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European Union Issues Major Ruling on Employee Monitoring

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The E***uropean Union ("EU")*** has issued a major court ruling on employee monitoring which deserves attention on this side of the pond and provides some guidance for companies with employees in the EU. The EU has generally taken a more protective stance than the U.S. when it comes to protection of individual privacy. For example, in 2014 the Court of Justice of the European Union, in ***Google Spain SL v. Agencia Espanola de Proteccion de Datos*****,** held that a Spanish citizen had the "right to be forgotten" and specifically a right to de-list information on Google about his past financial troubles. The gap between the EU and the US in privacy law may be narrowing ever so slightly, however.

On January 12, 2016, the ***European Court of Human Rights*** in Strasbourg issued a decision in the case of Barbulescu v. Romania***,*** Application No. 61496/08. Barbulescu, a citizen of Romania, worked for an un-named private company in Bucharest. In 2007, he was asked by his company to set up a ***Yahoo Messenger*** account for the purpose of responding to client inquiries, and did so. In July of 2007, the company informed him that it had been monitoring his account and that the records showed that he had been using it for personal purposes contrary to internal regulations. Barbulescu denied the personal use, but when confronted with proof, including communications with his fiancée about his "sexual health," he claimed invasion of his privacy. His employment was terminated on August 1, 2007. Barbulescu challenged his termination in Bucharest County Court, which dismissed his complaint. From there he appealed to the Bucharest Court of Appeal, which upheld the dismissal.

Barbulescu's case eventually found its way to the European Court of Human Rights, not on the issue of whether he was wrongfully terminated, but whether the company's actions violated Article 8 of the 1981 Council of Europe Convention for the protection of individuals with regard to the automatic processing of personal data.

The Court, in a 6 to 1 decision, held that Article 8 applied, but was not violated in this case. It held that Barbulescu had not convincingly explained why he had used the Yahoo messenger account for personal purposes and that there was nothing to indicate that the Romanian courts failed to strike a fair balance "between the applicant's right to respect for his private life under Article 8 and his employer's interests."

As often occurs in American disputes of this nature, the question of whether the employee was put on notice was critical. The Government of Romania claimed Barbulescu had been given notice that the employer could monitor his communications, but he denied it and there was no signed acknowledgment. The court noted that this gap meant there was “no straightforward answer” to the question before it, which shows that having a clear policy and signed acknowledgement of employee monitoring is always a good idea, in any country.

One judge, Judge Pinto de Albuquerque, dissented, disagreeing with the holding that the “employer’s monitoring was limited in scope and proportionate.” He noted further that:

> Internet surveillance in the workplace is not at the employer’s discretionary power. In a time when technology has blurred the line between work life and private life, and some employers allow the use of company-owned equipment for employee’s personal purposes, other allow employees to use their own equipment for work-related matters and still other employers permit both, the employer’s right to maintain a compliance workplace and the employee’s obligation to complete his or her professional tasks adequately does not justify unfettered control of the employee’s expression on the Internet. Even where there exists suspicions of cyberslacking, diversion of the employer’s IT resources for personal purposes, damage to the employer’s IT systems, involvement in illicit activities, or disclosure of the employer’s trade secrets, the employer’s right to interfere with the employee’s communications is not unrestricted.

Like most cases, the decision likely turned on the particular facts, and the dissent suggests that restrictions on employee monitoring will probably still be subject to greater scrutiny in the EU than in the US (and individual countries have their own specific laws in this area).

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