



# EMPLOYMENT LAW

## THE RIGHTS AND DUTIES OF EMPLOYERS AND EMPLOYEES IN RESPECT OF THE USE OF COMPUTERS AND THE WEB AT THE WORKING PLACE

### FRANCE

Information and Communication Technologies (ICT) are the techniques used for processing and transmitting information by computer, the Internet, and telecommunication. They are ubiquitous in everyday life, including at work.

As regards the Internet for example, a recent survey shows that in 2009 and 2010 people spent an average 59 minutes a day on the Internet at work for private purposes in France, which represents a loss of productivity estimated at 14%. The uncontrolled use of the Internet could therefore cost companies an average six weeks of paid vacation in addition to 2.5 time's worth of monthly salary per employee per year – not counting the extra bandwidth, the risk of criminal prosecution for illicit use of the Internet, or the disclosure of sensitive information about the company.

This illustrates the need for employers to respond to this issue, without however encroaching upon employees' individual freedoms such as their right of privacy, freedom of expression, etc.

The French courts have had to deal with so many of these major new issues that case law on that matter developed significantly these last few years, sketching the broad outlines of employer ICT control within the workplace (1) and settling issues relating to the dismissal of employees on grounds of ICT misuse (2)

### 1. EMPLOYER ICT CONTROL WITHIN THE WORKPLACE

The Nikon case, which dates back to 2 October 2001<sup>1</sup>, was the first time that the Court of Cassation had to settle issues relating to the use of hardware and, more generally, ICT at the workplace.

It established the principle that *“the employee is entitled, even during working hours and at the workplace, to have the intimacy of his private life respected; this includes in particular the secrecy of correspondence [...]”*.

Over the past ten years, the Court of Cassation has progressively defined the employer's prerogatives regarding ICT and their use by employees, and especially regarding social networks, the storage of files, the sending of e-mails, or the downloading of files via professional tools.

#### a. Folders

Electronic folders created by employees with their professional tools are presumed to be professional in nature unless expressly identified as personal<sup>2</sup>.

Employers may access these folders in the absence of the employee. The same applies to hard copies kept by employees in their office<sup>3</sup>.

#### b. E-mail

Unless there is a risk for the company, employers may only open messages identified by employees as “personal” on their professional computer in the employee's

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presence or after they have been duly advised<sup>4</sup>.

On 2 February 2011, the Court of Cassation ruled in two related cases (“Securitas”) that employees using company e-mail to disparage their superiors can face disciplinary action, including dismissal. Once an employer has gained legitimate access to the contents of such e-mails, employees cannot hide behind the privacy defence as the messages are related to the workplace and are therefore deemed not to be private<sup>5</sup>.

### c. Phone / mobile phone

Checking an employee’s telephone communications (e.g., by way of an itemized bill provided by the operator) is not an illegal monitoring method, even if the employee has not been warned in advance<sup>6</sup>, and may ground an employee’s dismissal for serious misconduct, as was admitted for an employee who called Martinique every day for several months<sup>7</sup>.

Phone-tapping without the knowledge of the employee on the other hand is unfair (and also a criminal offence!)<sup>8</sup>.

### d. Internet connection

There is no law forbidding employers from setting the conditions and restrictions applicable to the use of Internet for purposes other than work. Such conditions and restrictions are not in themselves violations of the privacy of employees. Internet surfing by employees during their working hours is assumed to be professional in nature, and employers may freely carry out checks in their absence.

HADOPI is an independent public authority endowed with legal personality. It was established by the French act of 12 June 2009, which obliges employers to prevent their employees from downloading illegal content from the Internet – meaning increased liability for employers.

## 2. DISMISSAL OF EMPLOYEES ON GROUNDS OF ICT MISUSE

Employees may be dismissed for misusing ICT within the workplace, but now also outside the workplace according to recent case law.

### a. Within the workplace

The courts appreciate the facts on a case-by-case basis and take into account the time spent by the employee on his personal affairs.

For example, the courts have held that the fact that an employee used the company’s Internet connection for private purposes for a total of forty-one hours in a month amounted to serious misconduct justifying their dismissal<sup>9</sup>.

