EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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Monitoring of an employee's electronic communications amounted to a breach of his right to private life and correspondence

The case of Bărbulescu v. Romania (application no. 61496/08) concerned the decision of a private company to dismiss an employee after monitoring his electronic communications and accessing their contents, and the alleged failure of the domestic courts to protect his right to respect for his private life and correspondence.

In today's **Grand Chamber** judgment[1] in the case, the European Court of Human Rights held, by eleven votes to six, that there had been:

a violation of Article 8 (right to respect for private and family life, the home and correspondence) of the European Convention on Human Rights.

The Court concluded that the national authorities had not adequately protected Mr Bărbulescu's right to respect for his private life and correspondence. They had consequently failed to strike a fair balance between the interests at stake.

In particular, the national courts had failed to determine whether Mr Bărbulescu had received prior notice from his employer of the possibility that his communications might be monitored; nor had they had regard either to the fact that he had not been informed of the nature or the extent of the monitoring, or the degree of intrusion into his private life and correspondence. In addition, the national courts had failed to determine, firstly, the specific reasons justifying the introduction of the monitoring measures; secondly, whether the employer could have used measures entailing less intrusion into Mr Bărbulescu's private life and correspondence; and thirdly, whether the communications might have been accessed without his knowledge.

Principal facts

The applicant, Bogdan Mihai Bărbulescu, is a Romanian national who was born in 1979 and lives in Bucharest.

From 1 August 2004 until 6 August 2007 Mr Bărbulescu was employed by a private company as an engineer in charge of sales. At his employers' request, he created a Yahoo Messenger account for the purpose of responding to clients' enquiries.

On 3 July 2007 the company circulated an information notice among its employees which stated that one employee had been dismissed on disciplinary grounds after she had privately used the internet, the telephone and the photocopier.

On 13 July 2007 Mr Bărbulescu was summoned by his employer to give an explanation. He was informed that his Yahoo Messenger communications had been monitored and that there was evidence that he had used the internet for personal purposes.

Mr Bărbulescu replied in writing that he had only used the service for professional purposes. He was then presented with a transcript of 45 pages of his communications from 5 to 12 July 2007, consisting of messages he had exchanged with his brother and his fiancée relating to personal matters, some of the messages being of an intimate nature. On 1 August 2007 the employer

1 Grand Chamber judgments are final (Article 44 of the Convention).
All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

terminated Mr Bărbulescu's employment contract for breach of the company's internal regulations that prohibited the use of company resources for personal purposes.

Mr Bărbulescu challenged his employer's decision before the courts, 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 and Criminal Code. His complaint was rejected by the Bucharest County Court in December 2007, on the grounds, in particular, that the employer had complied with the dismissal proceedings provided for by the Labour Code; that employers were entitled to set rules for the use of the internet, which was a tool made available to employees for professional use; and that Mr Bărbulescu had been duly informed of the company's regulations. The County Court noted that shortly before Mr Bărbulescu's disciplinary sanction, another employee had been dismissed for using the internet, the telephone and the photocopier for personal purposes.

Mr Bărbulescu appealed, contending that the court had not struck a fair balance between the interests at stake. In a final decision on 17 June 2008 the Court of Appeal dismissed his appeal. It essentially confirmed the lower court's findings. Referring to European Union Directive 95/46/EC on data protection, it held that the employer's conduct, after having warned Mr Bărbulescu and his colleagues that company resources should not be used for personal purposes, had been reasonable and that the monitoring of Mr Bărbulescu's communications had been the only method of establishing whether there had been a disciplinary breach.

Complaints, procedure and composition of the Court

Relying in particular on Article 8 (right to respect for private and family life, the home and correspondence) of the European Convention on Human Rights, Mr Bărbulescu complained that his employer's decision to terminate his contract after monitoring his electronic communications and accessing their contents was based on a breach of his privacy and that the domestic courts failed to protect his right to respect for his private life and correspondence.

The application was lodged with the European Court of Human Rights on 15 December 2008.

In its Chamber judgment of 12 January 2016, the European Court of Human Rights held, by six votes to one, that there had been no violation of Article 8 of the Convention, finding that the domestic courts had struck a fair balance between Mr Bărbulescu's right to respect for his private life and correspondence under Article 8 and the interests of his employer. The Court noted, in particular, that Mr Bărbulescu's private life and correspondence had been engaged. However, his employer's monitoring of his communications had been reasonable in the context of disciplinary proceedings.

On 6 June 2016 the case was referred to the Grand Chamber at Mr Bărbulescu's request.

