

SUMMARY

ECtHR 5 October 2010, (Kopke – v – German), Application no. 420/07, Fundamental rights

<p>The European Court of Human Rights (“ECtHR”) has recently considered these cases, which have a direct and indirect impact on employment law. Kopke raises issues of an employer using covert surveillance on an employee to investigate and prevent theft. Lalmahomed was a criminal case, but illuminates the strict requirements of the need for a fair procedure. Cudak is a case in which the right to bring a claim for unfair dismissal was given primacy over the public international law principle of state immunity.</p>

Introduction

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Facts

In *Kopke*, a shop assistant and cashier was dismissed after some 11 years’ employment on grounds of theft, namely taking money from the cash register. The employer was concerned with the taking of monies from the tills in the drinks department and used a private detective agency to engage in covert video surveillance of the employee. The employee denied theft,

claiming she was simply taking the tips she was entitled to. She commenced proceedings in the Labour Court for her dismissal and sought compensation for the covert surveillance. Further, she requested that the videotapes be given to her. After losing in the Labour Court, she appealed to the Labour Court of Appeal, to the Federal Labour Court and finally submitted a complaint to the Constitutional Court. She was unsuccessful at every level and her claim was dismissed. Thereafter, she made an application to the ECtHR under Article 8 for breach of her rights of privacy.

In *Lalmahomed*, an individual was taken to court for failing to present an identity document. He failed to attend court and was tried in absentia. Thereafter, he sought to appeal, but was subject to the 'leave to appeal' special procedure in which a single judge can refuse an appeal on the papers without hearing the accused. An application was made to the European Court on the grounds that this process failed to comply with the fair trial procedures of Article 6. The defendant was denied any opportunity 'to defend himself in person or through legal assistance of his own choosing...', as provided by Article 6(1)(3)(c).

In *Cudak*, a Lithuanian employee was recruited by the Polish embassy in Vilnius. She was employed in a secretarial capacity and was dismissed because of poor health, consequential on sexual harassment from a fellow employee. Her claim for unfair dismissal was struck out by the Regional Court, Court of Appeal and Supreme Court on jurisdictional grounds, namely that the doctrine of State immunity applied. She applied to the ECtHR for breach of Article 6(1), as the domestic courts had violated her right of access to a court.

ECtHR's judgments

In *Kopke*, the ECtHR had to examine whether the balance struck by the German labour courts between the applicant's right to respect for her private life under Article 8 ECHR on the one hand, and the rights of the employer to protect its property rights on the other, had sufficiently respected the applicant's rights. The ECtHR held that the German courts had correctly balanced the interests of the employer and employee. The ECtHR held that the use of the covert surveillance was proportionate and there was no violation of Article 8.

The decision of the Labour Court had held there was, in effect, no other realistic means by which the employer could have acted to ascertain the source of the theft. The defence of the shop assistant (that she was simply removing her tips) was considered irrelevant, as an employer could not be expected to employ a person who put money from the till into her own pockets without keeping any records.

The ECtHR considered the wider implications of the growth of ever more sophisticated technologies by which an employer can 'snoop' on their employees and specifically limited

their judgment to the facts of the case (implying a limitation on the use of this tactic). After considering the importance of the right to privacy and the duty of the State to positively secure fundamental rights, the Court addressed the question of proportionality.

The employer had used covert surveillance to secure a legitimate property interest, in which it sought to prevent further significant losses. The surveillance was not directed at all employees or at customers, but was specifically directed at two employees. The surveillance was both limited in time and place and was found necessary in the interests of justice (without it an innocent employee might have been accused).

In *Lalmahomed*, the 'leave to appeal' process on the facts of this case came under the supervision of the ECtHR for compatibility with Article 6. Certainly, the case lacked merit in that Mr Lalmahomed missed his own court hearing and raised an unlikely defence that someone else was impersonating him. However, the new 'leave to appeal' procedure permitted this case to arise. The defendant failed to appear in Court and judgment was therefore given in absentia and the 'leave to appeal' process meant he was only permitted an appeal on the papers. Thus, the full defence of Mr Lalmahomed was never fully considered by the Court. Clearly, the single judge considering the appeal thought the case lacked any merit, but the right to a fair trial required important safeguards and efficacy was not a justification.

In *Cudak*, the ECtHR showed itself as a court that is both a 'constitutional court' for the Member States of the Council of Europe, and an 'international court'.

The ECtHR held that recognised principles of public international law were part of the corpus of its jurisprudence and went on to consider the impact of the doctrine of state immunity on the right of an employee to claim for unfair dismissal. The ECtHR held that Ms Cudak was denied access to the court. She was employed in secretarial work, which raised no issues relating to the sovereign interests of Poland. Consequently, there was no reason why she could not seek unfair dismissal like any other similar employee. The ECtHR considered the 2004 Convention on State Immunity (which Lithuania had not ratified) represented customary international law to which Lithuania was bound and which was given effect through Article 6 of the European Convention.

Commentary

These decisions raise a number of concerns and issues. Whilst *Kopke* is an eminently sensible decision on its facts, it is interesting how the ECtHR approached its decision. Considerable emphasis was placed on the right to privacy which had, prima facie, been interfered with. The Court reiterated that privacy extends to aspects of personal identity, such as a person's name or picture (*Hanover – v – Germany* no 59320/00).

The case was always going to be one based on 'proportionality'. It has re-enforced common sense and has enabled employers to act decisively in order to detect and deter crime. The ECtHR considered that the German Data Protection Act 2009, which permitted the use of personal data in order to detect crime in certain circumstances, had correctly transposed Directive 95/46/EC (although that question is ultimately for Luxembourg).

The United Kingdom may have as many as four million CCTVs in which the average person can have his or her image caught between 70 and 300 times a day (the exact figure is uncertain). Most of these CCTV cameras are not related to the detection of a specific crime, but are directed towards innocent citizens in shops and streets. Their use is not limited in time. It is difficult to see how a general need to detect crime can be compatible with a right to privacy or with the presumption of innocence protected by Article 6(2).

Lalmahomed is a criminal case, but raised issues of procedure, especially in relation to Labour Courts and professional disciplinary tribunals. Many labour tribunals and professional disciplinary bodies have cost efficient proceedings. Whilst often reserved for 'minor' matters, such issues can be of crucial importance to both employer and employee. In *Lalmahomed*, the ECtHR was specifically critical of the Dutch Government's position on the need to filter out minor and hopeless appeals. The ECtHR held that 'the right to the fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed for the sake of expedience' (paragraph 36).

As the decision was based on the facts of the case, rather than a review of the Dutch 'leave to appeal' procedures' compatibility with Article 6, such measures of expediency may still be compatible with the Convention. However, it is important that any judicial or quasi-judicial process enable parties to put their case in full, that any judge/decision maker is possessed of all the facts that any party wishes to submit and gives a reasoned judgment/decision.

It is unlikely that the facts of *Cudak* will have an impact on many employment lawyers. The doctrine of public international law in relation to immunities is more important in the criminal sphere than the labour sphere. However, in a number of recent decisions, the ECtHR has considered both the impact of EU Directives and international Conventions. The decision by the ECtHR to adjudicate on customary international law and hold Lithuania bound by a Convention that it has not signed, in itself raises issues of national sovereignty.

Creator: European Court of Human Rights (ECtHR)

Verdict at: 2010-10-05

Case number: 420/07