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BECAUSE RECRUITMENT MATTERS

Legal bulletin

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MONITORING YOUR EMPLOYEES' ELECTRONIC COMMUNICATIONS DOES NOT BREACH THEIR HUMAN RIGHTS – IN CERTAIN CIRCUMSTANCES

A symptom of the digital age we live in is that the majority of communications we make at work are done so electronically, be it over the telephone, through email, instant messaging or social media. Historically speaking, this is a relatively new way of working, which has resulted in an emergence of legislation and case law around how employers can monitor their employees to ensure they are using the computers and the internet to carry out their employment duties properly.

The REC Legal Helpline has seen an increase in number of calls from employers who have 'caught' their employees using work computers and telephone systems for personal activity rather than using them in the course of their employment. Methods of monitoring employees in this way can range from the relatively simple, such as checking internet history, to more complex software packages which record every button pushed by the employee.

Monitoring employees' use of electronic communications was the subject of a recent ruling by the European Court of Human Rights in *Barbulescu v Romania*. This case was well publicised by the media and it is therefore important to consider what this case means for employers wishing to monitor their employees in a similar way. ›››

IN THIS ISSUE:

Can employers snoop on employees' emails?

FAQs including: working time rules for young workers, suppling temps on apprenticeship rates, and data protection issues with references.

LEGAL ROUND UP including: holiday and commission, gender pay reporting and the National Living Wage.

THE FACTS

The case concerns a Romanian national (referred to as B) who was employed by a private employer as an engineer in charge of sales. He was asked by his employer to set up a Yahoo Messenger account so he could respond to client enquiries, the account was protected by a password created by the employee. The employer had a clear policy in place prohibiting all personal use of company facilities, including computers and internet use.

His employer subsequently informed him that his Messenger communications had been monitored over a period of nine days and he had been found to breach the company's internal policies by using the account for personal use. The employee initially denied this, however the employer provided a 45 page transcript of messages sent by the employee to his wife and brother. The subject of these communications was very personal. The employee was subsequently dismissed.

THE EMPLOYER HAD A CLEAR POLICY IN PLACE PROHIBITING ALL PERSONAL USE OF COMPANY FACILITIES, INCLUDING COMPUTERS AND INTERNET USE

The employee made a series of claims to the Romanian courts, arguing that his employer had breached the Romanian Criminal Code and his correspondence was protected by the Romanian Constitution. These claims were all ultimately unsuccessful as the courts held that the employer had followed the Romanian Labour Code in terms of the approach they adopted in dismissing the employee. The courts additionally held that the employer had a right to check the messages as it was the only way to verify the employee's statement that he was only using the account for work purposes.

The employee then made a complaint to the European Court of Human Rights against the Romanian state, arguing that the dismissal was in breach of his right to respect for his private and family life, his home and his correspondence under Article 8 of the European Convention on Human Rights. He further claimed that the domestic courts in Romania had failed to protect these rights on his behalf.

THE JUDGMENT

The court acknowledged, in accordance with previous cases, that telephone calls/emails/messages are protected under Article 8 as 'correspondence' and 'private life.' In reaching a decision in this case the court had to assess whether the employee had a reasonable expectation of privacy when sending messages from the Yahoo Messenger account that he had registered at his employer's request.

The court stated that, in the absence of a warning that emails and internet usage could be monitored, the employee would have had a reasonable expectation of privacy. However, in this case the employer had a clear policy in place. The court decided that the employer in this case was entitled to monitor the use of work computers to ensure that work was being properly carried out and that its company policies were being complied with. Consequently the employee's rights under Article 8 had not been violated.

The court placed particular importance on the fact that:

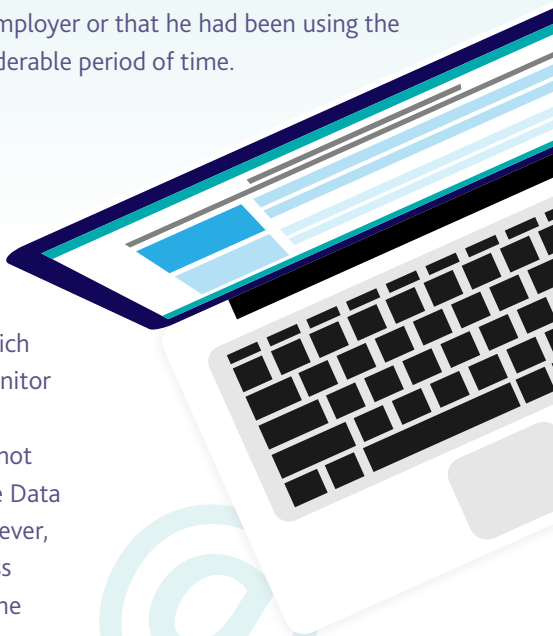
1) the employer had a clear policy in place;
2) the monitoring was limited in scope and proportionate; and
3) when accessing the messages the employer was under the belief that it contained work related communications only.

