

PRIVATE LIFE AND EMPLOYMENT

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Mrs. Chairwoman, Ladies and Gentlemen,

A young man wanted to reveal his homosexuality to one of his best friends. In attempting to send him an email from his work place he made a mistake and sent his message to all the company's computers. He was dismissed by his employer for using the company's electronic message system for private purposes. The case was brought before the court, which, despite being formed half by employer representatives and half by employee representatives, ruled at a majority that the dismissal was lawful.

The dismissal of an employee of a computer manufacturer uploaded pornographic material from the web, was judged unjustified by the Labour Court of Nanterre on January 13, 2000.

Conversely, on September 19, 2000, the Labour Court of Montbéliard considered as lawful the dismissal of a woman who had used company equipment to inform a former employee of the company of current reorganisations.

On November 17, 2000, the 17th criminal chamber of the First Instance Court of Paris ruled that the Act dated July 10, 1991 on the secrecy of correspondence sent by way of telecommunication applied to « any remote communication means currently known », including the Internet.

Among others, these examples show the current trials and errors of the case law regarding an issue that the Internet and networks put in the centre of the private life and employment problem, which it self is renewing itself.

Indeed, for a long time, there was a strong distinction between private life and employment. This translated into almost banning, at least formally, any private life from the work place. The policies of numerous companies bear witness to that, such policies expressing the regulatory power of the company manager.

During the last decades of the 20th century, the concept emerged that an irreducible part of an employee's private life can exist within the company. From then on, it

was generally accepted that the employee does not give up all sovereignty and right to a private life by merely passing the gates of his/her company.

Naturally, in the company, the right to a private life co-exists with the right of the employer who should, as a « good father », ensure the proper performance of the employment contract and the preservation of the company's assets. A natural tension results from the different, if not conflicting, interests of both parties.

I – Review of techniques and private life within the company :

Private life should be discussed within the context of this tension, knowing that :

- The subordination relationship which is part of the work relationship makes the latter asymmetric ;
- That techniques are increasingly offering functions likely to be more and more intrusive ;
- That the changes of an increasingly immaterial work affects its nature and required creative and innovative involvement, which supports freedom.

Thus, techniques give the means to increase the employee's openness, at the very moment when that employee is having his right to a private life recognised and when, in our society, professional efficiency is dependent on the trust placed in a working man.

Although it is in line with them, the Internet distinguishes itself from techniques by a different nature from previous techniques, all of which affected human work.

Three generations of information and communication techniques at least have had applications here.

The first generation is the generation of automation, which in the industry, introduced robots, first with a view to relieving working men, then to increase knowledge by the computer.

The second generation has seen Information and Communication Technologies change and acquire new functions that help monitor employee attendance in the places where such employees were to be to perform their employment contracts. Passes, video cameras and autocommutators were given the name of "electronic supervisors" the main objective being to check attendance, check locations, and subsequently, measure productivity.

We are at the heart of the third generation which certainly by enriching, and more than the ones before, by mutation, is introducing the functions of networks, of which the INTERNET constitutes the modern figure.

At first glance, these technologies illustrate what the C N I L said on several occasions : "we used to be on files because someone wanted us on files. Now we can be on files due to the only fact that technology leaves traces without us always being fully aware".

Such traces are divided in three categories :

- for the needs of preventive or curative system maintenance : identifying breakdowns, improving performance ;
- for safety purposes, by allowing access to the system only to authorised users and knowing who does what, avoid malevolence and plundering resulting from the disclosure of possibly strategic data circulating unprotected or ill-protected on the network ;
- for restricting, by filtering, some actions by the uses, considered by the company as beyond the scope of their duties.

At first sight, one could think that the third generation of ICT would only extend the effects and risks of the second generation by recording in more or less detail employees' facts and acts. However it differs by the brand new possibilities it provides and that leave traces open for review, which traces would be tedious to delete.

Actually, a new horizon is opening up, with the traces left by each and all, processed by software continuously designed by computer wizards, to the establishment of intrusive but prospective professional or psychological profiles, hazardous but endowed by technology with a disproportionate credibility and almost assurance of infallibility.

