In the balance: an employer's right to monitor communications versus employees Convention Rights in light of Burbalescu v Romania [2017] ECHR 754 (5 September 2017)

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Introduction

1. On 5 September 2017, the Grand Chamber of the ECHR ('the Court') handed down their final judgment in ***Burbalescu v Romania*** and in doing so provided detailed guidance to domestic courts on how to approach the issue of monitoring in the employment context. The decision should also be interpreted as a warning, to both private and public employers who undertake employee monitoring, to ensure that their processes are lawful.

2. The decision in ***Burbalescu v Romania [2017] ECHR 754***, is the first ECHR consideration of monitoring by a ***private*** employer.[1] However, before considering the minutiae of ***Burbalescu***, a summary of the relevant principles is provided so as to contextualise the Court's findings.

3. The law in this area is relatively complex and therefore, this overview must not be taken as legal advice as to the circumstances of any particular case.

[1] The ECHR has considered monitoring of electronic communications by a public authority previously e.g. state authorities in the context of law enforcement or the well-known decision in ***Copland v United Kingdom (2007 BHRC 216***) where the employer was a college and therefore a public authority. In ***Copland***, monitoring of telephone calls, email and internet was found to violate Article 8.

The Employment Tribunal's obligations regarding Convention rights

4. Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention') provides as follows:

   '(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

5. Section 6 of the Human Rights Act 1998 ('HRA') makes it unlawful for a public authority to act in a way that is incompatible with the rights laid down in the European Convention on Human Rights (ECHR).

6. Although it is not directly unlawful for a private employer to act in a manner incompatible with the ECHR s.3 HRA requires that courts and tribunals must, so far as possible, read and give effect to UK legislation in a way compatible with ECHR rights. This interpretative obligation applies to all domestic legislation, including the Employment Rights Act 1996, which governs unfair dismissal between public authorities and private individuals.

7. An employment tribunal or court is a 'public authority' within the meaning of s.6(3) HRA which means that it has an 'extremely strong interpretative obligation' imposed by s.3 when dealing with a case involving a private employer (***X v Y 2004 ICR 1634, CA***).

The Tribunal's interpretative obligations in unfair dismissal cases

8. Tribunals must take account of fairness, the band of reasonable responses of a reasonable employer, equity and the substantial merits of the case when deciding an unfair dismissal claim under s.98 ERA. In ***X v Y,*** the Court of Appeal stated that, it would be reasonable to expect that a decision in favour of the employer would not involve a breach of an employee's Convention rights.

9. Where the Tribunal is dealing with unfair dismissal claims against **private** employers involving HRA issues in ***X v Y***, the Court of Appeal proposed that the issue should be approached using the following questions:

(a) Do the circumstances of the dismissal fall within the ambit of the ECHR? If they do not, the ECHR is not engaged and need not be considered.

(b) If they do, does the state have a positive obligation to secure enjoyment of the relevant Convention right between private persons? If it does not, the Convention right is unlikely to affect the outcome of an unfair dismissal claim against a private employer.[2]

(c) If it does, is the interference with the employee's Convention right by dismissal justified?

(d) If it is not, was there a reason for the dismissal under the ERA that does not involve unjustified interference with a Convention right? If there was not, the dismissal will be unfair for the absence of a permissible reason to justify it

(e) If there was, is the dismissal fair, tested by the provisions of s.98 ERA, reading and giving effect to them under s.3 HRA so as to be compatible with the Convention right?

10. Where the Tribunal is dealing with unfair dismissal claims against public authorities involving HRA issues it is not necessary to consider question (b) because s.6 HRA makes it unlawful for a public authority to act in a way which is incompatible with ECHR rights.

11. The Tribunal does not have jurisdiction to consider claims under s.6 HRA (***X v Y***) and therefore, a Claimant would need to rely on s3 HRA. This is unlikely to cause significant practical difficulties for the majority of unfair dismissal claims in light of the obligations under s.3 HRA.

12. The EAT applied its interpretative obligations under s3 HRA in ***Pay v Lancashire Probation Service 2004 ICR 187***. The EAT accepted that a public authority employer will not act reasonably under s98 ERA if it violates employees' ECHR rights. The words "reasonably or unreasonably" in s98(4) ERA should be interpreted as including the phrase, 'having regard to the applicant's Convention rights', at least in the context of public authority employers. Therefore, if the Tribunal concludes that a public authority employer has breached an employee's Convention rights then it cannot have acted 'reasonably' in accordance with s98(4) ERA.