In another case, the courts considered that the fact that the employee simply kept three

electronic files containing pornographic pictures (not criminal in nature) on his computer, because it did not affect his work, did not amount to a breach of his obligations under his employment contract justifying his dismissal.

On the other hand, an employee who had used his computer and Internet connection to visit erotic or pornographic web sites and send and receive messages of the same kind was found guilty of a breach of trust.

### b. The use of social networks outside the workplace

#### (i) The “Facebook” jurisprudence

Two separate courts have recognized that employers may sanction or dismiss an employee for posting messages on the web page of a social network accessible to a wide audience of “friends”.

The violation of private written correspondence implies that an exchange is read by a person for whom it is not intended using unfair means. This is not the case when the employer takes disciplinary action following a message left by an employee on the “wall” of another social-networking person categorized as “friend”<sup>10</sup>.

Consequently, employers are allowed to adduce social-network conversations as evidence justifying the employee’s dismissal<sup>11</sup>.

#### (ii) The CNIL’s recommendations

Following the “Facebook” jurisprudence, the CNIL (the commission set up by the French Data Protection Act) published a series of recommendations on the proper use of the computer resources made available by employers.

For example, the CNIL reminds users of social networks such as Facebook that they can create different contact lists and change their privacy settings according to the information they wish to share with each category of contacts<sup>12</sup>.

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<sup>1</sup> Cass. soc. 2 octobre 2001 n° 99-42.942

<sup>2</sup> Electronic files:

• Cass. soc. 18 octobre 2006, n° 04-48.025, Le Fur c/ Sté Techni-Soft: RJS 12/06 n° 1241

• Cass. soc. 16 mai 2007, n° 05-43.455, Eve c/ Sté Info Mag.

<sup>3</sup> Paper files: Cass. soc. 18 octobre 2006, n° 04-47.400, Alazard c/ Sté JEPS: RJS 1/07 n° 7

<sup>4</sup> E-mails:

• Arrêt Corbeau: Cass. soc. 17 juin 2009, n°08-40.274 Sanofi Chimie c/ M. Guzzi

• Cass. soc. 15 décembre 2010 n°08-42.486

<sup>5</sup> Arrêts Securitas:

• Cass. Soc. 2 février 2011 n°09-72.313

• Cass. Soc. 2 février 2011 n°09-72.449

<sup>6</sup> Cass. soc. 15 mai 2001, n° 99-42.937:RJS 7/01 n° 830

<sup>7</sup> Cass. soc. 18 juin 2003, n° 01-43.122: RJS 8-9/03 n° 979

<sup>8</sup> Cass. soc. 16 décembre 2008, n° 07-43.993: RJS 2/09 n° 133

<sup>9</sup> Cour de cassation, 18 mars 2009, n°07-44247

<sup>10</sup> CA Reims 9 juin 2010 n° 09-3209, ch. soc. SAS l’Est Eclair c/ Callendreau

<sup>11</sup> CPH Boulogne-Billancourt 19 novembre 2010 n° 10-853, Barbera c/ SAS Alten sir

<sup>12</sup> Article du 10 janvier 2011

## ISRAEL

Although the introduction of computers and the Internet into the working place as private working tools started more than 20 years ago, and in spite of the fact that the use of the Internet and mailboxes became the standard and regular communication method in general and in the working place in particular, the issue of the rights and duties of the parties in employment relations in respect of the use of computers and the Internet did not bring any specific legislation in this regard in the Israeli Labour laws.

Therefore, when the Labour courts were asked to deal with issues related to the rights and duties of the Employers and Employees in respect of the use of the web and computer and since these questions are always related to issues of the right of privacy and dignity, the Labour Courts mainly applied general laws dealing with these questions and, more specifically:

1. The Law for Protection of Privacy, 1981.
2. The Basic law on Human dignity and Liberty, 1992

Over the years the Labour courts dealt with various cases on the question of duties and rights of employees with regard to the use of the Internet and the computer at a working place. There were various decisions of the different law courts in this regard.

