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Art. 8 EVRM

RAR 2016/49
JAR 2016/43
JAR 2017/259
Computerrecht 2017/255
TRA 2017/101
NJB 2017/1920
NJB 2016/642
ECLI:CE:ECHR:2016:0112JUD006149608
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Ontslag wegens e-mailgebruik voor privédoeleinden op de werkplek; monitoring en registratie van e-mailgebruik zonder voorafgaande toestemming. Criteria voor de beoordeling van de positieve verdragsverplichting ter eerbiediging van het privéleven en correspondentie in een arbeidsrechtelijke context. Schending art. 8 EVRM.

Verzoeker was werkzaam als sales engineer bij een bedrijf te Boekarest waarin een chatprogramma (Yahoo Messenger) werd gebruikt om vragen van klanten te beantwoorden. De werkgever heeft op enig moment verzoekers e-mailgebruik gedurende meerdere dagen gemonitord en geregistreerd, zonder verzoeker hierover vooraf te informeren. Daarop is verzoekers arbeidsovereenkomst beëindigd wegens e-mailgebruik voor privédoeleinden in strijd met een intern reglement over persoonlijk gebruik van bedrijfsmiddelen. In nationale instanties heeft verzoeker zich tevergeefs hiertegen verzet.

Ten overstaan van het EHRM klaagt verzoeker dat zijn ontslag berust op een schending van het door art. 8 EVRM gewaarborgde recht op bescherming van zijn privéleven en correspondentie, en dat de nationale autoriteiten verzuimd hebben dit recht te beschermen.

EHRM: de klacht dient te worden beoordeeld vanuit het perspectief van de positieve verdragsverplichting van lidstaten (r.o. 108-112). Bij de beoordeling van de positieve verdragsverplichting van een lidstaat ter eerbiediging van het privéleven en correspondentie in een arbeidsrechtelijke context zijn de volgende factoren van belang: (i) of de werknemer vooraf is geïnformeerd over (de aard van) de mogelijke monitoring van correspondentie en andere communicatie door de werkgever, (ii) wat de omvang van de monitoring en hoe ernstig de inbreuk op de privacy van de werknemer is geweest, (iii) of de werkgever legitieme gronden heeft aangevoerd ter rechtvaardiging van de monitoring, (iv) of een monitoringssysteem met minder indringendere methoden een maatregelen mogelijk was geweest, (v) welke gevolgen de monitoring voor de werknemer heeft gehad, en (vi) of de werknemer adequate waarborgen zijn geboden, in het bijzonder bij indringende vormen van monitoring. De nationale autoriteiten dienen te verzekeren dat de werknemer een rechtsmiddel ten dienste staat dat hem toegang geeft tot een rechterlijke instantie die rechtsmacht heeft om vast te stellen hoe de hiervoor genoemde criteria zijn voldaan en of de bestreden maatregelen rechtmatig waren (r.o. 113-123). Mede omdat niet kan worden vastgesteld op welk moment verzoeker over de monitoring werd geïnformeerd, en de nationale instanties enkele van de hiervoor genoemde criteria niet kenbaar in hun beoordeling hebben betrokken, is er sprake van een schending van art. 8 EVRM (r.o. 124-141).

Barbulescu
tegen
Roemenië

EHRM:

The law

I. Alleged violation of Article 8 of the Convention

55. The applicant submitted that his dismissal by his employer had been based on a breach of his right to respect for his private life and correspondence and that, by not revoking that measure, the domestic courts had failed to comply with their obligation to protect the right in question. He relied on Article 8 of the Convention, which provides:

> '1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. 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.'

A. The Chamber's findings

56. In its judgment of 12 January 2016 the Chamber held, firstly, that Article 8 of the Convention was applicable in the present case. Referring to the concept of reasonable expectation of privacy, it found that the present case differed from *Copland* (cited above, § 41) and *Halford v. the United Kingdom* (25 June 1997, § 45, *Reports of Judgments and Decisions* 1997-III) in that the applicant's employer's internal regulations in the present case strictly prohibited employees from using company computers and resources for personal purposes. The Chamber had regard to the

nature of the applicant's communications and the fact that a transcript of them had been used as evidence in the domestic court proceedings, and concluded that the applicant's right to respect for his 'private life' and 'correspondence' was at stake.

57. Next, the Chamber examined the case from the standpoint of the State's positive obligations, since the decision to dismiss the applicant had been taken by a private-law entity. It therefore determined whether the national authorities had struck a fair balance between the applicant's right to respect for his private life and correspondence and his employer's interests.

58. The Chamber noted that the applicant had been able to bring his case and raise his arguments before the labour courts. The courts had found that he had committed a disciplinary offence by using the internet for personal purposes during working hours, and to that end they had had regard to the conduct of the disciplinary proceedings, in particular the fact that the employer had accessed the contents of the applicant's communications only after the applicant had declared that he had used Yahoo Messenger for work-related purposes.

59. The Chamber further noted that the domestic courts had not based their decisions on the contents of the applicant's communications and that the employer's monitoring activities had been limited to his use of Yahoo Messenger.

60. Accordingly, it held that there had been no violation of Article 8 of the Convention.

B. Scope of the case before the Grand Chamber

61. The Court notes that in the proceedings before the Chamber the applicant alleged 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 enshrined in Article 8 of the Convention and that, by not revoking that measure, the domestic courts had failed to comply with their obligation to protect the right in question. The Chamber declared this complaint admissible on 12 January 2016.

62. The Court reiterates that the case referred to the Grand Chamber is the application as it has been declared admissible by the Chamber (see *K. and T. v. Finland* [GC], no. 25702/94, §§ 140-41, ECHR 2001-VII; *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 109, ECHR 2007-IV (*NJ* 2008/380, m.nt. E.A. Alkema; *red.*); and *Blokhin v. Russia* [GC], no. 47152/06, § 91, ECHR 2016 (*NJ* 2016/260, m.nt. N. Keijzer; *red.*)).

63. In his observations before the Grand Chamber, the applicant complained for the first time about the rejection in 2012 of the criminal complaint filed by him in connection with an alleged breach of the secrecy of correspondence (see paragraph 90 below).

64. This new complaint was not mentioned in the decision of 12 January 2016 as to admissibility, which defines the boundaries of the examination of the application. It therefore falls outside the scope of the case as referred to the Grand Chamber, which accordingly does not have jurisdiction to deal with it and will limit its examination to the complaint that was declared admissible by the Chamber.

C. Applicability of Article 8 of the Convention

1. The parties' submissions

(a) The Government

65. The Government argued that the applicant could not claim any expectation of 'privacy' as regards the communications he had exchanged via an instant messaging account created for professional use. With reference to the case-law of the French and Cypriot courts, they submitted that messages sent by an employee using the technical facilities made available to him by his employer had to be regarded as professional in nature unless the employee explicitly identified them as private. They noted that it was not technically possible using Yahoo Messenger to mark messages as private; nevertheless, the applicant had had an adequate opportunity, during the initial stage of the disciplinary proceedings, to indicate that his communications had been private, and yet had chosen to maintain that they had been work-related. The applicant had been informed not only of his employer's internal regulations, which prohibited all personal use of company resources, but also of the fact that his employer had initiated a process for monitoring his communications.

66. The Government relied on three further arguments in contending that Article 8 of the Convention was not applicable in the present case. Firstly, there was no evidence to suggest that the transcript of the applicant's communications had been disclosed to his work colleagues; the applicant himself had produced the full transcript of the messages in the proceedings before the domestic courts, without asking for any restrictions to be placed on access to the documents concerned. Secondly, the national authorities had used the transcript of the messages as evidence because the applicant had so requested, and because the prosecuting authorities had already found that the monitoring of his communications had been lawful. Thirdly, the information notice had contained sufficient indications for the applicant to have been aware that his employer could monitor his communications, and this had rendered them devoid of any private element.

(b) The applicant

67. The applicant did not make any submissions as to the applicability of Article 8 of the Convention, but repeatedly maintained that his communications had been private in nature.

68. He further argued that, since he had created the Yahoo Messenger account in question and was the only person who knew the password, he had had a reasonable expectation of privacy

regarding his communications. He also asserted that he had not received prior notification from his employer about the monitoring of his communications.

2. The Court's assessment

69. The Court notes that the question arising in the present case is whether the matters complained of by the applicant fall within the scope of Article 8 of the Convention.

