Privacy at work*

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Today, there is a widespread recognition of the horizontal effect of fundamental rights. The labour contract represented everywhere, in democratic systems, the natural framework for the development of such an effectiveness of constitutional precepts and values, with the need of answering to the question of *whether* - and *to what extent* – the interests that are in the basis of the employer's power require and justify *in casu* the limitation of the employee´s freedom. The Portuguese Labour Code, in articles 14 and following, expressly recognizes certain fundamental rights of the human being in the workplace, including the *privacy*. The employee has, in fact, the right to expect a certain degree of respect for his privacy in the workplace, which is where he develops an important part of his relations with others. This right shall, however, be balanced with other rights and legitimate interests of the employer, in particular the rights to effectively manage his enterprise and specially to protect himself from liability or damage caused by employee´s actions. The case law – namely that of the Supreme Court of Justice - has influenced the evolution of the Labour Law, contributing to the interpretation of the law and the resolution of some controversial employment issues, e.g. in matters related to fundamental rights. In the final part of this article we will seek to provide a brief overview of some innovative case law issued by the Social Chamber of the Portuguese Supreme Court, particularly after entering into force the Portuguese Labour Code in 2003.
Key words: fundamental rights; labour contract; privacy; case law

Magánélet a munkában

Ma már széles körben elismerik az alapvető jogok horizontális hatását. A munkaszerződés a demokratikus rendszerekben mindenütt az alkotmányos normák és értékek hatékonyságának kialakításához szükséges természetes keretet jelentette, azzal az igénnyel, hogy választ kellett adni arra a kérdésre, hogy a munkáltató hatalmának alapját képező érdekek szükségessé teszik-e – és ha igen, milyen mértékben – a munkavállaló

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szabadságának korlátozását. A portugál Munka Törvénykönyve a 14. és az azt követő cikkekben kifejezetten elismeri az ember bizonyos alapvető jogait a munkahelyén, beleértve a magánélethez való jogot is. A munkavállalónak joga van ahhoz, hogy elvárja a magánéletének bizonyos fokú tiszteletben tartását a munkahelyén, ahol kapcsolatainak egy fontos részét alakítja ki. Ezt a jogot azonban egyensúlyba kell hozni a munkáltató egyéb jogaival és jogos érdekeivel, különösen a vállalkozás hatékony irányításához való jogával, és különösen azzal, hogy a munkáltató megvédje magát a munkavállaló tevékenysége következtében felmerülő felelősségtől vagy károktól. Az ítélkezési gyakorlat - nevezetesen a Legfelsőbb Bíróság ítélkezési gyakorlata - befolyásolta a munkajog fejlődését, hozzájárulva a törvény értelmezéséhez és egyes vitás munkajogi kérdések megoldásához, például az alapvető jogokkal kapcsolatos kérdésekben is. E cikk utolsó részében arra törekszünk, hogy rövid áttekintést adjunk néhány innovatív esetről, amelyeket a portugál Legfelsőbb Bíróság Szociális Tanácsa hozott, különösen a portugál Munka Törvénykönyve 2003. évi hatálybalépését követően.
Kulcsszavak: alapvető jogok, munkaszerződés, magánélet, esetjog

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1. Constitutionalization of labour law

Our theme – right to privacy and labour contract – is part of a wider one: the fundamental rights of the human being at work, that brings us to the evolution operated in the last two centuries, in the sense of what can be called a "*constitutional reconstruction*" of labour contract, with those rights and this contract, departing from separate worlds, with the liberalism, and passing to be no longer strangers to each other, with the social constitutionalism and the social State.

The liberalism was based on a radical separation between the State and the civil society, between public law and private law. In fact, the Constitution was seen reduced to the guarantee of the individual freedom against the State, seen as the only power able of threatening that individual freedom. According to the French Declaration of Rights from 1789 (article 16), the Constitution appears as an instrument for the protection of *natural individual rights*, prior and superior to the political society and the State. Existing in all men, in all times and places (article 1), these rights are limited only for the equal rights of all men (article 4). They are, therefore, *rights of defense* (*Abwehrrechte*) against the State, the only force able to threaten individual freedom.

Private law appears as the kingdom of relations between equals, largely dominated by the principles of *autonomy of will* and *contractual freedom*. The intervention of the legislator was proscribed, given that only the parties, free and acting on equality, could fairly self-regulate their interests.

