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PRIVACY & SUREVEILLANCE – WHAT ARE THE LIMITS?

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INTRODUCTION

1. To what extent do employees actually *have* a 'private life', in the context of the workplace? To the extent that they do, what degree of privacy can employees legitimately expect to enjoy; and in what circumstances will employers be permitted by law to monitor and intrude upon elements of that private life? Furthermore, to what extent can employers rely on employees' conduct *outside* the workplace, in a truly personal capacity, to justify disciplinary sanctions at work? These are all questions which this paper seeks to address (amongst others), having regard to the European and domestic jurisprudence. The first part of this paper addresses some of the key principles arising from the case law of the European Court of Human Rights; and the second part addresses the domestic law position, giving particular consideration to the following topics:

   1.1 The range of reasonable responses test;

   1.2 Covert surveillance;

   1.3 Covert recordings;

   1.4 Monitoring at work: the Information Commissioner's Office guidance;

   1.5 The Regulation of Investigatory Powers Act 2000 ("RIPA");

   1.6 The perils of social networks;

   1.7 Private conduct bringing an employer's reputation into disrepute; and

   1.8 CRB checks and access to employment.

[1] With thanks to James Laddie QC for his comments on a first draft of this paper

PRIVACY IN THE WORKPLACE – THE ECHR POSITION

2. Any discussion of privacy rights in the workplace compels a consideration of the European Convention on Human Rights ("ECHR"). Article 8 is the key provision:

> "8 (1) Everyone has the right to respect for his private and family life, his family and his correspondence.
>
> 8 (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."

3. A number of preliminary points need to be made about Article 8:

   3.1 It contains no express protection of privacy in the context of the workplace;

   3.2 The right is qualified; and

   3.3 The qualification of the right relates to '*interference by a public authority*' (and not interference by a private authority, such a private sector employer).

4. With regard to the latter point, whilst Article 8 will have 'direct vertical effect'[2] only in respect of UK public sector employers and workers, that does not mean that private employers have *carte blanche* to invade the privacy of their workforce in a manner which would be impermissible for a public authority employer (by virtue of the restrictions imposed by Article 8).

5. For example, a private sector employee who alleges that his Article 8 (1) privacy rights have been infringed by his employer may argue that the Employment

[2] i.e. giving rise to a 'freestanding' right of action under the Human Rights Act 1998

Tribunal judging the fairness of his dismissal should, as a public authority defined by s. 6 (3) (b) of the Human Rights Act 1998, ensure that it does not act in a way which is incompatible with the Article 8 right in deciding the case.[3]

6. So, how has the ECtHR interpreted Article 8 in the context of workplace privacy disputes? **Neimitz v Germany** [1993] 16 EHRR 97 concerned the search of a German lawyer's premises, including his professional office, on the grounds that he was suspected of involvement in conduct which could amount to a contempt of court. In response to Mr Niemitz's complaint that his Article 8 rights had been infringed, the German government argued that the search of the lawyer's office fell *outside* the scope of private life, as recognised by Article 8. The ECtHR disagreed, stating as follows:

> "29. The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life". However, it would be too restrictive to limit the notion to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.
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> There appears, furthermore, to be no reason of principle why this understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world. This view is supported by the fact that, as was rightly pointed out by the Commission, it is not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not. Thus, especially in the case of a person exercising a liberal profession, his work in that context may form part and parcel of his life to such a degree that it becomes impossible to know in what capacity he is acting at a given moment of time.

[3] See the approach adopted by the Court of Appeal in **X v Y** [2004] IRLR 624, in particular paras. 56 – 57, *per* Mummery LJ

To deny the protection of Article 8 on the ground that the measure complained of related only to professional activities - as the Government suggested should be done in the present case - could moreover lead to an inequality of treatment, in that such protection would remain available to a person whose professional and non-professional activities were so intermingled that there was no means of distinguishing between them. In fact, the Court has not heretofore drawn such distinctions: it concluded that there had been an interference with private life even where telephone tapping covered both business and private calls (see the *Huvig v. France* judgment of 24 April 1990, Series A no. 176-B, p. 41, para. 8, and p. 52, para. 25)…

…

31. More generally, to interpret the words "private life" and "home" as including certain professional or business activities or premises would be consonant with the essential object and purpose of Article 8, namely to protect the individual against arbitrary interference by the public authorities (see, for example, the *Marckx v. Belgium* judgment of 13 June 1979, Series A no. 31, p. 15, para. 31). Such an interpretation would not unduly hamper the Contracting States, for they would retain their entitlement to "interfere" to the extent permitted by paragraph 2 of Article 8 (art. 8-2); that entitlement might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case."

7. Applying these statements of principle to the particular facts of the case, the ECtHR concluded that the search warrant, although issued for a legitimate purpose and in accordance with German domestic law, had been drafted too broadly and failed the test of proportionality; accordingly, Mr Niemitz's rights under Article 8 had been breached.

8. **Halford v UK** [1997] IRLR 471 concerned the alleged interception of a senior policewoman's private telephone calls, made by her from an office telephone during working hours, by her employer. Ms Halford was, at the time of the alleged interception, in the process of suing the police force for sex

discrimination. It was accepted by the UK government that Ms Halford had adduced sufficient material to establish a reasonable likelihood that calls made from her office telephones (including her 'private line') had been intercepted.

9. The ECtHR accepted that Ms Halford's Article 8 rights were engaged, stating as follows:

> "44. In the Court's view, it is clear from its case-law that telephone calls made from business premises as well as from the home may be covered by the notions of "private life" and "correspondence" within the meaning of Article 8 para. 1 (art. 8-1) ….
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> 45. There is no evidence of any warning having been given to Ms Halford, as a user of the internal telecommunications system operated at the Merseyside police headquarters, that calls made on that system would be liable to interception. She would, the Court considers, have had a reasonable expectation of privacy for such calls, which expectation was moreover reinforced by a number of factors. As Assistant Chief Constable she had sole use of her office where there were two telephones, one of which was specifically designated for her private use. Furthermore, she had been given the assurance, in response to a memorandum, that she could use her office telephones for the purposes of her sex-discrimination case (see paragraph 6 above).
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> 46. For all of the above reasons, the Court concludes that the conversations held by Ms Halford on her office telephones fell within the scope of the notions of "private life" and "correspondence" and that Article 8 (art. 8) is therefore applicable to this part of the complaint."

10. The UK government did not seek to contend that, in the event Ms Halford's Article 8 rights were engaged, the breach was nevertheless justified. Accordingly, her complaint was upheld.

11. **Copland v UK** [2007] 25 BHRC 216 is another relevant authority in this context. This case concerned an application brought by a personal assistant working in a Carmarthenshire College, a state-run body providing further and higher education. During the course of her employment, Mrs Copland's telephone, e-mail and internet usage had been the subject of monitoring at the instigation of the Deputy Principal of the College. The stated aim of that monitoring, which was covert, was to "*ascertain whether the applicant was making excessive use of College facilities for personal purposes*". The College did not have a computer use policy.

