

## EU Court Reverses Ruling On Employee Chat Surveillance

By **Paige Long**

*Law360, London (September 5, 2017, 2:07 PM BST)* -- The upper chamber of the European Court of Human Rights ruled Tuesday that a Romanian company violated an individual's right to privacy when it monitored his computer activity almost a decade ago, overturning a 2016 judgment that backed the firm's actions.

The decision marks the end of a lengthy appeal brought by a Romanian national centered on private correspondence that his former employer had intercepted and subsequently used in disciplinary proceedings that resulted in his termination in 2007.

The grand chamber of the European Court of Human Rights sided in an 11-6 vote with Bogdan Mihai Barbulescu's argument that his former employer — who has not been identified — had violated Article 8 of the European Convention on Human Rights, which guarantees a right to respect for private and family life, the home and correspondence. It overrules a decision by the ECHR's lower chamber.

Barbulescu joined the firm in August 2004 as an engineer in charge of sales and was told by his senior managers to set up a Yahoo messenger account to communicate with clients.

On July 13, 2007 he was told that his messenger account had been monitored and that there was evidence he was using it for personal exchanges, which he denied. Barbulescu was later presented with a 45-page transcript of communications between himself, his brother and his fiancée from July 5 to July 12 and was fired two weeks later for breaching the company's internal regulations.

The European court, which was first presented with the case in 2008, concluded that the Romanian national courts that had previously ruled in favor of the employer had not recognized Barbulescu's right to protection under Article 8. They had failed to determine whether he had been given sufficient notice by his employer that his communications could be monitored, the European court found.

"The court concluded, from the material in the case file, that Mr. Barbulescu had not been informed in advance of the extent and nature of his employer's monitoring, or the possibility that the employer might have access to the actual contents of his messages," the ECHR said as it announced Tuesday's judgment.

The Strasbourg-based court also said that the lower courts had not carried out a "sufficient assessment" of whether there were legitimate reasons to allow Barbulescu's communications to be monitored.

“Neither of the national courts had sufficiently examined whether the aim pursued by the employer could have been achieved by less intrusive methods than accessing the contents of Mr. Barbulescu’s communications,” the ECHR said.

The latest ruling also rejects a judgment on the case handed down in January 2016, when the ECHR’s lower chamber voted by six to one that there had been no violation of Article 8. The chamber said in that ruling that it had found nothing to indicate the Romanian courts had failed to strike a “fair balance” between the worker’s right to privacy and his employer’s interests.

The case was referred by Barbulescu’s legal team to the grand chamber, the highest level of appeal, which is composed of 17 judges compared with the chamber’s seven, on June 6, 2016.

“Where a case is referred to the grand chamber after a chamber judgment it is possible that the grand chamber decides differently, in terms of the approach followed, its reasoning or its findings,” the ECHR said.

The Strasbourg court also said it is the first time it has examined a case focused on the monitoring of an employee’s electronic communication by a private employer — rather than the significant cases it has decided on over surveillance or seizure of electronic data by state authorities.

The judgment included criteria that national authorities should apply when they assess measures in future similar cases. It also stressed that the ruling should not be interpreted to mean that employers cannot monitor employees’ communications or cannot dismiss employees for using the internet at work in a personal capacity.

“However the court considers that states should ensure that, when an employer takes measures to monitor employees’ communications, these measures are accompanied by adequate and sufficient safeguards against abuse,” the ECHR said.

Helena Milner-Smith, special counsel in law firm Covington’s global employment team, said the ruling would have little effect in the U.K.

“The decision serves as a reminder for employers who monitor workplace communications to ensure their monitoring practices do not go beyond what is necessary for a legitimate purpose, that employees normally receive prior notice of the monitoring and that appropriate safeguards are in place to preserve privacy in spite of the monitoring,” Milner-Smith said.

“However the grand chamber’s ruling will have very little practical impact in the UK, since these steps are already widely recognized as good practice by U.K. employers and reflect the requirements of existing privacy legislation.”

Counsel information for the parties was not immediately available.

The case is *Barbulescu v. Romania*, application number 61496/08, in the European Court of Human Rights.

--Additional reporting by Allison Grande. Editing by Ed Harris.