

## EMPLOYEE'S RIGHT TO PRIVACY: WHERE IS THE BOUND OF THE EMPLOYER'S RIGHT TO MONITOR EMPLOYEES' COMMUNICATIONS\*\*

### *Abstract*

*Starting from the assumption that employees enjoy the protection of private life in relation to their employers, this paper seeks to answer the question how the right to privacy as a civil right can be incorporated into labour law without, concurrently, undermining the nature of the employment relationship, and considering the subordination as its primary feature. Accordingly, the nature of this right is analysed and the conditions under which it can be restricted in the workplace. Taking into account that the breaches of privacy and even more subtle ways of breach have increased in frequency in the workplace, the author deals with the issue of monitoring the employee's communication, pointing to the high sensitivity of this topic, since at the same time numerous legitimate interests of the worker should be fulfilled, as well as of the employer. The aim of the paper is to point out that in this case, the consistent application of the principles of legitimacy, proportionality and transparency is crucial for balancing the conflicting interests of workers and employers.*

**Keywords:** *right to privacy, principles of legitimacy, proportionality and transparency, monitoring at work, monitoring employees' communications.*

### **1. Background of the study**

*The right to privacy belongs to the group of basic, fundamental (civil) human rights that aim to protect moral and mental integrity (Paunović, 2013, p. 179). It is simply defined as the primal right of man to be left alone (Guerin, 2011, p. 252). Each individual has the right to carefully guard his or her privacy (intimacy) from the eyes of the public (of others), thus protecting his or her personal dignity. Protecting the private sphere of the individual, his/her intimacy and his/her family is one of the basic goals of modern legal systems. Although a strict negative approach is usually associated with the right to privacy,*

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which entails the obligation to refrain from interfering with or excessive interference in the private sphere of the individual, in addition to these primarily negative obligations, there might be specific (positive) obligations contained in genuine respect for private and family life.<sup>1</sup>

According to its content, the right to privacy is a complex right encompassing a number of freedoms and rights. This is because *privacy/private life* is a broad concept incapable of exhaustive definition.<sup>2</sup> It is not absolute, however, but its boundaries are always determined according to the circumstances in which it is observed (Danilović, 2017, p. 163). The boundary between the public and the private varies case by case (Ditertr, 2006, p. 229). To determine the extent of the private sphere, a person's reasonable expectation of privacy may be a significant, though not necessarily decisive factor (Rid, 2007, p. 514). In seeking to make the notion of private life operational in law, that is, to determine how well the presence of others in the private domain can and must be tolerated, the literature and case law have constructed a plurality of public, non-private spheres.<sup>3</sup> In each of these spheres, an individual enjoys a degree of protection of privacy. However, difficulties in delimiting particular spheres of private life were the reason for abandoning this theory and taking a stand on the *unique notion of private life*, acknowledging that some of its parts, such as intimacy, are particularly sensitive (Kovačević, 2013, p. 498).

The right to privacy, in the first place, protects the physical and moral integrity of the person, including his or her sex life. Any interference with a person's physical integrity must be prescribed by law and that person's consent is required (Gomien, 2007, p. 133), because sex life/sexual orientation is an important aspect of one's private life (Ditertr, 2006, p. 231). Of particular importance is that the right to privacy protects the right to the free unfolding of personality, as well as the right to establish and develop relationships with other human beings and the outside world (*Botta v. Italy*, par. 32). The right to privacy also protects all other parts of the person's intimacy, such as his or her name or voice, which makes it difficult to determine its contents in advance, as evidenced by the fact that European Court for Human Rights (ECtHR) extends the scope of application of Article 8 of the European Convention on Human Rights (hereinafter ECHR or Convention) on a case-by-case basis. Moreover, the right to privacy also applies to professional or

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<sup>1</sup> With regard to the protection of Article 8 of the European Convention on Human Rights (ECHR), the European Court for Human Rights (ECtHR) has repeatedly considered whether the positive responsibility of the state held in harmony with genuine respect for family life can be discussed (*Airey v. Ireland*, *Rees v. The United Kingdom*). In determining whether there is a positive obligation, it must be taken into consideration the equitable balance which must be struck between the general interest of community and the interests of an individual, the balance which is an integral part of the entire Convention (Ditertr, 2006, pp. 227-228).