12. The ECtHR held that there had been a violation of Mrs Copland's Article 8 rights. In the course of its judgment, it noted that there may be a breach of Article 8 even in relation to information which has been legitimately obtained by the receiving party. In this case, some of the monitoring related to standard itemised telephone bills which had been sent directly to the employer; whilst mere receipt of such data would not ordinarily engage Article 8, the Court considered that use of the data may do. On the facts, the Court held that analysis of the telephone bills to establish how many calls had been made by Mrs Copland (and when, to whom and for how long those calls had been made) had the effect of engaging her Article 8 rights.

13. Further, the fact that the College had not listened into the telephone calls or examined the contents of the e-mails did not mean that Article 8 had not been engaged; in this regard, the ECtHR relied on its earlier judgment in **Malone v UK** [1984] ECHR 8691/79, to the effect that information relating to the date and length of a telephone conversation and details of numbers dialled constitutes an "*integral element of the communications made by telephone*".

14. Also, the fact that the information had never been used against Mrs Copland (e.g. in order to justify disciplinary proceedings) was irrelevant to the question of whether Article 8 had been engaged. The important point, from the ECtHR's perspective, was that "*the collection and storage of personal information relating to the applicant's telephone, as well as to her e-mail and internet usage, without her knowledge, amounted to an interference with…Article 8*" (emphasis added).

15. The ECtHR rejected the UK Government's arguments that the interference with Mrs Copland's Article 8 rights was justified. The monitoring could not be "*in accordance with the law"*, given that "*there was no domestic law regulating monitoring at the relevant time*". Given that the monitoring was not "*in accordance with the law"*, the ECtHR was not required to go on and determine whether the monitoring of Mrs Copland's communications were "*necessary in a democratic society*" and/or proportionate. However, it did say this (at para.48):

> "The Court would not exclude that the monitoring of an employee's use of a telephone, e-mail or internet at the place of work may be considered '*necessary in a democratic society'* in certain situations in pursuit of a legitimate aim."

16. It is readily apparent from this passage that the ECtHR was not keen to endorse, condone or encourage employers to adopt the practice of 'invasive' employee monitoring as their default position.

PRIVACY IN THE WORKPLACE – THE DOMESTIC LEGAL POSITION

17. The relative lack of case law at ECtHR level makes it all the more important to seek guidance from the domestic authorities on what is and is not likely to constitute a permissible intrusion into the privacy rights of employees. Putting aside for one moment the consideration of whether an employee's Article 8 rights may or may not be engaged by the conduct of his employer, and the ECtHR test of objective justification / proportionality, it is always important to bear in mind the restraints placed upon an employer by reason of the fundamental implied term of mutual trust and confidence, which regulates all employment relationships governed by UK law.

18. In practice, many cases which are argued before Employment Tribunals may be advanced principally on this basis, and turn on considerations of whether an employer had "reasonable and proper cause" for the surveillance / monitoring in question (assuming that such conduct would be calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and

employee), independent of jurisprudential debates about the precise impact / effect of Article 8 in the workplace.

19. Notwithstanding the above, it is possible to identify some helpful legal principles (at the domestic level) regarding the protection of privacy in the workplace. These are considered below.

The Range of Reasonable Responses Test

20. In **Turner v East Midlands Trains Ltd** [2012] IRLR 107, the claimant, a senior train conductor, was dismissed on grounds of gross misconduct; her employer believed that she had fraudulently created and sold fake tickets to customers, and dishonestly retained the proceeds. The claimant alleged that her dismissal was unfair and brought a claim in the tribunal. Amongst her arguments was a submission that the employer's investigation had not satisfied the procedural requirements which the proper protection of Article 8 rights required (having regard to the damage which the dismissal had on her reputation; her ability to secure alternative employment (i.e. stigmatisation); and the social relationships which she had developed with her work colleagues). The claimant's claim was dismissed before the Employment Tribunal and her appeal to the EAT was unsuccessful.

21. On appeal to the Court of Appeal, one of the issues requiring determination was whether the traditional range of reasonable responses provides a sufficiently robust, flexible and objective analysis of an employer's decision to dismiss, such that the Tribunal applying such a test would be complying with its obligations under Article 8. The CA held, *inter alia, that:*

    21.1 Where Article 8 rights are engaged, matters bearing on the culpability of the employee must be investigated with a full appreciation of the potentially adverse consequences to the employee;

21.2 The range of reasonable responses test allows for a heightened standard to be adopted where those consequences are particularly grave[4]; and

21.3 The range of reasonable responses test, applied properly by tribunals, is Article 8 compliant.

22. Interestingly, the CA observed that in the employment sphere, the ECtHR has openly acknowledged that some leeway should be given to employers in the discharge of their powers of dismissal; and that *some* deference is to be paid to the views of management that dismissal is an appropriate sanction. Elias LJ (at para. 56 of the CA's judgment) summarised the position thus:

> "Strasbourg therefore adopts a light touch when reviewing human rights in the context of the employment relationship. It may even be that the domestic band of reasonable responses test protects human rights more effectively. Whether that is so or not, *Sanchez*[5] shows that the interests of the employer are given significant weight when carrying out the balancing exercise which Article 8(2) requires. *Sanchez* strongly reinforces my conclusion that the band of reasonable responses test provides a sufficiently robust, flexible and objective analysis of all aspects of the decision to dismiss to ensure compliance with Article 8"
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> (Emphasis added)

23. So, whilst **Turner** was not a breach of privacy case in the usual sense, the CA's decision regarding the impact of Article 8 on the domestic law of unfair dismissal is nevertheless important; and demonstrates the interplay between domestic statutory concepts regulating the employment relationship (such as the unfair dismissal test in s. 98 (4) ERA 1996) and human rights law.

[4] See for example **A v B** [2003] IRLR 405; and **Salford Royal NHS Foundation Trust v Roldan** [2010] IRLR 721

[5] **Palomo Sanchez and others v Spain** [2011] IRLR 934, ECtHR

Covert Surveillance

24. Before turning to consider some of the key cases involving covert surveillance in the employment context, a helpful starting point is the CA decision in **Jones v University of Warwick** [2003] EWCA Civ 151. In these civil personal injury proceedings, the defendant admitted liability but disputed that the claimant had the continuing disability which she alleged (which therefore impacted upon the assessment of quantum of damages). The defendant's insurer engaged a private detective to investigate the extent of the claimant's injuries and their effect on her day to day life. The private detective gained access to the claimant's home by posing (falsely) as a market researcher. The CA was ultimately required to determine whether the video recordings were admissible as evidence in the proceedings.

25. With some degree of reluctance, the CA held that the video evidence *was* admissible. It held as follows (at para. 28, *per* Lord Woolf CJ):

> "…The court must try to give effect to what are here the two conflicting public interests. The weight to be attached to each will vary according to the circumstances. The significance of the evidence will differ as will the gravity of the breach of art 8, according to the facts of the particular case. The decision will depend on all the circumstances. Here, the court cannot ignore the reality of the situation. This is not a case where the conduct of the defendant's insurers is so outrageous that the defence should be struck out. The case, therefore, has to be tried. It would be artificial and undesirable for the actual evidence, which is relevant and admissible, not to be placed before the judge who has the task of trying the case. We accept Mr Owen's submission that to exclude the use of the evidence would create a wholly undesirable situation. Fresh medical experts would have to be instructed on both sides. Evidence which is relevant would have to be concealed from them, perhaps resulting in a misdiagnosis; and it would not be possible to cross-examine the claimant appropriately. For these reasons we do not consider it would be right to interfere with Judge Harris's decision not to exclude the evidence."

