[TERMINATION OF EMPLOYMENT CONTRACT]

Personal emails at work: admissibility as evidence of misconduct is strictly limited

(Cass. Soc. January 26th 2016, 14-15360)

The French Supreme Court held that, although sent and received from a professional computer, the emails issued from a personal email, distinct from the professional one, are inadmissible evidence as their use would infringe upon the principle of the secrecy of correspondence.

Under a now well established case law trend, the employer only has a restricted access to emails sent or received by an employee on the professional computer if they are labelled as "private" (Cass. Soc. 2 October 2nd 2001, 99-42942).

Of course an employer can always access to professional electronic files, folders or emails, even in the absence of the employee (Cass. Soc. Oct. 18th 2006, 04-48025).

However, electronic files and folders that are explicitly identified as "personal" may only be opened by the employer if the employee is present – or at least has been summoned (Cass. Soc. June 17th 2009, 08-40274) and if the search is justified and proportionate with the goal (L.1121-2 Labour Code).

If a file is not identified as "personal", it is presumed professional – and thus accessible to the employer at any time. Furthermore, the employer will be able to use the information it contains even if the file turns out to be personal (Cass. Soc. October 18th 2011, 10-26782: use of unlabeled personal of emails to evidence misconduct by the employee). The same presumption applies to files and folders contained to a USB key not identified as "personal" (Cass. Soc. February 13th 2013, 11-28649) or to text messages on a professional cellphone (Cass. Soc. February 10th 2015, 13-14779).

Regarding emails issued from the personal email address of the employee, but sent or received on the professional computer, the employer may access them if they are "*integrated on the hard drive of the professional computer supplied to the employee*" (Cass. Soc. June 19th 2013, 12-12138). Indeed, in this case the Court considered that the "personal" character was "*not shown by the mere fact the emails initially originated from the personal email address of the employee*".

In this January 2016 decision, the Court rejected such emails as evidence on the ground that the "*emails were issued from the personal email address of the employee, distinct from the professional email address*". Thus, they "*had to be rejected as their use infringes on the principle of secrecy of the correspondence*".

To evidence a cause of dismissal, an employer had produced personal emails that were sent and received on the employee's personal address. The employer argued that the emails, which were not labelled as personal, were presumed to be professional as any other file on "*integrated*" on the hard drive. Neither the Court of appeal, nor the Supreme Court agreed.

It is not exactly clear why, in the present case, the Court departed from the application of its 2013 ruling. It be due to a difference in the way the employer accessed the emails. Indeed, in the present case, the Court lays the stress on the distinction between the professional and personal email addresses and does not mention any "*integration*" of the emails on the hard drive – as it did in its 2013 ruling.

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