



## Credit card

# Misuse by employee

Par Romain Dupuis le 21 October 2021

Does an employee who uses a company credit card for private purposes commit a breach of trust to the detriment of his or her employer ? The Federal Supreme Court answered this question in the affirmative in its ruling [6B 701/2020](#) of 11 June 2021.

A bank grants an executive secretary a credit card in her name and for her exclusive use to enable her to pay her business expenses independently.

Each month, the employee receives a statement which she must check for accuracy before forwarding it to her superior for verification and approval. If, exceptionally, she has used her card for private purposes, she is required to highlight the relevant transactions so that the related amounts are deducted from her salary.

In breach of her obligations, the employee frequently uses her credit card for private expenses without reporting them to her employer. Over a period of seven years, she spends nearly one million francs on restaurants, travel and other cosmetic surgery operations.

On 24 January 2011, the bank filed a criminal complaint against its employee for breach of trust ([art. 138 PC](#)) and fraud ([art. 146 PC](#)) and joined the proceedings as a civil claimant. It claimed damages equal to the amount of the embezzled funds.

After various procedural setbacks, the Zurich District Court fully acquitted the executive secretary and referred the bank to take civil action with regard to its claims for damages. This judgement was upheld on appeal.

The bank therefore lodged an appeal with the Federal Supreme Court and requested that its employee be found guilty of breach of trust and ordered to pay the bank the damages claimed.

Since the bank did not contest the acquittal on the charge of fraud, the Court of Cassation did not dwell on it. It reiterated that the cantonal court had ruled that the condition of trickery was lacking since the executive secretary had not falsified any statements, so that her private expenses were easily visible. A basic check, which was possible and reasonably required – and moreover explicitly provided for in the internal regulations – would have made it possible to recognise that the card had been used contrary to the instructions.

It is therefore from the perspective of breach of trust that the TF then analyses the employee's

alleged offences.

According to the cantonal court, by granting a credit card to its employee, the bank had not granted it 'largely uncontrolled' (*weitgehend unkontrollierte*) power of disposal over assets insofar as – precisely – a control mechanism was provided for. The Zurich court thus considered that the employee did not have material power of disposal since the amounts appearing on the card statements were only debited from the bank account once they had been checked and approved by the hierarchy.

In other words, for the cantonal authority, the bank's power of control excluded the employee's power of disposal, which in turn excluded a breach of trust.

The bank does not share this view and considers that its executive secretary was able to use her business card for her private expenses without prior authorisation, such that she did indeed have the power of material disposition. For each expense, a claim for reimbursement arose against the bank, which caused it damage regardless of any subsequent checking of the statements.

The Court of Cassation was persuaded by the bank's argument. After a brief reminder of the tripartite relationship that is formed through the use of a credit card (seller, card issuer and buyer), it found that the employee had been able to use her card without prior authorisation, so as to oblige the bank to pay third parties for each of her private expenses, contrary to the terms of use.

Insofar as there was no *upstream* control, since the credit card allowed the executive secretary to use up the credit limit independently, the TF considers that the latter was indeed granted power of disposal within the meaning of [art. 138 PC](#). The *downstream* control process does not limit this material power of disposal.

The TF concludes that assets were indeed entrusted and then used without authorisation, i.e. in violation of the purpose established by virtue of the relationship of trust. The employee must therefore be found guilty of breach of trust.

In view of this conviction, the FSC also accepts the bank's appeal on the question of referral to civil action. When a guilty verdict is handed down, the criminal judge must rule on the civil conclusions if they are sufficiently quantified and substantiated ([art. 126 para. 1 let. a and para. 2 let. b CPP](#)), which is the case here.

In our opinion, the [6B 701/2020](#) judgement is fully in line with the case law of the Federal Supreme Court on the subject of breach of trust. For many years, the FSC has accepted that a patrimonial value can be 'entrusted' within the meaning of [Art. 138 PC](#) even if the injured party retains his own power of disposition (cf. e.g. [ATF 119 IV 127](#) in the matter of power of attorney over a bank account).

In a 2018 ruling ([6B 382/2017](#)), the FSC also upheld the conviction for breach of trust of an employee who had used a bank card provided by his employer for private purposes.

Whether one considers – as the TF – that the damage occurs at the moment when the card is used for a private expense, or at the moment when the employee fails to highlight the relevant

transactions for the control of her superior, it must in any case be admitted that the employee had the power to dispose of the assets without the assistance of the bank, so that these assets should be considered as entrusted within the meaning of [art. 138 of the Penal Code](#).

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