26. The CA also dealt with a submission, advanced on behalf of the claimant (pursuant to Article 8), that unless it was *necessary* for the insurers to take the actions they did, then the evidence obtained by the private investigator must inevitably, in such a case, be held inadmissible. In support of this contention, Counsel for the claimant submitted that a failure to exclude the evidence would constitute a contravention by the court of *its* duty, pursuant to s. 6 of the HRA 1998, not to contravene the claimant's Article 8 rights. The CA rejected this submission, holding (at paras. 26 – 27):

> "[26]…While the court should not ignore the contravention of art 8, to adopt Mr Weir's approach would fail to recognise that the contravention would still remain that of the insurer's inquiry agent and not that of the court. The court's obligation under s 6 of the 1998 Act is to 'not itself act in a way which is incompatible with a convention right' (see *Venables v News Group Newspapers Ltd* [2001] 1 All ER 908 at 917–918, [2001] Fam 430 at 445–446 (paras 24–27).
>
> [27] As the Strasbourg jurisprudence makes clear, the convention does not decide what is to be the consequence of evidence being obtained in breach of art 8 (see *Schenk v Switzerland* (1988) 13 EHRR 242 and *PG and JH v UK* App No 44787/98 (25 September 2001, unreported), para 76). This is a matter, at least initially, for the domestic courts. Once the court has decided the order, which it should make in order to deal with the case justly, in accordance with the overriding objectives set out in CPR 1.1 in the exercise of its discretion under CPR 32.1, then it is required or it is necessary for the court to make that order. Accordingly if the court could be said to have breached art 8(1) by making the order which it has decided the law requires, it would be acting within art 8(2) in doing so."

27. Having determined that the evidence *was* admissible, the CA went on to emphasise its strong disapproval of the methods adopted by the defendant's insurer / private investigator, stating (at para. 29):

> "…While not excluding the evidence it is appropriate to make clear that the conduct of the insurers was improper and not justified. We disagree with the indication by Judge Harris to the contrary. The fact that the insurers may have

been motivated by a desire to achieve what they considered would be a just result does not justify either the commission of trespass or the contravention of the claimant's privacy which took place. We come to this conclusion irrespective of whether Mr Weir is right in contending that in this particular case the evidence could be obtained by other means."

28. The CA also went on to emphasise the adverse costs risk that a party will inevitably run, if it elects to engage in such conduct, stating (at para. 30):

"…In giving effect to the overriding objective, and taking into account the wider interests of the administration of justice, the court must while doing justice between the parties, also deter improper conduct of a party while conducting litigation. We do not pretend that this is a perfect reconciliation of the conflicting public interests. It is not; but at least the solution does not ignore the insurer's conduct."

29. So, what has been the approach of Tribunals and the EAT to the use of covert surveillance in relation to employment matters? Several cases are discussed below.

30. In **McGowan v. Scottish Water** [2005] IRLR 167, Mr McGowan was suspected by his employer of falsifying his timesheets with regard to call out time. The employer decided to organise covert surveillance of Mr McGowan's home. He lived in tied accommodation. Surveillance of his comings and goings continued for a week and was an important element of the evidence from which Scottish Water decided to dismiss him.

31. Mr McGowan claimed that his dismissal was unfair because it involved a breach of Article 8. Stranraer Employment Tribunal held that there had been no interference with his Article 8 rights because the surveillance had been carried out from a public road (and could therefore have been undertaken by any member of

the public).[6] It added that the employer's actions would in any event have been justified by reference to Article 8 (2), having regard to the gravity of the offence under investigation.

32. Mr McGowan appealed, arguing that the Tribunal had misapplied the ECHR. The appeal was dismissed, albeit on narrower grounds than relied upon at first instance, and by a majority only. Having first found (although with slightly uncertain reasoning) that "*covert surveillance of a person's home, unbeknown to him or her, which tracks all people coming and going from it…raises at least a strong presumption that the right to have one's private life respected is being invaded*", the EAT (Scotland) went on to consider justification:

> "13. …It has to be borne in mind that the respondents are a public corporation and they were investigating what was effectively criminal activity in the sense of fraudulent timesheets. They did consider how best to deal with the matter particularly with regard to inserting cameras in the workplace but concluded that such would be impractical and ineffective. It has also to be borne in mind that it could at least be argued that the tied house was part of the workplace. Be that as it may, the aim of the surveillance was to see or quantify the number of times the appellant left the house to go to the process plant which would plainly bear upon the accuracy or otherwise of the subsequently submitted timesheets. Thus it went to the heart of the investigation that the employer was bound to carry out to protect the assets of the company. The position is, therefore, that by alleged conduct on the part of the appellant, namely, the issue of false timesheets, the respondent is forced into action to investigate the matter. It is not the case where surveillance was simply undertaken for external or whimsical reasons. In our view, it goes to the essence of the obligations and indeed rights of the employer to protect their assets. Looking at the matter this way, it therefore seems to us that it is not disproportionate, and, accordingly, the findings of the tribunal that the Article was not breached can be supported on this basis. It has to be borne in mind that the suspicions of the employer were found to be established and the

[6] See **Miailhe v. France (No.2)** (1997) 23 EHRR 491, for support for the proposition that there is no reasonable expectation of privacy where the subject is monitored in public

subsequent disciplinary process, which is not challenged as a matter of fairness, resulted in the appellant being dismissed on grounds of dishonesty, a very important aspect of the case.

14. It has to be recorded that this is a majority decision. The minority member was of the view that the surveillance operation was not justified against the background of the Convention and was accordingly disproportionate. He would have allowed the appeal."

(Underlining added)

33. The decision in **McGowan** was not greeted with a great deal of fanfare at the time, but was an important marker that Tribunals should apply an objective test to the infringement of the right to privacy in the workplace. Although not spelled out, the implication of the EAT decision was that, had the surveillance been found to have been in breach of Article 8, the dismissal would therefore have been unfair.

34. The EAT in Scotland again considered the issue of covert surveillance in **McCann v Clydebank College** [2010] UKEATS/0061/09/BI. In this case, the claimant (a part-time employee) was filmed without his knowledge, as the College suspected that he was carrying out work for another employer whilst claiming sick pay from the College. A private investigator obtained video footage of the claimant at home, and also working at the garage where he was suspected of 'moonlighting' during his sickness absence. In dismissing the claimant, the College relied on the garage footage only.

