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Insights

PRIVATE LIFE AND DISCIPLINARY DISMISSAL

EVEN IF THEY ARE RACIST OR XENOPHOBIC, PRIVATE MESSAGES SENT VIA THE PROFESSIONAL EMAIL BOX DO NOT JUSTIFY AN EMPLOYEE'S DISMISSAL.

May 13, 2024

In this case submitted to the Supreme Court ("*Cour de cassation*"), a State health insurance agency dismissed one of its employee for gross misconduct for having sent to some of her colleagues, through her professional email box, messages - identified as personal and confidential – containing racist and xenophobic comments. The employer became aware as he received such messages by mistake from one of the recipients.

He launched an internal investigation out of which it appeared that the employee had sent similar emails in the past .

For instance, her last email was drafted in the form of a poem:

> *'(…) Your sons are burglars,*
>
> *Others more foolish*
>
> *Are into smoking*
>
> *And drive around in nice cars.(…)*
>
> *You are covered by Social security,*
>
> *You also benefitfrom the State universal medical cover,*
>
> *And you remain on the lookout*
>
> *You dream of being elected too (…)*
>
> *France is not bicultural*
>
> *You are our erysipelas*
>
> *Even more, our scabs.*

IL J K L Don't forget to forward...!!'

It was accompanied by three pictures :

- a “Marianne” (women bust sculpture embodying the French republic motto : *Freedom*, *Equality and* B*rotherhood*"), holding the French flag with the slogans: *”I love equality", ”I fight Islam”*, *”Neither veils nor burqa”*, *”Long live the secular republic”*,
- the drawing of an Oriental personage being *“kicked up in the backside”,*
- the tricolor cockade.

The employee lodged a claim with the Employment Tribunal to challenge her dismissal. She argued that the alleged facts in support of her dismissal pertained to her private life.

The Court of Appeal ruled in her favour, considering that « *notwithstanding their obvious racist and xenophobic nature* », these messages (i) were private and (ii) were not intended to become public, adding that even if the employee was subject to a duty of neutrality in the context of her duties (as she was employed by a State agency), she could freely express her opinions in a private context, as long as she did not make, in the context of her professional activity, any racist or xenophobic comments (*Court of Appeal, Toulouse, 4th chamber, 2nd section, 26 November 2021, no. 19/04850*).

The employer appealed to the Supreme Court.

The appeal was unsucessful.

Reiterating its established caselaw, the Supreme Court reminded in its decision of 6 March 2024 that «*a ground based on the employee's personal life cannot, in principle, justify disciplinary dismissal, unless it constitutes a breach, by the concerned employee, of an obligation arising from her employment contract »*.

On the basis of the Court of Appeal’s findings, i.e that the messages were part of private exchanges within a group of people (at least two employees according to the Court of Appeal's ruling), that the messages were not intended to become public and that the employer only became aware of them as a result of an error in sending them by one of the recipients, the Supreme Court confirmed the Court of Appeal's decision.

The Supreme Court also emphasised in its decision, adopting the analysis of the Court of Appeal, that:

- the letter of dismissal did not mention that the opinions expressed by the employee in her emails would have had an impact on her work or on her relations with users or colleagues,

- the employer did not provide any evidence tending to prove that the employee's writings had been known outside a private context and outside the "*Caisse Primaire d'Assurance Maladie*" and that the company's public image had been damaged,

- although the internal regulations prohibited employees from using for their own purposes and without prior authorization the computer equipment belonging to the company, an employee may nevertheless use his/her work email to send private messages as long as there is no abuse of it. Yet, in this case, the employee had sent nine private messages in the space of eleven months, which was not considered excessive, regardless of their content.

The decision may appear surprising. Indeed, the investigation carried out prior to the employee's dismissal had highlighted that the employee had already sent to work *colleagues* and *unknown recipients,* from her professional email inbox *other emails aimed at provocation, discrimination, racist and xenophobic hatred against the Muslim community.(...)*. And the employee concluded her last controversial email with *"Don't forget to forward...!"*. She clearly wanted to give her emails wide publicity. Is it therefore justified to consider that they fall within the scope of private life? And with the additional risk that these emails could reach company employees who might be offended by them? Is it not part of the employer's safety obligation to prevent such a risk?

However, the employer did not raise such arguments to justify the dismissal.

Thus, according to the Supreme Court, when private, the sole comments made in emails sent via the professional mailbox dot not support a fair termination.

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MEET THE TEAM

Claire Fougea

Paris

claire.fougea@bclplaw.com
+33 (0) 1 44 17 77 94

Marion Brière Ségala

Paris

marion.brieresegala@bclplaw.com
+33 (0) 1 44 17 77 96

Sophie Finel

Paris

sophie.finel@bclplaw.com
+33 (0) 1 44 17 77 57