This situation required the intervention of the Supreme Labour Court and, indeed, this was done recently in an important judgment laid down on 8 February 2011, in which the Labour Court dealing with two appeals and joining both cases issued a long award, creating for the first time clear instructions regarding the issue.

The basic elements as laid down by the courts are the following:

### A. The basic principle of the right of the employer to establish rules regarding the use of computers and the web

1. As a general rule, it should be clear that computers and any other technological means as well as the possible direct product of the use of the Internet and the computer, such as e-mail correspondence, are an **inherent part of the office environment** and, as such, the employer is entitled (and expected) to establish rules for the use of computers and the web in the working place. In this regard, the employer is entitled, of course, to prohibit the use of the access to different sites which the employer finds may either cause damage to the working place and to the employer as well as, **and this is important**, the access to sites which by nature can distract the employee from his work and the needs of his work (including, for instance, Facebook).

2. Along with this clear right of the employer, he is entitled to use technological means which may restrict the use of the Internet, as well as technological means that enable monitoring and control of the use of the Internet and computer by the employee.

3. This power and right of the employer to establish rules, also imposes on him a duty. It is the duty of the employer [to establish a clear policy](#) regarding the use of electronic mail in the office environment and to bring this policy very clearly to the knowledge of the employee with a specific requirement to add the policy as part of the employment agreement with the employee.

#### [B. The possibility of the employer to enter into the mail boxes of the employees](#)

1. The court made a distinction between two different kinds of mail boxes that can be used in the office environment:

(a) [A professional mail box](#) which is a mail box dedicated to work purposes only and the employee is not allowed to use it for his own personal needs. The employer is entitled to enter into such boxes (subject, of course, to *bona fide*, relevancy and maintaining the principles of reasonability of the inspection); however, he should *a priori* inform the employee of the policy which includes his intention and right to enter this professional box.

However, it is very important to mention that the court stated that if, in spite of the prohibition to use such mail box for personal purposes, there is private correspondence of the employee (assuming that it can be defined as private), [the employer is not entitled to enter into the contents](#) of this correspondence and by doing so invades the employee's privacy.

Entrance into the contents of such correspondence will be allowed only in exceptional and extreme situations (if, for instance, there is a suspicion of a criminal act another act that can damage the employer), and even then the employer is advised and ordered to ask the prior permission of the employee. If the employee does not agree, the employer can always approach the Labour court in such cases.

#### [\(b\) Private mail box used also for work purposes or mixed mail box](#)

Here again the assumption is that the employer entitles the employee to use the personal mail box in the working place, either as a separate box or as a mixed mail box. The employer is prohibited from entering into this mail box again, except in extreme circumstances, and the employer is always required to use less extreme technological means before invading the mail box of the employee, meaning that this should be the last resort.

#### [\(c\) Private mail box](#)

The employer is of course entitled to allow the employee to make use through the working place computer and server of his private mail box and, of course, in such cases [the employer is prohibited](#) from any access into the private box and if the employer is of the opinion that he should be entitled to enter the private boxes he must approach the labour court, which may grant this right only in very extreme situations.

#### [C. Additional issues](#)

1. The court dealt even with the question whether an employee is entitled to use a print-out of e-mail correspondence that was in the trash bin and, although the idea is that the trash bin is a public domain and there is no expectancy for privacy in such a place, still the status of the documents that were found there and the conditions for their submission as evidence in courts, derive from the virtual source from which they were produced. Therefore, for instance, if it is a print-out of private mail box correspondence found in the trash bin, still it will not be allowed as evidence in the court unless, again, there is a legitimate interest of the employer in submitting the document and, of course, subject to the court's discretion.

2. As to the question of Internet browsing in the working place, again, it is a matter of policy which the employer is entitled to establish, and he is fully entitled to prohibit Internet browsing and even, as already said, to use technological means to either prohibit it or reduce or limit the use of the internet. Therefore, again, the employer has on the one hand the power and on the other hand the responsibility to publish clear IT codes of conduct.