<sup>2</sup> For this reason, ECtHR determines in each particular case whether there has been a violation of Article 8 of the Convention, having in mind the circumstances of each individual case, which provides it with a degree of flexibility and thus the ability to adequately respond to any social changes that are primarily conditioned by technological development (Krstić, 2006, p. 15).

<sup>3</sup> Thus, according to one theory, the most hidden and furthest from the public, is the most *secret (intimate) sphere*, while the *private sphere* is what the individual can share with other (close) persons, but which should not be available to the public. In contrast, the *private-public sphere* involves what takes place in generally accessible places, and thus the public gains the right to be informed of all that is relevant in the specific case (Vodinečić, 1978, p. 918).

commercial activities, while the office and other premises fall within the scope of Article 8 of the Convention (*Niemietz v. Germany*, par. 31).

An important segment of the right to privacy is the protection of personal data, which primarily means protection against any unauthorised and excessive personal data processing. This is in line with the concept of distinguishing three types of privacy - physical privacy, data privacy, i.e. information privacy and privacy decision-making (Stojković-Zlatanović & Lazarević, 2017, p. 706). Although only information privacy directly refers to personal data, in fact all three can be compromised through the collection of personal data, i.e. by monitoring the work process or other aspects related to the work process (Reljanović, 2020, p. 75).

In the field of labour relations, the processing of personal data is present to a large extent, whereby employers and employees do not often realize that many of the activities which they do routinely and on a daily basis include the processing of personal data indeed. The processing of personal data is, in most cases, carried out when it is required for concluding an employment contract or for fulfilling legal obligations.<sup>4</sup> However, for the processing of certain data, the employee must give his/her consent, which he/she will sometimes do explicitly and sometimes by conclusive action - passive behavior is considered debatable as a clear expression of will and can be disputed (Reljanović, 2020, pp. 67-68). Data privacy is also related to the right to confidentiality of personal data, which implies the right of a person to prevent the re-disclosure of personal information to a third party (Stojković-Zlatanović & Lazarević, 2017, p. 706).

The right to privacy is the most affected human right by the development of technology on a global scale. It has become almost impossible to preserve an individual's privacy in a context where smartphones equipped with cameras, eavesdroppers, microphones, and monitoring devices are accessible to every individual, and where one piece of information can, thanks to the Internet, go round the world in record time. All this has caused a steady rise in the number of citizens seeking protection of their privacy before the court.

## 2. The right to privacy in the workplace

Although the right to privacy is a basic human right that belongs to every individual, its growing importance in the field of labour relations has been noticeable in the last few decades. In the context of the workplace, the right to privacy refers to the right of an employee to be free from the excessive intrusiveness of an employer who wishes to have insight into his or her activities, beliefs and private communication (Guerin, 2011, p. 252). There are a number of reasons that have brought workplace privacy issues into the focus of interest (Blanpain, 1995, pp. 1-2). The process of globalisation, that is, the global economic market, has led to fierce competition among employers, who now, in order to survive and be successful in such a market, rely heavily on the potential of their workers.

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<sup>4</sup>This is considered a lawful reason for the processing of personal data in accordance with Regulation (EU) 2016/679 (General Data Protection Regulation).

In order to achieve the best possible business result, the employer wants to obtain as much information on employees and candidates for employment as possible, including information on their private life. On the other hand, the development of information technology has enabled the employer to supervise the work of an employee in new, innovative ways, but also to obtain all the information about the employee's psychological health, genetic or other conditions/predispositions thanks to the development of science. Also, as the employer's responsibility for workplace safety grew, so did his need to obtain certain personal information and information about employees' habits. All of this made an employee's right to privacy extremely vulnerable.

