Brazilian labour court decisions on privacy rights in the technology era

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The workplace was considerably changed by technological and innovative advances. Some extrapolations of such change, however, occur when the employer monitors landlines and mobile phones, e-mails and instant messaging applications, internet use, and use and behaviur in social networks. Brazilian literature in this area has been developing throughout the years, but it is still insufficient and case law is not uniform, causing legal uncertainty that usually harms the most vulnerable party: the worker. This qualitative empirical study therefore seeks to understand those decision that to maintain and do not maintain (and why) the dismissal with cause in cases involving the use of information and communication technologies. A legal search in the jurisprudence of the Regional Labour Court of the Second Region (São Paulo, Brazil) was performed and decisions published until December 2019 were retrieved and confronted with the understanding provided for in instruments from the International Labor Organization related to the future of work and termination of employment. It seems information and communication technologies are still a recent matter when decisions from the abovementioned Court were analyzed and confronted with International Labor Organization's instruments. This study understands that privacy and the use of information and communication technologies could be more discussed and incorporated into the Brazilian legislative agenda, so it generates policy development and discussion on the importance of protecting workers' right to privacy.

Keywords: privacy, human rights, information and communication technologies, labor law.

1. Introduction

The pace at which Information and Communication Technologies (ICTs) have been implemented at the workplace and the abundant technological innovation greatly impacts the ways an employer may end up violating the worker's right to privacy. Also because of globalisation and technology development in the twenty-first century, several workers, in turn, have their employment agreements terminated due to misconducts related to the use of such technologies, especially in a country as Brazil, where employment can be terminated at will.

Brazilian literature has been trying to keep up with innovation, dwelling upon new ways through which information and communication technologies should and should not be used by workers and employers so the former does not have their privacy violated. General aspects of the right to privacy (Barros 2017; Burmann 2011; Corrêa and Oliveira

2019; Slomp Neto and Gunther 2020) and of informational and communication technologies (Maranhão, Benevides and de Almeida 2017; Vianna 2012), the use of social networks (Rodrigues and Barros 2015) and e-mail (Calonego 2007) by employees have already been addressed to some extent. But studies of this nature are rather insufficient and case law keeps proliferating, although decisions, as one may expect, are not uniform, which causes legal uncertainty, usually harming the most vulnerable party: workers.

It is therefore the aim of this study to analyse decisions of a Brazilian labour court located in São Paulo, Brazil, in lawsuits that deals with the use of ICTs and violation of privacy at the workplace, confronting the decisions with Brazilian legislation and the International Labour Organization (ILO) guidelines provided for in the Convention No. 158 and Recommendation No. 166 of 1982, both on termination of employment, as well as the ILO Centenary Declaration for the Future of Work and the ILO Declaration on Social Justice for a Fair Globalisation[1]. This study hypothesises that the Brazilian practice may diverge from ILO's stipulations, as the country is not a signatory of Convention No. 158.

Section 1 introduces this article, Section 2 addresses how the right to privacy has developed in the Brazilian legislation, especially regarding employment, describes in more detail the methodological procedures adopted in order to reach the study's purposes and the qualitative empirical search on the precedents of the Regional Labour Court of the Second Region (São Paulo, Brazil). Finally, Section 3 concludes this study and provides suggestions.

2. Basic research

2.1. Brazilian workers: a panorama on labour and privacy rights

The right to privacy has its roots in historical documents, such as the 1689 Bill of Rights, which protected freedom and life, the 1787 United States Constitution and the 1804 French Civil Code, which protected individual freedoms, such as expression and belief, and, of course, the 1948 Universal Declaration of Human Rights, which protects personality, discrimination and individual rights in detail. One of the first publications to address such a right in the academia described it as the extension of the state "protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise" (Warren and Brandeis 1890, 213).

In Brazil, the first constitution to at least briefly address rights of this nature was enacted in 1891 and only provided for secrecy of correspondence. An expansion of rights occurred throughout the years following international patterns, and the current 1988 Federal Constitution thus provides for a wide range of personality and privacy rights, such as inviolability of the home, correspondence, honour, reputation, image, liberty, private life and intimacy, in similar patterns as those theorised by Warren and Brandeis. Despite this fact, said Constitution uses several terminologies to address these same rights and principles, for example, secret, reservation, private life, modesty, intimacy, among others

[1] Convention C158 — Termination of Employment Convention, 1982 (No. 158). Available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C158 (accessed: 16.02.2022); Recommendation R166 — Termination of Employment Recommendation, 1982 (No. 166). Available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312504:NO (accessed: 16.02.2022).

