommentar hertil. Restauranten modtog ikke varsel om sympatiaktionen forud for dens effektuering. Den manglende postomdeling har blandt andet betydet, at han ikke har kunnet få refunderet sygedagpenge, og at restauranten ikke har modtaget regninger fra kreditorer, hvilket har medført, at Vejlegården to gange er blevet taget til inkasso. Han arbejder ca. 95 timer om ugen og har ikke tid til selv at hente restaurantens post på posthuset. Post Danmark har efter hans opfattelse pligt til at omdele posten eller i det mindste returnere den til afsenderen.

Også renovationsaktionen fik han oplysning om gennem en journalist. Restauranten producerer meget organisk affald. Dette affald udgør en sundhedsrisiko, hvis det ikke bliver fjernet med jævne mellemrum, bl.a. fordi det tiltrækker måger og rotter. Han måtte derfor selv køre en del af affaldet væk. Afhentningen af organisk affald blev genoptaget efter nogen tids forløb. Renovationsaktionen er stadig virksom med hensyn til papaffald. Han har i hele perioden betalt fuld pris for renovation.

Konflikten er ikke en fordel for restauranten. Når han har sagt noget andet til journalister, så har det været som led i det psykologiske spil. Han har bestemt ikke tjent penge på konflikten, hvilket også ses af den opgørelse, hans revisor har foretaget. I starten var der en nyhedsinteresse, som førte til en

god omsætning, men alt i alt har konflikten medført et tab på formentlig omkring 400.000 kr. Han har ikke økonomisk interesse i, at konflikten fortsætter.

Karsten Høgild har forklaret blandt andet, at han er direktør i Kristelig Arbejdsgiverforening. For- eningen har en overenskomst med Kristelig Fagforening, og Restaurant Vejlegården er via medlem- skabet af Kristelig Arbejdsgiverforening omfattet af denne overenskomst. Han har været involveret
i sagen med 3F siden begyndelsen af december 2011. Han har deltaget i et møde med Bent Moos, hvor overenskomsten blev holdt op imod 3F's overenskomst. Der er teknisk set en række forskelle. Overenskomsten indgået mellem Kristelig Arbejdsgiverforening og Kristelig Fagforening er på visse punkter bedre for lønmodtagerne end 3F´s overenskomst med HORESTA, og det kan derfor være svært at konkludere, hvilken af overenskomsterne der er bedst. Efter hans opfattelse bidrager en mangfoldighed på overenskomstmarkedet samlet set til en bedre overenskomstdækning i Dan- mark.

Henning Troelsen, har forklaret blandt andet, at han er gruppeformand i 3F, Vejle. Baggrunden for konflikten er, at der på restaurationsområdet er behov for at øge overenskomstdækningen, der i dag er ca. 40 %. Det kom bag på ham, at restauranten ikke ønskede at indgå overenskomst med 3F. 3F anerkender ikke overenskomsten mellem Kristelig Arbejdsgiverforening og Kristelig Fagforening, da den på mange punkter efter hans opfattelse er ringere end 3F's, og 3F må derfor bruge de red- skaber, den danske model giver dem, for at få restauranter til at indgå en overenskomst med 3F,
som giver lønmodtagerne samme beskyttelsesniveau som overenskomsten indgået med HORESTA. Baggrunden for, at 3F specielt interesserer sig for Restaurant Vejlegården, er, at restauranten før Amin Skovs overtagelse af den 1. november 2012 havde overenskomst med 3F. En del af medar- bejderne er de samme, og de har nu fået forringet deres vilkår.

Han har været involveret i aktionerne mod restauranten. 3F har på intet tidspunkt – heller ikke un- der møder i Arbejdsretten – tilkendegivet, at man var enig i, at forbundets handlinger kunne være ulovlige kampskridt. Så snart 3F er blevet opmærksom på, at deres handlinger kunne opfattes som ulovlige, er handlingerne blevet stoppet.

På de tidspunkter, hvor 3F ikke var dækket ind med blokadevagter, tog de billeder af restaurantens gæsters biler for at gøre de besøgende opmærksom på konflikten på samme måde som ved at have

blokadevagter stående. Han fik både pæne svar og svar fra nogle, der ikke havde brudt sig om hen- vendelsen fra 3F, men han fik flest pæne svar.

Det er ham, der har lavet løbesedlen med madanmeldelsen, og det var ham, der delte den ud. Han delte den ud i en times tid til 18-22 personer, inden han stoppede, da han af en kollega fik

at vide, at en journalist fra Vejle Amts Folkeblad var fortørnet over, at 3F havde brugt madanmeldelsen.

Bent Moos har forklaret blandt andet, at han sammen med Karsten Høgild foretog en sammenlig- ning af de to overenskomster. Det er hans opfattelse, at 3F's overenskomst er bedst på de fleste punkter og samlet set.

**Parternes argumentation**

Klager, Kristelig Arbejdsgiverforening for Restaurant Vejlegården ApS, har til støtte for den prin- cipale påstand anført bl.a., at der er behov for en justering af retspraksis, således at grænserne for, hvad et fagforbund er berettiget til at foretage med hensyn til iværksættelse af hovedkonflikt og sympatikonflikter mod en virksomhed, som ikke ønsker at indgå overenskomst med organisationen, kommer til at afhænge af, om virksomheden i forvejen er dækket af en overenskomst. Er virksom- heden i forvejen dækket af en overenskomst, må der skulle mindre til for at statuere, at et kamp- skridt er uproportionalt. Dette må ikke mindst gælde i en situation som den foreliggende, hvor om- kring 2/3 af virksomhederne inden for restaurationsbranchen ikke har indgået overenskomst med et fagforbund. De iværksatte sympatikonflikter medfører endvidere særdeles væsentlige driftsmæssige gener for klager. Klager har mistet kunder og omsætning og er i dag truet på sit eksistensgrundlag. De iværksatte konflikter og kampskridt er derfor uproportionale i forhold til konfliktens formål og er dermed ulovlige allerede efter den retstilstand, som følger af hidtidig retspraksis.

Til støtte for den subsidiære og mere subsidiære påstand har klager anført, at 3F i væsentlig grad
har gjort brug af og i et vist omfang fortsat gør brug af ulovlige kampskridt, som har truet og fortsat truer restaurantens eksistensgrundlag. 3F har således ved henvendelser til restaurantens gæster og potentielle gæster på retsstridig måde opfordret disse til at boykotte restauranten. 3F har herunder bl.a. overtrådt markedsføringsloven og krænket privatlivets fred. 3F har endvidere på retsstridig måde forhindret, at restauranten kan få udbragt sin post. Det følger af postlovgivningen og af trans- portministerens individuelle tilladelse til Post Danmark A/S, at restauranten har krav på at få ud-bragt sin post, og 3F er derfor ikke berettiget til ved iværksættelse af konflikt at etablere en situati- on, hvor posten ikke kan udbringes til restauranten. 3F kan ikke påberåbe sig force majeure, når henses til, at 3F selv har etableret situationen. Det kan ikke føre til et andet resultat, at restauranten kan afhente sin post på det lokale postkontor. Udvidelsen af sympatikonflikten til at omfatte stop
for afhentning af affald er også et ulovligt kampskridt, idet restauranten har et lovmæssigt krav på at få bortskaffet affald og betaler herfor. Det er særlig klart, at det var retsstridigt, at 3F i en periode udvirkede, at restauranten ikke kunne få afhentet sit biologiske affald, da det udgør en sundhedsri- siko, såfremt biologisk affald ikke bliver afhentet.

Det bestrides, at klager som følge af passivitet er afskåret fra at gøre indsigelser gældende mod sympatikonflikterne vedrørende postudbringning og afhentning af affald.

Specielt vedrørende den subsidiære påstand har klager yderligere anført, at karakteren og omfanget af de ulovlige kampskridt indebærer, at hovedkonflikten er ulovlig, jf. herved Arbejdsrettens dom af
13. marts 2007 i sagerne A2007.639-641 (AT 2008.98). De ulovlige kampskridt indebærer

endvide- re, at restaurantens interesser og retsstilling reelt alene kan sikres, hvis Arbejdsretten bestemmer, at
3F er afskåret fra at opretholde hoved- og sympatikonflikter i en af retten fastsat "fredningsperio- de", smh. herved den netop anførte dom, hvori Arbejdsretten traf afgørelse om en særlig genopret- ningsperiode, hvori der ikke lovligt kunne iværksættes frigørelseskonflikt.

Indklagede, Landsorganisationen i Danmark for Fagligt Fælles Forbund, har anført bl.a., at 3F har en særlig interesse i at etablere konflikt i forhold til Restaurant Vejlegården, især da 3F før Amin Skovs overtagelse af restauranten den 1. november 2011 havde overenskomst med restauranten. Da overenskomsten mellem Kristelig Arbejdsgiverforening og Kristelig Fagforening er ringere for de ansatte end 3F's overenskomst, fik de ansatte således deres retsstilling forringet ved overtagelsen. Det er efter dansk arbejdsret fuldt ud lovligt for et fagforbund under LO at etablere hovedkonflikt
og sympatikonflikter mod en virksomhed, der ikke ønsker at indgå overenskomst med et fagforbund under LO, og dette gælder, selv om virksomheden er dækket af en overenskomst indgået med et udenforstående fagforbund, jf. bl.a. Arbejdsrettens dom af 12. december 2007 i sag A2007.831 (AT
2007.178) vedrørende Nørrebro Bryghus.

De kampskridt, der understøtter en konflikt, skal være lovlige og proportionale, men ved vurderin- gen heraf må det tages i betragtning, at en konflikt skal "gøre ondt", da dens formål er at lægge et effektivt pres på virksomheden. I den foreliggende sag er 3F ikke gået for vidt, hvilket man heller ikke på noget tidspunkt har anerkendt, heller ikke under retsmøder i Arbejdsretten, og der er ingen dokumentation for, at restauranten er lukningstruet som følge af de iværksatte kampskridt. Tværti- mod peger nyhedsomtalerne på, at restauranten har fordel af konflikten.

Bannerne og løbesedlerne har ikke haft karakter af en opfordring til kundeboykot, men har alene opfordret restaurantens kunder til refleksion, og der har i øvrigt alene været tale om kortvarige akti- oner. Den manglende postudbringning og manglende afhentning af affald er et resultat af sympati- aktioner, som er iværksat af 3F, der også har iværksat hovedkonflikten. Der skal i den situation me- re til, for at der statueres uproportionalitet, end hvis konflikterne var iværksat af forskellige faglige organisationer. Det er ikke uproportionalt, at restauranten ikke får udbragt post, da posten kan af- hentes på postkontoret. Det følger endvidere af tilladelsen til Post Danmark A/S, at postbefor- dringspligten ophører ved force majeure, og en arbejdsstandsning udgør en klassisk force majeure situation. Hvis klager ikke er enig heri, må klager gøre sine krav gældende over for Post Danmark A/S. Den manglende afhentning af biologisk affald stod kun på i en kort periode, og der er samlet set kun tale om mindre uregelmæssigheder hvad angår affaldsafhentningen. Der er derfor heller
ikke på dette punkt tale om uproportionalitet.

Restauranten har i øvrigt i relation til postudbringning og afhentning af affald udvist retsfortabende passivitet, idet man først den 8. august 2012 påberåbte sig, at disse konflikter er ulovlige.

Hvis det måtte antages, at der i visse tilfælde har været anvendt ulovlige kampskridt, har disse ikke en karakter og et omfang, der kan bevirke, at hoved- og sympatikonflikterne

erklæres ulovlige. Der er ikke hjemmel til, at Arbejdsretten kan bestemme, at en konflikt ikke må opretholdes i en "fred- ningsperiode".

**Arbejdsrettens begrundelse og resultat**

Klager ønsker bl.a. dom for, at adgangen til at iværksætte konflikt over for Restaurant Vejlegården ApS må undergives begrænsninger i forhold til, hvad der følger af Arbejdsrettens praksis, under hensyn til, at restauranten allerede er dækket af en overenskomst med et andet fagforbund.

Som anført i Arbejdsrettens dom af 12. december 2007 i sag A2007.831 (AT 2007.178) vedrørende Nørrebro Bryghus er det karakteristisk for den danske arbejdsmarkedsregulering, at lønniveauet og andre arbejdsvilkår sikres gennem de kollektive overenskomster og ikke gennem lovgivning. Ar- bejdstagerorganisationernes konfliktret til opnåelse af kollektiv overenskomst er således af afgøren- de betydning for udviklingen i lønfastsættelsen og opnåelsen af andre centrale arbejdsvilkår i Dan- mark. Der har flere gange i Folketinget været fremsat forslag til folketingsbeslutning, der skulle pålægge regeringen at fremkomme med forslag om begrænsning af arbejdstagerorganisationernes adgang til at iværksætte konflikt, f.eks. i tilfælde, hvor et fagforbund iværksætter konflikt for at opnå overenskomst på et område, der allerede er dækket af en overenskomst med et andet fagfor- bund. Disse forslag er ikke blevet vedtaget, idet der bl.a. er henvist til, at en lovregulering af kon- fliktretten vil være meget vanskelig og fundamentalt vil ændre den måde, hvorpå rollerne på det danske arbejdsmarked hidtil har været fordelt.

Arbejdsretten finder i overensstemmelse hermed, at spørgsmålet om hovedkonfliktens, sympatikon- flikternes og de omtvistede kampskridts lovlighed, herunder med hensyn til proportionalitet, må afgøres i lyset af Arbejdsrettens sædvanlige praksis.

Der skal under denne sag tages stilling til, om de konflikter og kampskridt, der er iværksat over for Restaurant Vejlegården, overskrider grænserne for det tilladelige. Arbejdsrettens praksis herom er beskrevet i "Hovedorganisationernes redegørelse om retten til at iværksætte konflikt til støtte for krav om overenskomst", afgivet af Dansk Arbejdsgiverforening og Landsorganisationen i Danmark i juni 2003. Det hedder i redegørelsens afsluttende "Sammenfatning af retstilstanden" bl.a.:

"Spørgsmål om lovligheden af varslede kollektive kampskridt eller af de i denne anledning udstedte konfliktvarsler samt spørgsmålet om lovligheden af anvendelse af kollektive kamp- skridt til støtte for krav om overenskomst på områder, hvor kollektiv overenskomst ikke er indgået, henhører under Arbejdsrettens kompetence jf. arbejdsretslovens § 9, stk. 1, nr. 3 og nr. 5.

Arbejdsrettens praksis viser, at retten opstiller en række kriterier, der altid indgår i rettens be- dømmelse af konkrete sager. Kriterierne er følgende:

*Konfliktens overordnede karakter.* Der skal mellem lønmodtagerorganisationen og arbejdsgi- veren bestå en interessetvist dvs. en uenighed om, hvorvidt – og i bekræftende fald under hvilke forudsætninger – en kollektiv overenskomst skal indgås eller fornyes.

*Konfliktens formål.* Konflikten skal forfølge et rimeligt fagligt formål. Formålet med lønmodtagerorganisationens iværksættelse af konflikt skal være at opnå en kollektiv overenskomst med den arbejdsgiver, der lader arbejde, som naturligt henhører under lønmodtagerorganisati- onens faglige område, udføre. En konflikt der tager sigte på, at opnå overenskomstdækning
for arbejdsfunktioner, der ikke falder inden for den aktionerende lønmodtagerorganisations faglige område, er ulovlig. Hvis det arbejde, der søges overenskomstdækket ikke i forvejen er overenskomstdækket, vil udgangspunktet være, at der forfølges et rimeligt fagligt formål. Ved bedømmelsen af, hvad der er en lønmodtagerorganisations naturlige, faglige område spiller det ingen rolle om organisationen aktuelt har nogen medlemmer på den konfliktramte virksomhed. Derimod skal organisationen have den fornødne og aktuelle interesse i at overenskomstdække det pågældende område. De formål, lønmodtagerorganisationen lovligt kan forfølge og understøtte med anvendelse af kollektive kampskridt, kan være begrænset af lovgivning eller overordnede aftaler f.eks. hovedaftaler. Formålet med konflikten må ikke være indgåelse af en overenskomst, hvis indhold helt eller delvist er i strid med lovgivningen.

*Konfliktens midler.* De kollektive kampmidler, lønmodtagerorganisationen tager i anvendelse med henblik på at formå arbejdsgiveren til indgå en kollektiv overenskomst, skal i sig selv være lovlige. Grænserne for, hvilke kampskridt der lovligt kan tages i brug, fastlægges af Arbejdsretten og under hensyntagen til eventuelle overordnede retsgrundlag i form af lovgivning eller aftaler. Lønmodtagerorganisationens kampmidler er primært strejke og blokade; arbejds- giverens primært lockout og boykot. I praksis vil det ofte være af afgørende betydning for lønmodtagerorganisationen at understøtte hovedkonflikten med en sympatikonflikt. Fysiske blokader er ikke lovlige kampskridt. Kampskridt, der berøver den konfliktramte arbejdsgiver enhver eksistensmulighed, er ligeledes ulovlige.

*Konfliktens omfang og virkning.* Det mål (den kollektive overenskomst), lønmodtagerorganisationen søger opnået gennem anvendelse af en konflikt, skal stå i et rimeligt forhold til de midler (de kollektive kampskridt), lønmodtagerorganisationen anvender for at nå målet. En sådan "proportionalitetsafvejning" foretages af Arbejdsretten. I de relativt sjældne tilfælde, hvor retten får forelagt spørgsmål om forholdet mellem det mål, der søges opnået, og de midler, der anvendes, synes retten at være tilbageholdende med at kende en konflikt ulovlig ud fra proportionalitetsbetragtninger. Dette gør sig særligt gældende i situationer, hvor alene lønmodtagerorganisationens egne medlemmer er berørt af konflikten. Bedømmelsen af, om de midler, der under en i øvrigt lovlig konflikt anvendes, er ude af proportioner med det mål, der søges opnået, synes derfor at have sin største betydning i tilfælde, hvor andre lønmodtagerorganisationer har iværksat sympatikonflikter til støtte for den lønmodtagerorganisation, der er part i hovedkonflikten."

Arbejdsretten lægger efter bevisførelsen til grund, at 3F's hovedformål med at kræve overenskomst i den foreliggende sag er at fastholde og forsvare veletablerede overenskomstmæssige positioner, herunder de mindsterettigheder for faglært og ufaglært personale, som man har opnået gennem for- bundets landsdækkende overenskomst med HORESTA. Arbejdsretten finder endvidere, at 3F's interesse i at opnå overenskomst med Restaurant Vejlegården under hensyn til forbundets position og medlemstal har den fornødne styrke og aktualitet til, at konflikten forfølger et rimeligt fagligt formål. Det kan ikke heroverfor tillægges betydning, at Restaurant Vejlegården allerede er dækket af overenskomsten mellem Kristelig Arbejdsgiverforening og Kristelig Fagforening. Kristelig Fag-

forening står med hensyn til medlemmer og overenskomstdækning i et frit konkurrenceforhold til
3F uden de begrænsninger, som vil gælde, hvis de konkurrerende forbund var tilsluttet en fælles hovedorganisation. Hovedkonflikten er derfor som udgangspunkt lovlig, jf. herved bl.a. Arbejdsret- tens dom af 6. maj 1999 i sagerne A98.632 og A98.702 (AT 1998.53).

Ved vurderingen af sympatikonflikterne, herunder deres betydning for hovedkonfliktens lovlighed, må det tages i betragtning, at der i dansk arbejdsret er en vidtgående adgang til at etablere sympati- konflikt til støtte for lovlige overenskomstkrav. Hovedbetingelsen for, at en sympatikonflikt er lov- lig, er, at selve hovedkonflikten er lovlig. Dernæst skal der være interessefællesskab mellem løn- modtagerne i hoved- og sympatikonflikten. Endvidere skal sympatikonflikten være egnet til at på- virke hovedkonflikten. Endelig skal sympatikonflikten stå i et rimeligt forhold til det mål, der søges opnået ved hovedkonflikten.

Arbejdsretten finder, at 3F's interesse i at fastholde og forsvare de nævnte veletablerede overens- komstmæssige positioner, som forbundet har opnået gennem den landsdækkende overenskomst med HORESTA, er fundamental og så stærk og legitim, at den retfærdiggør, at der fra de øvrige afdelinger af 3F er iværksat effektive sympatikonflikter, der nødvendigvis må være mærkbare for restauranten. Der er således det fornødne interessefællesskab mellem lønmodtagerne i hovedkon- flikten og sympatikonflikterne, ligesom de iværksatte sympatikonflikter findes at være egnet til at påvirke hovedkonflikten.

Spørgsmålet er herefter, om sympatikonflikternes omfang er urimeligt i forhold til det mål, der sø- ges opnået med hovedkonflikten, og om der i forbindelse med hovedkonflikten og sympatikonflik- terne er anvendt ulovlige kampskridt samt, hvis det er tilfældet, hvilken betydning det har for kon- flikternes lovlighed.

Det bemærkes indledningsvis, at klager ikke findes at have fortabt retten til at gøre indsigelser mod sympatikonflikterne på grund af passivitet.

Det følger af Arbejdsrettens praksis, at en konflikt ikke må være så omfattende, at den helt afskærer en arbejdsgiver fra at udøve sin virksomhed. Dette indebærer, at det er ulovligt, hvis en arbejdsta- gerorganisation som led i en konflikt for eksempel ved uddeling af løbesedler opfordrer den kon- fliktramte virksomheds nuværende og potentielle kunder og forretningsforbindelser til at boykotte virksomheden. Arbejdsretten finder, at nogle af de løbesedler m.v., 3F har anvendt, indeholdt op- fordringer til restaurantens gæster og potentielle gæster til ikke at spise på restauranten. Det drejer sig om bannerne anvendt af 3F's blokadevagter med teksten "GÅ BARE VIDERE! Restaurant Vej- legården ønsker ikke at indgå overenskomst", løbesedlerne med teksten "Vi opfordrer til at man i stedet går på overenskomstdækkede spisesteder. Se liste på bagsiden" og løbesedlerne med teksten på bagsiden af madanmeldelsen i Vejle Amts Folkeblad "Restaurant Vejlegården ønsker ikke or- dentlige løn- og aftaleforhold for deres ansatte. Du finder spisesteder med overenskomst på www.3f.dk/spisesteder". Anvendelsen af det nævnte banner og de nævnte løbesedler er derfor ulov- lige kampskridt. Det samme gælder de mails, 3F har sendt til restaurantens gæster, herunder mails af 15. maj og 7. juni 2012.

Arbejdsretten finder endvidere, at det henset til sundhedsfaren ved, at organisk affald ikke afhentes, var uproportionalt og dermed ulovligt, at 3F ved sympatikonflikten, der blev

iværksat den 29. Maj 2012, etablerede en situation, hvorefter organisk affald i en periode ikke blev afhentet. I denne ud- strækning har sympatikonflikten iværksat for at forhindre afhentning af affald været ulovlig.

Arbejdsretten finder derimod ikke grundlag for at anse de øvrige kampskridt for uproportionale eller på anden måde ulovlige. Dette gælder tillige sympatikonflikten iværksat for at hindre postud- bringning, da restauranten har mulighed for at hente sin post på postkontoret. Det bemærkes herved, at Arbejdsretten ikke har kompetence til at tage stilling til retsforholdet mellem Restaurant Vejle- gården og Post Danmark A/S, herunder om Post Danmark har været berettiget til at undlade post- udbringning.

Hvad angår de ulovlige kampskidt i form af uretmæssige kundehenvendelser mv. og afskæring af afhentning af organisk affald, har indsigelser mod disse kampskridt ført til, at 3F er ophørt hermed, og det er, som sagen foreligger oplyst, ikke sandsynliggjort, at disse ulovlige kampskridt har haft nogen nævneværdig indflydelse på konfliktens forløb, endsige haft afgørende betydning for Restau-rant Vejlegårdens virksomhedsudøvelse. Brugen af disse ulovlige kampskridt kan derfor ikke føre til generelt at anse hovedkonflikten og/eller sympatikonflikterne for ulovlige.

Det er efter bevisførelsen endvidere ikke godtgjort, at de iværksatte kampskridt og sympatikonflik- ter, som alene har omfattet 3F´s egne medlemmer, har haft som en uundgåelig konsekvens, at Re- staurant Vejlegården tvinges til lukning. På denne baggrund – og under hensyn til det ovenfor an- førte om 3F´s interesse i at opnå overenskomst – finder Arbejdsretten, at der ikke er grundlag for at fastslå, at de lovligt iværksatte kampskridt og sympatikonflikter overskrider grænserne for det tilla- delige.

