The limits of online criticism of employers: The power of a “single click”

Do employees have complete freedom of expression? Or, when criticising their employer, should they face consequences, including losing their job? How far can such criticism go until it meets a regrettable response? Our clients often encounter these and similar questions. Based on our many years of practice, we will try to answer them, while pointing out significant legislative initiatives in this area.

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In an era of omnipresent social media, when any opinion can reach hundreds or thousands of people (and remain on the internet forever), the line between permissible and impermissible criticism of an employer is becoming harder and harder to draw. While Polish labour law generally gives employees significant freedom to express their views, including criticising their superiors, not every such statement will go without consequences. On the internet, it is easy to cross the thin line between legitimate opinion and a malicious act that could irreparably harm a company's reputation.

The right to criticise employers—seeking the boundary

Every employee has a right of criticism, including the right to criticise their employer. This is an element of the freedom of expression enshrined in the Polish Constitution and in a number of international conventions. The parties cannot contractually exclude or restrict this freedom. But at the same time, being in an employment relationship entails for the employee a significant obligation to care for the good of the workplace. This duty is interpreted broadly, and includes an obligation to refrain from any actions that harm or could harm the employer, as well as an obligation to take all necessary actions for the good of the workplace. This applies to the employer's property, but also intangibles. These include a duty of loyalty to the employer and a duty to respect the personal interests of the employer and fellow employees. This duty of care for the good of the workplace determines the scope of permissible forms of behaviour by the employee at work, but also—perhaps more controversially—during their free time.

→ Labour Code Art. 100 §2(4)

Undoubtedly, criticism of the employer may reach the level of infringing the duty of care for the good of the workplace and other employment duties. So where is the border between permissible

and impermissible criticism of the employer, particularly online, where critical comments on employers more and more often appear?

Permissible and impermissible criticism —looking for answers in the case law

Although so far the courts have not issued many rulings on the issue of critical comments about employers on the internet, in evaluating such content the rulings on criticism of employers in general can be quite illuminating.

First and foremost, permissible criticism should be based on objective arguments and expressed in an appropriate form. It must also be proportionate under the specific factual circumstances, and the employee should act in good faith, that is, in the belief that the criticism is based on fact (using due diligence to check the facts), and in the legitimate interest of the employer.

Supreme Court of Poland judgment of 9 March 2022, case no. III PSKP 62/21

Even if the allegations do not hold up, but the employee's behaviour cannot be regarded as driven largely by bad faith and a conscious effort to endanger the employer's interests or expose the employer to a loss, the criticism should be found to be permissible.

Supreme Court judgment of 16 November 2006, case no. II PK 76/06

The assessment of how far an employee can go in criticising their employer should be tied in each case of the circumstances of the particular matter—which carries the risk of some unpredictability. For example, the Supreme Court held that it exceeded the bounds of permissible criticism for an employee to belittle the company's CEO for allegedly earning his engineering credentials at night school, finding the statement to be insulting.

Supreme Court judgment of 23 September 2004, case no. I PK 487/03

The Supreme Court took a similar view of groundlessly accusing a member of the employer's board of committing a crime. The Supreme Court also found that it was impermissible to post on the workplace notice board a claim that "the CEO has turned the cooperative into a swamp of lawlessness" and that actions of governing bodies of the cooperative were "planned excesses seeking to destroy the blind community."

Supreme Court judgments of 7 March 1997, case no. I PKN 28/97, and 12 January 2005, case no. I PKN 145/04

However, the Supreme Court found it was permissible, for example, for an employee of a school to send a letter to the school

Supreme Court judgment of 1 October 1997, case no. I PKN 237/97

board and county officials reporting irregularities allegedly committed by the director of the school. The court reasoned that even though the allegations proved to be ungrounded, the employee did not exceed the bounds of permissible criticism of the employer, because the criticism was not spread among unauthorised persons but was directed (narrowly) to the authorities who would be competent to consider any allegations against the director of the school.

Supreme Court judgment of 14 July 2004, case no. IV CK 588/03

The European Court of Human Rights took a similar tack in evaluating the situation of an employee who sent an email from his work account to the HR department containing a critical evaluation of his superior and the company's employment politics. The ECtHR held that the employee had not crossed the boundary of permissible criticism of his employer. Like the Supreme Court of Poland, the ECtHR took into consideration that the email was sent to a narrow group of staff of the HR department, and not to all employees or people outside the company.