35. The claimant's claim for unfair dismissal was rejected by the Tribunal. In its judgment, the EAT (Scotland) summarised the Article 8 point as follows:

"…the tribunal considered at paras 242 – 248 the Appellant's submission referred to above that the use of surveillance constituted a breach of his rights under art 8. It appears to have been common ground that if that were established the dismissal would be unfair; and since there is no issue as to that before us we will proceed on that basis. The tribunal directed itself, in

accordance with the decision of this tribunal (Lord Johnston presiding) in *McGowan v Scottish Water* (EATS/0006/04), that the question of whether there was a breach of art 8 depended on whether the use of surveillance was disproportionate. At para 247 it considered that question and decided it in the Respondent's favour. Accordingly it concluded, at para 248, that the DVD evidence was admissible…"

36. In rejecting the claimant's appeal, the EAT held that it could see "nothing wrong" with the Tribunal's approach or conclusions in this regard.

37. A first instance but nevertheless salutary warning for employers concerned about malingering employees comes in the form of **Pacey v Caterpillar Logistics** [2010] ET Case No. 3501719/10. In this case, the employer's insurers (with the knowledge and approval of the employer) engaged a private investigator to compile a report on the claimant's activities whilst he was absent from work on sick leave (with a back injury). In the course of the surveillance the claimant was filmed undertaking some ordinary day to day tasks, such as shopping and taking his dog for a walk. However, he was not videoed doing anything obviously strenuous, or which clearly indicated that he was in fact fit for work (and was malingering). Following receipt of the report and video evidence, the claimant was dismissed for gross misconduct (specifically, falsely claiming sick pay whilst fit for work).

38. The Tribunal found that the claimant's dismissal was unfair. Amongst other matters, the Tribunal held it was "completely incomprehensible" that the respondent had failed to show the video to a medical expert (such as its own Occupational Health doctor) prior to the decision to terminate the claimant's employment. It was clear that only a medical expert could properly assess the claimant's fitness to work; and whether he had in fact been malingering.

39. Interestingly, in its judgment the Tribunal steered clear from holding that the employer's decision to covertly monitor the claimant, away from the workplace, was itself manifestly unreasonable or unjustified (notwithstanding that the claimant had a good work record and had never been accused of malingering

before). The Tribunal's criticisms were directed more towards the manner in which the respondent had utilised the covertly obtained video evidence (as a basis for dismissal), as opposed to the gathering of the evidence *per se.*

40. **City of Swansea v Gayle** [2013] IRLR 768 is a recently reported case which illustrates the limits on an employee's right to privacy, in circumstances where they are acting in an essentially fraudulent manner, to the detriment of their employer. Here, the claimant's employer obtained video evidence of him outside a local sports centre (on five occasions), whilst he was supposed to working (and was claiming payment on the basis that he was at work). The claimant had previously been spotted on two occasions (by colleagues) playing squash at the sports centre whilst he was supposed to be at work. The claimant was dismissed for gross misconduct.

41. The Tribunal upheld the claim of unfair dismissal (albeit awarding nil compensation on the basis of contributory fault), partly on the basis that the employer had breached the claimant's Article 8 rights.

42. The EAT overturned this decision on appeal, substituting a finding of fair dismissal. Strikingly, the EAT concluded that the claimant's Article 8 (1) rights had not been engaged *at all*; and therefore the employer's actions did not require justification under Article 8 (2). It accepted the submissions of the respondent's Counsel, who relied upon three factors in support of his contention:

42.1 The photography was "*in a public place of somebody in a public place*" (specifically, it recorded the claimant outside the sports centre rather than inside the premises);

42.2 The claimant was "on the clock" when the surveillance occurred – i.e. the footage was taken at a time when the claimant was supposed to be at work. Put simply, "*An employer is thus entitled to know where someone is and what they are doing in the employer's time. An employee can have no reasonable expectation that he can keep those matters private and secret*

from his employer at such a time. To do so would be to run contrary to the contract he had entered with his employer"; and

42.3 The claimant was a "*fraudster*"; he was "*busily engaged on his own business whilst receiving his employer's money for his employer's business. He was presenting himself as having been elsewhere and on his employer's business when he was not*".

43. Significantly, the EAT also appeared to steer a course away from the assumption (which may be inferred from the reasoning in **McGowan**, for instance) that taking into account evidence obtained in breach of an employee's Article 8 rights, when deciding to dismiss, will *necessarily* render that dismissal unfair. It held (at paras. 25 – 26):

"[25]…There is no separate freestanding right to hold a dismissal unfair because an Employment Tribunal has a criticism of the way in which or a distaste for the way in which an employer has behaved. It is not evaluating the employer's conduct in a vacuum. It is asking the question in the context of the employer's decision to dismiss. However reprehensible an employer's behaviour may be in moral or social terms, it is only the extent to which that impacts on the fairness of the dismissal which is relevant to the Tribunal's decision.

[26] What is reasonable or unreasonable must have that focus. The decision which is to be held reasonable or unreasonable is that of dismissal. Accordingly, it is only if the faults in the investigation are relevant to the dismissal that it is likely to be held unreasonable. As Mr Cohen put it, to hold as the Tribunal did here that the behaviour of the employer was disproportionate because it did not need to rely upon the surveillance in addition to the oral evidence it already had says nothing nor could it say anything about the reasonableness of forming a view upon the material available that the employee was guilty. Further, it is never likely, if ever it could be, that an investigation will be held unreasonable because it is too thorough - at least without the nature of the investigation having in some other

way made the dismissal of the employee unfair. If what was unfair here about what the employer did was taking videos of him in public, and it had nothing to do with the dismissal because the dismissal was already sufficiently evidenced, then that would be no basis for holding the dismissal unfair since it would not be relevant to the dismissal itself, even although in this separate respect the employer might not have behaved entirely to the Tribunal's liking."

44. Although the EAT's conclusion on the Article 8 (1) issue rendered it unnecessary to determine the question of justification under Article 8 (2), the EAT nevertheless went on to express some strong views on the matter. It identified two legitimate aims which the Council could legitimately have relied upon, namely:

44.1 The prevention of crime; and

44.2 The protection of the rights and freedoms of others; "*the 'others' here being the employers whose money was at stake and who had contractual rights in agreement with the Claimant that he would behave in a way in which as it happened he did not*".

45. Having identified these legitimate aims, the EAT indicated that any interference with the claimant's Article 8 (1) rights would, in its view, have been proportionate and justified.

Covert Recordings

46. The author's experience is that covert recordings of workplace interactions are on the rise; principally due to the audio recording capacity of smartphones. The admissibility of such recordings can be the subject of fiercely contested arguments at preliminary hearings; and it is an area which is likely to attract further appellate litigation.

47. **Chairman and Governors of Amwell View School v Dogherty** [2007] IRLR 198 demonstrates that not all covertly recorded material, even if potentially

relevant to the issues in dispute, will necessarily be admissible as evidence in proceedings. In this case, Ms Dogherty was dismissed following allegations that she had abused pupils at a school for children with learning difficulties. She covertly recorded the disciplinary and appeal hearings. She had also left the recording device in the relevant room when the panel was deliberating in private so that their private deliberations were also recorded. In a claim for unfair dismissal, Ms Dogherty sought to rely on the transcripts of *all* of the meetings, both open and private. The Respondent sought to exclude all of the recorded material. The Tribunal permitted all of the material to be adduced, although it made a costs order against the claimant, principally as a result of her late disclosure of this material.