Herefter tager Arbejdsretten indklagedes frifindelsespåstand over for klagers principale og subsidi- ære påstand til følge, mens klagers mere subsidiære påstand tages til følge i det nedenfor anførte omfang.

**Thi kendes for ret:**

Indklagede, Landsorganisationen i Danmark for Fagligt Fælles Forbund, skal anerkende, at forbun- dets anvendelse af

- bannerne med teksten ”GÅ BARE VIDERE! Restaurant Vejlegården ønsker ikke at indgå overenskomst”,
- løbesedlerne med teksten ”Vi opfordrer til at man i stedet går på overenskomstdækkede spi- sesteder. Se liste på bagsiden” og
- løbesedlerne med teksten på bagsiden af madanmeldelsen i Vejle Amts Folkeblad ”Restau- rant Vejlegården ønsker ikke ordentlige løn- og aftaleforhold for deres ansatte. Du finder spisesteder med overenskomst på www.3f.dk/spisesteder”

er ulovlig.

Indklagede skal anerkende, at de mails, 3F har sendt til restaurantens gæster, herunder mails af 15. maj og 7. juni 2012, er ulovlige.

Indklagede skal anerkende, at sympatikonflikten, der blev iværksat den 29. maj 2012, var ulovlig for så vidt angår manglende afhentning af organisk affald.

I øvrigt frifindes indklagede.

I sagsomkostninger til Arbejdsretten skal Kristelig Arbejdsgiverforening betale 1.000 kr., og Landsor- ganisationen i Danmark skal betale 1.000 kr.

## Finland

**National reporter: Judge Jorma Saloheimo, President of the Labour Court**

### 1. General remarks

Issues relating to the use and impact of IT in working life are frequently discussed in the Finnish media, and also commentaries on workers' privacy and data protection legislation have been published. Considering this, it is surprising how little case law in this area has come about. There are one or two dismissal cases, as well as a couple of cases concerning industrial action, in which IT has played a role. Not even these cases involve direct application of legal rules concerning IT.

### 2. Individual labour law

A recent judgment of the Labour Court (R 203/13, not yet published) concerns working from home and misuse of working time.

In the case the employee, a sales assistant of a saw mill, had in her possession the employer's computer. She explained that she had from time to time done work at home in the mornings. These tasks had included for instance reading and processing work related emails. In order to have this work included in working hours, she had used the computer to log in the working time surveillance system of the company at home just before leaving for work in her car. This meant in effect that her travel time to work was counted as working time as a kind of compensation for the work she said she had done earlier that morning. According to her, this had happened maybe 10 to 15 times over 5 years.

The employer's suspicions raised when the superiors noticed that the entries in the working time surveillance system, indicating the start of the employee's working hours, did not match with her actual arrivals to work. In order to further verify this, a video surveillance of her arrivals to the parking place was started and lasted for a week or so. In addition, reports of the working time surveillance system, covering about one year, were checked. The video material and the web connections and the IP addresses of the working time report revealed, that the employee had logged in the system at home on a regular basis. As a result, the employee's contract was terminated with immediate effect.

The trade union challenged the termination and brought an action before the Labour Court. In the proceedings, the employer denied that the employee had

permission to arrange her working hours the way she had done. Her work tasks did not require working at home in the first place, said the defendant employer company. The plaintiff could not prove the opposite. Neither could the trade union show that any work at home had in fact been done. The Court found the termination to be justified on the ground of the employee's long-lasting and unauthorized manipulation of working hours, and the action was rejected.

The case is an example of how IT is involved in everyday work, both as a tool and a means of surveillance of work. Furthermore, the case shows how data based on IT can be used as *evidence* in court proceedings. The existence of the video material and the working time surveillance report convinced the Court of the malpractice that the employee had made herself guilty of.

In various kinds of labour law cases it is everyday practice to present *emails* as written evidence, too.

## 3. Collective labour law

Two similar cases of the Labour Court illustrate the role of IT in the context of *industrial action* (judgments 2012:30 and 2012:119).

In both cases the employer had installed surveillance cameras at the work place to minimize various risks to company safety. The local trade union opposed the arrangements and argued that the surveillance endangered the workers' privacy. To back its view the trade union undertook a strike. The employers' association sued the trade union for violating the labour peace obligation. The trade union opposed the action and contended that the strike was not directed against the collective agreement currently in force, and therefore no violation had taken place. Instead, the dispute was about workers' privacy which was not regulated in the collective agreement.

The Court did not accept this defense and found that the strike was directed against the provision of the collective agreement, according to which the employer has the right to supervise work. The trade union was ordered to pay a compensatory fine to the plaintiff for violation of the peace obligation.

The legal problem in these cases was the interpretation and extent of the employer's right to supervise work, provided for in almost every collective agreement. There were no express provisions on workers' privacy or camera surveillance in the collective agreements in question, but could the camera surveillance be regarded as exercise of the general managerial power under the collective agreements? Normally the use of the managerial power presents itself in the employer´s decisions concerning directly the arrangements of work, working hours, recruitments and dismissals etc. Also general decisions made in business administration are, as a rule, assessed the same way. For instance, if a company decides to outsource some of its activities and the trade union opposes this by means of a strike, the action is regarded as a violation of the peace obligation (on condition that the collective agreement is in force).

The Labour Court's answer in these two cases was the same, as has been in other similar types of cases where the purpose of the industrial action has been to protest against new parking arrangements or access control systems at the work place etc. Thus also decisions on the use of IT at the work place enjoy the protection of the labour peace obligation.

## Germany

**National reporter: Dr. Regine Winter, Federal Labour Court of Germany**

### 1. Individual labour law

### 1a. Use of IT in the hiring process:

- **Unrealised plans:** Years ago, as part of a draft of a law governing workplace privacy, the government did propose placing restrictions on employers who want to use Facebook profiles when recruiting.[45] That has not become reality until today.

- **Existing law:** Federal Data Protection Act (BDSG)[46] - "Section 32 - Data collection, processing and use for employment related purposes":

    - "(1) An employee's personal data may be collected, processed or used for employment-related purposes where necessary for hiring decisions or, after hiring, for carrying out or terminating the employment contract. Employees' personal data may be collected, processed or used to investigate crimes only if there is a documented reason to believe the data subject has committed a crime while employed, the collection, processing or use of such data is necessary to investigate the crime, and the employee does not have an overriding legitimate interest in ruling out the possibility of collection, processing or use, and in particular the type and extent are not disproportionate to the reason.

    - (2) Subsection 1 shall also apply when personal data are collected, processed or used without the help of automated processing systems, or are processed or used in or from a non - automated filing system or collected in such a filing system for processing or use.

    - (3) The rights of participation of employee staff councils shall remain unaffected."

- **Cases:** Not aware of decided cases on topics such as "googling", performing background checks etc.

[45] 2010: "Germany Plans Limits on Facebook Use in Hiring" (http://www.nytimes.com/2010/08/26/business/global/26fbook.html?_r=0).
[46] English translation of the Federal Data Protection Act: http://www.bfdi.bund.de/EN/DataProtectionActs/Artikel/BDSG_idFv01092009.pdf?__blob=publicationFile

- **Sending out signals:** For instance, the Deutsche Bahn AG did set out core principles for the protection of employee data, including selection processes only based on data received from applicants[47].

**1b. Use of IT during employment:**

- The majority of decided cases concerns "IT activity as ground for termination/dismissal" (see below).
- Use of internet and/or e-mail at work: Quite a few companies try to reduce the potential for conflict by "limited permission" for the use of internet and/or e-mail at work (frequently allowed for private use - unless no deterioration of work/working hours); often as "works agreements" negotiated by the works council and the employer (see below).
- "Control"
    - … is in the German labour law context probably often rather a question of collective labour law.
    - However, there are some cases. One concerns the question whether an employee after termination of a contract of employment/employment relationship is entitled to be blanked out in pictures on the company's homepage.
        - The first-instance Labour Court in Frankfurt/Main (Arbeitsgericht Frankfurt/Main, 20/06/2012 -7 Ca 1649/12 -) decided: Yes, because of infringement of privacy rights ("right to one's own image"/German "Recht am eigenen Bild") and because of the general right to protection of personality.
        - To be decided by the second-instance Land Labour Court in the federal state of Hessen (Hessisches Landesarbeitsgericht, - 7 Sa 1123/12 -).

**1c. IT activity as ground for termination of employment / in connection with dismissal:**

- **Preface:** Before termination for reasons of conduct, according to German labour law in general a previous warning ("Abmahnung") and a repetition of the alleged conduct is required. Only in exceptional cases termination without a warning is possible, e.g. when a termination without notice is justified. Judgments essentially depend on the circumstances of the individual case and the assessment of the case by the trial courts (first-instance Labour Courts and second-instance Land Labour Courts / Arbeitsgerichte and Landesarbeitsgerichte). The final-instance Federal

[47] Source: Prof. Dr. Peter Wedde, Datenschutz für Arbeitnehmer ist "Flickwerk".

Labour Court (Bundesarbeitsgericht) cannot re-examine on questions of fact, only on questions of law.

- Infringement of an explicit prohibition on private use of the Internet at the workplace - **(e.g. activities during breaks)**:
    - Infringement of an explicit prohibition on private use of the Internet at the workplace (including download of pornographic material) during breaks is not necessarily an absolute cause for termination. A previous warning may be necessary (Bundesarbeitsgericht 19/04/2012 - 2 AZR 186/11 - ). However, in severe cases of private internet use a termination without notice and warning may be justified (Bundesarbeitsgericht 07/07/2005 – 2 AZR 581/04 -).
    - Installation of anonymizer / anonymization software constitutes a considerable violation of the employee's duties and is therefore a reason for termination without warning (Bundesarbeitsgericht 12/01/2006 - 2 AZR 179/05 - )
- **Activities outside of the workplace:**
    - In general, working life and life outside work are unrelated in terms of German labour law. An employer cannot impose sanctions because of acts done privately. However, there are a few exceptions. Some cases, focusing different topics in the range of issues:
    - "(Potentially) business-damaging comments of employees on the Internet justify a termination without notice":
        - Description of the case: Uploading a video on Youtube in which the employee - untruthfully - claims the absence of skilled employees at the establishment of the applicant company.
        - Decided by: second-instance Land Labour Court of Hamm (Landesarbeitsgericht Hamm, 15/03/2013 – 13 Sa 6/13 –): termination without notice is justified.
        - To be decided by the Federal Labour Court (Bundesarbeitsgericht): 31/07/2014 - 2 AZR 505/13 -
    - Defamation or similar accusations of the employer, although he was not referred to by name, in a publicly accessible Forum or Chat may justify a termination without notice
        - Decided by: Land Labour Court of Hamm (Landesarbeitsgericht Hamm, 10/10/2011 – 3 Sa 644/12 –)

- The Land Labour Court did not grant leave to appeal. An “appeal against denial of leave to appeal” had been lodged without success (Federal Labour Court - Bundesarbeitsgericht, 6 AZN 2420/12).

- “Fundamental right to freedom of expression carefully balanced with a prohibition of insult and ‘denigrate’ (Schmähung)”

  - Description of the case: After having participated in a seminar about so-called termination talks and having received an announcement by the Company Management to the workforce about forthcoming termination talks in the enterprise, a member of the works council placed a computer animation on a website operated for employees of that company, displaying a rapid succession of 62 images in 26 seconds with fragmentary sequences featuring 20 different motifs: 33 images in 12 seconds with a sub-line “Hier ist die Meinungsfreiheit” (“here's the right to freedom of expression”) and a computer keyboard showing the words “Meinung” (“opinion”) and “Schwarzes Brett” (“notice board“); 14 seconds with images like a guillotine, explosion of nuclear weapon, corpses piled upand, the historic sign 'Arbeit macht frei', a historic image of selection on the ramp, lightning, a teddy bear sitting in a boat, an open crocodiles' mouth; on the bottom of the picture always a grim reaper and “termination talks”.

  - The court instances (Arbeitsgericht, Landesarbeitsgericht, Bundesarbeitsgericht) understood the message of the animation differently in view of forbidden insult and ‘denigrate’. As the first-instance Labour Court, the Federal Labour Court (Bundesarbeitsgericht, 24/11/2005 - 2 AZR 584/04 -) concluded that the animation not exceeded the balance of freedom of expression. Not insulting the company and the Board of Management had been the goal, but to strengthen opposition of employees in the context of “termination talks” by images causing strong emotions of fear and horror.

## 2. Collective labour law:

### 2a. Industrial action

- Only as marginal reference:

  - “Flash mob” in retail stores organized via social media by a union as part of industrial action, after retail companies had replaced striking employees with temporary workers. The use of social media is not a subject of the judgement (Federal Labour Court - Bundesarbeitsgericht, 22/09/2009 - 1 AZR 972/08 -).

**2b. Employees' representation and co-determination (Betriebsverfassungsrecht):**

- When introducing and applying data-processing systems which allow (mainly and/or as a subsidiary function) monitoring of employees at their workplace by technical means:
    - Relevant act: Sec. 87 Works Constitution Act (Betriebsverfassungsgesetz - BetrVG)[48] - "Right of co-determination" - para. 1:"The works council shall have a right of co-determination in the following matters in so far as they are not prescribed by legislation or collective agreement:", no. 6: "the introduction and use of technical devices designed to monitor the behaviour or performance of the employees". It is not necessary that the employer intends to control. **Examples:**
        - Equipping with mobile communication devices
        - Installation of "Data Warehouse"-processing system ("Brokerage System Redesign" - BSR), a system used for reporting and data analysis in the enterprise (Federal Labour Court - Bundesarbeitsgericht, 14/11/2006 - 1 ABR 4/06 -)
        - „Truck tracking" - monitoring performance of lorry drivers with a GPS tracking system (FleetBoard) (first-instance Labour Court in Dortmund - Arbeitsgericht Dortmund, 12/03/2013 - 2 BV 196/12 -)
- "Works agreements" on the use of internet and/or e-mail at work (for business purposes, frequently also allowed for private use), negotiated by the works council and the employer ("works agreements" - sec. 77 para. 2 Works Constitution Act)

**3. Restrictions in jurisdiction on the use of information derived from social media as evidence in legal proceedings:**

The German Code of Civil Procedure (ZPO) and the Labour Court Act (Arbeitsgerichtsgesetz) do not contain an explicit ban on using such information. However, violations of the general right of personality are prohibited (Basic Law for the Federal Republic of Germany [GG][49]: art. 2 para. 1 GG[50] in connection with the guarantee of human dignity of art. 1 para. 1 GG). Evidence obtained in violation of this right shall be excluded (see for instance: Federal Labour Court - Bundesarbeitsgericht, 21/11/2013 - 2 AZR 797/11 -).

[48] English translation of the German Works Constitution Act: http://www.gesetze-im-internet.de/englisch_betrvg/englisch_betrvg.html#p0482
[49] English translation of the Basic Law for the Federal Republic of Germany: http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0015
[50] Personal freedoms - «Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law»

## Hungary

**National reporters: Dr. Tünde Handó, Dr. Éva Simon, Dr. Zoltán Németh, Dr. Anna Csorba**

Hungary has cases mostly on individual labour law, especially on the ground of termination of the contract.

1.
The claimant was in an employment relationship with the defendant as a mailman. The claimant registered himself on Facebook (created a profile) and in the personal data section of the profile listed the Post Office as his workplace. The claimant's friends knew that he was employed at Magyar Post Zrt. (the Hungarian Postal Service). The claimant posted the following to his Facebook message wall.
"Tomorrow Hungary is going to wake up for a day. Starting tomorrow, we are going to keep the managers of the Postal Service use harsh, dictatorial, and terroristic means to demand order. We are going to stand up for respect. We are not going to allow them to destroy the good reputation and ethical norms of the post office and we are not going to allow them to humiliate its real, hard-working employees.
ENOUGH IS ENOUGH!!!
We are going to employ such brutal force in declaring our sentence that the managers will have no other choice but to stand up and say "Goodbye!". My dear fellow employees, even if you are afraid, even if you are afraid of losing your jobs, the political situation and the positive energy resulting from it is an enormous source of energy for us. It gives us the strength to finally work in a normal, humane environment, and to express our opinion in this cruel, demoralizing process that the managers have incited.

ENOUGH IS ENOUGH!!!
I wish you all a lot of strength and perseverance!"

The defendant terminated the claimant's employment relationship without notice with a reason that this text violated the Ethical Code of the Postal Service, it casts a negative light on the employer in a publicly accessible manner. According to the claim, the post does not reach a level so as to justify the defendant terminating the employment relationship without notice.

The Labour Court rejected the claim on the grounds that this conduct constitutes termination without notice. The Second Instance approved the Labour Court's decision, highlighting that it did not examine the claimant's reference to the defendant using prohibited data collection to access the claimant's post. There is no debate as to whether the entry in question was posted by the claimant on his Facebook message wall, where anyone could have legally accessed it, whether through the claimant's friends, or even the friends of his friends. Due to the public nature of the post and where it was posted, it may not be considered private correspondence. Due to the use of the threatening, offensive terms it violated the limits of the freedom of expression.

2.
The claimant was in a public employment relationship with the defendant in the position of facility/technical inspector. The defendant initiated disciplinary proceedings against the claimant for visiting "recreational" websites on the Internet, including a significant amount of porn websites to the detriment of the claimant's working time and work on his work

computer. The defendant imposed a disciplinary punishment on the claimant with the justification that he had spent a significant amount of time regularly visiting recreational, primarily sex and pornographic Internet websites during working time, using the Internet access provided by the employer, to the detriment of the claimant's working time and work.

With regard to the Internet usage, the claimant stated that it could not be established whether the computer recorded pages running next to news portals, or intentionally recorded images of a pornographic nature. It cannot be ruled out with complete certainty that someone else had access to his computer, the claimant was never warned about the constraints of Internet usage, and the defendant did not have an Internet usage policy in place.

In response to the defendant's motion, the court ordered an IT expert to establish what kind of Internet usage the data saved from the claimant's computer proves. The court accepted the expert opinion and, based on it, established that the claimant had viewed websites of a pornographic nature during working time, furthermore, that he had created a separate folder in which he had stored such images. According to the expert opinion, an intentionally created folder could be found in which numerous images of a specifically erotic and pornographic had

been copied, furthermore, that many erotic websites had been visited (based on the cookie files). The expert opinion also included detailed daily breakdowns of the frequency of the visits, confirming that the claimant's activity was regular and had taken place mainly during working time. Based on the expert's opinion it was proven that only the claimant had access to his work computer.
The Court also emphasized that even without a separate IT policy, it is obvious that it is not allowed for public employees to regularly visit porn websites during working time. The court decided that the claimant's conduct is grounds for the most severe disciplinary punishment, not only because visting porn websites during working time breaches the obligation to carry out work, but also because this conduct is unbefitting of a public employee.

3.
BH. 2008.369 of the Curia:
The applicant worked for the employer as goods uploader, but at the same time he had a certificate in IT. Thet meant a bright knowledge in the field of IT. The applicant put an internet browser on a newly installed computer and it made possible for the workers to access the internet in uncontrollably way. This unauthorized installation of the browser was against the intended use of the computer system by the company, and made the system vulnerable against computer viruses. The applicant was also aware of this fact. After the employer had recognized these employee's misbehaviour, he offered the termination of the contract by mutual consent rather than termination with immediate effect.

4.
BH. 2006. 64 of the Curia:
The Supreme Court said in this case that using another colleague's computer for private purposes can lead to a termination with immediate effect.

The applicant worked for the company as a legal advisor. On 22th April 2003 the employer terminated his contract with immediate effect for 3 reasons: The applicant watched porn sites on his own and his colleague's computer during the working hours. He behaved with his colleges and with his boss inappropriatly, and gave an incorrect/ wrong data service to the auditor. The applicant apologized his collague for using unpermitted porn-sites on the computer on his computer. This fact is recorded in an official protocol. During the legal procedure the Court of Second Instance found the reasons of the termination not so serious, which could have led to a fair dismissal, so the Court in second instance changed the decision of the Labor Court and declared the dismissal unfair. After the decision of the Court of second instance opening certain sites can be morally inappropriate, however using the sites by the applicant remained unproven in the procedure. So it can be stated with certainty, that these sites were only used just by the applicant.

In the Review Procedure the Supreme Court found the use of another colleague's computer proved, (according to the protocol about applicant's apology ) and this fact was also admitted by the applicant.

According the Labour Code regulation: ' During the of the employment relationship workers shall not engage in any conduct by which to jeopardize the legitimate ecomomic interests of the employer, unless so authorized by the relevant legislation.' The applicant worked in a position with a higher level of trust. The decision established a serious breach of obligation on the side of the applicant, and annulled the final judgement, finding the decision of the first instance correct.

A case of the Administrative and Labor Court in Miskolc:
The applicant worked for the highway control company as a price controller, working on the highway in a mobile vehicle. For the job the employer made him a computer with mobile Internet available.
The employer has a valid data flows and Internet regulation, which were familiar with the employees, and so was the applicant. According to this regulation using the mobile Internet is only allowed to query the toll of the highway use, that means, any other use is prohibited. These facts and rules were familiar to the applicant too.

In January 2014 the mobile service provider sent a bill of more than 3 million forints. After receiving this bill with an extremly high amount the employer investigated the case, and stated, that the extremly big data flow was related to the vehicle and the mobile Internet used exlusively by the applicant. The data flow was downloading multimedia content, visiting torrent websites and youtube.
These circumstances led to a termination of the contract with an immediate effect, because the employee's behaviour was meant breach the IT regulation, the worker used the PC device for unintended purposes.
This serious breach of obligation made the dismissal legally correct.

## Ireland

**National reporter: Kevin Duffy, Chairman, The Labour Court**

### Introduction

There have been relatively few reported cases in Ireland concerning the impact of information technology in employment and industrial relations. Such cases as have come before the Courts and Tribunals concerned the dismissal of employees for abusing their employer's IT system by posting offensive comments, either about other employees or the employer.

There have been no cases involving employers using social media as a tool is selection for employment. This is perhaps unsurprising since reliance on such material is covert and may never come to light. Moreover, reliance on information obtained in this way would only lead to illegality if the employer subsequently relied upon a consideration that offended against employment equality law. For example, if an employer discovered undisclosed facts about an applicant for employment which came within the ambit of the Employment Equality Acts and relied upon that discovery in making a decision not to employ that person, a cause of action would accrue in equality law.

### IT and Defamation

Issues can also arise in defamation law through the use of social media. It is now settled in Irish law that the posting of information on the internet constitutes a 'publication' for the purposes of the Defamation Act 2009. In a recent case (*Eoin McKeogh v John Doe and Others* [2012] IEHC 95]) the Irish High Court made extensive orders requiring You Tube to remove material defamatory of the plaintiff and to disclose to the plaintiff the identity of the person who had posted the offending material.

This case arose from an incident recorded on a mobile phone and posted on You Tube showing a man running away from a taxi without pay the fare. The public were invited to identify the person in question. Subsequently a person using the pseudonym "Daithii4U" saw the video footage and wrongly identified the plaintiff as being the person who had left the taxi without paying the fare, thereby defaming him. In this respect, it had been ascertained that, on November 13, 2011, the plaintiff had been present in Japan and that he was not, and could not have been, the man seen exiting the taxi on that date.

The Court made orders directing the immediate removal of the defamatory material and also made so called 'Norwich Pharmacal' orders requiring certain of the named defendants to provide to the plaintiff the identity of the web users who had defamed the plaintiff via their websites so that the plaintiff would be able to take steps against them.

While this case was unconnected with employment the principle which it established is far reaching. Those who post offending material about others on the internet do so at their peril and they cannot avoid liability by the use of pseudonyms. While the matter has not yet been

tested before the Irish Court there is no reason in principle why an employer about whom defamatory material is published cannot trace the author of the material and if the author is an employee to deal with the matter as one of misconduct. Equally, if an employer believes that sensitive information concerning an employer's business is being disclosed on the internet by an employee in breach of his or her contractual obligation not to disclose such information there appears to be no reason why the employer cannot seek to have that person identified and to take appropriate action.

**Irish Case Concerning Employment**

In the employment sphere a number of cases have come before the Irish Employment Appeals Tribunal[i] concerning employees who were dismissed for misconduct associated with IT usage.

