

# Considerations on the conditions under which the employer may monitor their employees at the workplace

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## **Abstract**

*Recently, the European Court of Human Rights in the case *Bărbulescu v. România* has ruled that the national courts did not ensure respect for the right to privacy in the employment relationship of an employee who had been disciplinary dismissed for using the internet and an IT application in the personal interest during the working hours, dismissal which was based on evidence obtained after the employer had monitored the employee's electronic communications. The Court concluded that the national courts failed to strike a fair balance between the employee's right to private life at the workplace and the employer's right to supervise and control the work of his employees. Thus, the Court found a violation of Article 8 of the European Convention of Human Rights. In its decision, the Court specified the criteria to be applied by the national authorities in order to achieve a balance between the rights of the two parties (employee-employers). The herein study aims to briefly analyze the case and to establish the concrete elements that employers should consider if they intend to monitor their employees in order not to violate their right to private life at the workplace of the latter.*

**Keywords:** *employee, employer, privat life, monitor, labor law.*

**JEL Classification:** K31

## **1. The Trial *Bărbulescu v. Romania***

Recently, on 5 September 2017, the judgment of the Grand Chamber of the European Court of Human Rights in *Bărbulescu v. Romania* was published. This decision altered the first solution adopted by the Court on 6 June 2016. The case concerned the violation of Art. 8 of the European Convention on Human Rights regarding the observance of the private life of the employee at the workplace, respectively the observance of his correspondence.

In fact, the plaintiff, employed on a private-sector employer's job, was fired because he used the internet network of the company he was employed during working hours, in violation of the rules in the internal regulation prohibiting the use of computers and other equipment of the unit for personal purposes. The employer also issued an internal note alerting its employees that the use of personal equipment by the employer is forbidden and that an employee has been fired as a result of such an act. The employer monitored for a determined period the correspondence carried on by the applicant on a private Yahoo Messenger account,

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an account created at the employer's request to respond to requests from the employer's clients. The complainant used the account to communicate with clients as well as on personal interest. Following the monitoring of the yahoo messenger account, the employer has received transcripts of the conversations made by the complainant over a period of approximately 5 days. Following the presentation of the employer's monitoring situation, the complainant claimed that all his communications were of a professional nature and denied the use of the employer's resources for personal reasons. On the basis of the transcript of the conversations made on the yahoo messenger account, both for professional and professional reasons, the employer ordered the applicant to be dismissed for disciplinary reasons by violating the rules contained in the internal regulation and internal note prohibiting the use of employer resources personal interest. Against the dismissal decision, the employee expressed controversy claiming that the employer had violated the privacy of correspondence and the right to privacy. The national courts considered that the dismissal decision was legally issued in compliance with the disciplinary investigation procedure in which it was shown that the employee had violated the provisions of the internal regulation which he knew of and which provided for the prohibition of employing the employer's resources for personal purposes, these provisions. It was considered that the right of the employer to monitor employees at the workplace, in particular as regards the use of computers and the Internet, falls within the right to exercise control over the way in which service tasks are performed, as is legally recognized in Article 40 par. (1) lit. d) of the Labor Code. The national courts considered that the measure taken by the employer was legitimate and proportionate to the aim pursued and that the necessary balance had been achieved between the employer's right to supervise the work of employees and their right to private life at work. In order to assess this balance, the national courts considered, in principle, the following: the employer has the right and duty to ensure the smooth operation of the unit, has the right to supervise the way in which the employees perform their professional duties and the disciplinary prerogative ; the employer can monitor and transcribe the employee's conversations on the yahoo messenger account in the context in which the employee denied using it for personal reasons; the employer's employees were warned about the ban on using the equipment / resources of the employer for personal reasons.

In the first instance, the ECHR supported the decision of the national courts and found that the case was different from the others in which the right to privacy<sup>2</sup> was called into question as the employer's internal regulations made known to the employees in writing explicitly forbidden the use of computers and other resources of the employer for personal benefit. Consequently, he considered that the Romanian state had taken the necessary measures to ensure respect for the

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<sup>2</sup> Case Copland v. The United Kingdom, no. 62617/00 ECHR decision of 3 July 2007; the case of Halford v. the United Kingdom, no. 20605/92, ECHR decision of 25 June 1997.

right to private life and the secrecy of correspondence, considering that there had been no violation of art. 8 of the Convention<sup>3</sup>.

