The difficulty of reconciling the imperative of control and monitoring by the employer and respect for the privacy of the employee, in the face of digital technologies. French and Moroccan law

De la difficulté de conciliation entre l'impératif de contrôle et de surveillance par l'employeur et le respect de la vie privée du salarié, à l'épreuve des technologies numériques. Droit français et Marocain

EL GDAIHI Mohamed
Doctor in private law
Higher School of Technology in Sidi Bennour
Chouaib Doukkali University, El-Jadida
Sustainable Agriculture Management Laboratory
Morocco
juristeconseil.grenoble@gmail.com

Date de soumission : 01/03/2021

Date d'acceptation : 09/05/2021

Pour citer cet article :

EL GDAIHI M. (2021) « The difficulty of reconciling the imperative of control and monitoring by the employer and respect for the privacy of the employee, in the face of digital technologies. French and Moroccan law», Revue Internationale du Chercheur « Volume 2: Numéro 2 » pp : 530 - 546

Abstract

The purpose of this work is to draw a line between the exorbitant interventionism of employers and the vulnerability of wage earners, particularly with regard to the issue of privacy of the former and the excessive power of the latter. Even if the social courts in Morocco have not although had opportunity to give a ruling on conflicts relate to the question of the private life of the wage earner facing the sprawling powers of the employer in remote monitoring on the places of job; the moroccan judges will not contradict coherent legal and judicial standards and respected by french justice, since the moroccan law of 23 February 2009 relating to the protection of the individuals regarding the data processing with personal character strongly drew inspiration from the french model notably, the national committee of computer science and of freedom.

In principle, the wage earner cannot be constantly monitored without his or her knowledge, and the employer can only achieve and exploit the employee's personal digital data in the presence of the employee for a serious and legitimate reason.

Keywords : Internet; relationship of subordination; remote monitoring; privacy; employer's power of management.

Résumé

Le présent travail a pour but de tracer une ligne de démarcation entre l'interventionnisme exorbitant des employeurs et la vulnérabilité des salariés, notamment, quant à la question de la vie privée des premiers et le pouvoir excessif des seconds. Même si les tribunaux sociaux au Maroc n'ont pas encore eu l'occasion de se prononcer sur les conflits relatifs à la question de la vie privée du salarié face aux pouvoirs tentaculaires de l'employeur en matière de surveillance à distance sur les lieux de travail ; les juges marocains ne contrediront pas les normes juridiques et judiciaires cohérentes et respectées par la justice française, puisque la loi marocaine du 23 février 2009 relative à la protection des personnes physiques à l'égard du traitement des données à caractère personnel s'est fortement inspirée du modèle français notamment, la commission nationale de l'informatique et des libertés.

En principe, le salarié ne peut pas être surveillé en permanence à son insu, et l'employeur ne peut atteindre et exploiter les données numériques personnelles du salarié qu'en présence de ce dernier pour un motif sérieux et légitime.

Mots clés : Internet ; lien de subordination ; télésurveillance ; vie privée ; le pouvoir de l'employeur.

Introduction

Privacy is an individualistic conception, it is formed on the idea of secrecy, everything that a person wants under secrecy concerns his private life, the essential is therefore in the will of the individual in a logic of protection of intrusions by others, was this other the employer (LECONTE, 2013).

Today, employers are more inclined than ever to greater control in order to prevent various problems: fight against the theft of materials or goods, control of working time, control of movement of employees etc.

The introduction of electronic communication tools in the company has caused profound changes in the organization of work, so the development of information and telecommunications technologies has profoundly modified the organization of work and relationships between the employer and the employee; consequently, the distinction between working and non-working time or the use by an employee of his professional computer to have access to private files are at the heart of a very rich legal debate.

The employee remains the party to a contract by which he makes his work and his industry available to his employer in exchange for remuneration; strong in a relationship of dependence on him, he holds it by a bond of subordination which operates in principle during working time, this contractual relationship generates a legal and economic superiority of the employer, the employee suffers the counterpart of this imbalance by applying the orders and, if necessary, the control or even the disciplinary sanction (SUPIOT, 1988) ; in France, the court of cassation defines this bilateral relationship as the link characterized by the performance of work under the authority of the employer who has the power to give orders and directives, to control their execution and to sanction the shortcomings of his subordinate, the work within an organized service can be an indication of the relationship of subordination since the employer unilaterally determines the conditions of performance of the work (french court of cassation, November, 1996).

