

THE WORKER'S PRIVACY AND ELECTRONIC CONTROL

Francisco Andrade - fandrade@direito.uminho.pt

Teresa Coelho Moreira – tmoreira@direito.uminho.pt

Overview

- Introduction
- The electronic control
- The control of the worker's email by the employer
- The danger of the Homo Conectus
- Cloud Computing
- Ambient Intelligence
- Principle of transparency and secret of correspondence
- Effectiveness of Fundamental Rights?
- Conclusions

Legal Framework about Privacy at the Workplace

- Articles 34.º and 35.º of Portuguese Constitution
- Articles 14.º to 22.º of Portuguese Labour Code – Personality Rights
- Articles 70.º to 81.º of Portuguese Civil Code
- Law 67/98 – Data Protection Act
- Law 41/2004

Introduction



The use of information technology in the workplace has grown exponentially and surveillance and monitoring have become important issues in the modern workplace

Electronic Control

- One of the most disturbing aspects of the introduction of the new technology is related with the new forms of the exercise of the electronic power of the employer, because they increased it in an unusual way without precedents.
- This control becomes many times intrusive, continuous and total, bringing inclusively risks for the workers' health, so much physical as psychological namely for knowing or to feel constantly watched.

The control of the e-mails

- Matter of considerable interest and surrounded of great controversy in the last years
- Establishment of limits
- Application of the data protection principles

The control of the e-mails: principles

- The control has to comply with the principles established in the Law 67/98, 26 October- Data Protection Act
- Personal data must be processed fairly and lawfully
- Must be collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes
- Principle of transparency
- Principle of proportionality

The control of the e-mails



- The employer before the adoption of any form of this type of control has to respect the legitimate purpose
- This principle is in art. 5.º, n.º 1, paragraph b), of the Portuguese Data Protection Act

Privacy and data protection at work

- The employer will still have to always respect the proportionality principle.
- This principle is in art. 5.º, n.º 1, paragraph c), of the Portuguese Data Protection Act
- This principle specifies that the only personal data that may be collected is the one who is necessary to achieve the purposes of the data collection operation
 - ▣ Specifically in the case of the e-mail, this principle means that the employer will have to pay attention to the whole constitutional protection not only to the right of privacy but, above all, to the right established in article 34.º of secret of communications.

Privacy and data protection at work

- This principle means that the employer cannot invoke his legitimate organization and control power to limit the exercise of the constitutional right established in article 34.º
- And, also, in article 22.º of the Portuguese Labour Code – that establish the “confidentiality of messages and access to information”

Privacy and data protection at work: article 22.º

- Number 1 states that

“The employee is entitled to reserve and to the confidentiality of contents of personal messages and access to non-professional information sent, received or consulted, namely through e-mail”,

- Number 2 states that

“The preceding clause does not prejudice the employer’s right to establish rules regarding the use of undertaking’s electronic resources, namely e-mail”.

Privacy and data protection at work

- The employer is limited in his power of electronic control, and he cannot control the content of the personal e-mails and, at this point, we should make a distinction among different situations.
- We have to distinguish between received e-mails or sent e-mails for effects of a different control of the employer.

Privacy and data protection at work

- When clear politics exists concerning the use of these means with the establishment of proportional limits and in agreement with the principle of good faith that the workers know, and respecting like this the principles of information and publicity, we believe...

...that it should be considered lawful the access of the employer to the worker's professional e-mail without needing a judicial authorization.

Privacy and data protection at work

- In the case of personal e-mails the messages are protected by the right to the secrecy of the communications and the employer cannot control the content of these messages not even in exceptional situations in that there are suspicions of abuse.
- However, he can control some external data.

Privacy and data protection at work

- The employer will still have to respect the **principle of transparency**
 - ▣ The workers have to be informed of how, where and when the control is made
 - ▣ Elaboration of internal guidelines or a kind of “Charters of informatics”; about the use of this type of communication instruments
 - ▣ These seems to be the best way of information to the workers on the possible correct or incorrect use

The danger of the Homo Conectus

- Electronic communication networks: new techniques, new problems:
 - ▣ Geo-localization, social networks, cloud computing, ambient intelligence, surveillance
 - ▣ Blurring of borders between professional and personal, public and private

Enhanced controlling power of the employer: monitoring "anywhere and whatever they do"

The danger of the Homo Conectus

- Is there a right to disconnect?
- Are we supposed to be permanently on-line?
- Legal principles may be compromised: the right to oblivion, the right to be forgotten, the right to be let alone
- The right to erase our data becomes almost impossible
- Cloud computing makes it harder

