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The employee's right to criticise the employer on the internet: how to set legal boundaries?

Summary

The issue of the limits of acceptable criticism of an employer by an employee has been considered in case law and literature for a long time. However, with the widespread access to the internet, in particular to social media, there are new challenges in this area. The paper addresses the problem of permitted criticism of an employer posted by employees on the internet. The author seeks an answer to the question of whether the existing criteria developed in the doctrine and jurisprudence, which are used to determine the limits of criticism, are also appropriate in the case of an employee's statements published in a virtual space, which is characterised by its public nature, the lack of control over the audience and the persistence of the content.

Keywords: criticism, employee, employer, internet, social media, limits

1. Introductory remarks

The impact of new technologies on labour law is reflected, among other things, in the creation of new challenges with which the existing institutions of this branch of law must deal. One such challenge is the issue of online criticism of the employer by the employee. The issue of the limits of criticism expressed by an employee is not a new one[1]. Jurisprudence and doctrine have developed criteria that should be

[1] See e.g.: S. W. Ciupa: *Niedozwolona krytyka pracodawcy ze strony pracownika jako przyczyna wypowiedzenia umowy o pracę*. "MOP" 2002, issue 20; E. Suknarowska-Drzewiecka: *Wypowiedzenie z powodu niekorzystnych wypowiedzi o pracodawcy umieszczanych na serwisach społecznościowych lub stronach internetowych*. "MOPR" 2017, issue 7; M. Bosak: *Zjawisko krytyki w stosunkach pracy – wybrane aspekty*. "Annales Universitatis Mariae Curie-Skłodowska. Sectio G (Ius)" 2015, vol. LXII, no. 2; M. Brodecki: *Granice krytyki pracodawcy przez pracownika. Odpowiedzialność za niedozwoloną krytykę pracodawcy*. In: *Demokracja w zakładzie pracy. Zagadnienia prawne*. Eds. Z. Hajn, M. Kurzynoga. Warszawa 2017.

taken into account when assessing the admissibility of such criticism. However, the development of modern technology has also meant the spread of social media, to which any employee can have access. As a result, criticism directed at the employer can now have a different character and – more importantly – a much wider reach.

The purpose of the paper is to consider whether – and under what conditions – the criteria developed in doctrine and case law for permitted criticism of an employer apply to the criticism published by an employee on the internet. It seems that most of the criteria developed both in case law and in the doctrine, which determine the limitations of such criticism, can also be applied in the case of internet activity. However, certain nuances related to the specific nature of this medium should be taken into account – first and foremost, the widespread availability of statements posted there, which means that such criticism is, as a rule, of a public nature. The very broad scope of the criticism may therefore result in the need to broaden the catalogue of the criteria according to which unfavourable statements made by an employee about the employer are assessed. This topic is all the more relevant because, as pointed out in the literature, online statements by employees disparaging their employers have become ubiquitous[2].

The doctrine distinguishes three main types of employee social media activity that occur outside working hours and without the use of the employer's tools or technology (e.g. a computer). Firstly, there are disparaging remarks about the employer or employment itself. The second type of behaviour is bullying, harassing or intimidating other co-workers on social media. Thirdly, these are behaviours that, although not directly related to the employment, may damage the interests or reputation of the employer[3]. To outline the framework of this study, it should be emphasised that only the first mentioned type of expression, i.e. critical statements about the employer, will be its subject. Due to the limited volume of the paper, excluded from its scope will be such issues as the general freedom of expression on the internet by employees (not related to criticism) and the employer's

[2] See: P. Sanchez Abril, A. Levin, A. Del Riego: *Blurred Boundaries: Social Media Privacy and the Twenty-first-century Employee*. "American Business Law Journal" 2012, 49(1) pp. 68–69.

[3] S. Hook, S. Noakes: *Employer Control of Employee Behaviour Through Social Media*. "Law, Technology and Humans" 2019, vol. 1(1), p. 142.

control over their social media accounts, the possibility of termination of the employment relationship with or without notice and the civil law and criminal law consequences of exceeding the limits of freedom of expression, as well as the detailed description of the phenomenon of whistleblowing, which is regarded as a particular form of criticism of the employer by the employee[4]. For the same reasons, the views of the judicature on the issue of criticism of the employer will be narrowed down to Polish jurisprudence[5].

The paper is divided into three parts. The first part focuses on answering the question of what criteria constitute acceptable criticism of the employer. The second part is devoted to the analysis of specific character of criticism posted on the Internet (e.g. on social media). The final part offers some suggestions on how the criteria for permitted criticism should be adapted to the development of new technologies.

