17 Private Messages at Work

Strasbourg Court of Human Right's Judgement in Bărbulescu v. Romania Case[*]

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17.1 Introduction

On 12 January 2016, the European Court of Human Rights (ECtHR) issued its judgment in the case of *Bărbulescu v. Romania* (61496/08), in which it confirmed that employers are permitted to monitor employees' personal communications in the workplace, in certain circumstances. Contrary to what was reported by the press we need to express that the decision in *the previously mentioned case* does not give employers a green light to monitor their employees. The present work is aimed to summarize the facts of the decision rendered in the case *Bărbulescu v. Romania*.

17.2 Background to the Case

Bogdan Mihai Bărbulescu from 1 August 2004 until 6 August 2007 was an employee at a private company. He was dismissed by his employer in 2007 for private using of a Yahoo Messenger account at work, talking with his family. The account was particularly set up for business purposes and any use for personal affairs was expressly forbidden by the company's internal regulations. The employer discovered the employee's breach while accessing the account with the belief that it contained messages in relation with his work, as the employee denied any personal use of the account, however, the employer, presented a transcript of personal messages that the employee had exchanged with his girlfriend. Barbulescu challenged the dismissal before the Bucharest Court complaining that the decision to terminate his contract was null and void as his employer had violated his right to correspondence in accessing his communications in breach of the Constitution[1] and Criminal Code.[2] The claim was dismissed on the grounds that the employer had complied

* *Barbulescu v. Romania* – 61496/08 [2016] ECHR 61 (12 January 2016).

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1 The Romanian Constitution guarantees the right to the protection of intimate, private and family life (Art. 26) as well as private correspondence (Art. 28).

2 Art. 195 of the Criminal Code provides that: "Anyone who unlawfully opens somebody else's correspondence or intercepts somebody else's conversations or communication by telephone, by telegraph or by any other long distance means of transmission shall be liable to imprisonment for between six months to three years."

with the dismissal proceedings under the Labour Code[3] and that Mr Bărbulescu had been duly informed of the company's regulations. The said judgment was maintained by the Bucharest Court of Appeal. After all, Mr Bărbulescu brought a claim in the ECtHR, alleging that the Romanian national courts had failed to protect his right to respect for private and family life protected under Article 8 of the European Convention on Human Rights and that he had not received a fair trial in breach of Article 6 of the Convention.

17.3 Judgement and Reasoning

Following the identification of the relevant legal provisions at national and international levels, including Article 8 of the Convention which Mr. Barbulescu alleged had been violated, the Court declared the case admissible. It reiterated that private life is a broad concept referring to its own case law and considering that "[…] e-mails sent from work should be […] protected under Article 8."[4]

The ECtHR referred to its precedents treating similar situations with loss of privacy by employees and where a violation of their rights to privacy were recognised. However, the Court distinguished them from this case given the existence of internal regulations strictly prohibiting any personal use of the company's equipment.[5]

The Court among other judgments considered the *Halford*[6] and *Copland*[7] cases which decided that telephone calls, emails sent from work and information derived from Internet usage are covered by the notions of *private life* and *correspondence* for purposes of Article 8. The ECHR's decision in *Copland* establishes an expansion of the Convention's Article 8 rights. Now, individuals not only have the right to privacy with respect to their family life, home, and correspondence, but this right extends to any correspondence in the workplace.[8] The judgement in *Copland* suggested that in the absence of a warning regarding monitoring of these communications, the applicant had a reasonable expectation as to the privacy of those communications and this same expectation extended to emails and Internet usage.[9] However, the Court pointed out that the facts in the present case are

3 The Labour Code in force at the time of events provided in Art. 40(1)(d) that the employer had the right to monitor the manner in which the employees completed their professional tasks. Art. 40(2)(i) provided that the employer had a duty to guarantee the confidentiality of the employees' personal data.

4 Barbulescu §36.

5 E-Commerce Law Reports, Vol. 16, No. 1, 3.

6 *Halford v. United Kingdom*, Appl. No. 20605/92, 25 June 1997.

7 *Copland v. United Kingdom*, Appl. No. 62617/00, 3 April 2007.

