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Legal lowdown: Employees' right to privacy

Dominic Crossley and Chris Weaver, SEPTEMBER 20, 2017

The case Bărbulescu v Romania shows the need to strike a fair balance between employees' privacy and a company's access to information

The important recent judgment of the European Court of Human Rights (ECHR) examines the competing interests of employers in monitoring the activities of their employees and those employees' right to privacy under Article 8 of the European Convention of Human Rights. There is little doubt that it will be seen as a shift in favour of expanding privacy rights and will be deployed by employees and their lawyers in the UK.

The case of *Bărbulescu v Romania* concerned a Romanian engineer who was dismissed by his employer for breaking its rule banning personal use of work communications systems. Importantly, while the employer had notified its employees that breaking this rule could result in dismissal, it did not inform its employees they would be monitored.

At his employer's request, Bărbulescu had set up a Yahoo Messenger account for responding to customers. After monitoring his usage the employer accused Bărbulescu of using it for personal messages. He denied this, saying he had used it only for work-related purposes. The employer presented Bărbulescu with extensive evidence of his personal use of its communications systems; including transcripts containing sensitive personal information. Bărbulescu informed his employer that he believed it had breached his right to privacy. The employer dismissed him for personal use of work communications systems.

Bărbulescu was unsuccessful in challenging his dismissal in the Romanian courts. He then complained to the ECHR that the employer's actions had breached his right to privacy. The ECHR considered the employer's ban on personal use of work systems significant and distinguished the case from others where some personal use of work systems was allowed. The ECHR decided a fair balance between Bărbulescu's right to privacy and the employer's interests had been struck. The dismissal was therefore considered to be lawful.

Bărbulescu's final appeal was to the court of last resort – the Grand Chamber of the ECHR – which overturned the ECHR's earlier ruling. It concluded that although Bărbulescu had been informed of the ban on personal use of work communications systems, it was not clear that he had been given advance warning of the monitoring that would take place. In particular, he had

not been informed about the nature and extent of that monitoring, or of the possibility that the employer would access the contents of his personal communications.

The judgment provides weighty authority for the need to strike a fair balance between employees' right to privacy and a company's own interests in access to information. It acknowledges that employers have legitimate reasons for monitoring employees' communication but that any monitoring must be proportionate to achieve that aim. While an employer can place restrictions on personal use of work communications systems this does not mean employees' right to privacy can be excluded entirely.

Employers who wish to monitor their workforce should carry out an impact assessment beforehand. This should consider why the monitoring is necessary, whether its objectives can be achieved through less intrusive means, the impact of the monitoring on employees, and whether this is justified. Employers should then provide information in advance of carrying out the monitoring so the employees have a clear understanding of its nature and extent, the reasons for it, and how the information will be used. Employers should not allow the content of employees' personal communications to be read unless strictly necessary or they risk being hauled before the courts by a determined litigant such as Bărbulescu.

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