

**Ruling no 779 of 30 September 2020 (19-12.058) –  
Cour de cassation (*Court of cassation*) - Labour  
Chamber  
ECLI:FR:CCAS:2020:SO00779**

**Employee's fault: evidence relying on extracts from private Facebook account is not necessarily contrary to the ECHR.**

*Only the french version is authentic*

**Evidence - Special professional status - Collective status of work**

**Dismissal**

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**Summary**

**It follows from Articles 6 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 9 of the Civil Code and Article 9 of the Civil Procedure Code, that the right to evidence may justify the production in court of elements extracted from an employee's private Facebook account that infringes on their privacy, provided that such production is indispensable to the exercise of this right and that the infringement is proportionate to the objective pursued.**

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*Appellant(s): Ms A... X...*

*Respondent(s): Petit Bateau, simplified single shareholder company (société par actions simplifiée unipersonnelle)*

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**Facts and Procedure**

1. According to the ruling under appeal (Paris, 12 December 2018), Ms X... was hired as of 1 July 2010 as export project manager by the company Petit Bateau. By letter dated 15 May 2014, she was dismissed for serious misconduct, in particular for having breached her contractual obligation of confidentiality by publishing, on 22 April 2014 on her Facebook account, a photograph of the new 2015 Spring/Summer collection presented exclusively to the company's sales representatives.

2. Disputing her dismissal, the employee brought various claims before the conseil des prud'hommes (*Labour Court*).

[...]

### **On the first and third parts of the first plea**

#### Statement of plea

4. The employee objects to the ruling stating that the dismissal was based on serious misconduct and for dismissing her requests concerning the breach of contract, whereas:

*“1°/ The employer may not access information extracted from a Facebook account of one of its employees without having been authorised to do so. It follows that proof of the facts invoked against an employee in a disciplinary procedure resulting from publications appearing on their private Facebook account, reported through the intermediary of another employee of the company authorised to access said account, is inadmissible. In her conclusions of appeal, the employee argued that the evidence of the alleged facts was not enforceable, as the latter related to a private Facebook account, not publicly accessible, but only accessible to the persons that she had accepted to join her network. The cour d'appel (Court of Appeal) merely maintained that the employer had not committed any unlawful act or unfair invasion of privacy since it had been informed of the distribution of the litigious photograph on the employee's Facebook account by one of the employee's "friends" working for the company. The cour d'appel (Court of Appeal) did not explain itself concerning the unenforceability, and thus inadmissibility, of the invoked evidence, and as such, deprived its decision of legal basis with regard to Article 9 and Article 1353 of the Civil Code, and all of Article 9 of the Civil Procedure Code;*

*2°/ The employer may not disproportionately and unfairly infringe on the employee's right to privacy. It follows that the employer may not improperly interfere with the employee's publications on social networks. The cour d'appel (Court of Appeal) decided that the employer had not committed any unlawful act or unfair process of invasion of privacy when, in order to justify the serious misconduct, it referred to the identity and professional activities of the employee's friends on the Facebook network, as reported by the employer and who the employer considered worked for competitors. In so doing, the cour d'appel (Court of Appeal) violated Article 9 of the Civil Code.”*

#### **Court's response**

5. First, while under the principle of fairness in the administration of evidence, the employer cannot resort to a scheme to gather evidence. The cour d'appel (*Court of Appeal*) found that the disputed publication had been spontaneously communicated to the employer by an e-mail from another employee of the company authorised to access Ms X...’s private Facebook account as a “friend”, and it was able to infer that this process of obtaining evidence was not unfair.

6. Then, it follows from Article 6 and Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 9 of the Civil Code and Article 9 of the Civil Procedure Code, that the right to evidence may justify the production in court of elements

extracted from an employee's private Facebook account that infringe on their privacy, provided that such production is indispensable to the exercise of this right and that the infringement is proportionate to the objective pursued.

7. The employer's production in court of a photograph extracted from the employee's private Facebook account, which the employer was not authorised to access, and of elements identifying the fashion professional "friends" who were the recipients of this publication, constituted an invasion of the employee's privacy.

8. However, the cour d'appel (*Court of Appeal*) found that, in order to establish an objection of disclosure by the employee of confidential company information to professionals likely to work for competing companies, the employer had limited themselves to producing the photograph of the future collection of the company published by the interested party on her Facebook account and the professional profile of some of her "friends" working in the same sector of activity, and that the employer had only sought an affidavit from a bailiff in order to thwart the employee's dispute as to the identity of the account holder.

9. In light of these findings, the cour d'appel (*Court of Appeal*) pointed out that this production of elements infringing on the employee's privacy was indispensable to the exercise of the right to evidence and proportionate to the objective pursued, namely the defence of the employer's legitimate interest in the confidentiality of its affairs.

10. The plea is therefore unfounded.

[...]

**ON THESE GROUNDS, the Court:**

DISMISSES the appeal;

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**President: Mr Cathala**

**Reporting judge : Ms Depelley, Judge Referee**

**Advocate-General: Ms Berriat**

**Lawyers(s): SCP Didier et Pinet - SCP Célice, Texidor, Périer**