70. At this stage of its examination it considers it useful to emphasise that 'private life' is a broad term not susceptible to exhaustive definition (see *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, § 43, ECHR 2004-VIII). Article 8 of the Convention protects the right to personal development (see *K.A. and A.D. v. Belgium*, nos. 42758/98 and 45558/99, § 83, 17 February 2005), whether in terms of personality (see *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 90, ECHR 2002-VI) or of personal autonomy, which is an important principle underlying the interpretation of the Article 8 guarantees (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III (*NJ* 2004/543, m.nt. E.A. Alkema; *red.*)). The Court acknowledges that everyone has the right to live privately, away from unwanted attention (see *Smirnova v. Russia*, nos. 46133/99 and 48183/99, § 95, ECHR 2003-IX (extracts) (*NJ* 2005/550, m.nt. T.M. Schalken; *red.*)). It also considers that it would be too restrictive to limit the notion of 'private life' to an 'inner circle' in which the individual may live his or her own personal life as he or she chooses, thus excluding entirely the outside world not encompassed within that circle (see *Niemietz v. Germany*, 16 December 1992, § 29, Series A no. 251-B). Article 8 thus guarantees a right to 'private life' in the broad sense, including the right to lead a 'private social life', that is, the possibility for the individual to develop his or her social identity. In that respect, the right in question enshrines the possibility of approaching others in order to establish and develop relationships with them (see *Bigaeva v. Greece*, no. 26713/05, § 22, 28 May 2009, and *Özpınar v. Turkey*, no. 20999/04, § 45 *in fine*, 19 October 2010).

71. The Court considers that the notion of 'private life' may include professional activities (see *Fernández Martínez v. Spain* [GC], no. 56030/07, § 110, ECHR 2014 (extracts) (*NJ* 2016/25, m.nt. E.A. Alkema; *red.*), and *Oleksandr Volkov v. Ukraine*, no. 21722/11, §§ 165-66, ECHR 2013), or activities taking place in a public context (see *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 95, ECHR 2012 (*NJ* 2013/250, m.nt. E.J. Dommering; *red.*)). Restrictions on an individual's professional life may fall within Article 8 where they have repercussions on the manner in which he or she constructs his or her social identity by developing relationships with others. It should be noted in this connection 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 (see *Niemietz*, cited above, § 29).

72. Furthermore, as regards the notion of 'correspondence', it should be noted that in the wording of Article 8 this word is not qualified by any adjective, unlike the term 'life'. And indeed, the Court has already held that, in the context of correspondence by means of telephone calls, no such qualification is to be made. In a number of cases relating to correspondence with a lawyer, it has not even envisaged the possibility that Article 8 might be inapplicable on the ground that the correspondence was of a professional nature (see *Niemietz*, cited above, § 32, with further references). Furthermore, it has held that telephone conversations are covered by the notions of 'private life' and 'correspondence' within the meaning of Article 8 (see *Roman Zakharov v. Russia* [GC], no. 47143/06, § 173, ECHR 2015 (*NJ* 2017/185, m.nt. E.J. Dommering; *red.*)). In principle, this is also true where telephone calls are made from or received on business premises (see *Halford*, cited above, § 44, and *Amann v. Switzerland* [GC], no. 27798/95, § 44, ECHR 2000-II). The same applies to emails sent from the workplace, which enjoy similar protection under Article 8, as does information derived from the monitoring of a person's internet use (see *Copland*, cited above, § 41 *in fine*).

73. It is clear from the Court's case-law that communications from business premises as well as from the home may be covered by the notions of 'private life' and 'correspondence' within the meaning of Article 8 of the Convention (see *Halford*, cited above, § 44; and *Copland*, cited above, § 41). In order to ascertain whether the notions of 'private life' and 'correspondence' are applicable, the Court has on several occasions examined whether individuals had a reasonable expectation that their privacy would be respected and protected (ibid.; and as regards 'private life', see also *Köpke v. Germany* (dec.), no. 420/07, 5 October 2010). In that context, it has stated that a reasonable expectation of privacy is a significant though not necessarily conclusive factor (see *Köpke*, cited above).

74. Applying these principles in the present case, the Court first observes that the kind of internet instant messaging service at issue is just one of the forms of communication enabling individuals to lead a private social life. At the same time, the sending and receiving of communications is covered by the notion of 'correspondence', even if they are sent from an employer's computer. The Court notes, however, that the applicant's employer instructed him and the other employees to refrain from any personal activities in the workplace. This requirement on the employer's part was reflected in measures including a ban on using company resources for personal purposes (…).

75. The Court further notes that with a view to ensuring that this requirement was met, the employer set up a system for monitoring its

employees' internet use (…). The documents in the case file, in particular those relating to the disciplinary proceedings against the applicant, indicate that during the monitoring process, both the flow and the content of the applicants' communications were recorded and stored (…).

76. The Court observes in addition that despite this requirement on the employer's part, the applicant exchanged messages of a personal nature with his fiancée and his brother (…). Some of these messages were of an intimate nature (ibid.).

77. The Court considers that it is clear from the case file that the applicant had indeed been informed of the ban on personal internet use laid down in his employer's internal regulations (…). However, it is not so clear that he had been informed prior to the monitoring of his communications that such a monitoring operation was to take place. Thus, the Government submitted that the applicant had acquainted himself with the employer's information notice on an unspecified date between 3 and 13 July 2007 (…). Nevertheless, the domestic courts omitted to ascertain whether the applicant had been informed of the monitoring operation before the date on which it began, given that the employer recorded communications in real time from 5 to 13 July 2007 (…).

78. In any event, it does not appear that the applicant was informed in advance of the extent and nature of his employer's monitoring activities, or of the possibility that the employer might have access to the actual contents of his communications.

79. The Court also takes note of the applicant's argument that he himself had created the Yahoo Messenger account in question and was the only person who knew the password (…). In addition, it observes that the material in the case file indicates that the employer also accessed the applicant's personal Yahoo Messenger account (…). Be that as it may, the applicant had created the Yahoo Messenger account in issue on his employer's instructions to answer customers' enquiries (…), and the employer had access to it.

80. It is open to question whether — and if so, to what extent — the employer's restrictive regulations left the applicant with a reasonable expectation of privacy. Be that as it may, an employer's instructions cannot reduce private social life in the workplace to zero. Respect for private life and for the privacy of correspondence continues to exist, even if these may be restricted in so far as necessary.

81. In the light of all the above considerations, the Court concludes that the applicant's communications in the workplace were covered by the concepts of 'private life' and 'correspondence'. Accordingly, in the circumstances of the present case, Article 8 of the Convention is applicable.

D. Compliance with Article 8 of the Convention

1. The parties' submissions and third-party comments

(a) The applicant

82. In his written observations before the Grand Chamber, the applicant submitted that the Chamber had not taken sufficient account of certain factual aspects of the case. Firstly, he emphasised the specific features of Yahoo Messenger, which was designed for personal use. His employer's decision to use this tool in a work context did not alter the fact that it was essentially intended to be used for personal purposes. He thus considered himself to be the sole owner of the Yahoo Messenger account that he had opened at his employer's request.

83. Secondly, the applicant argued that his employer had not introduced any policy on internet use. He had not had any warning of the possibility that his communications might be monitored or read; nor had he given any consent in that regard. If such a policy had been in place and he had been informed of it, he would have refrained from disclosing certain aspects of his private life on Yahoo Messenger.

84. Thirdly, the applicant contended that a distinction should be drawn between personal internet use having a profit-making purpose and 'a small harmless private conversation' which had not sought to derive any profit and had not caused any damage to his employer; he pointed out in that connection that during the disciplinary proceedings against him, the employer had not accused him of having caused any damage to the company. The applicant highlighted developments in information and communication technologies, as well as in the social customs and habits linked to their use. He submitted that contemporary working conditions made it impossible to draw a clear dividing line between private and professional life, and disputed the legitimacy of any management policy prohibiting personal use of the internet and of any connected devices.

85. From a legal standpoint, the applicant submitted that the Romanian State had not fulfilled its positive obligations under Article 8 of the Convention. More specifically, the domestic courts had not overturned his dismissal despite having acknowledged that there had been a violation of his right to respect for his private communications.

86. Firstly, he submitted that the Chamber had incorrectly distinguished the present case from *Copland* (cited above, § 42). In his view, the decisive factor in analysing the case was not whether the employer had tolerated personal internet use, but the fact that the employer had not warned the employee that his communications could be monitored. In that connection, he contended that his employer had first placed him under surveillance and had only afterwards given him the opportunity to specify whether his communications were private or work-related. The Court had to examine both

whether an outright ban on personal internet use entitled the employer to monitor its employees, and whether the employer had to give reasons for such monitoring.

87. Secondly, the applicant submitted that the Chamber's analysis in relation to the second paragraph of Article 8 was not consistent with the Court's case-law in that it had not sought to ascertain whether the interference with his right to respect for his private life and correspondence had been in accordance with the law, had pursued a legitimate aim and had been necessary in a democratic society.

88. With regard to the jurisdiction of the labour courts, the applicant contended that they were competent to carry out a full review of the lawfulness and justification of the measure referred to them. It was for the courts to request the production of the necessary evidence and to raise any relevant factual or legal issues, even where they had not been mentioned by the parties. Accordingly, the labour courts had extensive jurisdiction to examine any issues relating to a labour-law dispute, including those linked to respect for employees' private life and correspondence.