PRIVATE EMPLOYERS ARE NOT DIRECTLY BOUND BY THE EUROPEAN CONVENTION ON HUMAN RIGHTS

It is also worth noting that the employee was aware that one of his colleagues had been dismissed shortly before him for using the internet, telephone and photocopiers for personal use. Furthermore the employee did not convincingly explain why he used the Yahoo Messenger account for personal correspondence.

NOT ALL THE JUDGES AGREED

It is notable that one of the seven judges disagreed with the majority opinion as he felt that there had been a breach of the employee's Article 8 rights. The judge argued that an employee's obligation to complete his or her professional tasks adequately did not justify uncontrolled control of the employee's expression on the internet. This judge also focussed on the fact that the dismissal was not proportionate because there was no evidence that the employee had actually caused any damage to his employer or that he had been using the Yahoo Messenger account in this way for any considerable period of time.



WHAT DOES THIS MEAN FOR UK EMPLOYERS?

Private employers are not directly bound by the European Convention on Human Rights, as opposed to public sector employers who are. However, the courts and Employment Tribunals in the UK are bound by it and as such in any claim they are required to take the Convention into account.

This case has been well covered by the UK press and in some cases reported in a way which is perhaps a little misleading as to what the consequences will be for employers who monitor their employees in this way. Many of the press reports have reported this case as giving employers the unrestricted right to 'spy' on their employees. Importantly this case does not give an employer free reign to monitor everything that their employees do. In the UK the Data Protection Act 1998 does not prevent employers from monitoring their employees. However, under the Regulation of Investigatory Powers Act 2000 (RIPA) it is unlawful for a business to 'intercept' communication unless one of the exceptions listed within the Act apply. One of these exceptions is where the interception is to *'ascertain compliance with regulatory or self-regulatory practices,'* for example ensuring that your employees are complying with your company policy.

Employers should have a clear policy in place outlining what is expected of employees in terms of their use of company equipment and the internet. If you wish to monitor your employees, the policy should clearly set out the nature and extent to which the employees will be monitored. You should ensure that all of your employees have been made aware of the policy, as well as what the consequences will be for breaching it.

If you wish to take disciplinary action against an employee for breaching such a policy you will need to ensure that you have a legitimate business objective for monitoring your employees, and given this legitimate business objective you need to ensure the level of monitoring you have undertaken is both reasonable and proportionate.

The Information Commissioner's Office Employment Practices Code encourages employers to advise their employees to mark any personal/private emails or messages as such. Where this has been done and it is clear that a particular communication is personal, you do not necessarily need to read the communication to establish that your employee has breached your company policy. Reading communications that you have already established are personal will run the risk of violating the employee's Article 8 rights because your level of monitoring may not be a proportionate way to establish that your company policy has been breached.

ENSURE THAT YOU HAVE A LEGITIMATE BUSINESS OBJECTIVE FOR MONITORING YOUR EMPLOYEES

Therefore employers need to be very careful when monitoring their employees' internet and telephone use. The court in this case held that monitoring employees will always raise questions with regard to an employee's rights under Article 8. The question is whether there is a clear policy in place preventing employees from using the facilities for personal use, and whether this policy is limited in scope and proportionate.

If you do not have a company policy in place, the employees may have a reasonable expectation of privacy and any disciplinary action you take as a result of monitoring their electronic communications could breach both RIPA and their Article 8 rights. Alternatively, if your company policy is overly unreasonable or disproportionate, any decision to dismiss an employee for breaching this policy could result in an unfair dismissal claim.

The key therefore is to ensure you make your employees aware of your policy of monitoring their communications, this policy (as stated above) must be both reasonable and proportionate. The Information Commissioner's Office Employment Practices Code recommends employers carry out an impact assessment to decide if and how to carry out employee monitoring. Although this code is not legally binding, it is best practice and the ICO recommend any impact assessment involves:

- identifying clearly the purpose(s) behind the monitoring arrangement and the benefits it is likely to deliver;
- identifying any likely adverse consequences of the monitoring your employees in this way;
- considering alternatives to monitoring or different ways in which it might be carried out;
- taking into account the obligations that arise from monitoring; and
- judging whether monitoring is justified.