8 *Copland v. United Kingdom*: What Is Privacy and How Can Transnational Corporations Account for Differing Interpretations? Loyola of *Los Angeles* International and *Comparative Law Review*, 31/2009. *295.*

9 Barbalescu §28; §36-38.

quite different, because the employer had an absolute ban on employee's use of work equipment for private reasons.[10]

In the proceedings the ECtHR basically undertook a balance between the right of Bărbulescu as an employee to respect for his private sphere protected by Article 8 of the ECHR and the legitimate interests of his employer in proving the disciplinary breach.[11]

The Court noted that in adjudicating the dispute, the Romanian courts attributed particular importance to the fact that Mr. Bărbulescu's employer had accessed the Yahoo Messenger account in the belief that it would only contain messages related to the fulfilment of professional tasks, as Mr. Bărbulescu initially claimed. Consequently, according to the ECtHR, since the employer accessed the messages on the assumption that they would solely be of a professional nature, the access had been legitimate and the employer thereby acted within its disciplinary powers.[12] The Court also considered the Romanian courts to have relied on the transcript of Mr. Bărbulescu private communication only to the extent that it proved a breach of his professional obligations. Moreover, as the employer did not access any other data or documents than the Yahoo Messenger account, the Court consider that the employer's monitoring was limited in scope and proportionate.[13] Accordingly, the majority of the ECtHR concluded that there was no indication that the Romanian national courts failed to respect a fair balance between the employee's right to respect for private life and the employer's legitimate interests in proving a breach of internal regulations.[14]

17.4 Partly Dissenting Opinion: The Question from Another Standpoint

The dissenting opinion provided by Judge Pinto de Albuquerque acknowledges the argument that Mr Barbulsecu's Article 8 rights have been interfered with and disagrees with the conclusion of the majority of the Court that there was no violation. The opinion expressed concern about whether Barbulescu was actually on notice about the possibility of the employer's surveillance. The judge emphasizes that the right to freedom of expression protected by Article 10 of the Convention is engaged and that both Article 8 and Article 10 rights conflict with the rights and freedoms of others in this case. The crucial issue of Albuquerque's opinion is the acknowledgement that Internet access is a human right and that its protection requires a transparent internal regulatory framework, a consistent implementation policy and a proportionate enforcement strategy.[15] The judge highlighted

10 Ibid., §39.
11 Ibid., §50.
12 Ibid., §40, 41; §55-58.
13 Ibid., §60.
14 Ibid., §62.
15 Ibid., §3.

that Internet surveillance was not at the employer's discretion and the employer's right to interfere with an employee's communication was not unrestricted. In terms of the level of protection afforded by the Convention principle regarding Internet communications, the dissenting opinion considered that the protection afforded to the communication was not lowered because (a) the communication occurred during working hours; (b) it took place in the employment context; (c) it had an impact on business activities, or (d) it affected employee performance.

The existence of a Labour Code was not sufficient in the dissenting judge's view. A specific, transparent set of rules including a comprehensive Internet usage policy in the workplace was required rather than a blanket ban on personal communication. Further, the dissenting opinion contended that employees must be (a) made aware of the Internet usage policy; (b) notified personally; (c) consent explicitly.[16]

The Internet usage policy itself should be governed by the principles of necessity and proportionality and only targeted surveillance based on well-founded suspicions is admissible. The dissenting judge was not satisfied that the Government had discharged their burden of proving that Mr Barbulescu had been notified of the Internet surveillance policy. The notice provided was not signed by the employee and, even if signed, was not sufficient to justify his termination especially when it was not proven that Mr Barbulescu had caused actual damage to his employer.[17] The opinion emphasizes that new technologies make prying into the employee's private life both easier for the employer and harder for the employee to detect, the risk being aggravated by the connatural inequality of the employment relationship. A human-rights centred approach to Internet usage in the workplace warrants a transparent internal regulatory framework, a consistent implementation policy and a proportionate enforcement strategy by employers. The dissenting opinion states that such a regulatory framework, policy and strategy were totally absent in the present case. The interference with the applicant's right to privacy was the result of a dismissal decision taken on the basis of an ad hoc Internet surveillance measure by the applicant's employer, with drastic spill-over effects on the applicant's social life. The employee's disciplinary punishment was subsequently confirmed by the domestic courts, on the basis of the same evidence gathered by the above-mentioned contested surveillance measure. The clear impression arising from the file is that the local courts willingly condoned the employer's seizure upon the Internet abuse as an opportunistic justification for removal of an unwanted employee whom the company was unable to dismiss by lawful means.[18] Judge Alberquerque highlighted the unnecessary interference with Mr Barbulescu's

