

18 February 2022

## **INFORMATION NOTE REGARDING THE DECISION RENDERED AS PER THE INDIVIDUAL APPLICATION BY SAMET AYYILDIZ**

*In the decision rendered as per the individual application by Samet Ayyildiz, dated 28.12.2021 and numbered 2018/34548 published in the Official Gazette numbered 31747 and dated 11.01.2022 ("**Decision**"), the Constitutional Court decided that an employee whose employment contract was terminated due to his correspondence on the messaging program called WhatsApp is in violation of the right to respect for private life stipulated in Article 20 and the freedom of communication stipulated in Article 22 of the Turkish Constitution.*

### **I. INTRODUCTION**

The application is based on the applicant's allegations, who works in a private company, that his right to respect for private life and freedom of communication were violated with the termination of his employment contract as a result of the employer's examination of the correspondence made by him using the messaging program called WhatsApp.

### **II. SUMMARY OF FACTS**

The employment contract of the applicant, who is a private company employee working as an IT officer in a state hospital affiliated to the Ministry of Health, where the company provides services, was terminated on 22.11.2017. With the letter dated 16.11.2017, the employee was asked to defend himself on the issues that he tried to be allowed to leave days with false statements, slandered and insulted his colleagues, company and institution managers with the messaging program, and disrupted the information system in an organized manner with his colleagues. The applicant submitted his defense on 21.11.2017 and his employment contract was terminated without notice on 22.11.2017.

The applicant filed a lawsuit at Ordu Labor Court on 20.12.2017 for reinstatement to job. Ordu Labor Court decided to accept the case, by holding the termination invalid and accepting reemployment request of the applicant on 31.05.2018, and in the reasoning of the decision; it was stated that the relevant messaging program is widely used, these correspondences should be protected as personal data, the way these conversations were obtained is ambiguous, the conversations are unlawful evidence and therefore, the termination that does not comply with the formal conditions is invalid.

The defendants' appeal request was accepted, on the grounds that the employer has right to terminate immediately for just cause, and that the relevant messages contained humiliating and insulting correspondence against the defendant company and institution managers, it was definitively decided to cancel the court decision and reject the case.

### **III. RELEVANT LEGISLATION**

Constitutional Court set out the relevant law as follows, by referring to its decision “E.U.” dated 17.09.2020 and numbered 2016/13010: Relevant articles of the Law on the Protection of Personal Data numbered 6698, Article 25 of the Labor Law numbered 4857 (“**Labor Law**”) titled “Immediate termination right of the employer for just cause”, articles of the Turkish Code of Obligations numbered 6098 regarding the General Service Agreement (article 393 et al.); Article 20 of the Constitution titled “Privacy of private life” and Article 22 titled “Freedom of communication” and the European Convention on Human Rights.

#### **IV. ASSESSMENT OF THE CONSTITUTIONAL COURT**

Firstly, the employer's authority to monitor the employee's communication was examined within the scope of the positive obligations of the state in the context of the right to respect for private life and freedom of communication. It was observed that there is no special regulation in the Labor Law regarding the monitoring of the communication tools made available to the employee by the employer. However, it was stated that in the context of creating a legal infrastructure, the positive obligations have been fulfilled, considering that the guarantees in Articles 20 and 22 of the Constitution and there is no prohibition in our legal system preventing the existing regulations to be applied also for labor law disputes.

It was emphasized that, in the absence of full and clear information that the communication made over the computer allocated for use in the workplace may be monitored and on the conditions of use of the communication tools, it can be foreseen by the employer too that that the employee can make personal correspondence via the workplace computer with the rightful expectation that his fundamental rights and freedoms would be protected in the workplace as well.

Reference was made by the Constitutional Court to the decision “E.U.” dated 17.09.2020 and numbered 2016/13010, which is about a similar case in which the content of the applicant's corporate e-mail account was examined by the employer and the employment contract was terminated based on these correspondences. The Constitutional Court stated that it is necessary to examine whether certain guarantees were provided by the employer interfering with the right. So, there must be legitimate grounds showing that the examination of the communication tools and communication contents made available to the employee by the employer is justified, the monitoring of communication and the processing of personal data should be carried out in a transparent manner, the employees should be informed about the process in advance by the employer - this information should at least cover the legal basis and purposes of the monitoring of the communication and the processing of personal data, the scope of the monitoring and data processing, the period of storage of the data, the rights of the data subject, the results of the monitoring and processing and the possible beneficiaries of the data, the data obtained through the inspection activity should be used by the employer for the intended purpose, it should not be possible to reach the same purpose with a lighter interference, the interference should be mandatory for the purpose to be achieved, the data to be processed or used in any way by monitoring the communication should be limited to the purpose to be achieved, the conflicting rights and interests of the parties should be balanced fairly by taking into account the impact of the communication examination on the employee and its consequences for the employee.

In the present case, it was understood that there was no clear information provided by the employer that the communication made over the computer allocated for use in the workplace could be monitored and supervised. On the other hand, although the applicant's employment contract was terminated on the grounds of WhatsApp messaging content concerning his private life, the employer could not explain the legitimate reasons and grounds for the intervention, that the expectations of the applicant were observed and his rights were considered, and that the applicant was informed about the intervention. Whether such information was provided for communication with the WhatsApp messaging program, which constitutes the main reason for the termination, or private communication on workplace computers was not discussed by the courts of instance, and the claims of the applicant that the contents of the messages were accessed unlawfully without his consent and without prior notification, although he did not make it public, were not met.

In addition, the employer could not give a sound explanation that they had obtained the private messages on the applicant's computer through a lawful method. From the reply petition, it was understood that the contents of the correspondence, which were the basis for the termination, were obtained by the responsible supervisor in the absence of the applicant while he has left his computer turned on. In this sense, it was observed that the employer did not explain if there was a situation requiring access to the content of the communication on the applicant's computer. Despite there being tools such as the analysis of the complaints and defenses of the parties, hearing witnesses, examining the processes and results of the workplace records and the projects carried out to achieve the same purpose, it was not clearly explained by the employer why it was necessary to examine the contents of the correspondence, nor was this aspect discussed by the courts of instance. Again, although it is widely known that the program is a messaging program for personal use, no evaluation was made on how the correspondence in such a program was monitored, whether their content was necessary for the termination to be based on, and its effect on the applicant's private life and communication.

After evaluating the applicant's correspondence submitted to the court by the employer and the trial process, it was understood that the employer provided access to the contents of the correspondence against the consent of the applicant and his friends. It was considered that the control of the said program, which is widely known to be related to personal use, was contrary to the reasonable expectation of the applicant regarding protection of the privacy of his private life and correspondence.

The Constitutional Court decided that the right to respect for private life and the freedom of communication had been violated for the reasons explained above.

## **V. CONCLUSION**

In the evaluation made by the Constitutional Court, conclusions were reached that it is accepted that the employee would have a reasonable expectation that there would be no interference with his rights and freedoms in the absence of clear notification, failure to clearly state why the examination of the contents of the messages by the employer was deemed necessary despite there being tools such as the analysis of the complaints and defenses of the parties, hearing witnesses to achieve the same purpose, and that the WhatsApp correspondence, which the applicant installed on his computer for his own private use and not for corporate use, and using it as a basis for the termination of the employment contract by the employer, does not require departing from the principles set out in the Constitutional

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Court decision referred to in the Decision; and decided that the right to respect for private life and the freedom of communication were violated.

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*Should you have any queries on the above, please do not hesitate to contact us.*

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