48. The Respondent's appeal to the EAT was allowed in part. The EAT rejected the submission that the material in issue had been obtained in breach of the Article 8 rights of the school governors whose voices had been captured on tape. The EAT appeared wrongly to assume that because no interference could be shown with the governors' "family life", Article 8 could not be engaged at all – suggesting a failure to understand the import of either **Niemietz** or **Halford** (discussed above). However, the EAT did hold that public policy considerations required that the recording of the disciplinary panel's private deliberations should have been excluded. The EAT emphasised that all the parties had been asked to withdraw and the panel legitimately and genuinely expected its deliberations to be conducted behind closed doors.

49. Whilst it is an unusual case in that it involves an allegation that an *employee* (i.e. the claimant in Tribunal proceedings) breached rights of privacy, the result is consistent with the **Halford** analysis: the key question was what the school governors had expected once the parties had retired to deliberate. In holding that where *some* evidence is obtained by a gross invasion of privacy it ought to be excluded from Tribunal / Court proceedings, the EAT established an interesting precedent for cases where it is the *employee* who is arguing that nefariously-obtained evidence should be excluded from consideration.

50. The issue of admissibility of covert recordings was re-visited by the EAT in **Vaughan v London Borough of Lewisham & Others** [2013] UKEAT/0533/12/SM. Here, the claimant (who had presented a claim of discrimination) applied for permission to rely on 39 hours' worth of covert recordings that she had made, using a dictaphone, of communications between herself and her managers and colleagues. The claimant alleged the recordings would prove that official notes made by the respondents were inaccurate or wrong. However, at the time when she presented her application to the Tribunal, the claimant did not make available (whether to the tribunal or the respondent) the recordings, or transcripts of the recordings (or any part thereof). The Employment Judge refused the application.

51. On appeal, the EAT stated that the practice of covert recordings is "*very distasteful*". However, it went on to confirm that such recordings are "*not inadmissible simply because the way in which they were taken may be regarded as discreditable*" (citing **Dogherty** with approval).

52. On the particular facts, the EAT held that the Employment Judge had made the right decision (albeit the EAT not convinced with the entirety of her reasoning), as it was not possible for the Judge to form any view as to the relevance and thus the admissibility of the recordings. Had the claimant submitted a more focused application, with reference to particular parts of the recordings and/or or transcripts on which she intended to rely at trial, the outcome could well have been different.

Monitoring at work: the ICO Guidance

53. In terms of practical guidance for employers seeking to understand the boundaries of permissible monitoring (and the principles of good practice), a useful resource is the ICO 'Data Protection Employment Practices Code', Part 3 of which deals with 'Monitoring at work'.[7] The guidance emphasises the importance of:

[7] http://ico.org.uk/for_organisations/data_protection/topic_guides/employment

53.1 Openness and transparency – i.e. ensuring that, save in exceptional circumstances, employees are made aware of the proposed monitoring (and its purpose);

53.2 Education and accountability – i.e. ensuring that a dedicated individual(s) has responsible for authorising monitoring, and has read and familiarised himself with all relevant parts of the Code;

53.3 Security – ensuring that information obtained through monitoring is kept secure and not disclosed to third parties (unless absolutely necessary);

53.4 Avoiding 'mission creep' – i.e. not using information obtained through monitoring for a collateral purpose (unless there are very good reasons to do so);

53.5 Proportionality – i.e. using monitoring for a particular, targeted, purpose; rather than as an all-encompassing default position; and

53.6 Sensitivity – i.e. avoiding reading emails etc which are clearly intended to be personal, private and confidential.

54. The Code also deals with other areas where thorny data protection issues can frequently arise, such as the recruitment and selection of workers, managing employment records, and dealing with information about workers' health (which are outside the scope of this paper).

RIPA

55. RIPA is a complicated and controversial piece of legislation; put simply, it provides a statutory framework which certain public bodies, who wish to carry out particular types of "directed surveillance" (including interception activities, and other covert monitoring "in the course of transmission"), are expected to comply with. Provided that the activities in question fall within the scope of the Act, and the public authority has acted in accordance with the Act, it will be deemed to

have lawful authority for the surveillance in question (i.e. RIPA can provide a form of 'immunity from suit' for public authorities).

56. In the high profile case of **R v Coulson & Another** [2013] EWCA Crim 1026, a submission was advanced on behalf of the defendants that the statutory definition of "in the course of transmission" was not apt to cover the accessing / hacking of voicemail messages 'after the event' – i.e. in circumstances where the voicemail message was not being listed to 'as it happened' (by a person other than the intended recipient), but rather had already been stored on the recipient's handset and phone network. The Court of Appeal disagreed with this interpretation of the legislation, stating that it was:

> "…entirely apt to cover a situation, such as that presently under consideration, where a message having been initially received by the intended recipient is stored in the communications system where the intended recipient may thereafter have access to it by playing back the message…"

57. Accordingly, the interception of such a voicemail message intentionally and without lawful authority was a criminal offence; and the defendants would be required to stand trial in respect of the Crown's allegations.

58. It would seem, however, that RIPA has limited application in the field of employment and workplace surveillance. First, the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000 ("the LBPR")[8] provide lawful authority for public body employers to access and monitor their own systems for standard business purposes, provided that users of the system – i.e. the employees / workers of that organisation – have been notified that such monitoring is taking place.

59. Secondly, not all public bodies are authorised under RIPA to carry out covert surveillance for the same purpose(s). For example, local authorities may only authorise directed surveillance for the purpose of preventing or detecting crime or

[8] SI 2000 / 2699, implemented under RIPA

of preventing disorder (and not, for example, on the potentially much wider ground of being in the interests of public safety).

60. Thirdly, a decision of the Investigatory Powers Tribunal ("the IPT") in 2006 tends to suggest that RIPA is unlikely to regulate surveillance in the context of internal disciplinary investigations. In **C v The Police and Secretary of State for the Home Department** (14 November 2006; Case No. IPT/03/32/H), the complainant, a former police sergeant, was awarded substantial damages and an enhanced (early retirement, ill health) pension, following an accident at work. Approximately a year after his retirement, the police force instructed a firm of private detectives observe the complainant, in order to assess whether he was acting in a manner consistent with his claimed injuries. The complainant became aware of this covert surveillance and presented complaint to the IPT.

61. In the course of its judgment, the IPT observed that:

> "…Cases of unauthorised covert surveillance by a public authority of its employees would appear at first sight to be the kind of case that would fall within the jurisdiction of the Tribunal…The main purpose of RIPA is to ensure that the relevant investigatory powers of public authorities, such as interception of communications and various forms of covert surveillance, are used lawfully and compatibly with [Human Rights] Convention rights…"

62. However, the IPT went on to conclude that the surveillance did *not* fall within the definition of "directed surveillance" in section 26 of the Act; and therefore fell *outside* the scope of the RIPA regime. It based its conclusion on a distinction between the 'ordinary' and 'core' functions of a public authority, holding as follows:

> "…The specific core functions and the regulatory powers which go with them are identifiable as distinct from the ordinary functions of public authorities shared by all authorities, such as the employment of staff and the making of contracts. There is no real reason why the performance of the ordinary functions of a public authority should fall within the RIPA regime, which is

concerned with the regulation of certain investigatory powers, not with the regulation of employees or of suppliers and service providers..."

