EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2013/57 Covert surveillance to prove unlawful absence from work allowed (UK)

<p>The UK Employment Appeal Tribunal (‘EAT’) has decided that covert surveillance of an employee by a private detective did not breach the employee’s right of privacy. Article 8 of the European Convention on Human Rights (‘ECHR’), which governs the right to a private life, was not engaged, meaning that the employee’s dismissal based on the surveillance evidence was not unfair. Further, the employer’s ignorance of the requirements of the Data Protection Act 1998 (‘DPA’), the UK’s transposition of EU Data Protection Directive 95/46/EEC, and Information Commissioner’s Codes of Practice did not render the employer’s investigation unreasonable or the employee’s dismissal unfair.</p>

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The UK Employment Appeal Tribunal (‘EAT’) has decided that covert surveillance of an employee by a private detective did not breach the employee’s right of privacy. Article 8 of the European Convention on Human Rights (‘ECHR’), which governs the right to a private life, was not engaged, meaning that the employee’s dismissal based on the surveillance evidence was not unfair. Further, the employer’s ignorance of the requirements of the Data Protection Act 1998 (‘DPA’), the UK’s transposition of EU Data Protection Directive 95/46/EEC, and Information Commissioner’s Codes of Practice did not render the employer’s investigation

unreasonable or the employee's dismissal unfair.

Facts

Mr Gayle was employed by City and County of Swansea (the 'Council'). In the summer of 2010 he was seen twice at a sports centre when he was supposed to be at work. On the first occasion he was seen by a colleague playing squash during working hours. On the second occasion, also during working hours, he contacted the office fifteen minutes after he was seen, leaving a message for his manager to say that he was at work and was just finishing.

As a result, the Council engaged a private investigator to monitor and covertly film Mr Gayle's activities. The private investigator filmed Mr Gayle outside the sports centre during working hours on a further five occasions. Mr Gayle had not 'clocked out' during these times. He was therefore at the sports centre during times that the Council paid him to work. As a result, Mr Gayle was dismissed. He brought claims for unfair dismissal, arrears of holiday pay and direct discrimination on the ground of race in the Employment Tribunal.

Employment Tribunal Decision

The employment tribunal found that Mr Gayle's dismissal was unfair. This was on the basis that the Council's investigation involved an "unjustified interference" with his right to a private life under Article 8. The Council had breached Mr Gayle's right to privacy by using covert surveillance, particularly when it already had other evidence it could rely on (the oral evidence from colleagues who had seen him at the sports centre during working hours). It had been "too thorough" in its investigation. The Tribunal decided that the Council, as a public body, had a positive obligation to safeguard Mr Gayle's Article 8 rights and interfering in these was disproportionate and unnecessary.

The Council was also criticised for showing "inexcusable ignorance" of the DPA (which lays down when data can be lawfully processed) and the relevant Information Commissioner's Code of Practice. The Information Commissioner is the UK's independent authority set up to uphold information rights in the public interest, in particular data privacy for individuals. It has published a four-part Code of Practice known as the Employment Practices Code which give guidance on an employer's obligations under the DPA. In particular, the Tribunal flagged the fact that the Council had failed to carry out any impact assessment before going ahead with the covert surveillance, as provided by the Code.

Whilst Mr Gayle's dismissal was held to be unfair, he was awarded no compensation because of his contributory conduct.

Employment Appeal Tribunal Decision

The Council appealed the tribunal decision. The key question before the EAT was whether an employee has a right to privacy when carrying out acts which are defrauding his employer.

The EAT overturned the Tribunal's decision, deciding that the Tribunal's criticisms of the covert surveillance were not sufficient to render Mr Gayle's dismissal unfair. In reaching its decision, the EAT asserted that Mr Gayle's right to privacy under Article 8 was not engaged as he was filmed outside the sports centre, which was a public place. Mr Gayle could not have an expectation of privacy in a public place, nor could he have one as he was committing fraud at the time.

The EAT also considered the relevance of the context of an investigation like this, emphasising that it could not be looked at in a "vacuum". The important context here was that Mr Gayle was being filmed during his working hours, not in his private time. The EAT went on to say that employers have a right to know where their employees are and what they are doing during working hours. In relation to the Tribunal's comments that the Council's use of the surveillance was unreasonable for being "too thorough", the EAT found that it was not likely that an investigation could be held unreasonable for being too thorough.