Thus, from its beginnings up to now, the history of ICT went through :

- An era of productive and knowledge function in the beginning
- An era of retrospective and memory function, afterwards
- An era of prospective and mirror function, now
- An ear of forecasting and trajectory functionnow imaginable.

The forecasting and trajectory function is particularly frightful. Information « from elsewhere », sometimes from the most intimate areas, such as genetic analysis, will help carry out sorting that yesterday's techniques and practices did not even envisage.

Here is the issue of efficiency, with the transformation of human work, and the substitution of immaterial or virtual energy to physical power. Dematerialization makes human work more secret. Checks and measures will no longer be based on an objectivity comparable to that of previous situations, where enthusiasm, energy, skill, experience and attendance were the basis of capacity, testified to a level of qualification and marked out likely career prospects. Time, place and space unity was the rule.

Immaterial work breaks free from those rules, it cannot be contained within old parameters. The impossible containment in yesteryear's criteria prompts to seek other appreciation methods, which are provided by the development of techniques, traces and resulting analysis. With them, the disclosure of everyone's reasoning method, the penetration of what until then was a « black box », are now possible. A new risk to the individual results from the « solitary » aspect of immaterial work, offset by the counter-productivity effect of anything coercive on that type of work, unlike work requiring physical strength which can be « forced ».

Regarding recognised rights to a private life, article L. 120-2 of the French labour code now provides that « no one can restrict the rights and collective and individual freedom of people in a manner out of proportion with the pursued purpose ».

Apart from that future and from the possible disclosure of the secret functioning of each one of us, Internet has already helped increase the monitoring, and is central to a growing dispute. Because the technique is so young, a case law in the making has gone through trials and errors as illustrated by the examples above. These examples show that exchanged messages are not protected in an absolute manner :

- First because the law does not deny an employer the right to tap his employees' phones provided he can furnish evidence of his good faith ;
- Secondly, because it is too early to believe as a completely established fact, based on the conflicting terms of current case law, that reading an e.mail stored on a message server or on the hard disk of a micro computer would constitute an interception of mail in the meaning of article L. 26-15 of the French criminal code.

Thus, the confirmation of the first judgements, especially from labour courts, would be more stringent towards the use of electronic mail than they were with the telephone and minitel.

In this far from stabilised situation, it is important to avoid excess, without impairing the best use of the ICTs' new functions.

II – TWO PRINCIPLES AND ONE PRACTICE FOR REGULATION

Now it is around two principles and one practice that the control and monitoring of company employees are organised, in the area of private life protection.

Openness and proportionality are the two founding principles used by the collective debate.

1. Transparency :

Transparency consists in the duty to inform people about the checks they can be subjected to and of any file or data processing concerning them.

2. Proportionality :

It is another primary principle of our data protection law.

Naturally, the principle of proportionality between an objective and adequate measure to achieve it is the most subjective and difficult to implement. In addition, the actual situations which the principle applies to take on various forms, and there are many different work situations. The management of employees in a craft company is not like the management of nuclear power plant employees ! The nature of the company, of its business, the more or less strategic position of employees can prompt different constructions of the same proportionality principle.

This is where the debate between employee and employer representatives should fully play its role in order to find a balanced implementation of the proportionality principle to the various situations existing in companies in general, and in each company in particular.

3. Collective discussion :

The collective debate is a prerequisite of real flexibility and the rule of collective life of sensible people with goodwill. This being said, the different interests of the parties naturally requires a compromise, more productive than an ukase for more involvement. Any compromise establishes rules and puts a temporary or final end to discussions.

In addition, collective debate in the area of the private life of employees, is a condition of justice : in the subordination place which the company remains, private life cannot be defended alone, it should be defended collectively.

RECOMMENDATION ITEM : what to do for a better use of current and future ICT for a win-win balance.

1. As to information system safety, generally :

As an introduction, it should be reminded that company durability requires company protection. Such protection naturally concerns intrusions and malevolent acts. This is the responsibility of information system departments. The latter have an essential role, in proportion to the strategic and more or less secret nature of the data which are at a higher risk of being disclosed and pillaged on the net than elsewhere.

Implementing information system safety rules is a right of the employer and his duty, to protect his company, provided he does not turn secrecy into a cult.