63. Although this restrictive interpretation of "directed surveillance" does mean that public body employers will face far fewer complaints from aggrieved employees that surveillance has been carried out in contravention of RIPA (and/or its subordinate legislation), importantly it also means that there will be less scope for such employers to claim 'immunity' from legal challenge, by reason of demonstrating compliance with RIPA. The current position is, therefore, somewhat of a double-edged sword for employers.

The Perils of Social Networks

64. The rise and prevalence of social network media (including Facebook, Twitter and LinkedIn) has undoubtedly been one of the biggest technological / communication developments in recent times. Importantly, its use is not restricted purely to private relationships or communications; and inevitably gives rise to a wide variety of challenging issues regarding privacy in the workplace. In recent years there have been a number of first instance Tribunal decisions dealing with the situation of an employee who is dismissed for misconduct, having posted comments on social media sites (and which comments cone to the attention of their employer). Such cases, properly argued, will often give rise to competing submissions on the importance and effect of Article 10 (freedom of expression), as well as Article 8.

65. The pervasiveness of social media in the workplace is highlighted by the fact that ACAS has recently published guidance for employers on social networking and how to develop an effective social networking policy.[9]

66. In **Teggart v Teletech** (NI ET Case No. 704/11), the claimant posted an offensive remark about one of her colleagues on Facebook. The colleague was not one of the claimant's Facebook 'friends', but the remark was nevertheless reported back

[9] http://www.acas.org.uk/index.aspx?articleid=3381

to her. When she complained about the comment, this resulted in further lewd and offensive remarks being posted online. The employer unsurprisingly concluded that the claimant's conduct amounted to gross misconduct and terminated her employment. Part of the claimant's case before the tribunal was that she believed her comment had been 'private' and would not be accessible to her colleague. The Tribunal held that the dismissal was fair; and that the claimant's mistaken belief as to privacy did not prevent her activities from being in the public domain.

67. A similar scenario arose in **Preece v JD Wetherspoons plc** (ET Case No. 2014/806/10); here, the claimant posted inappropriate comments on her Facebook wall, whilst on duty, about customers of the pub (after having been subjected to verbal abuse by them). She mistakenly thought that her privacy settings prevented anyone other than a limited number of 'privileged friends' from accessing her postings. As it was, the daughter of one of the customers (about whom the claimant had written in disparaging terms) viewed the posting and complained to the company. Although the Tribunal indicated that it may have been minded to impose a final written warning in the circumstances, it accepted that the employer's decision to dismiss fell within the range of reasonable responses and was therefore fair.

68. A finding of unfair dismissal was achieved by the claimant in **Whitham v Club 24 Limited t/a Venture** (ET Case No. 1810462/2010). In this case, the claimant (who was employed as a team leader on the company's Volkswagen / Skoda account) posted a status update on Facebook after work, stating that she "worked in a nursery" and that she did "not mean working with plants". A friend replied to her post, suggesting that she worked "with a lot of planks"; to which the claimant responded "2 true xx". Unfortunately for the claimant, two of her work colleagues (who were her Facebook friends – perhaps highlighting an important distinction between the concept of a 'Facebook friend' and an *actual* friend) reported her comments to her manager, which resulted in disciplinary proceedings and ultimately her dismissal (notwithstanding that the claimant apologised in writing for her comments). The respondent contended that her conduct had potentially damaged its reputation and could put its commercial relationship with Volkswagen / Skoda at risk.

69. The Tribunal concluded that the dismissal was unfair. It noted that the claimant had made no reference whatsoever to either Volkswagen or Skoda in her postings; and that no credible evidence had been advanced that the company's commercial relationship with clients could have been jeopardised. The Tribunal also concluded that insufficient weight had been attached by the employer to the claimant's hitherto unblemished record. This case is perhaps a paradigm example of an employer deciding to dismiss for breach of a social networking policy, without being able to articulate or evidence what damage it actually sustained (or could feasibly have sustained) as a consequence of the employee's breach. Whilst employers will plainly be in a stronger position to take disciplinary action against employees in circumstances where a clear written policy is in place and specifically drawn to the attention of employees (including the type of conduct which is prohibited and the potential consequences for non-compliance with the policy – see further the discussion of **Smith v Trafford Housing Trust** below), Tribunals will continue to scrutinise potentially over-officious disciplinary action with care.

70. In **Mulvey v Arriva** (ET Case No. 2302411/12) the claimant, a bus driver and trade union member, was one of several employees who contributed postings to a Facebook group which, though not an official Trade Union webpage, did constitute an 'informal gathering' of members. There was a significant degree of animosity amongst the members of the group, some of whom broadly supported management proposals regarding working conditions, and others who vehemently opposed them. The claimant's comments included critical comments about his employer, including pointing the finger of blame at an unnamed director of the company for losing bus routes. The claimant was also heavily critical of some of his follow union members, including to the effect that he believed union officials were trying to get him sacked.

71. The claimant's comments were subsequently forwarded to management, who ultimately took the decision to dismiss him for a breach of the company's policy on social networking websites and electronic media. The claim of automatic unfair dismissal (on grounds of trade union activities) failed; in the Tribunal's

view, the operative cause of the claimant's dismissal was "*not <u>because</u> he had taken part in the activities of an independent trade union by participating in the Facebook group…but rather because the Respondent regarded the tone, manner and content of his participation as breaching its Policy*" (emphasis in original).

72. The Tribunal further held that the employer did have reasonable grounds for believing that the claimant had committed misconduct. However, the Tribunal concluded, on balance, that the investigation into the alleged misconduct was in all the circumstances sufficiently flawed that it rendered the dismissal unfair. In reaching this decision, important considerations for the Tribunal included:

72.1 The decision maker had consciously decided to ignore the motives of any of the participants (in reporting the claimant's misconduct) and the history of animosity between some of the union members;

72.2 The fact that "*on its face*" what had happened "*appeared to be an internal union dispute*" was not considered or taken into account by the respondent;

72.3 No consideration was given to who made up the Facebook group, or what is was being used for;

72.4 No investigation was carried out into what the privacy settings on the Facebook site actually were;

72.5 No one knew who set the Facebook group up or who had access to it;

72.6 No one spoke to any of the other members of the Facebook group, or any of the other individuals who contributed to the particular threads under consideration;

72.7 The fact that it was said to be a closed group "*seemed to be disregarded*" by the employer; and

72.8 In reality, the employer simply did not know whether the comments were in the public domain or not;

72.9 There was no evidence that the unnamed director had found the claimant's postings offensive;

72.10 There was no evidence that the company's name had been brought into disrepute;

72.11 The thread in question was "*clearly a private exchange, yet [the disciplinary officer] based his decision to dismiss in part at least on a finding that [the claimant] had made "unacceptable public comments about a director and three other people*"'; and

72.12 "*Given the inadequacies [in the investigation process]…without these elements of information, it is hard to see how [the disciplinary officer] was in a position to form a proper view about the gravity of what had taken place and as to the seriousness of the claimant's conduct*".