2. Acceptable criticism of the employer

The employee's right to criticise the employer is based primarily on Article 10 of the European Convention on Human Rights[6] (freedom of expression), and Article 54 of the Polish Constitution[7] (freedom to express one's opinions and to obtain and disseminate information). Indeed, freedom of criticism is part of the freedom of expression[8]. The labour law provisions do not contain a definition of criticism and it is therefore necessary to refer to the jurisprudence and doctrine in this regard. The Supreme Court in its resolution of 17 December

[4] See: M. Bosak: *Zjawisko krytyki w stosunkach pracy...*, p. 34. On whistleblowing see e.g. H. Szewczyk: *Whistleblowing. Zgłaszanie nieprawidłowości w stosunkach zatrudnienia*. Warsaw 2020; M. Kozak-Maśnicka: *Dyrektywa w sprawie ochrony osób zgłaszających naruszenia prawa Unii jako wyzwanie dla polskiego ustawodawcy*. "MOPR" 2020, issue 4.

[5] With regard to the ECtHR case law on this issue, reference should be made, for example, to an article extensively discussing it, i.e. A. Rutkowska: *Granice wolności słowa w środowisku pracy – standardy w orzecznictwie Europejskiego Trybunału Praw Człowieka*. "MOP" 2014, issue 8.

[6] Convention for the Protection of Human Rights and Fundamental Freedoms, Journal of Laws 1993, No 61, item 284 as amended.

[7] Constitution of the Republic of Poland, 2.04.1997, Journal of Laws 1997, No 78, item 483 as amended.

[8] Cf. judgement of the Supreme Court, 15.01.2014, V KK 178/13, OSNKW 2014/8/62.

1965[9] noted that "criticism consists in communicating to a person or third parties an evaluation of the work, activity or conduct of another person, institution or association", while "the critic pronounces a positive or negative judgment according to a basic measure adopted by him". This definition is developed in the doctrine[10]. The literature draws attention to three levels of critical expression: 1. descriptive statements relating to facts; 2. evaluations and generalisations of these facts; 3. the external form of their expression[11].

The admissibility of criticism of an employer by an employee has not been questioned in case law for many years[12]. This is by no means to imply that this right is absolute in nature[13]. Hence, both in jurisprudence and in the doctrine, there has been a long-standing search for criteria to determine the limits of acceptable criticism. Moreover, the problem is broader, since the question of the boundaries of such criticism is essentially an attempt to resolve the natural conflict between the interests of the employer and the employee's freedom of expression[14]. Attention is drawn to the difficulty of formulating a general, universal catalogue of such criteria that would apply to all employees, since, as a general rule, each case should be individually assessed in this regard[15]. The vagueness of the boundaries of acceptable criticism is also influenced by the need to take into account such issues as the type of criticism, the conditions in which it takes place, the value

[9] Resolution of the Supreme Court of 7 judges - legal principle, 17.12.1965, VI KO 14/59, LEX No 113915.

[10] See more on the definition of criticism: S. W. Ciupa: *Niedozwolona krytyka pracodawcy ze strony pracownika...* pp. 925–926.

[11] Ibidem, p. 925 and literature quoted therein.

[12] See e.g. judgement of the Supreme Court, 11.12.1952, C 2556/52, PiP 1953/7/128; judgement of the Supreme Court, 7.12.2006, I PK 123/06, OSNP 2008/1-2/14; judgement of the Supreme Court, 7.09.2000, I PKN 11/00, OSNP 2002/6/139; judgement of the Supreme Court, 11.04.1984, I PR 34/84, LEX No 13554; judgement of the Supreme Court, 16.11.2006, II PK 76/06, OSNP 2007/21-22/312; judgement of the Supreme Court 25.11.2014, I PK 98/14, OSNP 2016/6/67.

[13] M. Bosak-Sojka, W. Wilczak: *Konsekwencje przekroczenia granic dozwolonej krytyki pracodawcy w ujęciu prawa karnego materialnego*. "MOPR" 2019, issue 2, p. 9 and literature quoted therein; see also: judgement of the District Court in Świdnica, 7.04.2017, I C 2237/16, LEX No 2344118.

[14] See: P. Sanchez Abril, A. Levin, A. Del Riego: *Blurred Boundaries...*, p. 69.

[15] M. Brodecki: *Granice krytyki pracodawcy przez pracownika...*, p. 448.

of the purpose for which it is undertaken, as well as the customs of the environment and the personal characteristics of the individuals[16].