89. However, in the applicant's case the domestic courts had pursued a rigid approach, aimed simply at upholding his employer's decision. They had performed an incorrect analysis of the factual aspects of the case and had failed to take into account the specific features of communications in cyberspace. The violation of the applicant's right to respect for his private life and correspondence had thus been intentional and illegal and its aim had been to gather evidence enabling his contract to be terminated.

90. Lastly, the applicant complained for the first time in the proceedings before the Grand Chamber of the outcome of the criminal complaint he had lodged in 2007: in 2012 the department of the prosecutor's office with responsibility for investigating organised crime and terrorism (DIICOT) had rejected the complaint without properly establishing the facts of the case.

91. At the hearing before the Grand Chamber the applicant stated, in reply to a question from the judges, that because his employer had only made a single printer available to employees, all his colleagues had been able to see the contents of the forty-five-page transcript of his Yahoo Messenger communications.

92. The applicant urged the Grand Chamber to find a violation of Article 8 of the Convention and to take the opportunity to confirm that monitoring of employees' correspondence could only be carried out in compliance with the applicable legislation, in a transparent manner and on grounds provided for by law, and that employers did not have discretion to monitor their employees' correspondence.

(b) The Government

93. The Government stated that the employer had recorded the applicant's communications from 5 to 13 July 2007 and had then given him an opportunity to account for his internet use, which was more substantial than that of his colleagues. They pointed out that since the applicant had maintained that the contents of his communications were work-related, the employer had investigated his explanations.

94. The Government argued that in his appeal against the decision of the first-instance court the applicant had not challenged the court's finding that he had been informed that his employer was monitoring internet use. In that connection, they produced a copy of the information notice issued by the employer and signed by the applicant. On the basis of the employer's attendance register, they observed that the applicant had signed the notice between 3 and 13 July 2007.

95. The Government further submitted that the employer had recorded the applicant's communications in real time. There was no evidence that the employer had accessed the applicant's previous communications or his private email.

96. The Government indicated their agreement with the Chamber's conclusions and submitted that the Romanian State had satisfied its positive obligations under Article 8 of the Convention.

97. They observed firstly that the applicant had chosen to raise his complaints in the domestic courts in the context of a labour-law dispute. The courts had examined all his complaints and weighed up the various interests at stake, but the main focus of their analysis had been whether the disciplinary proceedings against the applicant had been compliant with domestic law. The applicant had had the option of raising before the domestic courts his specific complaint of a violation of his right to respect for his private life, for example by means of an action under Law no. 677/2001 or an action in tort, but he had chosen not to do so. He had also filed a criminal complaint, which had given rise to a decision by the prosecuting authorities to take no further action on the grounds that the monitoring by the employer of employees' communications had not been unlawful.

98. Referring more specifically to the State's positive obligations, the Government submitted that approaches among Council of Europe member States varied greatly as regards the regulation of employee monitoring by employers. Some States included this matter within the wider scope of personal data processing, while others had passed specific legislation in this sphere. Even among the latter group of States, there were no uniform solutions regarding the scope and purpose of monitoring by the employer, prior notification of employees or personal internet use.

99. Relying on *Köpke* (cited above), the Government maintained that the domestic courts

had performed an appropriate balancing exercise between the applicant's right to respect for his private life and correspondence and his employer's right to organise and supervise work within the company. In the Government's submission, where communications were monitored by a private entity, an appropriate examination by the domestic courts was sufficient for the purposes of Article 8 and there was no need for specific protection by means of a legislative framework.

100. The Government further submitted that the domestic courts had reviewed the lawfulness and the necessity of the employer's decision and had concluded that the disciplinary proceedings had been conducted in accordance with the legislation in force. They attached particular importance to the manner in which the proceedings had been conducted, especially the opportunity given to the applicant to indicate whether the communications in question had been private. If he had made use of that opportunity, the domestic courts would have weighed up the interests at stake differently.

101. In that connection, the Government noted that in the proceedings before the domestic authorities the applicant himself had produced the full transcripts of his communications, without taking any precautions; he could instead have disclosed only the names of the relevant accounts or submitted extracts of his communications, for example those that did not contain any intimate information. The Government also disputed the applicant's allegations that his communications had been disclosed to his colleagues and pointed out that only the three-member disciplinary board had had access to them.

102. The Government further contended that the employer's decision had been necessary, since it had had to investigate the arguments raised by the applicant in the disciplinary proceedings in order to determine whether he had complied with the internal regulations.

103. Lastly, the Government argued that a distinction should be made between the nature of the communications and their content. They observed, as the Chamber had, that the domestic courts had not taken the content of the applicant's communications into account at all but had simply examined their nature and found that they were personal.

104. The Government thus concluded that the applicant's complaint under Article 8 of the Convention was ill-founded.

(c) Third parties

(i) The French Government

105. The French Government referred, in particular, to their conception of the scope of the national authorities' positive obligation to ensure respect for employees' private life and correspondence. They provided a comprehensive overview of the applicable provisions of French civil law, labour law and criminal law in this sphere. In their submission, Article 8 of the Convention was only applicable to strictly personal data, correspondence and electronic activities. In that connection, they referred to settled case-law of the French Court of Cassation to the effect that any data processed, sent and received by means of the employer's electronic equipment were presumed to be professional in nature unless the employee designated them clearly and precisely as personal.

106. The French Government submitted that States had to enjoy a wide margin of appreciation in this sphere since the aim was to strike a balance between competing private interests. The employer could monitor employees' professional data and correspondence to a reasonable degree, provided that a legitimate aim was pursued, and could use the results of the monitoring operation in disciplinary proceedings. They emphasised that employees had to be given advance notice of such monitoring. In addition, where data clearly designated as personal by the employee were involved, the employer could ask the courts to order investigative measures and to instruct a bailiff to access the relevant data and record their content.

(ii) The European Trade Union Confederation

107. The European Trade Union Confederation submitted that it was crucial to protect privacy in the working environment, taking into account in particular the fact that employees were structurally dependent on employers in this context. After summarising the applicable principles of international and European law, it stated that internet access should be regarded as a human right and that the right to respect for correspondence should be strengthened. The consent, or at least prior notification, of employees was required, and staff representatives had to be informed, before the employer could process employees' personal data.

2. The Court's assessment

(a) Whether the case concerns a negative or a positive obligation

108. The Court must determine whether the present case should be examined in terms of the State's negative or positive obligations. It reiterates that by Article 1 of the Convention, the Contracting Parties 'shall secure to everyone within their jurisdiction the rights and freedoms defined in … [the] Convention'. While the essential object of Article 8 of the Convention is to protect individuals against arbitrary interference by public authorities, it may also impose on the State certain positive obligations to ensure effective respect for the rights protected by Article 8 (see, among other authorities, *X and Y v. the Netherlands*, 26 March 1985, § 23, Series A no. 91; Von Hannover (no. 2), cited above, § 98; and *Hämäläinen v. Finland* [GC], no. 37359/09, § 62, ECHR 2014).

109. In the present case the Court observes that the measure complained of by the applicant, namely the monitoring of Yahoo Messenger communications, which resulted in disciplinary proceedings against him followed by his dismissal for infringing his employer's internal regulations prohibiting the personal use of company resources, was not taken by a State authority but by a private commercial company. The monitoring of the applicant's communications and the inspection of their content by his employer in order to justify his dismissal cannot therefore be regarded as 'interference' with his right by a State authority.

110. Nevertheless, the Court notes that the measure taken by the employer was accepted by the national courts. It is true that the monitoring of the applicant's communications was not the result of direct intervention by the national authorities; however, their responsibility would be engaged if the facts complained of stemmed from a failure on their part to secure to the applicant the enjoyment of a right enshrined in Article 8 of the Convention (see, *mutatis mutandis, Obst v. Germany*, no. 425/03, §§ 40 and 43, 23 September 2010 (*NJ* 2011/231, m.nt. E.A. Alkema; *red.*), and *Schüth v. Germany*, no. 1620/03, §§ 54 and 57, ECHR 2010 (*NJ* 2011/232, m.nt. E.A. Alkema; *red.*)).

111. In the light of the particular circumstances of the case as described in paragraph 109 above, the Court considers, having regard to its conclusion concerning the applicability of Article 8 of the Convention (see paragraph 81 above) and to the fact that the applicant's enjoyment of his right to respect for his private life and correspondence was impaired by the actions of a private employer, that the complaint should be examined from the standpoint of the State's positive obligations.

112. While the boundaries between the State's positive and negative obligations under the Convention do not lend themselves to precise definition, the applicable principles are nonetheless similar. In both contexts regard must be had in particular to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, subject in any event to the margin of appreciation enjoyed by the State (see *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06 and 3 others, § 62, ECHR 2011 (*NJ* 2012/522, m.nt. E.J. Dommering; *red.*)).

