

# An employee's professional online presence beyond the workplace

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### ***Can an employee be an expert in her work, beyond her employment?***

Employees engaged in knowledge or service industries have taken the initiative to also market themselves as leaders in their industries using online sources. Platforms such as LinkedIn may be used. Alternatively, a website that offers industry-specific information may be created by the employee. The issue for the Fourth Section of the European Court of Human Rights (ECtHR) in *Herbai v Hungary* (Application no. 11608/15), 5 November 2019, was whether Herbai's operation of such a website conflicted with his role for his bank employer. This website contained a profile of Herbai (with his photograph) in which he was identified as a human resources management expert working in the HR department of a large domestic bank (the employing bank was not identified).

### **Factual Background and Domestic Court Decisions**

From 2006, Herbai held a position at a Hungarian bank where his tasks included analysis and calculation of salaries and staffing management. Since 2011, he (with a colleague in the industry) also operated a website sharing knowledge, publications and events about human resources. In January 2011, the website published two articles. One was written by Herbai's colleague entitled "New year, new strategy - Really new? Really a strategy?". Herbai wrote the second article, "Sweet 16%". Herbai's employment was terminated on 11 February 2011 for breaching the employer's confidentiality standards. The bank contended that Herbai's running of this website (with the two noted articles as examples) infringed upon the bank's economic interests. The applicant had mixed results through the Budapest Labour Court (where he lost), to the High Court (where he won) and finally with the Kúria (where the Labour Court decision was reinstated). The Kúria ruled that the similarities between Herbai's work tasks and the information provided on the website constituted a breach of the employer's code of ethics because Herbai had intended to share knowledge acquired in his work capacity through this website.

### **A typical problem**

Herbai pursued the matter to the ECtHR as a constitutional complaint based upon his right to freedom of expression. The applicable Hungarian law was typically (for this legal issue) challenging. Act no. XXII of the Labour Code, Article 3(5), stated: "In the employment relationship, employees shall not engage in any conduct which would jeopardise the legitimate economic interests of the employer, unless so authorised by a legal regulation...". Conversely, Article IX of the Fundamental Law stated:

“1. Everyone shall have the right to freedom of speech...”. And so, an employee retains the right to free speech; seemingly so long as it does not “jeopardise the legitimate economic interests of the employer”.

### **What is the speech in question?**

The Fourth Section of the ECtHR ruled in *Herbai*’s favour. In particular, the Court criticised the domestic courts’ failure to balance *Herbai*’s right to freedom of expression against the bank’s right to protect its legitimate business interests. In so doing, the Court clarified a wider scope for the freedom: “workplace-related free speech does not only protect comments that demonstrably contribute to a debate on a public matter” [43]. Rather, the right included discussion on matters of interest to a professional audience.

### **Breadth of speech protected**

The Court’s ruling contains a laudable approach to speech protection insofar as it encourages a wider understanding (than just political speech) of what constitutes protected categories of speech. However, the decision does not sufficiently engage with the bank’s argument about the safeguarding of its economic interests. Questions here include:

- whether or not the knowledge being shared in a professional capacity has been gained exclusively through an employee’s work tasks; and
- whether sharing such information constitutes an inadvertent disclosure of the employer’s strategic approach to an issue.

It cannot be argued that an employee gains all of her knowledge at the workplace; for many service-industry positions require some formal education and/or training. Still, there is continued learning in many contemporary work positions.

### **Mutuality of interests**

And yet, there is a mutuality to these situations that was also not addressed. An employee creating an industry-specific information website, where views are exchanged, is also marketing herself as a person of note in that field. In the employee’s attempt to develop a leadership profile, the employer also gains as an entity, as a leader itself or one that employs such people. The issue, then, is not one of clear advantage being taken by one side over the other.

### **The Influence of Information Technology on the Workplace**

In another post on this site, social media influencers were discussed in the work context. (Research on social media influencers in labour law is part of a forthcoming publication in 2020.) The post suggested that information technology had become embedded in the day-to-day of work to such an extent that the topic of social media influencers may be viewed as one of degree.

With *Herbai*, we see that there is a confluence of labour and branding (the latter with a commercial element). An employee may establish an online profile in order to advance her career (a path that may or may not include the current employer). Lingering considerations include: to what degree may employers limit employees’ free speech when these employees are discussing topics (on open access platforms) within their work expertise.