16 Ibid., §12-13.
17 https://ukhumanrightsblog.com/2016/01/14/surveillance-of-internet-usage-in-the-workplace/.
18 http://europeancourts.blogspot.hu/2016/01/this-week-in-strasbourg-roundup-of_14.html.

rights by the employer in failing to ensure that the transcript was restricted to the disciplinary proceedings.[19]

17.5 Assessment

It seems that workplace privacy is becoming an increasingly vexed topic as technology blurs the lines between work and personal life. Workplace monitoring has been described as one of the thorniest legal issues and there are various sources of law that apply to the electronic monitoring of employees,[20] as well as the workers' right to privacy is perhaps one of the most pressing concerns facing labour right advocates today.[21] Summarizing the findings of similar cases, we can say that the scope of an employer's surveillance must be balanced with the targeted employee's subjective expectation of privacy as well as that the legality of an employer's surveillance should be analyzed as a function of both the employer's legitimate business interest and the affected employee's expectation of privacy as measured through the lens of the broader society's expectation.[22]

In addition to the Court decision it is important to emphasise the significance of the dissenting opinion which – similar to a recent statement of United Nations General Assembly[23] – highlights the fact that the right to access the internet is a human right. The message of that opinion raises an important question: is the Court's assessment about the present case acceptable? The Court pointed out that the general ban of usage of business account for private purpose is enough to monitor the private letter by employer. Regarding the Strasbourg case-law, there are different ways to interpret the question under discussion. To be sure, the previous court's decisions in this area contradict each other and for this reason do not help navigate in question under discussion. Furthermore, also Judge Pinto de Albuquerque opinion declared that the employer's interest of maximum profitability and productivity from the workforce is nor per se an interest covered by Article 8(2).[24] Additionally, Article 8 provides that interferences must be prescribed by law, but the "law"

19 Barbalescu §20-21.

20 Chris Hunt and Corinn Bell, 'Employer Monitoring of Employee Online Activities outside the Workplace: Not Taking Privacy Seriously?', 18 *Canadian Labour and Employment Law Journal* 2014-2015, p. 411.

21 Deanna Wai-shan Law, 'The Big "Boss" Is Watching? Electronic Monitoring in the Workplace and the Right to Privacy', *Hong Kong Journal of Legal Studies* (2008) Vol. 2, p. 27.

22 Saby Ghoshray, 'Employer Surveillance versus Employee Privacy: The New Reality of Social Media and Workplace Privacy', *Northern Kentucky Law Review* (2013) Vol. 40, No. 3, p. 626.

23 A/HRC/32/L.20, United Nations General Assembly, 27 June 2016.

24 Art. 8(2) of the Convention: There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

includes also internal regulations in case law.[25] To sum up, balancing the interests therefore appears difficult to Court. The recent technological development will force the Strasbourg Court to a broad, well-defined cases develop practices in this area.

17.6 Significance of the Judgment

The recent decision of the ECtHR in the case of *Barbulescu v. Romania* attracted considerable press attention. The question concerns the surveillance of Internet usage in the workplace. Hence, the ruling in the present case does not provide employers with a universal shield against their employees' claims on grounds of respect for private life. The Court merely stated that insofar as the employer's interference is limited in scope, proportionate and serves a legitimate objective, such as proving a disciplinary breach, a sufficient balance is ensured between the employer's interests and employee's rights under Article 8 of the Convention. To sum up, the Strasbourg Court of Human Rights has confirmed that employers may, in some circumstances, monitor employees' personal communications in the workplace. There remain – as there were before this judgment – cases where such surveillance is justified, and cases where it is not. The significance of *Barbulescu* is some clarification on where the dividing line falls between those two categories. In this case, the crucial difference is that the employer banned such use. However, the case helpfully confirms the importance of qualifying an employee's expectation of privacy and adopting a proportionate approach to any monitoring. It cannot be seen as a template that employers should follow without running the risk of claims. On the other hand it is also worth to highlight and consider the findings of the dissenting opinion which assesses the question from another perspective, therefore arrives to a (partly) different conclusion in respect of the essence of the case.

25 F. Kefer and S. Cornelis, 'L'arrét Copland ou l'esperancé légitime du travailleur quant au caractére privé de ses communications', *RTDH*, 2009, p. 779.