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

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An employer may consult files on a work computer unless the employee in question has clearly identified them as "private"

In today's **Chamber** judgment[1] in the case of Libert v. France (application no. 588/13) the European Court of Human Rights held, by a majority, that there had been:

no violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights.

The case concerned the dismissal of an SNCF (French national railway company) employee after the seizure of his work computer had revealed the storage of pornographic files and forged certificates drawn up for third persons.

The Court noted that the consultation of the files by Mr Libert's employer had pursed a legitimate aim of protecting the rights of employers, who might legitimately wish to ensure that their employees were using the computer facilities which they had placed at their disposal in line with their contractual obligations and the applicable regulations.

The Court observed that French law comprised a privacy protection mechanism allowing employers to open professional files, although they could not surreptitiously open files identified as being personal. They could only open the latter type of files in the employee's presence. The domestic courts had ruled that the said mechanism would not have prevented the employer from opening the files at issue since they had not been duly identified as being private.

Lastly, the Court considered that the domestic courts had properly assessed the applicant's allegation of a violation of his right to respect for his private life, and that those courts' decisions had been based on relevant and sufficient grounds.

Principal facts

The applicant, Eric Libert, is a French national who was born in 1958 and lives in Louvencourt (France).

Mr Libert had been working at the French national railway company (SNCF) since 1958, latterly as Deputy Head of the Amiens Regional Surveillance Unit. He had been temporarily suspended from his duties in 2007. On his reinstatement in March 2008, he noted that his work computer had been seized. He was summoned by his superiors and informed that the computer had been found to contain, *inter alia*, address change certificates drawn up for third persons and bearing the official Surveillance Unit logo, and a large number of files containing pornographic images and films. He was dismissed from his post on 17 July 2008.

Mr Libert applied to the Amiens Industrial Tribunal, which ruled that the decision to dismiss him had been justified. The Amiens Court of Appeal upheld the substance of that judgment. The applicant's appeal on points of law was dismissed. The Court of Cassation noted, as had the Court of Appeal,

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

that files created by employees using computers provided by their employers were presumed to be professional in nature unless they were identified as “personal”.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life), the applicant complained that his employer had opened, in his absence, personal files stored on the hard drive of his work computer. Relying on Article 6 § 1 (right to a fair trial within a reasonable time), he alleged in particular that the Court of Cassation had unexpectedly overturned its case-law, thus infringing certainty of the law.

The application was lodged with the European Court of Human Rights on 27 December 2012.

Judgment was given by a Chamber of seven judges, composed as follows:

Angelika **Nußberger** (Germany), *President*,
Erik **Møse** (Norway),
André **Potocki** (France),
Yonko **Grozev** (Bulgaria),
Síofra **O’Leary** (Ireland),
Mārtiņš **Mits** (Latvia),
Gabriele **Kucsko-Stadlmayer** (Austria),

and also Claudia **Westerdiek**, *Section Registrar.*

Decision of the Court

Article 8

As regards the applicability of Article 8, the Court could accept that under certain circumstances, non-professional data, for example data clearly identified as private stored by an employee in a computer supplied by his employer in order to discharge his duties, might be deemed to relate to his “private life”. It noted that the SNCF allowed its staff occasionally to use the computer facilities placed at their disposal for private purposes, subject to compliance with specific rules.

The Government had not disputed the fact that the applicant’s files had been opened on his work computer without his knowledge and in his absence. There had therefore been an interference with Mr Libert’s right to respect for his private life. The SNCF was a public-law entity supervised by the State, which appointed its Director. That entity provided a public service, held a monopoly and benefited from an implicit State guarantee. Those factors conferred on it the status of a public authority within the meaning of Article 8. The present case was therefore distinct from the case of *Bărbulescu v. Romania* [GC], no. 61496/08, 5 September 2017, in which a private-sector employer had infringed the right to respect for private life and private correspondence. Since the interference in this case had been due to a public authority, the complaint had to be analysed from the angle not of the State’s positive obligations but of its negative obligations.

At the material time positive law had provided that employers could open files contained in employees’ work computers unless such files had been identified as personal. The interference had therefore had a basis in law, and positive law had specified sufficiently clearly the circumstances and conditions under which such a measure was authorised. The interference had therefore been geared to guaranteeing the protection of “the rights … of others”, in this case the rights of employers, who might legitimately wish to ensure that their employees were using the computer facilities which they had placed at their disposal in line with their contractual obligations and the applicable regulations.

French law comprised a mechanism to protect private life: although the employer could open any professional files stored in the hard drives of the computers with which he had supplied his

employees in the exercise of their functions, he could not surreptitiously open files identified as being personal "unless there was a serious risk or in exceptional circumstances"; he could only open such files in the presence of the employee concerned or after the latter had been duly informed. The domestic courts had applied that principle. They had considered that in the instant case, that principle had not prevented the employer from opening the files at issue, since they had not been duly identified as being private.

The court of appeal had had regard to the finding that the impugned photographs and videos had been found in a file stored in a hard drive under the default name of "D:/données", which was used by staff to store their work documents and which, on the applicant's computer, had been titled "D:/données personnelles" ("D:/personal data"). The court had considered that an employee could not have used a whole hard drive, which was supposed to record professional data, for private use and that the generic term "personal data" could have referred to work files being processed personally by the employee and might therefore not have explicitly designated elements related to private life. The court of appeal had accepted the SNCF's argument that the User's Charter laid down that private information should be clearly identified as such ("private" option in the Outlook criteria), and that the same applied to "media receiving that information ('private' directory)". Furthermore, the court of appeal held that Mr Libert's dismissal had not been disproportionate since he had committed a serious breach of the SNCF professional code of ethics and of the relevant internal guidelines. According to the court of appeal, his actions had been particularly serious because, as an official responsible for general surveillance, he would have been expected to set an example.

The Court therefore observed that the domestic courts had properly assessed the applicant's allegation of a violation of his right to respect for his private life and that that those courts' decisions had been based on relevant and sufficient grounds.

Admittedly, in using the word "personal" rather than "private", Mr Libert had opted for the word which was used in the Court of Cassation's case-law to the effect that an employer could not, in principle, open files designated "personal" by the employee. However, that did not suffice to call in question the relevance of the reasons given by the domestic courts, since the User's Charter specifically stated that "private information (had to) be clearly identified as such".

The domestic authorities had not overstepped the margin of appreciation available to them, and there had therefore been no violation of Article 8 of the Convention.

Article 6 § 1

The Court of Cassation had previously ruled that employers could only open files identified by employees as being personal in the latter's presence or after informing them. It had, however, added that files created by an employee were presumed to be professional in nature unless the employee identified them as personal, so that the employer could access them in the employee's absence. The Court consequently noted that at the material time, positive law had already allowed the employer, within the said limits, to open files stored in an employee's work computer.

The Court consequently concluded that that part of the application was manifestly ill-founded and declared it inadmissible.

The judgment is available only in 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.