73. So, whilst the claimant's case was not specifically argued by reference to Article 8 rights, it is clear that considerations of privacy did influence the Tribunal's reasoning process as the fairness of the claimant's dismissal.

74. **Smith v Trafford Housing Trust** [2013] IRLR 86 is a significant recent decision of the High Court concerning the interplay between Facebook postings and disciplinary action. In this case, the claimant was demoted and to a non-managerial position within the Trust (with a consequent 40% cut to his pay), following postings which he made on Facebook about gay marriage, including his opinion that it was "equality too far". The claimant brought an action in the High Court, contending that the demotion was a breach of contract. The High Court upheld his claim, and made a number of important observations which are likely to be relevant to Employment Tribunal claims arising out of social media-related disciplinary sanctions, including:

74.1 A reasonable reader of the claimant's Facebook page would not rationally have concluded that his postings were made on his employer's behalf, or that they reflected its views;

74.2 From the context of his other postings, it was clear that the claimant used his Facebook wall for personal and social purposes, rather than work – it was "*inherently non-work related*" and "*an aspect of his social life outside work, no less than a pub, a club, a sports ground or any other physical (or virtual) place where individuals meet and converse*";

74.3 The fact that 45 of the claimant's Facebook friends also worked for the Trust did not mean that anything he posted online was therefore inherently 'work-related';

74.4 He had not 'targeted' his personal views at any of his colleagues, nor had he thrust his views upon them;

74.5 "*…it was [the claimant's] colleagues' choice, rather than his, to become his [Facebook] friends, and that it was the mere happenstance of their having become aware of him at work that led them to do so. He was in principle free to express his religious and political views on his Facebook, provided he acted lawfully, and it was for the recipients to choose whether or not to receive them*";

74.6 Accordingly, "*[t]he prohibition on the promotion of the political and religious views in the code of conduct did not, as a matter of interpretation and application, extend to Mr Smith's Facebook wall. In any event, the postings in question did not amount to promotion*".

75. Briggs J went on to make some further important observations on the right of employees to express their personal opinions in a private setting (which *may* include Facebook), and not be subjected to detrimental treatment as a result; and the circumstances in which conduct in a private sphere may be deemed to cross the line and justify a disciplinary sanction. In particular:

"82 …The frank but lawful expression of religious or political views may frequently cause a degree of upset, and even offence, to those with deeply held contrary views, even where none is intended by the speaker. This is a necessary price to be paid for freedom of speech. To construe this provision as having application to every situation outside work where an employee comes into contact with one or more work colleagues would be to impose a fetter on the employee's freedom of speech in circumstances beyond those to which a reasonable reader of the code and policy would think they applied. On any view their main application is to circumstances where the employee is working for the trust. For the reasons already given, Mr Smith's use of his Facebook involved his work colleagues only to the extent that they sought his views by becoming his Facebook friends, and that did not detract to any significant extent from the essentially personal and social nature of his use of it as a medium for communication.

83 This issue is of course a matter of fact and degree. It is not difficult to imagine the use of Facebook, for example to pass judgment on the morality of a named work colleague, which would contravene this part of the code and the policy. Furthermore prohibitions upon certain kinds of conduct may be of wider application to managers than to other employees. Nonetheless some objectivity needs to be applied to the analysis of Mr Smith's postings, even if a 'real risk' test is applied to the prohibition on causing upset. Statements about religion or politics may be more prone to misinterpretation than others, but I do not consider it to be a reasonable interpretation of those provisions that they should be taken to have been infringed if language which is non-judgmental, not disrespectful nor inherently upsetting nonetheless causes upset merely because it is misinterpreted.

84 In my judgment Mr Smith's postings about gay marriage in church are not, viewed objectively, judgmental, disrespectful or liable to cause upset or offence. As to their content, they are widely held views frequently to be heard on radio and television, or read in the newspapers. The question remains whether the manner or language in which Mr Smith expressed his views about gay marriage in church can fairly or objectively be described as judgmental, disrespectful or liable to cause discomfort, embarrassment or

upset. Again, it seems to me that it was not. He was mainly responding to an enquiry as to his views, and doing so in moderate language.

85 It is understandable that a person like Miss Stavordale, who misinterpreted Mr Smith's observations as homophobic, would be offended by that interpretation of them. But her interpretation was not in my view objectively reasonable, nor was Ms Hawkins' view that the tone of the postings was offensive. In that context Mr Corfield was right to acknowledge, in his written reasons for demoting Mr Smith, that his postings did not disclose homophobia. The result is that in my judgment the trust's third way of putting its case on misconduct also fails."

76. It is interesting to note the strong emphasis placed by the High Court on how an *objective* reader of the comments would be likely to react (rather than the *actual* reaction of some of the claimant's colleagues, who were personally offended by the comments); and the *degree* of upset or offence which may (objectively) be required, in order to justify disciplinary action. To an extent, this approach replicates the prohibition on harassment found in section 26 of the Equality Act 2010, which requires an Employment Tribunal to consider not only whether the complainant *genuinely* feels that the conduct in question creates an intimidating, hostile, degrading, humiliating or offensive environment for them, but also whether it would be *reasonable* for the conduct in question to have that effect.

Private conduct bringing an employer's reputation into disrepute

77. It is not only employees' Facebook / Twitter postings (etc) that have the capacity to damage the reputation of employers and give rise to disputes over the lawfulness of subsequent disciplinary action. A good example of the conflict between employees' right to live their private lives as they choose, and the right of employers to rely on private behaviour of which it disapproves as a ground for disciplinary action, is **Pay v United Kingdom** [2009] IRLR 139.

78. In this case, Mr Pay was employed by the Lancashire Probation Service to deal with sex offenders. It came to his employer's attention that in his spare time he

was involved in bondage, domination and sadomasochistic performances; and photographs of him involved in such acts were available on the internet. The Probation Service took the view that these activities were incompatible with his role and responsibilities as a probation officer; and were particularly inappropriate having regard to his work with sex offenders. Mr Pay was sacked for gross misconduct and subsequently presented a claim for unfair dismissal (and sexual orientation discrimination). The Tribunal and EAT rejected his claims; and the matter eventually reached the ECtHR for determination.

79. The ECtHR proceeded on the basis that Mr Pay's Article 8 rights were engaged (contrary to the approach which had been taken by the Employment Tribunal, which had found that Article 8 was not engaged, on the basis that his activities had been publicised on the internet and promoted in public places – a conclusion which was not interfered with on appeal to the EAT). However, the ECtHR concluded that any interference with Mr Pay's Article 8 rights was justified, having regard to his professional relationship with the offenders with whom he worked; the need for public confidence in the system to be maintained (including amongst victims of sex crimes); and the potential damage to the Probation Service's reputation.

