Darren Newman
Twitter - @DazNewman

West Midlands employers
PEOPLE & LEADERSHIP SOLUTIONS

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Employee Monitoring

Can an employee expect to be granted privacy in the workplace? Time spent at work is, after all, something that the employer is paying for.

In that sense the time 'belongs' to the employer and the employer is entitled to know what the employee is doing with it. On the other hand, we all have private moments in the workplace where we would certainly object if we discovered that the employer was watching our every move. Article 8 of the European Convention on Human Rights guarantees everyone the right to respect for his or her 'private life and correspondence' and a recent decision from the Grand Chamber of the European Court of Human Rights (ECHR) makes it clear that this is a right that employers need to respect.

In *Bărbulescu v Romania*, Mr Bărbulescu was a technician who was asked to set up a What's App account to deal with customer enquiries. His workplace had a very strict rule against any personal use of the internet or computer systems and he was accused of using the account to conduct personal conversations with, among others, his fiancé. When he denied this, the employer produced 45 pages of transcripts of those conversations - and he was sacked.

His dismissal was held to be lawful in Romania and he took his case to the ECHR. He failed at the first hearing but appealed to the Grand Chamber which held that there had indeed been a breach of Article 8.

Now we need to be careful with this case. Mr Bărbulescu was bringing his claim against the state of Romania, not against his employer. Human rights must be guaranteed by the state and what the ECHR found was that, in not sufficiently scrutinising the employer's actions, the Romanian Courts failed to ensure that Mr Bărbulescu rights under Article 8 were protected. The Romania courts had not asked whether Mr Bărbulescu was told that his What's App communications could be monitored and whether that might involve the employer actually reading the contents of any messages that were sent.

Nor had the courts expressly considered how many people had read the messages in question and the time period over which the monitoring had taken place. There was a balance to be struck between the rights of the employer to protect its business from employees misusing their working time and the rights of an employee to have the privacy of his or her correspondence protected. The Romanian Courts had failed to conduct this balancing exercise and had not given Mr Bărbulescu the protection to which he was entitled.

This falls somewhat short of a finding that the employer was wrong to check the content of his What's App messages – and it should be remembered that he had vigorously denied that there were any private messages for them to read! The ECHR clearly did not think that there had been any egregious violation of rights here because they expressly declined to award Mr Bărbulescu any damages. Nevertheless, the case has important lessons for employers in the UK.

There are basically two ways in which an employer's monitoring of an employee's online activities may come under scrutiny in the UK. The first is where an employment tribunal is considering an unfair dismissal claim and the tribunal needs to look at the monitoring to determine whether the dismissal was reasonable or (in a constructive dismissal case) whether the employee was entitled to resign without notice because the monitoring was a breach of mutual trust and confidence. The other (rather less likely) scenario is where a complaint has been made to the Information Commissioner who then queries whether the monitoring complied with the Data Protection Act requirement for 'fair and lawful' processing of personal data.

Perhaps the most important point made by the ECHR is that an employer cannot completely erase an employee's reasonable expectation of privacy in the workplace. Simply telling employees that anything they do at work may be subject to monitoring will not be enough – additional safeguards are needed to protect the right to a private life set out in Article 8.

Fundamentally it is a question of balance. Does the reason that the employer has for monitoring the employee's activities justify the extent of intrusion involved? An employer may be entitled to ensure that an employee is not using too much working time on personal matters – but that is something that can be checked without actually reading emails that appear to be personal. To justify that level of intrusion, an employer would probably need to show that it was investigating serious allegations of misconduct and that it was necessary to read the actual emails in order to protect its vital interests.

Clarity and transparency are also key issues. Part 3 of The Information Commissioner's Employment Practices Code makes a number of good practice recommendations on employee monitoring and it is worth ensuring that there is a policy in place that broadly reflects those recommendations. In broad terms, this means giving as much clarity as possible about the circumstances in which an employee's online activity will be monitored and the extent to which the monitoring might involve reading the content of otherwise private communications. An important point for any policy to stress is that the employer will not intrude on an employee's correspondence more than is necessary to ensure that the system is not being misused and that the actual content will only be looked at if there is no reasonable alternative available. Any viewing of the content of correspondence should only take place where it is necessary to deal with specific allegations and the policy should make it clear that the contents will only be shared on a need-to-know basis.

As for Mr Bărbulescu, it does seem a bit cheeky of him to complain that the employer printed out copies of messages that he had assured them did not exist It may well be that printing out his messages was the only way of demonstrating that he had broken the rules. But to protect an employee's right to privacy, the ECHR has made it clear that courts and tribunals must insist that an employer has proper safeguards in place to prevent abuse. I am normally loath to react to a new case by telling employers to take a close look at their policies and procedures - but this case really does make that a good idea.

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Twitter - @DazNewman
Blog – darrennewman.wordpress.com