In addition, depending on the perspective adopted – employment law, civil law or criminal law – these criteria may differ[17]. In the context of labour law, the assessment of the admissibility of criticism should be carried out first and foremost in relation to the fundamental duties of employees, such as taking care of the interests of the workplace (pol. *dbałość o dobro zakładu pracy* – Art. 100 § 2 sec. 4 of the Labour Code[18]), as well as compliance with the principles of social coexistence[19], the breach of which may lead to potential consequences, such as notice of termination of the employment contract or disciplinary dismissal, as well as organisational liability and material liability of the employee[20]. With regard to civil law, the admissibility of criticism should, in turn, be assessed mainly through the prism of a possible infringement of the employer's moral rights (Articles 23–24 of the Civil Code[21]), especially its reputation. In the area of criminal law, on the other hand, it would be appropriate to refer to the prerequisites of the offence of defamation (Article 212 of the Penal Code[22]) and insult (Article 216 of the Penal Code).

As can be seen from the above, it is difficult to establish a definite catalogue of criteria that would determine the admissibility of criticism of the employer in each case. Yet, such attempts are made, and not without success. The jurisprudence accepts that the following should be taken into account: the content, the form of the statement, the cir-

[16] Judgement of the District Court in Poznań, 28.08.2017, XVIII C 530/17, LEX No 2413720.

[17] Boundaries of acceptable criticism may be different for e.g. defamation, infringement of moral rights, etc. See more: M. Brodecki: *Granice krytyki pracodawcy przez pracownika...,* pp. 442–448; S. W. Ciupa: *Niedozwolona krytyka pracodawcy ze strony pracownika...*

[18] Labour Code, 26.06.1974, consolidated text: Journal of Laws 2023, item: 1465.

[19] See: judgement of the Supreme Court, 28.08.2013, I PK 48/13, LEX No 1448689.

[20] However, the assessment of the employee's liability should take into account the principles of protection of moral rights and criminal liability – M. Bosak: *Zjawisko krytyki w stosunkach pracy...,* p. 35. Also, the Supreme Court instructs that the criminal law perspective be taken into account – see: judgement of the Supreme Court, 28.08.2013, I PK 48/13, LEX No 1448689.

[21] Civil Code, 23.04.1964, Journal of Laws 2023, item 1610 as amended.

[22] Penal Code, 6.06.1997, Journal of Laws 2024, item 17.

cumstances of its articulation, as well as the motives of the critic[23]. The Supreme Court emphasises that the basic feature of permissible criticism is the employee's good faith, i.e. "her subjective conviction that she is basing the criticism on facts that are truthful (while exercising due diligence in verifying them) and is acting in the justified interest of the employer"[24]. The jurisprudence also points out that these boundaries are determined by i.a. the social purpose of the criticism[25], and the public interest in which it is undertaken[26]. Criticism must also be proportionate to the scale of the negative phenomenon it targets[27] and shall not disorganise the work[28]. The Supreme Court further states that criticism must respect the moral rights of the employer or of persons acting on its behalf and must not lead to a breach of the employee's duties, i.e. to take care of the interests of the workplace and to keep secret the information whose disclosure could expose the employer to damage[29]. Permitted criticism must not be "dictated by personal considerations" and take the form of "offensive personal assault"[30]. What is noteworthy is that, in the opinion of the Supreme Court, acceptable and constructive criticism expressed by an employee not only does not violate the duty of care for the interests of the workplace, but actually demonstrates such care on the part of the employee[31].

It is not only in jurisprudence that attempts are made to define the limits of the employee's right to criticism. S. W. Ciupa, also taking into account the court jurisprudence, has undertaken to determine a cata-

[23] Judgement of the Supreme Court, 3.08.2016, I PK 227/15, LEX No 2135803.

[24] See: judgement of the Supreme Court, 28.08.2013, I PK 48/13, LEX No 1448689.

[25] Judgement of the Court of Appeal in Białystok, 30.01.2019, I ACa 647/18, LEX No 2635142; judgement of the District Court in Poznań, 28.08.2017, XVIII C 530/17, LEX No 2413720.

[26] Judgement of the Supreme Court, 11.12.1952, C 2556/52, PiP 1953/7/128.

[27] Judgement of the District Court in Poznań, 28.08.2017, XVIII C 530/17, LEX No 2413720; with regard to journalistic criticism: judgement of the Supreme Court, 15.01.2014, V KK 178/13, OSNKW 2014/8/62.

[28] Judgement of the Supreme Court, 28.07.1976, I PRN 54/76, LEX No 14319.

