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The personal life of the employee versus the interests of the company

Chantal Mathieu, Associate Professor, University of Franche-Comté

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Chantal Mathieu, Associate Professor, University of Franche-Comté

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The interface between the employee's right to respect for private life and the company's interests is based essentially on a case-law construct. Any student of French labour law knows the *Ronsard* case (1), named after the secretary at a car dealership who was dismissed for purchasing a vehicle produced by a rival manufacturer. For the employer, as for the trial judge, the purchase undermined the brand and therefore justified the dismissal. Relying on Article 9 of the Civil Code, the Social Chamber of the Court of Cassation took a different approach and set down a strong distinction between private life and its effect on the company's operations. Yet the solution was heavily criticised by authors on the grounds that the purchase of a vehicle could not be classed as private life (2). This criticism was echoed by certain authors (3) who proposed that "personal life" designate acts outside the scope of an employer's power. The Social Chamber of the Court of Cassation (4) then the legislature (5) were quick to adopt the term which is why, since *Ronsard*, court decisions and the Labour Code rarely use the term "privacy", preferring "personal life". The latter term refers not only to private life in the strict sense, but more broadly to the employee's individual freedom, together with his social and family life.

Since the 1990s, there has been a proliferation of rules protecting the personal life of the employee against employer interference. The employee is primarily a person; he has an inalienable freedom, despite his subordination. The Court of Cassation also considers that the employee is entitled, even on work premises and during working hours, to respect for private life and an employer cannot freely read the employee's private correspondence (6). Beyond the prohibition on interference by the employer in the employee's personal life, the French legal system also tends to grant the employee the means to pursue his personal life without sacrificing his professional life. This is why various rules compel the employer to take into account extra-professional details before making a decision about his employee (7).

Still, as revealed in *Ronsard*, the choices made by the employee in his personal life sometimes collide head-on with the company's interests. A conflict must then be resolved between the employee's interests and those of the company: which should be upheld? Occasionally, priority is automatically given by law to the employee's personal life, especially in cases involving a serious family situation (8). More often, legislation requires that a balance be struck between the company's interests and those of the employee and, in the event of a dispute, entrusts the courts with the task of separating the two (9). There remain scenarios in which precedence is given to the company's interests. The way in which those interests are grasped can then either guarantee and curtail the employee's personal life. One point seems clear: the employer is not the one to decide the matter. In other words, it cannot content itself with arguing the company's interests in imposing its decision and thereby sacrifice the employee's personal life. It must explain its decision, stating how the interests of the company are at stake. Two lines of argument are

admissible: the smooth running of the business, and company safety. At first glance, the former would appear to leave more room for subjectivity than the latter. Yet where the running of the business is argued, the test is particularly subtle and the courts' tendency to objectivise this reference protects personal life (section I). Conversely, safety becomes an established argument which, unless the court checks the relevance of the same, can stifle personal life (section II).

I – Personal life protected by the objectivisation of the smooth running of the business

As part of its management powers, the employer must make decisions to ensure the smooth running of the business. When it considers that a malfunction is attributable to the employee's personal life, it will make a decision affecting the latter's interests. To avoid the arbitrariness of power, the Labour Code establishes procedures requiring that the employer explain its vision of the proper running of the business, thereby opening up room for discussion (section A). In addition, the courts tend to outline the concept of the smooth running of the business by establishing a set of indicators to assist in its definition. The employer's response to the employee's behaviour is then no longer assessed in light of what the employer identifies as the company's interests, but rather in terms of an objective point of reference: disruption (section B).

A – Room for discussion

The Labour Code contains many prerogatives allowing the employee to suspend his employment contract or reduce his working time in order to devote himself to personal projects. He may wish to take a training or an educational course (10), devote himself to a charity project (11) or even take a sabbatical (12). The employee's absence may hamper business operations. Additionally, the law sometimes allows employers to oppose the employee's departure. The exact conditions vary depending on the legislation, but we do a common reference: the smooth running of the business. In order to halt the employee's plans, the employer must objectivise the reasons for its decision. It must then issue written information for the employee, giving reasons for the decision. It must also account for its position with staff representatives who, where appropriate, are simply informed or to be consulted on the final decision or give their consent (13) In the event of a dispute, the employer's refusal can be challenged in court through an accelerated procedure. The employer must then provide proof of the organisational difficulties caused by the employee's plans. Specifically, it should demonstrate how the person's absence would have "*adverse consequences for production and the smooth running of the company*" (14). It must therefore not plead mere inconvenience but the risk of real harm to the company. Sometimes, the legislature goes further and completely removes any room for discussion by setting down an arithmetic criterion. Refusal is then possible if the number of employees concerned by the application reaches a certain threshold relative to the company's workforce (15). A malfunction is treated as a percentage of employees concurrently (16) or successively absent over a given reference period (17). No risk assessment is therefore left to the employer alone.

