CENTRE DE DROIT
BANCAIRE ET FINANCIER

Breach of confidentiality

The bank has (partially) proven the damage caused

Par Célian Hirsch le 29 June 2025

A CEO who discloses confidential information to a journalist must compensate his employer for the damage caused, *in this case* the costs incurred by the communications agency. The fact that other press articles had been published previously does not negate the existence of a causal link (4A_159/2024).

A company belonging to a Portuguese banking and financial group dismissed its CEO. It drew his attention to his obligation to maintain professional secrecy. A few years later, rumours began to circulate about the group's solvency. A journalist contacted the former CEO, who disclosed confidential information. Various articles by the journalist were published about the group. In order to defend its reputation, the group hired a communications agency in Switzerland and Portugal.

The group obtained super-provisional and then provisional measures in Switzerland against the CEO, in particular to prevent him from disclosing information and to require him to file the confidential documents in his possession with the court registry. In essence, the group also claimed damages of approximately CHF 100,000 for the costs incurred by the communications agency. The Cantonal Property Chamber of the Canton of Vaud upheld the claim for damages, but the Cantonal Court of Vaud dismissed it on appeal by the CEO (HC/2023/890). The Cantonal Court considered that the company's reputation had already been seriously damaged before the journalist's articles were published. Therefore, there was no causal link between the damage claimed and the CEO's breach of his duty of confidentiality.

Under Art. 321*e* CO, an employee is liable for damage caused to the employer intentionally or through negligence. The four classic conditions for liability must therefore be met. In this case, the CEO breached his duties of loyalty and confidentiality as an employee and director of the company (Art. 321*a* para. 4 CO *cum* 717 CO).

With regard to causality, the Federal Court considers that the cantonal assessment is arbitrary. Following a chronological analysis of various press articles concerning the bank, it found that the articles published on the basis of information provided by the CEO were particularly detailed, contained numerous details and were particularly reliable due to their source, namely a former executive of a group company. The group had to respond to each new article in order to defend itself. It therefore had to hire a communications agency. Consequently, natural causality is established. With regard to adequate causality, the Federal Court held that it was indisputable that the information disclosed by the CEO was likely to damage the company's reputation and

to entail costs to remedy that damage.

Finally, with regard to the damage, the communications agencies were specifically commissioned to manage the media crisis caused by the journalist. However, the company did not specify the periods covered by certain invoices submitted. It cannot therefore invoke Art. 42 para. 2 CO to compensate for the lack of proof of damage. The other invoices are sufficiently precise. Consequently, the Federal Court upheld the appeal and ordered the employee to pay the bank approximately CHF 30,000.

This ruling is one of the few cases of compensation for reputational damage. When an author damages a person's reputation, the latter often finds it difficult to prove causality and the damage claimed. The present case illustrates the exception. The group was able to prove the damage caused, in particular because the CEO had admitted to disclosing confidential information and the journalist had published detailed articles in a recognised media outlet. The Vaud Cantonal Court had strangely denied causality. It wrongly considered that the agency's costs could only be reimbursed if they were 'attributable to the statements' made by the CEO. However, this does not meet the condition of causality. Indeed, "where several persons have each acted independently in a manner that gives rise to the same damage, (…) [the injured party] may bring an action against any one or all of those responsible and claim compensation from each of them for the entire damage suffered ' (c. 5.1.2). In the present case, the Federal Court rightly considers it 'perfectly natural' that the group should 'react to each new publication in order to defend its reputation" (c. 5.2).

With regard to the dispute over the damage, the Vaud Cantonal Court had considered that the CEO's determination 'in relation to the documents' did not constitute admission of the alleged fact. The Federal Court corrected this again. It considered that such an "enigmatic" determination did not constitute 'a pure and simple dispute' (c. 6.2.1).

Finally, the Federal Court considers that the facilitated proof of damage provided for in Art. 42 para. 2 CO 'is not there to compensate for deficiencies in the documents produced by [the group]' in the proceedings (para. 6.2.2). This assessment is convincing *in casu*. That being said, in other situations, the Federal Court remains too reluctant to apply this provision when strict proof of damage is not possible (see Thévenoz/Hirsch, Le pouvoir du juge d'apprécier le dommage d'investissement (art. 42 para. 2 CO)).