ENSURE YOU MAKE YOUR EMPLOYEES AWARE OF YOUR POLICY OF MONITORING THEIR COMMUNICATIONS

The subject of this case was communications sent while physically at work. Many recruitment companies give their employees laptops and/or smartphones for their employees to use from home or while they are on the move, in such circumstances they would likely have more of a reasonable expectation of privacy than they would if they were sending personal communications from the office computers. This again highlights the need to have a clear policy in place to demonstrate what you regard to be acceptable practice. Given the reliance we place on digital communications while we work, this is an area of law which promises to deliver more cases going forward.

FAQs

ASH O'KEEFFE, LEGAL ADVISER, REC, BRINGS YOU A SAMPLE OF QUESTIONS POSED TO THE LEGAL HELPLINE

I have been asked by a client if I can supply a temporary worker to them who is 17 years old. Do the Working Time Regulations 1998 apply differently to young people than adults?

Yes, the Working Time Regulations 1998 (WTR) do apply differently to young people than adults. As you may already know the WTR are primarily health and safety legislation to protect workers from the risks that arise out of working excessively long hours or for long periods without breaks.

Under the WTR therefore, special consideration is paid to young workers within the workplace. The WTR defines a "young worker" as someone "who has attained the age of 15 but not the age of 18 and who, as respects England and Wales, is over compulsory school age". An individual ceases to be of compulsory school age on the last Friday in June in the school year in which s/he has her/his 16th birthday. If you are dealing with someone who has not ceased to be of compulsory school age then they will be considered a "child" and it will be local by-laws and the Education Act 1996 rather than the WTR that will apply.

In addition to entitlements under the WTR (including annual leave and protection through Employment Tribunals), the WTR specifically entitles young workers to the following:

- An absolute maximum of a 40-hour working week and a maximum working day of eight hours, except where the young worker is required for continuity of service or a surge in demand; or where no adult worker is available; or where it would not adversely affect a young worker's education or training.
- A 30-minute rest break where the working day is longer than four and a half hours.
- A minimum daily rest period of 12 consecutive hours in each 24 hour period. This minimum period may only be interrupted in the case of activities involving periods of work that are split up over the day or of short duration.
- A minimum of 48 hours rest every seven days. This minimum rest period may be interrupted in the case of activities involving periods of work that are split up over the day or are of short duration. It may also be reduced where this is justified by a technical or organisation reason, but may not be less than 36 consecutive hours. ›››

- Young workers may not ordinarily undertake night work – that being work between 10pm and 6am, or 11pm and 7am. The exception to this is if the young worker is employed in hospitals or similar establishments; or if they undertake activities which are cultural, artistic, sporting or advertising. Where young workers are required to do night work there is also a requirement to carry out a more onerous health assessment or capacities checks, including consideration of whether the worker has the physical and psychological ability to do the work. A capacities check should involve verifying the particular skills, knowledge and experience needed for the task in hand and determining the suitability of the young worker in terms of his/her age, experience, skills and qualifications in the light of those requirements. Where you are supplying a young worker you will also need to make specific enquiries of your client with regards to the knowledge, skills and experience required for a specific assignment in order for your to carry out the capacities check. What constitutes a capacities check will be subject to the common-sense approach.

My client has asked me if I can supply a worker to them on the apprentice rate of national minimum wage for a temporary assignment. Am I able to do this?

Apprentices aged 16 to 18 and those aged 19 or over who are in their first year of an apprenticeship are currently entitled to £3.30 an hour under current national minimum wage (NMW) laws. When compared to the current statutory rates of pay for other workers it is easy to see why some clients would prefer to hire temporary workers as apprentices. For instance, workers who are not apprentices aged 18 are currently entitled to £3.87 an hour, those aged 18-20 are entitled to £5.30 an hour, workers aged 21 and over are entitled to £6.70 an hour and from 1 April 2016 workers aged 25 and over are entitled it £7.20 an hour.

However, agencies should be aware that there are only certain types of workers who are entitled to be paid an apprenticeship rate – namely apprentices. Regulation 5 of the National Minimum Wage Regulations 2015 states that the apprenticeship rate applies to a worker who is:

- employed under a contract of apprenticeship or an apprenticeship agreement; and
- under the age of 19, or is within the first 12 months of the apprenticeship after the commencement of the employment.

Should you pay a worker £3.30 an hour and they are not in fact an apprentice as defined by NMW Regulations then you will be in breach of NMW laws and could run the risk of penalties and being 'named and shamed' by HMRC and potentially incur reputational damage to your agency.

So what exactly is an apprenticeship? An apprenticeship allows an individual to combine working with studying for a work-based qualification by entering into either a contract of apprenticeship or an apprenticeship agreement with an employer. An apprentice must work with experienced staff, learn job-specific skills and study for a work-based qualification during their working week – such as at a college or training organisation.

