Monitoring Correspondence of Employees: Lessons to be learned from the ECtHR Judgment in the Case of Barbulescu v. Romania

Marko Bošnjak*

UDK: 347.9:342.7:061.1EU
349.2:347.9:061.1EU

Abstract: *The author presents a recent judgment of the ECtHR in the case of Barbulescu v. Romania, which sets the standards for applicability of Article 8 of the ECHR as well as positive obligations of the High Contracting Parties in cases of monitoring of employee's correspondence by private employers. Possible further developments in the Court's case law and implementation of the judgment at the national level are also discussed.*

Key words: *European Court of Human Rights, correspondence at workplace, monitoring of employees, reasonable expectation of privacy, balancing of interests, margin of appreciation*

Nadzor komunikacije zaposlenih: kaj nas uči sodba ESČP v zadevi Barbulescu proti Romuniji

Povzetek: *Pisec predstavlja nedavno sodbo ESČP v zadevi Barbulescu proti Romuniji, ki določa pravila uporabljivosti 8. člena EKČP, kakor tudi pozitivne obveznosti držav pogodbenic v primerih nadzora komunikacije zaposlenih s strani zasebnih delodajalcev. Razpravlja tudi o možnem nadaljnjem razvoju presoje Sodišča in implementacije sodbe na nacionalni ravni.*

Ključne besede: *Evropsko sodišče za človekove pravice, dopisovanje na delovnem mestu, nadzor zaposlenih, razumno pričakovanje zasebnosti, ravnotežje interesov, polje proste presoje*

* Judge of the European Court of Human Rights, doctor of law, associate professor of criminal law. The views on specific legal issues taken by the author of the article do not necessarily represent position of the European Court of Human Rights.

I. INTRODUCTION

On 5 September 2017, the Grand Chamber of the European Court of Human Rights (hereinafter referred to as the Court) delivered a judgment in the case of *Barbulescu v. Romania*[1]. The judgment is rightly considered to be a landmark one, setting the standards for Council of Europe member states, but also for employers across Europe regarding the issue of monitoring of employees' correspondence.[2] First and foremost, the Grand Chamber was invited to decide a case touching upon an employee's right to privacy in general and with regard to Internet communication in particular. The increased use of new technologies and means of communication in the workplace has created new concerns for both employers and employees.[3] The line between private and professional activities has (further) been blurred,[4] since these technologies enable employees to work and be accessible outside office premises and hours, while on the other hand research shows that majority of them use professional tools (office and professional mobile phones, computers) also for private purposes. In the past, the Court has extended applicability of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention) to professional environment[5] and has, in particular cases, acknowledged reasonable expectation of privacy to employees communicating over lines available in their respective offices[6]. In the Barbulescu case, the

---

1 Application nr. 61496/08.

2 On the importance of this particular judgment, see e.g. *Kaeni, Sara*, p. 603.

3 See *Hustinx, Peter*, p. 126.

4 See *Köffer, Sebastian/Anlauf, Lea/Ortbach, Kevin/Niehaves, Björn*, p. 1-17.

5 See, for example, *Niemietz v. Germany*, 16 December 1992, Series A no. 251-B, where the office of the a lawyer was searched in order to find the perpetrator of a criminal case, where a judge was insulted in an anonymous letter. The ECtHR acknowledged in the present case for the first time that not only the ''inner circle'' is a part of one's private life but Art. 8 may also include business activities.

6 See, for example, *Halford v. the United Kingdom*, 25 June 1997, Reports of Judgments and Decisions 1997-III, where Ms Halford, an Assistant Chief Constable of the Merseyside Police claimed that she was not promoted to a higher rank due to her sex. In order to disprove her accusations, the Police i.a. intercepted private telephone calls from her office telephones, which the court considered as covered by the scope of protection of Article 8 as a part of her 'private life' as well as 'correspondence'. In *Copland v. the United Kingdom*, no. 62617/00, ECHR 2007-I, the telephone, e-mail and internet usage of Ms Copland, an employee of a State administered College, was monitored upon the instigation of the Deputy Principal in order to ascertain whether Ms Copland used the facilities for personal reasons. She has neither consented nor been informed of the monitoring.