B – Characterising objective disruption

Since the early 1990s, the Court of Cassation has tended to reject any grounds for dismissal based on subjective criteria specific to the employer. This is why the loss of confidence (18) or the risk of a conflict of interest between the employee and his employer (19) cannot constitute acceptable grounds for dismissal. Thus, an employee cannot be dismissed simply because his spouse works for a competitor (20). In addition, the Court of Cassation made a careful distinction between an employee's behaviour in his personal life and his impact on the running of the business. The employee's attitude of the employee in his personal life can never be grounds for dismissal.

However, if the employer proves that this attitude caused disruption, it may issue a non-disciplinary dismissal (21). Disruption is a legal standard that gives rise to a variety of arguments. Yet the Court of Cassation has established a narrow framework. Not only must the disruption be physically verifiable, but it must also have a degree of intensity. Again, moderate disruption will not suffice. Above all, the Court of Cassation has outlined indicators for establishing it.

Disruption is considered as a malfunction in the running of the business due to the employee's personal life, likely to cause harm to the company. Firstly, this may be a strong reaction from third parties (colleagues, clients, sub-contractors) with respect to the employee's personal circumstances. The employer must demonstrate a proven risk of disruption due to such condemnation. Publicity surrounding a private act is not sufficient. The publicity must also provoke indignation or act the company's reputation. Such will be the case for example when an employee's conviction for raping a minor causes a considerable emotional reaction on the part of colleagues who have to associate with the mother of the victim who also works in the business (22). Similarly, the indictment of an employee for indecent assault while running an establishment for people with disabilities is likely to bring the organisation into disrepute (23). The malfunction may also consist in a lack of activity on the part of the employee owing to personal events, without that inactivity being described as wrongful. Such is the case when the employee is ill. His prolonged absence may hamper the smooth running of the business. However, the disruption will be accepted if it was such as to compel the employer to seek a permanent replacement (24). The Court of Cassation also accepts that the withdrawal of a driving licence for offences committed outside the scope of an employee's functions is an objective situation and cannot characterise a disciplinary offence (25) but justifies the termination of the employment contract where the licence is necessary for the effective exercise of the professional activity (26).

The smooth running of the business might be a subjective reference, allowing the employer to give precedence systematically to the company's interests, as viewed by the employer, at the expense of the employee's private life. The objective reading given by the Court of Cassation prevents such a drift. However, case law may easily be circumvented if the employer relies on a different argument: company safety.

II - Personal life stifled by company safety

The company's interests may take on safety aspects. The people present in the company, whether customers or employees, must be protected. Property allocated to the business activity cannot be damaged or used to cause injury to others. In order to avoid incurring civil or criminal liability, the employer is duly authorised to supervise and sanction. That authority may quickly impact on the employee's personal life. However, the test applied by the courts to the employer's arguments is quite weak. Safety becomes an argument that easily justifies the extension of such supervision of employees in the workplace (section A) or of discipline outside working hours (section B).

A - Extending supervision in the workplace

In the name of the right to respect for private life, there is a framework governing an employer's access to personal information. As regards email (27), folders (28), sound recordings (29) or SMS (30), the Court of Cassation makes a distinction between professional and private documents. While the employer is free to read the former, it must follow a specific procedure for the latter. In particular, it must first inform the employee so as to allow him to the present. However, the Court has stated such documents may be opened in the employee's absence "*in case of a particular risk*

or event" (31). The same rules apply to the opening of a locker or a desk drawer (32). As regards searching an employee's personal belongings, such as a handbag, this is framed more extensively. The employer must obtain the employee's consent and inform him or his right to refuse and to require the presence of a witness. Yet again, the Court of Cassation raises the possibility of "*exceptional circumstances*" overriding the need for the consent of an employee who refuses to open his bag (33). Such phrasing provides the employer with the means to respond quickly where company safety is compromised. One thinks, for example, of the risk of a terrorist attack, computer viruses or unfair competition. Nevertheless, the Court has not established objective criteria that would identify these extraordinary powers. It sets down no procedural requirements such as the presence of staff representatives. An examination of the various judgments shows that security appears as an end in itself legitimising emergency rules. However, if the employer could invoke security as soon as it has the slightest suspicion, the right to respect for private life on company premises would be an empty shell. Moreover, only a situation of extreme urgency must be able to justify such an invasion of an employee's privacy. In all other cases of "particular risk or event," the Court has encouraged employers to use the ex-parte procedure provided under Article 145 of the Civil Procedure Code. This procedure allows the applicant to request that the presiding judge of the *tribunal de grande instance* (regional court) order the investigative measures required to protect the rights of others (34). It therefore implies the consideration of the legitimate grounds invoked by the employer before it conducts investigations.