[2] Article 8 — the right to privacy and family life, does impose such an obligation on the state.

13. In ***Turner v East Midlands Trains Ltd 2013 ICR 525***, in a case involving the private sector, the Court of Appeal considered whether the band of reasonable responses was compatible with Article 8. In Elias LJ's view, the band of reasonable responses test provided sufficient flexibility to ensure compliance with Article 8 in the context of a dismissal.

14. However, the approach towards public authorities has arguably differed. For example, in ***Hill v Governing Body of Great Tey Primary School 2013 ICR 691, EAT***, where it was alleged that Article 10 (Freedom of expression) was infringed, when an employee was dismissed, for speaking to the press and parents about an incident in the school playground. As stated above, public authorities such as the school have a duty to ensure Convention rights. C alleged that Article 10 had been infringed and therefore, the EAT considered that the potential breach was relevant in considering the fairness of the dismissal. Article 10 is of course a qualified right and therefore in that context the Tribunal would need to consider not only whether the right had been interfered with but whether any such interference was justified. The Tribunal had not adequately considered those matters and therefore the matter was remitted on this issue.

15. The EAT in ***Hill*** required the Tribunal to independently consider the Article 10 issues outside of the band of reasonable responses test, unlike ***Turner***. In my opinion, the fact that ***Hill*** was a public sector case explains the difference in approach. As a result, it appears that human rights arguments against public sector employers are more likely to be successful subject to the usual caveat that each case turns on its own facts.

An employer's right to monitor: Directive no.95/46/EC (Data Protection)

16. The conflict between the employer's right to engage in monitoring and the employee's right to protection of their privacy is governed by Data Protection legislation.[3]

17. Practitioners will be familiar with the principles governing the monitoring of internet and email in the workplace which include the following acknowledged by the ECHR:

    (a) Necessity: Monitoring must be necessary to achieve a certain aim.

    (b) Purpose specification: Data must be collected for specified, explicit and legitimate purposes.

[3]UK legislation is subject to change pending implementation of the General Data Protection Regulation (GDPR) from 25 May 2018.

(c) Transparency: The employer must provide employees with full information about monitoring operations.

(d) Legitimacy: Data-processing operations may only take place for a legitimate purpose.

(e) Proportionality: Personal data being monitored must be relevant and adequate in relation to the specified purpose.

(f) Security: The employer is required to take all possible security measures to ensure that the data collected as not accessible to third parties.

18. As such, employers are entitled to ensure the smooth running of a company and to that end supervise how employees perform. This supervision includes monitoring. However, this right does not supersede Convention rights and the Courts must balance competing rights.

19. ***Barbulescu*** provides the most recent guidance on how the courts should balance the Convention rights of employees and an employer's right to engage in monitoring and the only ECHR guidance in the context of a private lawyer (at equivalent appellate level).

Barbulescu v Romania (ECHR Grand Chamber, 5 September 2017)

Relevant facts

20. On 5 September 2017, the Grand Chamber of the European Court of Human Rights ('ECHR') handed down its judgment in the matter of ***Barbulescu v Romania (Application no. 61496/08)*** overturning the decision of the Fourth Section of the ECHR on 12 January 2016.

21. Mr. Barbulescu ('B') was employed until 6 August 2007 by a private company ('the employer'). At his employer's request, B created a Yahoo Messenger account for the purpose of responding to customer's enquiries. He already had a personal Yahoo Messenger account.

22. The employer's internal regulations prohibited the use of company resources by employees and forbade personal use of computers, photocopiers, telephones, telex or fax machines. The regulations did not contain any reference to the possibility of the employer actually monitoring employee communications.

23. On 3 July 2007, a notice was distributed to employees that a senior member of staff had been dismissed for personal use of the internet, phone and photocopier, negligence and failure to perform duties. There was a reference to monitoring misconduct.

24. Between 5 and 13 July the employer recorded B's Yahoo Messenger communications in real time.

25. On 13 July B was informed that there was evidence he had used the internet for personal purposes, in breach of the regulations and he was provided with charts indicating his internet use was greater than his colleagues. B was not informed whether monitoring of his communications also related to their content.