Court has seized an opportunity to clarify principles concerning right to privacy in workplace in respect of correspondence.

What is more, the Barbulescu judgment differs from the existing case law in that in previous cases, the right to privacy of correspondence was interfered with by the respondent State[7], whereas in the case at issue, it was a private employer who first prohibited, then monitored the applicant's correspondence and finally dismissed him on the basis of private content of that correspondence. Therefore, the Grand Chamber was called upon to address the question of positive obligations of High Contracting Parties to the Convention in this highly sensitive domain by setting clear criteria for balancing between interests of private parties, i.e. employers and employees. It might be expected that these criteria would also be applicable, *mutatis mutandis*, to situations where other dimensions of privacy come into play. It may be fair to say that the establishment of principles and the development of the case-law in this case are more important than its actual outcome. In this sense, the author of this article finds it particularly indicative that the Grand Chamber of the Court was unanimous on these principles, which are not called in question by both partly dissenting opinions.

II. BACKGROUND OF THE CASE

The applicant, Mr. Bogdan Mihai Barbulescu, was employed as a sales engineer by a private company. At his employer's request, he created a Yahoo Messenger account for the purpose of communicating with company's customers. Apparently, the applicant was also using this account for private communication with his brother and fiancée, despite the fact that the employer's internal regulations prohibited the use of company resources for personal use. In addition, the employer circulated a notice among its employees which i.a. repeated the above

In the present case, the Court considered the secret monitoring of e-mails or personal internet usage as similarly protected as telephone calls, which it already stated in *Halford v. the United Kingdom* as a notion of 'private life' and 'correspondence' under Article 8.

[7] In *Halford v. the United Kingdom*, the applicant was working for the police, using a telephone line put at her disposal by her employer. In *Copland v. the United Kingdom*, the applicant was employed by a State university. It was a position of the Court in both these cases that the applicant's right under Article 8 of the Convention had been interfered with by the State and that the interference should be analysed according to the criteria of the second paragraph of that Article.

prohibition and warned the addressees that any misconduct would be carefully monitored and punished. The applicant signed a copy of the internal regulations on 20 December 2006 and took knowledge of the subsequent notice at a non-specified date between 3 and 13 July 2007.

From 5 to 13 July 2007, the employer monitored and recorded the applicant's communication in real time. On 13 July 2007, the applicant was summoned to explain why he was using company resources for personal purposes and was shown a chart demonstrating that his internet activity was greater than that of his colleagues. The applicant asserted that his Yahoo Messenger use was for work-related purposes only. Less than an hour later, he was presented with 45 pages of transcripts of his communication effectuated between 5 and 12 July 2007 showing its mostly private and partly even intimate nature.

On 1 August 2007 the employer terminated the applicant's contract of employment, the reason being the use of company's resources for private purposes. The applicant challenged his dismissal in an application to the Bucharest County Court (hereinafter referred to as the County Court). The County Court rejected the applicant's action and confirmed that his dismissal had been lawful. In its judgment, the County Court took a view that an employer indisputably had a power, by virtue of its right to supervise its employee's activities, to monitor personal internet use. According to the County Court, such checks by the employer were made necessary by the risks of damage to the company's IT system, for preventing illegal activities in cyberspace or preventing disclosure of the company's trade secrets. In the particular case, since the applicant maintained during the disciplinary investigation that he had not used the Yahoo Messenger for personal purposes, the County Court was of the opinion that an inspection of the content of conversations was the only way to ascertain the validity of his arguments. The applicant appealed to the Bucharest Court of Appeal (hereinafter referred to as the Court of Appeal), which dismissed his appeal. It confirmed that an employer was entitled to prohibit personal use of internet in the workplace and to monitor compliance with any such prohibition. According to the Court of Appeal, an employee who breaches the employer's rules may incur a disciplinary sanction, including a dismissal. No further remedies were available to the applicant at the national level to challenge this decision.

In parallel, the applicant lodged a criminal complaint against the statutory representatives of the company. The complaint was dismissed by the competent

investigative authority on the grounds that the company was the owner of the computer system and the internet connection and was therefore entitled to monitor its employees' activities. The applicant decided not to challenge this decision at the domestic level.