Historically, the right to privacy was first guaranteed to the individual in relation to the state, while the privacy of an employee in the workplace depended on how the employer exercised his/her managerial powers. The employer used to perceive an employee as the parent perceives his/her child, so in that relationship the employee had no more privacy than the child has in relation to his/her parent (Ray & Rojot, 1995, p. 61). Today, however, the situation is vastly different, as there is growing awareness that the enjoyment of the right to privacy, to some extent, needs to be extended to the area of employment. This understanding is the result of the idea of the horizontal effect of human rights, which enjoy not only protection in relation to the state, but also in relation to third parties.<sup>5</sup> However, it is not easy to determine the extent to which privacy is guaranteed to an employee in the workplace, since the employees voluntarily submit themselves to the employer's authority by signing an employment contract. *Legal subordination, personal performance of work, voluntariness and remuneration* as essential features of employment represent additional risk generators for an employee's private life and make it difficult to apply basic principles regarding limitations of the right to privacy. It should not be forgotten, however, that one of the essential features of employment includes a special *employment-law regime of employment*, which, as professor Lubarda states "evolved from the concept of subordinate work to the concept of decent work of an employee-citizen" (Lubarda, 2012, p. 15). Accordingly, there is general agreement that an employee enjoys the protection of the right to privacy with respect to the employer during his or her employment and that he/she does not waive his/her rights when coming to work (Vigneau, 2002b, p. 507).

### 3. Conditions (principles) of limitation of an employee's right to privacy

In democratic societies, the possibility of limiting basic human rights is minimised. Human rights, in principle, can only be restricted under pre-determined conditions. Like other rights, the right to privacy is relative and must be balanced with other rights, so,

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<sup>5</sup> In Germany, the right to privacy and its protection have been of particular importance since the World War II because of the experience with the Nazi regime during which individuals and their rights were completely unprotected in relation to the state. For this reason, human rights were considered as rights which were enjoyed exclusively in relation to the state. In this context, human rights had an effect only between the state and the individual (citizen). However, German doctrine has largely changed to adapt to the reality, so that the exercise of the right to privacy has expanded, and today it has a horizontal effect (Weiss & Geck, 1995, pp. 75-76).

therefore, the general limitation of this right arises from the existence of other subjective rights and legally recognized interests (Vodinelić, 1978, p. 925). Privacy, therefore, is recognized as a *prima facie* value that can be pushed aside in favour of a higher value (Palm, 2009, p. 212).

A general rule for the limitation of human rights, transposed into the field of labour law, could be interpreted as an opportunity for the employer to, to a certain extent, restrict an employee's right to privacy when necessary to achieve a *legitimate aim* and with respect for the principle of *transparency*. However, unlike the right to privacy of an individual (citizen) which is regulated in detail by international and local legal acts, an employee's right to privacy still requires many answers. What essentially differentiates the *state-individual* relationship from the *employer-employee* relationship is the fact that an employee, by entering into employment (by signing an employment contract), agreed to be under his/her employer's authority and, among other things, comply with his/her business interests. In this regard, in practice, the legitimate interest of an employer is more broadly interpreted than the legitimate interest of the state. However, regardless of the specificity of employment, the principles of legitimacy (relevance), proportionality and transparency are applied as necessary conditions to limit an employee's right to privacy, wherever possible (Vigneau, 2002a, pp. 511-514). These principles are legal techniques that should be used primarily by courts to find, in each individual case, the right measure to meet the interests of employer and employee.

According to the principle of *legitimacy*, employee's right to privacy can be restricted if there is an important and justified *interest* of the employer for such limitation, or if such limitation is generally justified. It is a very flexible tool that allows courts to consider all the circumstances of the case and to decide on whether a limitation on the right to privacy is justified or not (Vigneau, 2002a, p. 510).

The employer's ability to limit employee's privacy is usually associated with two kinds of reasons, namely *business-related* and *liability-related reasons*. In the first case, it is about the need of the work process, i.e. the situation when the limitation of an employee's privacy is considered necessary for the smooth running of the business process. In the second case, it is the responsibility of the employer, as the owner of the facilities, with regard to safety (persons and property) in the workplaces. In general, *liability-related reasons* are the least *controversial*, since security of property and persons always arises as a higher interest justifying a limitation on human rights. *Business-related reasons*, however, should be interpreted narrowly, since the breach of an employee's privacy can only be considered justified if it is proven that it is indeed necessary for the work process or indispensable in the implementation of the employment contract.