The right to the protection of one's private life is enshrined in many national and international texts, in moroccan positive law, this fundamental right is first of all enshrined by the name which all the lower internal sources, namely the constitution (article 24 of the moroccan constitution of 2011); of other countries have opted for the literal inscription of this freedom within the law, it is the case of the french legislator, it is within the article 9 of the civil code that this fundamental right is highly devoted to such point that the french

constitutional council gives it a constitutional value under the personal liberty protected by articles 2 and 4 of the declaration of the rights of man and of the citizen.

In international law, private and family life is the subject of protection in Article 10 of the european convention for the protection of human rights and fundamental freedoms, it constitutes a sphere of privacy for the individual preventing any interference from the outside: however, this right to privacy does not stop at the door of the company despite the employer's right of surveillance, which also binds him to his employee, if this private life must to be respected, the evolution of the information society allows increased surveillance of the employer and particularly significant interference in this sphere of privacy (GREBONVAL, 2002).

The development of these new technologies also leads to an emphasis on the use that the employer can make of the computer tool to monitor his employees when we know that employees use the Internet during their working time on average 94 minutes per day, including 59 minutes for non-professional purposes, 63% of the surfing done by employees in companies would therefore be for personal use : most visited sites, blogs, forums, social networks, media, leisure, online commerce, video sharing, based on this average, the authors of the study estimate at 14% the drop in productivity caused by the use of the Internet in the office for personal purposes, which would represent in lost time for the company six weeks by year and by employee estimated at 2.5 times the monthly salary for each employee Internet user is concerned (OLFEO study, the reality of using the web in business, 2011).

If the monitoring of employees by the employer is possible and even compulsory, it must nevertheless respect their fundamental rights and freedoms (DUMEZ, 2014), this control is even more problematic when it is accentuated by technological and digital technics and processes as well as; the specificities of this balance of power between the employer and its employees in terms of cyber control invite us to formulate the problematic in the following terms:

Would the sacredness of the private life of the employee at work be to curb the inclinations of employers to want to control everything, does the law allow to, if not to balance the two scales of the balance, at least to avoid the total disappearance of the privacy of the employee? also, is the weak party to the employment contract sufficiently protected in the face of the great latitudes of employers to know everything at the time of the digital revolution?

We will first study the conditions of the remote monitoring of employees before highlighting between the power of the employer and the right of the employee to the inviolability of his as well as his right of expression through the internet network.

1. The remote monitoring methods of the employees

Tired of the behavior of certain employees, such as having to manage breakdowns linked to viruses introduced into computer systems by their excessive connections, some employers have yielded to the sirens of spyware such as "Monitor *MonSalarié*.com"» (American software : « Perfect Surveillance Tools », marketed in France since 2010), these "snitches" allow a formidably effective monitoring of the IT activity of employees: recording of all entries on the keyboard, mouse clicks, websites visited, conversations on instant messengers, screenshots every second with the time , the date and the name of the employee etc., all compiled in a report sent daily by e-mail to the employer; as much to say that with these software of control, the private life of the employee disappears completely from the company (QUEMENER and al., 2020).

Information and telecommunications technologies are conducive to the development of employee surveillance by the employer but under certain conditions even if there is a simple presumption placing the burden of proof on the employer that the work tools are used by the employee for professional purposes.

1.1 The conditions for the remote monitoring of the employee arising from the supervisory power of his employer

Control of his employer the use of the digital tool does not disappear the principle of subordination of the employee to his employer, he can supervise him on the license and during the working time, however, the supervision must be loyal (article 3 of Law 09-08, february 18, 2009), the device must be declared to a national commission[1]; thus, an employer cannot set up software to control the flow of a professional messaging system without a prior declaration (article L.1222-3 of the french labor code), the latter retains a right of appeal (french court of cassation, 16 March, 2011) in the event that he is controlled or even sanctioned on this basis (french court of cassation, 4 July, 2012) ; the employer, being the person in charge under the terms of the law of February 18, 2009, promulgated by dahir n° 1-09-15 and governing the rights and freedoms of individuals with regard to the use

[1] Consultative body with several attributions in labor law, in this case in article 466 of the Moroccan labor code.

of their personal data, must declare the device to a national commission (last paragraph of article 3 of the law 09-08).

Regarding geolocation, this monitoring procedure is only possible if no other means can be used to control working hours, if this monitoring applies to employees who lack freedom in the organization of their work and only for the purposes declared to the national commission ensuring the protection of personal data; in France, both of the council of state and of the court of cassation defend the same principle (Casaux-Labrunée, 2012).

It should be noted that the geolocation device is also excluded if other control methods are possible, better proportioned to the objective sought (french cassation court, 3 november, 2011).