III. PROCEEDINGS BEFORE THE COURT

On 15 December 2008, the applicant lodged an application with the Court complaining, in particular, that his employer's decision to terminate his contract had been based on a breach of his right to respect for his private life and correspondence as protected by Article 8 of the Convention and that the domestic courts had failed to comply with their obligation to protect that right. On 12 January 2016, a Chamber of the Fourth Section of the Court held, by six votes to one, that there had been no violation of Article 8 of the Convention. While the Chamber found that the case before it differed from Copland and Halford (both cited above) in that the employer's internal regulations clearly prohibited employees from using the company resources for private purpose, it nevertheless had regard to the nature of the applicant's communications and concluded that the applicant's right to respect for his "private life" and "correspondence" was at stake and that therefore Article 8 was applicable.

As to the merits, the Chamber examined the case in terms of the State's positive obligations, given the fact that the applicant was dismissed by a private company. In the view of the Chamber, the national courts had to strike a fair balance between the applicant's right to respect for private life and correspondence and his employer's interests. The Chamber noted that the applicant brought his case and presented his arguments before the national courts, which in turn found that the applicant had committed a disciplinary offence by private Internet use during working hours. They also found it important that the employer had accessed the content of the applicant's communications after he had declared that he had used the account for professional purposes only.

The applicant requested the referral of the case to the Grand Chamber, which was accepted by a panel on 6 June 2016. A public hearing of the case took place on 30 November 2016 and the Grand Chamber deliberated on the same day and on 8 June 2017. The Grand Chamber unanimously found Article 8 of the Convention to be applicable in the case and by eleven votes to six, it held

that there had been a violation of the abovementioned Article. By sixteen votes to one, it held that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant.

IV. PRIVACY OF COMMUNICATION AT WORKPLACE – ISSUES OF APPLICABILITY OF ARTICLE 8 OF THE CONVENTION

Article 8 of the Convention guarantees the right to respect for three circles of an individual's life, namely his or her private and family life, his or her home and his or her correspondence. It has been a long standing practice of the Court that the notion of private life is a broad one not susceptible to exhaustive definition.[8] It may include professional activities[9], taking into account that it is in the course of their working lives that the majority of people have a significant, if not the greatest opportunity to develop relationships with the outside world[10]. To put it simple, private life does not stop at the door of the workplace.[11]

When adjudicating on previous cases involving monitoring of an employee's communications from business premises, the Court has regularly resorted to the concept of "reasonable expectation of privacy".[12] An expectation of privacy was held to be reasonable where the applicant was given no prior warning that her calls from work telephone would be liable to monitoring. In Barbulescu judgment, the Grand Chamber held that when applicability of Article 8 of the Convention is at stake, a reasonable expectation of privacy is a significant though not necessarily conclusive factor. In this context, it is important to note that the Grand Chamber emphasized that an employer's instructions cannot reduce private social life in the workplace to zero. Respect for private life and for

---

8 See, for example, *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, ECHR 2004-VIII, where two former KGB employees complained about a ban from the public sector and various private sector fields for a period of ten years due to their former KGB activities. The ECtHR saw their private life affected in a sense that their reputation and work situation was strongly shaped by their status as "former KGB officiers", which can be seen as a very broad interpretation of the notion of private life.

9 See, for example, *Fernandez Martinez v. Spain (GC)*, no. 56030/07, ECHR 2014 (extracts), where the contract of a religious education teacher was not renewed due to the fact that he decided to start a family and join a movement opposing Church doctrine.

10 See *Niemietz*, cited above.

11 *Mouly Jean*, p. 300 f.

12 See *Halford* and *Copland*, both cited above.

the privacy of correspondence continues to exist, even if these may be restricted in so far as necessary. It might be fair to say that by adopting this standpoint, the Court prohibited any full and blanket ban on private correspondence at the workplace, though limitations are of course possible.