(Oliveira, Barros and Pereira 2017), without however having a terminological definition of what would be protected by all these terms and the difference between them, which could cause legal uncertainty within a vital stream of rights. In this dispute, da Silva (2000) suggests that the expression that best fits the legislator's intent would be right to private life, as, according to him, in this expression would be encompassed all manifestations of the intimate, private and personality spheres.

Such a right was also used as the basis of the new Brazilian Consolidated Labour Laws[2], as prior to the labour reform the labour courts relied only on the Constitution and in case law to make their decisions. Articles 223 C and 223 D of the Brazilian Consolidated Labour Laws, for example, address non-pecuniary damages, which may result from an offense to honour, image, intimacy, self-esteem, freedom, sexuality, physical integrity, name, among others. Due to that, the employer's power ought to be adequate and respects worker's privacy, as the work itself is a means through which individuals participate in society and develop themselves and human beings (Freitas Júnior 2006).

It is also worth mentioning that Brazil is not a signatory to Convention No. 158 of 1982, which stipulates international standards regarding termination of employment, such as the valid reasons for termination, the procedures prior and after the termination, period of notice, income protection, among other provisions that are also provided for in Recommendation No. 166 of 1982. Therefore, the employment is at will, which means it is possible to terminate the employment without cause, by giving prior notice to the other party. Furthermore, it is also possible to terminate the employment agreement with cause, which implies the existence of grave misconducts provided for in Articles 482 and 483 of the Brazilian Consolidated Labour Laws, which severely reduces the employee's usual termination entitlements, such as additional employer's deposit, Time Service Guarantee Fund account withdrawal and unemployment insurance[3].

2.2. Research design

This work is situated in a multidisciplinary area, thus combining studies on international labour and employment law and human rights. Due to the specificity of the themes addressed herein, it would not be effective to rely on a single methodological procedure to reach findings and answers. Therefore, in order to achieve the objectives outlined in the introduction to this work this research was developed through a qualitative approach, combining theoretical and empirical analyses, as well as methods such as bibliographic, document and legal search.

As for the theoretical analysis, a bibliographic research was conducted on workers' rights, the right to privacy, information and communication technologies and labour law, based on relevant and current literature on these themes. It is also relevant to mention studies from Latin authors, authors from the global South and authors who dedicate their research to the study of the global South were preferred when available, in order to oxygenate the western thinking towards these themes. A document search was conducted to

[2] Decreto-Lei No 5.452, de 1o de Maio de 1943. Available at: http://www.planalto.gov.br/ccivil_03/decreto-lei/del5452.htm (accessed: 16.02.2022).

[3] Decreto-Lei No 5.452, de 1o de Maio de 1943. — Hereinafter, all references to Brazilian normative legal acts and judicial practice are given according to: https://www.trtsp.jus.br (accessed: 16.02.2022).

collect ILO documents concerning the matters addressed herein, which were after analysed in their entirety.

Regarding the jurisprudence data, the judicial body chosen to be assessed was the Regional Labour Court of the Second Region, in São Paulo, Brazil, due to the size and development of the city, which is the most populated city in the Americas and southern hemisphere. The sets of terms used to retrieve information were: "privacy" and "technology"; "invasion of privacy"; "privacy" and "social network". Results discussed in Section 4 were then compared to Brazilian legislation and ILO guidelines provided for in the Convention No. 158 and Recommendation No. 166 of 1982, both on termination of employment, as well as the ILO Centenary Declaration for the Future of Work and the ILO Declaration on Social Justice for a Fair Globalisation.

2.3. Brazilian labour court decisions and the right to privacy in technology-related cases

The qualitative empirical search dealt with precedents of the Regional Labour Court of the Second Region (São Paulo, Brazil) published until December 2019. The sets of keywords used were "privacy" and "technology"; "invasion of privacy"; "privacy" and "social network". The results were divided into three different categories presented below in subsections 5.1 "Personal and corporate equipment", 5.2 "Spy software" and 5.3 "Publications on social media".

It is important to bear in mind that this study only analysed lawsuits related to employee's right to privacy, excluding cases not related to this matter beforehand. The research results were then divided into the three main groups described above. The first encompasses decisions found through keywords "technology" and "privacy" (307 decisions, most of them were not related to the topic discussed herein, except for nine). The second group used the keyword "invasion of privacy" and found 218 decisions. Again, the majority were also not related to this matter, except for one. The third group found 52 decisions through keywords "privacy" and "social network" and seven could be used by this study. The decisions found and used by this study ranged from January 2012 until December 2019 and the lawsuits mainly addressed moral damages and reversal of the dismissal due to said invasion of privacy.