In *Mehigan v Dyflin Publications*[ii] an employee was dismissed for disseminating pornographic images *via* his work email account. The employee denied downloading the images but claimed that he had received them by email and passed them on to others. The employer did not have any published policy on the use of the email system. On that account the Tribunal found that the dismissal was unfair in that it could not be held that the employee had breached a policy against the use of the internet for this purpose. However the Tribunal found that the employee had contributed greatly to his own dismissal and compensation of only €2,000 was awarded.

In *Fogarty and O'Connor v IBM International Holdings B.V*[iii] the employee had been furnished with a copy of the employer's written internet use policy together with business conduct guidelines and security guidelines. Another employee complained that the Claimant had made offensive comments of a sexual and racial nature on a chat area of the website directed at colleagues. In this case it was held that the Claimant's dismissal was fair. This finding was bases on the conclusion that the Claimant had contravened the published policy of the employer directed against the use of the website to disseminate offensive material.

In *Walker v Bausch and Lomb Limited*[iv] an employee posted a message claiming that 500 workers were to be made redundant. This was during a time of considerable industrial relations uncertainty. The employer claimed that this posting caused further unrest amongst the workforce. The employee was dismissed for misconduct.

The message was not posted on the company's main website but on an intranet site and thus had limited circulation. While the company had clear guidelines on the use of its main website there was no specific policy concerning the use of the intranet site. On that account the dismissal was held to be unfair as being disproportionate to the conduct complained of.

The case of *Emma Kiernan v A Ware Limited*[v] concerned a posting by an employee making offensive comments about her manager. These comments were made on a social media page from the employee's own computer and in her own time. The comments were directed to a friend of the Claimant but the site was accessible to the public at large through links. The Company regarded the comments are amount to gross misconduct on the part of the employee and she was dismissed.

The Tribunal agreed that the online activities of an employee outside of the workplace and during her own time can constitute misconduct. In the circumstances it held that the sanction of dismissal was disproportionate. The employee obtained a relatively low award of €4,000, reflecting a belief by the Tribunal that she had contributes to her own dismissal

Finally the more recent case of *O'Mahony v PJF Insurance* [vi]is noteworthy. Here a director of the Company happened to access a social networking site on which she discovered references to her in abusive and disparaging terms. The references had been posted by the Claimant. Following a disciplinary inquiry the Claimant was dismissed.

The Tribunal took the view that the nature of the comments had amounted to a breach of trust on the part of the employee. In these circumstances the dismissal was upheld.

## Israel

**Judge Rami Cohen, President of the Haifa Regional Labour Court, Israel**

**"Impact of Information Technologies (IT) on industrial and employment relations" – review of national case law**

"Information technology (IT)" covers a broad range of issues. Our aim is to discuss questions relating to IT in a broad sense, including social network (use of Facebook – both "open" and closed groups), blogs, Instagram etc.
We kindly ask the national reporters to present relevant case law on any topic within the following two main areas:

**The following is the response from Israel:**

**National Labour Court Case 90/08 *Isakov v. State of Israel* (February 8, 2011)**

Two of Israel's Regional Labour Courts (Tel Aviv and Nazareth), have dealt with the issue of whether personal correspondence conducted via an employee's mailbox accounts - accounts provided by the employer or private accounts for which the employee only used the employer's server - may serve as evidence submitted by the employer against the employee. Because the two Regional Courts reached different conclusions, the issue went on to be heard by the National Labour Court (N.LC).

[It should be noted that between the time the appeals were made and the National Labour Court's issuance of its decision, the *Histadrut Ha-Clalit*, Israel largest employees' organization and the Manufactures Association (Federation) of Israel- the largest employers' organization - signed a Collective Agreement which set the general guidelines for the use of an employer's computer in the workplace. This Collective Agreement will be discussed in detail below.]

In addressing the issue, the N.L.C. attempted to balance between the employee's right to privacy and to live in dignity – on the one hand – and, on the other hand, the employer's rights to his property, and his right to run his business the way he sees fit (in terms of working hours and an expectation that the tools he gives to his employees, such as a workplace computer, will be used for work purposes only). Part of that right is the ability to set the rules for using the workplace computer assigned to the employee, and to use measures to secure the computer's network and verify that the use made of it is legal and for work purposes.

The court held that the employer's ownership of the computers does not allow him to violate the employee's right to privacy, except under exceptional circumstances, and subject to the relevant law.

The Court noted that new ways and applications for the use of computers are discovered every day, such as the internet, and these include the transfer of databases - through many formats, contents and means of communication. These include email accounts, chat rooms, forums, blogs, Facebook, personal and commercial websites, etc. Within this global communication dimension, the computer also contains a personal dimension of the user. This personal dimension surrounds the physical and metaphysical living space of the user. In using the information technology that every user has access to, the user develops a virtual private space that holds his personal, commercial and creative world, all of his correspondence - private and business alike - and his thoughts, matters concerning his job and other activities, and his browsing history. The computer information technology applications, especially the internet and email correspondence, contain information that enables the user to create a profile that defines his world and personality, hobbies, and aspirations, as well as his relationships and communications throughout his life, and his activities at work, with his family, and within his community.

The computer user's private virtual space is the same as his personal physical space, and the activities that are carried out through the computer are the same as those carried out in the user's home, on his premises or in his car. Thus, with the computer being its user's personal "drawer", containing private and personal information, an unauthorized intrusion into the computer is considered to be the equivalent of going through the owner's most intimate belongings, and of invading his territory, and it thus constitutes a violation of his right to privacy. This is why it is important to choose how sensitive information that is significant and unique for the user is stored.

The court stated that the constitutional value of the employees' privacy is given a significant weight in light of the enhanced obligations applying to the parties to the employment relationship.. The need to protect the employee's right to privacy in the workplace- including his right to privacy concerning information while using computers and additional communication technologies - stems from the inherent power differences between the employer and employee. In some circumstances, and subject to the needs of the employer, the employee's workplace and work environment may be considered to be his private space, protected by the constitutional value of privacy. As such, his use of an assigned computer in the virtual space, including when dealing with his personal affairs, will also be protected. The protection of the employee's right to privacy includes protection of his right to free speech in his communication, and to maintain confidentiality in his communications and his anonymity. Therefore, the employer should not be exposed to the employee's personal information - information that has nothing to do with the needs of the workplace, and the employee is protected from being monitored and from an invasion of his privacy.

It was held that the employer's property right and his managerial prerogative in setting policy with regard to the use of the workplace computer should be exercised in accordance with the law, including the employer's obligation to act in good faith; in accordance with the loyalty and decency that are in the base of the work relationship; in light of principles of transparency, proportionality, legitimacy; and while focusing on the objective- which is to protect the employer. The Court also held that the employer must set a clear policy regarding the "the do's and don'ts" of computer use in the workplace. The said policy must address the employees' professional and personal use of the computers; the monitoring and tracking activities that the employer intends to carry out; and the technology that will be used for these purposes. In addition, the employer must address the monitoring that will be carried out with regard to the employees' mailboxes, and specify the circumstances that will justify tracking and accessing the employee's personal information. This policy must be delineated in the individual employment contract, and receive the employee's consent. If the employer does not specify the monitoring and tracking policy, the assumption will be that the employee has an expectation of privacy in his use of his workplace computer and of his email accounts. Thus, the employer's monitoring of the employee's mailbox will be prohibited and the employer will also not be able to access the mailbox. It is also recommended that the employer's policy be determined upon consulting with the employees' representative body, with the intention of establishing an agreed-upon policy. In any event, the employer's ability to monitor, track and access his employees' mailboxes must be limited to legitimate purposes; the means used must be proportionate; and the information gathered must be used for the stated purposes. All this must be done with transparency, i.e. the employer must state the manner in which his policy of tracking and monitoring will be carried out; the employer must allow the employee access to the information accumulated about him, and notify him as to how long the information will be kept in the hands of the employer. The employer must also ensure that this information is held securely and that its confidentiality is maintained.

The Court explained that the need for the employee's consent is two-fold – first, there must be general consent to the employer's policy with regard to the tracking and monitoring procedures; second, the employee must consent specifically to every tracking and accessing procedure that the employer wishes to carry out. The employee's consent must be explicit, willful and given only after he has been given all the information required with regard to the employer's intention to violate his privacy. This consent is also needed if the employer wishes to monitor communication data (such as call lists), since such monitoring may expose a substantial amount of personal information about the employee and his habits.

If the employee's consent is needed, and the employee refuses to grant his permission, the employer may petition the Labour Court, and ask it to issue a relevant order.

The Court differentiated between three types of mailboxes that an employee may possess -

a) A professional mailbox- an email account which is only meant for work purposes: the Court allowed the employer to prohibit personal use of such an account. The employer may perform monitoring and tracking activities regarding this mailbox, including accessing its professional content, as long as the employee was notified about it in advance. If the employee uses this account for personal matters, even if it is done against the employer's

specific instructions, the employer may not access that personal content, and violate the employee's privacy. Rather, in this case the employer must follow the above-mentioned guidelines, and ask for the employee's specific consent to do so.

b) A mixed or personal mailbox - a mixed purpose mailbox is assigned by the employer, and may be used for both professional and personal matters. Another type of mailbox is a personal mailbox which is for personal use only. With respect to these mailboxes, the employee must give his general consent to the employer's policy. The employer is forbidden from monitoring, tracking or accessing the employee's personal content, and is subjected to the following rules: in a mixed mailbox, the employer must ask for the employee's consent to monitor or access the personal content (as apposed to the professional content); in a personal mailbox, the employee must give specific and express consent for every action the employer wishes to carry out (monitoring, tracking, accessing).

c) An external mailbox, owned by the employee - this type of mailbox is owned by the employee, and the employer is therefore prohibited from tracking the employee's use of it, and is specifically prohibited from accessing the mailbox, even if the employee uses this account from the workplace computer. These forbidden activities, if carried out by the employer, are a serious violation of the employee's privacy, and can be carried out only if a court order has first been obtained. Even if the employee's consent was given, the court will not recognize it unless the employer proves that the said consent was given freely, out of the employee's own free will.

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**Tel Aviv Labor Law case 2723/09 Shmuel Jovani v. "Si Siurim" (1986) Ltd. (March 20, 2013)**

Plaintiffs (P), who were employed by the Defendants (D) asked to submit transcripts of phone conversations held between D. themselves, in support of their claims against the D in a lawsuit they filed. D petitioned the Court to remove the transcripts from the court's records, since they were illegally obtained by violating the D's constitutional right to privacy and were the result of eavesdropping.

Both parties agreed that P. were not part of the aforementioned conversations, and that the only way P. came into possession of the conversation was upon borrowing one of the D's cell phone, listening and copying the audio files that were saved on it. After copying the relevant files, P. destroyed the cell phone altogether. This was, obviously, done without D's knowledge or consent. D. has even filed a complaint in the police regarding this matter.

The Court concluded that the audio files that were later transcribed, were in fact obtained while violating the D.'s constitutional right to privacy. The court added that D.'s cell phone contained a lot of personal and intimate information, and it is clear that in this case, the transcripts may not be used as evidence in the lawsuit, and will be taken out of the court's record.

P's claim that they were allowed to search in D's Cell phone, once they gained possession of it, and that they acted in good faith was rejected by the Court, clarifying that today people's cell phones are serving as personal computers, and allow similar applications. Therefore, the fact an individual hands his cell phone over to another, to be used it in order to make a call or send a text message, does not grant that other individual the right to look and search in it. A lot of personal data- such as photos, text messages, emails, ect- are saved on the

cell phone. Anyone who uses another's cell phone device must know that, and should not see it as an opportunity to harm the owner's right to privacy . More ever, the court also added that such a use of another's phone actually creates a duty on the part of the user to refrain from invading the owner's personal space, and that this obligation is derived from the user's duty to act in good faith.

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**Be'er Sheva Labor Law case 23983-05-12 Liron Levi v. Yaron Porter (June 12, 2014)**

Plaintiffs (P) have filed a suit against Defendants (D), requesting compensation, alleging D have defamed them by posting libel statements against one of P.'s businesses on D.'s "Facebook pages".

P. own and operate a hair salon and a night club in Eilat. D. did public relations work for P.'s night club, and claim P. still owe them lost wages for that job.

P. claim that one of the Defendants posted on his "Facebook page", statement calling for the boycott of D.'s hair salon. That post was viewed by over 1,000 people; a. 20 of D.'s "Facebook friends" shared this post, and 17 other "friends" replied to it.

The following day, the second D. posted on his "Facebook page", a post asking anyone who uses the hair salon to know "where they leave their money" and "in which hands they put their heads in". the same post, referred to P. as "two con men". That post was viewed by 4,850 people.

D. has also opened a "Facebook group", entitled "boycotting P.'s hair salon", to which 3,038 members joined.

As a result of the libel posting, numerous responds were posted, personally defaming both P. and the hair salon. P. was also contacted by customers asking to learn why these posts were published.

The Court ruled that: D.'s publications- the words and phrases that were used with regard to P. and their hair salon are in fact libel; and that D's are not protected by any of the defenses listed in the relevant Law. It was also proven that the above mentioned publications were made in response to P.'s causing one of the D.'s arrest. The Court stated that both D. have thousands of "Facebook friends", and though it has not been proven that they all read D.'s posts, even if only a few of them did, they could have shared these posts with their respective "Facebook friends" and so on. Farther more The Court pointed out that one of the D. actually requested his "friends" to share the posts with as many people as possible, and in fact 20 of them have shared the posts and 17 people responded to them.

To D.s claim that the court sould consider the statements that were made by the Supreme Court, according to which "… ***just as not every shameful call in the street may grant a cause of action, not every disrespectful publication over the internet gives rise to a lawsuit, as many of the 'talkbacks' posted are absurd, that everyone knows should not be taken seriously, and their 'damaging' value is accordingly***".

The Court found that the circumstances in this case are different from the Supreme court rolling, as there were no 'talkbacks', but rather "Facebook posts"; that the posts were harmful and specific. More ever, These posts also became popular and gained responses, i.e.- they were believable enough; it seems that the "readers" followed D.'s request to boycott the hair salon. The Court stated, while the internet has become the new "town square" that allows people to be heard, there is no reason to allow any harm to a person's good name and

reputation, just because of the way things are posted to "Facebook", or any other social network.

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**Tel Aviv Labor Law case 29090-05-12 Ana Gorlik v. Iliya Anbinder (April 21, 2014)**

The Plaintiff (P.) was employed by the Defendants (D) for about a year, and has filed a suit, claiming she was fired in an unjustly manner, and her right to privacy was violated.
Both parties agree that upon D.'s request that P. takes over additional responsibilities, and P.'s demand to raise her salary accordingly- which was not granted- P. notified D. that she was quitting. On one of the following days, P. arrived at the D.'s business, and asked to take back her resignation. P. claims D. accepted her request. On that day, D.'s son, who is also employed by D., turned on another employee's computer screen, where he found correspondence between that employee and P. over their "Facebook wall". He was shocked to learn that the two used offensive terms against the D. in public. D.'s son also learnt that P. recorded conversations it had with D. He then printed the posts and gave the printouts to his parents (D.). On the next day, D. approached to P., and demanded here to shows him her correspondence with her colleague on "Facebook". When P. refused, D. showed her the aforementioned printouts, and took her cell phone, telling her he wishes to check its content, specifically- if she recorded any conversation she might have had with D. and if the phone contains pictures of the factory's products (jewelry). D. also ordered P. to leave immediately, without her cell phone.
The Court found that D. did not ultimately turn on and used P.'s phone, due to the fact that he was forced by the police to return P.'s phone to her, therefore he did not violate her privacy by unlawfully gaining access to the content that was on her cell phone.
However, the Court determined that the mere fact that D. took possession of P.'s cell phone, without her permission, constitutes a violation of her privacy. The Court elaborated that while cell phone is no longer a device used only to make calls, but it has a lot of personal information on it, invading this private virtual space is not different from invading a "physical" space. This is particularly true in this case, where D. had every intention to search P.'s cell phone, but did not get around todo so before he was forced by the police to return P.'s phone to her. The Court farther explained that this prohibition is also relevant in case an employer suspect his employee has commercial secrets on his phone or other intellectual property the employer owns, or that he is looking for evidence for the employee's misconduct. The Court also stated that D. violated P.'s privacy by invading her "Facebook page", read the correspondence with her colleague, and "shared" parts of it. The Court states that anyone who uses computers today knows that it is common for someone to use a computer that was used earlier by another individual- whether an employee or the employer himself- who did not log out from their mailbox, their "Facebook" account or any other software or personal database, and therefore this information is easily accessible. According to the court, a new user's obligation is to close/ log off the specific software, immediately, and not to look at the information in front of him. Certainly not to print this information, copy it, or share it in public.

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**Tel Aviv Labor Law case 13-05-47635 Petit Food Ltd. v. Dniel Teweldabrhan (February 9, 2014)**

The Court was asked by an employer to issue an order :

a. forcing "Facebook Israel" company, to submit all of the posts her former employee posted on his "Facebook page" at the time he worked for the employer, and also to specify at what dates and times, and from which locations, the employee logged in to his "Facebook" account.

b. Requesting "Facebook Israel" to be forced to restore all of the information the employee loaded on to his account during the time of his employment.

The Court turned down the employer's request.

a. After stating that the information in question is not relevant and will not assist in resolving the parties' differences - The Court ruled that even if the requested information were to contribute to the case, such an order to "Facebook Israel" forcing it to expose the aforementioned information constitutes a brutal and unproportional immediately harm to the employee's constitutional right to privacy, to which the employer's right to gather the requested information yields to.

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**Tel Aviv Labor Law case 7945/09 Sophia Azimjenova v. Hatzlacha Parking Lots Ltd. (December 6, 2011)**

The Plaintiff (P.) was employed by the Defendant (D.)- a parking lots operator- for three years, before resigning. P. argues that she quit due to the fact D. did not grant her rights she was entitled to during her employment period.

One of the components in P's claim is for retirement fund's allowances D. was obligated to grant her each month, as stated in the Collective Agreement that applies to D. P. is basing her claim on the fact that in what is viewed as D.'s "Facebook page" it is stated that the D.'s C.E.O. now serves as the head of the employers' organization that is a party to the aforementioned Collective Agreement.

The Court rejected P's claim. The Court accepted the employer's representative testimony, who replied- upon being asked to explain the validity of that "Facebook" page- that it was the first time he learns that D. even has a "Facebook" account.

The court explained that in social networks, such as "Faebook", people can easily open accounts and pages perceived as those belong to a certain individual or a specific company. Therefore, the fact that there is a "Facebook page" that appears to be maintained by the employer does not prove it is in fact the official "Facebook page"/ account of the employer, and that it was not created by another. The court also added that even if the "Facebook" page was authentic and belonged to D., the fact that its C.E.O. in now a member of the employers' organization to whom the Collective Agreement applies to may not serve as evidence that D. was in fact a member of that employers' organization that was a party to the Collective Agreement at the time P. was employed by D.

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**Tel Aviv Labor Law case 13-12-13125 Histadrut Ha-Ovdim Ha-Clalit v. Migdal Insurance Company Ltd. (December 18, 2013)**

On Nov. 3, 2013, the Histadrut- Israel's largest general employees organization, declared it is the representative body of the Defendant's employees (Migdal insurance company). According to the Histadrut, 1,401 of Migdal's employees- more than 50% of the total number of Migdal's employees, joined it. Migdal refused to acknowledge this fact. Therefore, the Histadrut is petitioning the court to enjoin Migdal from harming its employee's right to organize. Migdal has petitioned the court to check whether all 1,401 employees joined the Histadrut willfully, and were not coerced or pressured to do so.

According to the court, the procedure of joining the Histadrut included a request sent to Migdal's C.E.O., to allow Histadrut's representatives access to the company's premises, in order to sign new members; sending informative letters to the employees regarding this matter; setting up a website containing additional information (www.midgal.hitagdut.org.il); opening a "Facebook group" (www.facebook.com/migdal.hitagdut), where Histadrut's representatives answer employees questions; meeting employees in person; etc.

Though it seems Migdal's C.E.O. supported the Histadrut's efforts at first, according to the Histadrut it later seemed like he was trying to interfere with the right of the employees to organize, among other things- by sending all employees forms to cancel their membership in the Histadrut, as well as sending them all emails- from one of Migdal's employee email account- stating it is not too late to stop the organizational steps, by signing the cancellation form attached. The Histadrut asked that Migdal will cease from sending the cancellation forms, and for it to issue a notice stating the abovementioned email was not sent on behalf of the company, and to stop any additional activity that will harm the organizational efforts.

Upon the Histadrut's petition to the court, a temporary restraining order was issued, prohibiting Migdal from contacting its employees- via personal correspondence or additional electronic means- with regard to the organizational steps.

In its decision, the court stated that Migdal chose to violate its employees autonomy to organize, and did not act in good faith.

As for Migdal's claim, that text messages regarding the organizational steps were sent via company's issued cellphones and that the phones were also used to sign up some employees as Histadrut members- the court replies that the "smartphones" in question may be used both for work matters and personal matters, and even if Migdal purchased these phones for its employees, with no specific agreement preventing the employees from using them for purposes that are not work related, it is clear they may be used for personal matters, including advancing the organizational steps.

As for Migdal's claim that all membership forms that were filled over the internet (about 320 forms) should be disqualified, since it should not be allowed to join the Histadrut by filling an electronic form, without a physical signature on it- the Histadrut replies that today, in an age where one may purchase Migdal's insurance policy over the internet, as well as other products, and sign numerous contracts over the internet, which is available everywhere, including for those using their "smartphones", an employee should not be prevented from joining the Histadrut in a similar way. According to the Histadrut, this manner for joining its organization has already been recognized in article 8 to its constitution. The court explains that it does not find the need to render a decision on the matter of allowing employees to become members of the Histadrut by filling out an electronic form via the internet, as this claim was raised incidentally, and the parties did not address it thoroughly in their arguments. The court adds that if Migdal will chose to pursue this matter, it should petition the court, detailing the full factual basis for its argument as well as its legal claims, and this issue will be discussed separately.

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**The General Collective Agreement of June 25, 2008:**

- On June 25, 2008, the Histadrut Ha-Clalit and the Israeli Manufactures' Association (Federation) signed a Collective Agreement regarding the issue of the employer's accessing of an employee's electronic mailbox (The Agreement).
- The Agreement was signed in an attempt to regulate conduct and establish the proper balance with regard to the employee's right to use the employer's computer, and the way in which it should be used.
- According to the Agreement, the employee may use the computer assigned by the employer even for his personal needs. However the employer has the right to inspect the employee's computer, if he suspects that the computer is being used for illegal activity, or that it is being used in a way that harms his business. In any event, this inspection must be carried out cautiously and must be proportionate and reasonable; it must be carried out only over a reasonable period of time, and while keeping the purpose of the monitoring process in mind.
- The preface to the Agreement states that the Agreement aims to balance between the employer's property right and the employee's right to privacy. The parties declared the following:

  "As the workplace computer is owned by the employer, and is part of his property, and is thus protected by the Basic Law: Human Dignity and Liberty;

  And as the right to privacy is also protected by the Basic Law: Human Dignity and Liberty;

  And because the employer's property right and the employee's right to privacy must be balanced properly;

  And because the use of the employer's computer at the workplace is an inseparable part of working in any job where computers are required;

  And because it appears that the issue of the principles and the manner in which the computer should be used in the workplace are essential, important and novel to both parties, and should be subjected to agreed normative regulation;

  And as the parties have negotiated in order to reach agreements with regard to the rules of conduct that will regulate the right to use the employer's computer; it is therefore agreed that…"
- Article 2 of the Agreement states its main principles. According to the article, these principles will apply to the rights and obligations that both the employee and the employer have with respect to the use of the workplace computer. For example, it recognizes the employer's property right in his business, including the right to run it - as well as the employee's right to privacy in his workplace- and that both rights must be exercised in a reasonable, proper and proportionate manner, in good faith, while granting the employee his right to privacy regarding his personal information. In addition, it requires that the employee must use the computer for work matters in accordance with any relevant law and with the guidelines that apply to those who operate a workplace computer, in fairness and in good faith. It recognizes that an individual's personal life should not concern others, and that a person's dignity and his privacy will be maintained according to any law and in accordance with the Agreement. It concludes by stating that the right to privacy will be examined in connection with the employer's right to run his business according to his goals and interests.

- Article 3 of the Agreement sets out these aforementioned rules of conduct, which apply to workplaces in which employees use an employer's computer. Among other matters, the article provides as follows:
- 3(a): The employer has the right to set the rules for use of a workplace computer- including rules addressing the technology required for the running of the business and the use of different software; adopting recognized standards in the issue of information safety (IISO); the policy for the distribution of mailboxes for the employees to use; the policy for connecting or disconnecting from the internet provider and from websites; rules for discarding business or private information output; and activities carried out in order to monitor and maintain the computers, and to prevent foreign and malicious objects from entering the computer, including the use of software to scan and detect viruses; etc. The article also states that all of these policies will be brought to the employees' attention.