When applying the principles to the present case, the Grand Chamber held that the applicant had been informed of the ban on personal internet use before the monitoring began. However, doubt remained whether he had been informed about the monitoring operation before it had been put in place. Namely, he had acquainted himself with the information notice on the monitoring on an unspecified date between 3 and 13 July 2007, whereas the monitoring began on 5 July 2007. In any event, the employer's notice did not contain information on the extent and nature of the monitoring activities, including the possibility that the employer might have access to the actual contents of the applicant's communications. Thereby, the Court has broadened the requirement of prior notice, a core feature of the concept of the reasonable expectation of privacy, to include a duty of an employer to notify employees about possible monitoring, its nature and extent. This position was later on reflected in the part of the judgment where the Court set the principles on positive obligations of the States to protect private life and correspondence in the context of the workplace.

Bearing in mind factual uncertainties surrounding the applicant's situation, the Grand Chamber left open whether – and if so, to what extent – the applicant was left with reasonable expectation of privacy. But since, as mentioned above, it found a reduction of private social life at workplace to zero to be inacceptable, it ruled that the applicant's privacy of correspondence continued to exist and that Article 8 of the Convention was therefore applicable.

Apart from examining the issue of applicability from the perspective of privacy of communication, the Grand Chamber had an option to consider the content of the applicant's communications to constitute personal data. Indeed, personal data are considered in the Court's case-law as "any information relating to an identified or identifiable individual"[13]. In addition, both Recommendation CM/Rec(2015)5 of the Committee of Ministers of the Council of Europe on the

[13] See *Amann v. Switzerland (GC)*, no. 27798/95, ECHR 2000-II, where the phone call of a Swiss business man was fortuitously intercepted and a putative contact with the Russian embassy and other personal data filled in a card for the national security card index was restored by the Federal Public Prosecutor's Office. The ECtHR reiterated the storing of personal data was already an interference with Art. 8.

processing of personal data in the context of employment and Opinion 8/2001 of the Working Party set up under Article 29 of the EU Directive no. 95/46/EC refer explicitly to monitoring by the employer of employees' communication or Internet use. According to these documents, monitoring of e-mails is classified as processing of personal data. Processing of personal data has been considered as an interference with the applicants' right to respect for private life under Article 8 of the Convention in the past.[14] Apparently, the Grand Chamber in Barbulescu did not decide to follow that path of argument, possibly for the fact that the pre-existing case-law concerning communication by employees from the workplace centred upon the concept of reasonable expectation of privacy. Equally, Article 8 of the Convention includes a specific reference to "correspondence", whereas the concept of "personal data" is much broader. In this respect, it is interesting to note that the Grand Chamber emphasized that the notion of "correspondence" within the ambit of Article 8 of the Convention is not qualified by any adjective, unlike the term "life". The judgment in Barbulescu does not seem to build further upon this argument. It remains to be seen, however, whether the Court will in future consider as protected by Article 8 of the Convention any correspondence at the workplace, regardless of whether it is of private nature or not.

V. OBLIGATIONS OF HIGH CONTRACTING PARTIES IN RESPECT OF PRIVACY OF COMMUNICATION AT WORKPLACE

The essential object of Article 8 of the Convention is to protect individuals against arbitrary interference by public authorities. Any interference by those authorities is compatible with the Convention only if it complies with requirements of the second paragraph of the same Article. For that purpose, it has to (1) be in accordance with the law, (2) pursue one or more of legitimate aims stipulated by that provision and (3) be necessary in a democratic society. This is also a test to be applied when communication of an employee is monitored by an employer from a public sector.

In the Barbulescu case, the measure complained of by the applicant was not

[14] See, for example, *Vukota-Bojić v. Switzerland*, no. 61838/10, 18 October 2016, where the applicant was declared unfit to work after an accident. In order to lower her insurance-related benefits, the insurer conducted secret surveillance, which the ECtHR considered as an interference of Ms Vukota-Bojić's right to a private life.

taken by a State authority but by a private commercial company. However, the Court noted that the measure taken by the applicant's employer was later accepted by the national courts, therefore it was their responsibility to secure to the applicant the enjoyment of the right enshrined in Article 8 of the Convention. Consequently, the applicant's complaint had to be examined from the standpoint of the Respondent State's positive obligations.[15] In this respect, it was considered to be of particular importance to check whether fair balance had been struck between the competing interests of the applicant and those of his employer. For that purpose, the Grand Chamber has expressly emphasized that in the present case, its task was to clarify the nature and the scope of the positive obligations the States are required to comply with in protecting the applicant's right to respect for his private life and correspondence in the context of employment.