26. B informed his employer that use of Yahoo Messenger was for work-related purposes only. In response, the employer sent B a 45-page transcript of his Yahoo Messenger communications and asked for an explanation as to why the entirety of communications between 5-12 July were private opposed to business related. The messages were between B and his fiancée or brother and some were of an intimate nature. The employer also provided 5 messages to his fiancée from B's personal Yahoo Messenger account.

27. B was dismissed on 1 August 2007 and brought a claim for unfair dismissal. B alleged that employee communications from the workplace were covered by Article 8; that the decision to dismiss him was unlawful and that by monitoring his communications and accessing their contents his employer had infringed criminal law.

28. Both the County Court, Court of Appeal and ECHR Fourth Section rejected his claims. The all concluded that there was no violation of Article 8. The Court did not agree.

Guidance from the Grand Chamber on monitoring

29. Domestic courts should ensure that monitoring of correspondence/communications by an employer, irrespective of the extent and duration of such measures, is accompanied by adequate and sufficient safeguards against abuse (para 120).

30. Proportionality and procedural guarantees against arbitrariness are essential and to that end the domestic courts are instructed to treat the following factors as relevant (para 121):

    (i) ***Notification:*** *Whether the employee has been notified of the possibility that the employer might take measures to monitor correspondence and other*

communications, and of the implementation of such measures. While in practice employees may be notified in various ways depending on the particular factual circumstances of each case, the Court considered that for the measures to be deemed compatible with the requirements of Article 8 of the Convention, the notification should normally be clear about the nature of the monitoring and be given in advance.

(ii) ***The extent of the monitoring by the employer and the degree of intrusion into the employee's privacy:*** *In this regard, a distinction should be made between monitoring of the flow of communications and of their content. Whether all communications or only part of them have been monitored should also be taken into account, as should the question whether the monitoring was limited in time and the number of people who had access to the results. The same applies to the spatial limits to the monitoring.*

(iii) ***Whether the employer has provided legitimate reasons to justify monitoring the communications and accessing their actual content****: Since monitoring of the content of communications is by nature a distinctly more invasive method, it requires weightier justification.*

(iv) ***Whether it would have been possible to establish a monitoring system based on less intrusive methods and measures than directly accessing the content of the employee's communications:*** *In this connection, there should be an assessment in the light of the particular circumstances of each case of whether the aim pursued by the employer could have been achieved without directly accessing the full contents of the employee's communications.*

(v***) The consequences of the monitoring for the employee subjected to it;*** *and the use made by the employer of the results of the monitoring operation, in particular whether the results were used to achieve the declared aim of the measure.*

(vi) ***Whether the employee had been provided with adequate safeguards****; especially when the employer's monitoring operations were of an intrusive nature. Such safeguards should in particular ensure that the employer cannot*

access the actual content of the communications concerned unless the employee has been notified in advance of that eventuality.

(vii) Finally, the court also emphasised that employment relationships are based on mutual trust and confidence.

Application of that guidance to the facts of ***Barbulescu***

31. B was dismissed based on monitoring by his employer. The interests at stake were, B's right to respect for his private life and correspondence, and the employer's right to engage in monitoring, including the corresponding disciplinary powers to ensure the smooth running of the company. The competing rights needed to be balanced. The Court considered whether the domestic courts had undertaken that balancing exercise. By a majority decision of 11:6 the Court concluded that the domestic courts had failed to apply the legal principles (paras 124-141). With reference to the aforementioned guidance the Court reached that conclusion for the following reasons:

Notification

32. B had been informed of his employer's internal regulations which prohibited personal use of company resources and he acknowledged and signed a copy of the same. B had seen the company notice in 2007 which reminding him of the internal regulations and alerting him to the fact a senior member had staff had been dismissed for breaching that rule. It was accepted that B had also signed a copy of that notice. On 13 July 2007 B was summoned on two occasions by his employer to provide an explanation as to his personal use of the internet and had been untruthful. However, B was not informed *in advance* of the extent and nature of the monitoring or the possibility that the employer might have access to the actual content of his messages. The Court stated:

"The Court considers that to qualify as prior notice, the warning from the employer must be given before the monitoring activities are initiated, especially where they also entail accessing the contents of the employees' communications." [para 133]

33. The Court concluded that these issues had not adequately been considered by the domestic courts.

Scope and degree of intrusion into privacy

34. It appeared that the employer recorded all communications during the monitoring period in real time, accessed them and printed them out. B's work and personal Yahoo Messenger account was targeted and some communications were of an intimate nature.