Dede v. Türkiye (application no. 48340/20)

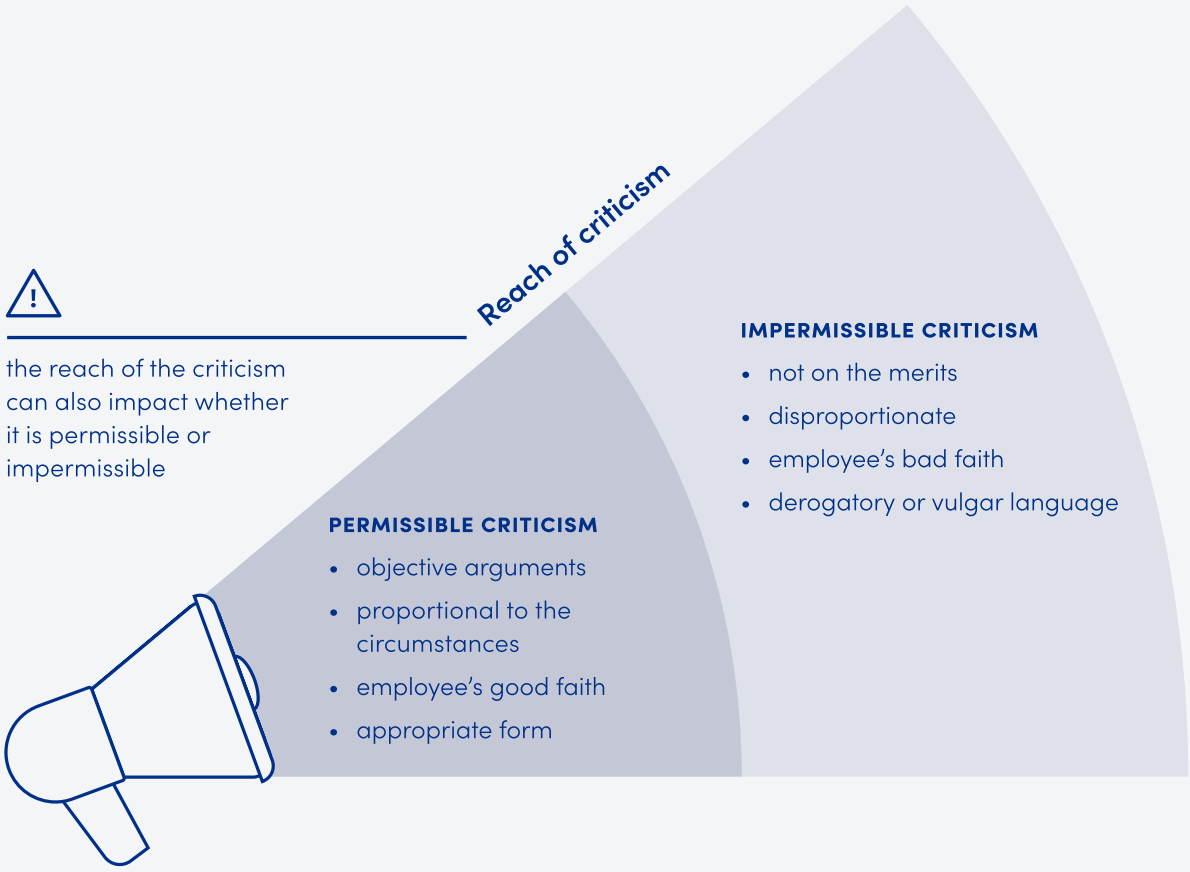
Online criticism—a click too far?

Thus, to assess criticism of the employer, the reach of the criticism is also relevant. In the case of online posts, this criterion is key for determining whether the boundary of permissible criticism has been crossed. As the courts have held, if the criticism occurs in a public forum, particularly severe criteria should be applied. The internet is undoubtedly a public forum. Critical and sometimes vulgar statements about companies by former or current employees regularly appear on social media or discussion forums. These posts don't always align with reality, but they instantly reach a large audience, including job candidates and the company's current and potential customers and suppliers.

Supreme Court judgment of 10 May 2018, case no. II PK 74/17

At the same time, instances of online criticism of employers have been analysed by the courts surprisingly mildly. In one case, an employee had posted a comment on the employment portal GoWork.pl about her employer: "I don't recommend them. Warning. Total lack of respect for the employee. They think they can buy anyone." The court found that the criticism was permissible, and a single post, which the court found to be "toned down (by internet standards)" could not cause any real damage to the employer.

Poznań Regional Court judgment of 3 November 2020, case no. VII Pa 118/20



The Supreme Court considered a case involving a museum employee who, in a television interview, called the director of the museum "a cultural illiterate," and then wrote on an online forum that the director had "fired a pregnant woman and a woman undergoing cancer treatment." Significantly, the employee was also a member of the local council. With this in view, the court ruled that the employee's subjective views were expressed "for the good of society in the broader sense," and that the employee had acted in the capacity of a council member.