(b) General principles applicable to the assessment of the State's positive obligation to ensure respect for private life and correspondence in an employment context

113. The Court reiterates that the choice of the means calculated to secure compliance with Article 8 of the Convention in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation. There are different ways of ensuring respect for private life, and the nature of the State's obligation will depend on the particular aspect of private life that is at issue (see *Söderman v. Sweden* [GC], no. 5786/08, § 79, ECHR 2013, with further references).

114. The Court's task in the present case is therefore to clarify the nature and scope of the positive obligations that the respondent State was required to comply with in protecting the applicant's right to respect for his private life and correspondence in the context of his employment.

115. The Court observes that it has held that in certain circumstances, the State's positive obligations under Article 8 of the Convention are not adequately fulfilled unless it secures respect for private life in the relations between individuals by setting up a legislative framework taking into consideration the various interests to be protected in a particular context (see *X and Y v. the Netherlands*, cited above, §§ 23, 24 and 27, and *M.C. v. Bulgaria*, no. 39272/98, § 150, ECHR 2003-XII, both concerning sexual assaults of minors; see also *K.U. v. Finland*, no. 2872/02, §§ 43 and 49, ECHR 2008 (*NJ* 2009/470, m.nt. E.A. Alkema; *red.*), concerning an advertisement of a sexual nature placed on an internet dating site in the name of a minor; *Söderman*, cited above, § 85, concerning the effectiveness of remedies in respect of an alleged violation of personal integrity committed by a close relative; and *Codarcea v. Romania*, no. 31675/04, §§ 102-04, 2 June 2009, concerning medical negligence).

116. The Court accepts that protective measures are not only to be found in labour law, but also in civil and criminal law. As far as labour law is concerned, it must ascertain whether in the present case the respondent State was required to set up a legislative framework to protect the applicant's right to respect for his private life and correspondence in the context of his professional relationship with a private employer.

117. In this connection it considers at the outset that labour law has specific features that must be taken into account. The employer-employee relationship is contractual, with particular rights and obligations on either side, and is characterised by legal subordination. It is governed by its own legal rules, which differ considerably from those generally applicable to relations between individuals (see *Saumier v. France*, no. 74734/14, § 60, 12 January 2017).

118. From a regulatory perspective, labour law leaves room for negotiation between the parties to the contract of employment. Thus, it is generally for the parties themselves to regulate a significant part of the content of their relations (see, *mutatis mutandis, Wretlund v. Sweden* (dec.), no. 46210/99, 9 March 2004, concerning the compatibility with Article 8 of the Convention of the obligation for the applicant, an employee at a nuclear plant, to undergo drug tests; with regard to trade-union action from the standpoint of Article 11, see *Gustafsson v. Sweden*, 25 April 1996, § 45, *Reports*

1996-II, and, *mutatis mutandis, Demir and Baykara v. Turkey* [GC], no. 34503/97, §§ 140-46, ECHR 2008, for the specific case of civil servants). It also appears from the comparative-law material at the Court's disposal that there is no European consensus on this issue. Few member States have explicitly regulated the question of the exercise by employees of their right to respect for their private life and correspondence in the workplace (…).

119. In the light of the above considerations, the Court takes the view that the Contracting States must be granted a wide margin of appreciation in assessing the need to establish a legal framework governing the conditions in which an employer may regulate electronic or other communications of a non-professional nature by its employees in the workplace.

120. Nevertheless, the discretion enjoyed by States in this field cannot be unlimited. The domestic authorities should ensure that the introduction by an employer of measures to monitor correspondence and other communications, irrespective of the extent and duration of such measures, is accompanied by adequate and sufficient safeguards against abuse (see, *mutatis mutandis, Klass and Others v. Germany*, 6 September 1978, § 50, Series A no. 28, and *Roman Zakharov*, cited above, §§ 232-34).

121. The Court is aware of the rapid developments in this area. Nevertheless, it considers that proportionality and procedural guarantees against arbitrariness are essential. In this context, the domestic authorities should treat the following factors as relevant:

(i) whether the employee has been notified of the possibility that the employer might take measures to monitor correspondence and other communications, and of the implementation of such measures. While in practice employees may be notified in various ways depending on the particular factual circumstances of each case, the Court considers that for the measures to be deemed compatible with the requirements of Article 8 of the Convention, the notification should normally be clear about the nature of the monitoring and be given in advance;

(ii) the extent of the monitoring by the employer and the degree of intrusion into the employee's privacy. In this regard, a distinction should be made between monitoring of the flow of communications and of their content. Whether all communications or only part of them have been monitored should also be taken into account, as should the question whether the monitoring was limited in time and the number of people who had access to the results (see *Köpke*, cited above). The same applies to the spatial limits to the monitoring;

(iii) whether the employer has provided legitimate reasons to justify monitoring the communications and accessing their actual content (…). Since monitoring of the content of communications is by nature a distinctly more invasive method, it requires weightier justification;

(iv) whether it would have been possible to establish a monitoring system based on less intrusive methods and measures than directly accessing the content of the employee's communications. In this connection, there should be an assessment in the light of the particular circumstances of each case of whether the aim pursued by the employer could have been achieved without directly accessing the full contents of the employee's communications;

(v) the consequences of the monitoring for the employee subjected to it (see, *mutatis mutandis*, the similar criterion applied in the assessment of the proportionality of an interference with the exercise of freedom of expression as protected by Article 10 of the Convention in *Axel Springer AG v. Germany* [GC], no. 39954/08, § 95, 7 February 2012 (*NJ* 2013/251, m.nt. E.J. Dommering; *red.*), with further references); and the use made by the employer of the results of the monitoring operation, in particular whether the results were used to achieve the declared aim of the measure (see *Köpke*, cited above);

(vi) whether the employee had been provided with adequate safeguards, especially when the employer's monitoring operations were of an intrusive nature. Such safeguards should in particular ensure that the employer cannot access the actual content of the communications concerned unless the employee has been notified in advance of that eventuality.

In this context, it is worth reiterating that in order to be fruitful, labour relations must be based on mutual trust (see *Palomo Sánchez and Others*, cited above, § 76).

122. Lastly, the domestic authorities should ensure that an employee whose communications have been monitored has access to a remedy before a judicial body with jurisdiction to determine, at least in substance, how the criteria outlined above were observed and whether the impugned measures were lawful (see *Obst*, cited above, § 45, and *Köpke*, cited above).

123. In the present case the Court will assess how the domestic courts to which the applicant applied dealt with his complaint of an infringement by his employer of his right to respect for his private life and correspondence in an employment context.

(c) Application of the above general principles in the present case

124. The Court observes that the domestic courts held that the interests at stake in the present case were, on the one hand, the applicant's right to respect for his private life, and on the other hand, the employer's right to engage in monitoring, including the corresponding disciplinary powers, in order to ensure the smooth running of the company (…). It considers that, by virtue of the State's positive obligations under Article 8 of the Convention, the

national authorities were required to carry out a balancing exercise between these competing interests.

125. The Court observes that the precise subject of the complaint brought before it is the alleged failure of the national courts, in the context of a labour-law dispute, to protect the applicant's right under Article 8 of the Convention to respect for his private life and correspondence in an employment context. Throughout the proceedings the applicant complained in particular, both before the domestic courts and before the Court, about his employer's monitoring of his communications via the Yahoo Messenger accounts in question and the use of their contents in the subsequent disciplinary proceedings against him.

126. As to whether the employer disclosed the contents of the communications to the applicant's colleagues (…), the Court observes that this argument is not sufficiently substantiated by the material in the case file and that the applicant did not produce any further evidence at the hearing before the Grand Chamber (see paragraph 91 above).

127. It therefore considers that the complaint before it concerns the applicant's dismissal based on the monitoring carried out by his employer. More specifically, it must ascertain in the present case whether the national authorities performed a balancing exercise, in accordance with the requirements of Article 8 of the Convention, between the applicant's right to respect for his private life and correspondence and the employer's interests. Its task is therefore to determine whether, in the light of all the circumstances of the case, the competent national authorities struck a fair balance between the competing interests at stake when accepting the monitoring measures to which the applicant was subjected (see, *mutatis mutandis, Palomo Sánchez and Others*, cited above, § 62). It acknowledges that the employer has a legitimate interest in ensuring the smooth running of the company, and that this can be done by establishing mechanisms for checking that its employees are performing their professional duties adequately and with the necessary diligence.

128. In the light of the above considerations, the Court will first examine the manner in which the domestic courts established the relevant facts in the present case. Both the County Court and the Court of Appeal held that the applicant had had prior notification from his employer (…). The Court must then ascertain whether the domestic courts observed the requirements of the Convention when considering the case.

