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Internet Surveillance in the Workplace

“When using surveillance to monitor an employee’s internet usage in the workplace, has the employer’s interference of an employee’s Article 8 Rights to respect for private life and correspondence become so unfettered that its legitimacy may now be disregarded?”

Balance of power in the workplace – impact of surveillance of the internet and email



Employee

Employer

Barbulescu v Romania

Application no. 61496/08 - Judgment 12 January 2016

The complaint was that the employer's decision to terminate his contract had been based on a breach of his right to respect for his private life and correspondence and that the domestic courts had failed to protect his right.

Significant factors in the case are:

- Private employer
- Surveillance lasted 5 – 13 July 2007
- 'Proper notice of monitoring'
- Business yahoo messenger
- Personal yahoo messenger
- Personal and sensitive communications to fiancée and brother
- Transcript used in domestic disciplinary proceedings as well as discussed with others
- Policy forbid use of computer for personal purposes
- Denied using personal purposes – *impact on expectation of privacy*

Article 8 was engaged

No violation of Article 8

Why no violation of Article 8?

Whether, in the context of its positive obligations under Article 8, struck a fair balance between the *applicant's right to respect for his private life and correspondence* and his *employer's interests*

- *Able to raise his arguments in the domestic courts when appealing disciplinary proceedings*
- *Initial denial by employee was significant as it then "legitimised" the access as they did it in the belief that it had contained professional messages*
- *Transcript of the messages, content not significant in the domestic courts' findings*
- *Although no damage caused to the employer, not unreasonable for an employer to want to verify that the employees are completing their professional tasks during working hours*
- *Only yahoo messenger account examined, not other data and documents on the computer so limited in scope and proportionate*
- *Employee had not convincingly explained why he had used yahoo messenger for personal purposes*

Interference of right to privacy unfettered?

The employer had no policy on internet usage - impact on expectation of privacy in the workplace?

“it is strictly forbidden to disturb order and discipline within the company’s premises and especially...to use computers, photocopiers, telephones, telex and fax machines for personal purposes”

- Halford v United Kingdom 1997
- Copland v United Kingdom 2007
- [***Liberty Living Plc v Reid \[2011\] WL 664388.***](#)

Insufficient evidence that employee’s were aware of monitoring software recording communications

Expectation of Privacy

- If in the workplace we should lower our expectation of privacy?
- What are our privacy boundaries?
 - Written communications
 - Online communications
 - Sensitive information
- How have they changed?
- Smartphones/Laptops/Ipads/Tablets

“Workers do not abandon their right to privacy and data protection every morning at the doors of the workplace”(1)

Legitimacy of the employer's interference can be disregarded?

Interference went beyond what was necessary?

- Legitimacy based on entitlement of the employer to *“check the manner in which professional tasks are complete”* para 10 *Barbulescu v Romania*
- Content of personal and sensitive nature transcribed and shared with colleagues
- Personal yahoo messenger accessed
- Reliance on his denial of personal use to legitimise the interference as it would be the only way to check the truth of the denial

“Employer’s seizure upon the Internet abuse as an opportunistic justification for removal of an unwanted employee whom the company was unable to dismiss by lawful means”

para 22 *Barbulescu v Romania* – partly dissenting opinion of Judge Pinto de Albuquerque

Impact of *Barbulescu v Romania*

Interference of the right to privacy should only occur if it is

- Transparent;
- Necessary;
- Fair;
- Proportionate and
- **prevention should be more important than detection (1)**

Broad interpretations in the case has arguably resulted in the

- almost unrestricted monitoring and surveillance by an employer in the workplace ; and
- tipping of the balance of the competing rights too far towards the employer's interests at the expense of the fundamental right to privacy in communications by an employee

References

- Article 29 of Directive 95/46/EC Working party working document on the surveillance and the monitoring of electronic communications in the workplace