

Employment & Pensions

News from Luxembourg

MOLITOR



February 2016

FAIR DISMISSAL AFTER THE USE OF INTERNET ACCOUNT FOR PRIVATE PURPOSES

Case of Bărbulescu v. Romania, European Court of Human Rights (ECHR), 12 January 2016, Application no. 61496/08

The ECHR had to examine the claim of a Romanian employee who was dismissed for using his professional Yahoo Messenger account, created on his employer's request, for private purposes. The employee was aware of the monitoring of his Internet account and according to the company's rules the private use of Internet was forbidden.

The claim was based in particular on Article 8 of the ECHR, claiming violation of his private life.

In the present case, the employer had banned its staff from sending personal messages at work and informed the employee it was aware that he was using his Yahoo Messenger account for private purposes. The employee replied in writing that he was only using it for professional purposes. His employer sacked him. After the Romanian domestic courts upheld the dismissal, the employee appealed to the ECHR.

His main argument was that his right to a private life had been breached, and claimed a breach of the confidentiality of correspondence. Thankfully **the Court ruled that it is not an abuse of the right to privacy** if an employer decides to check whether its employees are correctly performing their professional duties during working hours.

This is a **substantial overturning of governing principles** in terms of private life.

As a reminder, permanent monitoring is not allowed in principle. Any incoming or outgoing emails on the work desk are presumed to be professional, except if the subject of the email is

“private”, “personal” or if the subject of the email suggests that it's private.

The ban on opening emails applies in Luxembourg even if the employer has forbidden the use of informatics tools for private use (*Soc. 2/10/2001 Nikon, 99-42.942*). Secrecy of correspondence governs the conduct, except in the case of a criminal investigation or if there's a judge's decision.

These rights are also guaranteed under the law of 11 August 1982 on the protection of private life and the law of 30 May 2005 on the processing of personal data in electronic communications.

This case law has a major impact on the existing principles: it means that an employer is able to sack an employee who infringes the company's rules prohibiting the private use of such a chat system. Secondly, it could also mean that the employee will be unable to invoke his right to respect for a private life if he has already agreed to the company's rules.

This case law moves a long way from the current trend of Luxembourg case law as well as from the principles of the secrecy of correspondence. We should keep an eye on this subject to see if national Courts confirm or overturn previous rulings.

Michel Molitor

Avocat à la Cour, Partner
michel.molitor@molitorlegal.lu

Virginie Liebermann

Avocat à la Cour, Senior Associate
virginie.liebermann@molitorlegal.lu