129. At this stage, the Court considers it useful to reiterate that when it comes to establishing the facts, it is sensitive to the subsidiary nature of its task and must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case (see *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, § 182, 14 April 2015 (*NJ* 2016/322, m.nt. T.M. Schalken; *red.*)). Where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and it is for the latter to establish the facts on the basis of the evidence before them (see, among other authorities, *Edwards v. the United Kingdom*, 16 December 1992, § 34, Series A no. 247-B). Though the Court is not bound by the findings of domestic courts and remains free to make its own assessment in the light of all the material before it, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by the domestic courts (see *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 180, ECHR 2011 (extracts), and *Aydan v. Turkey*, no. 16281/10, § 69, 12 March 2013).

130. The evidence produced before the Court indicates that the applicant had been informed of his employer's internal regulations, which prohibited the personal use of company resources (…). He had acknowledged the contents of the document in question and had signed a copy of it on 20 December 2006 (…). In addition, the employer had sent all employees an information notice dated 26 June 2007 reminding them that personal use of company resources was prohibited and explaining that an employee had been dismissed for breaching this rule (…). The applicant acquainted himself with the notice and signed a copy of it on an unspecified date between 3 and 13 July 2007 (…). The Court notes lastly that on 13 July 2007 the applicant was twice summoned by his employer to provide explanations as to his personal use of the internet (…). Initially, after being shown the charts indicating his internet activity and that of his colleagues, he argued that his use of his Yahoo Messenger account had been purely work-related (…). Subsequently, on being presented fifty minutes later with a forty-five-page transcript of his communications with his brother and fiancée, he informed his employer that in his view it had committed the criminal offence of breaching the secrecy of correspondence (…).

131. The Court notes that the domestic courts correctly identified the interests at stake — by referring explicitly to the applicant's right to respect for his private life — and also the applicable legal principles (…). In particular, the Court of Appeal made express reference to the principles of necessity, purpose specification, transparency, legitimacy, proportionality and security set forth in Directive 95/46/EC, and pointed out that the monitoring of internet use and of electronic communications in the workplace was governed by those principles (…). The domestic courts also examined whether the disciplinary proceedings had been conducted in an adversarial manner and whether the applicant had been given the opportunity to put forward his arguments.

132. It remains to be determined how the national authorities took the criteria set out above (see paragraph 121) into account in their reasoning

when weighing the applicant's right to respect for his private life and correspondence against the employer's right to engage in monitoring, including the corresponding disciplinary powers, in order to ensure the smooth running of the company.

133. As to whether the applicant had received prior notification from his employer, the Court observes that it has already concluded that he did not appear to have been informed in advance of the extent and nature of his employer's monitoring activities, or of the possibility that the employer might have access to the actual content of his messages (…). With regard to the possibility of monitoring, it notes that the County Court simply observed that 'the employees' attention had been drawn to the fact that, shortly before the applicant's disciplinary sanction, another employee had been dismissed' (…) and that the Court of Appeal found that the applicant had been warned that he should not use company resources for personal purposes (…). Accordingly, the domestic courts omitted to determine whether the applicant had been notified in advance of the possibility that the employer might introduce monitoring measures, and of the scope and nature of such measures. The Court considers that to qualify as prior notice, the warning from the employer must be given before the monitoring activities are initiated, especially where they also entail accessing the contents of employees' communications. International and European standards point in this direction, requiring the data subject to be informed before any monitoring activities are carried out (…).

134. As regards the scope of the monitoring and the degree of intrusion into the applicant's privacy, the Court observes that this question was not examined by either the County Court or the Court of Appeal (…), even though it appears that the employer recorded all the applicant's communications during the monitoring period in real time, accessed them and printed out their contents (…).

135. Nor does it appear that the domestic courts carried out a sufficient assessment of whether there were legitimate reasons to justify monitoring the applicant's communications. The Court is compelled to observe that the Court of Appeal did not identify what specific aim in the present case could have justified such strict monitoring. Admittedly, this question had been touched upon by the County Court, which had mentioned the need to avoid the company's IT systems being damaged, liability being incurred by the company in the event of illegal activities in cyberspace, and the company's trade secrets being disclosed (…). However, in the Court's view, these examples can only be seen as theoretical, since there was no suggestion that the applicant had actually exposed the company to any of those risks. Furthermore, the Court of Appeal did not address this question at all.

136. In addition, neither the County Court nor the Court of Appeal sufficiently examined whether the aim pursued by the employer could have been achieved by less intrusive methods than accessing the actual contents of the applicant's communications.

137. Moreover, neither court considered the seriousness of the consequences of the monitoring and the subsequent disciplinary proceedings. In this respect the Court notes that the applicant had received the most severe disciplinary sanction, namely dismissal.

138. Lastly, the Court observes that the domestic courts did not determine whether, when the employer summoned the applicant to give an explanation for his use of company resources, in particular the internet (…), it had in fact already accessed the contents of the communications in issue. It notes that the national authorities did not establish at what point during the disciplinary proceedings the employer had accessed the relevant content. In the Court's view, accepting that the content of communications may be accessed at any stage of the disciplinary proceedings runs counter to the principle of transparency (see, to this effect, Recommendation CM/Rec(2015)5 (…)).

139. Having regard to the foregoing, the Court finds that the Court of Appeal's conclusion that a fair balance was struck between the interests at stake (…) is questionable. Such an assertion appears somewhat formal and theoretical. The Court of Appeal did not explain the specific reasons linked to the particular circumstances of the applicant and his employer that led it to reach that finding.

140. That being so, it appears that the domestic courts failed to determine, in particular, whether the applicant had received prior notice from his employer of the possibility that his communications on Yahoo Messenger might be monitored; nor did they have regard either to the fact that he had not been informed of the nature or the extent of the monitoring, or to the degree of intrusion into his private life and correspondence. In addition, they failed to determine, firstly, the specific reasons justifying the introduction of the monitoring measures; secondly, whether the employer could have used measures entailing less intrusion into the applicant's private life and correspondence; and thirdly, whether the communications might have been accessed without his knowledge (…).

141. Having regard to all the above considerations, and notwithstanding the respondent State's margin of appreciation, the Court considers that the domestic authorities did not afford adequate protection of the applicant's right to respect for his private life and correspondence and that they consequently failed to strike a fair balance between the interests at stake. There has therefore been a violation of Article 8 of the Convention.

II. Application of Article 41 of the Convention

142. Article 41 of the Convention provides:

'If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if

the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.'

A. Damage

1. Pecuniary damage

143. Before the Chamber, the applicant claimed 59,976.12 euros (€) in respect of the pecuniary damage he had allegedly sustained. He explained that this amount represented the current value of the wages to which he would have been entitled if he had not been dismissed. At the hearing before the Grand Chamber, the applicant's representatives stated that they maintained their claim for just satisfaction.

144. In their observations before the Chamber, the Government stated that they were opposed to any award in respect of the pecuniary damage alleged to have been sustained. In their submission, the sum claimed was based on mere speculation and there was no link between the applicant's dismissal and the damage alleged.

145. The Court observes that it has found a violation of Article 8 of the Convention in that the national courts failed to establish the relevant facts and to perform an adequate balancing exercise between the applicant's right to respect for his private life and correspondence and the employer's interests. It does not discern any causal link between the violation found and the pecuniary damage alleged, and therefore dismisses this claim.

2. Non-pecuniary damage

146. Before the Chamber, the applicant also claimed € 200,000 in respect of the non-pecuniary damage he had allegedly sustained as a result of his dismissal. He stated that because of the disciplinary nature of the dismissal, he had been unable to find another job, that his standard of living had consequently deteriorated, that he had lost his social standing and that as a result, his fiancée had decided in 2010 to end their relationship.

147. The Government submitted in reply that the finding of a violation could in itself constitute sufficient just satisfaction. In any event, they submitted that the sum claimed by the applicant was excessive in the light of the Court's case-law in this area.

148. The Court considers that the finding of a violation constitutes sufficient just satisfaction for any non-pecuniary damage that may have been sustained by the applicant.

B. Costs and expenses

(…)

C. Default interest

152. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

For these reasons, the Court

1. *Holds*, by eleven votes to six, that there has been a violation of Article 8 of the Convention;

2. *Holds*, by sixteen votes to one, that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

3. *Holds*, by fourteen votes to three,

(a) that the respondent State is to pay the applicant, within three months, € 1,365 (one thousand three hundred and sixty-five euros) in respect of costs and expenses, to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable to the applicant;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

(…)

Partly dissenting opinion of judge Karakaş

(…)

Joint dissenting opinion of judges Raimondi, Dedov, Kjølbro, Mits, Mourou-Vikström and Eicke

Introduction

1. We agree with the majority, some of us with some hesitation, that, even in a context where on the facts before the Court it is difficult to see how the applicant could have had a 'reasonable expectation of privacy' (see below), Article 8 is applicable in the circumstances of this case (see paragraphs 69 to 81 of the judgment). With Article 8 having been found to be applicable, we also agree that this applicant's complaint falls to be examined from the standpoint of the State's positive obligations (see paragraph 111 of the judgment). Subject to what follows, we also agree with the general principles applicable to the assessment of the State's positive obligation, as set out in paragraphs 113 to 122 of the judgment.