B - Extending discipline outside working hours

In disciplinary matters, the Court of Cassation makes the distinction between personal and professional life. Acts falling within the scope of personal life enjoy immunity in the sense that the employer cannot under any circumstances use these to justify a sanction (35). This distinction does not, however, mean that an employee is completely free outside working hours. The safety approach allows the employer to sanction various forms of behaviour when the employee is no longer finds himself in a work context. Firstly, the Court of Cassation (36), like the *Conseil d'Etat* (37), considers that so long as he is on company premises, the employee is under a duty not to undermine the safety of other staff, even when he is not working (38). Next, the employment contract gives rise to a continuous duty of loyalty. This obligation has two facets: contractual loyalty and the loyalty of the contractor. The first allows the court to identify the duties and obligations inherent to a same category of contracts where the parties have not expressed their intentions. The Court of Cassation recognizes that the employee owes a duty of non-competition (39) and a duty of discretion (40) for the term of the employment contract. The second allows the employee's behaviour to be scrutinised and any maliciousness, dishonesty, or insulting, defamatory or excessive statements to be sanctioned (41). This is why derogatory comments about the company that are expressed on social media such as Facebook can be qualified as misconduct (42). The company's safety is protected by the reference made to loyalty. The Court of Cassation tends to take an increasingly broad approach, going so far as to sanction an employee's silence on information relating to his professional activities which, had they been known to the employer, would have allowed him to anticipate a risk (43).

Lastly, the Court of Cassation links acts to the "life of the company" in order to justify the imposition of a disciplinary sanction. These are acts committed while the employee is no longer under the subordination of the employer but which are dangerous in nature and likely to incur the employer's liability. Thus a disciplinary sanction was imposed on a waitress who smoked on the premises in spite of the legal ban and made racist comments about another waiter (44). Similarly,

a care assistant was sanctioned for using her mobile telephone on clinic premises outside working hours when she was bound to respect the rule prohibiting the use of mobile telephones within the building on grounds of patient protection (45). An employee, who had won a holiday following a competition organized by his employer, could be dismissed for misconduct for assaulting one of his colleagues during his stay (46).

The duty to ensure safe results which is incumbent on the employer certainly comes to bear in case law. At the same time, however, the Court dismisses all the guarantees usually offered to the employee on the grounds that it is not a matter of monitoring the employee in the performance of his duties. Thus, as regarded an employee who had just left his post still wearing his work clothes and had dishonestly taken a telephone that a customer had forgotten at the store's ticketing desk, the Court held that this behaviour impacted on the employer's obligation to ensure the safety of customers and their property, and was linked to the life of the company. The evidence was taken from a CCTV system and the employee challenged the employer's compliance with the provisions of the Labour Code relating to the implementation thereof (47). The Court dismissed the argument on the grounds that the system had been installed to ensure the safety of the store and had not been used to monitor the employee in the performance of his duties (48). Safety comes into play here, linking the employee's behaviour to disciplinary power and excluding guarantees related to surveillance and monitoring. The safety-based approach restricts the scope of personal life, without any objective limit being identified, and without any parameters being set for safe surveillance. There is therefore a significant risk that the employer will judge any behaviour on the part of the employee by artificially linking them to a risk for the company. A romantic relationship between two colleagues which then turns sour could quickly pass for sexual or psychological harassment (49). The illegal downloading of music files with a laptop made available to the employee could quickly be seen as conduct that would incur the employer's liability (50). Gradually, buying a brand of vehicle other than that marketed by the employer would end up being qualified as an act of mistrust in the quality of the company's merchandise, thus putting its financial security at risk. Security is certainly a legitimate purpose but it is likely to bring down the whole edifice built since the *Ronsard* decision. Moreover, like the reference to the smooth running of the business, it is up to the courts to require not only the demonstration of materially verifiable elements but, more importantly, to outline the attendant issues.

