

20th January 2016

EMPLOYERS UPDATE: DEVELOPMENTS IN EMPLOYMENT LAW – JANUARY 2016

Apologies for the late (yet again) publication of this quarter's Newsletter. A combination of varying work commitments, Christmas and the flu has got in the way.

When I came to review developments over the last three months, I found a larger number than usual of cases that might be of interest to small and medium employers.

I had therefore anticipated that I would be issuing a Newsletter with a variety of pieces of information relating to the development of employment law. However, that plan changed when I read an article in *"The Independent"* a few days ago. I have therefore decided to devote practically all of this Newsletter to the issues arising from it and the case to which it refers.

Barbulescu -v- Romania

The heading of the newspaper article was *"Staff surveillance: Is the answer to take your own devices into work?"* and then, immediately below that, the offending words *"It's official: You can be fired for e-mailing on the company's kit, and time."* It went on: *"A legal case became public this week in which a Romanian man had been sacked by his employer for sending a succession of private e-mails – some of which concerned his sexual health – while at work."*

The report continued: *"The man was convinced that this constituted wrongful dismissal, but the European Court of Human Rights judged otherwise: employers are now perfectly entitled to read personal messages sent on private messaging platforms during working hours."* The author went on to suggest that the case *"might just be conclusive proof of a modern world now ludicrously over-monitored, in which every thought is recorded."*

And then, *"The EU maintains that screen activity during work hours on phone or tablets that have been provided by work can be freely monitored."*

The article then concluded by suggesting that *"one potential outcome of the ruling is that we will all spend a lot more time on our own devices during working hours ..."*, the suggestion being that such action would be safe from employers' prying eyes.

I do find it infuriating when journalists are slapdash in their use of terms. I am well accustomed to them reporting about wrongful dismissal when, in fact, they mean unfair dismissal. The two are entirely different things. One also reads about cases being brought before an *"Industrial Tribunal"*. They have not existed since 1998. The hacks mean *"Employment Tribunal"*.

Since reading the newspaper article, I have read the Judgment of the European Court of Human Rights (EHCR) in the case of *Barbulescu -v- Romania*. The journalist has been taking some liberties.

Mr Barbulescu was dismissed by his employer for breaching its internal regulations which stated *"It is strictly forbidden to disturb order and discipline within the company's premises and especially ... to use computers, photocopiers, telephones, telex and fax machines for personal purposes."*

The company had requested that Mr Barbulescu create a Yahoo Messenger account in his name for business purposes.

This was monitored over an 8-day period and the employer found that there had been a number of messages passing between Mr Barbulescu and his fiancée and brother. The content was somewhat personal. It dismissed him.

The company also monitored Mr Barbulescu's personal Yahoo account. These, unsurprisingly, contained personal messages but, according to the report, *"these messages did not disclose any intimate information"*.

Mr Barbulescu challenged the employer's decision before the Bucharest County Court and lost. He appealed to the Bucharest Court of Appeal and lost again. He then took his case to the European Court of Human Rights.

Article 8 of the European Convention on Human Rights states at paragraph 1 *"Everyone has the right to respect for his private and family life, his home and his correspondence."*

Mr Barbulescu contended that his private e-mail messages on his company Yahoo Messenger account fell within the scope of Article 8 and that the Court should have *"protected his private sphere from interference by his employer."* by ruling the monitoring of his account unfair, although it had been created expressly for business purposes, at the employer's behest.

He said that *"The Yahoo Messenger software was by its nature designed for personal use and that the nature of the Instant Messaging Service had entitled him to expect that his communications would be private. Had he not expected privacy, he would have refrained from disclosing intimate information."*

The Court, citing some of its previous Judgments, confirmed that *"in the absence of a warning that one's [telephone] calls would be liable to monitoring, [an employee] had a reasonable expectation as to the privacy of calls made from a work telephone ... and the same expectation should apply in relation to an Applicant's e-mail and internet usage."*

The Court then went on to consider whether *"In view of the general prohibition imposed by his employer, [Mr Barbulescu] retained a reasonable expectation that his communications would not be monitored."* He had considered that a specific warning should have been given that his communications would be monitored.

