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Social media: when the court declares the evidence inadmissible

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Social media sites, like Facebook, are inexhaustible sources of personal information which can constitute evidence in the context of employer-employee disputes. In matters related to evidence, the general rule is that any relevant evidence is admissible.[1] Moreover, the courts have ruled that an excerpt from a Facebook page is admissible into evidence, provided that it has not undergone [translation] "severe editing" which would alter its essence or prevent opposing party from contradicting it.[2]

However, the courts must set aside such evidence, even on their own initiative, when the following two criteria are met:[3]

1. There is a breach of fundamental rights and liberties;[4] and
2. Using such evidence may bring the administration of justice into disrepute.

In what contexts have tribunals specialized in labour law decided to set aside evidence taken from a Facebook page?

The fake social profile

In 2012, in the case of *Campeau* c. *Services alimentaires Delta Dailyfood Canada inc*.,[5] the Commission des lésions corporelles ("**CLP**") ruled on the admissibility of excerpts from a private Facebook page in the context of the contestation by an employee of several decisions of the Commission de la santé et de la sécurité du travail ("**CSST**") regarding an employment injury.

In this case, the CLP refused to admit these excerpts as evidence since the employer had no serious reasons for questioning the employee's honesty and in fact, obtained access to her private Facebook page by creating a fake social media profile which contained information intended to entice the employee into accepting a fake friendship request. In fact, the employer had created a false profile especially designed to capture the employee's attention: work with the Cirque du Soleil, studies at the same university and similar artistic preferences.

The CLP refused to take into consideration the employer's evidence obtained through social networks for the following reasons:

> The use of a fraudulent scheme by the employer to access the Facebook page constituted an illicit and serious breach of the employee's right to privacy; and
> The impossibility of obtaining this information legally (private profile which was not available for access by the employer), combined with the absence of prior serious doubts as to the employee's honesty which would justify the employer in acting as it did, would have brought the administration of justice into disrepute.

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The CLP further concluded that the employer's actions constituted an unrestrained incursion into the employee's private life and it could not grant *carte blanche* for such spying.

Involvement of a third party

In 2016, in the case of *Maison St-Patrice inc.* et *Cusson*[6], the Tribunal administratif du travail ("**TAT**") refused to admit into evidence excerpts from the Facebook profile of an employee filed by the employer.

The employee had a Facebook account which was restricted by privacy protection parameters and exercised active control over the visibility of her posts. However, the employer had succeeded in obtaining excerpts from this private account through an unidentified third party, possibly a colleague and "Facebook friend" of the employee, which the TAT concluded was subterfuge. The employee further testified to the effect that it was not the first time the employer had committed unjustified breaches of the privacy rights of its employees. Indeed, she had herself been asked by the employer to disclose the contents of the Facebook profile of a work colleague to which she had access.

The TAT concluded that the employer had seriously breached the employee's privacy, without a real interest or serious purpose for doing so, in hopes of possibly uncovering a lack of honesty. In order to act in this manner, the employer's breach of the employee's privacy should have been justified by rational, serious and necessary reasons, which was not the case. Furthermore, the employer could not use subterfuge to obtain information found in the private social profile of the employee. Since the illegally obtained evidence brought the administration of justice into disrepute, it could not be accepted by the tribunal.

Conclusion

Although it may sometimes seem appropriate for an employer to check the posts of its employees on social networks, some information obtained may be inadmissible as evidence before a tribunal. As in the case of surveillance, employers should ensure that, before they take actions which may constitute a breach of their employees' privacy rights, that they have serious reasons for questioning their sincerity and honesty and avoid conducting systematic or random verifications. Furthermore, the creation of fake profiles, involving a third party and the use of other ruses or deceptive strategies to obtain confidential information without sufficient reasons may be very viewed poorly by tribunals, resulting in their refusal to consider evidence collected in such a manner.

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1. *Civil Code of Québec*, art. 2857, hereinafter "CCQ".
2. Particularly see on this subject: *Landry* et *Provigo Québec Inc. (Maxi & Cie)*, 2011 QCCLP 1802, para 44-48.
3. CCQ, art. 2858 ; *Act respecting administrative justice*, CQLR c. J-3, art. 11.
4. What is most often breached is the right to privacy: *Canadian Charter of Rights and Freedoms, Part I of the The Constitution Act*, 1982 [Schedule B to the Canada Act 1982 (UK), 1982, c. 11 sec. 7, 8 and 24; *Charter of Human Rights and Freedoms*, CQLR, c. C-12, sec. 5 and 9.1.
5. 2012 QCCLP 7666.
6. 2016 QCTAT 482.

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