Weinhold Legal

Legal Alert

Are employers really entitled to read their employees' personal messages at will?

On 12 January 2016, the European Court of Human Rights ("**ECHR**") ruled in the case of Bărbulescu v. Romania that **the right of an employee to respect for family and private life** pursuant to Art. 8 of the European Convention on Human Rights (the "**Convention**") **had not been violated when the employer dismissed the employee because of private chat correspondence during working hours.**

A host of articles have been published in response to this decision, interpreting it to mean no limitations exist when it comes to employers reading their employees' personal correspondence. But such a simplistic conclusion cannot be drawn from the decision. **We recommend that employers tread carefully in regard to their employees' private lives and the monitoring of their activities** and adhere to the principle of proportionality.

Grounds for the decision

- Mr. Bărbulescu was employed by a Romanian company as an engineer in charge of sales. At his employer's request, he created a Yahoo Messenger account for the purpose of responding to clients' enquiries.
- In the summer of 2007, he was informed by his employer that they had found the account was used for personal purposes in breach of the company's internal regulations. The employee replied in writing that he had only used the account to communicate with clients, after which the employer presented a 45-page transcript of his personal correspondence and terminated his employment.
- Mr. Bărbulescu challenged his termination before the courts complaining that the termination had been based on a violation of his right to privacy. The Romanian courts dismissed his complaint. He then brought a complaint before the ECHR in 2008.
- In consideration of the following, the ECHR judges (with the exception of one dissenting opinion) found that Art. 8 of the Convention had not been violated:
  - the state had met its obligations ensuing from the Convention; the Romanian courts had correctly adjudicated the matter,
  - the employer ascertained the contents of the employee's conversation only after the employee had claimed to have used the account exclusively for professional purposes,
  - the employee had been warned in advance that his messages might be monitored,
  - the internal regulations strictly prohibited the use of employer computers for personal purposes,
  - the employer acted in accordance with its disciplinary authority under the Labour Code,
  - the employer only read messages in Yahoo Messenger, no other employee documents – the monitoring was therefore limited and proportional,
  - it is the right of an employer to verify employees are using working hours solely to perform assigned work tasks.

Czech law and case law

- Pursuant to § 316(1) of the Labour Code, employees may not, without the employer's consent, use the employer's production and work resources (including computers and telecommunications devices) for personal needs. The employer is entitled to control adherence to this prohibition in a proportional manner.
- The Czech Supreme Court ruled against an employee in a similar case in 2012 (Decision No. 21 Cdo 1771/2011). The Court found the immediate termination of employment due to the extensive visiting of non-work-related websites during work hours to be valid.

Implications for companies in the CR

- The decision is in line with recent Czech Supreme Court rulings – less leniency for employees who misuse employer resources; assessment of subsequent termination of employment for this reason as valid.
- Legal defects in the taking of evidence need not automatically exclude use of the evidence in court proceedings, though the employer may face a fine for tracking employees in violation of the principle of proportionality.
- The constitutionally guaranteed right to protection of the secrecy of correspondence and secrecy of other documents and records is another important check in this respect.
- An injured employee could legally seek appropriate redress for a violation of his/her right to privacy under the Civil Code.
- In its past opinions, the Office for the Protection of Personal Information ("**OPPI**") clearly set out Rules for Monitoring the Electronic Communications of Employees for the purpose of protecting personal information. Under these rules, an employer is not authorized to track, monitor or process the content of employee correspondence. Where warranted by a suspicion of misuse of work resources, the employer may only track the number of received and sent e-mails, including the header, where applicable. This activity constitutes the processing of an employee's personal information; thus, all obligations stipulated by the Act on the Protection of Personal Information must be met. An employer may only open and read an employee's private e-mail in exceptional cases, in the interest of protecting its rights, primarily if it is clear that work e-mail is involved and where objective reasons exist, e.g. long-term employee illness.
- Employers face an OPPI fine for violation of an obligation when processing personal information. A Labour Inspection Act amendment currently working its way through the legislative process should establish the possibility of sanctioning an employer for invasion of employee privacy for labor inspection.

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This information in this bulletin is correct to the best of our knowledge and belief at the time of going to press. Specific advice should be sought, however, before investment and other decisions are made. Nor should the information in this bulletin be considered an exhaustive description of the given matter and its possible ramifications. We also note that legal opinion varies regarding some of the issues raised in this bulletin due to ambiguities in the relevant provisions. Thus, it is possible that an interpetation other that the one presented here will prevail in future.

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