



LINARI LAW FIRM

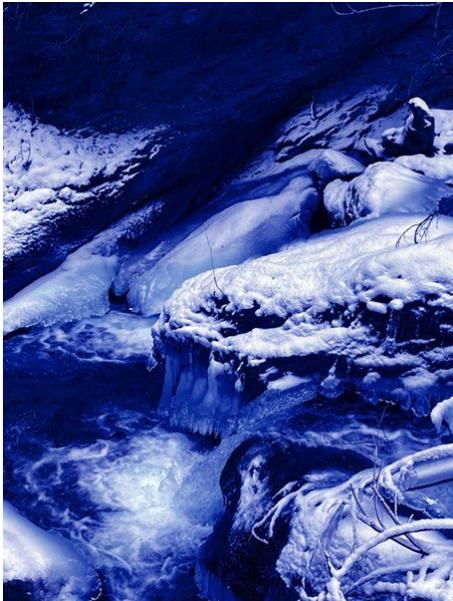
AVOCATS A LA COUR

**Messages sent from a private application and downloaded on a professional computer are not protected by the secrecy of correspondence**

A pregnant employee, hired by a company pursuant to a permanent contract, was suspended with immediate effects for serious misconduct (*"mise à pied"*) and the employer requested the termination of her employment contract, after he discovered several messages, sent by the employee, from a private application and downloaded on her professional computer.

The employee challenged her suspension with immediate effect for serious misconduct and lodged a claim against her employer. The Luxembourg Labour court rendered a decision, initially favorable to the employee but the Court of Appeal overruled the judgement and rejected all the employee's claims on January 27, 2022. The employee lodged an appeal with the Cour de Cassation which was rejected.

The question was, whether messages sent by an employee, from a private application such as WhatsApp, downloaded by the employee on her professional computer and only used with a private purpose, are protected by the secrecy of correspondence or not? Can they be used as an evidence against the employee, to prove her serious misconducts in order to justify her suspension with immediate effects?



According to the employee, the employer violated the right to privacy in the workplace, more particularly the secrecy of correspondence.

However, the conclusions of the Cour de Cassation are as follows :

- i. Firstly, the messages invoked in support of the suspension and of the request for termination of the employment contract were stored in the computer, made available by the employer to the employee for the purpose of performing her duties, i.e. a *professional computer*;
- ii. Secondly, the employer accessed this computer in order to save professional content, i.e. for a legitimate reason within the framework of the organization of the business;
- iii. Thirdly, the messages in question were not specifically identified as belonging to the private sphere of the employee, and therefore without any possibility for the employer to identify at first sight their personal nature;
- iv. Fourthly, the employer had access to these messages while the messaging application had been left open, allowing some of the messages to be read directly, and therefore without being protected by a password from which the employer could have deduced their private nature.

The Cour de Cassation concluded that the Court of Appeal, could legitimately consider that (i) the messages were of a professional nature, (ii) non-protected by the secrecy of correspondence, and (iii) that they could therefore be used by the employer to justify the employee's suspension and the request for termination of the employment contract.

Linari Law Firm is of course available should you need any assistance regarding labour law or dispute resolution (legal advice, pre-litigation and litigation).

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