Notes:

(1) Soc. 22 January 1992, *Bull. Civ.V, No. 30, Ronsard.*

(2) J. Savatier, *La protection de la vie privée des salariés*, *Dr. Soc.* 1992, p. 329

(3) Ph. Waquet, *Vie personnelle et vie professionnelle du salarié*, *CSBP,* 1994, p. 289

(4) Soc. 14 May 1997, *Bull. civ. V. n° 175 ;* J. Richard de la Tour*, La vie personnelle du salarié, rapport annuel de la Cour de cassation,* 1999

(5) Art. L. 2242-5; L. 2242-22; L. 3121-46 of the French Labour Code

(6) Soc. 2 October 2001, *Bull. Civ.V, No. 291 Nikon*

(7) During a change of work schedule (L. 3123-24, Labour Code) or during the implementation of a mobility clause (Soc. 28 January 2015, No. 13-28111).

(8) E.g. compassionate leave for bereavement (L. 3142-1 Labour Code), family care leave (L.3142-16, Labour Code), parental leave (L.1225-48 Labour Code); the employer cannot object to the employee's decision.

(9) L. 1121-1 Labour Code

(10) E.g. leave of absence for union-organised training (L. 3142-13 Labour Code).

(11) E.g. international solidarity leave (L. 3142-32 Labour Code.) or leave of absence following a natural disaster (L. 3142-41 Labour Code).
(12) L. 3142-91 Labour Code
(13) The approval of the works council is an exception in labour law. L. 3142-4 Labour Code; L. 3142-13 Labour Code
(14) Soc. 6 May 1998, No. 96-41066
(15) E.g. L. 3142-10 Labour Code; L. 3142-96 Labour Code
(16) D. C 3142-15. Labour Code
(17) R. C 3142-18. Labour Code
(18) Soc. 29 May 2001, No. 98-46341.
(19) Soc. 21 September 2006, No. 05-41155, *RDT* 2006, p. 315, note. E. Dockès
(20) Soc. May 27, 1998, No. 96-41276
(21) *Ch. Mixte*, 18 May 2007, No. 05-40803; *RTD* 2007, p. 527, obs. Aubert-Montpeyssen
(22) Soc. 26 September 2012, No. 11-11247
(23) Soc. 21 May 2002, No. 00-41128
(24) Soc. 3 May 2011, No. 09-67464
(25) Soc. 15 January 2014, No. 12-22117
(26) Soc. 5 February 2014, No. 12-28897
(27) Soc. 17 June 2009, No. 08-40274
(28) Soc. 10 May 2012, No. 11-13884
(29) Soc. 23 May 2012, No. 10-23521 (personal voice recorder)
(30) Com. 10 February 2015, *RTD* 2015, p. 191, notes Adam P.
(31) Soc. 17 May 2005, No. 03-40017. The discovery of erotic photos in a desk drawer is not considered as such.
(32) Soc. 11 December 2001, No. 99-43030
(33) Soc. 11 February 2009, No. 07-42068; Soc. 3 April 2001, No. 98-45818
(34) Soc. 10 June 2008, No. 06-19229
(35) Soc. 23 June 2009, No. 07-45256
(36) Soc. 4 October 2011, No. 10-18862 (an employee had left his dog inside his parked vehicle in the company car park and was not able to stop him attacking an employee) .
(37) CE 27 March 2015, No. 368855 (staff representative who strikes a colleague during a break in a works council meeting)
(38) The Labour Code also provides for an obligation to ensure security, but in the context of the performance of his work: Labour Code, L. 4122-1.
(39) CE 27 March 2015 No. 371174; Soc. 9 July 2014, No. 13-12423
(40) Soc. 5 February 2014, No. 12-28255
(41) Soc. 28 April 2011, No. 10-30107.
(42) Cons. prud'h. (industrial tribunal) Boulogne-Billancourt, 19 November 2010, No. 10/00853
(43) Soc. 29 September 2014, *RTD,* 2014 N. obs Moizard, p. 762, *Lexbase Weekly,* No. 587 obs S. Tournaux (employee who conceals his indictment on charges connected with his his functions).
(44) Soc. 16 October 2013, No. 12-19670
(45) Soc. 5 February 2014, No. 12-27251. There could be a risk of interference between medical devices and the waves emitted by mobile phones
(46) Soc. 8 October 2014, No. 13-16793
(47) The employer must inform the employee and the employee representatives of the systems implemented to monitor the activity of the employee. Soc. November 20, 1991, *Neocel, Bull.*

*Civ.*V, No. 519

(48) Soc. 26 June 2013, No. 12-16564

(49) Sexual harassment can be accepted even if the actions are taking place outside of time and place of work: Soc. 11 January 2012, No. 10-12930

(50) L. Casaux-Labrunée, « Vie privée des salariés et vie de l'entreprise », *Dr. Soc. 2012, p.331*