## WhatsApp groups and employment contracts – Can they coexist?

Groups, groups and more groups... Of friends, parents of children's mates, the list goes on. It's completely impossible to escape WhatsApp groups and we all know that, regardless of the purpose for which they are created, conversations/messages always end up on some other matter. This is one of the reasons why we shiver whenever our clients tell us about WhatsApp groups in the workplace. The reality is that they have become a "tool" that has gradually imposed itself on communications in the workplace. They are often created voluntarily by employees to discuss work issues, often by middle managers, each with their own rules, number of "administrators", range of issues that are discussed, etc.

The fact is that, along with the growing use of WhatsApp groups for work purposes, the legal problems they raise are becoming more frequent and pressing. From issues of discriminatory treatment (exclusion of a particular employee from the group, for instance), to issues of information protection and security (it is common for someone to "forget" to exclude people from the group who are no longer with the company, and may even have moved to a competitor, and thus continue to have access to information relating to their former employer) to, unfortunately more common, issues relating to behavior that may have disciplinary relevance within such groups.

Let's take a concrete example from a ruling by the Évora Court of Appeal: a group of workers (pilots for an airline) created a WhatsApp group closed to pilots from a particular air base. The group was not organized by the employer and the messages, although predominantly, were not only work-related. One of the employees in the group wrote messages in which he referred to a colleague in insulting terms and with intimidating and threatening content. The base commander (who was part of the group) and was their hierarchical superior, realizing the seriousness of the statements, passed on their content to the employer who then initiated a disciplinary procedure that culminated in the employee's dismissal. It should be noted that the employer never had direct access to the content of the messages shared in the group but learnt about them through one of its employees.

The Évora Court of Appeal decided, in short, that these messages could not be used as evidence in the disciplinary procedure, so the dismissal of the employee, based on this evidence, was deemed unlawful. The court based its judgement on the qualification of the messages written by the employee in a private and closed WhatsApp group as personal and private communications. In this context, it ruled that the evidence in question was invalid because it breached the fundamental right to privacy and the legal and constitutional protection of the confidentiality of personal messages.

We have the deepest reservations about the solution espoused in the ruling (which, incidentally, has already been applauded by some relevant legal opinion), since we believe that the court erred in the classification of the nature of messages written in a WhatsApp group (albeit a closed one).

National case law, of course, has been following the problems relating to employers' access to workers' messages as the media and communication channels used have evolved. In this context, there are already relatively consolidated case law views regarding (i) messages exchanged by e-mail, sms, messenger, etc. (which from the outset assume a personal and private nature) and (ii) posts on social networks and Facebook groups (where the protection of privacy tends to be less stringent). In the Évora Court of Appeal

ruling, WhatsApp group messages were given the same level of protection as messages sent by email, sms, messenger or private chats.

In our view, messages in WhatsApp groups are halfway between these two types of situations and are very similar in nature to messages in Facebook groups. In other words, we believe that it is very difficult for an employee who posts a message in a group of work colleagues to have a legitimate expectation of privacy with regard to that message. In this context, we find that the reasoning of the Porto Court of Appeal's ruling of 08/09/2014 (in which messages in a Facebook group were at issue) is particularly accurate:

*"Otherwise, that Facebook page would be the equivalent of a coutada or a fiefdom, in which all the comments made, however serious and tawdry they may be, would be exempt and immune from the employer's disciplinary power, which could jeopardize the normal functioning of the company (namely in terms of the relationship between employees, which is intended to be cordial, respectful and characterized by its urbanity), as well as its reputation and good name.*

*(...)*

*In no way can posts published on a social network (...) be compared to online communication tools such as messenger, private chats or e-mail (...). While the protection of privacy and confidentiality provided for in Article 22 of the Labour Code is defensible for such means of communication, the protection of privacy and confidentiality provided for in Article 22 of the Labour Code is also defensible. The protection of privacy and confidentiality provided for in Article 22 of the Labour Code and the protection of the constitutional right to freedom of expression and opinion with the broad scope recognised when expressed in a private conversation between family and/or friends - in a restricted and reserved environment, in which the interlocutors' discretion for the confidentiality of some of the things referred to and the understanding and inevitable "discount" for the others is counted on and there is the legitimate conviction that no one else will have access to and knowledge, in real or deferred time, of the content of the tables - the same cannot be said for the posts published on the social network at issue in these proceedings. "*

The reference to this discussion serves to illustrate the problems that may flow from the unregulated use of networks such as WhatsApp for the purposes of professional communications. In this context, it is paramount that organizations take proactive action to establish rules regarding their use for professional purposes.