The Government of France and the European Trade Union Confederation (ETUC) were granted leave to intervene in the written proceedings as third parties.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Guido **Raimondi** (Italy), *President*,
Angelika **Nußberger** (Germany),
Mirjana **Lazarova Trajkovska** ("The former Yugoslav Republic of Macedonia"),
Luis **López Guerra** (Spain), *ad hoc judge*
Ledi **Bianku** (Albania),
Işıl **Karakaş** (Turkey),
Nebojša **Vučinić** (Montenegro),
André **Potocki** (France),
Paul **Lemmens** (Belgium),
Dmitry **Dedov** (Russia),

Jon Fridrik **Kjølbro** (Denmark),
Mārtiņš **Mits** (Latvia),
Armen **Harutyunyan** (Armenia),
Stéphanie **Mourou-Vikström** (Monaco),
Georges **Ravarani** (Luxembourg),
Marko **Bošnjak** (Slovenia),
Tim **Eicke** (the United Kingdom),

and also Søren **Prebensen**, *Deputy Grand Chamber Registrar.*

Decision of the Court

Article 8

The Court confirmed that Article 8 was applicable in Mr Bărbulescu's case, concluding that his communications in the workplace had been covered by the concepts of "private life" and "correspondence". It noted in particular that, although it was questionable whether Mr Bărbulescu could have had a reasonable expectation of privacy in view of his employer's restrictive regulations on internet use, of which he had been informed, an employer's instructions could not reduce private social life in the workplace to zero. The right to respect for private life and for the privacy of correspondence continued to exist, even if these might be restricted in so far as necessary.

While the measure complained of, namely the monitoring of Mr Bărbulescu's communications which resulted in his dismissal, had been taken by a private company, it had been accepted by the national courts. The Court therefore considered that the complaint was to be examined from the standpoint of the State's positive obligations. The national authorities had been required to carry out a balancing exercise between the competing interests at stake, namely Mr Bărbulescu's right to respect for his private life, on the one hand, and his employer's right to take measures in order to ensure the smooth running of the company, on the other.

As to the resulting question of whether the national authorities had struck a fair balance between those interests, the Court first observed that the national courts had expressly referred to Mr Bărbulescu's right to respect for his private life and to the applicable legal principles. Notably the Court of Appeal had made reference to the relevant European Union Directive[2] and the principles set forth in it, namely necessity, purpose specification, transparency, legitimacy, proportionality and security. The national courts had also examined whether the disciplinary proceedings had been conducted in an adversarial manner and whether Mr Bărbulescu had been given the opportunity to put forward his arguments.

However, the national courts had omitted to determine whether Mr Bărbulescu had been notified in advance of the possibility that his employer might introduce monitoring measures, and of the nature of such measures. The County Court had simply observed that employees' attention had been drawn to the fact that, shortly before Mr Bărbulescu's disciplinary sanction, another employee had been dismissed for using the internet, the telephone and the photocopier for personal purposes. The Court of Appeal had found that he had been warned that he should not use company resources for personal purposes.

The Court considered, following international and European standards[3], that to qualify as prior notice, the warning from an employer had to be given before the monitoring was initiated,

[2] Directive 95/46/EC

[3] In particular, the International Labour Office (ILO) Code of Practice on the Protection of Workers' Personal Data of 1997 and Recommendation CM/Rec (2015)5 of the Committee of Ministers of the Council of Europe to member States on the processing of personal data in the context of employment

especially where it entailed accessing the contents of employees' communications. The Court concluded, from the material in the case file, that Mr Bărbulescu had not been informed in advance of the extent and nature of his employer's monitoring, or the possibility that the employer might have access to the actual contents of his messages.

As to the scope of the monitoring and the degree of intrusion into Mr Bărbulescu's privacy, this question had not been examined by either of the national courts, even though the employer had recorded all communications of Mr Bărbulescu during the monitoring period in real time and had printed out their contents.

Nor had the national courts carried out a sufficient assessment of whether there had been legitimate reasons to justify monitoring Mr Bărbulescu's communications. The County Court had referred, in particular, to the need to avoid the company's IT systems being damaged or liability being incurred by the company in the event of illegal activities online. However, these examples could only be seen as theoretical, since there was no suggestion that Mr Bărbulescu had actually exposed the company to any of those risks.

Furthermore, neither of the national courts had sufficiently examined whether the aim pursued by the employer could have been achieved by less intrusive methods than accessing the contents of Mr Bărbulescu's communications. Moreover, neither court had considered the seriousness of the consequences of the monitoring and the subsequent disciplinary proceedings, namely the fact that – being dismissed – he had received the most severe disciplinary sanction. Finally, the courts had not established at what point during the disciplinary proceedings the employer had accessed the relevant content, in particular whether he had accessed the content at the time he summoned Mr Bărbulescu to give an explanation for his use of company resources.

Having regard to those considerations, the Court concluded that the national authorities had not adequately protected Mr Bărbulescu's right to respect for his private life and correspondence and that they had consequently failed to strike a fair balance between the interests at stake. There had therefore been a violation of Article 8.

Just satisfaction (Article 41)

The Court held that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by Mr Bărbulescu.

Separate opinions

Judge Karakaş expressed a partly dissenting opinion. Judges Raimondi, Dedov, Kjølbro, Mits, Mourou-Vikström and Eicke expressed a joint dissenting opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.