- 3(b): The employee's workplace computer may also be used for his personal activities. Such use will be carried out in a proportional and reasonable manner, and will not violate any law or the provisions of the Agreement.

- 3(c): Manner of use- the employer will perform the activities mentioned in art. 3(a) in good faith, and with reasonableness and transparency, for a proper purpose, according to the needs of his business, and may not use the personal information gathered in a manner that violates the employee's right to dignity and privacy.

- 3(d): Circumstances in which an employer can access his employee's mailbox. An employee’s mailbox may be accessed under circumstances that give a reasonable employer reason to assume, in good faith, that the employee has used the computer for illegal purposes; that the employee's use exposes the employer to third-party lawsuits; or that the employee has engaged in use that may harm the business. In such cases, the employer may perform activities in order to check how the employee has used the computer, the internet and/ or email, all in a proportionate and reasonable manner, for a reasonable period of time. Such activities will focus on the purpose for which the measures are used. An employer must obtain the employee's specified consent before accessing an employee's personal mailbox, the address of which contains only the employee’s name - or before accessing his personal files. If the employee so requests - the mailbox or files can only be accessed in his presence. According to this article, however, there is no need for the employee to give consent if the employer wishes to access the mailbox that the employer has assigned to the employee for work purposes. However, with regard to the employee's private mailbox, which the employee uses via the workplace computer, the employer must receive the employee's specific permission. If the employee does not agree, the employer is forbidden from accessing such private mailboxes.

- 3(e): Use of the employee's personal information gathered by the employer - such use will be subject to certain rules. For example, it may be used only in a manner that inflicts the least possible harm to the employee's privacy. Information that was unlawfully obtained and or which was obtained other than in accordance with the provisions of the Agreement may not be used.

- 3(f): Notification- these rules will be announced to all members of the organizations that are parties to the Agreement.

- Article 4 addresses the issue of third-party activities, and states that an employer will not be liable for violation of his employee's right to privacy if it was committed by a third party who is not controlled by the employer; or by a computer maintenance technician, who is not an employee of the employer. It further states that in any event, the employer may not make any use whatsoever of the personal information gathered.

- Article 5 discusses procedures to resolve disputes between the parties with regard to any of the matters addressed in the Agreement. It establishes a dispute resolution mechanism - a discussion in a joint committee, whose members will be appointed by both parties. Differences of opinions with regard to the legal interpretation of a term or provision in the Agreement will be discussed in a committee appointed by the parties, which may also establish any guidelines in order to implement the Agreement. The committee will render its decisions, which will include legal arguments, within 30 days. Its decisions may be appealed to the Labor Court within 30 days.

- Article 6 mandates that the Agreement will be registered with the Collective Agreement registrar, and states that the parties intend to approach the Minister of the Economy and ask him to issue an Extension Order regarding the Agreement.

## Slovenia

**National reporter: Miran Blaha, Supreme Court Judge, Supreme Court of the Rep. of Slovenia**

Most jurisdictions will be bound by, inter alia, the Data Protection Directive (95/46/EC). The European Convention on Human Rights and the right to privacy is also relevant to the discussion. We assume that legislation implementing the applicable international rules is in place in each jurisdiction – and that such rules are broadly similar for all (most) of us.

It is therefore not necessary to describe these rules in your report unless there are special matters applicable to your jurisdiction.
We ask each country to present one (or a few) cases within the two main areas mentioned above. Please give a brief summary of each case and describe why you consider it to be of particular interest to our topic. If the judgment is available in English or a Scandinavian language (or if a translation is available), this may be included in the report.
Based on the cases that you present, we hope to facilitate an interesting and stimulating discussion which may form the basis for a more detailed report on the issues raised.

***

1. Individual labour law

1.1. The employer (a public kindergarten) dismiss the worker, because (among other reasons) she did not attend a mandatory (professional) staff meeting.
In the past, workers were on the time of these meetings informed with publication of notices on bulletin boards in the employer's premises and verbally. With "modernization" of business intranet was set up, but still remained the notification with the publication of notices on bulletin boards. Use of the intranet was not mandatory and the employer did not check

whether and how employees actually use the intranet. Employees are given passwords to access but there was no specific training for the use of the intranet.

Plaintiff did not use intranet because she could not, her attempts to use it were unsuccessful. The Court found that the employer has not published a notice about the meeting on the bulletin board and that no one orally informed the plaintiff about it. Since the employer has failed to show that the plaintiff was aware of the meeting, she can not be charged that she did not attend the meeting.

The question that it certainly raises is how the introduction of information technology into the business of the employer impact the older workers?

1.2. The employer dismiss the worker for breach of non-competition clause. Employer`s activity is selling medical equipment. The worker was employed in the field of marketing. Without informed the employer, she set up its own company to sell medical equipment and some equipment actually sold to the purchaser abroad.

The employer in the public register notice that a worker founded her own company, by looking at publicly available data found that her company has an income (that is, therefore, actualy active) and by checking on the Internet has found a power point presentation of the company.

1.3. The worker was employed as an database organizer. Within the employer raises some conflicts between management and employees. A worker outside normal working hours came to the premises and unauthorized broke into the computer of a colleague and in her private e-mail. She print a few e-mails about communication with the management of the employer and take it home.

Manipulation of a worker was discovered by accident. When printing the paper jam and part of the document is not printed. When the user of the computer came to work and restart the printer, the remaining documents were print. By checking the computer employer then found when the computer has been used and what has worked on it.

1.4. The worker was employed at the casino as usher (ticket collector). The casino was obliged by law to keep records of players with personal information to enable their identification. The information is a bussines secret and may only be communicated to those for which the law so provides. A worker from this computer database copy names, surnames and addresses of casino guests on pieces of paper, which was find out from video surveillance cameras. The employer dismissed the worker.

The worker argued that he only copy information about their friends and acquaintances that he had intended to propose as a witness in a legal dispute and claiming it is a violation of personal rights, because the employer has used video clips of surveillance cameras at the premises. The Court held that the termination of the contract of employment is justified and lawful.

Courts have also dealt with some similar issues when the policemen abused their powers of insight into computer databases of personal data. They may use these databases relating to the detection of offenders and criminal offenses, but not outside those powers (for example, looking for personal informanion on acquaintances, neighbors, celebrities, etc.).

2. Collective labour law

In accordance with the Employment Relationship Act as written notification shall be deemed also inform the Trade union electronically - using information technology in accordance with the arrangements in the collective agreement or agreement between the employer and the Tradse union.

In a strike case (strike of a crane operators in seaport) there was a dispute about the scope of the tasks that workers must perform in a public company during the strike. Communication between the management of the port and the strike committee took place by e-mail.

## Spain

**National reporters: Judge Antonio Martin Valverde, Supreme Court (Labour Chamber)**

**I. PRELIMINARY QUESTIONS**

"Information technology (IT)" covers a broad range of issues. Our aim is to discuss questions relating to IT in a broad sense, including social network (use of Facebook – both "open" and closed groups), blogs, Instagram etc.

We kindly ask the national reporters to present relevant case law on any topic within the following two main areas:

4. Individual labour law – this covers all phases of the employment and the individual employment relationship:
    - Use of IT in the hiring process (for instance "googling", performing background checks etc.)
    - Use of IT during employment (monitoring, control measures, use of email, control of mailboxes, including private mailboxes, sms etc.). Restrictions on private use of IT and IT activity outside the work place (for instance on social networks).
    - IT activity as ground for termination of employment / in connection with dismissal.

2. Collective labour law – inter alia, use of Facebook, blogs, sms etc. in connection with industrial action, for instance in connection with a demand for collective agreement.

To the extent that there are restrictions in your jurisdiction on the use of information derived from social media as evidence in legal proceedings, you may include comments on this.

Most jurisdictions will be bound by, inter alia, the Data Protection Directive (95/46/EC). The European Convention on Human Rights and the right to privacy is also relevant to the discussion. We assume that legislation implementing the applicable international rules is in place in each jurisdiction – and that such rules are broadly similar for all (most) of us.

It is therefore not necessary to describe these rules in your report unless there are special matters applicable to your jurisdiction.

We ask each country to present one (or a few) cases within the two main areas mentioned above. Please give a brief summary of each case and describe why you consider it to be of

particular interest to our topic. If the judgment is available in English or a Scandinavian language (or if a translation is available), this may be included in the report.
Based on the cases that you present, we hope to facilitate an interesting and stimulating discussion which may form the basis for a more detailed report on the issues raised.

****
We have selected and translated two important judgements on impact of IT on industrial and employment relations:

1) Constitutional Court 98/2000, September 26th (case Casino de la Toja): right of privacy and IT means of control in workplace
2) Supreme Court September 28th 2007 (case Coruñesa de Etiquetas): use of the professional computer for personal purposes

"Impact of Information Technologies (IT) on industrial and
Employment relations" – review of national case law

**Constitutional Court 98/2000, September 26th (case Casino de la Toja): right of privacy and IT means of control in workplace**

Appeal before the Constitutional Court against Judgment of January 25, 1996, issued by the Labour Chamber of the High Court of Justice of Galicia, reversing judgment of 7 November 1995, from the Labour Court no. 3 of Pontevedra stating that the decision of the company installating microphones in certain units of the workplace does not violate any fundamental right of workers. Infringement of the fundamental right to personal and family privacy and own image: granting appeal.

The First Chamber of the Constitutional Court, composed by Pedro Cruz Villalon, President; Manuel Jiménez de Parga y Cabrera, Don Pablo Garcia Manzano, Fernando Garrido Falla and Maria Emilia Casas Baamonde, Magistrates, delivered

IN THE NAME OF THE KING

the following

JUDGMENT

In the Appeal under Constitutional Court No. 4015/1996, promoted by Mr. Santiago AG, on its own behalf and on behalf of the works council of the "Casino de La Toja, SA ', represented by solicitor María Luisa MC, and defended by Attorney Manuel SC against the judgment of 25 January 1996 of the Labour Chamber of the High Court of Justice of Galicia, reversing an earlier decision of the Labour Court no. 3 of Pontevedra and stating that the decision of the company «Casino de La Toja, SA 'on installing microphones in certain premises of the workplace does not violate any fundamental right of workers. It appeared the company "Casino de La Toja, SA", represented by solicitor Don Juan Carlos EFN, under the legal direction of Don Juan VB, being party the Prosecutor. Was Reporter Judge Fernando Garrido Falla, who expresses the opinion of the Board.

Background
I. BACKGROUND
1
By document registered at the Constitutional Court on November 7, 1996, solicitor María Luisa MC, on behalf of Mr. Santiago AG and the works council of the "Casino de La Toja, SA", filed an appeal against the Judgment of the Labour Chamber of the High Court of Justice of Galicia of 25 January 1996 amending the judgment delivered on November 7, 1995 by Court No. 3 of Pontevedra and stating that decision of the company "Casino de La Toja, SA" on installing microphones in certain premises of the workplace does not violate any fundamental rights of workers.

2
The relevant facts for consideration of the claim are as given below.

a) During the summer of 1995, the company "Casino de La Toja, SA" in order to achieve adequate control of work activity that took place in facilities dedicated to gambling and specifically in cashier offices and dependencies where the French roulette was located, decided to add to one of the security systems available, consisting of a closed television circuit (existing since the opening of the casino in 1978), the installation of microphones that allow collect and record conversations that may occur in the indicated sections of the casino. These microphones placed next to the TV cameras, may go unnoticed, but were not hidden, having realized workers that they were installed as soon as it occurred.

No report was required to the Works Council on the installation of microphones. The launch of the auditions, however, began after the communication of the installation to the Works Council.

b) Mr. Santiago AG, in his capacity of chairman of the works council requested in September the withdrawal of the microphones. The company replied that "it is hereby informed that, for security reasons, there have been installed in the cashier office two microphones in both windows to be, like filming, audible evidence in case of a customer complaint. Also, several microphones were installed in the playroom with the same purpose, which is communicated to your knowledge. "

c) Mr. Santiago AG sued "Casino de La Toja, SA" by the premises of protection of fundamental rights laid down under the Labour Procedure Act. The application was granted by Judgment No. Labour Court. 3 of Pontevedra, of November 7, 1995 (procedure 835/1995). The judgment declared the fundamental right to privacy of workers and, consequently, the nullity of the conduct of the company, regarding the using of hearing aids, ordering the immediate cessation of such misconduct and the replacement of the situation prior to time of the installation of microphones.

Based on the premise of two conflicting legal interests, personal privacy (Article 18 of the Spanish Constitution, hereinafter, SC) and corporate power control (art. 20.3 of the Act on the Statute of Workers, hereinafter ASW), a corollary of freedom of running business (Article 38 SC), and after examining the Organic Act 1/1982 of Civil Protection of the Right to honor, personal and family Privacy and Self-Image (sections 2.2 and 7.1), constitutional cases (SSTC

114/1984 and 88/1985) and comparative law, the Labour Court concludes that it is against Law, except in very exceptional circumstances, the installation by company of means capable of helping to indiscriminately hear and record conversations that happen between workers or between those and customers. The Court differences between installing of hearing aids and visual, being the second type of less limiting privacy, mentioning the judgment of the Superior Court of Justice of Catalonia, of April 25, 1994; provided that, when recording conversations that workers have with each other and with clients “there might slide concepts or statements affecting particular fields of workers and even those of customers to whom there is no reason to authorize surveillance by the company.”

The Labour Court appreciates that there is not enough justification for the measure adopted by the company, since its interest is sufficiently satisfied with the use of a closed television circuit for viewing the changes and performing plays in certain games whose practice counsels to do so. Certainly, if the audition control is added to the visual, "the control would be complete, but also infringement of the right to privacy of the worker would be complete", adding the Court that "the subjection of the worker to a hearing surveillance is a intolerable aggression if there is no outstanding technical reason, as it is guaranteed by a constitutional right." The Court mentions, finally, that the company did not require the report of the works council, thus contravening Art. 64.4 d) ASW.

The Labour Court rejected, however, that, further to the right to privacy (art. 18.1 SC), the conduct of the company also violates the right to freedom of Union association (art. 28.1 SC). It was argued on the basis of the existence of an alleged climate of conflict inside the company, so that the true purpose of the hearing screening would be to control the protest activities of workers. The Court states that the evidence does not show it, and the eventually existing evidence was in any case undermined by various circumstances, as the installation of hearing aids was part of a comprehensive improvement of the security system, being the improvement of high budget, the microphones were not hidden and finally, in response to the company's business, it is more logical to conceive a simple intention to control the workforce activity. The interest of the company is exclusively work, the Court concludes.

d) "Casino de La Toja, SA ', then appealed against the judgment of the Labour Court, and the appeal was upheld by Judgment of the Labour Chamber of the High Court of Justice of Galicia, January 25 1996 (appeal no. 3/1996). The Superior Court held that the installation of microphones in certain premises of the workplace did not violate any fundamental right of workers.

After rejecting the application to this case of Constitutional Court judgments taken into account by the appealed Labour Court, as were referred, to protection of freedom of expression, as well as it happened regarding the Judgment of the Labour Chamber of the High Court of Justice of Catalonia of April 25, 1994, the Superior Court of Justice of Galicia shows that the judgment of the appealed Labour Court contains contradictory statements, since the arguments used to reject the infringement of freedom of association "practically enervate the placement of another request "related to the right to personal privacy”.

The Superior Court of Justice of Galicia reaches a contrary decision to that reached by the Labour Court. For that it takes as “basic premise" that the workplace is not by definition a space in which the right to privacy is exercised by the workers. For the Superior Court of Justice

of Galicia talks by workers and/o customers related to job or professional activities "are not covered by the right to privacy, and there is no reason why the company could not know those activities" The right to privacy is exercised “within the scope of the private sphere of the employee, that at the company must be understood related to their places of rest and recreation, locker rooms, and other similar services, but not in those places in which they develop work activity”. Moreover, it continues the Superior Court of Justice of Galicia, the installation of microphones is not indiscriminate in all workplaces, but it is only in the Cashier Office and in the French roulette, providing the company an explanation that the Superior Court of Justice of Galicia deems "perfectly logical" and supports the assumption that the purpose of the installation was "gain more control over certain aspects of the activity to which the company is engaged" since, indeed, recording “adds an extra security mean to resolve claims related to the game of roulette or those that may occur when making changes at the Cashier Office”.

Ultimately, the High Court of Justice of Galicia closes and summarizes his argument in the following: "if the measure adds greater control and security to the gaming activity that the company plays, if the installation was known by employees and by the Works Council before being started into operation, argument that does not offer doubt for the Court, given the importance of the work carried ... if microphones are on view, eliminating any surreptitious attitude of the company, and if the installation is limited to specific points of the workplace and therefore does not occur in a general way that would be deemed arbitrary, it must be concluded that there is no infringement of the fundamental right to personal privacy of workers."

The judgment of the Superior Court of Justice of Galicia defends a concept of personal privacy different to the one supported by the judgment of the Superior Court of Justice of Catalonia April 25, 1994. The fact that in the talks between the workers among themselves and with customers can slide claims regarding the particular field of each other -what worries the Superior Court of Justice of Catalonia- this argument cannot lead the Superior Court of Justice of Galicia to understand violated the right to personal privacy. For the latter Superior Court, the exercise of this right does not take place in the work activity or at the workplace, so that the slides of concern relevant to the High Court of Justice of Catalonia, "would always attribute them to a defect on the part of employees and customers and, where appropriate, determine the violation of privacy if the company misuses these conversations." Anyway, the case considered by the Superior Court of Justice of Catalonia was a hotel (not a casino), in which cameras were installed as well as microphones in virtually all parts of the workplace, which, although for the Superior Court of Justice of Galicia does not affect the right to privacy, it could be considered a misuse of the powers conferred to the company by the art. ASW 20.3.

Finally, the Superior Court of Justice of Galicia understands that, not appreciating any privacy breach, "is irrelevant" the alleged violation of Art. 64.4 d) ASW that the appealed Labour Court considers inflicted in its judgment, "and that, if this was the case, could be overruled, as it is clear that paragraph and quoted article refers to the right of the works council to report on the implementation of organization of systems and control of work, in which section may not be included the measure taken by the company."

e) The applicant of appeal before the Constitutional Court, on its own behalf and on behalf of the works council, appealed for unification of doctrine against the Judgment of the Labour

Chamber of the High Court of Justice of Galicia, January 25 1996, offering contradictory judgment as dictated by the Labour Chamber of the High Court of Justice of Catalonia, of April 25, 1994.

Nevertheless the application was turned down by Order of the Labour Chamber of the Supreme Court dated June 18, 1996, to state that between the two judgments is not accomplished “the required contradiction by lack of identity in the factual background under which relies each one.” This Order was notified to the applicant before The Constitutional Court on October 14, 1996.

3
The demand of appeal before the Constitutional Court considers that the contested judgment infringes the right to privacy (art. 18.1 SC) expressly avoiding to mention a breach of the right to freedom of union association (art. 28.1 SC). By focusing the issue on infringement of a fundamental right, the request for defense also ignores the failure to require the prior report of the works council [art. 64.4 d) ASW]; and similarly the degree of "clandestine" implantation of the sound system, which is relevant, says the appellant, even in a criminal procedure, but not in a constitutional one, since the invasion of privacy is likely to occur even after the installation of the microphones was notified and made public its location.

Injury caused by the installation and operation of collection and recording sound from an undetermined time in the summer of 1995 is alleged, without questioning the feedback system and image recording (CCTV) system that is running at the Company since 1978. Nevertheless, the existence of the latter system should be considered in order to assess the additional degree of intrusiveness that would imply the fact that, in addition to the image, the sound was recorded. The television circuit encroaches on privacy in a way that, given the nature of the workplace, can be understood and actually has been tolerated. But adding the above to the sound recording is what becomes an intolerable interference, as the combined effect of the various existing control mechanisms resulting in the casino, become not only a limitation, even in a radical curtailment of privacy of whom are so well controlled.

The lawsuit, after glossing and value highly the judgment issued by the first instance Labour Court, criticizes the concept of privacy held by the judgment of the Superior Court of Justice of Galicia, appealed, for being so restrictive that, rather than protecting privacy, limits it to the lockers and bathrooms, which does not meet the constitutional doctrine, that declared that "the conclusion of an employment contract does not imply any deprivation for a party, the worker, of the rights that the Constitution recognizes as citizens" (Constitutional Court Judgment no. 88/1985) and that "the employment contract can not be considered as a a legitimating title in order to cut the exercise of fundamental rights as a citizen to the relevant worker, who does not lose his status to be inserted in the context of a private organization" (Constitutional Court Judgment no. 99/1994). The view taken by the judgment under appeal back to what the Constitutional Court Judgment no. 88/1985 called "manifestations of industrial feudalism" so that if any citizen sells his work, during working time, the citizen looses their attributes, so that if some private comment is done with a partner or a customer, commit a breach or "a misconduct by workers or clients" (legal fundament 4 of the judgment under appeal), which would place the employer in a position to know legitimately what is commented during working time, without this constituting breach of privacy, provided the

employer does not make improper use of such comments, that is, unless he makes them public or makes extortion taking advantage of them.

Appeal pleads against this thesis. What the worker owes to his employer is rendering his work and whether, without prejudice to this obligation (if the impairment occurs, it would be punishable), the worker makes a private comment to a partner or a customer, there is no reason related to monitoring, control or directioning that will allow the employer to deprive those who make such comments on their privacy, thorough listening and recording their conversation. And this conclusion is regardless of an ulterior unlawful use of the recording, which, if occurs, would be punishable, even criminally.

In short, the applicant requested for defense, first, claiming for a statement that declares that the conduct of the company installing and using listening devices and sound recording in various parts of the workplace violates the fundamental right to privacy of workers and to the other people who are subject to monitoring and recording, so it should be declared null radically. Second, that the nullity of the judgment under appeal should be declared. And finally, the immediate cessation of that behavior, withdrawal from the sound system and sound recording, the destruction of recordings made and such other measures as appropriate to restore the fundamental right infringed must be ordered.

4
By Order of October 3, 1997, the First Section of the Court agreed to hear the request for appeal and to require the courts concerned the testimony of the relevant proceedings, with notice of those who were parties to them, appearing «Casino La Toja, SA ", by document registered at the Court on 31 October 1997.

5
By Order of November 17, 1997, the First Section of the Court agreed to have received the procedures submitted by the Fourth Chamber of the Supreme Court, the Labour Chamber of the High Court of Justice of Galicia and the Labour Court No... 3 of Pontevedra, and declared to give notice to them to the Public Prosecutor, to the complainant and to the representation of "Casino de La Toja, SA ', so that within the common term of twenty days the parties could formulate the arguments that considered appropriate.

6
The applicant for appeal, by document registered on December 15, 1997, elaborated on the arguments made in the application, with particular emphasis on the appointment of the doctrine established in the Constitutional Court Judgments no. 88/1985, 99/1994 and 90/1997.

7
Mr. Juan Carlos EF-N., Solicitor of the Courts and representing "Casino de La Toja, SA", filed its claims on December 12, 1997, opposing the appeal.

In that document requested, first, dismiss the appeal for lack of locus standi of the appellant. He understands that Mr. Santiago AG appeared before the Labour Court no. 3 of Pontevedra, in the Labour Chamber of the High Court of Justice of Galicia and before the Fourth Chamber of the Supreme Court without locus standi and legal representation, according to the two interests he was holding (on its own behalf and on behalf of the works council, as president of

it). This is so because inside the analysis of the procedures it is found that the only power that credited representation dated on October 30, 1996, according to an agreement of the works council of the "Casino de La Toja, SA ', taken on day 23 of the same month and year.

It also pledges the inadmissibility of the appeal for breach of the requirement of Art. 44.1 b) Constitutional Court Act, because the appellant intends to review the facts and also for breach of art. 44.1 c) Constitutional Court Act, as the appellant did not formally invoke during the process the constitutional right that estimated to be violated. On the merits of the case, it is alleged that the claim for protection is manifestly absent of content in order to justify a decision on the merits of the same, as required by art. 50.1 c) Constitutional Court Act, arguing that, as recognized by the judgment of the Superior Court of Justice of Galicia, the installation of microphones is limited to specific points of the workplace, it is based on the order to add greater control and security in a gambling activity that the company serves, being known installation by workers and the works council before they become operational, so it is not possible speak of a breach of a fundamental right to privacy of workers.