On 6 June 2016, at the complainant's request, the case was referred to the ECHR Grand Chamber, which, analyzing the case, brought a new perspective. On the one hand, the Grand Chamber found that the question of the application of art. (8) of the Convention, the instant messenger in question is a form of communication which is part of the exercise of private life, the notion of 'correspondence' applies in the case of sending and receiving messages, even if they are made on a computer of the employer; the correspondence carried out by the employee at the workplace is covered by the concepts of "private life" and "correspondence"; the applicant employee was not previously informed of the extent and nature of the control carried out by his employer, nor of the possibility that he had access to the contents of his correspondence. On the other hand, there has been the question of Romania's compliance with the positive obligations to ensure the observance of these rights<sup>4</sup>. Thus, states have a broad margin of appreciation to determine the conditions under which the employer can monitor the employee's correspondence at or outside the workplace. In this context, proportionality and procedural safeguards against arbitrariness are essential. However, the Grand Chamber found that although the national courts had identified the interests of the parties, they examined whether the disciplinary procedure had been respected and whether the complainant was given the opportunity to present its arguments, they did not properly assess the circumstances of the case and omitted the analysis aspects of the facts when they decided that there was a balance between the interests of the two parties. Thus, the Grand Chamber indicated that the national authorities should also have taken into account the following: if the employer proved to have informed the employee in advance of the extent and nature of the monitoring; if the employer has informed the employee of the degree of intrusion into his / her private life; if the employer has demonstrated a legitimate interest strong enough to monitor the content of the mail; the severity of the consequences of the supervision measure and the disciplinary procedures; if the employer could have implemented less intrusive measures. Thus, despite the existence of a margin of appreciation of the State, the Grand Chamber held that the national authorities did not adequately protect the applicant's right to respect for his private life and correspondence and, consequently, did not ensure a

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<sup>3</sup> The decision was taken with 6 votes in favor and one against.

<sup>4</sup> It can be seen that few Member States have explicitly regulated the issue of the right of employees to exercise their right to private life and correspondence at work. Most member states of the Council of Europe recognize in general terms, at constitutional or legal level, the right to privacy and the secrecy of correspondence. Countries such as Austria, Finland, Luxembourg, Portugal, Slovakia and the UK have express regulations on private workplace privacy in labor law or special legislation. In the legalization of several states (Austria, Estonia, Finland, Greece, Lithuania, Luxembourg, Norway, Poland, Slovakia and Macedonia) it is expressly stipulated that the employer must notify the employee prior to the monitoring. (paragraphs 52-53 of the judgment in *Bărbulescu v. Romania*).

fair balance between the interests in question. As a result, the Grand Chamber established that there had been a violation of Art. 8 of the Convention<sup>5</sup>.

## 2. The legal framework for regulating the right to private life at work

Protection of privacy and correspondence at work<sup>6</sup> is based on:

- art. (8) of the European Convention on Human Rights, which provides:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence. (2) The interference of a public authority with the exercise of this right is only admissible insofar as such interference is prescribed by law and is a measure which, in a democratic society, is necessary for national security, public security, economic well-being the defense of order and the prevention of criminal offenses, the protection of health and morals, or the protection of the rights and freedoms of others”;

- art. Article 17 of the International Covenant on Civil and Political Rights states that “No one shall be subjected to any arbitrary or unlawful interference with his or her private life, family, domicile or correspondence, nor to unlawful interference with his or her reputation and reputation. Everyone has the right to protection of the law against such interference or prejudice”;

- Directive 95/46 / EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data<sup>7</sup>; European act to be repealed upon the entry into force of EU Regulation 2016/679 of the Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/ EC<sup>8</sup>;

- art. 71 of the Civil Code according to which “(1) Everyone has the right to respect for his private life. (2) No one may be subjected to any interference in the intimate, personal or family life, in his or her domicile, residence or correspondence, without his / her consent or without observing the limits provided in art. 75. (3) It is also forbidden to use in any way the correspondence, manuscripts or other personal documents, as well as the information of a person's private life without its consent or without observing the limits stipulated in art. 75”;

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<sup>5</sup> The decision was taken with 11 votes for and six against. It is worth mentioning that one of the votes against was expressed by the president of the court itself.

<sup>6</sup> For the analysis of the legal regulatory framework see R. Dimitriu, *Dreptul muncii. Anxietăți ale prezentului*, Rentrop&Straton, Bucharest, 2016, p. 365-367; R. Dimitriu, *Aspecte privind respectul vieții private și al demnității personalei*, in vol. *Noul Cod civil. Studii și comentarii*, vol. I, Universul Juridic, Bucharest, 2012, p. 260-290; I.T. Ștefănescu, R. Dimitriu, *Considerații referitoare la protecția datelor personale ale salariaților în cadrul raporturilor de muncă*, in „Dreptul” no. 9/2015, p. 187 and next.

<sup>7</sup> Published in OJ L281 of 23 November 1995 as amended by Regulation 1882/2003 published in OJ L 284 of 31 October 2003.