In the first place, the Court analysed a question whether the Contracting Parties, like in some other aspects touching upon issues of Article 8 of the Convention,[16] are under obligation to set up a legislative framework governing the conditions under which an employer may regulate electronic or other communications of a non-professional nature by its employees in the workplace. The Court answered in the negative for three reasons, namely (a) the nature of labour law, (b) non-existence of European consensus in the field and (c) a wide margin of appreciation enjoyed by the States in this respect. As to specific features of labour law, the Court has emphasized its contractual nature, leaving room for negotiation between the parties to the contract of employment.[17] Furthermore, only six Council of Europe members (Austria, Finland, Luxembourg, Portugal, Slovakia and the United Kingdom) out of 34 studied regulate the issue of workplace privacy either in their labour laws or in special legislation. Issues of private Internet use at workplace

---

[15] See more about States' positive and negative obligations regarding Article 8 in: *Harris, David/ O'Boyle, Michael/ Bates, Edward/ Buckley, Carla*, p. 504 f.

[16] Such legislative framework was considered mandatory in order to ensure compliance with positive obligations under Article 8 of the Convention in cases of sexual assault against minors (e.g. *X and Y v. the Netherlands*, 26 March 1985, series A no. 91, where a 16 year old mentally handicapped girl was not capable of filing a complaint due to sexual assault by herself and the public authorities did not entitle her father to file the complaint), violation of personal integrity committed by a close relative (e.g. *Söderman v. Sweden (GC)*, no. 5786/08, ECHR 2013, where a 14 year old girl was attempted to be filmed naked by her stepfather) or medical negligence (e.g. *Codarcea v. Romania*, no. 31675/04, 2 June 2009, where the State failed to provide adequate means of ensuring compensation for injuries caused by medical error).

[17] On the other hand, it seems that the Court did not specifically consider the fact that in labour law relations, an employee is often a fragile party in comparison with the position of an employer, this in turn limiting the contractual freedom to a certain extent.

are most commonly dealt with in contracts of employment or employers' internal regulations, with domestic courts adjudicating in case of a dispute generally paying special attention to the clarity of such regulations.

Although labour law is marked by a high degree of autonomy of parties to agreements and the margin of appreciation of Respondent States is in this particular field wide, putting in place of guarantees against arbitrariness is essential. The Court has outlined several safeguards against abuse. It may be fair to say that this outline should be considered as the most important part of the Barbulescu judgment.[18]

In the first place, the national authorities should in a given case consider whether the employee has been notified not only of the possibility of monitoring, but also of the implementation of any such measures. The notification should normally be clear about the nature of the monitoring (e.g. whether the content of communication is equally accessed) and be given in advance, i.e. before the start of the monitoring.

The employer has to provide legitimate reasons to justify monitoring of the communications or even accessing their actual content. In the event of monitoring, the national authorities should verify its extent and the degree of intrusion into the employee's privacy. The more invasive the method, the weightier should be the justification provided. In this regard, a distinction should be made between simple monitoring of the flow of communications and of their content. Equally, national authorities should also take into account whether all communications or only part of them have been monitored. Limits in time and the number of people who had access to the results are also important.

Furthermore, the Court has emphasized the principle of subsidiarity/necessity of monitoring of correspondence.[19] Any such activity by the employer may only be considered acceptable if no less intrusive methods and measures were available. It is important to consider whether the aim pursued by the employer could have been achieved without directly accessing the full contents of the employee's communications. In assessing proportionality of interference with an employee's right under Article 8 of the Convention, regard must be had to the consequences for the employee subjected to monitoring and the use made of the results by the employer. In any event, if monitoring is put in place, adequate

[18] The outline of the principles is contained in para. 121 of the judgment.
[19] See more about the criteria of "necessity" of Article 8 in: *Christoffersen, Jonas*, p. 120-122.

safeguards must be provided against abuse in order to ensure that the principles outlined above are complied with.

