SUMMARY

2013/13 Article 8 ECHR does not prohibit an employer from accessing private employee emails (LU)

<p>Secrecy of correspondence does not prevent an employer from accessing the content of a document sent by an employee from the company’s laptop even if the employee uses his private mailbox, when the file has not been identified as personal and the interests of the company justify it.</p>

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Facts

On 31 May 2007, the plaintiff was hired as Chief Financial Officer in a company specialising in aircraft rental. In particular, he was responsible for the billing. While on leave from 17 to 28 March 2008, the employee took the laptop provided by his company to his home in Switzerland. However, the employee did not return to work on 29 March but was on medical leave from 26 March until 30 May 2008. This was an unforeseen absence, during which the employee continued to keep the laptop at home.

The laptop contained the billing program used by the company. Despite repeated requests to return the laptop in order to enable the employer to issue the invoices for April, the plaintiff did not return the laptop until 18 April 2008. Because of this delay, the company was obliged to use an external service provider for the billing.

When it recovered the laptop, the employer noticed that various programs and files were missing and so it decided to do an investigation. The investigation was conducted by a computer expert appointed by the Court and under the supervision of a bailiff. It revealed that many files, programs and emails had been deleted from the hard drive and it enabled the employer to see a file named "*brainstorming.doc*" which was attached to several emails addressed to certain employees of the company. This file included the minutes of a meeting held on 10 April 2008 between several employees and former employees (including the plaintiff) regarding a plan to set up a competing business, divert clientele and destabilise the proper functioning of the company.

The employer dismissed the employee with immediate effect on 10 June 2008, citing three reasons: (i) the employee had removed certain corporate documents, in particular the original copies of minutes of board of directors' and shareholders' meetings; (ii) the employee had not returned the laptop, thereby hindering the April billing; and (iii) the employee had committed acts of unfair competition.

In an interlocutory judgement dated 8 October 2009, the Labour Court considered that the first two grounds, i.e. having removed corporate documents and failed to return the laptop, could justify dismissal if the allegations were proved. Consequently, the Labour Court granted the employer permission to bring forward the evidence regarding those two grounds.

As for the acts of unfair competition, the Judges observed in their judgment of 8 October 2009 that the employer's allegations were based on the document named "*brainstorming.doc*" and on the testimony of one witness, who said that the employee had attempted to lure away another employee. The judges held that this testimony had no probative value since it originated from the manager of the company. Regarding the document "*brainstorming.doc*", the employee did not dispute that it contained the minutes of a secret meeting convened with a view to setting up a competing business. However, according to the employee, this evidence had been obtained in breach of the privacy of correspondence enshrined in Article 8 of the European Convention on Human Rights, and thus should be set aside by the Labour Court.

The Labour Court found that Article 8 of the European Convention on Human Rights was directly applicable. The Judges noted that although the file in question had been transferred by means of an employer- provided tool, it had originated from a private email folder and had been sent to another private email folder. Consequently, the employer was not entitled to intercept the contents of the file and present it as evidence. The Judges therefore set aside the evidence and found the allegation of acts of unfair competition was not proved - for lack of evidence.

In a second judgement dated 20 May 2010, the Labour Court reached a decision based on the evidence presented pursuant to its interlocutory judgment. The Court found that the first ground for dismissal was unfounded, as the employee had not removed the documents in question on his own initiative, but had acted at the request of another employee. Regarding the second ground given by the employer, the Labour Court found that the plaintiff showed insubordination by refusing to return the laptop to his employer with the data necessary for the billing. This ground was accordingly well founded and the Labour Court considered the dismissal justified.

The plaintiff appealed both judgments before the Court of Appeal. The company cross-appealed, seeking a declaration that (1) the ground set aside by the Labour Court in its judgment of 8 October 2009, namely unfair competition, was in fact established and (2) confirmation of the judgment of 20 May 2010.

Judgment

In a judgment dated 15 March 2012, the Court of Appeal confirmed the findings of the Labour Court, having concluded that the dismissal was valid on the basis of the insubordination of the employee. However, as regards acts of unfair competition, the Court of Appeal adopted different reasoning and overturned the first judgment of 8 October 2009.

The Court of Appeal reasoned that the notion of privacy includes professional activities (*ECtHR, Nimietz – v - Germany*, 23 November 1992) and that employees have a right to privacy at work, which implies that their private correspondence is confidential (*French Cour de cassation*, Nikon, 2 October 2001). However, according to the Court of Appeal, the wording of the Nikon decision is too "*absolute*" and some breach of privacy should be permitted.

Under certain conditions, if the interests of the company require it, the employer may breach the right to privacy. The Court of Appeal referred to a decision of the French *Cour de cassation* dated 30 May 2007 (*The Phone House – v – X*). In that case, the *Cour de cassation* quashed a decision of the Court of Appeal of Versailles, in which it had declared a dismissal invalid because the employer had no right to access personal messages sent or received by the employee, on the grounds that the Court did not verify whether or not the files had been identified as personal.

The Court of Appeal took the view that the use of a message from a personal email folder, used by the employee to send documents about the company, as evidence, did not breach the privacy of correspondence. In particular, this was because the title of the document provided no indication that its contents were of a private nature and because the employee did not criticise the employer for trying to recover documents. Accordingly, the employer's

interference was legitimate and proportionate and the Court reversed the judgment of 8 October 2009 on this point.

Commentary

The judgment shows that the use of computer technology must be combined with respect for fundamental freedoms, including the protection of privacy, but that this protection is not absolute and ends where the interests of the employer are sufficient to justify disclosure. In this way, the Court of Appeal tried to find a middle course between competing values.

