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Personal emails and files: to what extent can an employer use them against its employees in the framework of a dispute? Focus on the latest case-law developments

Emails and files retrieved from an employee's personal email account can be freely consulted by the employer, even in the absence of the relevant employee, insofar as they have been saved on the hard drive of the professional computer and are not marked "personal".[1]

This is the stand adopted by the Labor Chamber of the *Cour de Cassation* (French Supreme Court) in two decisions rendered on June 19, 2013[2]. While this ruling may be surprising as it seems to conflict with the principle of absolute protection of private correspondence[3], it is in fact fully in line with a set of decisions that have been handed down over the past few years by the Labor Chamber of the *Cour de Cassation*.

The determination of the legal rules applicable to employees' emails and computer files is of paramount importance because it conditions the evidence that the employer may legally build against an employee in the framework of a disciplinary or dismissal procedure. Depending on whether the information falls within the public sphere (i) or the private sphere (ii), the applicable mode of proof is different:

- (i) If the employee's emails and files are deemed of a professional nature, they are part of the **public sphere**, which means that the employer may access such information without the presence of the employee and that such access will not be constitutive of a privacy breach;
- (ii) If the employee's emails and files are deemed of a personal nature, they are part of the **private sphere**, which means that employer's access to and review of such information shall be strictly regulated, if not prohibited.

As such, it goes without saying that building a case against an employee suspected, for example, of being

engaged in unfair competition practices will be easier if the employer has free access to the relevant employee's emails and files because it will be entitled to gather evidence against the employee without the latter's knowledge.

This is the reason why it is so important to know what is considered as part of the public sphere.

While French courts have already clarified certain aspects allowing to identify the emails and files that are part of the public sphere and those that are part of the private sphere, they may still be grey areas.

In the two aforementioned decisions rendered on June 19, 2013[4], the Labor Chamber of the *Cour de Cassation* has provided new insights in relation to a specific case where files and emails retrieved from the personal email account of an employee had been saved on the hard drive of the latter's professional computer/laptop. Despites the fact that these data were *a priori* personal information, such files and emails retrieved from a personal email account were held to be of a professional nature.

In fact, **the source of the emails or files is irrelevant.** Judges prefer to apply another criterion to determine applicable rules: has the file or email **been saved on the hard drive** of the professional computer/laptop?

An email or file retrieved from the employee's personal email account, not marked "personal"/"private" and merely *"copied-pasted"* on his/her personal computer/laptop, (I) is not subject to the same rules as an email or file that has not been transferred on the professional computer/laptop (II).

For any employer wishing to sanction an employee, the use of this "right click" on the computer mouse feature can make all the difference.

1. Emails and files retrieved from an employee's personal email account and saved on the hard drive of the professional computer/laptop

1.1 Email and files saved on the hard drive are deemed of a professional nature

According to an established case-law, wherever the emails and files **are saved on the hard drive** of the computer/laptop made available by the employer to the employee for business purposes, they shall be deemed of a professional nature[5].

This presumption can, however, be rebutted if the employee had named such emails or files with a mention conferring them a personal nature[6]**.** This is for instance the case if the email, file or folder has been named *"private"* or *"personal"*[7]. The applicable rules will thus be those governing the private sphere, i.e. rules that are constraining for the employer *(cf. 2.2 below).*

Folders saved on the employee's professional computer/laptop which contain emails and files retrieved from his/her personal email account could have been automatically deemed personal information if the judges had

taken into account the source of such information.

Yet, the *Cour de Cassation* has adopted a different view. Indeed, in the two aforementioned decisions of June 19, 2013, it ruled that the principle of absolute protection of private correspondence does not automatically extend to **emails retrieved from the employee's private email account** and **saved on the hard drive** the professional computer/laptop.

Wherever the emails and files are incorporated into the hard drive of the professional computer/laptop and have not been strictly identified as personal/private, they cease to belong to the private sphere, become part of the public sphere and are thus subject to a different set of rules.

However, these decisions do not mark a reversal of case-law. The Labor Chamber of the *Cour de Cassation* has merely continued to shape its case-law, putting emphasis solely on the question as to whether or not the emails or files had been saved on the hard drive of the professional equipment made available to the employee.

For employees, the only way to circumvent the application of this presumption is to mark all such emails or files as "personal".

1.2 Rules applicable to files and emails of a professional nature

Insofar as the relevant emails or files are professional, the employer may freely access such information and legally exploit the content thereof against the employee.

In practice, this means that the employer has not the obligation to require the presence of the employee to consult and exploit such information.

This can be useful for the employer to build up a file against an employee, including where there is a violation of a non-compete commitment or in the event of unfair competition practices, as was the case in the two aforementioned decisions of June 19, 2013. In these matters, an advertising agency was suspecting that two of its employees were engaged in unfair competition practices. It appointed an IT expert to remove and copy the hard drive of their respective personal computers, without the relevant employees' knowledge but in the presence of a bailiff. The expert's report was damning for the two employees who were then dismissed for serious professional misconduct resulting from the breach of their contractual duty of loyalty and exclusivity.