<sup>8</sup> Published in OJ L119 / 1 of 4 May 2016.

- art. 6 par. (2) of the Labor Code enshrines the right of employees to the protection of personal data;
- Law no. 677/2001 on the protection of individuals with regard to the processing of personal data and the free movement of such data<sup>9</sup>.

### **3. The conditions under which the employer may monitor their employees at the workplace**

a). In the light of the ECHR solution, labor relations practice rests with the question of respecting the right to privacy regarding the employer's access to employee electronic correspondence, made by using the equipment of the employer or during working hours.

Providing work equipment, including computer systems with Internet access, by the employer generates the issue of employer control both on how the employee performs his duties and on how to use the equipment<sup>10</sup>. From the employer's point of view, the employer's material basis must be used only for the purpose of performing tasks and duties. Supervision of employees through the use of electronic equipment, telephone calls or the use of the Internet can be determined by various reasons, such as: checking costs, identifying computer viruses, avoiding network overcrowding, monitoring how to perform tasks, identifying breaches the obligation of fidelity and non-competition, possible damage to the image of the employer.

However, the employer can not monitor telephone conversations, how to use the Internet or electronic equipment unconditionally because the freedom of correspondence falls within the right of the individual to privacy. As is clear from ECHR jurisprudence, the employee does not renounce the right to private life at work during work hours; the pursuit of professional activities does not exclude the existence of private life. In any case, monitoring of telephone conversations or the use of the Internet may not include the collection and retention of personal information without the agreement of the employee concerned<sup>11</sup>. Additionally, in the specialized legal

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<sup>9</sup> Published in M.Of., part I, no. 790 of 12 December 2001, as subsequently amended and supplemented.

<sup>10</sup> C. Juguș, *Prejudiciul – repere românești în context european*, Hamangiu, Bucharest, 2013, p. 321.

<sup>11</sup> In this respect, ECHR judgment of 3 April 2007 in the *Copland v. United Kingdom* case, in which it was considered that the actions for collecting and storing personal information relating to the applicant's telephone conversations, as well as those relating to e- and the use of the Internet without being aware of it constitutes an interference with the rights to respect for privacy and the secrecy of correspondence within the meaning of Article 8 of the European Convention on Human Rights and that this interference was not "prescribed by law", given that at the material time, no provision of national law regulates that supervision. The Court has admitted that it may sometimes be legitimate for an employer to monitor and control the use of the telephone and the internet by an employee but considered that in the present case it is not necessary to determine whether the interference in question was " a democratic society." Also in *Amann v. Switzerland* (which concerned a telephone call made to the applicant at the Soviet embassy headquarters, as it was called at that time - to order a hair removal appliance he was selling - intercepted by the public ministry , which requested the information services to be opened by the intelligence services), by judgment of 16 February 2000, the Court held that there had been a violation of Art. 8 by recording

literature it was pointed out that the employer's right to property on the informational means and the legal subordination of the employee does not prevail over the requirement to respect the employee's right to private / personal life<sup>12</sup>.

b). Beyond certain controversial issues that can be found in the judgment, determined by the analysis of some substantive issues, the sinusoidal course of the case, the separate opinions formulated in both procedural phases, the judgment of the ECHR Grand Chamber in the case of *Barbulescu v Romania*, marks a certain vision, gained over time, about the right to the private life at the workplace of the employee and the supervision of employees' activity by employers.

The elements highlighted by the ECHR and which need to be further highlighted in this context are as follows:

- the concept of private life may include both professional activities and activities taking place in a public place;
- within the meaning of Art. 8 of the Convention, correspondence includes telephone conversations, mails, and instant messaging services;
- the right to privacy and the freedom of correspondence continue to exist in the workplace, even if some restrictions are imposed;
- the private life of the employee can not be reduced to zero at the workplace.

Although it may be concluded at first sight that employers can no longer monitor employee correspondence at work, the Court lists the criteria to be applied by national authorities to determine whether there is a proportionality between supervision and purpose and if the employee is protected against arbitrariness. Specifically, the main issues to be considered are<sup>13</sup>:

- if the employee has been notified of the possibility for the employer to have mail or other communications monitored; the notification must be explicit on the nature of the monitoring and be preceded by the measure;
- the extent of the monitoring and the degree of intrusion into the private life of the employee; in this case, a distinction should be made between monitoring the flow of conversations and their content;
- if the employer has legitimate reasons to justify monitoring and access to the content of conversations;
- if the employer could use less intrusive means and methods;
- monitoring of the employee was necessary to achieve the goal pursued by the employer;
- the employee has been protected by appropriate measures, especially if the monitoring is of intrusive nature.