The plaintiff had used a laptop that the company had provided in order to exercise his function as Chief Financial Officer. This involved the creation of invoices and using the laptop enabled the plaintiff to work remotely. As is often the case when such tools are made available to employees, the plaintiff also used the laptop for private purposes. In the case reported above, the private use of the laptop provided by the employer included attempts to destabilise the company.

The Court of Appeal aligned its reasoning first with the ECtHR's leading case of *Niemietz* and also with the French case of *Nikon*, in order to stress its commitment to the protection of privacy of correspondence in relation to employees in the workplace. However, it went on to refer to a more recent decision of the French *Cour de cassation*, in which the identification of the email as 'personal' had been taken as the main criterion for determining whether or not the employer was entitled to access its content. This later case law allowed the Court of Appeal to deduce that the protection of private life in the workplace can be subject to certain limitations. That said, in the current case, the Court of Appeal did not apply this case law directly, as the fact that the document was not identified as 'personal' seems to have played a minor role.

What was truly at stake in the present case was rather the objective that the employer pursued in recovering documents from the laptop

–and whether this was legitimate and proportionate. The reasoning of the Judges would probably have been different if the employee had not acted in a suspicious way, first by refusing without good reason to return the laptop to the employer and then by removing some of the company's programs and data before returning it. The Court of Appeal explained that an absolute privacy of correspondence would allow dishonest employees to hide illegal files.

One might ask whether the criterion of whether an email is identified 'personal' is likely to stand up in future. In the present case, identifying the file as 'personal' would probably not have been enough to disguise its potentially illegal character. The document had been

attached to an email sent from a private mailbox to another private mailbox, so it could have been presumed to be of a private nature and yet when the employer investigated, the circumstances were so suspicious that the presumption that the e-mail was private could be rebutted.

Therefore, it would seem better to abandon consideration of whether the data are identified as 'personal', since this no longer offers any protection to employees. As explained, this would not have prevented the employer in this case from accessing the document and using it before the Court.

However, if identification as 'personal' is not sufficient to protect correspondence, the lack of such identification should also be insufficient for the employer to conclude that the email is not private. In other words, one should not be able to categorise correspondence as not private simply because the title does not contain the words 'private' or 'personal'. Correspondence should be protected when it appears from the context that it is private, such as when the email is sent from a private mailbox to another private mailbox, even if not marked as 'personal'. This presumption could then be rebutted if in the context, it appears that the correspondence was used in a way liable to harm the employer, as in the present case.

Comments from other jurisdictions

Czech Republic (Nataša Randlová): a Czech court would likely come to a different conclusion. The secrecy of letters and other records (including messages communicated by email) is governed at the highest level by the Charter of fundamental rights and freedoms, which is a component part of constitutional order of the Czech Republic.

The Czech Labour Code regulates employers' right to check even professional emails very strictly. Under the Labour Code employees are not entitled to use the employer's production equipment including computers and the employer is authorised to verify compliance with this prohibition, but the checks must be performed appropriately and the employer cannot interfere with employees' privacy. The employer may only monitor the number and titles of emails sent by employees. If the employer has serious cause to do with the nature of its activity, it may introduce open monitoring, including the monitoring of emails. In order to do so, the employer must directly inform employees in advance of the scope and methods to be used. Only then is it entitled to check the content of emails.

Note however, that it is generally accepted that the above exceptions relate to professional correspondence and emails included in company mailboxes assigned to relevant employees - and not to the right of the employer to open and read private emails from private mailboxes (e.g. free-mailssuch as hotmail), even if these are sent by using a company computer.

United Kingdom (Bethan Carney): From a UK law perspective this case is immediately interesting because the investigation of the computer was conducted by a computer expert appointed by the court and under the supervision of a bailiff. In the UK, an employer could simply ask a computer expert to do the investigation, it would not need court involvement. There would be a risk that to do so would be in breach of the Data Protection Act 1998. However, it is unlikely that it would be in circumstances like these, where the delay in returning the laptop and the deletion of programs and files gave rise to suspicions of misconduct by the employee. In other circumstances, where an employer has no specific grounds for conducting a search on the computer, it might still be able to do so without breaching the Data Protection Act if it had notified employees that it conducted such monitoring, how and why it did so, what sort of information it collected and how that information would be used. It should also conduct the monitoring without accessing personal data in so far as possible. The employer's reason for doing the monitoring must be sufficient to justify the intrusion and the type of monitoring done must be proportionate taking that reason into account.

But, even if the employer had breached the Data Protection Act in gathering the information, provided the data gathered disclosed evidence of serious wrongdoing by the employee, an employment tribunal is very unlikely not to admit the evidence. So, an employee might be able to make a complaint to the Information Commissioner about the employer's conduct but the employer could still use the evidence gathered in court proceedings (e.g. in any unfair dismissal claim by the employee).

Only public authorities are directly subject to the Human Rights Act 1998 ('HRA'), which incorporates the European Convention on Human Rights ('ECHR') into UK law. So, private employers are not subject to the Act, although public employers would be. However, courts and tribunals must interpret the law in a way that is compatible with the HRA. For example, a tribunal would have to consider the effect of any breach of Article 8 (the right to respect for private and family life, home and correspondence) when considering an unfair dismissal case. However, tribunals do not in practice tend to exclude evidence of wrongdoing where an employer has obtained it in these types of circumstances. This is because the right to privacy is a qualified one and interference with it is justified in the pursuit of certain legitimate aims, such as the prevention of disorder and crime and the protection of the rights and freedoms of others.

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