Before the groups were defined, other searches were also made, such as (i) "privacy" and "technology" and "ICT" (no results found) (ii) "privacy" and "ICT" (24 results, no decision was relevant to this study); and (iii) "privacy" and "information and communication technology" (two decisions found, no decision was relevant to this study). The searches were performed considering the existence of physical and electronic lawsuits. The main contributions found through the three groups of this qualitative empirical research are described as follows.

2.3.1. Personal and corporate equipment

Lawsuit no. 0001905–72.2014.5.02.0065 published in September 2017 considered that it is illegal for the employer to obtain evidence against the employee through the latter's personal computer. The decision, however, understood the dismissal with cause was correctly applied, besides the illegal piece of evidence, because it took into consideration

other evidence produced in this specific case. According to the research, it is not possible for the employer to monitor the personal e-mail of employees, but it is possible to monitor corporate e-mail.

The monitoring of corporate e-mail, as well as the browsing history, are within the employer's directive power (according to Lawsuit no. 0001028–21.2011.5.02.0039 published in 2012), mainly because the computer belonged to the company (according to a decision published in 2019 and 2013 for Lawsuit no. 1002196–79.2016.5.02.0002 and Lawsuit no. 0000489–58.2011.5.02.0038, respectively). There are no rights to moral damages due to monitoring of corporate e-mails or even Skype conversations (Lawsuit no. 1000845–03.2017.5.02.0078 and Lawsuit no. 1001414–66.2017.5.02.0316, both published in 2019) and internal messenger applications (Lawsuit no. 0001603–03.2011.5.02.0080 published in 2012) considering that the use of such an application or equipment that belongs to the company only happens because of the employment relationship.

It is also important to mention that it is not allowed for employees to access third party computers in order to obtain documents and records to use as evidence of wage parity request. In this situation, Lawsuit no. 1002152–76.2016.5.02.0708 published in 2018 determined the right to dismiss the employee with cause.

Other situation found in this qualitative empirical search is the Court's understanding that the installation of an application on the employee's cell phone, whose purpose is data transmission, communication, location tracking and journey control is legal. The understanding in this situation was that the access to personal data (contacts, location) depended on the user's authorisation. The Court concluded that there was no violation to the right to privacy when private calls were made or the Messenger was used, according to Lawsuit no. 1001620–77.2017.5.02.0608 published in 2018.

2.3.2. Spy software

Despite the understanding that the monitoring of corporate equipment is legal, the research concluded that the use of a monitoring software is illegal. This monitoring software spies on everything that the employee does, types, accesses, including bank accounts and other personal data. In this situation, the violation of the employee's rights to privacy, intimacy and dignity was recognised (according to the judgement of Lawsuit no. 0219700–20.2009.5.02.0086, published in 2012).

2.3.3. Publications on social media

Lawsuit no. 0001021–69.2015.5.02.0433 published in 2016 analysed a dismissal occurred because of a Facebook publication that was considered offensive to the honour and good image of the employer. In this case, the Court decided that there is no right to dismiss with cause. The freedom of expression and its limits stablishes that the employer invaded employee's privacy (accessing her social media accounts) in order to punish.

In other case, however, the Court recognised the right to dismiss with cause in a similar situation, considering that the employee offenses made directly against the employer on social media sets up a breach of confidence and offend the honour and good image of the employer (according to Lawsuit no. 1001386–07.2015.5.02.0466 published in 2017 and Lawsuit no. 1001196–90.2016.5.02.0019 published in 2017).

One case law set an important precedent regarding the intention of the publication on social media. In this case, the Court decided there is no right to dismiss, considering it was a publication on an employee's group of friends with no intention to offend the honour or good image of the company. The complaint was also made as a consumer of the company's — and employer — product, and not as an employee (Lawsuit no. 002361.81.2015.5.02.0034 published in 2017).

One of the decisions (Lawsuit no. 1000750–28.2017.5.02.0383 published in 2019) considered the use of photos published in Facebook as an evidence to dismiss the employee with cause. During the case, however, the employee confessed to the fact intended to be proved by said photos. The decision therefore concluded that the Facebook photos became irrelevant to the solution of the case and no precedent on this regard was set. It is relevant, however, to consider that the same Court has already determined that (i) photos on social media are public in a broad sense and they may be known by anyone (according to Lawsuit no. 0002240–74.2013.5.02.0373 published in 2015); and (ii) once published, the responsibility for the content lies with the person who posted it (according to Lawsuit no. 0002413–32.2015.5.02.0049 published in 2018).