Among *business-related reasons*, the most controversy is caused by the reasons related to the employer's interest in controlling intended use of the facilities, quality of work performance, but also maximum productivity and profitability. This is because in many cases the employer can satisfy these interests by applying other methods that do not necessarily imply an infringement of an employee's privacy (e.g. restricting the Internet traffic or setting goals at work to be achieved on a daily, weekly or other basis).

*The principle of proportionality* is considered to be an essential legal remedy for the understanding and application of human rights.<sup>6</sup> Because of the way it establishes a fair relationship between conflicting interests and rights, this principle has been a recognizable element of the justice system since Aristotle (Vigneau, 2002a, p. 510). It was first used in Labour law to establish certain restrictions on the right to strike and the right to lock-out<sup>7</sup>, and today it is used as a mechanism to prevent abuse of power by the employer, since all power holders are expected to use it proportionally and to avoid any unnecessary restriction on the rights (Davidov, 2012, p. 63). It is not so demanding to determine the employer's interest in restricting an employee's right to privacy, as it is demanding to assess whether that restriction has been properly and appropriately enforced, and whether it is justified under the given circumstances. The principle of proportionality applies not only to the *extent* of the restriction, but also to the *way* in which that restriction is exercised. Accordingly, the employer's interest should be satisfied in a manner and by the means that will least violate an employee's privacy, or in the least intrusive way. It also applies to the *duration* of the restriction that should exist only as long as there are reasons to justify it.

*The principle of transparency* means that the employer should be clear and open about all his/her activities, and its application can crucially influence the decision on whether, in this particular case, interference with an employee's privacy by the employer is permitted. As a rule, it is a constituent element of a justified restriction on an employee's privacy, and only exceptionally its application can be ruled out. Generally speaking, this principle means that an employee must be familiar in advance with the employer's intention to limit his/her privacy in any way. The principle of transparency is sometimes directly linked to an employee's duty of loyalty to an employer (Ray & Royot, 1995, p. 71), and it can also be derived from the general rule of obligation law on the performance of contractual obligations in good faith (*bona fide*).

When it comes to protecting the right to privacy in the workplace, the principle of transparency should, among other things, make up the deficit of the *principle of legality*. The principle of legality is a condition for the restriction of the right to privacy of an individual (citizen) by the state, since such restrictions should be prescribed by law.<sup>8</sup> Since it is not possible in labour law to anticipate all the reasons in advance that may justify a

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<sup>6</sup> The principle of proportionality usually involves three types of test: first, the relationship between the goal and the means by which a legitimate goal can be attained is examined; then the choice of the least restrictive means is made; and eventually a comparison is sought between what is to be achieved and the 'price' to be paid concerning the restriction of a right (Davidov, 2012, pp. 63-64).

<sup>7</sup> Unlike collective labour law, where the application of the principle of proportionality is required by both parties, in the context of individual labour law, due to the different power of workers and the employer, the application of the principle of proportionality refers to the employer. For more on the principle of proportionality in Labour law, see: Davidov, 2012, p. 67.

<sup>8</sup> Article 8 of the European Convention on Human Rights: "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

restriction on an employee's private life, the principle of transparency should ensure that the employee is notified in advance of the possibility of such restriction.

#### 4. Employee monitoring

*Employee monitoring* is a very broad term that in practice can refer to different methods of monitoring and surveying. The term 'monitoring' includes, but is not limited to, the use of devices such as computers, cameras, video equipment, sound devices, telephones and other communication equipment, various methods of establishing identity and location, or any other method of surveillance (International Labour Organisation, 1997, p. 1). It, therefore, implies different types of surveillance through which information is collected on the subjects of surveillance.

The most commonly used methods of employee monitoring are video surveillance, *communications monitoring* and GPRS monitoring. The surveillance system can still be divided into electronic (computer) monitoring system and telephone monitoring system.<sup>9</sup> In addition to these, there are other, less prevalent, types of surveillance such as: electronic cards for monitoring arrival and departure from work; magnetic cards; portable computers for keeping track of workplace, ways and time spent on breaks; pagers, eavesdroppers, recording devices, etc. (International Labour Organisation, 1993, p. 13). All these forms of surveillance have in common the fact that they are carried out by modern technologies, they can violate employee's privacy and, in practice, lead to similar dilemmas that are sought to be addressed using the same principles.

