

Out-of-work conducts in social networks and the just cause to dismissal.

An analysis of Portuguese and Spanish case law

Legal framework

Both rights are protected under article 12º and 18º of the Universal Declaration of Human Rights

Both Portuguese and Spanish Constitutional and Labour Laws recognize the right of freedom of speech and to privacy - article 26º/37º Constituição da República Portuguesa (CRP) - article 18º/20º Constitución Española (CE) - article 14º/16º/22º Código do Trabalho (CT) - article 4º/18º Estatuto de los trabajadores (ET)

The constitutional system itself provides that the exercise of fundamental rights, far from being absolute and unconditioned, must respect others constitutional rights

From labour contract arise a complexity of duties and rights that limit the fundamental rights of the worker

Labour duties may be classified as being dependent or autonomous from the work performance

Autonomous duties such as the loyalty, respect and nondisclosure, enacted by article 128º CT and article 5º ET, prevail outside the workplace

Out-of-work conducts may lead to dismissal with just cause in both Portuguese and Spanish case law if they are of such a serious nature or extent that makes unbearable the employment relationship - article 351º CT and article 54º ET

The constitutional and legal protection of personal message confidentiality prohibits the employer the possibility of seeking evidence to instruct disciplinary process through access to personal messages

Evidence obtained in violation of that worker's rights are null and void - article 32.º, n.º 8 CRP and 24º, nº 2 CE

Precedent Case Law

Kimberly Swann
Virgin Atlantic

Out-of-work conducts in social networks considered juste cause to dismissal in Portuguese and Spanish Case Law



Dissemination of comments and/or postings on social networks represent a breach of contract itself and can be used as evidence to instruct disciplinary proceedings

Tribunal Superior de Justicia de Castilla y León de 21.04.2010 declared the fairness of the dismissal of a worker who had threatened one of the executives of the company through a blog.

Tribunal Superior de Justicia de Madrid de 23.01.2012 held the validity of the dismissal of worker, who was posting photos on Facebook showing her going out and drinking alcohol during a leave for depression.

Tribunal Superior de Justicia de Madrid de 28.05. 2012 held that the employer could legally dismiss a worker that during a disability leave kept working on a business regarding the design of hair ornaments that was published on Facebook.

Tribunal Superior de Justicia de Andalucía de 22.05.2014 held that insulting or threatening statements made through a social network against the company or against other employees allow disciplinary dismiss a worker, even if the opinions are issued outside the company premises and using a personal computer owned by the employee and not the company.

Tribunal da Relação do Porto, de 8.09.2014 examined the validity of the dismissal of an employee who posted several messages that defamed the employer, co-workers and superiors in the Facebook group, composed of at least 140 members, all employees or former employees of the employer. The Court held that there is no privacy on Facebook, which can be protected by the right to privacy Article 22 of the Labour Code, as the messages posted can overflow the borders of a "group" created on the social network Facebook.

Tribunal da Relação de Lisboa, de 24.09.2014, by denying the private feature of the group and the "personal" nature of publications from a worker offending and defaming the employer on his personal Facebook page, rejected that the post was covered by the right to privacy emerging from article 22º CT.

The public nature of the post published in Facebook enabled the employer to use it to instruct disciplinary process.



Conclusions

Worker's fundamental rights suffer limitations owing to the complexity of rights and duties arising from labour contract.

Privacy is naturally weakened in social networks, as the publication of the content can become available to an unknown number of persons through the network.

Comments and posts on social networks can not be considered private messages protected by the worker right to privacy.

The public nature of the posts and comments enables the employer to use it to instruct disciplinary process towards dismissal.

Out-of-work conducts in social networks breaching the labour contract duties, that prevail outside the workplace, can legally justify the worker dismissal.