Supreme Court judgment of 28 August 2013, case no. I PK 48/13

Moreover, criticism of employers more and more often uses images, memes, and increasingly realistic "deep fakes." The Polish courts have yet to rule on a case in this context, but given visual media's dominance of contemporary culture it is no doubt just a question of time. Such cases have already arisen in other countries. An example is a colourful case heard by an Australian court involving the dismissal of an employee who had posted on a private Facebook group a video with scenes from *Downfall* (a film about the last days of Adolf Hitler) to which the employee had

added hilarious subtitles alluding to the salary negotiations at his company. Although the Fair Work Commission initially upheld the dismissal, on appeal the commission found that the dismissal was improper. Recognising that the *Downfall* clip had developed into "a meme," the commission pointed out: "Anyone with knowledge of the meme could not seriously consider that the use of the clip was to make some point involving Hitler or Nazis." The employee was reinstated, and the reinstatement was upheld by the Federal Court of Australia.

Tracey v BP Refinery (Kwinana) Pty Ltd, [2020] FWCFB 820
tinyurl.com/f84vhzv5

BP Refinery (Kwinana) Pty Ltd v Tracey, [2020] FCAFC 89
tinyurl.com/2pctenpa

What steps can employers take?

In practice, crossing the line in criticising the employer may lead to a disciplinary interview with the employee, a reprimand, and ultimately, termination of employment (with or without notice). However, according to the Supreme Court of Poland, even if the employee has violated their employment duties, it must be considered whether termination is proportional to the infringement. Every case of online criticism of the employer should be assessed separately, in light of the specific circumstances, including the reach of the post and its consequences, and the position held by the employee. In extreme instances, crossing the line may even warrant disciplinary dismissal.

Impermissible criticism may also expose the employee to liability for infringing the personal interests of the employer or its representative (e.g. their reputation). If the online post is untrue, the employer can request the site administrator to take it down. Additionally, with a view to potential litigation, it may be worthwhile to make a notarial record of the offending post.

In practice, it can be hard to hold people to account, because most critical comments concerning employers are posted online anonymously. And under the Polish civil procedure rules, a case cannot be pursued if the plaintiff cannot provide the full details identifying the defendant. A proposal to address this problem is a bill on "blind" statements of claim, filed by members of parliament from the Poland 2050 party. It would introduce a separate procedure for pursuing claims for protection of personal interests against unidentified persons. Under this proposal, the duty to identify

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tinyurl.com/msw7vz4e

the infringer would be shifted to the court, and the plaintiff (e.g. a company about which a former employee has made disparaging statements on the internet) would include in its statement of claim an application to require the service provider through which the infringement occurred (e.g. the owner of a social media platform) to disclose the infringer's details. The bill had a first reading in parliament and was then passed on for further work in committee.

Parliamentarians from the Polish People's Party (PSL) have submitted an even broader proposal to address this area. Apart from the "blind" statement of claim, the bill also includes provisions enabling rapid response to illegal online content where the details of the infringer are known. It would also introduce proceedings against service providers who fail to take down unlawful content. Thus the bill would add to the Civil Procedure Code three separate new types of proceedings for online infringements:

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tinyurl.com/3a72ebsu

- Against identified persons
- Against unidentified persons
- Against providers of indirect services.

The last of these, perhaps the most interesting, would allow claims to be pursued against a service provider for not taking down content infringing the plaintiff's personal interests. The PSL bill had a first reading in parliament and was then passed on for further work in committee.

In practice, currently the details of persons infringing personal interests are often obtained in investigative proceedings following notice of suspected defamation. This is because an employee can face criminal liability for impermissible criticism of the employer rising to the level of criminal libel. In certain instances, impermissible criticism may also constitute an act of unfair competition, which carries the risk of civil and criminal sanctions under the Unfair Competition Act.

Significantly, the employer does not have a right to continually or preventively monitor its employees' online activity, including on social media. However, the employer can react if it learns from certain sources of statements by an employee that could violate the employee's duty of care for the good of the workplace, e.g. crossing the boundary of permissible criticism of the employer. In such situations, employers are entitled to take certain steps, although they

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must make sure that the measures do not fall afoul of the General Data Protection Regulation.

But employers need not wait until they face the first overly critical post about the company. Instead, they can consider rules governing their employees' online activity. To this end, they can include relevant provisions in the workplace policies, or adopt a separate policy for employees' use of the internet, including social media. It is also worthwhile to conduct periodic training in this area, including refresher courses, and to conduct a regular review of the agenda for such training to keep up with the growth of new forms of communication, and thus new opportunities for creative criticism.

Importantly, the wording of provisions concerning employees' online activity must be carefully weighed to reflect the interests of both the employer and the employees, particularly the right to privacy.

Summary

Today the internet is the basic platform for seeking out and sharing information, and virtual image is an inseparable element of doing business. The uninterrupted stream of information in real time shapes users' views, including their opinion of employers. Ensuring mutual respect within the digital environment requires introduction of clear policies and regular training on the limits of criticism of employers. Only such measures can minimise the risk of conflicts in this area—and may also cause an employee to think twice before clicking "publish."