In France, with regard to the declaration phase to the CNIL : the national commission for IT and freedoms (NCIF) which is the equivalent of the national commission for the control of protection of personal data and from which the moroccan legislator was inspired to implement the law of February 18 2009 (DHIMENE 2020), the social chamber of the french cassation court is relatively flexible, this is what we see in several decisions rendered during 2017, it for example considered that the absence of a simplified declaration of a professional electronic messaging system not provided with an individual control of the activity of the employees, which is not intended to object to privacy and fundamental freedoms under article 24 of the Data Protection Act (a french law n° 78-17 of January 6, 1978 relating to data processing), does not make illegal the production in court of emails sent by the employer or by the employee whose author cannot be unaware that they are recorded and kept by the computer system (french cassation court., June 1, 2017). ; in another decision, the social chamber ruled that informing the employee of a geolocation system that once the device is in place does not necessarily represent a breach by the employer making it impossible to continue the employment contract and justifying an act to the wrongs of the employer (french cassation court, December 20, 2017).

1.2 The contours of the presumption of professional character of the tools made available to the employee

The difficulty in applying the principle of inviolability of the secrecy of correspondence within a company lies in the possible confusion between professional and the personal files of the employee on his computer station, this is the reason why a presumption of professionalism of the files on the employee's computer tool has been put in place in

particular by french case law, which retains that the files created by an employee using the computer tool made available to him by his employer for the performance of his work are presumed, unless the employee identifies them as personal, to have a professional character so that the employer can have access to it without his presence (french cassation court, 21 December, 2006).

But this rule led employees to generalize the mention to “personal” on their files recorded on their computer, but a decision from the french court of cassation (french cassation court, 4 July, 2012), provided an important clarification by considering that the fact that an employee names one of his files "personal data" is a necessary but not sufficient condition to consider all the data of said file as having a personal character, the employee had deposited in the hard drive of his computer tool made available by his employer more than 1,500 files relating to pornography, all representing 787 megabytes in the space of 4 months, he intended to contest the sanction pronounced against him dismissal of the executives on the grounds that the employer had consulted his computer without his presence.

Later, the ECHR [2], ruled that there had been no invasion of privacy within the meaning of Article 8 of the european convention on human rights, considering that the disputed files were not had not been clearly identified as private, whereas it was provided in the user charter that the information of a private nature had to be clearly identified as such (ECHR, 22 February, Libert against France, 2018).

In the same sense, the emails sent and received and the connections established on websites from this tool have a professional character, the french cassation court considered that a message sent or received from the workstation made available by the employer has a professional character, unless it is identified as “personal”, in the subject of the message; therefore, the employer can consult them outside the presence of the employee, it is the same for the data the employee’s business phone (french cassation court, May 30, 2007).

On the other hand, an employee can use the professional IT tool for personal purposes without being at fault, this type of use cannot however exceed a certain threshold thus, the employer, thanks to the information obtained by his monitoring, can prove that the employee makes excessive use of his work tool for personal purposes, he will be entitled to penalize him, or even to dismiss him, in the same sense, the judge recalls that this is the case if an

[2] The european court of human rights.

employee has stored in such a way excessive personal files on his work computer (Appeal court of Rouen, April 26, 2017).

It must be remembered that the employer cannot access the information contained on the personal USB key of an employee and disconnected from the professional computer, the right of property and respect for the private life of the employee opposing it (french cassation court, 5 July, 2017), if the employer can exercise supervision over employees, he must nevertheless respect their fundamental rights and freedoms in the company, by not introducing disproportionate restrictions and not justified by the task to be accomplished, it should be noted that this provision prohibiting restrictions by the employer on the fundamental rights and freedoms of employees, in this case the respect for his private life is provided for by a legal text in french labor law, which guarantees great legal certainty and would facilitate work judges since they are the ones by the text of the labor code without having to refer to common law or to general principles of law (article L.1121-1 of the french labor code).

The issue of employee privacy at work put to the test by means of controls digital technology arises more particularly with respect to its correspondence as well as its freedom of expression.

2. The control of the employee by the remote monitoring of his correspondence and the risk of interference with his freedom of expression

Despite the presumption of the professional nature of the IT tools made available to the employee, the employer must respect the latter's privacy, the question is rebounded by the use of social networks.