2. However, for the reasons set out below, we respectfully disagree with the majority in relation to the correct approach to the State's positive obligation in the context of this case and their ultimate conclusion that the 'domestic authorities', by which the majority means only the employment courts, 'did not afford adequate protection of the applicant's right to respect for his private life and correspondence and that they consequently failed to strike a fair balance between the interests at stake' (see paragraph 141 of the judgment).

Principle

3. In light of the fact that there is common ground that the present application is to be

considered by reference to the State's positive obligation under Article 8, the appropriate starting point is provided by the Court's case-law defining the content and reach of the concept of 'positive obligations' under Article 8. The relevant principles were most recently summarised by the Grand Chamber, in the context of the positive obligation to protect the applicant's physical and psychological integrity from other persons, in *Söderman v. Sweden* ([GC], no. 5786/08, §§ 78–85, ECHR 2013). There the Court made clear that:

(a) the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities. However, this provision does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there are positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see, *inter alia, Airey v. Ireland*, 9 October 1979, § 32, Series A no. 32) (*Söderman*, cited above, § 78);

(b) the choice of the means calculated to secure compliance with Article 8 of the Convention in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation, whether the obligations on the State are positive or negative. There are different ways of ensuring respect for private life and the nature of the State's obligation will depend on the particular aspect of private life that is in issue (see, for example, *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 104, ECHR 2012 ((*NJ* 2013/250, m.nt. E.J. Dommering; *red.*); *Odièvre v. France* [GC], no. 42326/98, § 46, ECHR 2003-III; *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-I; and *Mosley v. the United Kingdom*, no. 48009/08, § 109, 10 May 2011) (*Söderman*, cited above, § 79); and

(c) in respect of less serious acts between individuals, which may violate psychological integrity, the obligation of the State under Article 8 to maintain and apply in practice an adequate legal framework affording protection does not always require that an efficient criminal-law provision covering the specific act be in place. The legal framework could also consist of civil-law remedies capable of affording sufficient protection (see, *mutatis mutandis, X and Y v. the Netherlands*, 26 March 1985, §§ 24 and 27, Series A no. 91, and *K.U. v. Finland*, no. 2872/02, § 47, ECHR 2008 (*NJ* 2009/470, m.nt. E.A. Alkema; *red.*)). The Court notes, for example, that in some previous cases concerning the protection of a person's picture against abuse by others, the remedies available in the member States have been of a civil-law nature, possibly combined with procedural remedies such as the granting of an injunction (see, *inter alia, Von Hannover*, cited above; *Reklos and Davourlis v. Greece*, no. 1234/05, 15 January 2009; and *Schüssel v. Austria* (dec.), no. 42409/98, 21 February 2002) (*Söderman*, cited above, § 85).

4. The facts of this case, as the majority at least implicitly accepts (see paragraph 80 of the judgment), are, of course, a million miles away from the seriousness of the cases considered in *Söderman*. After all, in that case the Court was concerned with allegations of the violation of a person's physical or psychological integrity by another person.

5. Nevertheless, even in that context, it is clear, firstly, that the choice of measures designed to secure respect for private life under Article 8, even in the sphere of the relations of individuals between themselves, is primarily for the Contracting States; a choice in relation to which they enjoy a wide margin of appreciation (see paragraph 119 of the judgment; narrowing where, unlike in the present case, a particularly important facet of an individual's existence or identity is at stake, or where the activities at stake involve a most intimate aspect of private life). This conclusion is underlined by the fact that there is no European consensus on this matter and only six out of thirty-four surveyed Council of Europe member States have explicitly regulated the issue of the workplace privacy (see paragraphs 52 and 118 of the judgment). Secondly, the 'measures' adopted by the State under Article 8 should in principle take the form of an adequate 'legal framework' affording protection to the victim. Article 8 does not necessarily require that an efficient criminal-law provision covering the specific act be in place. The legal framework could also consist of civil-law remedies capable of affording sufficient protection.

6. This, of course, applies *mutatis mutandis* in the present case where, as the majority identify, the Court is at best concerned with the protection of a core or minimum level of private life and correspondence in the work place against interference by a private law employer.

The focus of the enquiry

7. Having identified some of the principles set out above, the majority, in paragraph 123, unjustifiably in our view, narrowed its enquiry to the question 'how the domestic courts to which the applicant applied dealt with his complaint of an infringement by his employer of his right to respect for private life and correspondence in an employment context'.

8. Although recognising that 'protective measures are not only to be found in labour law, but also in civil and criminal law' (see paragraph 116 of the judgment), the majority in fact sidelined and avoided the real question that falls to be answered, namely: did the High Contracting Party maintain and apply an adequate 'legal framework' providing at least civil-law remedies capable of affording sufficient protection to the applicant?

9. As the respondent Government submitted, and the majority accepts, the relevant 'legal

framework' in Romania consisted not only of the employment courts, before which the applicant raised his complaint, but also included *inter alia*:
(a) the criminal offence of 'breach of secrecy of correspondence' under Article 195 of the Criminal Code (see paragraph 33 of the judgment); incidentally, a remedy which the applicant engaged by lodging a criminal complaint but, following a decision by the prosecutor that there was no case to answer, failed to exhaust by not challenging that decision in the domestic courts: paragraph 31 of the judgment;
(b) the provisions of Law no. 677/2001 'on the protection of individuals with regard to the processing of personal data and on the free movement of such data' (see paragraph 36 of the judgment), which, in anticipation of Romania's accession to the EU, reproduces certain provisions of Directive 95/46/EC of the European Parliament and of the Council of the European Union of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. This Law expressly provides, in Article 18, for a right to (i) lodge a complaint with the supervisory authority and, in the alternative or subsequently, (ii) apply to the competent courts for protection of the data protection rights safeguarded by the Act, including a right to seek compensation in relation to any damage suffered; and
(c) the provisions of the Civil Code (Articles 998 and 999; paragraph 34 of the judgment) enabling a claim in tort to be brought with a view to obtaining reparation for the damage caused, whether deliberately or through negligence.

10. Other than the criminal complaint which was not pursued any further, none of the domestic remedies was ever engaged by the applicant. Instead, the applicant only applied to the employment courts to challenge not primarily the interference by his employer with his private life/correspondence but his dismissal. As the majority note in paragraph 24:

> 'He asked the court, firstly, to set aside the dismissal; secondly, to order his employer to pay him the amounts he was owed in respect of wages and any other entitlements and to reinstate him in his post; and thirdly, to order the employer to pay him 100,000 Romanian lei (approximately 30,000 euros) in damages for the harm resulting from the manner of his dismissal, and to reimburse his costs and expenses.'

11. It was only in the context of these dismissal proceedings that, relying on the judgment of this Court in *Copland v. the United Kingdom* (no. 62617/00, §§ 43–44, ECHR 2007-I), he argued that the decision to dismiss him was unlawful and that by monitoring his communications and accessing their contents his employer had infringed criminal law.

12. The fact that the applicant's focus was primarily, if not exclusively, on the legality of his dismissal, rather than the interference by his employer with his right to respect for private life/correspondence, is also reflected in the way his case was presented before this Court. As the judgment notes at paragraph 55, the applicant's complaint was that 'his dismissal by his employer had been based on a breach of his right to respect for his private life and correspondence and that, by not revoking that measure, the domestic courts had failed to comply with their obligation to protect the right in question'.

13. As a consequence, one cannot help but note (if only in passing) that, if the respondent Government had raised this as a preliminary objection, there might have been some question as to whether, by applying to the employment courts on the basis he did, the applicant had, in fact, exhausted those domestic remedies 'that relate to the breaches alleged and which are at the same time available and sufficient' (see *Aquilina v. Malta* [GC], no. 25642/94, § 39, ECHR 1999-III). After all, there is no material before the Court to suggest that any of the three remedies identified above, and, in particular, a complaint to the specialist data protection supervisory authority and/or an action for damages under Law no. 677/2001 before the competent courts were 'bound to fail' (see *Davydov and Others v. Russia*, no. 75947/11, § 233, 30 May 2017).