##### 4.1. Monitoring employee communication

Monitoring communication is one of the most complex issues related to an employee's privacy in the workplace. This is because the interests (of the employer) that justify the supervision of this form of communication are more broadly set, but also because it is more difficult to determine the proportion and circumstances in which such supervision is permitted. The complexity of this issue is certainly associated with the fact that the development of labour law did not accompany the development of technology, its use in the workplace, and the consequences that such use carries with it. The complexity of the issues that arise in practice is particularly related to the monitoring exercised over an employee through *computer-based performance monitoring*, since some clear attitudes have emerged in theory and practice regarding video surveillance and telephone communication monitoring. Employee computer-based monitoring in the first place involves monitoring communications via email and Internet applications.

<sup>9</sup> Electronic (computer) monitoring system involves employee data collected directly through the use of computers and other means of communication. This system automatically records information about employee's work such as the number of characters typed, the number of transactions completed, the time spent for each transaction completed, and the idle computer time. In contrast, telephone monitoring system records all information about the date, time, duration, call destination, the number called and its cost. Thus, for example, all calls by taxi dispatchers are recorded, their duration and efficiency, while the speed, distance travelled, holds and breaks which taxi drivers make are measured (International Labour Organisation, 1993, p. 13).

*Electronic mail*, as the most prevalent form of communication in the workplace, raises many contentious issues regarding its private use and monitoring. The nature of e-mail is such that an employee often perceives it as his or her own, even when it is a business one, because the e-mail address is usually made up of the employee's first and last name and only the employee has access to this address. On the other hand, life in modern society cannot be imagined without internet access. The Internet is where a modern man (employee) finds all the information. Therefore, it is not advisable to introduce a complete ban on private internet use at work. Since e-mail and internet communication represent an integral part of the notion of privacy, it is necessary to establish legitimate reasons for their monitoring, and in order to be able to do so, it is important to differentiate *external and internal (content) monitoring*. The first type involves monitoring the number of calls, their duration, the number of e-mails, their size, internet traffic, and unlike the second type of monitoring, it does not involve monitoring the content of telephone, electronic or internet communication. In the leading workplace privacy case in France, *Nikon* case of 2001, the Court of Cassation (*Cour de cassation*) stated that workers have a right to respect for private life in the workplace and during working hours, what specifically implies the secrecy of his/her communication, i.e. the employer cannot monitor the content of personal messages either sent or received by the employee through a computer assigned to him/her as a tool for work without violating his/her fundamental rights and freedoms. This principle should be applied even when the use of computers for non-business purposes was prohibited (Vigneau, 2002b, p. 355).

An additional problem is that the issue of monitoring communication also contains a sub-question that complicates it and which could be considered *per se*, regardless of the issue of monitoring. It is a question of the *intended use of the means (of communication) for the sake of*, or the use of company facilities for private (personal) purposes. There are different views as to whether an employee has a *right to private access* to company facilities. By itself, an employment contract does not allow an employee to use his or her employer's resources for private purposes (Reinhard, 2002, p. 385). *The employer, as the owner of the property and facilities who manages and controls the work process, has the right to restrict or prohibit the use of company facilities for private purposes, since their purpose is to have work performed.*

In practice, however, employers very often allow (tolerate) the use of telephones, emails and the Internet for private purposes on a limited (insignificant) scale. Limited or modest use of company facilities for private purposes refers to the use that does not prevent an employee from performing all his/her work tasks on a daily basis, as well as that which does not cause significant expenses on his or her *employer's* behalf. For example, in French law the occasional use of company facilities does not constitute *grounds for justifiable termination* of an employment contract, and *vice versa*, the apparent misuse and regular use of company facilities for private purposes will constitute a justifiable termination.<sup>10</sup>

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<sup>10</sup> Disciplinary sanction must be proportionate to the extent of the use of company facilities for private purposes. For example, online gambling in the workplace is a *justified reason to terminate* an employment. For more on the use of company facilities for private purposes as a job termination reason, see: (Vigneau, 2002b, pp. 358-359).