In addition to this research conducted in the Regional Labour Court of the Second Region (São Paulo, Brazil), it is also important to consider the precedents from the Brazilian Superior Labour Court (Tribunal Superior do Trabalho) for these subjects that recognises that it is lawful to use as evidence messages exchanged in software (MSN Messenger) made available by the company, on its computer — therefore, for professional use — which demonstrates the establishment of unfair competition by the employee. There is no breach to employee's privacy in this situation (Lawsuit no. AIRR-130440–21.2007.5.10.0007[4], 1st Panel of the Tribunal Superior do Trabalho, Rapporteur: Minister Emmanoel Pereira, Published on March 27, 2018).

The qualitative empirical analysis of the decisions from the above-mentioned Court confronted with the understandings provided by the Convention No. 158 of 1982 (Termination of Employment), Recommendation No. 166 of 1982 (Termination of Employment), as well as ILO Centenary Declaration for the Future of Work and ILO Declaration on Social Justice for a Fair Globalisation conclude that ICT is still a recent matter that both Brazilian legislation and ILO instruments must face urgently. Although there are no specific legal provisions with the Brazilian panorama, the courts decide cases concerning such matters in a daily basis.

3. Conclusion

Workers' right to privacy has been a constant concern of the International Labour Organization, as privacy stems from first generation rights provided for in Article 12 of the Universal Declaration of Human Rights. Several ILO instruments address the workers' right to privacy in their provisions, but only a few documents correlate the right to privacy with information and communication technologies, a current and ongoing debate in an innovative world in which work relations are always evolving. Globalisation and technol-

[4] Lawsuit no. AIRR-130440-21.2007.5.10.0007. Available at: https://consultaprocessual.tst.jus.br/consultaProcessual/consultaTstNumUnica.do?consulta=Consultar&conscsjt=&numeroTst=130440&digitoTst=21&anoTst=2007&orgaoTst=5&tribunalTst=10&varaTst=0007&submit=Consultar (accessed: 16.02.2022).

ogy development in the twenty-first century changed the workplace forever. Abundant technological innovation, however, greatly impacts the ways an employer may end up violating the workers' right to privacy, while the latter may have their employment agreements terminated due to misconducts related to the inappropriate use of information and communication technologies, especially in Brazil.

The country is not a signatory to Convention No. 158 of 1982, which stipulates international standards regarding termination of employment, such as the valid reasons for termination, the procedures prior and after the termination, period of notice, income protection, among other provisions that are also provided for in Recommendation No. 166 of 1982. Therefore, the employment agreement can be terminated at will, which means it is possible to terminate the employment without cause, by giving prior notice to the other party. It is also possible, however, to terminate the employment agreement with cause, which implies the existence of grave misconducts provided for in the Brazilian Consolidated Labour Laws, which severely reduces the employee's usual termination entitlements.

Several employment agreements have been terminated in Brazil with cause due to inappropriate use of ICTs at the workplace. Some decisions of the Regional Labour Court of the Second Region, in São Paulo, Brazil were analysed by this article in order to understand how the cases were decided, as there are no provisions directly concerning ICTs and the right to privacy in Brazilian legislation. The qualitative empirical analysis of the decisions from the abovementioned Court confronted with the understandings provided by the Convention No. 158 and Recommendation No. 166 of 1982, as well as ILO Centenary Declaration for the Future of Work and ILO Declaration on Social Justice for a Fair Globalisation conclude that ICTs are still a recent matter that both Brazilian legislation and ILO instruments must face urgently. Although there are no specific legal provisions within the Brazilian panorama, the courts decide cases concerning such matters in a daily basis. None of the cases expressly mentioned any of ILO's Conventions, all being restricted to national legislation.

Concerning the topics discussed herein, there could be more development in the following matters by Brazilian legislative bodies: (i) whether would the monitoring of corporate equipment (computer, cell phone, e-mail and message software) be a violation of workers' right to privacy, (ii) whether the employer can make use of a full-time spy software, (iii) whether the employee should be given prior written warning before being dismissed due to inappropriate use of ICTs, and (iv) what would be the limits for the employee to share opinions about their employer on social media.

Finally, it is important to mention that this research was conducted before the COVID-19 pandemic, which may have increased considerably remote work around the globe. During the following years precedents will probably be enriched by new situations considering ICT and employees' rights considering the evolution and regular use of ICTs at the workplace.

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