Last but not least, the Grand Chamber has stressed the importance of judicial protection of an employee whose communications have been monitored: he or she needs to have access to a remedy before a judicial body with jurisdiction to determine how the criteria outlined by the Court were observed in a particular case. The Grand Chamber did not specify the nature of that legal remedy, leaving the issue to the High Contracting Parties. It might be fair to say that in principle, labour law proceedings in court or a civil action in damages could meet the criteria. This is not evident for criminal law remedies, since usually no direct access to court is available to an employee acting as an complainant in a criminal case, a decision whether to prosecute and thereby bring an action in court being reserved to a state or public prosecution authority.

It is of symbolic importance that these principles were adopted by unanimity. The dissenting judges in this particular case disagreed with the outcome of the application of these principles to circumstances of monitoring and dismissal of Mr. Barbulescu or with a decision not to award any just satisfaction to the applicant.

VI. APPLICATION OF THE GENERAL PRINCIPLES TO THE CASE

According to the principle of subsidiarity, it is for the national authorities to adjudicate in particular cases by establishing the relevant facts and to apply relevant legal provisions. In its turn, the Court's role is to ascertain whether the domestic courts observed the requirements of the Convention when considering the case. In the light of the case in question, it was necessary to examine whether and if so, how the County Court and the Court of Appeal applied the principles outlined above.

The Grand Chamber noted in the first place that the domestic courts correctly identified the interests at stake by holding that there existed a collision between, on the one hand, the applicant's right to respect for his private life, and on the other hand, the employer's right to ensure smooth running of the company. By referring to Directive 95/46/EC, the Court of Appeal made reference to the principles of necessity, purpose specification, transparency, legitimacy, proportionality and security, which in many ways are compatible with principles

outlined by the Court and presented above. Both domestic courts also examined whether disciplinary proceedings had been conducted in an adversarial manner and whether the applicant had been given the opportunity to put forward his arguments, answering in a positive manner.

However, it seems that the principles outlined by the Court had been applied by the domestic courts in an insufficient manner. As to whether the applicant received prior notification from his employer, the Court observed that he had not appeared to have been informed in advance of the extent and nature on his employer's monitoring activities, or of the possibility that employer might have access to the actual content of his communications. In connection with that, the domestic courts omitted to determine whether the applicant had been notified of the above in advance, apparently considering these issues to be of no importance. Equally, they failed to examine the issues of the scope of monitoring and the degree of intrusion into the applicant's privacy. Regarding the existence of legitimate reasons to justify the monitoring, the Court of Appeal did not at all address the issue, while the County Court mentioned the need to avoid the company's IT systems being damaged and its trade secrets being disclosed. However, these examples seemed rather theoretical, since there was no evidence that the applicant had actually exposed the company to any of those risks. Furthermore, the domestic courts neither considered whether the aim pursued by the employer could have been achieved by less intrusive methods nor the seriousness of the consequences for the applicant, who had in the end been dismissed due to his disciplinary offence. Finally, the Court noted that the domestic authorities did not establish at what point during the disciplinary proceedings the employer had accessed the relevant content, this having possibly happened before the applicant was summoned to give an explanation for his use of company resources.

Consequently, the Grand Chamber held that there had been a violation of Article 8 of the Convention. The applicant was awarded no just satisfaction in respect of asserted pecuniary damage, since no causal link between the violation found and the alleged pecuniary damage could be discerned. Equally, no just satisfaction for non-pecuniary damage was awarded, since the Court considered that the finding of a violation constitutes sufficient gratification for the applicant. Therefore, only costs and expenses in the amount of 1.365 euros were awarded. Six dissenting judges submitted a separate opinion disagreeing with the majority that in the particular case, the domestic authorities did not

afford adequate protection of the applicant's right to respect for his private life and correspondence. One judge from the majority dissented on the issue of just satisfaction awards, holding that the particular violation of Article 8 of the Convention had undoubtedly caused non-pecuniary damage to the applicant, who could not be satisfied with the mere finding of violation.