Incidentally, it should be noted that in these two decisions, the *Cour de Cassation* has validated a useful process which consists in making a full copy of the employee's hard drive, during his/her absence, and entrusting the analysis of such copy to an expert appointed by the company, in order to exploit the files and emails that are not marked "personal"[8].

In addition, based on these two decisions, it seems that the mention "confidential" on an email or file enables the employee to benefit, with respect to such email or file, from the protection afforded to the private sphere, which may be surprising as many purely professional emails and files are often marked "confidential". This issue must be clarified by future court decisions.

2. Emails and files retrieved from an employee's personal email account and not saved on the hard drive of the professional computer/laptop

2.1 The nature of emails and files retrieved from a personal email account

A completely different set of rules applies if the employee has not "copied-pasted" the email or file contained in his/personal email account into the professional computer/laptop.

Such an email or file not saved on the hard drive of the professional computer/laptop is subject to the rules governing the private sphere and employer's access to this information is far more restricted, if not impossible.

Walking in the footstep of the Labor Chamber of the *Cour de Cassation*[9], the Commercial Chamber[10] recently rendered a decision on this issue on April 16, 2013[11]. Emails retrieved from the employee's personal email account – that is different from his/her professional account – and not copied on the professional computer/laptop are considered as private correspondence, **even if their content is related to the employee's professional activities**.

If, like in the case adjudicated on April 16, 2013, the employer gathers, through the intermediary of third parties, contentious emails from the employee's personal email account, it shall not be entitled to use such information against the employee.

In this specific case, two former employees had set up a rival company. Their former employer had gathered, through the intermediary of a client, emails related to orders and produced such emails in the framework of the unfair competition proceedings initiated against these former employees. The relevant orders had been sent to the client from a personal email account – **that was different from the professional email account that one of the former employees had created for the operation of its new business**. This suggests that if the orders had been sent to the client from this professional email account, the former employer would have been entitled to use them in its case against the two former employees.

2.2 The rules applicable to emails and files of a personal nature

Wherever the emails and files are part of the private sphere, either because they were retrieved from a personal email account and not saved on the hard drive of the professional computer/laptop, or because, even though saved on the hard drive, they are marked "personal", it is more difficult – if not impossible – for the employer to build evidence against the employee.

A distinction should be made between emails and files.

Personal emails benefit from an absolute protection under the secrecy of private correspondence and if the employer opens such emails, it may be liable to prosecution[12].

On the other hand, all electronic files (documents and apps of any type whatsoever) that do not constitute "correspondence" can be opened by the employer but only in the presence of the relevant employee or if the latter had been duly summoned for this purpose.

When the employer has taken either step, he may open the relevant files or apps, even if the duly summoned employee has not joined his/her workstation to attend the opening process.

Yet, this control by the employer must be substantiated, e.g. by the discovery of certain facts allowing the suspicion that the employee is personally involved in competing activities likely to jeopardize the company or is making an abusive personal use of the professional tools, leading notably to a drop in productivity (personal activities during working hours).

As the employer must inform the employee beforehand, it runs the risk that the employee will quickly delete the files even before it had had the possibility of consulting them and using them as evidence against the employee.

In conclusion, while the protection of the employee's private sphere is far-reaching and employer's access to this sphere quite limited, there is no excuse for a foolhardy employee who uses his professional computer like a personal computer and does not take any step to delineate the scope of his/her private sphere on his/her professional equipment: this seems to be the very least employees should do!

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[1] In collaboration with Sara Bellahouel, trainee-lawyer.

[2] Labor Chamber of the *Cour de Cassation*, June 19, 2013, n°12-12139 and n°12-12138.

[3] Any violation of the secrecy of correspondence is a criminal offense under Article 226-15 of the French Criminal Code (up to one year of imprisonment and a EUR 45,000 fine).

[4] Labor Chamber of the *Cour de Cassation*, June 19, 2013, n°12-12139 and n°12-12138.

[5] Labor Chamber of the *Cour de Cassation*, December 15, 2010, n°08-42.486 regarding emails; Labor Chamber of the *Cour de Cassation*, May 10, 2012, n°11-13.884 regarding computer files.

[6]Unless specific risk or event, an assumption rarely relied upon by French courts (Labor Chamber of the *Cour de Cassation*, May 17, 2005, n°03-40.017).

[7] On the contrary, this does not apply to a folder entitled "My documents" (Labor Chamber of the *Cour de Cassation*, December 15, 2010, n°08-42.486).

[8] Labor Chamber of the *Cour de Cassation*, June 19, 2013, n°12-12139 and n°12-12138.

[9] Labor Chamber of the *Cour de Cassation*, January 26, 2012, n°11-10.189.

[11] Commercial Chamber of the *Cour de Cassation*, April 16, 2013, n°12-15.657.

[12] Up to one year of imprisonment and a EUR 45,000 fine (Article 226-15 of the French Criminal Code).