[29] Judgement of the Supreme Court, 28.08.2013, I PK 48/13, LEX No 1448689; judgement of the Supreme Court, 3.08.2016, I PK 227/15, LEX No 2135803; judgement of the Supreme Court, 18.07.2012, I PK 44/12, LEX No 1226441; see also: judgement of the Supreme Court, 28.03.2017, II PK 18/16, LEX No 2281254; judgement of the Supreme Court, 16.11.2006, II PK 76/06, OSNP 2007/21-22/312.

[30] Judgement of the Supreme Court, 11.12.1952, C 2556/52, PiP 1953/7/128.

[31] Judgement of the Supreme Court, 7.12.2006, I PK 123/06, OSNP 2008/1-2/14.

logue of basic criteria of acceptable criticism. According to this author, such criticism should be characterised by legitimacy (understood as an objectively existing more general or individual interest deserving legal protection), substantiality (factuality and reference to relevant facts), fairness (based on verified facts), relevance to specific circumstances (not aimed only at judging, but enabling its addressee to draw conclusions for the future), and appropriate form (cultural and in line with the principles of social coexistence)[32]. M. Brodecki refers to analogous criteria, additionally developing the connection between the criticism and the breach of the duty of care for the interests of the workplace – this scholar emphasises that the criticism expressed by the employee may result, for example, in a loss of trust in the employer by its contractors, loss of reputation, negative perception in public opinion, which may consequently result in financial losses[33]. Based on the above criteria and court case law, the literature discusses examples of exceeding the limits of acceptable criticism[34].

It is worth noting that the doctrine postulates the valuation of particular groups of premises for acceptable criticism. According to M. Brodecki, when assessing the admissibility of criticism of an employer, priority should be given to substantive premises, i.e. those relating to the criteria of legitimacy, substantiality and fairness. Secondly, what matters is the content and form of such criticism[35].

3. Characteristics of criticism posted on the internet

Nowadays, almost every person – and therefore every employee – has the possibility to post their statements and opinions online. As pointed out in the literature, the advent of social media has resulted in blurring the line between people's behaviour as employees and citizens[36]. ECtHR indicated that "user-generated expressive activity on the Internet provides an unprecedented platform for the exercise

[32] S. W. Ciupa: *Niedozwolona krytyka pracodawcy ze strony pracownika...*, p. 925.

[33] M. Brodecki: *Granice krytyki pracodawcy przez pracownika...*, pp. 435–438.

[34] See e.g. ibidem, pp. 441–442; S.W. Ciupa: *Niedozwolona krytyka pracodawcy ze strony pracownika...*

[35] M. Brodecki: *Granice krytyki pracodawcy przez pracownika...*, p. 441.

[36] S. Hook, S. Noakes: *Employer Control of Employee Behaviour...*, p. 141.

of freedom of expression"[37]. The employee can choose from a variety of platforms, such as websites, forums, blogs, etc., of which social media seem to be the most accessible. Within this last category, we can also note a great diversity: the employee may therefore use sites such as LinkedIn, Facebook, Twitter, as well as TikTok or Youtube. Each of these social media has its own characteristics. In order to analyse the application of the general criteria of acceptable criticism of the employer to statements made in online space, it is first necessary to try to characterise the latter and to point out the differences with criticism made in other forums, such as in a conversation with colleagues.

Despite the aforementioned diversity within online space, there is a consensus that the feature that distinguishes the internet is its public nature. This view has been shared by the Supreme Court, which, on the basis of a misdemeanour case, indicated that "the internet, although a virtual space, has the character of a public place"[38]. The judicature acknowledges that this space "remains accessible to its general public, without any restriction, as long as access to the posted content is not password-protected"[39]. The Internet – unsurprisingly – is also qualified by the courts as a means of mass communication[40].

The public nature of the internet and its widespread accessibility has important consequences with regard to the reach of statements published there, including critical opinions expressed by an employee about her employer. Unlike other types of expression, in the case of messages sent over the internet, there is limited or no control by the author over who reads them, as well as their dissemination[41]. Even if it was addressed to a limited audience, the message can be forwarded, reposted[42] or shared; it is also possible to take a print screen; data leakage cannot be excluded either. Messages published on the internet can

[37] Judgement of the European Court of Human Rights, Cengiz v Turkey, 12.12.2015, 48226/10 and 14027/11.

[38] Decision of the Supreme Court, 17.04.2018, IV KK 296/17, OSP 2019/2/15.

[39] Decision of the Court of Appeal in Szczecin, 17.09.2020, II AKz 524/20, OSASz 2020/3/15-21.

[40] E.g. judgement of the Supreme Court, 9.05.2013, IV KK 403/12, LEX No 1312369.