2.1 Respect for the private life of the employee to the test of the employer's power to control his correspondence

It is very important to remember that the employer's power to control the digital activities of its employees is not only based on the relationship of subordination but above all on its special obligation to control internet access that a supplier has set up at his disposal, therefore, he can see his civil liability engaged following use of the internet by his employees damaging to third parties, this type of liability is commonly referred to in the labor code, civil and criminal codes as that of employers because of faults committed by their employees during the performance of an employment contract (article 85 of the morrocan dahir of obligations and contracts, 1933) : responsibility of the principal due to

faults committed by the agents in the exercise of their functions (appeal court of Aix-en-Provence, March 13, 2006); on the penal plan, he may also be held liable in particular, if as a legal person, when the acts are committed on behalf of it and when the offense is committed within the framework of the structure, the organization and functioning of the company, it is committed in its entirety (BOUHARROU, 2002), by analogy, if it does not control the access of its employees to illegal sites because of their content child pornography sites, illegal online games, racist or revisionist sites, sites selling banned or regulated products etc.(L.121-2 of the french crminal code).

The moroccan law of February 18, 2009 relating to the protection of individuals with regard to the processing of personal data, reinforced by international law (Article 8 of the human rights convention), protects private life including the secrecy of correspondence and the personal life of the employee, defined as everything that is outside the contractual and distinguished division of professional life, is protected (LECONTE, 2013).

The employer's power of control finds another limit in the fundamental principle of the right to respect for private life from which every employee benefits, the latter has the right, even at the time and place of work, to respect for the privacy of his private life, this implies in particular the secrecy of correspondence (Article 447-I of moroccan criminal code). The famous Nikon judgment of October 2, 2001 clearly affirms that there is a private life in the workplace and that it must be respected, even though it expresses itself by the means provided to the employee for work and even then that the employer would have prohibited his employees from using their computer for personal purposes (Gautier, 2001), this judgment has singularly extended for employees, at least under french law, the scope of protection deriving from article 9 of the french civil code and from Article 8 of the european convention on human rights to whom we will add article L. 1121-1 of the labor code if the employee intends to assert an unjustified or disproportionate interference with his privacy as a result of the control procedure chosen by the employer and thereby contest the proof of the facts which he has are reproached in the context of a possible dismissal for serious misconduct; this ruling, which is so important in french labor law, has above all adapted the principle of the secrecy of correspondence to modern modes of communication the current difficulties relate much more to messaging and electronic files than to postal letters (QUEMENER and al,. 2020).

Unless they have been expressly identified as personal, the files used by an employee during his working time are considered, by the effect of the presumption, as professional unless he calls them personal; consequently, the employer retains the possibility of consulting them without his consent or his presence; however, it cannot be used as evidence against the employee if these files relate to his private life, these solutions apply to files and to electronic mails (CHONNIER, 2011).

As for files or messages on the professional computer, the presumption of professional character can be reversed if the employee names them explicitly personal, by a decision rendered by the social judge (french cassation court, January 26, 2016), he have reaffirmed this right to the secrecy of personal correspondence of the employee which stems from the fundamental principle of the right to respect for his private life, in fact, the judges argue that the employer cannot produce in court messages from the employee resulting from his personal messaging, even if these are discovered by the employer on the professional computer made available for the needs of the employee's activity.

Messages recorded on the hard drive are also protected if they come from the employee's personal messaging system, they are then subject to private life and the employee must be present so that the employer can consult them; the european court of human rights as well as considers that the opening by the employer of the personal emails of the employee, without his presence and without his having been informed, necessarily characterizes an invasion of his private life, the employer cannot then use the elements obtained to sanction his employee or as a means of proof (ECHR, 5, September, 2017).

The interference of the employer may, however, be justifiable if it pursues a legitimate aim and remains proportionate to that aim; the european court of human rights considers that this is the case when the employer, a public authority, seeks to protect his rights and the name of the files in question was "D: personal data, formula considered as generic (ECHR, 22, February, 2018, Libert against France).

2.2 Monitoring reports kept by an employee on social networks

When it comes to social networks, and the conversations that employees can have there about their company, the rampart of private life seems very thin, when it comes to escaping a sanction pronounced by the employer for offensive remarks or harmful to the company (GOLHEN, 2020) ; if the employee who expresses himself on a social network outside his working hours and from his personal computer may have the impression of being in a

private sphere on which the employer does not have taken, the conditions of use of said social network, more or less open: friends of my friends, are able to modify the private nature of the comments made, they will come under the public sphere and, as a consequence, the employee will no longer be able to plead the violation of his right to respect for private life (RAY & BOUCHET, 2010).

The development of Facebook has given rise to new and particularly abundant litigation, in the event of employee insults towards the employer on this new form of media; according to french case law, the solution depends, in this hypothesis, on the setting retained by the employee, if the latter carries out a filtering and reserves the content of these comments to a reduced number of friends, the case law considers that this closed setting does not does constitute a public insult and is therefore not likely to characterize a real and serious cause of dismissal (french cassation court., 12 September, 2018).