8
For its part, the prosecution filed its allegations on December 16, 1997, in which, after describing the facts and legal arguments, pledged that the appeal was estimated.

He begins his argument warning that it is not appropriate to admit the dual character that appears in Mr. Santiago AG: He is acting in his own name, as directly affected by the business decision to install in his job (cashier office) appliances hearing, and also on behalf of the works council, as chairman.

According to the prosecutor, the action must be restricted to appellant legitimating him in his own personal condition, leaving aside the representative character of the works council, which also holds, because the fundamental right claimed (art. 18.1 SC) has personal nature, so the appeal can not be extended under request to third parties (in this case the works council), adressing in support of his argument the doctrine established by the Court in Orders of the Constitutional Court 942/1985 and 69/1994.

On the merits of the case, the Prosecutor considers that, based on the doctrine of the Constitutional Court on the exercise of fundamental rights in the field of labor relations, and in view of the specific circumstances concurrent in this case, it should be concluded that the installation, even when in very specific locations and of particular sensitivity to casino security, of hearing aids and continuous and indiscriminate recording without any control mechanism to ensure the future use and destination of the tapes, must be deemed interference in the right to privacy of the appellant that exceeds the supervisory powers of diligence and integrity in the work performed legally granted by the art. 20.3 ASW to the employer and, therefore, the appeal should be estimated, as he understands infringed art. 18.1 SC.

9
By an Order of 10 December 1999, it was noted on the 13th of the same month and year for discussion and voting on this judgment, and the procedure has ended today after starting the debate the day above mentioned.

II. LEGAL FUNDAMENTS

1
The present appeal proceedings are brought against a Judgment of the Labour Chamber of the High Court of Justice of Galicia, overruling the appeal filed by the company “Casino de La Toja, SA”, that revoked the judgment of the Labour Court no. 3 of Pontevedra and declares that undertaking installation of microphones in certain units of the workplace (Cashier Offices and French roulette) does not violate any fundamental rights of workers.

It criticizes the judgment under appeal because of the infringement of the right to privacy set forth under art. 18.1 SC, caused by the installation and operation of the collection and sound recording in various parts of the casino (Cashier Offices and French roulette) since an undetermined time in the summer of 1995. The appeal Tribunal considers that the capture and recording sound nor is justified for security reasons (the company already had a complete security system, whose legitimacy is not questioned, based on a closed-circuit television, to which it must add the control using the chain of command of the company and security service personnel) neither may have place under the employer powers of auditing and monitoring given by labor legislation (art. 20.3 ASW).

Thus once defined the object of the petition for relief, it is necessary, before turning to consider the same, to answer to the reasons for inadmissibility of the appeal, pointed out by the representation of "Casino de La Toja, SA" during the processing of claims according to art. 52.1 of the Constitutional Court Act.

2
The representation of "Casino de La Toja”, SA claims, first, lack of locus standi of the appellant, Mr. Santiago AG, who appeared in previous procedural phases without crediting its legitimacy and legal representation, regarding two aspects when acting (on its own behalf and on behalf of the works council, as president of it). And this would be so because according to the proceedings it is found that the only power crediting representation was dated on October 30, 1996, executing an agreement of the works council of the "Casino de La Toja, SA ', of day 23 of the same month and year. Consequently, such actions would be unlawful in their origin, so it could not remedied in the way of Constitutional Appeal.

The argument must therefore be rejected. It is true that the company «Casino de La Toja, SA" did not claimed in previous Courts the procedural objection of lack of locus standi of the appellant that now is arguing, but it is certain it is not our function to examine whether or not concurred in that procedural phase alleged lack of standing, it is only relevant if the appellant has standing to bring this action for constitutional protection, in accordance with art. 44 and 46.1 b) of the Constitutional Court Act. Well, it is clear that Mr. Santiago AG holds the required legitimacy, having been party of the judicial process in which the judgment has been issued declaring the infringement of the fundamental right set forth in Article 18.1 SC and the alleged infringement affects his sphere of legitimate rights and interests (Constitutional Court Judgments 141/1985, of October 22; 25/1989, of February 3; 47/1990, of March 20, among others, and Constitutional Court Orders 102/1980 of November 20; 297/1982, of October 6; 205/1990, of 17 May; and 69/1994 of 28 February, as examples).

For its part, the public prosecution alleges that the admission is not appropriate in his double procedural condition as appellant, that is, in his own name, as an employee of the entity "Casino de La Toja, SA" directly affected by the business decision to install in his job (Cashier Office) media audition systems complementary to the video systems that were already serving at the workplace since 1978, and also on behalf of the works council (which he presides) of the company indicated. The prosecution sustains, therefore, that the legitimization of the appellant must adhere exclusively to their own personal condition as affected worker, lefting out the condition of works council president, whose representation also holds. This is so because the fundamental right relied as violated (Art. 18.1 SC) is personal, so it can only be sought by those who seek reparation for having suffered such unlawful behaviour, not being able to be extended its protection to a third, whatever would be the general interest invoked.

However, even this objection of the prosecution could not be accepted, since the works council of the Casino de La Toja, represented by its President, Mr AG, was part of the original judicial process that derives into the judgment under appeal, in accordance with the provisions of art. 46.1 b) Constitutional Court Act.

3
It also claims the representation of the "Casino de La Toja, SA" that the request for defense breaches the requirement contained in art. 44.1 b) Constitutional Court Act, as it is intended to review the facts established under the previous procedures, which is something expressly prohibited by the above provision.

This argument must also be rejected because it is not true that the request for defense intends to review the facts of the judgment under appeal tested [review in any case was effectively vetoed by this Court, pursuant to art. 44.1 b) of the Constitutional Court Act, having to discuss at the constitutional procedures of facts already established, so not being a third instance, as we have said since the starting Judgments 2/1982, of January 29 and 11/1982 of 29 March ]. The lawsuit is directed against a judgment delivered in appeal by the Labour Chamber of the High Court of Justice of Galicia, that was the one that committed violation of the fundamental right under Article 18.1 SC perfectly fulfilling, in short, the condition laid down by art. 44.1 b) of the Constitutional Court Act.

4
Similarly, it must be rejected the claim of "Casino de La Toja, SA" on the failure of the appellants to formally invoke in the process the constitutional right violated, as required by art. 44.1 c) Constitutional Court Act. That argument is meaningless. Recurring founded precisely its application to the Labour Court no. 3 of Pontevedra in two separated violation of fundamental rights, the right to privacy (art. 18.1 SC) and freedom of union association (art. 28.1 SC). Then in appeal, as now stated, it is expressly avoided the invocation of art. 28.1 SC, focusing the debate solely on the alleged infringement of the right to privacy (art. 18.1 SC). The demand for defense complies, in short, all the eligibility requirements.

5
Discarded the opposing procedural arguments of the representation of "Casino de La Toja, SA», it must start to analyze the merits of the case, which are limited to determine whether, as claimed by the appellant (and supported by the prosecution), installation for the company he

works at as a cashier, of microphones in certain areas of the workplace (Cashier Offices and French Roulette) has violated their right to privacy, guaranteed by art. 18.1 SC.

The right to privacy, as the Court already had occasion to notice, as derivation of the dignity of the person who recognizes the art. 10 SC implies "the existence of its own and reserved sphere against the action and knowledge of the other, necessary, according to the guidelines of our culture, to maintain a minimum quality of human life" (Judgments 231/1988, of December 1; 197/1991, of October 17; 99/1994, of April 11; 143/1994, of 9 May; and 207/1996, of 16 December, among others).

It is also settled law of this Court that "the right to privacy is not absolute, as it is not any of the fundamental rights, so it may yield to constitutionally relevant interests provided that the limit that it has to experience reveals necessary to achieve the legitimate purpose intended, provided to achieve it and, in any case, be respectful with the substance of the law "(Judgments 57/1994, of February 28, and 143/1994 of 9 May, as examples).

In this regard it should be noted that the powers of the employer address the company, essential to the smooth running of the organization of production and expressly recognized in the art. 20 ASW, authorizes the employer, among other powers, to adopt the measures it deems most appropriate of surveillance and monitoring to verify compliance by the worker of his work obligations (art. 20.3 ASW). But this power must occur, in any case, of course, within the due respect to the dignity of the worker as expressly reminds us labour regulations [arts. 4.2 e) and 20.3 ASW].

And the question that concerns us here to the use of surveillance and control measures should be considered in terms on the limits of human dignity that art. 7 of the Organic Act 1/1982 of 5 May, on Civil Protection of the Right of Honor, to personal and family privacy and Self-Image, in relation to art. 2 of the same Act, considered illegitimate interference in the right to privacy, including (without prejudice to cases of express consent of the holder and actions authorized by law), "the placement anywhere of listening devices, imaging, optical devices or any other means suitable for recording or reproducing the intimate life of the people" and "the use of listening devices, optical devices or other means to the knowledge of the intimate lives of people or demonstrations or private letters not intended for anyone who uses such means as well as recording, register or reproduction."

6
More precisely, to judge the subject matter of this action for appeal from a constitutional perspective it should be noted that the Legal cases of this Court has repeatedly insisted on the full applicability of the fundamental rights of workers in the framework of the employment relationship, as the latter does not mean, in any way, the deprivation of such rights for those serving in productive organizations, which are not out of the constitutional rights and principles that inform the system of labour relations (Constitutional Court Judgments no. 88/1985, of 19 July , Leal argument 2, whose doctrine was subsequently reiterated, inter alia, by the Constitutional Court Judgments no. 6/1988, of 21 January; 129/1989, of 17 July; 126/1990 of 5 July; 99/1994 of 11 April; 106/1996, of 12 June; 186/1996, of 25 November; and 90/1997, May 6). Consequently, as the Court also affirmed, the exercise of such rights only supports limitations or sacrifices to the extent that they are hold within an organization that reflects other constitutionally recognized rights in the arts. 38 and 33 SC and imposes, as

alleged, the necessary adaptability for the exercise of all of them (Judgment of the Constitutional Court no. 99/1994, of April 11, legal argument 4; 6/1995, of January 10, legal argument 2; 106/1996 of June 12, legal argument 5 and 136/1996 of July 23, legal argument 6), being from this point of view the evaluation of the specific limitations to fundamental rights that their own development employment relationship may impose (JCC 99/1994, F. 4, and 6/1995, of January 10, F. 2).

It must therefore rejected the original starting premise of the judgment under appeal, consistent in stating that the workplace is not by definition a space in which the right to privacy is exercised by the workers so that conversations that workers keep to each other and with clients in the performance of their work are not covered by Art. 18.1 SC and there is no reason why the company can not know the content of those because such right of privacy is exercised within the scope of the private sphere of the worker and at the workplace it must be understood limited to places of rest or recreation, changing rooms, toilets or the like, but not to those places where the work activity takes place.

Indeed, although we have sometimes stated that the facts related to social and professional relationships in which the worker operates, are not integrated, in principle, into the privacy of the person (Constitutional Court Judgments no. 180/1987 of 12 November, legal argument 4; 142/1993, of April 22, legal argument 7 and 202/1999 of 8 November, legal argument 2, Constitutional Order no. 30/1998, of January 28, legal argument no. 2) it is also true that we have also clarified that initial statement saying that it can not be ignored that, through a detailed analysis of these facts together, it is sometimes possible that the fact to access to information pertaining to the intimate and family life of the worker (Constitutional Court Judgment no. 142/1993 F. 8 information and 202/1999, F. 2) may be an offence to the right to privacy protected by art. 18.1 SC.

Consequently, the original thesis of the judgment under appeal can not be shared, starting to limit since the beginning the scope of the right to privacy of workers to areas of the workplace in which they do not perform the duties pertaining to the profession, so denying without exception that an unlawful behaviour of the fundamental right mentioned does not may occur in the field of performance of professional duties. This statement must be rejected, as it can not be excluded that also in those parts of the company in which the work is performed an illegal interference by the employer into the privacy of workers may occur, as it could be recording conversations between a worker and a client or between the workers themselves, as well as in the same it could be treated issues outside the employment sphere, then integrated into what we call proper sphere of development of the individual person (Constitutional Court no. 231/1988 of 2 December; legal argument 4 and 197/1991, of October 17, legal argument 3, as examples). In sum, we must take into account not only the place of the workplace in which audiovisual control systems are installed by the company, but also other criteria (if installation is done or not in an indiscriminate and massive manner, if the systems are visible or have been installed surreptitiously, the actual intended purpose of the installation of such systems, if there are security reasons according to the type of activity that takes place in the workplace in question, justifying the implementation of such control means etc..) to elucidate in each case whether these means of surveillance and control respect the privacy of workers. Indeed, the installation of such facilities in places of rest or relaxation, changing rooms, toilets, canteens and similar results, "a fortiori" harmful in any case to the right to privacy of employees without further consideration, for obvious reasons (besides that can injure other fundamental rights,

such as freedom of union association, if the installation occurs on the premises of the staff representatives of the works council or the unions). But it does not mean that any misconduct can not occur in places where the work activity is performed, if any of the circumstances set out to enable corporate performance qualify as illegitimate intrusion into the privacy of workers. There will be, therefore, to the circumstances of the particular case to determine whether there is infringement of art. 18.1 SC.

7
In short, the balance and reciprocal limitations arising for both sides of the employment contract suppose, to the extent of what is interesting to the issue, that also corporate organizational powers are limited by the fundamental rights of workers, the employer being obliged to respect those (Constitutional Court judgment no. 292/1993, of 18 October, legal argument 4). This Court has maintained that since the prevalence of such rights, that limitation from business powers can only derive either from the fact that the nature of the contracted work involves restricting the right (Constitutional Court Judgment no. 99/1994, legal argument 7, and 106/1996, legal argument 4) either a proved business need or interest, so the mere invocation would be enough to sacrifice the fundamental right of workers (Constitutional Court no. 99/1994, legal argument 7, 6/1995, legal argument 3 and 136/1996, legal argument 7). But, in addition, constitutional legal cases have maintained, as it is rational, that the exercise of the organizational and disciplinary powers of the employer can not aid, in any case, to produce unconstitutional results, detrimental to the fundamental rights of the worker (among others, Constitutional Court no. 94/1984, of 16 October; 108/1989, of June 8; 171/1989, of 19 October; 123/1992, of 28 September; 134/1994 of 9 May; and 173/1994 of 7 June), or to punishment of the legitimate exercise of such rights by the employer (Constitutional Court Judgment no. 11/1981, of April 8, legal argument 22).

Therefore, this Court has emphasized the need for judgments in cases such as this to preserve "the necessary balance between the obligations of the contract for the worker and the subsisting field -modulated by the contract, but in any case present- of his constitutional freedom "(Constitutional Court Judgment no. 6/1988 of 21 January). Therefore, given the prominent position of fundamental rights in our legal system, this modulation occurs only "to the extent strictly necessary for the proper and orderly development of the productive activity measured" (Constitutional Court no. 99/1994). Which implies the need for a proper weighting (Constitutional Court decision no. 20/1990, of 15 February; 171/1990, of 12 November; and 240/1992, of 21 December, among many others), that respects the right definition and assessment of the fundamental constitutional right at stake and work obligations that can modulate it (Constitutional Court Judgment no. 170/1987, of 30 October; 4/1996, of 16 January, 106/1996; 186/1996, of 25 November; 1/1998 of January 12, among many others).

These limitations or modulations must be strictly necessary and indispensable to satisfy a business interest worth of protection, so that if there are other opportunities that meet the right in question and that affects entrepreneurial interest in a less aggressive way, the latter should be used avoiding those more aggressive. It is a manifestation, in short, of the principle of proportionality.

8
There is no specific legislation governing the installation and use of these control mechanisms and monitoring systems consistent in getting images or recording at the workplace, so the

courts (and, ultimately, this Tribunal) are in charge of balancing, in case of conflict, under what circumstances may considered legitimately used by the holder the power steering on it by art. 20 ASW, in a consistent way with respect of fundamental workers' rights and especially with the right to privacy that protects the art. 18.1 SC, bearing in mind the principle of proportionality.

Therefore, the control of this Court of the judgment under appeal that should be performed must fall precisely judge whether, as required by the settled doctrine of this Court which has been exposed, the court has properly weighted if the installation and use of means of capturing and sound recording by the company has complied with in this case the right to privacy of workers of 'Casino de La Toja, SA'.

9
Well, in this case, the justification offered by the company «Casino de La Toja, SA" to install and use some hearing aids that allow capture and record conversations taking place in the Cashier sections and Game French roulette is that these recordings serve to complete security systems (particularly, the system CCTV) already in the casino, still helping sound recording in case it should be necessary to resolve any complaints of the customers. This justification is considered sufficient by the judgment under appeal to understand that no breach of the right to privacy of the workers in that the installation of microphones is limited to specific points of the workplace (so that there is no indiscriminate overall utilization it could be regarded arbitrary), being known by employees and serving a legitimate purpose since “adds extra safety to resolve claims relating to the game of roulette or which may occur when making changes in case”. In reaching this conclusion, the judgment appealed, as already noted, assumes “the basic premise that the workplace is not by definition a space in which the right referred by workers is exercised. Work activity in general, even if considered in the strict sense of the performance of professional duties, even as concurring in the same relationships with customers, including talks between staff and clients in the field of the professional role and at the workplace, are not covered by the right to privacy, and there is no reason why the company can not know them because, in principle, such right is exercised within the scope of the private sphere of the worker, being understood at the company limited to his places of rest or recreation, locker rooms, and other similar services, but not in those places where the work activity takes place "(legal basis 3).

Then, in view of the doctrine established by the Court, it can not be accepted that the purpose of this judgment under appeal properly weighted in this case the requirements arising from the principle of proportionality. It is unacceptable, as already stated, the premise of the contested part in the sense that workers can not exercise their right to privacy in the business, except for certain places (changing rooms, toilets and the like). This thesis is refuted by referred doctrine of the Constitutional Court, which holds that the conclusion of the contract does not imply any deprivation for a party, the worker, of the rights that the Constitution recognizes as citizens, even when the exercise of such rights within the production organization might support certain modulations or restrictions, provided that such modulations were founded on reasons of strict necessity duly justified by the employer, and without having any sufficient reason to exclude "a priori" that any attack to the right to privacy of the workers in such places in which actual work activity is performed might occur.

The question to be solved is therefore whether the installation of microphones that can record the conversations of employees and customers in certain areas of the casino comply the necessary requirements to respect the right to privacy. In this regard we must begin by pointing out that it is indisputable that the installation of equipment to capture and record sound in two specific areas of the casino, as are Cashier Offices and French roulette, are useful to the business organization, especially if you have notice that these are two areas where economic transactions of any significance occur. But mere utility or convenience for the company does not authorize installation hearing aids and recording, given that the company already had other security systems that the system is intended to supplement hearing.

As rightly warns the public prosecutor, the installation of microphones has not been a result of the detection of a failure in systems security and control previously established but, as it is clear from a press release that the company submitted to the works council giving account system implementation hearing, the decision was made to supplement the existing security systems in the casino. It means, it has not been established that the installation of the pickup and recording sounds is essential for safety and proper functioning of the casino. So, using a system that allows the continued and indiscriminate hearing of all kinds of conversations, both the workers themselves, as well as casino customers, is a performance that goes really beyond the powers granted to the employer art. ASW 20.3 and represents, in short, an illegitimate interference in the right to privacy enshrined in art. 18.1 SC.

In summary, the implementation of a hearing and sound system was not in this case in accordance with the principles of proportionality and minimum intervention governing the modulation of fundamental rights by the specific requirements of the interest of the business organization, as the purpose to be installed (give extra safety, especially against possible claims from customers) is disproportionate to the sacrifice involved in the privacy of workers (and even to casino customers). This system can capture private comments, both customers and employees of the casino, comments completely unrelated to the business interest and therefore irrelevant from the perspective of controlling labour obligations, and may, however, have negative consequences for workers that in any case, will feel constrained to make any personal comment to the belief that they will be listened to and recorded by the company. It is, in short, an illegitimate interference in the right to privacy enshrined in art. 18.1 SC, as there is no definitive argument to authorize the company to listen to and record private conversations that casino workers keep to each other or with customers. This leads to the granting of protection to restoring integrity to the applicant of his right, as it was recognized by the pending Social Court no. 3 of Pontevedra.

JUDGMENT

In view of the above, the Constitutional Court by the authority under the Constitution of the Spanish Nation,

decides

to grant the relief requested by Mr. Santiago AG on its own behalf and on behalf of the works council of the "Casino de La Toja, SA" and, accordingly:

1st) Recognize the fundamental right of the applicant to personal privacy.

2nd) Declare null and void the Judgment of the Labour Chamber of the High Court of Justice of Galicia, January 25, 1996.

To be published this Judgment in the "Official Gazette".
Given in Madrid on April, 2000 Pedro Cruz Villalón.-Manuel Jiménez de Parga and Cabrera.-Pablo García-Manzano. Fernando Garrido Falla, María Emilia Casas Baamonde.-Signed and sealed.

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**Supreme Court September 28th 2007 (case Coruñesa de Etiquetas): use of the professional computer for personal purposes**

In the city of Madrid, on September 26th, two thousand seven.

According to the proceedings pending before this court under appeal for unification of doctrine brought by the company Coruñesa de Etiquetas, SL, represented by Attorney Mr. Vázquez Guillén and defended by Lawyer, against the judgment of the Labour Chamber the High Court of Justice of Galicia, January 25, 2006, in the appeal no. 5844/05, brought against the judgment delivered on 30 September 2005 by the Labour Court no. 3 of A Coruña, in proceedings no. 521/05, followed by Mr. Imanol against the appellant, on dismissal.

He has appeared before this Court by way of appeal Mr. Imanol, represented by Attorney Ms. Outeiriño Lago and defended by Lawyer. It is acting as Magistrate Speaker, His Honour Justice Aurelio Desdentado Bonete.

FACTUAL BACKGROUND

FIRST

On January 25, 2006 the Labour Chamber of the High Court of Justice of Galicia gave judgment, under appeal brought against the judgment of Labour Court no. 3 of A Coruña, in proceedings no. 521/05, followed by Mr. Imanol against the appellant, on dismissal. The mandatory part of the judgment of the Superior Court of Justice of Galicia stated as follows: "That, dismissing the appeal filed by the company Coruñesa de Etiquetas, SL, against the judgment delivered by the Hon. Labour Magistrate of Labour Court no. 3 of A Coruña, dated on September 30, 2005; we confirm and uphold the decision made."

SECOND

The first instance judgment, on September 30th, 2005, issued by the Labour Court no. 3 of A Coruña, containing the following proven facts. "1st - The plaintiff served to the defendant since April 2004, thorough a senior management contract of employment, with the rank of Director General for a period of five years, receiving a net monthly salary of € 2,103.5 prorated. Also he will be entitled to receive an annual fee of 0.80% of the company profit before tax, with a

minimum of one month of his salary. ---- 2 -. The plaintiff was rendering services in an office without any key, in which he had a computer, lacking of any password, and connected to the corporate network, which in turn has ADSL. The computer has its own antivirus. ---- 3 - On 11 May, a technician of the company HARD SOFT AND PROGRAMMING EQUIPMENT, SL was required to check the mistakes in a computer that the company said it was the one of the plaintiff, and the checkout, according to professional in charge, Mr. Eloy, was conducted at five in the afternoon of the day mentioned above. In this test there were found computer viruses, as a result of browsing unsafe websites. In presence of a Board Member, the company checked in the temporary folder containing old accesses to porn sites, which were stored in a USB device and printing on paper. These files correspond to images and videos of a pornographic nature. The USB device was brought to a notary public for safekeeping, as well as the relationship of pages contained therein. The operations carried out on the computer were made without the presence of the plaintiff or any other worker or union representatives. ---- 4 -. The computer was removed from the company for repair and on May 30th, once returned, the company proceed to do the same operation, this time in presence of two representatives of the workers, being recorded into another USB the stored pages of the temporary file, and sending it before the notary, with a list of pages that are referred. Again, the plaintiff was not there. ---- 5 -. On August 20, 1991 the company CORUÑESA DE ETIQUETAS, SL was established by partners Mr. Eusebio and his wife Mrs. Flor and Mr. Alberto and his wife Mrs. Natalia. Every couple earned 500 Units out of the 1000 that were the entire social capital allocated. The company appointed Joint Board Members to Mr Eusebio and Mr. Alberto. Due to the death of Mr. Eusebio on November 3, 2003, the 27th stakeholders meeting agreed to appoint his wife Mrs. Flor as Board member replacing the deceased, jointly with the previous Board member, in a public agreement on 22 December, 2003. On April 16, 2004, the plaintiff was hired by the defendant as Director General, signing with the Board member Mrs. Flor a senior management contract for a duration of 5 years since the date above said. It is agreed that the manager will make its journey into the overall business, but with the flexibility resulting of the condition of the position. For the event of termination of the contract, the following criteria apply:

If the contract is extinguished due to withdrawal of the company, a three months prior notice shall be given, being entitled the manager to a compensation amount of euro 90,151, whether the termination was not endorsed by 100% of the stockholders. Otherwise, the compensation shall be equivalent to 60 days of salary per year of service.