[41] See: P. M. Wragg: *Free Speech Rights at Work: Resolving the Differences Between Practice and Liberal Principle*. "Industrial Law Journal" 2015, vol. 44(1), P. 3; J. H. Rowbottom: *To Rant, Vent and Converse: Protecting Low Level Digital Speech*. "Cambridge Law Journal" 2012, vol. 71(2), p. 10.

[42] J. H. Rowbottom: *To Rant, Vent and Converse...*, pp. 9–10.

therefore reach a much wider range of people than intended by the author of such a statement[43].

The implication is that virtual statements are said to leave a "permanent record"[44] or are referred to as "more persistent" because they are saved in an online space – thus, they are searchable by a very wide range of web users long after they have been published[45]. However, that is not all. In the case of social media, it is not uncommon for an employee to be – *via* their profile and the content they post there – linked to their workplace[46].

Social and cultural conditions are not insignificant – social media favour the publication of "frequent, impetuous and sometimes brutal observations", which are considered "normal"[47], as well as e.g. rapid spread of gossip, bullying and hate speech[48]. Everyone, including employees, can speak out in the public domain "with great speed and ease"[49], which is certainly not conducive to thoughtful and balanced comments[50]. As acknowledged in the case law, statements published on the internet are generally anonymous and written "in the heat of the moment"; they are therefore characterised by harsher language and are often exaggerated[51]. Usually, Internet contributions are also not subject to verification, e.g. by a moderator[52]. The mass character of the opinions posted in the virtual space means that they are also characterised by a much higher degree of social harm[53].

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[43] Ibid., p. 9.

[44] V. Mantouvalou: *'I Lost my Job Over a Facebook Post – Was that Fair?'. Discipline and Dismissal for Social Media Activity*. "International Journal of Comparative Labour Law and Industrial Relations" 2019, p. 4.

[45] J. H. Rowbottom: *To Rant, Vent and Converse...,* p. 9.

[46] V. Mantouvalou: *'I Lost my Job Over a Facebook Post - Was that Fair?'...,* p 4.

[47] P. M. Wragg: *Free Speech Rights at Work...,* p. 3.

[48] J. H. Rowbottom: *To Rant, Vent and Converse...,* p. 1.

[49] V. Mantouvalou: *'I Lost my Job Over a Facebook Post - Was that Fair?'...,* p. 4.

[50] See: ibidem, p. 12; see also: judgement of the Court of Appeal in Poznań, 23.11.2017, III APa 23/17, LEX No 2447646; E. Suknarowska-Drzewiecka: *Wypowiedzenie z powodu niekorzystnych wypowiedzi...,* p. 362.

[51] Judgement of the Court of Appeal in Poznań, 23.11.2017, III APa 23/17, LEX No 2447646.

[52] M. Bosak-Sojka, W. Wilczak: *Konsekwencje przekroczenia granic dozwolonej krytyki pracodawcy...,* p. 11.

[53] In relation to the offense of defamation (Article 212 § 2 of the Penal Code) – ibidem, p. 11.

With reference to the above-mentioned three levels of criticism, it follows from the above considerations that, given the characteristics of statements made on the internet, the phenomenon of criticism of an employer by an employee in an online space stands out primarily at the level of the form[54]. This form – characterised by a public nature, a wide, not entirely controlled audience and permanence – can be reflected in the "potential impact on business reputation" of the employer[55]. As the Supreme Court accepts in its jurisprudence, "an employee may openly and critically express himself on labour matters", but "he should do so in an appropriate form, since even legitimate criticism of the relations existing in the workplace must be within the limits of the legal order"[56]. It seems that this potential damage to an employer's reputation resulting from the very broad reach of online content is the reason why criticism made in virtual space should be treated differently from other forms of such criticism.

4. How to set boundaries of admitted criticism in an online environment?

The labour law literature lacks a uniform approach to the issue of acceptable criticism of an employer published on the internet. For example, M. Bosak considers that posting negative remarks about an employer in a publicly accessible online space is an example of an inappropriate form of criticism[57]. This author argues that "even criticism that is permitted, but expressed in inappropriate form or addressed to a random audience, can result in real harm not only or not necessarily on the part of the employer, but also extend to other colleagues and their potential customers"[58]. In support of her position, the author

[54] D. Mangan: *Online Speech and the Workplace: Public Right, Private Regulation*. "Comparative Labor Law and Policy Journal" 2018, vol. 39(2), p. 2, cf. M. Bosak: *Zjawisko krytyki w stosunkach pracy...,* p. 34.

[55] See: D. Mangan: *Online Speech and the Workplace...,* p. 2.