Permission for the use of company facilities for private purposes may result from policies and procedures adopted by the employer, and may be the result of deeply rooted practices (habits) known by the employer which are considered as a permission *per facta conculdentia* (Hendrickx, 2002, p. 101). In cases where the employer tolerates the private use of the telephone in the workplace, the assumption is that there is also a tolerance in relation to the use of the Internet and e-mail (Reinhard, 2002, p. 385). However, an employee may never use the means of communication for commercial purposes, or the content of the conversation may be threatening, racist, sexual or pornographic oriented.<sup>11</sup>

#### 4.2. Is the employer allowed to monitor an employee's communication?

A good starting point for considering this issue is the view that the notion of private life includes the privacy of communication, which includes communication by mail, telephone, e-mail, as well as other forms of communication, but also includes information privacy, which primarily involves the use of the Internet (Council of Europe, 2015, p. 6). Also, a significant achievement in the field of an employee's privacy (and communication) is the view that activities of a professional or business nature are not excluded from the notion of privacy (*Niemietz v. Germany*, par. 29.), and that telephone calls from business premises are *prima facie* covered by the notions of private life and correspondence as defined in Article 8 of the ECHR, which can be analogously applied to e-mail sent from work, as well as to the information obtained through monitoring of the Internet use for private purposes in the workplace (*Copland v. The United Kingdom*, par. 41).

In general, it is possible to identify two different approaches to monitoring employee's communication: the first, *the more restrictive*, and the second, slightly *more flexible* with regard to this employer's possibility. While the first approach is to protect *employee's privacy*, the second focuses more on an *employer's authority* in the workplace. According to the first approach, employer may monitor employee's communication if he or she fulfills several requirements: a) *employer must have a legitimate (justifiable) reason for monitoring* employee's communication; b) *employee must be notified in advance* of possible monitoring and its scope; c) *employer cannot monitor the content* of an employee's private communication, regardless of whether it is permitted in the specific case or not; d) *monitoring should not be continuous and constant*; and e) *communication monitoring should be indispensable*, in the sense that the same objective cannot be achieved in any other, less intrusive way. Under this (restrictive) approach, controlling the proper use of company facilities and assessing an employee's abilities and performance (performance evaluation) are not reasons that *automatically* justify monitoring an employee's communication. Communication monitoring with reference to these reasons could only be considered permissible when there is no

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<sup>11</sup> In the Netherlands, in 1999, the largest trade union (FNV Bondgenoten) adopted the Agenda for privacy in the use of internet and e-mail. It provides that employees are authorized to use the e-mail system for non-commercial transactions in order to send and receive personal e-mail messages provided that this does not interfere with their day-to-day work commitments. It is not permitted to send threatening, sexual or racist oriented messages or to visit pornography websites. The employer is not allowed to check the number of e-mails, e-mail addresses, their content or to register the sites that are visited (Hendrickx, 2002, p. 102).

other way to monitor the conduct of employee or to evaluate the quality of his/her work.

According to the second approach, monitoring employee's communication may not be *indispensable* in order to be considered permissible. It is sufficient for monitoring by the employer to be *useful* or *desirable*, i.e. to favor his/her business interests. In other words, the employer has the right to monitor employee's communication and to control whether the employee uses company facilities for business purposes, i.e. whether the employee uses working hours for private communication, or for the purpose of evaluating the employee's work. However, in order to interpret the reasons for the implementation of monitoring an employee's communication in such a flexible way, it is necessary for the employer to respect the principle of transparency in a broad sense.

The complexity of the issue of monitoring an employee's communication as well as different approaches to answering this question were highlighted in *Bărbulescu v. Romania*, since in this case the Chamber (2016) and the Grand Chamber (2017) in their judgments were guided by different arguments and presented two completely different approaches in balancing an employee's right to respect for private life on the one side and the employer's right to monitor employees' communication and, accordingly to use his/her disciplinary power, on the other side. In this very case, the applicant (the employee) considered that his communication monitored by the employer was of a private nature, and that such monitoring violated his right to respect for private life as guaranteed by Article 8 of the Convention.<sup>12</sup> On the contrary, in its judgment of 12 January 2016, the Chamber took the view that it is perfectly reasonable for an employer to monitor whether an employee performs his/her job obligations and duties fully and in that sense there is no violation of an employee's right to respect for private life. This view is largely based on the fact that the employee could not expect privacy with regard to his communication in the workplace, since there was a *general ban* on the use of computers and other company facilities for private purposes.