VII. POSSIBLE FURTHER DEVELOPMENTS

The presented judgment touches upon a limited issue of privacy of correspondence in the context of employment relations. It remains to be seen how its main messages will affect further jurisprudence of the Court in cases pertaining to surveillance of employees by employers. Recently, the second section of the Court rendered a judgment in the case of *Antović and Mirković v. Montenegro*.[20] The applicants lecturing at the University of Montenegro alleged that installation and use of video surveillance in the auditoriums where they held classes had violated their right to respect for private life. By a majority, it held, it held that Article 8 of the Convention was applicable in the situation, regardless of the fact that the video surveillance in question was an overt one. By four votes to three, it also found a violation of the abovementioned Convention provision. The field of protection of Article 8 was thereby applied and extended to a separate field of employment relations.

Equally, it might be interesting to observe the steps the High Contracting Parties will take in order to implement the principles of the Barbulescu judgment. Although the Court did not require adoption of relevant legislation, this may be considered desirable as it could contribute to foreseeability of any measures particular employers might take in limiting privacy of their employees. Furthermore, this would offer a more fixed framework for judicial decision-making of national courts when adjudicating in disputes between employees and employers. Those decisions, in their turn, might in particular cases arrive to the Court, which will test whether the principles developed in the Barbulescu judgment have been complied with.

Be that as it may, it is worthwhile to reiterate the overarching idea stressed by the Grand Chamber, namely that in order to be fruitful, labour relations must

[20] Application no. 70838/13, judgment from 28 November 2017.

be based on mutual trust. Such trust may be solid and lasting only if both the employee's exercise of right to privacy and the employer's surveillance are conducted in good faith and with respect for everyone involved.

LITERATURE LIST:

Christoffersen, Jonas, Fair Balance: Proportionality, Subsidiary and Primarity in the European Convention on Human Rights. Martinus Nijhoff Publishers, Leiden, 2009.

Harris, David/ O'Boyle Michael/ Bates, Edward/ Buckley, Carla, Law of the European Convention on Human Rights: Articles 8-11: General Considerations. Oxford University Press, 3rd ed., 2014.

Hustinx, Peter, EU Data Protection Law: The Review of Directive 95/46/EC and the General Data Protection Regulation. In: *Cremona, Marise*, New technologies and EU law. Oxford University Press, 2017.

Kaeni, Sara, Case Analysis Barbulescu v Romania (App. No.61496/08), 5 September 2017. European Human Rights Law Review, issue 6/2017.

Köffer, Sebastian/ Anlauf, Lea/ Ortbach, Kevin/ Niehaves, Björn, The Intensified Blurring of Boundaries Between Work and Private Life through IT Consumerisation (2015). ECIS 2015 Completed Research Papers. Paper 108.

Mouly, Jean, Le droit au respect de la vie privée au sens de la Convention européenne des droits de l'homme. In : *Sudre*, *Frédéric* (dir.) : Actes du colloque des 26 et 27 novembre 2004 organisé par l'Institut de droit européen des droits de l'homme, Faculté de droit, Université Montpellier I [et] Journée nationale d'études de la Commission pour l'étude des Communautés européennes (CEDECE). Nemesis, 2005.

Judgments of the European Court of Human Rights (in descending chronological order):

Antović and Mirković v. Montenegro, no. 70838/13, 28 November 2017.

Barbulescu v. Romania, no. 61496/08, 5 September 2017.

Fernandez Martinez v. Spain (GC), no. 56030/07, ECHR 2014 (extracts).

Söderman v. Sweden (GC), no. 5786/08, ECHR 2013.

Codarcea v. Romania, no. 31675/04, 2 June 2009.

Copland v. the United Kingdom, no. 62617/00, ECHR 2007-I.

Sidabras and Džiautas v. Lithuania, nos. 55480/00 and 59330/00, ECHR 2004-VIII.

Halford v. the United Kingdom, 25 June 1997, Reports of Judgments and Decisions 1997-III.

Niemietz v. Germany, 16 December 1992, Series A no. 251-B.

X and Y v. the Netherlands, 26 March 1985, series A no. 91.