3. Although it is a side point however still related to the rights and duties of the employer under the technological environment, the Israeli labour court dealt also with the issue of the use of GPS devices in order to control the places where the employee is in each and every moment of the working day, and the labour court stated that while we talk of the framework of the working day, the employer has the right to use these means. However, of course, the exposure of information on places in which the employee was at the termination of the working day is prohibited since it is regarded an invasion of the employee's privacy.

#### [4. Collective Labour agreement on the use of computers and web](#)

Due to the differences of the lower Labour courts, a Collective Labour Agreement was signed in June 2008 in which the parties to the labour relations establish the agreed policy with regard to the use of computers in the working place. However, the policy contained in the Collective Labour Agreement are applicable only to the parties

to the labour agreement and therefore the court found it essential to establish clear directives in this regard to apply to all the employees and employers in Israel



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## ITALY

The rules in force in Italy are the ones coming from the Privacy Authority, that issued in March 2007 a decision containing some guidelines in the matter of use of IT tools (in particular internet and e-mails) at the workplace.

Some basic principles have been stressed:

- employers have the duty to ensure that employees are provided with workable IT tools and use them appropriately in compliance with the laws in force.
- employers are required to take suitable security measures to ensure the integrity of information systems and data, also in view of preventing unfair use (and consequent liability).
- use of the Internet by employees may be analysed, tracked (by processing browsing log files) and collected (by data storage devices). E-mail services are also liable to controls (based on the keeping of traffic log files and the storage of e-mail messages) that might enable the employer to become apprised of related contents. The information collected can contain personal data, including sensitive data, related to employees (or third parties). On this regard some sector-related rules provide for specific prohibitions and limitations, such as those laid down by the Workers' Statute with reference to distance monitoring (Sect.4), to the processing of personal information suitable for disclosing religious/political opinions, health/sex life information (Sect.8), or by the Data Protection Code, providing that the data processing must respect binding principles of necessity (information systems must be configured by minimizing use of personal and identification data) and fairness (the processing must be carried out only for specific and legitimate purposes).

Given these principles, the employers are requested to adopt:

A) **internal guidelines** (to be adequately communicated to employees) suitable to clarify:

- which conducts (if any) are not allowed as for “browsing” the Internet (e.g. downloading music or software files) and using e-mail;
- to what extent it is allowed to use e-mail and network services also for personal purposes (e.g. whether using such systems is only allowed outside working hours or during breaks, or whether they may also be used with moderation during working hours);
- what information is recorded on a temporary basis (e.g. which log file components are recorded) and who is lawfully entitled to access such information (including external entities);
- which information (if any) is kept for longer, in a centralised or decentralised manner (also by making backup copies or by technical management of the network);
- whether and to what extent the employer reserves the right to carry out controls in pursuance of the laws (on occasional basis and/or in connection with the checks on operation and security of the system);
- which consequences (also of a disciplinary nature) may be drawn by the employer when e-mail and Internet services are misused;
- which solutions are envisaged to ensure that work can continue also in the employees’ absence (especially in case of planned leaves) with particular regard to the use of out –of-office auto-reply messages;

B) **organizational measures** aimed to:

- carefully assess the impact on employees’ rights;
- specify in advance which employees (also by category/class) are allowed to use e-mail and access the Internet;
- specify the location of workstations so as to reduce the risk of misuse;

C) **technological measures**, in particular:

as for the use of Internet:

To reduce the risk the Internet is browsed inappropriately (i.e. without any connection with the work performance, for example: irrelevant websites visited, files downloaded, network services exploited for entertainment) the employer is required to take preventive measures in order to avoid ex-post controls on the employees.

A list of appropriate measures is provided:

- specifying which websites (also by category) are considered to be related/unrelated to work performance;
- configuring systems and/or using filters to prevent certain operations from being performed, as such operations are considered to be unrelated to the work performance (e.g. downloading files, or

accessing certain sites, possibly included in a sort of blacklist, or downloading files or software with specific features in terms of size or data types);

- processing the data in an anonymous format (or in such a manner as to prevent users from being immediately identified, even on a collective basis by aggregating the data appropriately);
- retaining the data for no longer than is necessary to achieve organizational, production and security purposes;

as for e-mail services:

The contents of e-mail messages are subject to confidentiality safeguard on the basis of constitutional principles (Sect. 2 and 5 of the Italian Constitution) and criminal provisions protecting inviolability of secrets (Sect. 616 of the Criminal Code).