Mr Barbulescu lost because the ECHR considered that the Romanian Courts had dealt with the matter properly and, in particular, had concentrated not on the content of the personal messages, but the fact that they had been made. The Court added that it found *"that the Applicant has not convincingly explained why he had used the Yahoo Messenger account for personal purposes."* There was, it said, no indication that the Romanian Courts had failed to strike a fair balance between the Applicant's right to respect for his private life under Article 8 and his employer's interests. Accordingly, there was no violation of the Convention.

You can read the Judgment here: <http://www.bailii.org/eu/cases/ECHR/2016/61.html>.

I would suggest that the Judgment itself goes nowhere near as far as the newspaper article (which you can read here: <http://www.independent.co.uk/life-style/gadgets-and-tech/staff-surveillance-is-the-answer-to-take-your-own-devices-into-work-a6813151.html>) would suggest.¹

It is perhaps no surprise that there is a line of argument among employees that they ought to be able to use an employer's e-mail system for sending and receiving personal messages (whether or not of an intimate nature) and that the employer is not entitled to any opinion on the subject.

If the employer had not issued any rules indicating what was and was not acceptable then this might be a reasonable position to take. However, in the present case, the company had indeed issued rules and the employee had chosen to break them. It is difficult to conclude that he did not get what he deserved.

Further, employees would do well to treat the advice contained in the newspaper article with some care. An employer might reasonably conclude that an employee should not feel free to spend work time sending personal messages on his/her own devices.

The point to be made here is that the employer ought to have in place robust Policies to make it abundantly clear what is and is not acceptable during work time. Needless to say, I would be pleased to help prepare such Policies.

One final point on the ECHR case: The Judgment of the Court was delivered on 1st December 2015. Mr Barbulescu had been dismissed on 1st August 2007.

A Few Other Things

Had I not been wound up by "*The Independent*" article, I would have covered these matters in this quarter's Newsletter:

- From 11th January 2016 employees on Zero-Hour Contracts are protected from dismissal where the reason is that he or she has breached a contractual clause prohibiting him or her from working for another employer and zero-hours workers (not necessarily employees) from detriment in the same circumstances.
- There is to be no increase this April in statutory maternity, paternity, adoption and shared parental pay, maternity allowance and statutory sick pay.
- The EAT case of *Kelly -v- Covance Laboratories Limited* reminds us that although a requirement to speak English in the workplace can amount to indirect race discrimination which an employer can seek to justify as a proportionate means of achieving a legitimate aim, a requirement not to speak a particular language

¹ I have since found online the "Daily Mail" report of the case "*dubbed a 'Snoopers Charter' for employers*".

at work can amount to direct race discrimination. The law does not permit an employer to seek to justify direct discrimination. He automatically loses the case.

- In *Monmouthshire County Council -v- Harris*, the EAT, when considering whether or not it was fair to dismiss an employee on long-term sickness absence, must consider whether the employer could reasonably have been expected to wait longer before dismissing.
- In another unfair dismissal case, the EAT considered the implications of apparently inconsistent treatment of two employees who had an altercation at a staff function. In *MBNA Limited -v- Jones*, the EAT confirmed the fairness of the dismissal of Mr Jones, who had punched Mr Battersby. This was unaffected by the fact that the employer had given Mr Battersby a final written warning as a result of his various threatening texts to Mr Jones. The question of inconsistency did not arise because the two cases were not "*truly parallel circumstances*".
- It has been revealed that, in the last 5 years, only two employers have been prosecuted for failure to pay the National Minimum Wage.

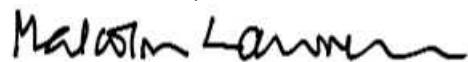
Divorce Surgery – Saturday 20th February 2016

I thought I would take the opportunity to give notice of this facility. Please pass the details on to anyone who might be interested. I attach a flyer which gives some further information.

As always, these newsletters are only a guide to some changes in Employment Law. They are by no means exhaustive nor an alternative to getting proper advice about your particular problem. Please call me for more help on any employment matter.

With best wishes.

Yours sincerely



MALCOLM LAWRENCE

e-mail : mjl@copleyclark.co.uk

To Malcolm Lawrence
Fax no 01737 363101

QualitySolicitors Copley Clark

Solicitors
Pathtrace House
91-3 High Street
Banstead
Surrey

Tel 01737 362131
Fax 01737 363101
Email to **mjl@copleyclark.co.uk**

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