[56] Judgement of the Supreme Court, 28.08.2013, I PK 48/13, LEX No 1448689; judgement of the Supreme Court, 7.09.2000, I PKN 11/00, OSNP 2002/6/139; judgement of the Supreme Court, 28.07.1976, I PRN 54/76, LEX No 14319.

[57] M. Bosak: *Zjawisko krytyki w stosunkach pracy...,* p. 34; M. Bosak, D. Habrat: *Granice dozwolonej krytyki w stosunkach pracy*. In *40 lat Kodeksu pracy*. Eds. Z. Góral, M. A. Mielczarek. Warsaw 2015, p. 337.

[58] M. Bosak: *Zjawisko krytyki w stosunkach pracy...,* p. 34.

cites two main arguments. Firstly, in the case of negative opinions about an employer published online (especially on websites dedicated to discussions about employers), there is a serious risk of exceeding the limits of acceptable criticism. Secondly, the recipients of such statements are also people who are not connected to the employer in question[59]. Furthermore, Bosak remarks that critical opinions posted on the internet are always "dictated by the subjective considerations of the employee, and their form is offensive and in the shape of a personal attack"[60]. However, this author emphasises that the internet can be a tool for both mass and interpersonal communication, with, in principle, the user deciding[61]. She acknowledges that not every position expressed in a virtual space will be in breach of the law, as it is necessary to demarcate statements that do not lead to a breach of the employee's duties of care for the interests of the workplace, maintaining the confidentiality of certain information and respecting the rules of social coexistence[62].

Other authors take the view that, as long as the statement posted by an employee is fact-based, fair, substantive and cultural (thus – roughly speaking – meets the general requirements of acceptable criticism), such an employee should not face negative consequences, as this would violate her constitutional right to express opinions[63]. It would seem that in principle the latter view should be favoured. The proposed approach is in line with the already cited opinion that substantive premises, such as fairness, substantiality, etc., are of primary importance when assessing a possible exceeding of the limits of acceptable criticism. It is only then that the form in which the criticism was expressed should be taken into account[64]. Following this line of reasoning, with regard to online criticism, it would therefore be necessary to first of all pay attention to whether the critical statement is characterised by the general features of acceptable criticism and only

[59] Ibidem, pp. 34–35.

[60] Ibidem, p. 35.

[61] Ibidem.

[62] M. Bosak-Sojka: *Granice dopuszczalnej krytyki pracodawcy.* "Annales Universitatis Mariae Curie-Skłodowska. Sectio G (Ius)" 2018, vol. LXV, no. 2, p. 66 and literature quoted therein.

[63] M. Brodecki: *Granice krytyki pracodawcy przez pracownika...,* p. 436.

[64] Ibidem, p. 441.

finally to assess whether the fact that it has been posted online is relevant in the case in question (taking into account the already mentioned public character and the permanence of such publications).

How do the courts approach criticism formulated by an employee in public, not necessarily in an online space? The Supreme Court points out that "an employee has the right to authorised public criticism of his/her superior (...) whistleblowing (...) when this does not lead to a breach of her employment duties consisting, in particular, in taking care of the interest of the workplace and maintaining the confidentiality of information the disclosure of which could expose the employer to damage (...), as well as in observing the company rules of social coexistence"[65]. The Supreme Court did not consider giving a press interview critical of a member of the employer's board of directors as serious violation of employee's basic duties, as long as she kept to the correct form of expression and there was no "considerable ill-will" on her part and no "conscious action endangering the employer's interests or exposing her to damage"[66]. In another case, the court held that the mere fact of speaking in the media (here: giving an interview to a TV journalist) does not necessarily imply disloyalty to the employer[67]. On the other hand, making public allegations that are partly unconfirmed later on may constitute exceeding the limits of acceptable criticism and justify termination of the employment contract due to the loss of trust (although not necessarily disciplinary dismissal)[68].

Particularly noteworthy is the case settled by the District Court in Poznań[69], as it concerned criticism against an employer posted on GoWork.pl, i.e. a website dedicated to the exchange of opinions about employers. The judgment may therefore provide an indication of how the jurisprudence approaches opinions posted on this type of site by former or current employees. The defendant posted an opinion about the company – his former employer and one of its board members –

[65] Judgement of the Supreme Court, 28.08.2013, I PK 48/13, LEX No 1448689; see also: judgement of the Supreme Court, 25.11.2014, I PK 98/14, OSNP 2016/6/67.

[66] Judgement of the Supreme Court, 16.11.2006, II PK 76/06, OSNP 2007/21-22/312.

[67] Judgement of the Supreme Court, 3.08.2016, I PK 227/15, LEX No 2135803.