It is only with the 20th century that this view is beginning to be corrected, giving the increasing content of the constitutional texts, which pass to rule, not only the political system, but also the so-called civil society. The *constitutionalization of labour law* is precisely one of the first manifestations of constitutional intervention in private area which occurred firstly with the Constitutions of Querétaro, 1917, and Weimar, 1919.

The Social State appears, with the replacement of the *liberal constitutionalism*, concerned only with the guarantee of personal autonomy of the individual against the power of the State, for the *social constitutionalism*, characterized by state intervention with the purpose of solidarity and social justice. The new State is no longer the neutral state of the liberal tradition, but a state that recognizes itself "*the right and the duty to intervene in economic relations between citizens*" and for which this duty arises, even if such intervention sacrifices individual freedom and its projections in contractual freedom and private property.

2. Effectiveness of fundamental rights in private relations - particularly in the framework of labour contract

2.1. In Portugal, the *horizontal effectiveness of fundamental rights* came with the Constitution of 1976 (PC), where the acceptance of this horizontal effect was expressly previewed by article 18/1 as a "*direct*" effect. Today, there is a widespread recognition of this effectiveness, through the rules of *conflict of rights*, in particular the *principle of proportionality*, either that effectiveness is seen as directly imposed by the constitutional provisions either by the general clauses of private law (e.g., *good faith*).

The labour contract, because of the full involvement of the employee, increasing the possibility of threats to his fundamental rights, represented everywhere, in democratic systems, the natural framework for the development of such an effectiveness of constitutional precepts and values, with the need of answering to the question of *whether* - and *to what extent* – the interests that are in the basis of the employer's power require and justify *in casu* the limitation of the employee´s freedom.

The issue is the balance between employee´s rights and the correct performance of his contractual commitments. The restrictions on these rights must "*be limited to the necessary to safeguard other constitutionally protected rights or interests*" (e.g., honor, intimacy, health, physical and moral integrity, freedom of enterprise, private property, etc.) and furthermore they must not affect "*the extent and scope of the essential content*" of the rights in question (cf. paragraphs 2 and 3 of article 18 of the PC).

2.2. The Portuguese Labour Code (PLC), in articles 14 and following, expressly recognizes certain fundamental rights of the human being in the workplace, including the privacy. The employee has, in fact, the right to expect a certain degree of respect for his privacy in the workplace, which is where he develops an important part of his relations with others. This right shall, however, be balanced with other rights and legitimate interests of the employer, in particular the rights to effectively manage his enterprise and especially to protect himself from liability or damage caused by employee´s actions.

3. Right to privacy

3.1. The article 16 of the PLC states the *right to privacy*, with both the prohibition of the access to as well as the disclosure of information about the private life, namely regarding family life, emotional and sexual life, state of health and political and religious beliefs; the paragraph 2 of the article is not exhaustive, covering not the prohibition of all the irrelevant facts for the purpose of assessing the professional attitude, even the personal tastes and lifestyle of the employee, family situation, etc.

Also here, either by imposition of paragraph 2 of article 18 of the PC either of article 335 of the Civil Code, the intimacy of private life must be the *rule*, not the *exception*, only being justified its limitation when higher interests (e.g., "*other constitutionally protected rights or interests*") so require.

According to the *principle of the separation between private life and labour relation*, the employee may, as a rule, dispose of his extraprofessional life, being forbidden for the employer to investigate or take into account facts of his private sphere, unless they have a *direct* connection with his duties. The private sphere of the employee (even, for example, a criminal conviction) can not constitute just cause for dismissal, unless in concrete has "*negative impact on service*", for example disrupting the correct development of contract for reasons *directly* linked to the functions exercised or to the nature of the enterprise itself (e.g., in the case of a *tendency enterprise*).

Facts of the private sphere can hardly constitute a disciplinary offense, because for that it would be necessary to constitute a breach of contractual duties. The private life can therefore have a merely indirect relief for the labour contract insofar as it reflects negatively in working relationship and in any case it is not that private life but only its reflect which may be subject to sanctions imposed by the employer. Analyzing some court decisions on just cause for dismissal we will see precisely this.[1]

3.2. The following articles of the PLC also have to do with privacy, defining e.g. the terms on which the employer may "*require job applicants or employees to provide information concerning their private lifes*", "*state of health or state of pregnancy*" (article 17), to process biometric data of the employee (article 18), require him the performance or presentation of tests or medical exams (article 19), use "*remote surveillance methods at the workplace*" (articles 20 and 21) or "*establish rules for the use of the undertaking's electronic resources, namely e-mail*" (article 22).