Conversely, if the wall is public and the setting open, the fault of the employee is likely to justify a dismissal if necessary, without compensation (Labor Council of Boulogne-Billancourt,19 November, 2010), the difficulty consists in determining the border between the settings allowing to remain within the framework of the private life and the broader setting which makes it out, it seems that a strict setting is necessary here, the appeal court of Paris underlined in its decision of december 12, 2018 that the conversation space was limited to fourteen “friends, case law endeavors to establish a reconciliation here between, on the one hand, the employee’s freedom of expression and his right to respect for his private life and on the other hand, respect for the rights of others as referred to by Article 10 of the european convention on human rights, in this case the reputation of the employer; thus, the burden of proof of the fault obviously falls on the employer, it can be done in particular by bailiff's report, we were able to wonder about the unlawfulness of this with regard to the principle of fairness of proof, the employer having to enter an employee’s network in order to obtain it, in reality, this risk of wrongfulness appears low insofar as the problem of the sanction arises only if the network is widely open to the public (QUEMENER and al., 2020).

It must be emphasized that the quality of an executive does not deprive the employee of his freedom of expression, especially internally, even if this may be limited by the duties of loyalty and confidentiality (french cassation court, 14 December, 2013).

The employer finds his supervisory power dependent on the type of settings used by the employee who owns the account, so the presence of closed settings and in the case of Facebook – public or private space – a judgment of appeal court of Rouen annulled the dismissal of a cashier for serious misconduct based on a correspondence published on Facebook (appeal court of Rouen, 15 November, 2011); in this case, the employer was not able to demonstrate that the remarks had been published in a public space, in which case the correspondence in question produced as evidence would have lost its character of private correspondence, the french judge considered that the proof of an open configuration allowing undetermined persons to access the comments is not reported; in the same sense, the appeal court of Bordeaux also retained the private nature of the Facebook wall similarly (appeal court of Bordeaux, 1er April, 2014)

The french high court qualified as private elements from the employee's Facebook account that she received from her work colleague's phone, these the employer not having the right to consult them, by doing so it infringes the right to respect for the employee's private life (french cassation court, 20 december, 2017), but remember that an employee cannot invoke the privacy of a conversation when it has not used the site's privacy settings.

Two judgments (Labor council of Boulogne Billancourt, November 19, 2010) had thus previously concluded that the employee who produces a Facebook page whose wall is accessible to "friends of friends" – therefore in open configuration – has not violated the privacy of the dismissed employees, for serious misconduct, in this case, the employees had published on the personal page of one of them remarks denigrating their company and the social judge considered that their dismissal was justified (appeal court of Versailles, 22 February, 2012).

The same meaning, such as the message posted by an employee on the wall of one of his friends and whose account had been configured to allow access to "friends of his friends", because, according to the judges, the fact that Facebook is known to be a network open to all by simple internet connection, does not offer the confidentiality often sought, likewise, the dismissal of an employee who had posted on the wall Facebook of a former colleague derogatory remarks with regard to his company considered that this network has no other objective than to see the number of subscribers increased thanks to the fact that friends of friends accept each other and become friends as a result, the number of friends is a

parameter for assessing the private or public nature of the network (appeal court of Toulouse, 2 February, 2018).

Conclusion

Forty years after the first email exchange between the university of Los Angeles and that of Stanford, information technologies and especially communication technologies are gradually erasing the spatial but also temporal frontiers, they are even one the main factors of the growing confusion between professional and personal life today (RAY & BOUCHET, 2010); this could be part of the unhappiness of employees and yet the literature remains poor on the subject, while the guarantee of a good social climate is able to prevent violence, stress and discrimination within the company (Njaya & Serno , 2020).

The alienation of the employee in the contractual relationship must not be aggravated by the interference of the employer in the private life of the employee, the company is the place of a possible infringement of the employee's personality rights, new technologies can be sources of attack on the moral or physical integrity of the worker, the issue of respect for the employee's privacy in the employment relationship requires reasonable solutions based on the principles of necessity, purpose, proportionality, adequacy and relevance, in order to reconcile the divergent interests and the establishment, if not of a balance between the employer and his employee, but at least a guarantee so that the private life of the latter does not leave the sphere of intimacy; on the other hand, the proper functioning of the company is not disturbed by the improper use of the IT tool made available to it (Boughanmi-Papi, 1995).

Whether it is a question of checking the files on the employee's computer taking knowledge of his correspondence or judge his expression on social networks, the employer can in principle remotely monitor his employees in order to make his company function well, this power of control is not without limit, nor the argument of sacredness of the private life of the employee must not make him forget that he is under the subordination of an employee who undergoes heavy legal obligations to make his company function well (CHONNIER, 2011).

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