The EAT went on to say that, even if Mr Gayle could make out that the right to privacy was engaged, the Council could still justify its conduct by relying on two potential legitimate aims under Article 8: the protection of the Council's own rights and freedoms and the prevention of crime. The crime here was defrauding the Council.

When addressing the DPA-points put forward by the Tribunal, the EAT held that the Council did not breach its data protection obligations by filming Mr Gayle in a public place. Further, the matters the Tribunal referred to from the relevant Code (carrying out an impact assessment before proceeding with covert surveillance) are not requirements of the law but guidance only. In its judgment, the Tribunal had overemphasised the role of the Code and its effect.

Commentary

This decision is certainly a useful one for employers in the UK who want to use covert surveillance in order to catch out employees suspected of misconduct. This is particularly true where the surveillance is carried out in a public place. This is not particularly surprising on the facts and I believe that it is the right decision. However, it does not give employers carte blanche to use covert surveillance. It should serve as an important reminder that this method

can be a breach of Article 8 and due consideration should be given to whether the particular circumstances are appropriate for it from the outset.

Employers should always be mindful of the context of the investigation and that, whilst a failure to follow data protection best practice will not necessarily make a dismissal unfair, the DPA and Code of Practice should be borne in mind and considered prior to instigating any surveillance of this kind. In particular, even if choosing not to follow the Code of Practice to the letter, employers should always ensure they do not breach the DPA itself. Whilst the EAT has made clear that not following the Code will not render a dismissal unfair, that does not mean that a breach of the DPA will be treated in the same manner.

Whilst the EAT did say that an employee committing fraud during working hours has no expectation of privacy it does not follow that any covert surveillance will then be permissible. Where surveillance is not in a public place, extra thought should be given as to whether the circumstances are appropriate. Employers should consider whether an impact assessment should be carried out in advance, balancing the importance of carrying out the surveillance with the level of intrusion into the employee's privacy.

Comments from other jurisdictions

Austria (Martin Risak): In Austria the topic of covert surveillance outside the workplace is mostly discussed in connection with the conduct of workers during sick leave. In principle it is seen as an unlawful infringement of the employee's private life that requires justification (usually the interest of an employer that the employee does not act in a way that prolongs sick leave). Additionally, covert surveillance needs to be an appropriate measure due to the lack of other less-interfering measures producing the same evidence. If there is enough evidence for the employee to presume misconduct by the worker the courts have not only admitted evidence provided by covert surveillance and deemd a dismissal based on it lawful but have also ordered the employee to compensate the employer for the costs of these measures. Note that if the covert surveillance is not an ad hoc measure but employed systematically, it also requires the consent of the works council.

In this context is has to be stressed that the Austrian courts as well as most of the legal literature does not accept the notion that evidence acquired unlawfully should not be admissible in employment law cases. Therefore the discussion reported on above would only have limited effect in practice.

Germany (Elisabeth Höller): In Germany a debate is ongoing as to the circumstances under which an employer may survey its employees, or one specific employee, with the aid of a video camera or a private detective. In my opinion the UK case concentrates on the issue of which

surveillance measures an employer may use against an individual suspected of significant contract breaches.

In most cases in which the employer has a suspicion against one of his employees, it will hope to dismiss the employee as soon as possible. For the dismissal it is necessary, according to established case law of the German Federal Labour Court, for the employer to have taken all reasonable steps necessary to establish the facts behind its suspicion.

In terms of assessing the effectiveness of surveillance under German law, the following statutory protections of the employee must be considered:

the employee's general right to personal freedom pursuant to Articles 1(1) and 2(1) of the German Constitution;
the participation rights of the works council;
the German Data Protection Act ('Bundesdatenschutzgesetz', or 'BDSG') if a public access area is observed.

In Germany an employee is not free to leave the arranged workplace during his or her working hours without the consent of the employer. The employee is contractually bound to perform the work at the arranged workplace and this must be considered as part of a balancing of the interests of the employer and employee.

However, the secret surveillance of an employee is permitted and therefore may be used as evidence of a contractual breach by the employee if:

a specific suspicion of a criminal act or another grave misconduct at the expense of the employer is provided;
no less radical measures can be used to clarify the facts;
the surveillance is practically the only way of clarifying the matter:

and the surveillance is not disproportionate.In the view of the Federal Labour Court an employer is allowed to use detective surveillance in order to verify correct job performance by a particular employee if the detective's instructions are within a very tight timeframe and refer exclusively to the employee's professional conduct. As soon as the employer has solid evidence of breach or misconduct at the expense of the employer, it may take labour law measures, particularly dismissal.