The rule is always that the right to privacy can only be limited if relevant interests justify that limitation and this cannot put into question the constitutional principles of *necessity*, *proportionality* and *prohibition of excess*. The employer must only access data about the private lives that are *strictly necessary and relevant* for assessing the capability to perform the contract.

[1] See, *infra*, 6. Case-law.

4. Information about the private life

4.1. According to the paragraph 1 of article 17, the employer may request information about the private life "*strictly necessary and relevant*" to assess the capability to perform the contract; subparagraph b) states that information referring to health state or pregnancy can only be requested when "*particular requirements inherent to the nature of work*" so justify.

4.2. One interesting problem is the one about what are the consequences in the case that the employee does not answer or even respond lying. Has he a *right to lie*? Supposing the situation where a job candidate, with no duty to inform the employer and without anything being answered, tells in the interview for admission that she has no plans to have children, may the employer later invoke error in her hiring? I think not – although for us it is more appropriate to speak, not of a *right to lie*, but of a "*right to maintain the intimacy reserved*" or of a "*right to not reveal the state of health*", part of the fundamental right to private life.

4.3. Another important question is to what extent can or not the employer take into account certain evidences, namely for disciplinary purposes. Take, for example, the case of *facebook*: is it possible or not that this social network (or any other) be used by employer as evidence of a disciplinary offense? Access to social networks and in general the attention of the employers to what is shared by employees or job seekers is more and more a reality also in Portugal, being known cases of dismissal and rejection of job applications because of the contents of these networks. Recently a court stated in favor of a firm that fired an employee, for having expressed in *facebook* offensive comments about the employer: the argument that these comments were private has not convinced the court, because "the fact that all comments and posts published in the social network can be easily republished makes that the information is visible to others and thus must be considered semi-public".

4.4. Another topic that we can consider is the problem of *tendency organizations*, that is, ideologically oriented organizations, from the religious, political, trade union or another point of view, for which some doctrine considers that, because of its peculiar nature, some fundamental rights – e.g., the right to privacy and the ideological and expression freedoms - must be limited. In fact the compliance with labour provisions is there identified with the achievement of the ideals where the organization is based and so the position of the employee and the ideological content of its activity can impose some increased limitations in those rights. For example: in a catholic university, is the extra-professional conduct of the teachers irrelevant and if not how far can it be limited (is he just obliged to the respect of the catholic faith or must he actively participate in the acts of worship?)? *Quid juris*, whether in a religious school a teacher of the discipline of Christian Education abandons the religion? Or as it happened in Germany the direction of a school for children belonging to an evangelical community dismisses a teacher for having baptized his children in the Catholic Church? Or a newspaper which explicitly

assumes an editorial line in accordance with a political party dismisses a journalist who left the militancy of this party?

4.5. About the article 19, it may be referred that though the realization of genetic tests seems legitimate there, it appears hardly compatible with article 12 of the European Convention on human rights and biomedicine, which states that "*tests which are predictive of genetic diseases or which serve either to identify the subject as a carrier of a gene responsible for a disease or to detect a genetic predisposition or susceptibility to a disease may be performed only for health purposes or for scientific research linked to health purposes, and subject to appropriate genetic counseling*".

The courts stated also, for example, that social interests worthy of protection, e.g., road safety or the prevention of occupational accidents can justify the submission to alcohol or drugs detection tests. The right to privacy is not absolute: it may be limited, for example, if it is concerned the protection of public health or safety of himself or others. Incidentally, some activities (cases of train or bus drivers, ship or airplane pilots, air traffic controllers, nuclear power plant employees, etc.) justify more restrictive measures in the selection of employees and therefore these exams can be justified.

5. Powers of monitoring and control by information and communication technologies

A very important subject is also the power of control of the employer given the new technologies of information and communication, e.g. the many issues raised by means of remote surveillance in the workplace, control of electronic communications (e.g., Internet and e-mail), etc.

We will limit ourselves here to a brief reference. Regarding the use of new technologies, the PLC could - and should - have set guidelines about ways and means, the scope and extent of the power of electronic control of the employer, e.g., about the control of the use of telephone, e-mail or Internet for private purposes. On the contrary, there are no legal standards.

In our point of view video surveillance must result in a general surveillance to detect incidental situations or events and cannot be directly addressed to the action of the employees turning them indefinitely as suspects of illegal conducts, with clear violation of their personality rights. The protection of property is not an argument without more; aspects as the goods value, the fact that they are or not easily accessible, etc. must also be taken into account. On the other hand, the hidden video surveillance violates article 20, paragraphs 1 and 3 of the PLC and the duty of loyalty and good faith in employment relationship.

