SUMMARY

2016/46 No expectation of privacy in material obtained during a criminal investigation (UK)

<p>The Employment Appeal Tribunal ('EAT') has upheld an Employment Tribunal's ('ET's') finding that Article 8 of the European Convention on Human Rights ('ECHR') was not engaged when an employer used private material obtained by the police during a criminal investigation as part of an internal disciplinary investigation into one of its employees. This material had been taken from the claimant's phone by the police, who then provided it to the employer (stating that it could be used for the purposes of their investigation). The facts in this case were unusual. Whether or not an employee has a reasonable expectation of privacy in similar circumstances will depend on all the facts, including the source of the information, whether the employee has expressly objected to its use, and whether the relevant conduct took place in, or was brought into, the workplace.</p>

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whether the employee has expressly objected to its use, and whether the relevant conduct took place in, or was brought into, the workplace.

Background

Article 8 of the ECHR provides that:

everyone has the right to respect for his private and family life, his home and his correspondence; and
there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The right to private life is therefore a qualified right rather than an absolute one; interference with the right is permitted in specific circumstances.

UK courts and tribunals are required by section 3 of the Human Rights Act 1998 to give effect to all national legislation in a way which is compatible with the ECHR, insofar as possible. This includes the Employment Rights Act 1996 and the provisions on unfair dismissal.

In X v Y [2004] ICR 1634, the Court of Appeal gave guidance as to how Article 8 operates in the context of unfair dismissals brought under section 98 of the Employment Rights Act 1996. The factors the Court considered included whether the conduct in question took place in the employee's private life, whether it took place in a private location and whether it was a criminal offence that was a matter of legitimate public concern.

Facts

Mr Garamukanwa was Clinical Manager for the Mental Health Liaison Team, employed by the Solent NHS Trust (the 'Trust'). He had a personal relationship with another member of staff at the Trust, a staff nurse named Ms MacLean, which came to an end in May 2012. After this relationship ended, Mr Garamukanwa suspected that Ms MacLean had started another relationship with a different member of staff, Ms Smith. Mr Garamukanwa, by his own admission, remained fond of Ms MacLean, and expressed concern that her relationship with Ms Smith, who worked on the same ward, was not in the interests of patients on the ward.

Mr Garamukanwa raised his concerns in an email on 21 June 2012 to a friend of Ms MacLean.

Meanwhile, an anonymous letter dated 16 June 2012 had been sent to the women's manager, Mr Brown, which purported to come from a concerned member of staff and claimed that the women engaged in "inappropriate sexual behaviour" on the ward. Ms MacLean and Ms Brown denied such conduct, and Ms MacLean suggested that Mr Garamukanwa may be the author of the letter as a result of her having recently ended her relationship with him.

On 25 June 2012 Mr Garamukanwa emailed both of the women at their work addresses, threatening to inform their manager of their alleged relationship if they did not do so. Ms MacLean expressed her distress at this to her manager, and said that she felt threatened.

Between June 2012 and April 2013 an anonymous course of conduct took place, carried out by somebody who appeared to have a vendetta against the two women. For example, a fake Facebook account was set up in Ms Smith's name, to which some 150 work colleagues were added. Anonymous emails were sent to various members of the Trust's senior management, from email addresses such a "deesmith" and "notflorencenightingale", and the ET held that these emails "were malicious in nature and were designed to [cause] distress to Ms MacLean and Ms Smith". The emails also revealed that the sender was aware of the personal activities of the women, and had likely been following them. Finally, an email containing unpleasant personal comments was sent from one of the anonymous email addresses to a large number of staff including the two women.

As a result of this email, Ms MacLean approached the police and made a witness statement in support of a complaint against Mr Garamukanwa. The police then investigated this matter. During their investigation, the police obtained some photographs from Mr Garamukanwa's personal mobile phone. These were of Ms MacLean's home and of a page from a notebook which contained the details of the email addresses from which the malicious emails had been sent. For reasons not clear from the EAT's judgment, the police determined that no charges would be brought.

The Trust had suspended Mr Garamukanwa on full pay during the criminal investigation. Once it was established that the police were not going to bring charges against him, they nonetheless decided to investigate the issues. The woman running this investigation was provided with evidence the police had obtained, including the photographs mentioned above, and determined that a disciplinary process should be followed as a result. This disciplinary process, principally on the basis of the photographs found on Mr Garamukanwa's phone, resulted in the conclusion that Mr Garamukanwa had committed gross misconduct, and he was summarily dismissed.