Cloud Computing

- Distributed computation – ubiquitous access to informatics resources
- Delocalization of software, services, archive
- Increase in international flow of data
- Challenges for legal systems (at national and international level)
- Cooperation between national authorities and with employers and trade unions
- Liability of service providers may have to be re-thought

Ambient Intelligence

- Ambient Intelligence: The Internet of things
- Sensing modules: mobile monitoring of persons
- Virtual Residence, Virtual Workplace, smart devices used for efficiency aims
- Domotics and Ambient Intelligence (Toyota and Microsoft Partnership)
- Transformation in Electronic persons (systems constantly surveilling us)

Principle of Transparency and secret of correspondence

- Transparency of the systems ?
- Consent of the users?
- Finalities for the collection of data?

- Secret of communications, secret of correspondence, where are they?
- The danger of dataveillance
- Software agents, distribution of data, profiling

Principle of transparency

- The power of control of the employer allows the collection of personal information and creation of profiles of the employees?
- It is mandatory to rethink the powers of control of the employer

Effectiveness of Fundamental Rights?

- European Convention on Human Rights
- European Charter of Fundamental Rights
- The recognition of fundamental rights to privacy and to data protection

- Privacy is at serious risk: RFIDs, GPS and constant monitoring
- The establishment of relations between persons and things (The Internet of Things)

Effectiveness of Fundamental Rights?

- Are there reasonable expectations of privacy? Or reasonable expectations of being monitored?
- Data mining, profiling, dataveillance
- Where is negative aspect of intimacy? Excluding any knowledge by thirds of what is won to the person?
- Where is the positive aspect of intimacy? Person's control over his own information?

Effectiveness of Fundamental Rights?

- Legal impositions on the use of electronic systems?
- Requirements of privacy (warranties of opacity) and requirements of data protection (warranties of transparency)
- Important role of law and regulations
- Important role of technology (technical standards and compliance with legal requirements)

Effectiveness of fundamental Rights?

- Need of laws and regulations both at national and international level
- Consideration of different spheres of protection (public, private and intimate)
- Consideration of digital territories?
 - ▣ First territory: complete control of the individual
 - ▣ Second territory: individuals or group have some control
 - ▣ Third territory: public space

Effectiveness of Fundamental Rights?

- Possibility of choice of the individual on how much personal information is disclosed, to whom and for what purpose
- Protective role of State, involvement of technology, involvement of individuals
- Need of rethinking of the powers of the employer and of his relation with employee

Effectiveness of Fundamental Rights?

- Importance of elaboration
 - ▣ At company's level
 - ▣ At collective negotiation level

Of rules of good conduct related with telematics

Conclusions

- The recognized values and promoted by the privacy are directly in cause in the work relationship
- The autonomy, the dignity, the trust, the respect and the diversity acquire fundamental importance in this relationship, mainly when we know that the workers are spending more time in professional issues
- These should be protected as well as their privacy, mainly when it is their dignity that has to be protected

Conclusions

- With these new forms of electronic control of the employer a new form of taylorization can appear, now at informatics level
- And if it is unquestionable that the companies should be efficient and dynamics, is not less right than those objectives cannot be obtain at the expense of the workers' dignity
- Not everything that is technically possible is legal admissible

Conclusions

- The ever growing use of electronic communication brings along the threat of a permanent connectivity (Homo Conectus) with a consequence of the rights of privacy and data protection being somewhat compromised.
- The availability of cloud computing services will increase the international flow of data and there will be a need, at national and international level, of rethinking the legal framework of liability for service providers.
- Ambient Intelligence brings along electronic entities as new active subjects and a consequent need for new requirements concerning the transparency of the systems, the consent of the users and the finalities of the use of the collected data.

Conclusions

- The principles of transparency and of secret of correspondence may be in serious risk. It is unavoidable to rethink the powers of control of the employer accordingly.
- Effectiveness of fundamental rights to privacy and data protection is at stake. There is a need of considering, besides law (at national and international level), an active role of technology and of individuals in enhancing these rights. Only through an active intervention of individuals will it be possible to talk about self-determination right
- Compliance with the transparency principle is of utmost importance and the elaboration, at the company's level or at the collective negotiation level of "rules of good conduct related with telematics" should be promoted.



Thank you very much!

fandrade@direito.uminho.pt

tmoreira@direito.uminho.pt