If the termination is due to the will of one of the Board Members and concurring certain causes the conditions mentioned in paragraph above shall apply.

While the contract was signed by only one of the Board members, the other had knowledge of its contents and agreed to the same.

The same day, April 16, Mrs. Flor, as Joint Board member empowers Mr. Imanol and worker Mrs Mariana, so that jointly could perform extremely broad powers collected therein, and given its size and being a copy of them in the proceedings it is considered hereby reproduced.

On May 18, 2004 at a meeting of the General stakeholders to which only attends Lawyer appearing on behalf of the company at the present procedures, the couple Alberto Natalia, attended by notary, decides the dismissal of Mrs. Flor as Board Member for disloyalty and leaving the company in risk of liability, exercising social responsibility action against her. The

reasons were the lack of preparation and suitability of the contracts signed between the plaintiff and Mr. Inmanol and have granted powers to them. These powers were revoked by the Board Member Alberto in a separate memorandum on 28 May and 27 April 2004.

The plaintiff had assigned his job together with Mrs. Mariana; in the visit of the Labour Inspection that took place on 30 June it found that in that office on the supposedly occupied tables there was no document at all, also the existing double closet was empty.

The Labour Inspection raised an infringement Order on August 18, 2004, considering that they were harassed on their job, so a breach of art. 4 2.e) of the Workers' Statute happened, which establishes the right of dignity of those workers, establishing a penalty of euro 6,000, being the infringement subject to appeal.

--- 6 -. For this court a judgment was delivered, not subject to appeal, declaring the termination of Mrs. Mariana employment relationship for serious breaches of the company by failing to provide effective occupation to her, and ordering payment of compensation fixed in contract. --- 7 -. The plaintiff is son of law of the stakeholder Mrs. Flor. His work schedule was 8 to 16. "

The mandatory part of that judgement is worded as follows: "That dismissing the plea of lack of jurisdiction and estimating the suit brought by Mr. Imanol, I declare unfair his dismissal, being the company Coruñesa de Etiquetas, S. L. not entitled to opt out for compensation except as provided by Article 11.3 of Royal Decree 1382/85, having the company to pay the sum of euro 90,151 for compensation to the worker, not being entitled the worker to back pay.

THIRD

Attorney Mr. Vázquez Guillén, in representation of the company Coruñesa de Etiquetas, SL, by letter of March 16, 2006, claimed for appeal for unification of doctrine, wherein:. FIRST - it is alleged as contradictory judgment the judgment rendered by the Labour Chamber of the High Court of Justice of Madrid on November 13, 2001. SECOND -. It is alleged infringement of Articles 18, 20.3, 4.1 e), 5.a), 54.2.d) and 55.4 of the Workers' Statute, and Article 90.1 of the Labour Procedure Act and Article 18 of the Spanish Constitution.

FOURTH

By Order of this Court of 30th March 2006 the appellant appeared at the procedures and formally filed the present appeal for unification of doctrine.

FIFTH

Giving time for objection to the prosecutor, he issued a report in the sense of considering the appeal inadmissible and being informed the Hon. Mr. Magistrate, the procedures were declared ready to the vote and to make a final decision on September 20th of the current year, at which time vote and final decision took place.

LEGAL FUNDAMENTS

FIRST

In the proven facts of the judgment at first instance the plaintiff, Director General of the defendant company, was rendering services in an office without a key, in which it had a computer, without any password to access and connected to the company network ADSL available. It is also proven that a technician of a computer company was sent on May 11th to check failures in a computer that "the company said as it was of the plaintiff." When he was checking the computer, computer viruses were detected, due to 'browsing unsafe websites". "In the presence of company Board member it was found in the temp folder "old hits to porn sites", which were stored in a USB device, and which was delivered to a notary public. The statement declares that "operations carried out on the computer were made without the presence of the complainant, worker representatives or any employee of the company." The computer was removed from the company for repair and once returned, on May 30th it was done the same operation with the presence of worker delegates. The judgment of appeal confirms the first instance decision which held that the test was invalid because the company obtained the evidence through a search of personal effects that do not meet the requirements of Article 18 of the Statute of Workers.

To prove the contradiction requirement it is alleged the judgment of the Labour Chamber of the High Court of Justice of Madrid on November 13th, 2001, in which it is analyzed a case in which at the hours and dates set out the plaintiff proceeded to download and view files of pornographic content. The judgment considers the dismissal to be fair appreciating the serious failure that occurs as a result of completion of this activity during working time and using a tool provided by the company, valuing on one hand, the reduction of effective working time and unjustified expense for the company, and on the other, the disruption of the availability of the computer equipment in such a serious matter as the landing and takeoff of aircrafts. The contrast statement excludes the application of the guarantees of Article 18 of the Workers' Statute, because the computer is not a personal worker effect, but a "working tool" property of the company.

It is regarding this last point that contradiction must be evaluated, because this action is not about assessing the conduct of the employee for disciplinary purposes, but to solve a previous problem on the scope and way of corporate control over the use of the computer by the worker, computer that was provided by the company as a working tool and at this point the identity can be seen in essence as differences act further reinforcing the opposition of the pronouncements, because in the appealed judgment in this case control occurs during a repair, which it is something that does not appear in the judgment of contrast. So does occur with the fact that the computer in the case hereby under appeal had not personal password in contrast to what happened in the other case. It should be stressed that this is not about the prosecution of conduct for disciplinary purposes from the perspective of the scope of protection of a fundamental right, as in the case decided by the judgment of April 20th, 2005, but before a previous problem on determining the limits of corporate control over an area that, although linked to work, may affect the privacy of the worker.

SECOND

Established contradiction in terms to which reference has been made, it must be analyzed the infringement object of the complaint regarding Article 18 of the Workers' Statute in conjunction with Article 90.1 of the Labour Procedure Act and Article 18 of the Constitution. As it was already anticipated, the appealed decision is based in the idea that the way obtaining

the evidence, from which the conduct alleged by the company to justify the dismissal could be credited, did not comply with the requirements of Article 18 of the Statute Workers because: 1) it is not shown that examining the computer or at least further consideration once appeared temporary files was necessary to be carried out at that time and without the presence of the worker, 2nd) it does not appear that the whole control process was held at the place and time of work, as the computer was removed for repair; 3rd) nor the inspection was according with the dignity of the worker as it was made without his presence and 4) the check was carried out without the presence of a representative of the workers.

The discussing question focuses, therefore, on whether the conditions of Article 18 of the Workers' Statute provide for the inspection of the person of the worker, his locker and personal effects, also apply to corporate control over the use of worker computers provided by the company. But the problem is broader, because in reality, the question raised, from the perspective of wrongfulness of evidence obtained in breach of fundamental rights (Article 91.1 of the Labour Procedure Act), refers to the compatibility between the corporate control and worker's right to personal privacy (Article 18.1 of the Constitution) or even the right to secrecy of communications (Article 18.3 of the Spanish Constitution), in the case of email control. Article 8 of the European Convention for the Protection of Human Rights also states that everyone has the right to be respected in private and family life and prohibits interference that is not provided for in the Act and that would not be justified for reasons of safety, welfare economic, defense of order, prevention of crime, protection of health, morals or the rights and freedoms of others. The right to privacy, according to the doctrine of the Constitutional Court, consists on "the existence of an own and reserved sphere against the action and knowledge of the others, necessary, according to the guidelines of our culture, to maintain a minimum quality of human life" and that area must also be respected in the context of labour relations, in which" it is sometimes possible to access to data pertaining to the intimate family life of workers that can be harmful to the right to privacy "(Constitutional Court Judgment nos. 142/1993, 98/2000 and 186/2000). Hence, certain forms of control of working services may be incompatible with this right, because although it is not an absolute right and may respect, therefore, "interests constitutionally relevant", it is necessary that the required constraints are justified to achieve a legitimate aim and are also provided to achieve and respect the essence of the right. When workers use computer technology provided by the company, conflicts affecting the privacy of workers may arise, when using the email, in which the involvement extends, as already mentioned, to the secrecy of communications, and also when practising the so-called 'navigation' through the Internet and accessing to certain personal computer files. These conflicts happen because there is a personal use and not merely a custom work or professional use of the means provided by the company. That individual tailoring occurs because of the practical difficulties of establishing an absolute prohibition on personal use of the computer -as it is the case of telephone conversations at the company- and the generalization of a certain tolerance and moderate use of the means of company. But at the same time, it should be kept in mind that this is media owned by the company and that it facilitates the employee for use in carrying out the work performed, so that such use falls within the scope of the power of surveillance of the entrepreneur who, due to Article 20.3 of the Statute of Workers, "may take the measures it deems most appropriate for surveillance and monitoring to verify compliance by the worker of his job duties and obligations", although this control should respect "due consideration" to the "dignity" of the worker.

THIRD

These considerations show that Article 18 of the Workers' Statute does not apply to the control by the employer of the computer means that workers are provided with for the execution of the work performed. Article 18 of the Workers' Statute provides that "only inspection of the individual workers, their lockers and special effects, may be made when necessary for the protection of business assets and other workers of the company, within the workplace and during hours of work", adding that in making these inspections " the dignity and privacy of the worker should be respected at the possible highest level and with the attendance of a legal representative of the employees or, in his absence from the workplace, being present another employee of the company, whether this would be possible." The assumption made in the mentioned rule is completely different from what occurs with the control of computer technology at work. Article 18 entitles to the employer to a control that exceeds the one which derives from its position inside the employment contract and therefore falls outside the scope of Article 20 of the Statute of Workers. In the inspections, the employer acts so outrageous and exceptional, outside the contractual framework of the powers granted by Article 20 of the Workers' Statute and, in fact, as noted by the scientific doctrine, plays -no without normative coverage problems- a function as "private police" or "business police" that the law is binding to the defense of its assets or the assets of other employees of the company. The inspection system of Article 18 of the Workers' Statute appears as an exception to the ordinary rules governing the Code of Criminal Procedure (Article 545 between others). Both the individual worker, and his personal effects and the locker are part of the private sphere and fall outside the scope of implementation of the contract of employment to which the powers of Article 20 of the Statute of Workers extend. In contrast, the control measures on computer resources made available to workers are, in principle, within the normal scope of those powers: the computer is a production tool which is owned by the employer "as owner or another title" and it has, therefore, control powers of use, which logically includes checkouts. Moreover, by using the computer the rendering of services takes place and therefore, the employer can verify its proper compliance, which it does not happen in the cases of Article 18, because even with respect to the locker, which is a furniture of the entrepreneur, there is a transfer of use for delimiting the proper worker use of it that, although causally related to the employment contract, falls outside of the enforcement and corporate powers given under Article 20 of the Workers' Statute, so entering within the personal sphere of the worker.

Hence the elements that define the guarantees and limits of Article 18 of the Workers' Statute, are not applicable to the control of computer technology. First, the need for control of those media does not have to be justified by "the protection of business assets and other employees of the company" because the legitimacy of that control comes from the nature of the production tool of the object on which the control lies. The entrepreneur has to control the use of the computer, because through it the work is performed and therefore the employer must examine whether its use is consistent with the purposes that justify it, because otherwise it would be rewarding as working time what it is not related to work activities. The employer must also control the content and results of the work performance. Thus, our judgment of 5th December 2003 on an issue regarding telephone telemarketing, accepted the legality of a consistent corporate control in random hearing and recording of telephone conversations between workers and customers "to correct defects and to provide the necessary trade-related technical arrangements", reasoning that such control has " the sole purpose ... the work activity of the worker" because the controlled phone was made available to workers as a tool to carry out its functions of "telemarketing" and workers know that the telephone is only

for work and also know that it can be operated by the company. The computer control is also justified by the need to coordinate and ensure continuity of work activity in cases of worker absences (customer orders, customer relationships…), to protect the computer system of the company, which may be adversely affected by certain uses, and to prevent responsibilities for the company that could also derive for some forms of illicit use against third parties. In reality, the corporate control of a working environment does not need, unlike what happens with the provisions of article 18 of the Workers' Statute, specific reasons in each case. Conversely, legitimacy derives directly from Article 20.3 of the Statute of Workers.

Second, the requirement of respect human dignity during controlling the worker is no a specific requirement of Article 18 records, since this requirement is general for all forms of corporate control, as can be seen from the wording of Article 20.3 of the Statute of Workers. In any case, we should clarify that the fact that the worker is not present in the control is not in itself a factor that may be considered contrary to his dignity.

Third, the requirement that the inspection is practiced at the workplace and during working hours makes sense in the context of Article 18, which refers to business powers which, by their exceptional character, can not be exercised outside the company level. It is clear that the employer can not register the employee or his personal effects out of the workplace and working time, for doing so his powers of private police or self protection would reach a completely disproportionate outcome. The same applies to the inspection of the locker, although in this case the requirement that is practiced during working hours is to enable the presence of workers and their representatives. In any case we should clarify that the requirements of time and place of Article 18 of the Statute of Workers are not intended to preserve the privacy of the registered worker; its function is different: to limit exceptional business ability and reduce it to the scope of the company and its working time. This does not happen in the case of control of a working tool which is owned by the entrepreneur himself.

Finally, the presence of a representative of employees or an employee of the company was not related to the privacy of registered workers; is rather, as happens with the provisions of Article 569 of Criminal Procedure Act for similar interventions, a guarantee of objectivity and the effectiveness of the test. That requirement can therefore not be applied to normal control by the employer of the means of production, regardless of whether to make the test results of the control to be effective has to be made to a witness or an expert evidence on the control itself.

There is not, therefore, direct application of Article 18 of the Statute of Workers on control of computer use by workers, not even by analogy, because there is no similarity of the cases, or identity of reason in the regulations (Article 4.1 of the Civil Code).

FOURTH

The control of the use related to the computer provided the employee by the employer is not set forth under Article 18 of the Workers' Statute, but regulated by Article 20.3 of the Workers' Statute and that provision must be interpreted with the qualifications that have to be made next. The first concerns the limits of such control and in this matter the said provision itself refers to an exercise of the powers of supervision and control to save “in its adoption and application due consideration" to the dignity of the worker, which also refers to respect for privacy under the terms to which has already been referred when examining the judgments of

the Constitutional Court no. 98 and 186/2000. At this point it must be remembered what has been said about the existence of a widespread social habit of moderate tolerance to certain personal use of computer technology and communication means facilitated by the company to workers. This tolerance also creates a general expectation of privacy in such use; expectations that can not be ignored, but neither become a permanent impairment of corporate control, because even though the worker is entitled to respect for their privacy, respect can not impose when a worker uses a medium provided by the company against the instructions set by it and regardless of the controls adopted for such use and to ensure continuity of service. Therefore, what business has to do in accordance with the requirements of good faith is set previously the rules of use of these media with implementation of absolute or partial bans, and informs to workers that will be control and the way the employer will apply in order to check the correctness of the use, and the measures to be taken where necessary to ensure effective labour utilization means when necessary, without prejudice to the possible application of other preventive measures such as exclusion of certain connections. Thus, if the medium is used for private use against these prohibitions and knowledge of controls and measures, can not be understood that when the control is carried out, "a reasonable expectation of privacy" was violated in the terms that establish judgments of the European Court of Human rights of 25 June 1997 (Halford case) and April 3, 2007 (Copland case) to assess the existence of an injury of Article 8 of the European Conventionfor protection of human rights .

The second point relates to the qualification or scope of protection of privacy, which is compatible with the lawful control to which reference has been made. Clearly telephone calls and email are included in this area with the additional protection afforded by the constitutional guarantee of the secrecy of communications. The guarantee of privacy also extends to the employee personal files found on the computer. The application of the guarantee could be more questionable in this case, because it is not about communication, or personal files, it is about the so-called temporary files, which are copies that are automatically stored on the hard drive of the places visited through the Internet. Rather it is about trace or traces of the 'navigation' on the Internet and no about personal information that is stored in a closed session. But it must be understood that these files also fall in principle within the protection of privacy, notwithstanding what has been said about the warnings of the company. This is what sets forth the judgment of 3 April 2007 the European Court of Human Rights when he notes that it is included in the protection of Article 8 of the European Convention on Human Rights' the information derived from the monitoring of staff internet usage "and that these files may contain sensitive data in order to privacy, to the extent that the files can incorporate information on certain aspects of privacy (ideology, sexual orientation, personal hobbies, etc..). Nor is the obstacle to privacy protection that the computer does not have a password. This data -bound to the location of the computer in an office keyless- does not imply in itself an acceptance by the employee of an open information in the computer access, although it arises other problem that does not affect to this appeal as it is the difficulty of attribution of authorship to the complainant.

FIFTH

From the foregoing the contesting claim must therefore be dismissed in accordance with settled doctrine of this Court, the appeal is against the judgment given and not against the legal basis of the contested judgment and the judgment is correct, then the company could not collect the information contained in the temporary files and use it for the purposes that it did.

That performance in this case has been a violation of their right to privacy. Indeed, assuming that the above files actually recorded the plaintiff activity, the action taken by the company, without warning on the use and control of the computer, is an injury to his privacy on the terms it has been referenced in the above legal arguments. It is true that the initial entry into the PC can be justified by the existence of a virus, but the business performance does not stop at the detection and repair tasks, as rightly says the judgment, rather than merely to the control and removal of viruses, "continued the examination of the computer" to get in and grab a file whose examination or control can not be regarded as necessary to complete the repair concerned. Thus, it is inconceivable that we are facing what in criminal law qualifies as an "incidental finding" (judgments of 20 September, 20 November to 1 December 2006), as it has gone beyond the regular entry for repair warranted.

The appeal must therefore be dismissed with the consequences resulting thereof by the imposition of costs to the appellant, with loss of deposit made for using and maintaining the guarantee covering the execution of the sentence.

For these reasons above, on behalf of His Majesty the King and the authority of the Spanish people.

LEGAL DECISION

Dismiss the appeal for unification of doctrine brought by the CORUÑESA DE ETIQUETAS, SL, against the judgment of the Labour Chamber of the High Court of Justice of Galicia, January 25th, 2006, in the appeal No. 5844/05, lodged against the judgment delivered on 30th September 2005 by the Labour Court no. 3 of A Coruña, in the file no. 521/05, followed at Mr. Imanol instance against the appellant, on dismissal. We order forfeiture of deposit formed to use, keeping the guarantee as security for the execution of the sentence. We condemn the appellant to payment of the fees of Legal advisors of the respondent in the amount, within legal limits, set by the Chamber if this would be necessary.

Return the proceedings before this Court and supplication procedures to the Labour Chamber of the High Court of Justice of Galicia, along with certification and communication of this resolution.

So by this our decision, to be inserted in the Legislative Records, we pronounce, sign and order.

PUBLICATION. - On the same day of the date the above judgment was read and published by the Hon. Mr. Judge Aurelio Desdentado Bonete in Public Hearing at the Labour Chamber of the Supreme Court, what as Registrar thereof, I certify.

## Sweden

**National reporter: Judges Cathrine Lilja Hansson, Carina Gunnarsson and Karin Renman**

**"Impact of Information Technologies (IT) on industrial and employment relations" – review of national case law**

Summary of the Swedish case

The case concerns the question if a policeman could be dismissed for what he has written on a blog and shows the importance of the constitutional right of freedom of expression.

*The dispute*

LV was employed by the police since 1992. He had a blog since 2009, freely available on the Internet. Under the fictive character, "Patrol car Uncle Blue", he wrote blog postings, on a daily basis, primarily about police work. In purely general terms, it may be said that the blog described, for example, in certain respects criminal offences or, at any rate, misconduct by the police. The contents of the blog attracted attention in the evening newspapers and was closed down by LV in 2010. In this connection it became known that it was LV who had written the postings.

LV was dismissed from his employment as Police Inspector at the Police Authority in June 2010. His union, the Swedish Police Union, brought an action against the State and claimed that the dismissal was unlawful and therefore should be declared invalid. The State contested the claim.

*The Labour Courts assessment concerning the question if there were grounds for termination of employment due to the blogging, per se*

The Labour Court noted the following. LV was exercising his constitutional right of freedom of expression by blogging in his spare time. Employment by the State is based on a private employment contract (i.e. on civil law grounds) and is, in addition, partially regulated by law. As the Labour Court has stated previously on several occasions, there is no scope, due to these or other circumstances, for considering that it should not be possible to uphold the individual's constitutional freedoms vis-à-vis the State in its capacity as an employer. Today, the Constitution explicitly states that it is a criminal offence for a representative of a public authority to take action in the form of dismissal or notice of termination on the grounds of certain forms of expression.

The Labour Court then refers to an earlier judgement in which the Court has summarised the legal position as follows:

"Generally speaking, a public authority may not take action against an employee in the authority because, by exercising his/her constitutional liberties and rights, the employee has caused disturbances in operations or damaged the authority's reputation and the general public's confidence in the authority. A different situation may possible apply if this involves an employee in a special position of confidence and with direct responsibility for the authority's decisions, or in other extreme situations. There is scope for taking steps in the case of serious problems of cooperation, even if such problems may be ultimately based to some extent on the fact that the employee has exercised his/her constitutional liberties and rights. Obviously, a public authority should also be able to take action against an employee who fails to perform his/her duties in a proper manner."

The Labour Court than found that LV, who could not be considered to have had any special position of confidence in the police force, in his blog has permitted a fictive character, Uncle

Blue, to express his views, and has hence not expressed any opinions on his own account and under his own name. In the opinion of the Labour Court in this case, it was not a question of an extreme situation such as that referred to by the Court in the extract cited.

The above implied, in the opinion of the Labour Court, that such results of LV´s exercise of freedom of expression as loss of confidence, damage to reputation, and indignation and a sense of insult on the part of the general public and state employees cannot, per se, constitute grounds for termination of his employment with the police. Therefore, to the extent that such circumstances may have occurred, the State must tolerate them.

*The Labour Courts assessment concerning the question whether there were grounds for termination of employment due to problems of cooperation?*

The Labour Court stated that with reference to freedom of expression as an interest protected by the Constitution, there is reason to make especially high demands on the reasons on which grounds for termination of state employment may be based, due to cooperation difficulties as the result of an employee's exercise of his/her freedom of expression.

The Labour Court found that it did not appear that there were any problems of cooperation until March 2010, when it became known that LV was the author of the blog postings. The Court than concluded from the investigation is that it had not been proved that there were any serious cooperation problems. To the extent that there may have been justified cause to fear such problems, the Court meant that the employer should, in the first instance, have dealt with this by measures other than dismissal.

*The final judgement*

In its Final Judgement The Labour Court declared the dismissal of LV invalid and ordered the State to pay general damages to him.

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[i] This is the body that currently has jurisdiction in cases of unfair dismissal. Under pending legislation this jurisdiction will be transferred to a new first instance tribunal and on appeal to the Labour Court.
[ii] UD/582/2001, heard in 2001.
[iii] UD 771/2000
[iv] UC 179/2008
[v] UD 643/2010
[vi] [2012] 23 E.L.R. 86

## [Translation from Swedish]

**THE LABOUR COURT** **JUDGMENT** Judgment No. 74/11
7 September 2011 Case No. A 156/10
Stockholm

PLAINTIFF
Polisforbundet (the Swedish Police Union), Box 5583, SE-114 85 Stockholm
Counsel: Annett Olofsson, Union Lawyer, LO-TCO Rättskydd AB, Box 1155, SE-11181 Stockholm

DEFENDANT

The State (the Kingdom of Sweden) via Rikspolisstyrelsen (the National Police Board), Box 12256, SE-102 26 Stockholm
Counsel: Mathias Berg, lawyer, Rikspolisstyrelsen, address as above

THE ISSUE
Annulment of dismissal, etc.