35. The domestic courts failed to consider this at all [para 134].

Legitimate reasons to justify monitoring

36. The Court acknowledged a legitimate interest in ensuring the smooth running of the company within the judgment but considered that the domestic courts did not sufficiently assess the issue of legitimate aim.

37. It was acknowledged that the County Court had recorded the need to avoid the company's IT systems being damaged, liability being incurred by the company in the event of illegal activities in cyberspace, and the company's trade secrets being disclosed (para 28 and 135). However, concluded that they were only "theoretical" (135) because there was no evidence B actually exposed the employer to those risks.

Less intrusive methods of monitoring

38. The employer will need to show that the aim pursued could not be achieved by less intrusive measures than actually accessing the contents of the communications (136). The domestic courts failed to deal with this.

The consequences of monitoring

39. The consequence was disciplinary proceedings and dismissal, which the domestic courts failed to deal with (para 137).

Safeguards

40. B was not informed *in advance* of the employer accessing the contents of the communications. The domestic courts failed to determine whether the contents of the communications had already been accessed when B was summoned to provide an explanation. Permitting access to the communications at any stage of the disciplinary process contradicts the principle of transparency. (Para 138)

Compensation for the breach of Article 8

41. B was not awarded any compensation by the Court. His claim for loss of wages was rejected on the basis that the Court found a breach of Article 8 and there was no causal link between that finding and his loss of earnings!

42. As to non-pecuniary loss put on behalf of B as a reduced standard of living, social standing and loss of a relationship as a result of his dismissal that was also rejected on the basis that the finding of a violation of his Convention rights was, *"…just satisfaction for any non-pecuniary damage…"* (para 148).

Comment

43. Even objectively, it is difficult to not to conclude that the decision is both surprising and harsh. However, the Court has not said that employers cannot monitor employees. Employers are legally entitled to do so, provided that they act in accordance with the Court's guidance. As to the guidance, many will consider that nothing said is strictly new. But, it would be difficult to dispute that the breadth and depth of the obligations on the employer appear to be more onerous than that seen in previous decisions. The Court has ceased the opportunity to provide more wide-ranging guidance on monitoring.

44. It is clear that merely indicating that personal use of the internet, email etc. is prohibited or monitoring might take place is not enough. Employees must be aware that monitoring might or will take place and the extent and nature of the same.

45. Justification for such monitoring needs to be well evidence to avoid any suggestion that it is purely theoretical. Consideration of less invasive methods of monitoring should be considered and that consideration evidenced in case of challenge. Practically, this is likely to need regular review by employers.

46. In respect of whether less intrusive measures could have been utilised it is difficult to see how this practically could have been done in B's case. This case involved Yahoo Messenger and B initially denied any personal use. In that context, it is somewhat difficult to see how the employer could have avoided considering the contents. However, claimants would no doubt argue that access to a few communications would have been less intrusive (this would have disproved his denial of any personal use). In the case of email this issue might be easier to avoid by relying on subject titles, recipient details etc…Other messenger applications such as WhatsApp record details of the parties to a

conversation and the size of communications, which may also assist in avoiding consideration of communication contents.

47. The Court's decision may make it much easier for employees to successfully raise Article 8 issues around monitoring until employers take the necessary steps to review internal policies. Even then employers will need to ensure that any policies are applied in accordance with the guidance. In my experience, there is a real risk that many employers do not have such prescriptive policies and therefore might infringe Convention rights.

48. Those instructed on behalf of employers may wish to consider the dissenting opinion (which includes that of President Raimondi) attached to the main judgment (pages 48-56). The dissenting opinion is more supportive of employers and their right to monitor. It is likely to provide some basis for arguments before domestic courts on the basis that each case turns on its own facts.

49. Importantly, decisions of the ECHR will be unaffected by BREXIT and therefore will still bind domestic courts. In addition, the Government has confirmed that the General Data Protection Regulation (GDPR) will apply from 25 May 2018 regardless of BREXIT.

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