While it is true that the employer, as the owner of company facilities, has a strong interest in monitoring an employee's activities, the impression is that the Chamber did not pay sufficient attention to the employee's right to privacy. This is because the employee was not informed in advance about the possible monitoring of communication and was misled about the nature of such communication, since he himself created his access code to the application through which he communicated, and especially because the employer made transcripts of his communication and made it available to his colleagues who discussed it publicly. It is also noted that no clear distinction has been made between the undisputed *right of an employer to monitor the work process and to sanction<sup>13</sup> inappropriate behavior*

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<sup>12</sup> The messages sent by the applicant related to his sexual health problems and relationship with his fiancée, which is covered by the notion of private life and which requires the highest level of protection under Article 8 of the Convention. Also, the employer had clear indications that a part of the communication entitled '*Andre loves you*' had nothing to do with his job. (Partly Dissenting Opinion of Judge Pinto De Albuquerque, *Bărbulescu v. Romania*, no.61496/08, Judgment of ECHR, 12 January 2016, par. 19).

<sup>13</sup> Sanctioning for illegal or inappropriate use of the Internet should start with a verbal warning first and then be gradually tightened by giving reprimand, imposing a fine, degrading, and eventually for the most severe forms of repeated transgression, to pronounce a measure for termination of employment. Partly Dissenting Opinion of Judge Pinto De Albuquerque, *Bărbulescu v. Romania*, no.61496/08, Judgment of ECHR, 12 January, 2016, par. 3.

of an employee on one side, and the way he/she exercises his/her right, which may be such as to offend an employee's right to privacy on the other side. In this sense, it is possible that the employer legitimately exercises his/her right to monitor, but still violates his/her employee's privacy.

Taking the above into account, it is not surprising that in a judgment of 5 September 2017 the Grand Chamber found a violation of the right to respect for privacy. The Chamber seized the opportunity once again to strongly emphasise that the state has a positive obligation to protect the employee's privacy, regardless of the fact that in this specific case it is violated by the employer, and that the employee enjoys the protection of privacy and communication in the workplace even when their restriction is, for some reason, necessary. Several facts decisively influenced this outcome in the case *Bărbulescu* and these are: the employee/applicant did not receive prior notice of the nature and extent of the activities undertaken by the employer to monitor employees' communications, nor that such monitoring could include the content of his communications; the applicant himself created a messenger account and was the only person who knew the password; during the monitoring procedure, the employer recorded and stored both the flow and the content of his employee's communications; the domestic courts did not determine a specific (legitimate) reason to justify such strict monitoring, given that such reasons as *the risk of damage to the information technology system or the prevention of unlawful activities and business secrecy* are too theoretical and do not constitute evidence that the employee really exposed his employer to these risks through his activities; the domestic courts also did not determine whether the employer could satisfy his interests in another way that would be less intrusive and would not imply the insight into the content of communications (*Bărbulescu v. Romania*, pars.108-141).

It is therefore concluded that it is too dangerous to take the stance that employer is unconditionally authorised to violate employee's privacy (to access the content of the employee's communications) whenever he/she has previously informed his/her employees about the *prohibition of the use of company facilities for private purposes*, and that the *principle of transparency* is not exhausted by informing employees about the prohibition of the use of company facilities for private purposes, but should include a prior warning to an employee about the possible monitoring, its nature, duration and scope.

## 5. Conclusion

The right to privacy is one of the basic human rights that protects mental and physical integrity and dignity of man. Although this right was first granted to an individual in relation to the state, a positive trend in the development of human rights has contributed to a strong affirmation of human rights in the workplace, and thus to the belief that once an employee enters the workplace he/she does not relinquish his/her privacy, and in that sense he/she enjoys the protection of private life in relation to the employer, which is generally interpreted as his/her right to be free from excessively intrusive monitoring by employers. However, the right to privacy may, like any other right, under certain conditions, be limited, provided that the fulfillment of these conditions is appreciated on a case-by-

case basis, and in particular considering subordination as an indispensable feature of the employment relationship and the balance of the interests of workers and employers as an important achievement of labour law.