About the admissibility of video surveillance as an evidence we must say that in our point of view it is legitimate to use in the exercise of disciplinary power data accidentally known through the controls designed according to the legal requirements, e.g. for reasons of security or management business. This surveillance can prove disciplinary violations if it is justified by a legitimate aim and

respects the other criteria of proportionality, such as the *ultima ratio* (for example, if the accidental knowledge is the sole evidence and the conduct in question respected compromising of constitutional significance goods).

Also for the e-mail, once again the principle is that the employee's activities in the workplace do not entail the loss of his right to privacy and so the employer must choose forms of control that have less impact on fundamental rights of the employee. Generic control methods must be privileged, avoiding individualized consultation of personal data. The employer must not make a systematic monitoring of e-mails and such control must be targeted to areas and activities which present a greater "risk" for the enterprise. The monitoring must be randomly performed and primarily aim to ensure the safety of the system and its performance. To ensure it the employer may - always with the knowledge of the employees - adopt procedures necessary for the "filtering" of certain files that, by the position of the employee in the enterprise, may indicate that they do not concern to service (e.g., image files, exe or mp3).

The access to the e-mail must be used as the *ultima ratio* and only in the presence of the concerned employee, being in principle limited to the view of the addresses, subject, date and time of the recipients.[2]

6. Case-law

We have already said that the private life can have a merely indirect relief for the labour contract and also that in any case it is not the private life but only its reflect which may be subject to sanctions imposed by the employer. Let us now see some court decisions that show precisely this.[3]

We will refer above all to some judgements on the relevance of the private life of the employee for the termination of the labour contract, namely by just cause for dismissal. Furthermore, we will choose decisions of the Portuguese Supreme Court, that has a special role in the interpretation and application of the Labour Law in topics related to fundamental rights and has contributed to interpreting the labour law provisions concerning the right to privacy and its projections, particularly articles 16 and ff. of PLC, defining some guidelines to find a balance between the different rights and legitimate interests at stake. The first decisions of the Supreme Court on this matter have stimulated the reflection of scholars and the development of the case law on fundamental rights of employees over the last fifteen years, including in the lower courts.[4]

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[2] Even the fact that the employer prohibits the use of the e-mail for private purposes does not give him the right to automatically open any e-mail addressed to the employee.

[3] All these decisions can be seen in www.dgsi.pt

[4] E.g., about the termination by disciplinary reasons, there are decisions in the lower courts about the violation of labour duties out of work hours by an airline pilot (and there are similar cases with professional football players) or about the dismissal of a stewardess of an airline company because it was detected that she consumed cannabis); or decisions about someone drunk during the work (RP 10/07/2013), sexual relations in the workplace (RP 9/03/1981), conviction of drug trafficking (RL 31/07/1985), etc.

One of the most debated issues concerning employees' privacy is related to the monitoring of electronic communications by the employer.

In a judgment of 5 July 2007 (Case no. 07S043), the Supreme Court contributed to the interpretation of this provision, clarifying that the employer cannot access the content of personal messages and non-professional information that the employee receives, consults or sends by e-mail, even for purposes of investigating and proving a potential disciplinary offence.

Considering the prohibition of accessing personal messages, the distinction between personal and professional e-mails becomes crucial. In the referred decision, the Supreme Court interpreted broadly the concept of personal messages, considering that it does not include only communications related to employees' family, affective and sexual life, health, political and religious beliefs. According to the Supreme Court, the mere fact that the intervening parties refer to aspects of the company as well as the circumstance of the electronic equipment belongs to the company do not mean that the communication has a professional nature, and the employer has legitimacy to access its content. In this case, the Supreme Court qualified as private a message i) sent via e-mail by an employee to a friend and work colleague (sent to the electronic address of the After-Sales Division of the company to which such colleague had access for purposes of developing her functions and whose password she had revealed to other colleagues that replaced her during her absences), ii) during the working hours, iii) from her workstation, iv) using a computer belonging to the employer, v) in which the said employee made inappropriate remarks concerning, among others, the company's Vice-President. The Supreme Court justified that, in this case, the lack of a prior and formal reference to the personal nature of the message does not eliminate the protection provided by the Labour Law. Furthermore, the Supreme Court also stated that if the employer has access, for any reason, to the content of personal messages of the employee, it should stop reading them when realizes its personal / non-professional nature and cannot use the same for any purpose nor disclose its content.