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**Background and pleas, etc.**

A collective agreement between the parties applies. Lasse Vartiainen (previous name Lasse Lahti) is a member of the Police Union (the Union) and was employed by the Skåne Police Authority in 1992. He was dismissed from his employment as a police inspector on 14 June 2010. The parties are in dispute regarding, on the one hand, whether this dismissal was based on lawful grounds and, on the other hand, whether the State acted in a manner that caused Lasse Vartiainen to become ill and thus caused him economic loss for which the State is to provide financial compensation.

The Union has instigated an action against the State via the National Police Board and presented the following claims.

**1.** The Union has pleaded that the Labour Court is to annul Lasse Vartiainen's dismissal and compel the State, via the National Police Board, to pay him SEK 250 000 in general damages.

In the event that the Labour Court should find that there were no lawful grounds for dismissal, but that there were nonetheless objective grounds for notification of termination of employment, the Union has instead pleaded that the Labour Court is to compel the State, via the National Police Board, to pay Lasse Vartiainen SEK 120 000 in general damages.

Interest in accordance with Section 6 of the [Swedish] Interest Act is claimed for these amounts, as from the date of service of summons on 19 July 2010 until payment is made.


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| | www.arbetsdomstolen.se | |


**2.** In addition, the Union has pleaded that the Labour Court is to compel the State, via the National Police Board, to pay Lasse Vartiainen SEK 93 669, which corresponds to the difference between his salary, including holiday pay and sickness benefit/sick pay, for the period 5 May to 2 November 2010, plus interest in accordance with Section 6 of the Interest Act, amounting to:

- SEK 7 322 from 25 May 2010,
- SEK 14 159 from 25 June 2010,
- SEK 17 624 from 25 July 2010,
- SEK 17 624 from 25 August 2010,
- SEK 18 110 from 25 September 2010,
- SEK 17 624 from 25 October 2010, and
- SEK 1 206 from 25 November 2010 until payment is made.

In the event that the Labour Court concludes that there were lawful grounds for dismissal, the Union has pleaded that the Labour Court is instead to compel the State, via the National Police Board, to pay Lasse Vartiainen economic damages for the difference between his salary, including holiday pay and sickness benefit/sick pay, for the period 5 May to the date of dismissal on 14 June 2010 amounting to SEK 13 930,

plus interest of SEK 7 322 in accordance with Section 6 of the Interest Act, as from 25 May 2010, and SEK 6 608 from 25 June 2010, all of which applies until payment is made.

**3.** Furthermore, the Union has pleaded that the Labour Court is to compel the State, via the National Police Board, to pay Lasse Vartiainen SEK 32 690 per month as from 3 November 2010 until 15 June 2011, corresponding to salary and holiday benefits, plus interest in accordance with Section 6 of the Interest Act, and due for payment as from the 25th of each month until such payment is made. The Union has also pleaded that the Labour Court is to entitle Lasse Vartiainen to make further claims regarding amounts corresponding to salary and holiday benefits for periods subsequent to the main hearing in this case.

In the event that the Labour Court concludes that there were no lawful grounds for dismissal, but nonetheless objective grounds for dismissal notice, the Union has instead petitioned that the Labour Court is to compel the State, via the National Police Board, to pay Lasse Vartiainen SEK 45 274, corresponding to termination salary and holiday benefits for the period 3 November to 14 December 2010, plus interest in accordance with Section 6 of the Interest Act, SEK 30 511 from 25 November 2010 and SEK 14 763 from 25 December 2010, all of which applies until payment is made.

The State has contested all these pleas, but has confirmed that the amounts in accordance with postings 2 and 3 above are, per se, correctly calculated. On the other hand, the State has not confirmed any amount whatsoever for general damages, but has instead requested that any such damages are to be set in the first instance at zero, and otherwise at an amount that the Labour Court considers to be reasonable. The State has also confirmed, per se, the procedure for calculating interest on the amounts claimed.

Both parties have claimed compensation for their litigation costs.

The parties have, in principle, presented the following in support of their pleas.

**The Union**

*Lasse Vartiainen's blog*

Lasse Vartiainen was appointed by the Skåne Police Authority in 1992 as a police inspector and worked from 1998-2009 as a dog handler in Trelleborg. During a period up to 2 April 2010, he served as a UN police officer in Sudan. During his training prior to the journey to Africa, he was informed by instructors and people who had previously been abroad on UN assignments that it would be a lengthy period and that he should have a simple leisure pursuit in order to be able to cope with everyday life. As a result, Lasse Vartiainen started a blog, for which he created a fictive character, namely "Patrol car Uncle Blue". In his blog, Lasse Vartiainen wrote imaginary accounts, based on tall stories about the police. It should be noted that Lasse Vartiainen has not worked as a patrol car officer since 1998.

In assessing the contents and nature of the blog in question, the blog must be taken into account in its entirety. In one posting entitled "Hints to parents", advice was given as to how parents can and should take care of their children as regards substance abuse and bad company, etc. And a posting entitled "Do you dare to be a witness?" emphasised the importance and significance of a witness to a crime being brave enough to give evidence. A posting entitled "Student weeks" warned of the dangers of alcohol in connection with school graduation celebrations. In another posting, "To Hans (and all you others)", the focus was the lack of checks on sources on the Internet and, in this context it was noted that the reader of the blog should not take it for granted that the author of the blog really was a policemen. A posting entitled "Crimes the police don't care about" referred to a newspaper article with the same name, and refuted the contents of the article in factual terms and also pointed out that the article was not objective and gave an unnecessarily negative picture of the police.

On 19 March 2010, when his employer became aware of these blog postings, Lasse Vartiainen was recalled from his UN assignment, ahead of time. He returned on 2 April 2010 and was posted to the Fraud Squad in Malmö. His work in this position functioned very satisfactorily and his immediate superior describes him as willing to work and interested, pleasant and accommodating.

On the grounds of the contents of his blog, Lasse Vartiainen was charged with breach of his confidentiality obligation and sexual harassment. On the first count, the prosecutor decided not to initiate a preliminary investigation since there was no reason to assume that an offence subject to public prosecution had been committed and, on the second count, the preliminary investigation was discontinued since it could not be proved that an offence had been committed.

*Circumstances in connection with dismissal*

On 28 April 2010, on a bus on his way to work, Lasse Vartiainen saw an article in the Metro newspaper stating that his employer wanted to dismiss him. The employer had not previously informed him that the Police Authority had made a request to the Personnel Disciplinary Board, that he should be dismissed. Lasse Vartiainen was shocked when he read the article in Metro. He continued to his workplace and tried to work, but could not manage it and went on holiday instead. He was on sick leave as from 5 May 2010 up to and including 2 November 2010. The Disciplinary Board first informed him of the question of dismissal in a communication dated 28 April 2010, which he received on 30 April.

Prior to a decision as to whether Lasse Vartiainen was to be dismissed, the Disciplinary Board held a meeting. On this occasion Lasse Vartiainen was represented by Annett Olofsson, who had submitted a power of attorney to the Board. After discussion of Lasse Vartiainen's case in the meeting, the Disciplinary Board informed Annett Olofsson that a decision regarding the question of dismissal would be announced at 15.00 hours on 14 June 2010. Lasse Vartiainen and Annett Olofsson agreed that she was to telephone the Disciplinary Board at this time to get information, and that she would subsequently inform him by telephone. The idea was that possible negative information could be transmitted as smoothly as possible. However, Lasse Vartiainen received a visit in his home already at 13.30 on 14 June 2010 from a representative of the employer, and was personally served notice of dismissal. Annett Olofsson had no knowledge of this. Lasse Vartiainen, who had been in a state of crisis since late April, took this very badly.

The employer has been in breach of its rehabilitation obligation vis-à-vis Lasse Vartiainen. He was only contacted from the employer's side on one occasion, a week or two after he had left his work, when Ing-Louise Udén – who was then temporary head of the Fraud Squad in Malmö – telephoned him to say that he must either go on sick leave or return to work. However, following the initiative of his cohabitant/partner, he took personal contact with the occupational health care unit. The medical certificate and medical records indicate that Lasse Vartiainen was suffering from an acute crisis reaction in response to extreme stress that had resulted in a reactive depression, and that these problems meant that he was registered as sick, and that the reason for the deterioration in his mental status and inability to work was the employer's actions in connection with the process that culminated in his dismissal.

*Lawful grounds for the plea*

In his blog, Lasse Vartiainen has utilised his constitutional right to freedom of expression, and he has not committed any offence. He was dismissed without any objective grounds for notice of termination. Furthermore, the State has failed to fulfil its transfer/relocation obligations. As a result, his dismissal is to be declared invalid, and Lasse Vartiainen is to be awarded general damages.

Lasse Vartiainen has been registered as sick on a 100% basis as from 5 May 2010 until, and including, 2 November 2010. The cause of this period of sickness was his dismissal by the State and actions by the State in connection with dismissal. In this respect, for which the State is to be held responsible, this involved a proposal by the State, in a document with public access, that Lasse Vartiainen should be dismissed from his employment without previously informing him of this, that Lasse Vartiainen was

dismissed without lawful grounds, that the State visited and informed Lasse Vartiainen of dismissal at a point in time that was earlier than, and differed, from the time of which Lasse Vartiainen and his representative had been informed, and also that the State did not provide help and support for the purpose of rehabilitation during the sickness period. In view of the above, the State is liable to pay damages to Lasse Vartiainen for the difference between the sickness benefit received and what he would have received in salary, including holiday benefits, if he had not been registered as sick.

Lasse Vartiainen has been declared to be in good health as from 3 November 2010. Since he was dismissed without even the existence of objective grounds for dismissal, the State is liable to pay a sum corresponding to salary and holiday benefits as from the date stated.

In the event that the Labour Court concludes that there were no grounds for dismissal, but objective grounds for notice of termination, the State is liable to pay a sum corresponding to termination pay for the period as from 15 June 2010 until and including 14 December 2010, plus holiday benefits based on such termination pay.

**The State**

*Lasse Vartiainen's previous service*

The Swedish police service is organised under the National Police Board as a central administrative authority and with a police district in each county. The Skåne Police Authority has approximately 3,500 employees, of whom about 2,600 are police officers. Prior to the end of May 2009, Lasse Vartiainen was working for the Southern Skåne Police Area. He was employed as a dog handler from 1998-2009. From the general public's viewpoint, there is no difference between dog-handling and patrol car duties, apart from the fact that officers in the former category have their dog with them in their vehicle.

As from 28 May 2009, Lasse Vartiainen was assigned to UN duties in the Sudan to supervise the peace process. The intention was that this posting abroad would continue until 30 May 2010, with some extension. After his return to Sweden, Lasse Vartiainen was offered a posting in the border police unit that handles border controls and crimes against aliens. This often involves people in a vulnerable position and people who are victims of human trafficking. As a result, it is important that employees in the border police unit are sensitive and inspire confidence. Petra Stenkula, the head of the border police unit, had discussed this with Lasse Vartiainen. She was aware of a National Police Board investigation in 2007 in which it emerged that Lasse Vartiainen had been active on websites with a pornographic content. Lasse Vartiainen had explained this in terms of his desire to obtain pictures that were to be used in a humorous context. This investigation has been discontinued and is not cited as a reason for dismissal.

*The Blog*

From 28 February 2009 – 11 March 2010, Lasse Vartiainen authored the "Patrol car" blog that is relevant in this case, under the pseudonym of "Uncle Blue". This blog was accessible on a continuously updated website and consisted of two columns – a left-hand column with the actual postings contributed, and a narrower static right-hand column which included the familiar police badge, in connection with which it was explicitly stated that the author of the blog (i.e. "Uncle Blue") was an active police officer.

As a result of his contributions in his blog, Lasse Vartiainen has demonstrated a total lack of respect and judgement. He gave the impression that he and his colleagues engaged in disrespectful and criminal behaviour, both vis-à-vis other colleagues and the general public. He turned genuine human tragedies into entertainment. He poked fun at people on the fringes of society and demonstrated a view of humanity that is totally alien to the police service. As regards his view of women, it appears, for example, that women who are sufficiently good-looking do not have to pay fines, and that it is possible to observe and pursue attractive girls in working hours. Policewomen are not infrequently portrayed as "wet behind the ears", or as shy objects that you might possibly have sex with in the patrol car or at a staff party – and then there

could well be several men sharing her. It is also symptomatic that on the occasions when Lasse Vartiainen has criticised or teased superiors in the police force whom he has chosen to name, they have all been women. In addition, Lasse Vartiainen has depicted himself as a real "macho man" who has never been beaten in a fight or left behind in a car chase. He has even expressed his "manliness" by publishing a picture of an erect, trousered penis, accompanied by a comment that patrol car officers love to hunt thieves. His description of car chases at 200 kph indicates that he has demonstrated total indifference to the lives of other people. He has also described how he ignored orders concerning pursuits and alcohol tests. It also appears that he detests the traffic police, who he considers are merely "bloody-minded" in their dealings with the general public, that he dislikes "lawyer policemen" who, according to him, are not real police, that he has abused his position as a policeman by being "bloody-minded" or getting his revenge on people, that his attitude to his profession is one of resignation and he wants to get his revenge on the police organisation, that things were much better in the past with a proper esprit de corps in the police force, that he and his colleagues have a real play school in their work, and that bullying applies in the police force, or at least this has been the case. He has also described several episodes which, if they could be proved, include criminal offences.

The blog is written in such an initiated and convincing manner that it gives the reader the impression that it really is the unvarnished and uncensored truth about the everyday police occurrences described. In other words it is not obvious, as the counterparty has claimed, that this is a matter of imaginary tales. Furthermore the postings are written in a manner that gives the reader the impression that the characteristics and opinions presented may also be ascribed to Lasse Vartiainen's colleagues. In order to emphasise the genuineness of the pictures presented, it is frequently mentioned that the author of the blog was at work, or on his way to work. These postings also indicate that Lasse Vartiainen both intended, and was aware, that these blogs would be disseminated as widely as possible. On 3 March 2010, when the blog was printed out in the state in which it has been presented to the Court, it had been read 31,348 times, according to the information on page 5. It is not clear, however, whether there were different readers on each occasion, or whether the same user was registered several times.

Lasse Vartiainen's blog postings have been designed to damage the reputation of the police and public confidence in the police. As a result of his blog, Lasse Vartiainen has also flagrantly contravened fundamental police values regarding professional and trustworthy behaviour, and also responsibility and respect for the equal value of all human beings.

*Course of events since the employer became aware of the blog*

Kvällsposten, which was the newspaper that first drew attention to the blog in question, contacted the Skåne Police Authority to find out whether the Authority was aware of the blog, but this proved not to be the case. Since there were some indications that the blogger was employed by the police, the Police Authority prepared a police report on 10 March 2010 regarding breach of confidentiality and sexual abuse. On 13 March 2010, it was established that Lasse Vartiainen had published and was the author of the blog since, on this date, he addressed an open letter to his colleagues about the blog.

On 15 March 2010, a preliminary investigation was initiated regarding the report on sexual harassment, since there was reason to assume that a crime subject to public prosecution had been committed. In other words, the contents of the blog were not regarded as "obvious tall stories". The preliminary investigation was broken off on 18 May 2010, on the grounds that it was impossible to prove that the person or persons under suspicion had committed a crime.

Lasse Vartiainen was recalled from Sudan on 2 April 2010 as a result of the blog in question. He was back in Sweden on 6 April and then went on holiday until 16 April. His duties in the border police unit that had been envisaged were not commenced. In order to ensure that he did not come into contact with the public, he was instead posted to the Fraud Squad in Malmö where his office was at the far end of a corridor. He worked at the Fraud Squad from 19 April to 28 April, and then went on holiday until 5 May. He was subsequently on sick leave.

On 23 April 2010, the Police Authority sent a communication to the Disciplinary Board at the National Police Board requesting that Lasse Vartiainen should be relieved of his duties. The Disciplinary Board informed Lasse Vartiainen of this on 28 April and unanimously decided to dismiss Lasse Vartiainen. His employment ceased when he was informed of the decision on 14 June 2010.

*Reactions of colleagues and the general public to the blog*

There can scarcely be any doubt that public confidence in the police suffered as a result of Lasse Vartiainen's blog. Kvällsposten published some of the comments when the blog was revealed, and also raised the question on its website of whether the policeman responsible should be punished for the blog. Readers could respond to the question by choosing one of the three following alternatives, namely: "Yes, he should be fired immediately", "Yes, he should be forbidden to blog" and "No, he should continue to blog and keep his job". Responses were received from 10,387 persons, of whom 86 per cent considered that the policeman concerned should be fired immediately. In addition, various readers commented on Kvällsposten's article and, in this context, many of them expressed the opinion that the policeman concerned should be dismissed. One person said that the police, in general, should be respected, while lack of confidence in the police force was expressed in other quarters. Feelings of shock that such contempt for women could prevail in the police force were also voiced.

Lasse Vartiainen's colleagues and superiors felt that several of the blog postings were insulting, and said that they had lost all confidence in him. This had a negative impact on cooperation. Lasse Vartiainen himself realised this, as demonstrated in his open letter of 13 March 2010 to his colleagues, in which he said that he had been told that many members of the police force were disturbed about things he had written in his blog, and that he had shut it down "so as not to make my colleagues feel worse".

The fact that the blog interfered with police operations is also indicated by the opinions expressed by Charlotta Göransson, Chief Superintendent and Acting head of the County Criminal Investigation Department at the time, and by Sven-Inge Nilsson, Superintendent and Head of the Söderslätt Community Police District as regards how their personnel reacted when they discovered that Lasse Vartiainen was the blogger in question.

Charlotta Göransson concluded that it was not possible to post Lasse Vartiainen either to the Border Police Unit or to any other of the Department's six units since, on the one hand, Lasse Vartiainen's blog postings demonstrated an outspokenness about police issues and events which meant that she did not have confidence in his integrity and awareness of security as regards sensitive information and, on the other hand, as a result of the contempt and lack of empathy which, according to the blog, characterised various encounters with people in a vulnerable position. According to Charlotta Göransson, she was contacted by several employees who expressed concern about having to work with a person with views of this nature.

Sven-Inge Nilsson described how the contents of the blog made people in his personnel disturbed, disappointed and angry. People repudiated the blog, but it was not feasible to comment effectively that it was nonsense and that it was not worth devoting energy to refuting it. The person who reacted most strongly was a colleague who had worked with Lasse Vartiainen for many years and was worried that he would be personally taunted by colleagues, and that Lasse Vartiainen would lose his job.

It is unreasonable to insist that the Police Authority should arrange continued employment for Lasse Vartiainen. primarily for the reasons cited by Charlotta Göransson. It is impossible to place him anywhere within the Police Authority. The Union has claimed that Lasse Vartiainen's work in the Fraud Squad functioned satisfactorily after his return, but it must be taken into account in this context that the personnel in this location were not aware that Lasse Vartiainen had written the blog in question.

*Claim that the State caused Lasse Vartiainen to take sick leave*

In addition to the fundamental claim that Lasse Vartiainen was dismissed unlawfully, the Union has, in this respect, cited three specific occurrences in support of its pleas.

Firstly, the Union has blamed the State for notification in a document with public access addressed to the Disciplinary Board that Lasse Vartiainen should be removed from his employment without previously informing him of this. This meant that Lasse Vartiainen became aware of the notification to the Disciplinary Board as the result of an article in Metro and, according to the Union, this led to an acute crisis reaction on his part.

The Union has also claimed that Lasse Vartiainen was notified of the Disciplinary Board's decision at 13.30 hours instead of the timepoint of 15.00 hours indicated by the Board. According to the Union, he was very upset by this.

Finally, the Union has claimed that the State has failed to fulfil its rehabilitation obligations as regards Lasse Vartiainen.

The Union's allegations in these respects are dealt with in the following.

Article in Metro

There are no links between the Police Authority and Metro, and the Authority cannot be held responsible for Metro's article. It is, per se, true that the Police Authority did not inform Lasse Vartiainen about the notification in question before it was sent to the Disciplinary Board. There is no obligation to provide such information, and this is frequently the case. The Police Authority is not authorised to dismiss a police officer for personal reasons, but – on the other hand – is liable to notify the Disciplinary Board of such circumstances, if there are grounds for such action.

To summarise, the employer has not committed any legal error in this context and therefore cannot be accused of negligence. Furthermore it is contested that there is a causal correlation since it is unlikely that information to Lasse Vartiainen prior to such notification would have meant that he would not have been registered as sick.

It should also be noted that, in the original summons application, the Union cited the fact that Lasse Vartiainen had read the article in question as grounds for granting him higher general damages. If, contrary to expectation, the Labour Court should conclude that higher general damages should paid in accordance with the Employment Protection Act on the grounds stated, it is not feasible to also cite the circumstances concerned as grounds for pronouncing damages in accordance with the Tort Liability Act.

Notification of the Disciplinary Board's decision

It is, per se, true that the Lasse Vartiainen was informed of the Disciplinary Board's decision "in advance", as stated by the Union. An employee must receive information concerning dismissal personally. In addition, it is customary to ensure that such information is provided immediately before a decision is made public. The reason for this is that the employee may, for example, avoid receiving information about the decision via the media. It may also be stated that, in connection with such notification, Lasse Vartiainen was given an opportunity to meet a union representative and a personnel officer, but he rejected this option. There has not been any agreement between the Disciplinary Board and Lasse Vartiainen or his [union] representative on deviation from the routines for notification of the decision in this case. The State has not committed any legal error and cannot therefore be accused of negligence. Since it is not particularly likely that Lasse Vartiainen's sick leave would have ceased if he had received information about his dismissal at 15.00 hours instead of 13.30 hours, there is similarly no requisite causal correlation as regards liability for damages.

Allegation that the State has breached its rehabilitation obligation

The employer proposed that the discussion prior to the Disciplinary Board's meeting, which was requested by Lasse Vartiainen, should take place on 11 May 2010, but the Union was unable to participate before 18 May. The issue was to have been subsequently discussed by the Disciplinary Board on 26 May, but it was postponed until 7 June at Lasse Vartiainen's request. When representatives of the Police Authority contacted Lasse Vartiainen on 9 and 10 June, he refused to meet them. However, Louise Udén, Lasse Vartiainen's immediate superior at the Fraud Squad, contacted him on repeated occasions, amongst other things to encourage him to return to work during the period in which he was subject to investigation.

A relatively brief period of sickness leave was involved, at least during the time that Lasse Vartiainen was employed by the Police Authority. It is quite natural for an employer to await a pending decision in an issue concerning dismissal before determining how a rehabilitation issue is to be handled. The preparation period in the Disciplinary Board would have been shorter if Lasse Vartiainen and the Union had not sought postponement. In addition, as already mentioned, Lasse Vartiainen did not want to meet representatives of the employer and, furthermore he did not personally contact the employer regarding any possible need for rehabilitation measures.

On the whole, the employer did not commit any legal error in this aspect either, and cannot therefore be declared liable. Furthermore, it does not appear to be particularly likely that the employer would have had time to take any rehabilitation measures that would have resulted in termination of Lasse Vartiainen's sick leave, even if Lasse Vartiainen had been contacted regarding such measures. Hence, the existence of a causal correlation has not been demonstrated.

The significance, per se, of the actual dismissal

There were lawful grounds for the dismissal. Even if it is concluded that this was not the case, there is no reason to assign liability for damages to the State on such grounds, since Lasse Vartiainen was on sick leave. Furthermore, it should be taken into account that the Disciplinary Board cannot be considered to have lacked cause for its unanimous decision concerning dismissal since Lasse Vartiainen's blog had harmed the police and given rise to problems of cooperation. In addition, it has not been clear that the provisions of the Employment Protection Act have been in conflict, in all respects, with the Instrument of Government's provisions regarding Freedom of Expression. In view of the evident prerequisite which, in accordance with the Instrument of Government, applied for statutory review until the turn of the year, it may even be argued that the Disciplinary Board was not entitled to apply the Employment Protection Act in any other manner. If the Labour Court should conclude that the dismissal was unjustified, Lasse Vartiainen is to be compensated for the infringement this has involved in the form of general damages.

Furthermore, there is no satisfactory causality between the dismissal and Lasse Vartiainen's sick leave. A page of the [medical] record submitted in this case indicates that although Lasse Vartiainen certainly experienced a crisis in early May 2010, he had not been feeling at all well since March. This is confirmed by Lasse Vartiainen in his open letter of 13 March 2010, addressed to his colleagues. It is probable that the main reason for his sick leave occurred already at this time, and was because Lasse Vartiainen realised the consequences of his blogging, for example that his colleagues were distressed. This page of the record also states that, in the course of a visit to the doctor on 7 June 2010, Lasse Vartiainen said that it did not matter what decision the Disciplinary Board arrived at since the result would be problematical in any event. Both this, and the fact that the period of sick leave commenced before the decision regarding dismissal had been taken, suggest that the dismissal was not the reason for sick leave. As a result, there is no liability for damages on the part of the employer.