Talking of openness when talking about information system safety simply requires that the overall plan implemented be made known to the employees and their representatives within the company. In doing so, the rights and duties of everyone will be determined. It does not mean leaving any information « open », it means disclosing the systems that will enable everyone to become responsible in accordance of the principle that no party, allowing for exceptions, has any interest in weakening the company they work in.

2. Trust and loyalty as principles :

Trust is the key to employee involvement. It is based on the rights and duties of the parties. No one will dispute the employer's right and duty to protect the company and ensure the employee's performance of his employment contract. The employee however has an undisputed right to protection of the right to respect for the « irreducible » part of his private life taking place in the company.

Achieving a balance is not easy. Discussions to reach a compromise are preferable, in order to establish rights and duties. Charters established by the only employer are not a good idea : their unilateral nature liken them to corporate policies. This prompts suspicion and many of those charters could be declared unlawful owing to their establishment and provisions.

3. About the use of company communication means by employees for private purposes :

Looking at decisions made by French courts in the area of dismissals on the ground that the employee has made a private use of communication means made available by his company, we found that the balance point between a lawful and acceptable private use and pure and simple prohibition had continuously moved from great tolerance to great strictness, as technical innovations emerged. An employee can receive personal mail on his work place, and the employer cannot open it. An employee can usually use the phone for private purposes, without being sanctioned ; an employee can also use the minitel for private purposes. However the first decisions regarding internet sites show a new strictness, sometimes with an absolute prohibition of any use of company communication means for a private purpose.

The feared attraction of « particular » or generally attractive internet sites, using contractual work time for other purposes, are in the spotlight of attention. The novelty of the communication means exacerbates the fear to see employees using an unacceptable amount of their time or extra-professional business.

Here again, the principle of an absolute prohibition of any extraprofessional use of the company's communication means should not be chosen. Such principle is quite unrealistic and could be counter-productive. Time to surf on extraprofessional sites may be the only « coffee-break » of our information companies and e-companies. It also is a condition of the intensity of the before and after work time.

Thus, rather than prohibition, the site filtering approach should be preferred, with the possibility, expressed, controlled and exceptional, of controlling connection times per computer, without identifying the sites visited, or a list of most visited sites, but without any name identification : such is the CNIL's recommendation.

4. Collective negotiation as a method :

Thus the CNIL recommends putting information system-related concerns in the heart of employer and employee negotiation at the various interprofessional branch and company levels. The choice of trust for efficiency requires an enlightened discussion.

Controlled on a regulatory, interprofessionnal and branch level, the debate should take place in existing bodies and result in a compromise between the parties.

The adopted document (charter, code of good conduct...) would prescribe the various applications in a detailed manner, with their goals, in order to satisfy the principle of proportionality. From this point of view, the company is not uniform and the proportionality and goal should be adjusted to each specific situation. They do not all require the same level of safety and monitoring.

The extremely rapid change in techniques and addition of new functions should result in any agreement being subject to regular updates.

The fact that the new technique generates new effects does not disqualify practices and structures that were efficient up until then. No doubt the practice of collective negotiation, with the flexibility and adjustability it offers, is valuable in that it allows to find a permanent balance provided employer and employee representatives have goodwill. After « digesting » the first two generations of ICTs, employers and employees are responsible for doing the same with the generation of Internet and networks.

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CONCLUSION

The transformation of human work causes the substitution of immaterial energy to physical power in professional activities. Immaterial energy is the basis of knowledge society that is central to an increasing number of our contemporaries and the prospect, if not the future of all. Mobilising immaterial energy requires conditions, including enlightened freedom, which were not essential to the use of physical power where coercion could prove efficient. And the corollary is a form of solitude inherent to the forms of immaterial work where the inter-individual distinction is natural.

The change in the centre of gravity of the production act puts the issue of monitoring in the heart of the debate. Too much monitoring generates passive resistance, including if it is unknown to the person concerned. Efficiency feels the effects thereof.

This confirms, as needed, that openness and discussion are the keys at a time when information and data are becoming the basis of work. Information and data are enriched by exchanges within improvable rules.

That is why, rather than talking of monitoring and cyber-monitoring, would it not be better to talk about regulation and cyber-regulation ?