Nadzor komunikacije zaposlenih: kaj nas uči sodba ESČP v zadevi Barbulescu proti Romuniji

Marko Bošnjak*

Izvleček

Septembra 2017 je Evropsko sodišče za človekove pravice (v nadaljevanju Sodišče) objavilo sodbo Velikega senata v zadevi Barbulescu proti Romuniji, ki obravnava nadzor elektronskega dopisovanja zaposlenega s strani njegovega delodajalca. Slednji je pritožnika obvestil, da je prepovedano uporabljati službene predmete za zasebne potrebe, kasneje pa tudi, da bo nadziral uporabo elektronskih komunikacijskih sredstev, pri čemer ni bilo ugotovljivo, ali se je s slednjim obvestilom pritožnik seznanil, še preden se je nadzor začel. Ker je delodajalec pri tem ugotovil, da pritožnik uporablja Yahoo Messenger račun, odprt za službene potrebe, pretežno za zasebne namene, mu je odpovedal pogodbo o zaposlitvi. Potem ko je ta ukrep neuspešno izpodbijal pred domačimi sodišči, se je pritožnik obrnil na Sodišče z očitkom o kršitvi pravice do zasebnosti iz 8. člena Konvencije. Senat Sodišča je odločil, da pritožniku navedena pravica ni bila kršena. Na zahtevo pritožnika je zadevo obravnaval še Veliki senat.

Ta je v zvezi z ugovorom romunske vlade najprej sklenil, da je pravica iz 8. člena Konvencije, ki med drugim varuje tako zasebno življenje kot dopisovanje, v konkretnem primeru uporabljiva. Že iz dosedanje presoje Sodišča izhaja, da je zasebno življenje lahko varovano tudi na delovnem mestu, pri čemer se je pogosto oprlo na doktrino razumnega pričakovanja zasebnosti. V pričujoči zadevi se Veliki senat ni opredelil, ali je pritožnik zasebnost lahko pričakoval, je pa opozoril, da delodajalec ne more v celoti odpraviti zasebnega družabnega življenja zaposlenih, kar je skušal storiti v konkretnem primeru.

Nato je Veliki senat sprejel stališče, da je pritožbo treba obravnavati z vidika pozitivnih obveznosti tožene države. Zato je moral presoditi, ali so domača sodišča ustrezno uravnotežila interese pritožnika in njegovega delodajalca. V zvezi s tehtanjem interesov je najprej poudaril, da države pogodbenice načeloma

* Sodnik Evropskega sodišča za človekove pravice, doktor pravnih znanosti, PhD, izredni profesor za kazensko pravo. Stališča o določenih pravnih vprašanjih, ki jih zavzema avtor v članku, ne predstavljajo nujno stališč Evropskega sodišča za človekove pravice.

niso zavezane k sprejemu zakonodaje, ki bi izrecno uredila vprašanje nadzora komunikacije na delovnem mestu. V nadaljevanju sodbe pa je postavil načela, ki jih morajo domači organi upoštevati pri takšnem tehtanju. Ugotoviti morajo, ali je delodajalec zaposlene predhodno obvestil ne le o možnosti nadzora, temveč tudi o njegovem dejanskem izvajanju in naravi. Delodajalec mora za nadzor imeti tehtne razloge. Intenzivnejši kot je nadzor, močnejši morajo biti, še posebej, če vključuje tudi vsebino komunikacije. Preveriti je treba, ali so bila za dosego delodajalčevega cilja na voljo milejša sredstva. Upoštevati je treba posledice nadzora in zagotoviti primerna jamstva pred zlorabami. Zaposleni mora imeti možnost sprožiti postopek pred domačimi sodišči, ki bodo preverila spoštovanje teh načel.

Ker pritožnik ni bil obveščen o naravi nadzora, ker romunska sodišča niso ugotavljala, ali je pritožnik prejel obvestilo o njem njegovim začetkom, ker niso ugotovila konkretnih razlogov, ki bi upravičili nadzorovanje, ker niso preverjala, ali so morda obstajala milejša sredstva in tudi ne, kdaj se je delodajalec v resnici seznanil z vsebino pritožnikovega dopisovanja, je Veliki senat ugotovil kršitev 8. člena Konvencije.