Finally, the Court considers that labor relations must be based on the mutual trust of the parties.

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the telephone call and by compiling and retaining the card, which were not "prescribed by law", and Swiss law did not include clear provisions as to the powers of the authorities in this field.

<sup>12</sup> I.T. Ștefănescu, R. Dimitriu, *Considerații referitoare la protecția datelor personale ale salariaților în cadrul raporturilor de muncă*, in „Dreptul” no. 9/2015, p. 189; I.T. Ștefănescu, *Tratat teoretic și practic de drept al muncii*, fourth edition, revised and added, Universul Juridic, Bucharest, 2017, p. 350.

<sup>13</sup> Point 121 of the Grand Chamber judgment.

c). The ECHR judgment establishing a violation of a right guaranteed by the Convention is binding on the State concerned. Although there is no direct or overriding applicability of the ECHR case-law, the analysis of the resolutions of the Committee of Ministers of the Council of Europe demonstrates that the national authorities are following compliance with the case law.

In relation to employers, we consider that there is a mediated obligation to comply with the Court's solution because, in the case of non-observance of the rules on the supervision of employees, the court appreciates the measure taken in the light of the ECHR judgment.

Although the criteria proposed in the judgment are of a general, somewhat vague nature, we highlight a few aspects to crystallize how employers should do if they plan to monitor employees (phone calls, email, instant messaging).

1. Pursuant to art. 242 lit. c) and h) of the Labor Code, the employer may establish within the internal regulation the prohibition for all employees or only a part of them to use the equipment for personal use and the indication that they can be monitored - permanently or temporarily – for to the mode of use.

2. The inclusion in the internal rules of IT policy and monitoring or in an addendum to the individual labor contract of the mention that the employee can be monitored for correspondence is not sufficient, but it is necessary to draw up a written document in which to record the mode and the monitoring measure (if only the flow of conversations or their content is tracked), duration, purpose of the monitoring, possible consequences. Monitoring is advisable to be limited in time and space and limited to specific information related to issues such as content of web addresses accessed, content of communications, location in space outside of program hours.

3. The monitoring decision must be brought to the attention of the employee prior to commencement of the procedures for supervising his activity. Regardless of how monitoring was established - unilaterally or consensually, the employee should be alerted when supervision is actually started.

4. The employee should not agree with the monitoring, but collecting and keeping personal information on the use of the e-mail, the phone requires the agreement of the employee concerned. If the employee gives his / her consent to be monitored for his / her personal data, Art. 38 of the Labor Code, since the prohibition provided by this rule concerns the waiving of the employee's total or partial renunciation of the employee's rights recognized by the labor law.

5. The monitoring decision must be based on a legitimate interest of the employer. We appreciate that a legitimate interest in supervising employees' correspondence with employees would always be at least in terms of the costs borne by the employer, but it may also be justified on other grounds such as the pursuit of competitive activities by employees, the analysis of the sphere infringements of the employer's non-patrimonial rights. It may be appreciated that checking the employee's work during his / her work program by the employer would be a legitimate reason as long as the employee was obliged to work for and under the employer's assignment in the established work schedule. However, in the light of the judgment, the employer's right to pursue electronic mail, including the

private one, is unlikely to achieve the necessary balance between the right to private life and the legitimate interest. As such, the legitimate interest can not be established in general terms, but only on a case-by-case basis, but pass the proportionality test.

6. The employer uses the information resulting from a monitoring only in accordance with the legitimate interest which determined the supervision and destroys them as soon as they are no longer necessary for the purpose pursued.

7. The employer may opt for certain measures to avoid monitoring, such as: restricting the use of equipment made available to employees, restricting the use of the Internet or mobile telephony; prohibiting the use of the employer's resources during leisure.

8. The employer, in order to provide additional safeguards to the employee with regard to respecting the right to privacy, may, prior to the decision to take a decision, enter into consultations with the trade union or employee representative as appropriate.

9. If the employee uses the personal telephony or the internet on personal communication (for example, smart phone or personal tablet), which is not the material basis of the employer, we consider that the same rules should be observed if the employer wishes to be monitored.

10. The employer is obliged to ensure the confidentiality of the personal data of the employees according to art. 40 par. (2) lit. i) of the Labor Code.

#### 4. Conclusion

Concluding, we can say that the judgment of the Grand Chamber in the above-mentioned case highlights increasingly obscure issues between the right of ownership of the employer (private), the right to exercise control over the way in which employees perform their job duties, work, working time, leisure and respect for the right to private life at the workplace of employees. It is a difficult task for the courts to carry out the test of proportionality between the employer's legitimate interest and the interference in the private life of the employee and to establish the necessary balance.

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