

An employer's right to evidence and a fair trial: the case of the use of an improperly installed video surveillance system (Ruling n° 228 – 21- 17.802)

08/03/2023



Ruling No. 228

Dismissal

FRENCH REPUBLIC

ON BEHALF OF THE FRENCH PEOPLE

RULING OF THE SOCIAL CHAMBER OF THE COURT OF CASSATION OF 8 MARCH 2023

The company 3A Grenelle, a limited liability company with registered office at [Address 2], brought appeal No. J 21-17.802 against the ruling delivered on 8 April 2021 by the *cour d'appel* (Court of Appeal) of Paris (Division 6, Chamber 7) in the dispute between:

(1) Ms [P] [N], domiciled at [Address 3],

(2) the Job centre, with registered office at [Address 1],

respondents in the quashing.

The applicant bases its appeal on the single plea for quashing appended to this ruling.

The case file was sent to the prosecutor-general.

On the report by Mr Barincou, judge, the observations of SCP Lyon-Caen and Thirir, lawyer of 3A Grenelle, SCP Bouzidi and Bouhanna, lawyer of Ms [N], and the advisory opinion of Mr Gambert, advocate-general, after discussions in the public hearing of 17 January 2023 attended by Mr Sommer, president, Mr Barincou, reporting judge, Ms Mariette, elder judge, Mr Pietton, Mr Seguy, Ms Grandemange, Ms Douxami, judges, Mr Le Corre, Ms Prior, Ms Marguerite, Mr Carillon, judge referees, Mr Gambert, advocate-general, and Ms Pontonnier, Chamber Registrar,

the Chamber for Social and Labour Matters of the *Cour de cassation* (Court of Cassation), composed, pursuant to Article R. 431-5 of the Judicial Code, of the above-mentioned president and judges, after deliberation thereof in accordance with law, has delivered this ruling.

Account of the dispute

Facts and procedure

1. According to the ruling under appeal (Paris, 8 April 2021), Ms [N] was hired as a nail technician by 3A Grenelle (the company) on 22 October 2007.
2. In her objection to her dismissal for serious misconduct communicated by letter of 12 August 2013, the employee brought the matter before the industrial tribunal.

Pleas

Review of the plea

On the second and third parts of the plea, appended hereto

3. Pursuant to Article 1014(2) of the Code of Civil Procedure, it is not necessary to rule on the basis of a specially reasoned decision regarding these pleas, which are clearly not susceptible to quashing.

On the first and fourth parts of the plea

Statement of plea

4. The employer criticizes s that the ruling held that its exhibits 10, 13 and 72 could not be used against the employee, that the dismissal lacked real and serious grounds and that it should therefore be ordered to pay her various sums as damages for unfair dismissal, compensation for notice, back pay for precautionary layoff, conventional redundancy payment and, in application of Article 700 of the Code of Civil Procedure, as well as ordering the provision of pay slips, a certificate for the Job centre and an employment certificate in accordance with the judgment, whereas:

"(1) the unlawfulness of a means of proof does not necessarily entail its dismissal in the proceedings; it is for the trial courts to determine whether the use of this evidence undermined the fairness of the proceedings as a whole by balancing the employee's right to respect for her personal life against the right to evidence, which may justify the production of evidence that infringes an employee's personal life, provided that such production is essential to the exercise of that right and the infringement is strictly proportionate to the aim pursued; in deciding that the use of video surveillance had undermined the fairness of the proceedings as a whole and to rule that exhibits Nos. 10 (video surveillance report), 13 (video surveillance CD), and 72, ancillary to the former (details of the video surveillance extracts) were unenforceable against the employee in the context of the industrial tribunal proceedings on the pretext that it resulted from the employer's statements that the production of the video surveillance was not essential to the exercise of its right, since there was other evidence likely to reveal the irregularities of which the employee was accused, even though it had rejected this other evidence provided by the employer, emphasising that it was insufficient to prove the employer's claim, as a result, only the video surveillance footage and the bailiff's report, which it had declared could not be used against the employee, were capable of demonstrating the materiality and reality of the misappropriation of funds and fraudulent misappropriation committed by the employee and therefore, the validity of the employer's claims, the *cour d'appel* (Court of Appeal) violated Articles 6 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