Mr Garamukanwa appealed his dismissal but the appeal was rejected. He then brought a

number of claims in the ET, which included a claim that the Trust had breached Article 8 by failing to respect his right to private life in examining the evidence found on his personal mobile phone. The ET dismissed all of Mr Garamukanwa's claims.

He appealed to the EAT, and the appeal was limited to the question of whether the ET had erred in its response to the Article 8 issue.

Judgment

The EAT upheld the ET's response to the Article 8 issue. It had been entitled to find that Article 8 was not engaged on the facts.

The EAT emphasised that this will always be a fact-sensitive question, and that the remit of Article 8 is potentially wide, extending to all private correspondence, potentially including emails sent at work where there is a reasonable expectation of privacy. However, in this case Mr Garamukanwa did not have a reasonable expectation of privacy over the information used in his disciplinary procedure.

While the emails had been sent from personal (anonymous) email addresses, Mr Garamukanwa had done various things to bring the matter into the workplace and, as such, make it a work-related issue. The EAT considered several factors in coming to this conclusion, including that he had sent emails to work addresses, to the women's manager and to various other employees, and that his conduct had had an impact on work-related matters. The EAT also found that the Trust's concern about the judgment of an employee in a senior position sending the malicious emails was a proper one.

Mr Garamukanwa therefore had no reasonable expectation of privacy over the information.

The Trust had also been entitled to rely on all of the material available to it, including the arguably private material provided by the police. The police had expressly stated that the Trust could rely on the photographs, and the ET had been entitled to conclude that it was therefore acceptable for them to do so. The Trust had been right to treat the potentially private photographs and the anonymous emails in the same way.

It was also significant that Mr Garamukanwa had raised no issues with the Trust using and relying on the information provided to them by the police as part of their investigatory procedures. Mr Garamukanwa had also been questioned at work by the women's manager, after which time he could have no reasonable expectation that the matter was not work-related, and he had continued to send abusive emails after this time.

On the strength of these facts, the ET had been right to conclude that Article 8 was not

engaged here as there could be no reasonable expectation of privacy in the circumstances, and Mr Garamukanwa's appeal was dismissed.

Commentary

This judgment suggests that personal information and personal relationships can lose their quality of privacy when they are brought into the workplace, and it may be harder for an employee to assert their privacy rights over such matters. However, these cases are always fact-sensitive, and the facts in this case are particularly extreme.

Mr Garamukanwa's conduct was shocking both in terms of what he did and in terms of its duration; his abusive emails extended over a course of months. The evidence provided pointed very clearly to serious misconduct on his part. Further, the private evidence used was not the result of a 'fishing' exercise, but was provided to the Trust by the police. His employer did not, for instance, obtain the evidence by monitoring his inbox. Instead, the employee carrying out the initial investigation was given the information by the police, asked whether the Trust was entitled to rely on it and was told that it could. It would seem unfair for an employer to be challenged on its use of the material in such circumstances. Nevertheless, the EAT did not deal with this point so it could potentially be open to challenge in other cases, particularly where the facts were less plainly against the dismissed employee. The case should therefore be treated with caution by any employer who wishes to rely on it to defend the use of potentially private information.

Further, given these facts it seems likely that even if the EAT had held that Article 8 was engaged, the Trust would have been able to rely on the exceptions under the ECHR, on the grounds that their use of the information was for the protection of the health of others (namely the two women). Any employer in a comparable position (but with facts less clearly against the claimant) might consider whether or not any arguably private information was used for the protection of the health of other employees, considering their duty of care towards them.

On another note, a question mark remains over whether the police were entitled to supply the Trust with the information they provided. Under the Police and Criminal Evidence Act 1984, anything which has been seized may be retained "so long as is necessary in all the circumstances" for use as evidence at a trial or for forensic examination (or to establish its lawful owner). In this case, therefore, the police's decision to retain the evidence after the conclusion of their own investigation (not to mention their decision to share it with a third party) appear to breach that requirement, and the photographs should have been returned to Mr Garamukanwa. However, this was not a matter for the Employment Tribunals, and neither

Tribunal discussed this point.

Subject: Human rights, privacy

Parties: Mr G Garamukanwa – v – Solent NHS Trust

Court: Employment Appeal Tribunal

Date: 1 March 2016

Case number: UKEAT/0245/15/DA

Creator: Employment Appeal Tribunal
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