

Workplace Investigations

Contributing Editors

Phil Linnard at Slaughter and May
Clare Fletcher at Slaughter and May

08. Can the employer search employees' possessions or files as part of an investigation?

Belgium

Author: *Nicolas Simon*
at Van Olmen & Wynant

The employer is, in principle, not entitled to search the employee's private possessions, except with the explicit consent of the employee. Digital files on the computer or laptop of an employee can be searched under the rules of CBA No. 81 (see question 7) and other privacy rules.

Last updated on 15/09/2022

Netherlands

Author: *Barbara Kloppert, Mirjam Kerkhof, Roel de Jong*
at De Brauw Blackstone Westbroek

When conducting an internal investigation (which must have a legitimate purpose), the employer must act in accordance with the principles of proportionality and subsidiarity. In line with these principles, the means of collecting and processing personal data during an internal investigation as well as the data that is searched, collected or processed, should be adequate, relevant and not excessive given the purposes for which the data is being collected or subsequently processed. These principles can be complied with by, for example, using specific search terms when searching electronic data, limiting the investigation's scope (subject matter, period, geographic locations) and, in principle, excluding an employee's private data.

The employer is, in principle, allowed to access documents, emails and internet connection history saved on computers that were provided to the employees to perform their duties, provided the requirements of proportionality and subsidiarity are taken into account. In other words, reading the employee's emails or searching electronic devices provided by the employer must serve a legitimate purpose (e.g. tracing suspected irregularities or abuse) and the manner of review or collecting and processing the data contained in such emails should be in accordance with the principles of proportionality and subsidiarity.

The employer can ask the employee to hand over an employee's USB stick for an investigation. Depending on company policies and (individual or collective) employment agreements, an employee is, in principle, not obliged to comply with such a request. A refusal from an employee, when there is a strong indication

that this USB stick contains information that is relevant to an investigation into possible irregularities, may be to the disadvantage of an employee, for example in a dismissal case.

The following factors, which derive from the *Bărbulescu* judgment of the European Court of Human Rights, are relevant to the question of whether an employee's e-mail or internet use can be monitored:

- whether the employee has been informed in advance of (the nature of) the possible monitoring of correspondence and other communications by the employer;
- the extent of the monitoring and the seriousness of the intrusion into the employee's privacy;
- whether the employer has put forward legitimate grounds for justifying the monitoring;
- whether a monitoring system using less intrusive methods and measures would have been possible;
- the consequences of the monitoring for the employee; and
- whether the employee has been afforded adequate safeguards, in particular in the case of intrusive forms of monitoring.

These requirements can sometimes create a barrier for employers, as seen in a ruling by the District Court Midden-Nederland (16 December 2021, ECLI:NL:RBMNE:2021:6071) in which the employer had used information obtained from the employee's e-mail as the basis for a request for termination of the employment contract. In the proceedings, the employee argued that his employer did not have the authority to search his e-mail.

According to the District Court, it was unclear whether the employer had complied with the requirements of *Bărbulescu* regarding searching the employee's e-mail. The regulations submitted by the employer only described the processing of data flows within the organisation in general. Therefore, the District Court found that the employer did not have a (sufficient) e-mail and internet protocol and the employee was not properly informed that his employer could monitor him. In addition, according to the District Court, it was unclear what exactly prompted the employer to search the employee's e-mail, as the employer did not provide any insight into the nature and content of the investigation. As a result, the District Court was unable to determine whether the employer had legitimate grounds to search the employee's e-mail. On this basis, the District Court disregarded the (possibly) illegally obtained evidence and ruled against the employer's termination request.

Last updated on 27/11/2023



Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

The basic rule is that the employer may not search private data during internal investigations.

If there is a strong suspicion of criminal conduct on the part of the employee and a sufficiently strong justification exists, a search of private data may be justified.^[1] The factual connection with the employment relationship is given, for example, in the case of a criminal act committed during working hours or using workplace infrastructure.^[2]

^[1] Claudia Fritsche, *Interne Untersuchungen in der Schweiz: Ein Handbuch für regulierte Finanzinstitute und andere Unternehmen*, Zürich/St. Gallen 2013, p. 168.

^[2] Claudia Fritsche, *Interne Untersuchungen in der Schweiz: Ein Handbuch für regulierte Finanzinstitute und andere Unternehmen*, Zürich/St. Gallen 2013, p. 168 et seq.

Last updated on 15/09/2022

Contributors



Belgium

Nicolas Simon

Van Olmen & Wynant



Netherlands

Barbara Kloppert

Mirjam Kerkhof

Roel de Jong

De Brauw Blackstone Westbroek



Switzerland

Laura Widmer

Sandra Schaffner

Bär & Karrer

www.internationalemploymentlawyer.com