(4) the infringement of an employee's privacy by placing the shop where she works under video surveillance for the purpose of safety of persons and property is justified by the nature of the task to be performed and proportionate to the aim sought; by stating, in order to declare the evidence constituted by the recordings from the video surveillance system unenforceable against the employee, that the installation of a camera in the shop infringed her right to respect for her private life, which was disproportionate to the aim pursued, without investigating, as it was required to do, whether the purpose of installing this system was not to ensure the safety of individuals and prevent damage to property, given the frequent thefts that took place in nail bars, the *cour d'appel* (Court of Appeal) deprived its decision of a legal basis in the light of Articles 6 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms."

Pleas

Court's response

5. It follows from Articles 6 and 8 of the Agreement for the Protection of Human Rights and Fundamental Freedoms that the illegality of a piece of evidence does not necessarily entail its dismissal from deliberations, and that, when so requested, the court must assess whether the use of that evidence infringed the fairness of the proceeding as a whole by weighing the right to personal privacy of the employee against the right to evidence, which may justify the production of elements infringing on the privacy of an employee provided that such production is indispensable to the exercise of this right and that the infringement is strictly proportionate to the objective pursued.
6. When there is unlawful evidence, the court must first examine the legitimacy of the employer's control and verify whether there were concrete reasons justifying the use of surveillance and the extent of such surveillance. It must then examine whether the employer could not achieve the same result by using other means that are more

respectful of the employee's privacy. Finally, the court must assess the proportionate nature of the infringement on personal privacy in the light of the objective pursued.

7. The *cour d'appel* (Court of Appeal) first noted that the employer had not informed the employee of the purposes of the video surveillance system or of the legal basis used, contrary to the provisions of Article 32 of the Law of 10 January 1978, and, secondly, had not sought, for the period in question, the prior prefectural authorisation required by the then-applicable provisions of Law No. 78-17 of 6 January 1978 and Articles L. 223-1 et seq. of the Internal Security Code, from which it correctly deduced that the disputed video surveillance recordings constituted unlawful evidence.
8. It then noted that, in order to justify the indispensable nature of the production of the video surveillance, the company argued that the recordings had made it possible to confirm the suspicions of theft and breach of trust by the employee, revealed by an audit it had carried out during the months of June and July 2013 and which had revealed numerous irregularities concerning the registration and cash collection of the services carried out by the employee, while acknowledging that the company did not produce said audit, which it also referred to in the dismissal letter.
9. From these findings and statements alone, which show that the production of the recordings at issue was not essential to the exercise of the employer's right to evidence, given that the employer had other means of proof that it had not submitted to the court, and regardless of whether it subsequently considered that the reality of the misconduct of which the employee was accused was not established by the other documents produced, the *cour d'appel* (Court of Appeal) deduced that the documents at issue were inadmissible.
10. The plea is therefore unfounded.

Operative part of the judgment

ON THESE GROUNDS, the Court:

DISMISSES the request;

Orders the company 3A Grenelle to pay the costs;

Pursuant to Article 700 of the Civil Procedure Code, dismisses the claim made by 3A Grenelle and orders it to pay Ms [N] the sum of EUR 3,000;

Thus decided by the Chamber for Social and Labour Matters of the *Cour de cassation* (Court of Cassation) and pronounced by the president at the public hearing of the eighth day of the month of March of the year two thousand and twenty-three.

President : Mr Sommer

Advocate-general : Mr Gambert

Reporting Judge : Mr Barincou

Lawyer(s) : SCP Lyon-Caen and Thirir – SCP Bouzidi and Bouhanna

[READ THE FRENCH VERSION](#)

Institution judiciaire

Translated rulings