Therefore, you can't simply supply a worker on an apprentice rate if they are not an apprentice.

I have received a request from a former candidate to see a reference on them. Can I share this even if the referee has refused consent to disclose the reference to the candidate?

Section 7 of the Data Protection Act 1998 (the DPA) entitles individuals to obtain a copy of any information that constitutes their personal data that is being held, shared or used in relation to him or her (such as references) – this is known as a 'subject access request' (SAR).

If your candidate makes a SAR it should normally be made in writing; however, you can respond to a verbal request if it reasonable to do so. Once you receive an SAR, you must respond to your candidate promptly and in any event within 40 days. You must produce copies of the information you hold in an intelligible form (i.e. readable and understandable). If you receive a SAR you are permitted to charge a maximum fee of £10 for dealing with it. If you choose to do this, you need not comply with the request until you have received the fee.

In instances where you are dealing with a referee who refuses their consent to disclose the reference to the candidate then you should attempt to anonymise the reference by redacting all names, headers, contact details and/or dates of work etc.

However, if the content of the reference itself indicates the identity of the referee, then a balancing exercise needs to be considered. The views of your referee amount to the referee's personal data which is protected from disclosure, while your candidate has a right to access information which amounts to their personal data. You need to balance both sets of rights when dealing with this request.

The Information Commissioner's Office (the ICO) has outlined considerations that you could make when determining whether to provide the reference to the candidate without the consent of the referee, which include:

- any clearly stated assurance of confidentiality given to the referee;
- any reasons the referee gives for withholding consent;
- the likely impact of the reference on the work-seeker;
- the work-seeker's interest in being able to satisfy himself that the reference is truthful and accurate; and
- any risk that disclosure may pose to the referee.

However, the view of the ICO will generally be that, even where a referee has refused consent, the **interests of the individual outweigh the interests of the referee** in keeping the contents of the reference confidential. This means that the reference must be disclosed unless there is a reason not to do so. Only where there is a real risk of harm, for instance, is the ICO likely to conclude that keeping the contents of the reference confidential to protect the identity of the referee outweighs the interests of the individual in knowing what has been said about them in the reference.

You should speak with your referee and ask them exactly why it is they do not want to disclose the reference to the candidate. If, for example, there is a real risk of harm to them then you should not reveal the reference. If this is not the case, then the reference must be disclosed and you should try and anonymise it as much as possible.

If you are going to disclose the reference then you should inform the referee you have to disclose the reference as per your legal obligation.

LORRAINE LARYEA, SOLICITOR
AND COMMERCIAL ADVISER, REC

LEGAL ROUND UP

GENDER PAY REPORTING

We have reported previously on the Government's plans to introduce an obligation for employers to publish data which shows the difference between in pay between male and female staff. This will apply to employers with 250 or more employees.

The draft legislation that will bring this into force has now been released for consultation.

In terms of timescales, the consultation sets out that the intention is to bring the provisions in October this year but that the employers will need to publish their first reports by April 2018 and annually thereafter.

From the draft legislation, it appears that only workers engaged on contracts of employment will need to be reported on and taken into account when determining whether the employer has 250 or more employees, triggering the duty to report.

BRITISH GAS AND LOCK (HOLIDAY PAY AND COMMISSION PAYMENTS) APPEAL

On 22 February the Employment Appeal Tribunal (EAT) gave its decision in this long running case which concerns whether employers are required to include commission payments when calculating statutory holiday pay.

Following judgments of the Court of Justice of the European Union, an Employment Tribunal (ET) ruled in March 2015 that the European Working Time Directive requires commission payments to be included when calculating holiday pay. This is contrary to the provisions of UK's domestic legislation – the Working Time Regulations (WTR). The ET had ruled that the WTR should be read in a way that allowed for commission payments to be taken into account. This effectively means using a 12 week average of a worker's pay (including commission payments) when calculating holiday pay, rather than just paying basic pay.

British Gas appealed that decision on a legal point as to whether the ET was able to decide that the WTR should be re-read in this way.

In this recent decision, the EAT has rejected the appeal and upheld the decision given by the ET last year, details of which can be found in the REC's briefing on the case.

NATIONAL LIVING WAGE REMINDER!

The new National Living Wage is set to come into force on 1 April 2016 - introducing a mandatory minimum rate of pay for workers aged 25 and over, of £7.20 per hour. See the REC Legal bitesize - Issue 7 (February 2016) for further details.

This publication is not a substitute for detailed advice on related matters and issues that arise and should not be taken as providing legal advice on any of the topics discussed.

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