14. Our doubts about the effectiveness of the employment courts in this context (and the appropriateness of the Court restricting its analysis to the adequacy of the analysis by those employment courts) is further underlined by the fact that, in line with this Court's jurisprudence under Article 6 of the Convention, regardless of whether or not the employer's actions were illegal that fact could not *per se* undermine the validity of the disciplinary proceedings in the instant case. After all, as this Court confirmed most recently in *Vukota-Bojić v. Switzerland* (no. 61838/10, §§ 94–95, 18 October 2016):

> '… the question whether the use as evidence of information obtained in violation of Article 8 rendered a trial as a whole unfair contrary to Article 6 has to be determined with regard to all the circumstances of the case, including respect for the applicant's defence rights and the quality and importance of the evidence in question (compare, inter alia, *Khan*, cited above, §§ 35–40; *P.G. and J.H. v. the United Kingdom*, cited above, §§ 77–79; and *Bykov v. Russia* [GC], no. 4378/02, §§ 94–98, 10 March 2009, in which no violation of Article 6 was found).
>
> In particular, it must be examined whether the applicant was given an opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, as must the circumstances in which it was obtained and

whether these circumstances cast doubts on its reliability or accuracy. Finally, the Court will attach weight to whether the evidence in question was or was not decisive for the outcome of the proceedings (compare, in particular, *Khan*, cited above, §§ 35 and 37).'

15. In any event, the above alternative domestic remedies, some of which are more obviously suitable to the protection of an individual's private life/correspondence in the private workplace, were plainly relevant to the assessment whether the 'legal framework' created by Romania was capable of providing 'adequate' protection to the applicant against an unlawful interference with his right to respect for private life/correspondence under Article 8 by another private individual (in this case, his employer).

16. By not including them, sufficiently or at all, in their analysis, the majority failed to have regard to important factors relevant to the question posed by this case and failed to give due weight to the acknowledged wide margin of appreciation enjoyed by High Contracting Parties in determining what measures to take and what remedies to provide for in compliance with their positive obligation under Article 8 to put in place an adequate 'legal framework'. Absent any evidence to suggest that the domestic remedies either individually or cumulatively were not sufficiently available or effective to provide the protection required under Article 8, it seems to us that there is no basis on which the Court could find a violation of Article 8 in the circumstances of the present case.

17. Before leaving this question of the appropriate focus for the enquiry, we would want to express our sincere hope that the majority judgment should not be read as a blanket requirement under the Convention that, where more appropriate remedies are available within the domestic legal framework (such as e.g. those required to be put in place under the relevant EU data protection legislation), the domestic employment courts, when confronted with a case such as that brought by the applicant, are required to duplicate the functions of any such, more appropriate, specialist remedy.

The analysis by the domestic employment courts

18. However, even if, contrary to the above, the majority's focus only on the analysis by the domestic employment courts were the appropriate approach, we also do not agree that, in fact, that analysis is defective so as to lead to a finding of a violation under Article 8.

19. In considering the judgments of the County Court and the Bucharest Court of Appeal, we note that both domestic courts took into consideration the employer's internal regulations, which prohibited the use of company resources for personal purposes (see paragraphs 12, 28 and 30 of the judgment). We further observe that the applicant had been informed of the internal regulations, since he had acquainted himself with them and signed a copy of them on 20 December 2006 (see paragraph 14 of the judgment). The domestic courts interpreted the provisions of that instrument as implying that it was possible that measures might be taken to monitor communications, an eventuality that was likely to reduce significantly the likelihood of any reasonable expectation on the applicant's part that the privacy of his correspondence would be respected (contrast *Halford v. the United Kingdom*, 25 June 1997, § 45, *Reports of Judgments and Decisions* 1997-III, and *Copland*, cited above, § 42). We therefore consider that the question of prior notification should have been examined against this background.

20. In this context, it is clear on the evidence before the Court that the domestic courts did indeed consider this question. Both the County Court and the Court of Appeal attached a certain weight to the information notice which the applicant had signed, and their decisions indicate that a signed copy of the notice was produced in the proceedings before them (see paragraphs 28 and 30 of the judgment). The County Court observed, among other things, that the employer had warned its employees that their activities, including their computer use, were being monitored, and that the applicant himself had acknowledged the information notice (see paragraph 28 of the judgment). The Court of Appeal further confirmed that 'personal use [of company resources could] be refused … in accordance with the provisions of the internal regulations', of which the employees had been duly informed (see paragraph 30 of the judgment). Accordingly, the domestic courts found, on the basis of the documents in their possession, that the applicant had received sufficient warning that his activities, including his use of the computer made available to him by his employer, could be monitored. We can see no basis for departing from their decisions, and consider that the applicant could reasonably have expected his activities to be monitored.

21. Next, we note that the national authorities carried out a careful balancing exercise between the interests at stake, taking into account both the applicant's right to respect for his private life and the employer's right to engage in monitoring, including the corresponding disciplinary powers, in order to ensure the smooth running of the company (see paragraphs 28 and 30 of the judgment; see also, *mutatis mutandis*, *Obst v. Germany*, no. 425/03, § 49, 23 September 2010 (*NJ* 2011/231, m.nt. E.A. Alkema; *red.*), and *Fernández Martínez v. Spain* [GC], no. 56030/07, § 151, ECHR 2014 (extracts) (*NJ* 2016/25, m.nt. E.A. Alkema; *red.*). The Court of Appeal, in particular, citing the provisions of Directive 95/46/EC, noted that there had been a conflict in the present case between 'the employer's right to engage in monitoring and the employees' right to protection of their privacy' (see paragraph 30 of the judgment).

22. We also note that, on the basis of the material in their possession, the domestic courts found that the legitimate aim pursued by the employer in engaging in the monitoring of the applicant's communications had been to exercise 'the right and the duty to ensure the smooth running of the company' (see the Court of Appeal as quoted at paragraph 30 of the judgment). While the domestic courts attached greater weight to the employer's right to ensure the smooth running of the company and to supervise how employees performed their tasks in the context of their employment relationship than to the applicant's right to respect for his private life and correspondence, we consider that it is not unreasonable for an employer to wish to check that its employees are carrying out their professional duties when making use in the workplace and during working hours of the equipment which it has made available to them. The Court of Appeal found that the monitoring of the applicant's communications was the only way for the employer to achieve this legitimate aim, prompting it to conclude that a fair balance had been struck between the need to protect the applicant's private life and the employer's right to supervise the operation of its business (see paragraph 30 of the judgment).

23. In our view, the choice of the national authorities to give the employer's interests precedence over those of the employee is not capable in itself of raising an issue under the Convention (see, *mutatis mutandis, Obst*, cited above, § 49). We would reiterate that where they are required to strike a balance between several competing private interests, the authorities enjoy a certain discretion (see *Hämäläinen v. Finland* [GC], no. 37359/09, § 67 in fine, ECHR 2014, and further references). In the present case, therefore, it is our view that the domestic courts acted within Romania's margin of appreciation.

24. We further note that the monitoring to which the applicant was subjected was limited in time, and that the evidence before the Court indicates that the employer only monitored the applicant's electronic communications and internet activity. Indeed, the applicant did not allege that any other aspect of his private life, as enjoyed in a professional context, had been monitored by his employer. Furthermore, on the evidence before the Court, the results of the monitoring operation were used solely for the purposes of the disciplinary proceedings against the applicant and only the persons involved in those proceedings had access to the content of the applicant's communications (for a similar approach see *Köpke v. Germany* (dec.), no. 420/07, 5 October 2010). In this connection, it is observed that the majority agree that the applicant did not substantiate his allegations that the content in question had been disclosed to other colleagues (see paragraph 126 of the judgment).

25. Lastly, we note that in their examination of the case, the national authorities took into account the attitude displayed by the applicant in the course of his professional activities in general, and during the disciplinary proceedings against him in particular. Thus, the County Court found that he had committed a disciplinary offence by breaching his employer's internal regulations, which prohibited the use of computers for personal purposes (see paragraph 28 of the judgment). The domestic authorities attached significant weight in their analysis to the applicant's attitude in the disciplinary proceedings, during which he had denied using his employer's resources for personal purposes and had maintained that he had used them solely for work-related purposes, which was incorrect (see paragraphs 28 and 30 of the judgment). They were plainly entitled to do so. This was confirmed when the applicant asserted before this Court that, despite the fact that he knew that private use of his work computer was prohibited, it would only have been an awareness of monitoring by the employer which would have led him not to engage in private use of the employer's computer; he did not deny that he was informed about the monitoring, but could not remember when he had received the information notice alerting him to the monitoring.

26. After all, as the majority also stress (see paragraph 121 of the judgment), in order to be fruitful, employment relations must be based on mutual trust (see *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06 and 3 others, § 76, ECHR 2011 (*NJ* 2012/522, m.nt. E.J. Dommering; *red.*)). Accordingly, it is our view that within their margin of appreciation, the domestic (employment) courts were entitled, when weighing up the interests at stake, to take into account the attitude displayed by the applicant, who had broken the bond of trust with his employer.

27. Having regard to all the foregoing considerations and in contrast to the majority, we conclude that there has been no failure to protect the applicant's right to respect for his private life and correspondence and that there has, therefore, been no violation of Article 8 of the Convention.