[68] See: judgement of the Supreme Court, 16.11.2006, II PK 76/06, OSNP 2007/21-22/312.

[69] Judgement of the District Court in Poznań, 28.08.2017, XVIII C 530/17, LEX No 2413720.

on the said website. The plaintiffs argued that the information in the comment damaged the company's good name (reputation), causing it to lose its good image as an employer and negatively affecting the perception of the company as a local business. The defendant argued that the entry did not infringe the plaintiffs' moral rights, as it was only the defendant's opinion, posted in the intended place and constituting so-called permitted criticism and evaluation of the work provided to the plaintiffs. The court found that the entry in question did not violate the company's good name and its good image as an employer. When assessing such an infringement, the average opinions of reasonable people in the environment to which the entity seeking protection belongs are decisive – the crucial factor is therefore the reaction a critical statement evokes in society, how it is received by third parties, and not the subjective feeling of the person seeking legal protection. The court emphasised that the former employee had expressed his subjective opinion about the working conditions and the employer. The company had not shown that the former employee's critical opinion had negatively affected the perception of the company as a business. It also failed to show that it was specifically the defendant's opinion that may have negatively affected the recruitment process, as there were also many other unflattering opinions about the company on GoWork.pl. It is also important to note that the court found that the critical statement in question had been posted on an internet portal designed to exchange opinions about employers – and therefore in the right place. Referring to the criteria of acceptable criticism, the court found that the indicated opinion did not exceed its limits.

It seems that posting critical opinions about an employer on the internet does not automatically result in exceeding the limits of admissible criticism, but additional criteria should be applied when assessing their acceptability, as, due to the public nature and the limited control over the audience, the risk of violations has to be assessed as higher than when the criticism is addressed only to one or a few strictly defined persons. In this context, it should be stressed that all the above-discussed general criteria of acceptable criticism of the employer are valid also with regard to virtual criticism, but in this case it would be advisable to include additional criteria – more specific and relating to the peculiarities of online publications, i.e. strictly to the aspect

of public nature. Such criteria seem advisable in order to assess the severity of the "public" aspect, since it is mainly this that distinguishes online negative opinions from other types of criticism.

When assessing the admissibility of online criticism, foreign literature, referring to case law, proposes to take into account the following factors: whether the employer is identifiable in the statement in question, whether the statement concerns personal matters and has only an indirect connection to the workplace, and whether the comments relate directly to the employer or refer to the terms and conditions of employment[70]. It seems that especially the latter criterion may be relevant (although in practice the two situations may often be difficult to distinguish), notably when it comes to a possible assessment of whether the employer's reputation has been damaged. This is – among others – because it is accepted in the case law that an employee has the right to speak openly and critically about issues concerning the organisation of work[71].

It appears that in addition to the factors mentioned above, one could also take into account, for example, the type of medium (website) on which the employee's critical opinion was posted. For example, whether these are forums intended for the exchange of opinions about employers (in the kind of GoWork.pl); or whether the employee publishes negative comments on a professional account on a platform such as LinkedIn, which has a specific, professional nature and purpose (maintaining a professional network); or whether the employee expresses unflattering opinions on a private profile on Facebook. The situation is even slightly different when it comes to statements posted on the company intranet[72]. The importance of the criterion of the place of publication can be indirectly deduced from the already cited ruling on the opinion posted on GoWork.pl, in which the court emphasised that the criticism was posted in the place intended for this purpose.

[70] S. Hook, S. Noakes: *Employer Control of Employee Behaviour Through Social Media...*, p. 146.

[71] Judgement of the Supreme Court, 7.09.2000, I PKN 11/00, OSNP 2002/6/139.

[72] See also a judgement concerning this type of statements: judgement of the District Court in Poznań, 1.06.2017, VIII P 44/15 and the judgement of the second instance in this case: judgement of the Court of Appeal in Poznań, 23.11.2017, III APa 23/17, LEX No 2447646.

Another criterion could be the reach of the opinion in question, which is reflected in the user's privacy settings, i.e. the visibility of the activity (including posts and comments published by the user). For example, in foreign case law, a distinction can be noted between "ordinary" blogs and comments posted on Facebook, as in the case of the latter, the author of the comment can limit its audience (although such settings cannot justify all comments)[73]. On the other hand, social media often give users little control over who their content goes to, e.g. by often revising privacy settings complicated rules[74]. This fact, together with the often complicated system of these settings, can make users, when publishing certain content and information, not fully aware of whether it is private or public and to whom it is actually visible[75]. The possible fact of securing the content with a login and password may also play an important role, making it not entirely public (as the Supreme Court points out, when access is thus restricted by the owner of a website, "such a place loses its public status, as it remains accessible only to a limited number of users"[76]). The size of the audience of the statement in question therefore plays an important role, as also confirmed by ECtHR case law[77].

