Update

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THE *Bărbulescu v. Romania* DECISION AND ACCESS TO EMPLOYEES' PRIVATE MESSAGES

On January 12 the European Court of Human Rights (hereon in "ECtHR") passed the *Barbulescu v. Romania* decision following the case filed by *Mr. Bodgan Bărbulescu* asking that his dismissal be considered illegal, claiming that the Romanian national courts had not considered his right to protection of private life and correspondence.

The case under analysis can be summarised as follows:

- By the request of his employer, *Mr. Bărbulescu* had created an account on a web chat with the aim of responding to clients' correspondence as part of his work responsibilities.
- *Mr. Bărbulescu* was subsequently informed that said web chat account had been monitored and that the employer had identified that the service, which was meant to be solely for professional purposes, had been used for private correspondence, thereby breaching company rules, which prohibited the use of work internet webmail and web chat accounts for private communication. The employee responded that he had used the web chat service solely for professional use, following which, however, the employer presented him with transcriptions of personal correspondence, on which grounds he was dismissed.
- *Mr. Bărbulescu* challenged the dismissal without, however, having had any success in the domestic courts, the latter having decided that the employer had met its legal requirements as foreseen in Romanian law, considering that the employee had been informed in advance that his conduct was

forbidden, and that his correspondence would be monitored[1]. In addition to this, said monitoring would be the only way of the employer confirming the veracity of that which the employee claimed with regard to his use (i.e. strictly professional) of the web chat.

- Consequently *Mr. Bărbulescu* appealed to the ECtHR, under Article 8 of the European Convention on Human Rights (hereon in "ECHR") - which prescribes the right to respect for private and family life - alleging that his dismissal was based on the unjustified interference into his privacy[2].

- However, in response, the Romanian Government invoked that the provision was not applicable in this case, given that the web chat account was exclusively for professional use, and, therefore, that it was not reasonable for the employee to claim an expectation of privacy. In contrast, *Mr. Bărbulescu* insisted on the privacy of his correspondence, reiterating that, in this regard, his expectations were well founded. In conclusion, he stated that his right to carry out private correspondence during working hours could not be forbidden at the employer's discretion.

In view of the above, the ECtHR's analysis had two premises:

First: The correspondence that was the object of the disciplinary action was of a personal nature;

Second: The employer had forbidden any personal use of the web chat.

The Court concluded that the provisions of Article 8 of the ECHR were not applicable to the case in hand considering that *Bodgan Bărbulescu*'s request was unfounded given that it considered there to be a fair balance between the rights of both parties (employee and employer), moreover considering that the employer's conduct was carried out solely to test the employee's allegations, namely that his use of the web chat was strictly professional.

PAULO PINTO DE ALBUQUERQUE, however, disagreed with the court's decision, claiming, in line with that which has been sustained in the Portuguese legal system, that, in this case, the employer's monitoring of the employee's correspondence was inexpedient and manifestly disproportionate. He supported this interpretation with the fact that there was scarce information on the form of monitoring used by the employer, there not being an internal policy that was transparent, detailed, and, most

[1] The employee challenged the first premise, however.

[2] Paragraph 1 of the provision claiming that *"[e]veryone has the right to respect for his private and family life, his home and his correspondence"*.

importantly, proportionate with regard to the opposing interests at hand, it certainly not being legitimate for an employer to establish any monitoring policies it sees fit to have.

It should be stressed that a similar position was adopted in Portugal by the National Data Protection Commission (CNPD - Comissão Nacional de Proteção de Dados). On this regard, please refer to CNPD decision No. 1638/2013 (in Portuguese), applicable to the treatment of personal data resulting from the private use of information and communication technologies in a work context[3], and which notes that: *"preliminary to the control of ICT by an employer is the possibility or admissibility of said employer forbidding the use of work means for personal matters"*. In this regard, it concludes that *"[i]n a world that is increasingly dominated by information and communication technologies, in which these means of communication are central to the work of any company or employer, it does not seem logical nor realistic that, in a work context, the use of telephones and mobiles, of e-mails and internet access be strictly prohibited for any purposes other than professional ones."* In fact, the CNPD not only considers unrealistic categorically forbidding the use of all work means for personal purposes, it also considers that although an employer might be authorized to monitor employees' correspondence, this does not give it the right to freely access the contents of employees' personal correspondence:[4] the employer will always have to resort to means of monitoring that do no breach its employees' fundamental rights. The Portuguese legal system has, therefore, adopted a balanced position that practically reconciles the conflicting interests at hand, trying to mitigate as much as possible any intrusion into employees' privacy. In this sense, one should also be reminded of the decision of the Portuguese Supreme Court of

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[3] Cf. Article 22 of the Portuguese Labour Code, which, in the epigraph "Confidentiality of messages and of access to information", provides, in Paragraph 1, that *"[the] employee has the right to discretion and confidentiality with regard to the contents of the correspondence of a personal nature and to access to information of a non-professional nature that he/she may send, receive or consult, namely via e-mail."* It should be highlighted, however, that Paragraph 2 of the same provision states: *"[that] foreseen in the previous paragraph does not impede the employer from establishing internal rules for the use of the company's means of communication, namely with regard to e-mail."*

[4] See the following part of the abovementioned CNPD decision: *"[w]hatever may be the rules defined by an individual company with regard to using work e-mail for personal means, the employer does not have the right to automatically open e-mails that are addressed to employees. It is not the fact that messages are saved on servers that belong to the employer that gives the latter the right to access said messages, which do not lose their personal or confidential nature, even in cases where a possible disciplinary infraction is being investigated"* (emphasis added).

Justice of July 5 2007[5] (in Portuguese), which confirms that Portuguese labour law *"[g]uarantees the right to discretion and confidentiality with regard to personal messages and non-professional information that employees may receive, consult or send via e-mail, which means that employers may not access the contents of these messages or information even in cases where a possible disciplinary breach needs to be investigated."*[6]

In short, and contrary to what seems to have been the conclusion of the ECtHR, the position of the CNPD and of Portuguese doctrine and jurisprudence has been to confer more protection on employees' privacy, with the employer having to try and find less intrusive methods of supervision, it not being legitimate to claim, contrary to that suggested by the ECtHR decision that is here being discussed, that employers have free and unrestricted access to employees' private correspondence.

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