Noot

1. In deze zaak formuleert de Grote kamer richtsnoeren voor de omvang van de privacy op de werkplek (niet te verwarren met de vraag in hoeverre er een recht is een beroep anoniem uit te oefenen: HR 31 maart 2017, (*Rabobank/Stichting Restschuld Eerlijk delen*), *NJ* 2017/238, zie ook mijn noot onder 6 bij EHRM 8 november 2016, (*Magyar Helsinki Bizottság/Hongarije*) *NJ* 2017/431). Bărbulescu had op zijn werkplek zijn mail voor privédoeleinden (mails met zijn broer en zijn verloofde) gebruikt in strijd met de daarvoor door de werkgever gestelde regels. Het bewijs van de overtreding was echter geleverd door de clandestien door de werkgever opgeslagen mails. 'Clandestien', omdat Bărbuescu niet

was gewaarschuwd dat tijdens zijn werk al zijn email zou worden gemonitord. De Kamer in eerste aanleg vond dat nog wel door de beugel kon, maar de (verdeelde) Grote kamer vond van niet. Een tweede belangrijk punt is dat het Hof uitvoerig stilstaat bij de vraag wat de positieve verdragsverplichting in art. 8 EVRM inhoudt.

2. Het Hof heeft zich al eerder over dit soort vragen uitgelaten in uitspraken die in het arrest worden geciteerd. Dat de 'correspondence' van art. 8 ook het internetverkeer (email) omvat besliste het expliciet in de zaak *Copland* (EHRM 3 april 2007, 62617/00, *NJ* 2008/617, m.nt. E.J. Dommering). Dat was dan ook niet meer een discussiepunt in deze zaak. Wel was een belangrijk punt bij de gewone Kamer van het Hof of de werknemer, gezien het expliciete verbod om mail tijdens het werk voor privédoeleinden te gebruiken, wel een voldoende duidelijke verwachting had dat zijn privacy zou worden geëerbiedigd nu hij die mail toch voor dit expliciet verboden doel gebruikte. De Grote kamer antwoordt op dit punt in de overwegingen 73-80. Het vertrekpunt is de derde overweging in de zaak *Köpke/Duitsland* (over clandestien cameratoezicht op werknemers werkzaam in een supermarkt, EHRM 5 oktober 2010, *NJ* 2011/566, m.nt. E.J. Dommering), waarin het een soortgelijke overweging uit 1997 in de zaak *Halford/Verenigd Koninkrijk* (*NJ* 1998/506) herhaalde: de expectancy of privacy is 'a significant but not necessarily decisive factor'. Het ontbreken van een waarschuwing voor het monitoren vindt het erger dan het al of niet bestaan van de verwachting van de werknemer dat het niet naleven van een voorschrift zal worden gemonitord. In overweging 80 oordeelt het:

> "It is open to question whether — and if so, to what extent — the employer's restrictive regulations left the applicant with a reasonable expectation of privacy. Be that as it may, an employer's instructions cannot reduce private social life in the workplace to zero. Respect for private life and for the privacy of correspondence continues to exist, even if these may be restricted in so far as necessary."

3. De ontwikkeling van de jurisprudentie op grond van art. 8 EVRM is voor een belangrijk deel gebaseerd op de positieve verdragsverplichting van de lidstaten formele en materiële regels in het leven te roepen zodat de privacy niet alleen in de relatie staat-burger, maar ook en met name in de relatie tussen de burgers onderling effectief is gewaarborgd. Uit diverse uitspraken blijkt dat de beleidsvrijheid die de lidstaten hebben (de 'margin of appreciation') niet wezenlijk verschilt van de negatieve verdragsverplichting zich van inmenging te onthouden. In r.o. 112 herhaalt het Hof nog eens dat de grenzen vergelijkbaar zijn. De lidstaten hebben beleidsvrijheid in de keuze van de middelen (overweging 113), maar het Hof toetst wel de effectiviteit daarvan (overweging 115): er moeten adequate en voldoende waarborgen zijn om de privacy te beschermen (overweging 120). Dat is ook het toetsingskader van het Hof. Deze vat het in overweging 121, toegespitst op het monitoren, samen in zes punten: 1. Er moet een behoorlijke notificatie van monitoringmaatregelen zijn, 2. Hoe indringend (hoeveel, hoe diep en hoe lang) zijn de monitoringmaatregelen?, 3. Wat is de rechtvaardiging van de monitoring maatregelen?, 4. Waren er minder bezwarende monitoringmaatregelen om het doel te bereiken mogelijk?, 5. Wat zijn de gevolgen van de monitoringmaatregelen voor de werknemer?, 6. Is er een bescherming van de werknemer, met name als de methode indringend is, in het bijzonder inhoudende dat de werkgever de werknemer in concreto waarschuwt voordat hij toegang tot de inhoud van de vertrouwelijke communicatie krijgt.

4. Een aparte eis formuleert het in overweging 122: de nationale regeling moet er in voorzien dat de werknemer die is gemonitord een rechtsmiddel heeft dat hem toegang geeft tot een 'a judicial body with jurisdiction to determine, at least in substance, how the criteria outlined above were observed and whether the impugned measures were lawful'.

5. Op basis van de hier geformuleerde criteria onderzoekt het Hof of de Roemeense wetgeving en het in casu toegepaste rechterlijke toezicht aan de criteria voldoen en komt het, anders dan de Kamer in eerste aanleg, tot het oordeel dat zowel de regels als het toezicht onvoldoende zijn geweest. Er zijn vijf dissenters die het inhoudelijk oneens zijn met de meerderheid. Zij vinden dat het Hof in de toetsing de margin of appreciation onvoldoende heeft gerespecteerd en dat de Roemeense rechters het goed hebben gedaan. Ze vinden ook dat de klager het nodige te verwijten vat. Hij zou nog andere rechtsmiddelen hebben gehad. Hij zou over het particuliere gebruik van de mail tegenover zijn werkgever hebben gelogen.

6. Het Hof verwijst in overweging 120 aan het slot naar de specifieke aard van de arbeidsrechtelijke relatie die gekenmerkt wordt door wederzijds vertrouwen en de daarmee samenhangende informatieplicht van de werkgever. Voor de typisch arbeidsrechtelijke aspecten van het geschil verwijs ik naar de noot bij dit arrest van Quinten Kroes in *Mediaforum* 2017-5, p. 172-173. Toch hebben de zes geformuleerde eisen algemene betekenis die ook voor de controle van de uitoefening van bevoegdheden in de sfeer van het strafrecht en de veiligheidsdiensten van betekenis zijn. Dat blijkt ook in het bijzonder door de verwijzing in r.o. 120 van het arrest, voorafgaande aan de formulering van de zes eisen, naar de overwegingen 232-234 in het arrest *Roman Zakharov/Rusland* (EHRM 4 december 2015, *NJ* 2017/185, m.nt. E.J. Dommering, zie met name die noot onder 8). In de uit laatstgenoemde zaak geciteerde overwegingen benadrukt het Hof dat in de fase van het onderzoek bij veiligheidsdiensten de betrokkene niet op de hoogte kan zijn, maar dat na afsluiting van het onderzoek notificatie dat een onderzoek heeft plaatsgehad 'is inextricably linked to the effectiveness of remedies before the courts and hence to the existence of effective safeguards

against the abuse of monitoring powers'. Inmiddels is de nieuwe Wet op de Inlichtingen- en Veiligheidsdiensten (WIV) vastgesteld (26 juli 2017, *Stb*. 2017, 317) die voorziet in een nieuw systeem van rechtsbescherming. Aan de Commissie van Toezicht op de Inlichtingen en Veiligheidsdiensten (CTIVD) is in art. 97 een klachtenafdeling toegevoegd. De wet bevat geen materiële normen voor de toetsing van een klacht, maar het ligt voor de hand dat deze afdeling zal moeten toetsen aan de zes hiervoor geformuleerde criteria, waarbij bijzonder gewicht toekomt aan de vraag of achteraf een behoorlijke notificatie heeft plaatsgehad. Daarnaast is er een nieuwe Commissie Toetsing Inzet Bevoegdheden (TIB) ingesteld (art. 32 e.v. WIV) die vooraf moet beoordelen of de door de minister verleende toestemming voor de inzet van bevoegdheden 'rechtmatig' is, zoals de wet het formuleert. Uiteraard zal de TIB niet de eis van notificatie kunnen stellen, maar de overige eisen die het Hof voor monitoring heeft gesteld vormen toch een valide toetsingskader. De WIV zwijgt over hoe en wanneer er beroep op welke rechter mogelijk is van de beslissingen die op grond van de wet in het kader van het toezicht zijn genomen. Dat zal de praktijk dus moeten leren.

E.J. Dommering