



EMPLOYMENT, PENSIONS AND EMPLOYEE BENEFITS

Email Privacy in the Workplace

by **Jennifer O'Neill**

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Employers beware, a recent ruling by the Grand Chamber of the European Court of Human Rights recognises the employee's right to privacy when using electronic communications in the workplace. Jennifer O'Neill and Jeanne Kelly explain.

This ruling could have a serious ripple effect for all employers who should check that their workplace policies regarding the use and monitoring of email and all forms of electronic communication (to include WhatsApp and other instant messaging applications) are legally effective.

The case in question centres on the challenge by a Mr. B?rbulescu regarding his dismissal which was brought before the Romanian Courts. Mr. B?rbulescu's employers found that he had breached company policy by using his work related Yahoo Messenger account for sending private messages and after disciplinary proceedings terminated his employment.

Mr B?rbulescu was unsuccessful before the Romanian court and appealed to the European Court of Human Rights ("ECHR") which held in January 2016 that the monitoring of an employee's email/internet usage was reasonable in the context of disciplinary proceedings. The ECHR noted that his employer's monitoring was both limited in scope and proportionate. Having exhausted the avenues of redress in Romania, Mr B?rbulescu then requested that the decision of the ECHR be referred to the Grand Chamber.

In an important departure from the previous decisions, on 5 September 2017 the Grand Chamber held that there had been a breach of Mr B?rbulescu's rights to privacy and correspondence under Article 8 of the European Convention on Human Rights.

Practical Implications for Employers

It is important to note that the Grand Chamber's decision does not prohibit employers from monitoring employee communications at work or prevent them from dismissing employees for private use of company equipment.

However the decision serves as a reminder that when an employer takes measures to monitor employees' communications, these measures must be accompanied by adequate and sufficient safeguards against abuse.

We recommend the following:

- **Employers need to carefully consider their phone, email and internet usage policies.**

Be very clear with your employees about what is and isn't permissible. Whilst employers' strive to ensure proper usage of company equipment by their employees, and in this regard are permitted to impose restrictions on usage, the Grand Chamber's decision has made it clear that an employer's instructions cannot reduce private social life in the workplace to zero. Employers should expect that their systems will be used for an element of personal communications.

- **Strike a fair balance**

Although not changing current best practice in Ireland in this regard, employers are reminded of the need to strike a fair balance between the interests at stake. Monitoring should be carefully considered, approached with caution and conducted in the least intrusive manner in the circumstances.

- **Email, internet and phone usage policies should be fair and reasonable**

When drafting email, internet and phone usage policies, employers' should ensure that such policies are reasonable and proportionate, that prior notice of all monitoring practices is furnished and that the scope of such practices does not go beyond what is necessary for a legitimate purpose. They also need to ensure that appropriate safeguards are put in place so that employees know what specific disciplinary consequences may follow from a breach. Crucially, policies should be clearly communicated to employees on induction and on a regular basis thereafter.

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