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Privacy in the workplace: *Can employers rely on personal communications to dismiss?*

In this post GDPR era, employers are more conscious than ever before of the limitations upon the processing of personal data, the need to respect employees' right to a private life, and the requirement to notify employees of when and how their data may be processed.

However, the question of what data an employer may process or consider is increasingly difficult as lines are blurred between personal and work life. The core issue in relation to the right to privacy is whether an employee has a *reasonable expectation of privacy* over the specific communications or documents. This is a question of fact.

In *Garamukanwa v UK*, the European Court of Human Rights ruled that it was not a breach of the right to privacy when an employer used, during a disciplinary hearing, material found by the police in an employee's personal notebook and phone, and emails sent to another individual's personal email account. Why? In this case, a key factor was that Mr Garamukanwa was made aware at an early stage that an employee had made a complaint regarding his communications and he was informed they were inappropriate. As such, it was regarded he could have no reasonable expectation of privacy over any similar materials connected to the complaint. Let's take a closer look at this case.

THE RIGHT TO PRIVACY

Article 8 of the European Convention on Human Rights (ECHR) states:-

"*Everyone has the right to respect for his private and family life, his home and his correspondence.*

There shall be no interference by a public authority with the exercise of this right except...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."

The ECHR was incorporated into Irish law by the European Convention on Human Rights Act 2003 which provides that courts are required to interpret rules and laws in a manner which is compatible with the ECHR provisions.

THE FACTS

Mr Garamukanwa was employed by an NHS Trust (the "Trust"). He had a personal relationship with a colleague,

Ms M, which ended in May 2012. In June 2012, Mr Garamukanwa sent emails to a colleague and to Ms M and another employee directly raising "concerns" that Ms M had formed a personal relationship with Ms D, a junior member of staff, and alleged inappropriate behaviour at work. Ms M complained to her manager stating that she wanted Mr Garamukanwa to leave her alone, and the manager spoke with him and explained that he felt his email to Ms M was inappropriate.

Subsequently, between June 2012 and April 2013, Ms M and Ms D were subject to a campaign of stalking and harassment with a number of anonymous emails sent to colleagues and to Ms M's personal email accounts. The emails were sent from anonymous accounts and were malicious in content. Ms M and Ms D also suffered damage to their property.

In April 2013, Ms M complained to the police that Mr Garamukanwa was stalking and harassing her and the Trust suspended Mr Garamukanwa. Mr Garamukanwa was arrested but was not charged. However, material found by the police during their investigations was handed to the Trust, which included photographs of Ms M's address on Mr Garamukanwa's personal phone and details of the email accounts from which the anonymous emails had been sent listed on a sheet in a notebook.

The Trust held disciplinary proceedings in December 2013. During the disciplinary hearing, Mr Garamukanwa voluntarily provided personal email and WhatsApp messages between himself and Ms M in support of his defence. Mr Garamukanwa was subsequently dismissed for gross misconduct and the Trust referred to various pieces of evidence, including the material from his phone and notebook provided by the police, and the emails and messages provided by Mr Garamukanwa himself.

Mr Garamukanwa brought various claims against the Trust, including unfair dismissal, race discrimination and a breach of his right to privacy under Article 8 of the ECHR by examining matters relating to his private life and using that as evidence to justify his dismissal.

DECISIONS OF THE UK TRIBUNALS/ COURT

The UK employment tribunal found Article 8 was not engaged and noted in particular that the emails were sent to work email addresses and dealt with work matters in part.

Mr Garamukanwa appealed. The UK Employment Appeal Tribunal rejected the appeal and said the employment tribunal was entitled to conclude that Mr Garamukanwa had no reasonable expectation of privacy in relation to the material relied upon by the Trust. In particular:

- Mr Garamukanwa had not objected to the use of the material during the disciplinary proceedings;
- Once Ms M had complained to her manager (in June 2012) who subsequently spoke to him, he could not have any expectation of privacy in relation to emails sent to her, even if sent to her personal email address and referring to their prior relationship;
- The content of the emails sent to Ms M's private email address were not purely personal and referred to workplace issues too.

In any event, even if Article 8 was engaged, any interference in Mr Garamukanwa's rights was justified by the Trust's requirement to protect the health and welfare of its employees.

The Court of Appeal of England and Wales refused to grant permission to appeal the decision of the EAT. As a result, Mr Garamukanwa brought proceedings in the European Court of Human Rights.

DECISION OF THE EUROPEAN COURT OF HUMAN RIGHTS

Mr Garamukanwa complained that Trust's decision to dismiss him relied on material that was private and the UK courts' decision upholding his dismissal constituted a breach of his right to privacy under Article 8 of the ECHR. In particular, he asserted the Trust had no right to retain or rely on the evidence provided by the police or the emails and messages sent to Ms M's private account or any other employee of the Trust.

The European Court of Human Rights confirmed that sending and receiving communications is covered by Article 8 under the reference to "correspondence," and that communications from business premises as well as from home may fall within the remit of "private life" and "correspondence" and the protection of Article 8.

The Court noted that the disciplinary panel of the Trust concluded that Mr Garamukanwa had sent at least two anonymous emails which were malicious in nature and in doing so had relied upon evidence provided by the police from Mr Garamukanwa's phone, and private emails and WhatsApp messages provided by Mr Garamukanwa and other employees. The Court held the emails and photographs relied upon by the Trust to justify the dismissal fell within the categories of "private life" and "correspondence" potentially protected by Article 8. As a result, the Court had to determine whether Mr Garamukanwa had a reasonable expectation of privacy in relation to the material relied upon by the Trust to dismiss him.

The Court dismissed the appeal. It concluded:

1. Some of the emails sent to Ms M were from a work email address and covered work issues (although as already noted such emails can fall under the right to private life).
2. Mr Garamukanwa could have no reasonable expectation of privacy in relation to the materials referred to:
    a. By April 2013 (when he was arrested and suspended from the Trust) he had already been aware for nearly a year that Ms M had raised concerns regarding his communications and that the Trust considered them inappropriate i.e. since Ms M's manager had discussed

the matter with him in June 2012. As a result, he could not have reasonably expected that any materials linked to the allegations by Ms M would remain private after June 2012.

b. Mr Garamukanwa had not challenged the use of the material from his phone or other private communications during his disciplinary hearing and had even voluntarily provided the panel with further private communications.

c. This case can be distinguished from *Barbulescu v Romania* where the employee was not put on notice regarding the employer's monitoring activities.

Note the Court did not examine the lawfulness of the passing of the evidence and emails to the Trust from the police as this had not been raised expressly before it or the UK courts. (Although this act of itself raises a number of questions in relation to privacy!).

ADVICE TO EMPLOYERS

» Whether or not an employee has a reasonable expectation of privacy in relation to certain communications will depend upon the facts.

» Remember employees may have a reasonable expectation of privacy over communications even if they are sent from business email and include work matters. Not every communication from work falls outside the protection of the right to a private life. An assessment will have to be made on the particular circumstances (see the case of *Barbulescu*).

» If an employee has been put on notice that a certain issue has been brought to an employer's attention i.e. misconduct, future communications relating to that conduct are unlikely to be regarded as private. Notification is the best way for an employer to protect itself in relation to the monitoring or review of employee communications. Reference should be made in Data Protection Policies to the circumstances when reviews may take place and should refer to more extensive review and monitoring when investigating misconduct.

» An employee will struggle to assert privacy over a category of communications where they themselves have voluntarily provided equivalent communications to support their position and they have not raised privacy as an issue at the earliest opportunity e.g. during disciplinary proceedings.

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