The Netherlands (Peter Vas Nunes): The courts in this case applied two tests that resemble one

another, but are distinct:

was Article 8 ECHR, i.e. the right to privacy, engaged?
did the Council violate the Data Protection Act, i.e. Mr Gayle's right to protection of his personal data?

The right to privacy, which is enshrined at the pan-European level in the ECHR, is not the same as the right to data protection, which is governed at the EU level by Directive 95/46 (to be replaced by an EU Regulation), although both rights clearly overlap.

The outcome of this case is satisfactory. However, I would like to make two observations from a Dutch perspective. The first relates to Article 8 ECHR. The EAT seems to reason: (i) that anyone who is in a public place can have no expectation of privacy; (ii) that an employee who is unlawfully absent from work has no expectation of privacy vis-a-vis his employer during that absence and, possibly also (the case report does not make this clear); (iii) that employees have no expectation of privacy during working hours. This strikes me as a rather sweeping finding.

As for the data protection argument raised by Mr Gayle, the text of the EAT's judgment does not make clear whether the EAT's sole reason for holding that there was no breach of the DPA was that Mr Gayle was filmed in a public place. I assume that the Council relied on (the UK's transposition of) Article 7(f) of Directive 95/46, which allows personal data to be processed "if processing is necessary for the purposes of the legitimate interests pursued by the controller". The Council had a legitimate interest in being able to prove that Mr Gayle was unlawfully absent from his work, but was the processing of his personal data necessary for that purpose?

An interesting difference between Mr Gayle's approach and the way a Dutch employee would be likely to have argued his case is the following. Mr Gayle argued that his dismissal was unfair because the Council had violated his rights to privacy and data protection. A Dutch employee in similar circumstances may have argued that the evidence of his wrongdoing was collected illegally, that that evidence is therefore not admissible and that therefore he must be deemed not to have been unlawfully absent from work. Although most Dutch courts reject such (rather artificial) reasoning, a few have accepted it.

Slovakia (Beáta Kartíková): Pursuant to Slovak law the interefernce of an employer into employees´ privacy at workplace is explicitly regulated. Employers must not infringe employees' privacy at his or her workstation or in shared areas by monitoring employees, recording phone calls made by means of technical devices or by checking work email without justified reasons based on the specific nature of the employers' activities and without

notifying employees about the monitoring beforehand.

When employers set up a ‘control mechanism’ they are obliged to negotiate with the employee representatives about the scope of of the mechanism, the way it will be done and its duration. They are also obliged to inform their employees about these aspects. The Slovak Labour Code refers to the right to privacy guaranteed by Article 8 of the European Convention on Human Rights and the Slovak Constitution. The Labour Code, however, does not explain what “justified reasons based on the specific nature of the employers’ activities” means in practice, but for example, the monitoring of employees to prevent theft is generally accepted. It is therefore advisable to put details of any surveillance of employees in the work rules and ensure that all employees are made aware of it.

Even though the Slovak Labour Code only governs monitoring at workstations or employer’s shared areas, this does not imply that monitoring beyond these places is allowed.

We agree that the priority of the employee´s right to privacy over the employer´s right to control its employees during working hours in this case was rather questionable. We are not aware of any similar cases in the Slovak jusrisdiction, which may be because the provision in the Labour Code regarding the employees´ rights to privacy and the employer’s ability to monitor are relatively new, coming into force on 1 January 2013.

The covert monitoring of employees will no doubt lead to questions about the balance of interests between employers and employees and the Slovak courts would be likely to consider the principle of proportionality and whether this has been observed by the employer. In general terms, the surveillance of employees is reasonable and appropriate provided employers ensure to monitor in a way that does not interfere excessively into employees´ privacy. This might mean inspecting the suspected employee in the workplace first, using the normal means and only later monitoring outside the workplace.

Subject: Privacy and data protection

Parties: City and Council of Swansea - v - Gayle

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Internet publication: http://www.bailii.org/uk/cases/UKEAT/2013/ 0501_12_1604.html

Information Commissioner Website: http://www.ico.org.uk/for_ organisations/data_protection/topic_guides/employment

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