Despite the many concerns that arise regarding determining the right measure of interest to be satisfied, it is concluded that the possibility of restricting this right in the workplace is limited by the principles of legitimacy, proportionality and transparency. The most challenging issue of restricting the right to privacy in the workplace concerns the application of the principle of proportionality, since its determining depends on the circumstances of the case and the importance of the employer's interest, but also to what extent the employee was notified in advance on the possibility of restricting the right to privacy, i.e. he/she could reasonably expect privacy in the workplace, which is why the principle of transparency (transparency of the employer) plays an increasingly important role in assessing the justification of an employee's right to private life.

The issue of the justification on the restriction on the right to privacy becomes particularly complex in circumstances when the employer seeks to monitor employee's behavior in the workplace in general, which includes monitoring his/her communication. Notwithstanding the diversity of cases that arise in practice and different views regarding the employer's ability to monitor employee's communication, it is concluded that compliance with the principles of legitimacy, proportionality and transparency is, in this case, a condition for restricting an employee's right to privacy. Of particular importance is the consistent application of the principle of transparency, which generally means the obligation of the employer to be clear and open about all his/her activities, and it also implies the obligation of the employer, in each concrete case, to warn his/her employee in advance of the monitoring being carried out, its nature, duration and scope.

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## PRAVO ZAPOSLENOG NA PRIVATNOST: GDJE JE GRANICA POSLODAVČEVOG PRAVA DA NADZIRE KOMUNIKACIJU ZAPOSLENIH

### Sažetak

Pravo na privatnost spada u red osnovnih ljudskih prava kojima se štiti psihički i fizički integritet i dostojanstvo čovjeka. Premda je ovo pravo najprije priznato pojedincu u odnosu na državu, pozitivan trend razvoja ljudskih prava doprinio je snažnoj afirmaciji ljudskih prava na radnom mjestu, a time i uvjerenju da se zaposleni dolaskom na posao ne odriče svoje privatnosti, te da u tom smislu uživa zaštitu privatnog života u odnosu na poslodavca. Međutim, pravo na privatnost kao i svako drugo pravo može se, pod određenim

uslovima ograničiti, s tim da se ispunjenost ovih uslova cijeni u svakom konkretnom slučaju.

U radu se zaključuje da je mogućnost ograničenja ovog prava na radnom mjestu omeđena principima legitimnosti, srazmjernosti i transparentnosti. Najizazovnije pitanje ograničenja prava privatnosti na radnom mjestu tiče se primjene principa srazmjernosti, budući da određivanje srazmjere zavisi od okolnosti slučaja i važnosti poslodavčevog interesa, ali i od toga u kojoj mjeri je mogućnost ograničenja prava na privatnost bila unaprijed poznata zaposlenom. Pitanje opravdanosti ograničenja prava na privatnost postaje naročito složeno u uslovima u kojima poslodavac nastoji da u cjelini kontroliše ponašanje zaposlenog na radnom mjestu, a što uključuje i nadzor nad komunikacijom zaposlenog.

Bez obzira na raznolikost slučajeva koji se javljaju u praksi i na različite stavove u pogledu mogućnosti poslodavca da nadzire komunikaciju zaposlenog, zaključuje se da poštovanje principa legitimnosti, srazmjernosti i transparentnosti, i u ovom slučaju, predstavlja uslov ograničenja prava na privatni život zaposlenog. Kao posebno važna javlja se dosljedna primjena principa transparentnosti koji, uopšteno govoreći, podrazumijeva obavezu poslodavca da u svakom konkretnom slučaju prethodno upozori zaposlenog o nadzoru koji se sprovodi, njegovoj prirodi, trajanju i obimu.

**Ključne riječi:** pravo na privatnost, principi legitimnosti, srazmjernosti i transparentnosti, nadzor nad zaposlenima, nadzor nad komunikacijom zaposlenih.

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