European Court of Human Rights: *Herbai v. Hungary*

IRIS 2020-1:1/4

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In *Herbai v. Hungary*, the European Court of Human Rights (ECtHR) has held that the dismissal of an employee for publishing articles on a website that could tarnish the reputation of his employer violated the employee's right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The ECtHR found that there was an absence of fair balance between the employee's right to freedom of expression and the employer's right to protect his legitimate business interests, especially as there was no evidence of damage to the business interests of the employer.

The applicant, Mr Csaba Herbai, worked as a human resources management expert at Bank O. since 2006. His tasks included the analysis and calculation of salaries and staffing management. According to the code of ethics of the bank, employees were under an obligation not to publish, formally or informally, any information relating to the functioning and activities of the bank. In 2011, Mr. Herbai, together with Ms. A.N., had started a knowledge-sharing website for human resources management-related publications and events. Shortly after the publication of two articles on the website, one by Ms. A.N. and one by Mr. Herbai himself, the bank terminated Mr. Herbai's employment for breaching his employer's confidentiality standards. The bank argued that Mr. Herbai's conduct in providing educational services in the field of human resources management had infringed its economic interests. Moreover, given the nature of his position, he was in possession of information whose publication interfered with the bank's business interests. Mr. Herbai instituted proceedings before the Budapest Labour Court challenging the termination of his employment contract, but the Labour Court dismissed his action, finding that the website and the content of the articles constituted a breach of the duty of mutual trust and had jeopardised Bank O.'s business interests. The Budapest High Court, however, came to the opposite conclusion: Mr. Herbai's conduct had not jeopardised his employer's business interests and his dismissal for breach of trust had therefore not been lawful. But the Kúria (Supreme Court) subsequently upheld a request for review made by the bank, and it endorsed the findings of the first-instance court, observing that Mr. Herbai's conduct had endangered his employer's business interests and that he had acted in breach of his employer's code of ethics. This finding was confirmed by the Constitutional Court, who found that Mr. Herbai's conduct in managing the website and the content of the articles at issue were not protected by the right to freedom of expression enshrined in Article IX (1) of the Hungarian Fundamental

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Law.

Mr. Herbai lodged an application with the ECtHR in which he complained that the termination of his employment on account of articles published on a website had infringed his right to freedom of expression as protected by Article 10 ECHR. In general terms, the ECtHR reiterates that Article 10 ECHR also applies when the relations between employer and employee are governed, as in the case at hand, by private law, and that the state has a positive obligation to protect the right to freedom of expression even in the sphere of relations between individuals (see also *Fuentes Bobo v. Spain*, Iris 2000/4-1, *Wojtas-Kaleta v. Poland*, Iris 2009/9-1 and *Nenkova-Lalova v. Bulgaria*, Iris 2013/4-1). The ECtHR observes that in order to be fruitful, labour relations must be based on mutual trust. Even if the requirement to act in good faith in the context of an employment contract does not imply an absolute duty of loyalty towards the employer or a duty of discretion to the point of subjecting the worker to the employer's interests, certain manifestations of the right to freedom of expression that may be legitimate in other contexts are not legitimate in that of labour relations. The ECtHR considers the following elements to be relevant when examining the permissible scope of a restriction on the right to freedom of expression in the employment relationship: the nature of the speech in question, the motives of the author, the damage, if any, caused to the employer by the speech, and the severity of the sanction imposed. It observes that the articles at issue dealt with human resources policies providing information and opinion on recent developments in the field, and inviting discussion on business practices and tax issues. The ECtHR explicitly disagrees with the Hungarian Constitutional Court's finding that comments made by an employee do not fall within the scope of protection of the right to freedom of expression on the grounds that they are of a professional nature, without a "public link" which would enable them to clearly characterise as part of a discussion on matters of public interest. Furthermore the ECtHR is of the opinion that Mr. Herbai has not acted in pursuit of purely private interests or aired a personal grievance through his website as his intention was to share knowledge with and among the audience. Although the information shared by Mr. Herbai was closely related to his employment tasks, and even though the ECtHR accepts that, under Hungarian law, employers are entitled to a degree of deference in deciding which conduct could lead to the disruption of working relations even without such disruption being manifest, it observes that neither Mr. Herbai's employer nor the Hungarian courts made any attempt to demonstrate in what way the speech in question could have adversely affected Bank O.'s business interests. Finally the ECtHR also notes that a rather severe sanction was imposed on Mr. Herbai, namely the termination of his employment without any assessment of the availability of a less severe measure.

The ECtHR concludes that the enjoyment of the right to freedom of expression should be secured even in the relations between employer and employee. It finds

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that in the case at hand, which concerns the establishment of a professional website and the publication of articles on that website, there is a lack of meaningful balancing of the interests at issue by the domestic courts. The substantive outcome of the labour dispute was dictated purely by contractual considerations between the applicant and Bank O. and voided the applicant's reliance on freedom of expression of any effect. The ECtHR finds that the Hungarian authorities have not fulfilled their positive obligations under Article 10 ECHR as they have failed to demonstrate convincingly that the rejection of Mr. Herbai's challenge against his dismissal was based on a fair balance between his right to freedom of expression, on the one hand, and his employer's right to protect its legitimate business interests, on the other hand. Therefore the ECtHR unanimously finds that Article 10 ECHR has been violated.

ECtHR Fourth Section, Herbai v. Hungary, Application no. 11608/15, 5 November 2019

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