Another projection of the right to privacy that has been developed in the case law of the Supreme Court is related to the usage of remote surveillance means.

Based on the article 20 of PLC 2009, Portuguese case law and scholars consider that, as a rule, the employer is prevented from using remote technological surveillance means at the workplace. For such remote surveillance to be considered lawful, it must be justified by (i) reasons of protection and security of people and goods or (ii) special requirements inherent to the nature of the activity.
In a judgment of 8 February 2006 (Case no. 05S3139), the Supreme Court held that the video surveillance systems impose restrictions to the employees' privacy and, therefore, should only be admitted under certain conditions: (i) these systems should pursue only the purpose of protection and security of people and property, being understood that this possibility is limited to places open to the public or areas accessible to people outside the company, where there is a reasonable risk of crimes being committed against people and property; (ii) the use of such systems

should consist of a generic surveillance aimed at detecting incidental facts, situations and events and not a surveillance directly pointed to workstations or to the field of action of employees; (iii) such systems are only admitted under the condition that they are not used to monitor the activity of employees (their admissibility is linked to the purpose of protection of people and property and cannot be used for other purposes). In the situation at stake, the Supreme Court ruled that the capture of images by video cameras installed at the workplace in such a way that the activity carried out by employees is subject to continuous and permanent surveillance is unlawful, as it violates their right to privacy.

In another judgment of 27 May 2010 (Case no. 467/06.3TTCBR.C1.S1), the Supreme Court ruled that the usage of remote surveillance means is always unlawful (even if the employee is informed of its installation), provided that its purpose is controlling the professional performance of the employee.

Another controversial question is whether a GPS device may be qualified as a remote means of surveillance for the purposes of Labour Law. The Supreme Court analysed this question, for the first time, in a judgment of 22 May 2007 (Case no. 07S054) and considered that a GPS device can only control the geographic position of the vehicle and does not allow to access the manner, circumstances and results of a concrete provision of work, not being therefore considered as a remote means of surveillance. This understanding was reaffirmed in a ruling of 13 November 2013 (Case no. 73/12.3TTVNF.P1.S1), in which the Supreme Court interpreted the concept of remote surveillance means contained in article 20 of PLC 2009 as referring to "the equipment that consists of a form of remote capture of image, sound or image and sound that allows to identify people and detect what they are doing, as it is the case of video cameras, audio-visual equipment, disguised microphones or mechanisms of listening and recording telephone calls". In this ruling, the Supreme Court considered that the GPS device installed by the employer in a company car used by the employee for the performance of his functions cannot be qualified as a remote surveillance means if it only allows knowing the location of the vehicle in real time (referencing it in a certain geographical space) and not what the driver is doing. Furthermore, in this ruling, the Supreme Court affirmed that, as the GPS device does not allow the recording of images or sound, its usage does not violate the employee's personality rights, namely the right to privacy. Notwithstanding the referred jurisprudence, this issue has continued to be disputable, existing some judgments of appeal courts that ruled in the opposite direction. This divergence has led to an interesting debate in the doctrine on the concept of remote surveillance means for the purposes of article 20 of PLC 2009, to which has also contributed the Portuguese data protection authority (Comissão Nacional de Proteção de Dados). Indeed, this authority issued a decision (Deliberation no. 7680/2014, of 28 October 2014) in which sustains the application of the said article 20 of PLC 2009 to the case of GPS devices.

Concerning the fundamental rights of the employees, one should also mention a well-known decision of the Supreme Court related to the termination of an employment contract with an HIV-positive cook. In a ruling of 24 September 2008

(Case no. 07S3793), the Supreme Court held that a cook with HIV was not able to continue to perform his professional activity, since he could be a source of danger to third parties (clients and colleagues). Therefore, the Supreme Court considered that there was a supervening and absolute impossibility for him to provide his duties as cook, which justified the termination of the respective employment contract by expiry. This decision is controversial and has given rise to different doctrinal positions, contributing to the discussion on the right to privacy of the employees regarding their health situation and the restricted conditions under which the employer may have access to such kind of (personal) information.

The referred case law demonstrates that the Portuguese Supreme Court has contributed to interpreting several provisions of PLC 2003 and PLC 2009, particularly those containing indeterminate concepts that require the jurisprudential concretization and densification, as it is the case of the provisions on employees' personality rights. In any case, it is undeniable that the decisions of the Supreme Court have usually encouraged the discussion and reflection from the legal scholars and the change of position of the lower courts, contributing to the development of the Portuguese Labour Law.