On the other hand, the use of e-mails in the employment context should be performed according to the needs of the employer’s organization rather than for personal purposes. The problem is therefore to establish when the employer is entitled to take steps in order to become apprised of the contents of messages sent to or from the e-mail address used by the employee.

A list of appropriate measures is provided:

- making available group e-mail accounts (to be shared by several employees, e.g. info@body.it; salesoffice@body.it), which may be added to individual e-mail accounts;
- making available a further e-mail account to employees, to be used for private purposes;
- making available specific functions to allow automatically sending out-of-office reply messages whenever it is known in advance that an employee will be absent from work, whereby such messages provide details for contacting another employee and/or department;
- where it is necessary to access the contents of e-mail messages because of pressing requirements related to work, and the relevant employee is absent from work unexpectedly or for a prolonged period, allowing the data subject (the employee) to entrust another employee (trusted party) with checking the contents of his/her e-mail messages and forwarding the ones considered work-relevant to the employer (data controller);
- including a disclaimer in e-mail messages to clarify, in case, that they are not considered as having confidential or personal nature, specifying whether the replies may be accessed by third parties in the sender’s organization.

The following activities are instead strictly forbidden, as aimed to pursue not allowed forms of distance monitoring of employees (Sect.4 of Workers’ Statute):

- the systematic scanning and recording of e-mail messages apart from what is technically necessary to provide e-mail services;

- the reproduction and systematic storage of the web pages visited by the employee;
- hidden monitoring and analysis of laptops entrusted to individual employees.



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## UK

The English law position regarding internet browsing in the workplace, and the employer–employee relationship and social networking is complex. An employee has no absolute right of privacy and the protections available to employees have been varied by successive legislation on the topic.

### Internet use and monitoring in the workplace

A cautious employer will want to monitor its employees’ use of the internet to minimise the risk of viruses, defamation or harassment. This is permissible and can include looking into employees’ email content and traffic and external website use, with the use of “cookies” or “web prints”. Different levels of monitoring include spot checks without reference to particular individuals within an organisation or even specific checks on individuals.

The regulatory framework in this area has developed over recent years:-

- Electronic forms of workplace surveillance involve processing of personal data and are, therefore, regulated by the Data Protection Act 1998.
- The DPA, together with the Employment Practices Data Protection Code (Employment Practices Code) issued by the Information Commissioner assist employers with interpreting this area of law.
- Employers who monitor also need to look at The Regulation of Investigatory Powers Act 2000 (RIPA); the Telecommunications (Lawful Business Practice) (Interception of Communication Regulations 2000 and the Human Rights Act 1998 (HRA).

The duty of trust and confidence implied into an employee’s contract of employment is also relevant. An employer will usually

include an express term in the contract that they employee will be monitored so as to ensure that the employee has no right to privacy. Even then, the employer's monitoring activities may constitute a breach of this duty, depending on the circumstances.

If an employer's monitoring activities are aimed at uncovering illegal or unsafe practices in the workplace, an employer should cite their duty to provide a safe system of work for their staff and to take reasonable care of their employees' health and safety as a justification for monitoring in the workplace.

Where an employer is contemplating action which may infringe a worker's rights under the HRA, for instance by implementing workplace monitoring, it should have regard to the doctrine of proportionality by considering the following steps:-

- Identifying a legitimate objective.
- Ensuring it is sufficiently important to justify limiting the ECHR right: in other words, balance the aim against the effects.
- Ensuring the method chosen is no more than necessary to accomplish the identified objective.

In order to justifiably monitor employees, an employer must do the following:-

- Carry out an impact assessment before monitoring (Employment Practices Code);
- Inform employees that they may be monitored in the workplace (para 2, Schedule 1, DPA) and the purpose for monitoring – in an Electronic Communication Policy and set up regular pop-ups and reminder systems, include training on the subject and ensure general awareness of monitoring among the workforce;
- Inform third parties of the above;
- Ensure it is clear to workers when and under what circumstances they can use electronic communication systems – the terms of use should be clearly set out.

