

Facebook and the employee's confidentiality obligation

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Court of Cassation, Labor Division, September 30, 2020, no. 19-12.058

In a decision dated September 30, 2020, the Court of Cassation decided on the conciliation between the employee's right to private life and the employer's right to proof.

In that matter, an employee disclosed confidential information about her company on Facebook (picture of the new 2015 spring-summer collection), available to employees of competing companies.

Informed by another employee, the employer then dismissed her for serious misconduct, reproaching her for a breach of her contractual confidentiality obligation.

Impossibility to use a stratagem to collect proof

It is reminded that pursuant to the principle of loyalty in proof management, the employer may not use a stratagem to collect proof.

Thus, the employer may not ask employees to spy on other employees on social networks, or infiltrate, on its own initiative, the Facebook and Instagram accounts of its employees.

In that matter, judges held that the way of collecting proof was not unfair since the contentious publication had been spontaneously communicated to the employer by an email from another employee of the company authorized to access the private Facebook account as a "friend".

Employer's right to proof

Whereas the use of an employee's Facebook publication by the employer may constitute an invasion of his/her privacy, the employer may, however, produce it as proof if it is:

- Essential to the exercise of the right to proof;
- Proportioned to the objective sought (for instance: defense of the company's legitimate interest).

In that matter, it appeared that the two conditions were met since:

- The employer only had the publication to establish the breach of disclosure by the employee of a confidential information of the company, and
- The invasion was not disproportionate to the objective sought, which was the defense of the employer's legitimate interest in the confidentiality of its business.

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