Context has an important place in assessing the harm caused by an opinion. This includes such factors as the length of time the statement has been online, whether the author intended it to be widely distributed, the level of preparation, and "how seriously it was likely to be taken"[78]. It should be stressed that the courts note the peculiarities of internet postings, which are often made "in the heat of the moment" and without further reflection, but in doing so they emphasise that, even taking these factors into account, internet entries must not exceed certain permitted and accepted norms[79]. The jurisprudence accepts that permissible criticism cannot be based merely "on the expression of an emotional attitude towards a certain subject and in such a way

[73] See: D. Mangan: *Online Speech and the Workplace...,* p. 16.

[74] V. Mantouvalou: *'I Lost my Job Over a Facebook Post - Was that Fair?'...,* p. 5.

[75] See: ibid., p. 5.

[76] Cf. decision of the Supreme Court, 17.04.2018, IV KK 296/17, OSP 2019/2/15.

[77] See also in relation to high-level and low-level communication: J. H. Rowbottom: *To Rant, Vent and Converse...* pp. 13–15.

[78] In relation to low-level speech: ibidem, p. 18.

[79] Judgement of the Court of Appeal in Poznań, 23.11.2017, III APa 23/17, LEX No 2447646.

that it violates moral rights"[80]. The assessment of such speech may also be affected by "opportunities to prepare the content", including the eventual possibility of withdrawing, reformulating or amending it before it is placed in the public domain[81]. Some authors therefore advocate that communications "made with an expectation of a limited audience, amateur, cheap and spontaneous are reasons for limiting the level of responsibility demanded of the speaker by law"[82].

5. Concluding remarks

As the above reflections show, despite attempts to define the criteria that should determine the admissibility of criticism of an employer posted on the internet, it is difficult to draw up their universal catalogue. These difficulties are already evident in the case of general criteria for acceptable criticism, let alone when the virtual space with its specificities is involved. It should be stressed that, depending on the type of potential liability (civil law, labour law or criminal law), the boundaries of acceptable criticism on the internet may be drawn somewhat differently[83]. In assessing whether unflattering online statements exceed the limits of permitted criticism, it would be necessary – in the light of the circumstances suggested above – to weigh proportionately, on the one hand, the interests of the employer, its reputation and the employee's duty of care for the interests of the workplace, and, on the other hand, the right to free speech, as expressed in the employee's right to criticise the employer online[84]. The aim should be to grant protection to the employer in those cases that require it, without depriving the employee of the right to culturally express her dissatisfaction with her work, including in virtual space.

[80] Judgement of the Court of Appeal in Białystok, 30.01.2019, I ACa 647/18, LEX No 2635142.

[81] J. H. Rowbottom: *To Rant, Vent and Converse...,* p. 15 and jurisprudence of ECtHR quoted therein.

[82] Ibidem, p. 16.

[83] See more about the consequences of unlawful criticism on the internet in labour law, criminal and civil law: M. Brodecki: *Granice krytyki pracodawcy przez pracownika...,* pp. 442–448; E. Suknarowska-Drzewiecka: *Wypowiedzenie z powodu niekorzystnych wypowiedzi...,* pp. 362–363.

[84] On the test of proportionality see more: V. Mantouvalou: *'I Lost my Job Over a Facebook Post - Was that Fair?'...,* p. 19 and P. M. Wragg: *Free Speech Rights at Work...,* pp. 10–14.

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Prawo pracownika do krytyki pracodawcy w internecie: jak wyznaczyć granice prawne?

Streszczenie

Kwestia granic dopuszczalnej krytyki pracodawcy przez pracownika jest rozważana w orzecznictwie i literaturze od dawna. Wraz z powszechnym dostępem do Internetu, w szczególności do mediów społecznościowych, pojawiły się jednak nowe wyzwania w tym obszarze. Artykuł porusza problem dozwolonej krytyki pracodawcy zamieszczanej przez pracowników w Internecie. Autor poszukuje odpowiedzi na pytanie, czy dotychczasowe kryteria wypracowane w doktrynie i orzecznictwie, służące do wyznaczania granic krytyki, są adekwatne również w przypadku wypowiedzi pracownika publikowanych w przestrzeni wirtualnej, która charakteryzuje się publicznym charakterem, brakiem kontroli nad odbiorcami oraz trwałością treści.

Słowa kluczowe: krytyka, pracownik, pracodawca, Internet, media społecznościowe, granice