

Video surveillance at work: European Human Rights Court approves hidden cameras

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In its judgement of 17 October 2019, in the case of *López Ribalda v. Spain*, the Grand Chamber (*Applications nos. 1874/13 and 8567/13*) of the European Court of Human Rights (ECtHR) revised the former judgement of the third section of the court. The Court now held that video surveillance of workers did not violate the right to privacy as protected under article 8 of the European Convention on Human Rights (ECHR). In essence, the case relates to the question whether, and under what conditions, employers can install hidden cameras at the workplace in order to obtain evidence from theft by its employees.

Facts and context of the case

The Grand Chamber decision of 17 October 2019 came after an appeal from the Spanish government against the judgement of 9 January 2018 of the third section of the Court.

The case concerns five employees who were dismissed for theft at the supermarket where they were employed. Three of them were cashiers, the other two were sales assistants behind a counter. The manager took the initiative to install video surveillance system after noticing inconsistencies between the stock level and the sales figures. He installed CCTV cameras, some of which were visible but others hidden. The staff members were informed of the installation of the visible cameras, but not of the hidden cameras. As is explained in the judgement, the company had notified the Spanish Data Protection Agency of its intention to install CCTV cameras. The Agency had pointed out the obligations to provide information under the data protection legislation. A sign indicating the presence of CCTV cameras was installed in the shop where the applicants worked, but without an indication of their location. Ultimately, all (fourteen) workers suspected of theft were called to individual interviews and were subsequently dismissed, including the five applicants.

In its judgement of 9 January 2018, the third section of the ECtHR found earlier that the covert video surveillance was not lawful and thus violated article 8 ECHR (right to privacy). The Court took into account the fact that the video surveillance took place over a prolonged period, did not comply with the requirements stipulated the applicable data protection act, in particular, with the obligation to previously, explicitly, precisely and unambiguously inform all persons concerned about the existence and the particular characteristics of a (monitoring) system collecting personal data.

Judgement of the Grand Chamber

In its judgement of 17 October 2019, the Grand Chamber has a different view and does not find a violation of article 8 ECHR (right to privacy).

According to the Grand Chamber, the domestic courts found that the installation of the video-surveillance had been justified by legitimate reasons, namely suspicion that thefts had been committed. These courts also found that the surveillance was limited as regards the areas and staff being monitored, since the cameras only covered the checkout area, which was likely to be where the losses occurred, and that its duration had not exceeded what was necessary in order to confirm the suspicions of theft. The ECtHR's Grand Chamber is of the opinion this assessment could not be regarded as unreasonable.

The Court finds that, as a result of their jobs, the employees could not evade the video recordings and were operated permanently and without any limitation. To some extent, the employees thus found themselves "in limited areas". But the Court also notes that, at the same time, the employees' duties were performed in a place that was open to the public and involved permanent contact with customers. The Court takes the view that it is a necessary to distinguish, in the analysis of the proportionality of a video-surveillance measure, the various places in which the monitoring was carried out, in the light of the protection of privacy that an employee could reasonably expect. "That expectation is very high in places which are private by nature, such as toilets or cloakrooms, where heightened protection, or even a complete ban on video-surveillance, is justified (...). It remains high in closed working areas such as offices. It is manifestly lower in places that are visible or accessible to colleagues or, as in the present case, to the general public." (§125 of the Judgement)

Furthermore, the Court notes that while the employer had not set the duration of the video-surveillance beforehand, it lasted for ten days and ceased as soon as the employees responsible had been identified. The length of the monitoring did not therefore appear excessive in itself. Lastly, only the manager and his legal representative, and the union representative, viewed the recordings.

As to whether the applicants had been informed of the installation of the video-surveillance, the Court notes that it was not in dispute that there were both visible cameras directed towards the shop's entrances and exits (of which the employees were informed) and hidden cameras directed towards the checkout areas, (of which employees had not been informed). The Court observes that it is necessary to inform the monitored individuals concerned, clearly and prior to implementation, of the existence and conditions of such data collection, even if only in a general manner. It takes the view that "the requirement of transparency and the ensuing right to information are fundamental in nature, particularly in the context of employment relationships, where the employer has significant powers with regard to employees and any abuse of those powers should be avoided" (§131). However, the Court is also of the view that the provision of information constitutes just one of the criteria to be taken into account in order to assess the proportionality of a measure of this kind in a given case. An overriding requirement relating to the protection of significant public or private interests, could justify the lack of prior information.

The Court thus concludes that there was no violation of the right to privacy as protected under article 8 ECHR.

Secret monitoring remains the exception

The case law has taken an important step in approving a case of (partly) 'hidden' video surveillance. However, the Court has obviously not approved all secret monitoring. The Court is quite clear that the specific circumstances of the case play an important role and that 'hidden' monitoring must remain

limited to certain contexts. The Court is also more precise as to what the position is of a video surveillance in the case of a suspicion of theft at the workplace. The case of suspicion of theft is not a 'carte blanche' for monitoring. In its own words, the Court "cannot accept the proposition that, generally speaking, the slightest suspicion of misappropriation or any other wrongdoing on the part of employees might justify the installation of covert video-surveillance by the employer, the existence of reasonable suspicion that serious misconduct has been committed and the extent of the losses identified in the present case may appear to constitute weighty justification. This is all the more so in a situation where the smooth functioning of a company is endangered not merely by the suspected misbehaviour of one single employee, but rather by the suspicion of concerted action by several employees, as this creates a general atmosphere of mistrust in the workplace (§134)".

Another important remark concerns the role of the European Court on Human Rights. It obviously has struck a balance between various rights and interests, taking into account the fundamental nature of the right to privacy, which should also – and this remains beyond doubt – be guaranteed at the workplace. The Court examined the case law of the domestic courts in Spain and obviously takes into account the manner in which the local judges have struck the balance. In this exercise, a certain margin of appreciation for the domestic legal systems always plays a role.

A last remark relates to the recording and use of images of individuals. The Court refers to its former case law, and stresses that the right of each person to the protection of his or her image is "one of the essential components of personal development and presupposes the right to control the use of that image" (§89). Let us take this element from the judgement as an important message for our larger (social) media society.