*Grounds for contention*

There were lawful grounds for the dismissal of Lasse Vartiainen.

Firstly, it is claimed that Lasse Vartiainen has been in such flagrant breach of his contract of employment that he must be considered to have seriously disregarded his obligations to his employer already when he authored and published the blog postings in question and, as a result, harmed both the Skåne Police Authority and the entire police service. The damage caused has been particularly serious since Lasse Vartiainen's blogs were written in a manner that appeared to readers to be initiated and credible. In must have been obvious for the reader that a policeman had written these accounts. From the general public's viewpoint, accounts by such a person are considered to have greater credibility than if they had derived from an outsider who was not a policeman. The harm that occurred in the form of damage to the reputation of the police force and loss of public confidence is very serious. In addition, the people described in the blog frequently find themselves in particularly vulnerable and delicate situations, with a special need to be able to feel confidence in the person conducting the operation. It is also clearly inappropriate for someone who is a policeman to present such a situation, while simultaneously expressing himself in the manner that Lasse Vartiainen does in his blog. This is not only harmful for confidence in the police force but it also hinders efforts to respond to such questions. The general public will have absolutely no confidence in Lasse Vartiainen as a police officer after attention has been drawn to his blogs. Furthermore, based on the outlook on humanity and the lack of judgement expressed in his blogs, he cannot be considered to live up to the ethical standards expected of a police officer, which mean that everyone is to be treated with dignity and respect, based on fundamental police values.

Lasse Vartiainen's blog gives the reader the impression that what he writes about was based on his own experience as a policeman. As a result, his behaviour may be considered to have had direct links with his duties, and this must be taken into account in assessing whether there were grounds for dismissal.

It is quite obvious that the author of a blog should also realise, and endeavour to ensure, that his/her text will be disseminated to as many people as possible. Lasse Vartiainen was both aware of this, and intended that his blog would be distributed to the general public.

For most of the time that Lasse Vartiainen was blogging, he had an assignment that called for a high degree of trust, in that he had been selected as a Swedish police officer at the UN Mission in Sudan. In other words, it is not only the State's and the general public's confidence that has suffered, but also confidence in police representatives posted in other countries.

For almost one year, Lasse Vartiainen systematically and carefully painted a picture of a highly degenerate and sexist police organisation that frequently indulges in insulting and disrespectful treatment of both colleagues and the general public. In other words, this is not a question of one or a limited number of blog postings published in all haste.

As a result of his lack of judgement and the lack of professionalism and integrity demonstrated in his blog, Lasse Vartiainen was completely ruthless vis-à-vis his superiors and colleagues, and both his superiors and his colleagues have felt themselves justifiably insulted by his distasteful and subjective accounts, and have lost all confidence in him.

In combination, these considerations mean that Lasse Vartiainen has been guilty of what may be characterised as serious misdemeanours with regard to his duties, since he has breached provisions in the police regulations regarding the way in which police officers are to behave in the course of their duties or, alternatively, with regard to the loyalty obligation resulting from the contract of employment. These considerations also involve breach of the provision in Chapter 1, Section 9 of the Instrument of Government, in accordance with which a person performing an assignment in the course of his/her duties in the public administration is to take into account the equality of all persons under the law and observe impartiality and objectivity.

Secondly, it is claimed that the blog, in combination with the results it had in the form of cooperation problems, for example, meant that Lasse Vartiainen seriously disregarded his obligations to his employer. The following is stated in addition to what is stated in the first instance [above].

The blog postings were formulated in a manner that was also subsequently highly offensive for Lasse Vartiainen's superiors and colleagues, and this undermined the prerequisites for future cooperation. Efficiency, the working environment and cooperation have suffered as a result of the turbulence the blog caused within the police force. An employee who is the author of a blog of this nature, and who has given rise to such reactions cannot insist on retaining his duties since his behaviour was designed to seriously disturb circumstances in his workplace. The obligations resulting from an employment contract imply, namely, an obligation not to behave in such an inconsiderate manner vis-à-vis other employees that relationships in the workplace and the desire of other employees for reasonably satisfactory working conditions are not seriously harmed or at risk. In this case, workplace relationships have been harmed as a result of Lasse Vartiainen's actions, and this has resulted in serious problems of cooperation and, for example, it has proved impossible to find suitable assignments for him. The lack of judgement that Lasse Vartiainen has demonstrated has served to fundamentally shake the confidence of the Police Authority in him, as an employee.

If the Labour Court should conclude that there were no lawful grounds for dismissal, it is asserted that Lasse Vartiainen's blog and the resultant cooperation problems do, in any event, constitute objective grounds for notice of termination. In the light of the problems of cooperation, it is not reasonable to require that the Police Authority should arrange other duties under its auspices. As a result, there was no liability for transfer/reassignment.

If the Labour Court should conclude that entitlement to general damages applies, it is pleaded that this must be set, in the first instance, to SEK 0 and, in the second instance, to the amount that the Court considers reasonable. The basis for such a claim for adjustment is that Lasse Vartiainen was actively involved in the decision to dismiss him, as a result of his actions. Furthermore, in view of the extent of the disloyalty to the employer that he has demonstrated, and the flagrant breach of the provisions of police regulations regarding the obligations of police officers in their employment of which Lasse Vartiainen has been guilty, the Disciplinary Board had grounds for its view that lawful grounds for dismissal applied. In any event, it has not been obvious for the Disciplinary Board that the provisions of the Employment Protection Act should be set aside in favour of the provisions concerning freedom of expression in the Instrument of Government.

As regards the question of economic compensation, it is claimed that the dismissal was based on lawful grounds. In the circumstances, the employer has not caused Lasse Vartiainen harm that resulted in inability to work, sick leave and loss of income. Even if the Labour Court should conclude that there were no lawful grounds for dismissal, it is claimed that the employer has not caused Lasse Vartiainen such harm as to result, in tort law in final loss of income. This is because there has not been any satisfactory causal correlation between dismissal and other circumstances cited by the plaintiff, on the one hand, and the final loss of income, on the other hand, and also that the Disciplinary Board's opinion that there were lawful grounds for dismissal was justified.

**Grounds for judgment**

*The dispute*

Lasse Vartiainen, who has been employed by the police since 1992, has had a blog since February 2009 which was freely available on the Internet. In order to be anonymous, he established a fictive character, "Patrol car Uncle Blue", in whose name he wrote blog postings, virtually on a daily basis, primarily about police work. After the contents of his blog attracted attention in the evening newspapers he closed his blog in March 2010. In this connection, it also became known that it was Lasse Vartiainen who had written these postings.

On 14 June 2010, Lasse Vartiainen was dismissed from his employment as Police Inspector at the Skåne Police Authority. The parties' dispute concerns, in the first instance, whether there were lawful grounds for dismissal or, in any event, objective grounds for notice of termination.

The State considers that there was already reason to terminate employment on the grounds that Lasse Vartiainen had written and published postings in his blog. According to the State, there were problems of cooperation that in any event occurred as a result of publication that constituted grounds for termination of employment.

According to the Union, there were not even objective grounds for notice of termination since Lasse Vartiainen was exercising his constitutional right of freedom of expression. The Union has also pointed out that the State did not attempt to transfer/relocate Lasse Vartiainen.

The parties are also in dispute as regards whether certain actions by the State in connection with dismissal caused Lasse Vartiainen to become ill, and thus caused him an economic loss for which the State is to provide compensation.

The following have been heard in the main hearing at the request of the Union: Lasse Vartiainen, Dr. Thomas Eriksson, Police Inspector Ulf Linder, Police Inspector Bo-Göran Nilsson, Superintendent Ing-Louise Udén, Superintendent Pia Hederen, Police Inspector Jonas Larsson and former Police Officer Wolf Lendt and, at the request of the State, Chief Superintendent Petra Stenkula, former Acting Head of Department Charlotta Göransson, Community Police Chief Sven-Inge Nilsson, Police Inspector Åsa Persson, Equality and Diversity Coordinator Helena Casu-Häll and Chief Legal Officer Mårten Unbeck. The parties have also cited written evidence.

*Are there grounds for termination of employment due to blogging, per se?*

In purely general terms, it may be said that the blog describes, for example, in certain respects criminal offences or, at any rate misconduct by the police. The State has claimed that the blog postings reflect an outlook on human beings that is not compatible with fundamental police values.

The State has not claimed that Lasse Vartiainen did this in the reprehensible manner he describes in his blog in the guise of the fictive character, Uncle Blue, or that he has otherwise done something of a criminal nature. Moreover, the State has not presented any complaints as to Lasse Vartiainen's behaviour in his work as a policeman as grounds for dismissal, or the values he expressed in this work. Although Lasse Vartiainen used a police badge in his blog and wrote about police work and stated that the fictive Uncle Blue was a patrol car officer, the Labour Court considers that it is clearly established that Lasse Vartiainen did not write these blog postings while on duty, or that he made it appear that this was the case (cf AD 2007 No. 20).

The State has claimed that, on the one hand, Lasse Vartiainen contravened the provision in Chapter 1, Section 9 of the Instrument of Government (in the wording that applied immediately prior to 1 January 2011), in accordance with which a person performing an assignment in the public administration in the course of his/her duties is to take into account the equality of all persons under the law and observe impartiality and objectivity and, on the other hand, a provision in the police regulations (1998:1558) stating that police employees are to behave in the course of their duties in a manner that imbues confidence and respect. The Labour Court considers that what the State means is somewhat unclear in this context. The provisions indicate that this is a question of what employees are to do in their operations in the public administration and their work in the police force. The investigation in this case does not give any support for the view that Lasse Vartiainen contravened these provisions in his work as a policeman.

Hence it is the blogging, per se, with the contents that the postings had which, according to the State, constitutes sufficient grounds for termination of employment. According to the State, Lasse Vartiainen has prejudiced confidence in the police as a result of his blogging. According to the State, the contents of the blog have also made superiors and colleagues feel insulted and caused them to lose confidence in Lasse Vartiainen.

As the Union has pointed out, Lasse Vartiainen was exercising his constitutional right of freedom of expression by blogging in his spare time. In accordance with Chapter 2, Section 1, first paragraph of the Instrument of Government, everyone is namely [entitled], under the general guaranteed freedom of expression involving freedom in speech, writing, in visual form or otherwise, to convey information and express thoughts opinions and feelings. This also applies, as Lasse Vartiainen has done in the main, to the expression of opinions from another country. Freedom of expression may, however, be restricted by the Swedish Parliament (Riksdagen) by law, under certain conditions. The State has claimed that the statutory provisions regarding when an employment may be terminated – and possibly also the police regulations determined by the government – mean that the State can terminate employment as a result of the contents of expressions of opinion made off-duty in the light of the harm to confidence which application of freedom of expression has caused and to the breach of the employee's loyalty obligation involved in such expressions of opinion.

Employment by the State is based on a private employment contract (i.e. on civil law grounds) and is, in addition, partially regulated by law, for example as a result of a provision in Section 7 of the Public Employment Act (1994:260) concerning "confidence harming" spare-time occupations prohibiting the pursuit by state employees of any activity in their spare time that may damage the public authority's reputation (cf. SOU 200:80, p. 138 et seq.). As the Labour Court has stated previously on several occasions, there is no scope, due to these or other circumstances, for considering that it should not be possible to uphold the individual's constitutional freedoms vis-à-vis the State in its capacity as an employer (AD 1991 No. 106 and AD 1995 No. 122 - freedom of association, AD 2003 No. 51 - municipal employer, and AD 2007 No. 20). Today, the Constitution explicitly states that it is a criminal offence for a representative of a public authority to take action in the form of dismissal or notice of termination on the grounds of certain forms of expression (Chapter 3, Section 5, third paragraph of the Freedom of the Press Act and Chapter 2, Section 5, third paragraph, of the Fundamental Law on Freedom of Expression).

In its Judgment AD 2003 No. 51,The Labour Court has summarised the legal position as follows:

"Generally speaking, a public authority may take action against an employee in the authority because, by exercising his/her constitutional liberties and rights, the employee has caused disturbances in operations or damaged the authority's reputation and the general public's confidence in the authority. A different situation may possible apply if this involves an employee in a special position of confidence and with direct responsibility for the authority's decisions, or in other extreme situations. There is scope for taking steps in the case of serious problems of cooperation, even if such problems may be ultimately based to some extent on the fact that the employee has exercised his/her constitutional liberties and rights. Obviously, a public authority should also be able to take action against an employee who fails to perform his/her duties in a proper manner."

In his blog, Lasse Vartiainen, who cannot be considered to have had any special position of confidence in the police force, has permitted a fictive character, Uncle Blue, to express his views, and has hence not expressed any opinions on his own account and under his own name. In the opinion of the Labour Court in this case, it is not a question of an extreme situation such as that referred to by the Court in the extract cited.

The above implies that such results of Lasse Vartiainen's exercise of freedom of expression as loss of confidence, damage to reputation, and indignation and a sense of insult on the part of the general public and state employees cannot, per se, constitute grounds for termination of his employment with the police. Therefore, to the extent that such circumstances may have occurred, the State must tolerate them.

However, the State has also contended that Lasse Vartiainen's blogging led to difficulties in cooperation. As indicated in the above quotation, a public authority may take action in the labour law context as the result of serious cooperation problems, even if they are ultimately the result of exercise of freedom of expression by an employee (see also AD 2011 No. 15). The Labour Court will now turn to a review of whether there were grounds for terminating Lasse Vartiainen's employment due to problems of cooperation.

*Are there grounds for termination of employment due to problems of cooperation?*

With reference to freedom of expression as an interest protected by the Constitution, there is reason to make especially high demands on the reasons on which grounds for termination of state employment may be based, due to cooperation difficulties as the result of an employee's exercise of his/her freedom of expression (cf. AD 2011 No. 15).

The State has argued as follows. The blog postings were deeply insulting for Lasse Vartiainen's superiors and colleagues, and they reacted strongly against the outlook on humanity and the lack of judgement expressed in his blog. Lasse Vartiainen's actions were calculated to seriously stir up matters in his workplace and resulted in serious cooperation problems that have, for example, made it impossible to find appropriate work assignments for him. The lack of judgement that he has displayed has also served to fundamentally shake the Police Authority's confidence in him as an employee.

According to the Union, there do not appear to have been any cooperation problems.

Lasse Vartiainen was working abroad on UN service as from May 2009. After it became known that he was author of the blog postings, he was recalled ahead of time. He returned to Sweden on 6 April 2010 and was on holiday until 16 April 2010, after which he was working in the Fraud Squad from 19-28 April 2010 (i.e. somewhat more than a week). Then he was on holiday. He has not worked for the police since he went on sick leave on 5 May 2010.

It does not appear that there were any problems of cooperation until March 2010, when it became known that Lasse Vartiainen was the author of the blog postings. Subsequently therefore, Lasse Vartiainen only worked for the Skåne Police Authority for little more than a week, when he was placed in a room in the police building "at the far end of a corridor" to prevent him coming in contact with the general public. According to Lasse Vartiainen's immediate superior, his work functioned satisfactorily during this period of just over a week, and furthermore there were no unusual features in his relations with his colleagues there, who were informed by Lasse Vartiainen that he was the author of the blog.

The investigation reveals that some of Lasse Vartiainen's superiors and colleagues believed, at least initially, that Lasse Vartiainen had personally participated in the events described in his blog and that he himself held the views that he expressed in this context. Among other things, police reports regarding breach of confidentiality and sexual harassment were made as a result of the information in the blog. The prosecutor did not stop the preliminary investigation of sexual harassment until the end of May 2010. In the opinion of the Labour Court, it is against this background that we should assess, for example, the account given by the head of the unit where it was originally planned that Lasse Vartiainen was to work after completion of his UN service, according to which several colleagues said that they did not want to work with Lasse Vartiainen. Some of those who have been heard have, in different wordings, also said that it would have been difficult to be able to trust a person who expressed himself in the manner that Lasse Vartiainen had done in his blog, via his fictive character, Uncle Blue. There have been no other concrete indications that there might have been any real problems of cooperation.

The Labour Court's conclusion from the investigation is that it has not been proved that there were any serious cooperation problems. To the extent that there may have been justified cause to fear such problems, the employer should, in the first instance, have dealt with this by measures other than dismissal.

*Invalidation of dismissal and compensation for loss of income after registration as sick*

The Labour Court's standpoint means that the State did not even have any objective grounds for notification of termination of Lasse Vartiainen's employment, and that his dismissal must therefore be declared invalid. This assessment also means that the Union's plea that the State is to pay Lasse Vartiainen a non-contentious amount corresponding to salary and holiday benefits for the period after the conclusion of his sick leave until the end of the main hearing, together with certified interest, is to be approved. In addition, as pleaded, the Union should be given an opportunity, to the extent authorised, to return with pleas regarding an amount corresponding to salary and holiday benefits for the period after the main hearing.

*General damages*

The Union has requested that Lasse Vartiainen is to receive SEK 250,000 in general damages, while the State considers that such damages should be set at zero.

The State dismissed Lasse Vartiainen because he blogged in his spare time. His dismissal has involved a serious violation of Lasse Vartiainen's constitutional right to freedom of expression. The Labour Court determines the general damages to be SEK 125,000, plus certified interest.

*Compensation for loss of income as a result of sick leave*

The Union wants Lasse Vartiainen to receive compensation from the State for the difference between his salary, including holiday pay and sickness benefit/sick pay, for the period he was on sick leave, as from 5 May 2010 and up to and including 2 November 2010. The Union considers, namely that the period of sick leave was caused by the State's actions in the following respects.
a) The State requested in a document with public access that Lasse Vartiainen was to lose his employment without informing him in advance.
b) Lasse Vartiainen was dismissed without lawful grounds.
c) The State visited and notified Lasse Vartiainen and served notice of dismissal in his home at a timepoint that was earlier and differed from the time of which Lasse Vartiainen and his representative had been informed.
d) The State did not give Lasse Vartiainen help and support for the purpose of rehabilitation during the sickness period.

The State considers that there is no satisfactory correlation between the State's actions and Lasse Vartiainen's loss of income, and hence that the State did not cause this loss.

The Labour Court has previously, on several occasions, encountered demands such as those presented by the Union. In its Judgment AD 2003 No. 16, the Court summarised its views on this issue as follows:

"An employee who is on sick leave during a period in which he or she should have received sick pay from the employer but has not received such payment, for example as a result of dismissal without lawful reason, is not entitled, in principle to economic damages for the corresponding period. He or she cannot namely be considered to be at the employer's disposal during the period in question and hence the employer did not need to pay any salary (see AD 1996 No. 125). In the Labour court's view there must be strong reasons for an exception to the principle that economic damages are not to be paid when the employee is on sick leave. Circumstances in connection with loss of employment and the manner in which this occurred may, for example have been of a nature that it appears justifiable to impose liability for damages on the employer for the economic loss that may have resulted from sick leave. However, the existence of a purely general correlation between circumstances in the workplace and the employee's sick leave it cannot be considered sufficient. Since sick leave is often due to mental or psychosomatic problems in cases of this nature, considerable demands must also obviously be made on the examination that confirms the causal correlation between the employer's actions and the sickness (cf. e.g. AD 2000 No. 12, AD 2001

No. 14 and AD 2001 No. 14). Finally it may be added that the employee normally receives compensation in the form of general damages for injury in the form of notice of termination without objective grounds, or a justified dismissal.

In judgment AD 2006 No. 42, the Court added that a corresponding restrictive approach was to be considered applicable when an employee requires compensation for a period of sick leave prior to a dismissal.

The investigation indicates that Lasse Vartiainen had an acute crisis reaction and became so depressed that he required sick leave. There is nothing to indicate that Lasse Vartiainen had experienced any corresponding problems previously. A psychiatrist, a staff medical officer and a registered psychologist, all of whom examined Lasse Vartiainen, consider that there are at least good reasons to indicate that the cause of the problems was actions by the employer in connection with the dismissal process. The Labour Court does not question their assessment or what Lasse Vartiainen said about how he was feeling.

The fact that Lasse Vartiainen became sick as a result of the dismissal process is not sufficient, as noted, for the State to be made liable to pay him anything for the period in which he was unable to work. The question then is whether the actions for which the Union blames the State mean that there are sufficiently strong grounds for compelling the State to make payment. The Labour Court makes the following assessment in this respect.

The State did not have any legal liability to inform Lasse Vartiainen in advance that the Police Authority, in accordance with what is prescribed, was to notify the National Police Board's Disciplinary Board – the only body in the police organisation entitled to decide on dismissal - of the issue in a document with public access. And the State cannot be considered to have acted unlawfully by not attempting to rehabilitate or otherwise assist Lasse Vartiainen during the period of more than a month in which he was on sick leave, prior to dismissal. Nothing has emerged to indicate other than that the State informed him of his dismissal in the manner that occurred, out of consideration for Lasse Vartiainen. Lasse Vartiainen is to receive compensation for his unconstitutional dismissal, in the form of general damages.

The Labour Court's overall assessment is that no special circumstances have emerged that mean that the State should be held liable for Lasse Vartiainen's sick leave and the economic loss that this caused. Hence, the conclusion is that there was no satisfactory causal correlation between the State's action and Lasse Vartiainen's inability to perform his duties. The Union's pleas in this respect are to be dismissed.

*Litigation costs*

The Union may be considered to have won in all respects, with the exception of its claim for SEK 93,699, plus interest. This loss is not so insignificant as to imply that the Union should nonetheless have all its litigation costs paid by the State. It is not possible to ascertain exactly the total cost of this aspect of the case. The Labour Court considers that it is reasonable, on the grounds of the Union's loss, to deduct approximately one fifth of the Union's litigation costs, as certified by the State, and let the State pay the remainder.

**Final Judgment**

1. The Labour Court declares the dismissal of Lasse Vartiainen invalid.

2. The Labour Court orders the State, via the National Police Board, to pay general damages of SEK 125,000 to Lasse Vartiainen, plus interest in accordance with Section 6 of the Interest Act as from 19 July 2010 until payment is made.

3. The Labour Court orders the State, via the National Police Board, to pay Lasse Vartiainen (32,690 / 30 X 27=) SEK 29421 for November 2010, SEK 32,690 per month for the period December 2010 – May 2011 and (32,690 / 30 X 14=) SEK 15,255 for June 2011, plus interest in accordance with Section 6 of the

Interest Act, due on a monthly basis from the 25th in each month until payment is made. Lasse Vartiainen is entitled to reserve the right to claim further amounts for the period after 14 June 2011, to the extent that this is justified.

4. The Labour Court dismisses the Police Union's pleas in other respects.

5. The Labour Court orders the State, via the National Police Board, to pay the Police Union SEK 270,000 for litigation costs, of which SEK 225,000 is for counsel's fees, plus interest in accordance with Section 6 of the Interest Act on the former amount as from the date of this judgment until payment is made.

Members of the Court: Sören Öman, Peter Syrén, Kurt Eriksson, Claes Frankhammar (dissenting opinion), Staffan Löwenborg, Gunilla Kevdal and Bo Almgren.

Secretary: Pontus Woxner

Judgment Enclosure
in case No. A 156/10

Dissenting opinion: Claes Frankhammar, Member of the Court

I do not share the majority opinion as regards the general damages awarded.

According to its minutes dated 7 June 2010, the Disciplinary Board took a unanimous decision to dismiss Lasse Vartiainen. Two senior representatives of the Police Union participated in this decision.

During the period from 28 February 2009 to 11 March 2010, Lasse Vartiainen wrote the "Patrol car policeman" blog relevant to this case under the "Uncle Blue" pseudonym. This blog, which thus continued for more than a year, depicted, a degenerate and sexist police organisation inclined to insulting and disrespectful treatment of both colleagues and the general public, both in its use of language and its formulation in other respects. I consider that Lasse Vartiainen contributed to a considerable degree, as a result of his blog activities, to the decision concerning dismissal, and I consider that it should be regarded as confirmed that the blog postings in question caused serious harm both to the Skåne Police Authority and to the entire police service. This applies, not least, to the highly critical task of establishing fundamental values in the police service and the equality and diversity process.

Even if Lasse Vartiainen's conduct does not constitute lawful grounds for dismissal, and even if the State must, to some extent, tolerate such actions in accordance with freedom of expression as protected under the Constitution, I consider that there are grounds for adjusting the general damages.

The general damages may be reasonably determined to be SEK 50,000.

In other respects I agree with the majority opinion.