In cases of employee misconduct, a clear Electronic Communications Policy will be helpful because it is essential that the standards of conduct expected of an employee are set out clearly by the employer. We have seen a growth in the case law in this area recently:-

In *Grant and another v Mitie Property Services UK Ltd* (unreported, 2009), two sisters dismissed for excessive internet use won their unfair dismissal cases on the basis that the policy relied on by the employer, which referred to personal use being permitted "outside core working times", was not clear enough.

*McKinley v Secretary of State for Defence*, is an example of a case where the Employment Tribunal took a common sense view that it was excessive for an employee to spend around 10% to 15% of his working time surfing the web for personal use. It was relevant that he was in a senior position and was in charge of the company IT policy.

Where an employer suspects an employee of misconduct involving electronic communications, it needs to substantiate its suspicion by carrying out an investigation and gathering evidence before confronting the employee as with other types of misconduct and comply with the principles of fairness set down in the Employment Rights Act 1996.

#### Now on to Social networking...

Employees' use of social networking or blogging sites usually takes place outside work, but can be during working hours. It may have quite a large impact on the reputation of the employer. However, there is very little case law, as yet, on the use of social media and its impact on the workplace.

There are many advantages to social media however there are a number of concerns for employers, which they should seek to address:-

#### FIRST RISK: Disclosure of confidential information

Social media permit the disclosure of an employer's confidential information rapidly to a wider group of people across a wider geographical area than ever before.

To address this an employer must impress on employees clearly what constitutes confidential information or trade secrets and restrict use of these post-termination and even during employment in contracts of employment, employee handbooks or internet usage policies.

Employers can take action where disclosure has been made – recover information and/or disciplinary action. Where an employee has used their employer's confidential information to formulate their own business plan and target client list, the employer can seek a court order to prevent the employee using it.

#### SECOND RISK: Business contact lists

Protection of a business' contact lists is not a new issue. Whilst database of business contacts created on a work computer/server are deemed to belong to the employer, business contact lists on social networking sites belong directly to the individual employee. An employer therefore faces more of a risk that an employee may take their business contacts with them when they leave or may face contacts falling into competitors' hands.

An employer should set tight controls on contact lists belonging to them, set parameters for the use of social networking sites, require employees to enter contacts they make in the course of their employment into a central database, encourage employees to create two separate profiles on social networking sites, one for personal and one for professional use and when they leave, an employer should ensure employees update their profile promptly to make it clear that they are no longer their employee.

#### THIRD RISK: Damage to reputation and vicarious liability

Employers are vicariously liable under English law if "in the course of their employment", employees posting derogatory or discriminatory comments about a third party, a colleague or the business in general.

In these circumstances, the employer must not only take action against the offending employee but also try to mollify the third party who has been offended in order to protect its business reputation. It must also take disciplinary action against any misconduct.

#### FOURTH RISK: Time wasting

Social networking is a potential distraction for employees and can lead to reduced productivity.

Each business has to decide what degree of freedom it allows its employees. Many employers will allow employees access to social networking sites. Once again, employers must set clear and certain boundaries and take disciplinary actions against employees who flout the rules. A good example is when two Dominos Pizza employees were instantly dismissed after posting a video of some very unhygienic pizza making on YouTube. Dominos Pizza's share price rebounded immediately because of the zero-tolerance approach.

#### FIFTH RISK: Cyber-bullying/-harassment

In English law, this involves sending or posting harmful or cruel text or images using the internet (of course, this includes emails, posts or messages on any social networking site etc.) or any other digital communication device (i.e. mobile phones).

Employers have a duty to protect the health and safety of employees and prevent personal injury. They can also be held responsible for acts of their employees in the course of employment against other employees or even third parties, whether or not the employee is using the employer's equipment. To escape liability, an employer needs to show that it has taken all reasonably practicable steps to prevent the harassment or discrimination. The employer's policies should state that an employer's business does not condone any bullying, harassment or victimisation of any type (whether or not in cyberspace!) and employees should be regularly reminded of these rules.



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