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A Facebook post to “friends” can lead to dismissal

The *Cour de Cassation* (French Supreme Court) recently ruled that an employer can produce in court elements extracted from an employee’s private Facebook account, to which it was not authorized to access, as long as (i) this production is indispensable to the exercise of its right to evidence, and (ii) the violation of the employee’s privacy is proportionate to the goal pursued.

The September 30, 2020 ruling[1] offered the *Cour de Cassation* the opportunity to clarify several aspects of its case law on the use of social networks.

An employee of the company Petit Bateau was dismissed for having published on her Facebook “wall” a photograph of the new spring/summer 2015 collection that had been presented exclusively to the company’s salespeople and not been made public.

It should be noted that her Facebook “wall” was accessible only to her “friends”, i.e. the people she agreed to have in her network.

Petit Bateau, informed of this publication by a “friend” colleague, dismissed the employee for serious misconduct, blaming her for a breach of her contractual duty of confidentiality, and arguing that this breach was all the more serious as this “wall” was accessible to “friends” working for competitors.

The employee challenged her dismissal and contended that she had been victim of an abusive and illicit intrusion in her private life and that, in order to access her personal page, the employer had used an unfair process. Consequently, the employee argued that the evidence of the facts invoked by the employer was inadmissible.

Evidence of the facts reported by the employer must be gathered in a fair manner

While the principle that prevails under French labor law is the freedom of evidence (i.e. the parties can make their case using any means at their disposal), this freedom is not without limits.

Pursuant to Article 9 of the French Code of Civil Procedure, each party must prove, in accordance with the law, the facts that are necessary for the success of his/her/its claim.

It is on the basis of this legal provision that judges assess the lawfulness of the evidence, which under French labor law covers two aspects:

- the principle of loyalty in the collection and production of evidence;
- the right to privacy.

In its September 30, 2020 ruling, the *Cour de cassation* recalled that "*by virtue of the principle of loyalty in the collection and production of evidence, the employer may not use a subterfuge to gather evidence*".

The French Supreme Court had already ruled that the fact for an employer to hide a camera in a cash register in order to monitor the behavior of a saleswoman whom he suspected of stealing money was a subterfuge[2].

In the same vein, a Court of Appeals has already ruled that the employer cannot be considered to have had access to information in an unfair or illegal manner if it produces screenshots of an employee's Facebook account provided by a person authorized to access this account and who has himself/herself spontaneously transmitted such screenshots to the employer.[3]

In the matter at hand, the contentious post had been spontaneously forwarded to the employer in an email from another employee of the company authorized to access, as a "friend", the dismissed employee's Facebook private account. Since Petit Bateau did not use any subterfuge, the *Cour de Cassation* ruled that this process of obtaining evidence was not unfair.

Although it was not obtained unfairly, was the evidence gathered without any invasion of the employee's privacy?

The invasion of the employee's privacy is allowed...

In a labor dispute, the employee's right to privacy may conflict with the right to evidence exercised by the employer to prove the existence of a breach.

In the case at hand, the *Cour de Cassation* acknowledged that "*the production in court by the employer of a photograph extracted from the employee's private Facebook account, to which it was not authorized to access, and of identification elements of the "friends" fashion professionals who received this post, constituted an invasion of the employee's privacy*".

The confidentiality of the contents published on a Facebook "wall" raises issues on which the *Cour de Cassation* has already had the opportunity to rule, in particular with regard to defamation, public insult or even disciplinary dismissal proceedings.

It has notably ruled that contentious statements posted on Facebook, accessible only "*to a small number of people approved by the employee*", namely a private group composed of 14 people, "*were part of a private conversation*" and "*did not constitute serious misconduct*".[4]

In that specific case, the employee had been terminated for having joined a Facebook group entitled "*extermination of bitchy directors*".

In the case that resulted in the September 30, 2020 decision, the employee's private account was accessible to her 200 "friends". Therefore, could the publication of the photograph still be considered as private? Was it really a private group?

In any event, if the number of "friends" within a private group were to become a key criterion to assess the private nature of the exchanges, it would be difficult to set a limit without being arbitrary. In other words, what is the minimum number of approved "friends" to consider that a Facebook account holder has made public the page he has created in order to restrict the posts to the people of his/her choice?[5]

In that specific case, the *Cour de Cassation* ruled that a private group on social networks is a matter of the account holder's privacy, regardless of the number of members.

As such, in the case at hand, the production in court of (i) the photograph intended for this group of friends, (ii) the nominative list of the "friends", and (iii) their professional activities, constituted an invasion of the employee's privacy.

This finding by the judges could have been sufficient to held that the exhibits produced by the employer in support of its position ought to be held inadmissible. On the basis of the invasion of the employee's privacy, the employer could therefore have been prevented from relying on the contentious photograph.

… only if it is indispensable to the exercise of the right to evidence and proportionate to the goal pursed.

However, the *Cour de Cassation* recalled that "***the right to evidence may justify the production of elements that invade* [the employee's] *privacy provided that such production is indispensable to the exercise of this right and that the invasion of privacy is proportionate to the goal pursued***".

It follows that the invasion of the employee's privacy could be justified by the employer's right to evidence as long as the collection and production of the evidence was:

- indispensable to the exercise of the right to evidence, since the employer had only these elements to establish the employee's breach of her contractual duty of confidentiality that constitutes a serious misconduct; and

- proportionate to the goal pursued, namely the defense of the employer's legitimate interest in the confidentiality of its business.

The balancing of the interests of the employee on the one hand and of the Company on the other hand led the *Cour de Cassation* to find that the employer's legitimate interest could justify an invasion of the employee's privacy since (i) the process of obtaining the evidence was fair, (ii) the invasion of the employee's privacy was proportionate to the goal pursued by the employer, and (iii) the production of the evidence was indispensable to the employer's exercise of the right to evidence.

The ruling of the *Cour de Cassation* is important as it enshrines the employer's right to evidence, sometimes even to the detriment of the employee's privacy. From now on, it will be up to the trial judges to determine what elements may be brought forward by the employer to legitimize such an invasion.

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[1] Labor Chamber of the *Cour de Cassation*, September 30, 2020, n° 19-12.058 PBRI

[2] Labor Chamber of the *Cour de Cassation*, November 20, 1991, n° 88-43.120, Bull. civ. V, n° 519. In accordance with Article 9 of the French Code of Civil Procedure, the *Cour de Cassation* overturned the ruling that had deemed this evidence admissible, on the ground that, "*While the employer has the right to control and monitor the activity of its employees during working hours, any recording, for whatever reason, of images or words without their knowledge, constitutes an unlawful mode of proof*".

[3] Court of Appeals of Rouen 26-4-2016 n° 14/03517 : "*The principle of freedom of evidence in labor law matters does not prohibit the employer from receiving any testimony whatsoever, and in particular that of a person authorized to access the employee's Facebook account, the spontaneous nature of the disclosure not being disputed; insofar as the employer has not had access to the disputed information in an unfair or unlawful manner*".

[4] Labor Chamber of the *Cour de Cassation*, September 12, 2018, no 16-11.690 P+B

[5] General Counsel Ms.Berriat's opinion

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