Global Workplace Law & Policy

Privacy in the workplace: fairness receives new impetus

Frank Hendrickx (Institute for Labour Law – KU Leuven (Belgium)) · Tuesday, January 30th, 2018

Recently, the European Court of Human Rights (ECtHR) has put privacy in the workplace back to our attention. The fast pace of technological evolutions and the wide availability for consumers of communication and monitoring tools has brought surveillance practices within the immediate reach of employers and human resources practices. Three recent cases of the ECtHR give guidance on the issue. The ECtHR recognises a reasonable expectation of privacy for workers, but this is not the only way to determine the reach of protection.

E-mail monitoring

The case of *Barbulescu* (Application no. 61496/08) came on 5 September 2017. An employer made a full screening (resulting in full transcripts) of an employee's Yahoo Messenger accounts involving private communication between the employee and his family. In the case, the ECtHR acknowledged the employer's legitimate interest in ensuring the smooth running of the company, and that this can be done by establishing mechanisms for checking that its employees are performing their professional duties adequately and with the necessary diligence. However, the ECtHR gave a number of principles which need to be taken into account when assessing whether the right to privacy of employees was violated: (i) prior notification of monitoring is needed; (ii) extent and degree of monitoring and intrusion should be taken into account; (iii) the employer must have legitimate reasons; (iv) less intrusive methods and measures should be considered; (v) the consequences of the monitoring for the employee have to be assessed; (vi) adequate safeguards need to be in place.

What is striking is that the 2017 *Barbulescu* judgment was decided by the Grand Chamber and

went directly against its former Chamber of 2016, in which it was found not to be unreasonable for an employer to verify that employees were completing their professional tasks during working hours.

Camera surveillance in lecture rooms

The ECtHR has been looking at camera surveillance in two recent occasions. In *Antovic and Mirkov v. Montenegro* (Appl. No. 70838/13, judgment of 28 November 2017) the Dean of the School of Mathematics installed video surveillance surveillance in lecture amphitheatres, specifying that the aim of the measure was to ensure the safety of property and people, including students, and the surveillance of teaching. The ECtHR referred to its *Barbulescu* case law and stated that a reasonable expectation of privacy is a significant though not necessarily conclusive factor. But the Court noted that, as university amphitheatres are the workplaces of teachers, it is where they not only teach students, but also interact with them, thus developing mutual relations and constructing their social identity. So the right to privacy was involved. The ECtHR observed that, on the basis of domestic law, public institutions can carry out video surveillance, but only if the aims provided for by that legislation, notably the safety of people or property or the protection of confidential data, cannot be achieved in any other way. The Court observed that the video surveillance was introduced in the present case to ensure the safety of property and people, including students, and for the surveillance of teaching. However, the latter reason was not provided for by the law as a ground for video surveillance. The Court concluded that the interference in question was not in accordance with the law, a fact that sufficed to constitute a violation of Article 8.

Camera surveillance and employee theft

In *López Ribalda and Others v. Spain (Applications nos. 1874/13 and 8567/13,* ECtHR Judgment of 9 January 2018) five employees were working as cashiers for a Spanish family-owned supermarket chain. When the employer noticed significant irregularities between the supermarket stock levels and what was actually sold on a daily basis the employer installed surveillance cameras consisting of both visible and hidden cameras. The purpose of the visible cameras was to record possible customer thefts and they were pointed toward the entrances and exits of the supermarket. The purpose of the hidden cameras was to record and control possible employee thefts and they were zoomed in on the checkout counters, which covered the area behind the cash desk. The company gave its workers prior notice of the installation of the visible cameras. However, neither they nor the company's staff committee were informed of the hidden cameras. About two weeks later, all the workers suspected of theft were called to individual meetings. During those meetings the applicants admitted their involvement in the thefts in the presence of the union representative and the company's legal representative. The workers were dismissed on disciplinary grounds as they had been caught on video helping co-workers and customers to steal items and for stealing themselves. The workers considered that the covert video surveillance of their place of work had seriously interfered with their right to privacy and brought the case to the ECtHR.

The Court observed that the covert video surveillance of an employee at his or her workplace must be considered, as such, as a considerable intrusion into his or her private life. The Court noted that a worker cannot evade recording of his or her conduct in the workplace, being obliged under the employment contract to perform the work in that place.

The ECtHR did not share the domestic courts' view on the proportionality of the measures adopted by the employer with the legitimate aim of protecting the employer's interest in the protection of its property rights. The ECtHR found that the covert video surveillance was not lawful and thus violated article 8 ECHR. The Court took into account the fact that the video surveillance took place over a prolonged period, did not comply with the requirements stipulated the applicable data protection act, in particular, with the obligation to previously, explicitly, precisely and unambiguously inform all persons concerned about the existence and the particular characteristics of a (monitoring) system collecting personal data. The Court observed that the rights of the employer could have been safeguarded, at least to a degree, by other means, notably by previously informing the applicants, even in a general manner, of the installation of a system of video surveillance and providing them with the information prescribed in the data protection legislation. The Court accepted that the applicants suffered non-pecuniary damage and awarded each of the five applicants a sum of 4,000 Euro in respect of compensation for these non-pecuniary damages.

Comments

It is interesting to note that many labour cases with our European jurisdictions turn into human rights cases as the monitoring and surveillance of workers is becoming a growing issue. Under article 7 of the Charter on Fundamental Rights of the EU as well under article 8 of the European Convention on Human Rights, the right to privacy is guaranteed for everyone, including employees at the workplace. It is apparent that the European Human Rights Court follows a broad interpretation of the notion of private life, including a 'social life' and a 'professional life'. Privacy protection thus receives a large scope and expands over business premises and workplaces. The ECtHR operates within the confines of article 8 ECHR and in its role of holding supervision over member countries' jurisdictions. But it is clear from its case law that individual privacy rights and data protection principles play an important role in the reality of monitoring practices. The Court is clearly willing to recognize legitimate business reasons for the monitoring of employees, but, in its approach, establishes principles for fair, informed and transparent practices. Holding a perspective of fair employment relations in its approach, the court draws the contours of (legitimate) electronic monitoring. It will only gain importance within the growing digital work environment.

This entry was posted on Tuesday, January 30th, 2018 at 2:32 pm and is filed under EU Law, European Court of Human Rights, Labor Law, Privacy
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.