80. In the ECtHR's view:

> "…given the sensitive nature of the applicant's work with sex offenders, the Court does not consider that the national authorities exceeded the margin of appreciation available to them in adopting a cautious approach as regards the extent to which public knowledge of the applicant's sexual activities could impair his ability effectively to carry out his duties."

81. It further noted that:

> "…given in particular the nature of the applicant's work with sex offenders and the fact that the dismissal resulted from his failure to curb even those aspects of his private life most likely to enter into the public domain, the Court does not consider that the measure was disproportionate."

82. **Leach v Ofcom** [2012] IRLR 839 provides important appellate guidance on the circumstances in which an employer may be permitted to dismiss an employee, on the basis of reputational damage / potential reputational damage to the organisation, arising from *unproven* allegations in respect of an employee's private life. In this case, officers from the Metropolitan Police's Child Abuse Investigation Command informed Ofcom of allegations that Mr Leach was a continuing threat to children; and several meetings took place between the officers and the employer to discuss (*inter alia*) the reliability of the allegations.

83. Ofcom was separately advised (by its press adviser) that even though Mr Leach's role did not require him to have contact with children, the allegations carried a "significant risk of reputational damage" to the organisation if they were true, and were covered by the press. Following a disciplinary process, Ofcom decided to terminate Mr Leach's employment on the ground that the relationship of trust and confidence had irretrievably broken down. The Tribunal concluded that the dismissal was fair, holding that:

83.1 Ofcom had discharged its duty to carry out a reasonable investigation by adopting an appropriately critical approach to the information disclosed to it;

83.2 The dismissal had been for "some other substantial reason" – a potentially fair reason for dismissal;

83.3 Dismissal had fallen within the range of reasonable responses, given the nature of OFCOM's organisation; the nature of the allegations; the nature of Mr Leach's role; the fact that there were no reasonable alternatives to dismissal available; and the fact that Ofcom had reasonably concluded that there had been a fundamental breakdown of trust and confidence.

84. The EAT rejected Mr Leach's appeal against the finding that he had been fairly dismissed. It held (at para. 48, *per* Underhill J):

> "We have found this a worrying case. It is not our role, and we are in no position, to make a judgment as to whether the claimant has committed

offences against children. The Metropolitan Police clearly believe he has, and it would, or in any event, should, not have formed that belief without reliable information. But it is only fair to record that the claimant has been (in effect) acquitted in the only proceedings brought against him; and he has ... produced apparently powerful statements in support of his innocence. If he is indeed innocent, he has suffered a very grave injustice. But the risk of injustice is inherent in a system where the police are permitted to make apparently authoritative "disclosures" of the kind made here, unsupported by any finding of a court; and it will no doubt be said that the risk is the price that has to be paid for achieving the protection of children. In any event, as we have already emphasised, the question for the employment tribunal was not, as such, whether the claimant has suffered an injustice but whether the conduct of the respondent towards him was fair. If he was treated unfairly by CAIC, his remedy is against them."

85. The CA endorsed the reasoning of the EAT. In rejecting Mr Leach's arguments that his Article 8 rights had been infringed by the dismissal, it held as follows (at para. 59, *per* Mummery LJ):

> "…Even if loss of employment opportunities in consequence of a dismissal for a substantial reason were capable of being an interference with the right to respect for private life under Article 8 (which is not some kind of universal haven for the protection of the whole of human life), the interference was justified as having been done for a lawful reason in the light of the perceived risk posed by the claimant and was in accordance with law; the aim was legitimate in seeking to protect confidence in a public regulatory body and in its reputation for acting responsibly; and it was achieved by proportionate means, his dismissal being within the range of reasonable responses to the reason for his dismissal."

86. It is important to consider the reasoning in **Leach v Ofcom** alongside the recent decision of the EAT in **Z v A** [2013] UKEAT/0203/13/SM. In this case, a school caretaker, who had been subject to an allegation of child sex abuse, was dismissed from his job on the ground that the trust and confidence which the school had in

him had fundamentally broken down; this was said to be "due to the very serious nature of the allegations".

87. However, prior to the dismissal the investigating police had expressed *no view* to the school as to the veracity of the allegation, nor had it warned the school against continuing to employ the claimant. The Tribunal concluded that the claimant's dismissal was unfair. The employer's defence failed at the first hurdle, as it was unable to demonstrate a potentially fair reason for dismissal. In the Tribunal's judgment:

> "Fundamentally, the Claimant was dismissed on an accusation leading to no more [than] an unsupported suspicion that he was a risk to children, but without any authoritative evidence or opinion to support it. That, in my finding, was not a substantial reason such as justified the dismissal of an employee holding the position that the Claimant held."

88. The EAT upheld the decision of the Tribunal, stating (at para. 29, *per* Langstaff J):

> "Ground 1 [of the Notice of Appeal] asks us to treat the Tribunal's hands as tied, despite consistent authority suggesting that though an employer's decision to dismiss where there has been an allegation (but no conviction) of child abuse may well, and indeed generally, be fair it is not inevitably so. Moreover, there is no presumption that such a dismissal will be fair unless there is some exceptional reason to decide otherwise: so to hold would be to introduce an inadmissible gloss on the wording of Section 98 of the Employment Rights Act 1996. That section calls for the employer first to establish a qualifying reason for the dismissal (therefore, in the present case it was for Z to establish that there was some other substantial reason of a kind justifying dismissal – and those last five words should not be overlooked), after which, once achieved, fairness falls to be determined without a burden being placed upon either party either to prove or disprove it."
>
> (Underlining added)

89. At para. 36 of its judgment, the EAT provided the following guidance:

> "Standing back from the detail of the appeal, unsubstantiated allegations of sex abuse, which are given no additional force by the endorsement of police CAIC or other authoritative body, give rise to one of the most difficult issues of balance which an Employment Tribunal has to perform. The employer is always likely to be in a cleft stick, unless it already has some reason of its own to suspect the employee, or some good reason to think that the allegations are out of character to an extent that diminishes their reliability. The duty of such an employer concerned with serving children is first and foremost to those children, but that does not remove its responsibility to its employees. Every case will turn upon its own facts. The principles to be applied have been clearly set out in **Leach v Ofcom** and it would be unwise of us to add any contribution of our own. We would, however, emphasise that those principles leave room for a Tribunal to draw its own conclusions both as to whether there was a reason of a kind justifying dismissal (emphasising those last words, which may too often be forgotten in examining a supposed SOSR), and whether having regard to equity and the substantial merits of the case, in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating that reason as sufficient. HHJ Clark, on the Sift, thought that the views of Lay Members would be of particular value as to the approach to be taken by an employer to a delicate and difficult issue such as this. Thus although the Judge sat alone below, HHJ Clark ordered an appeal panel of three and we have sat as such. All three of us had sympathy for the employer's position: but had the Lay Members been occupying their industrial roles each would from their respective positions have endorsed the views of the Employment Tribunal."

90. Finally in this section of the paper, whilst raising no great points of legal principle regarding the issue of disrepute / reputational damage, worthy of mention is the recent decision of the EAT in **GM Packaging (UK) Ltd v Haslem** [2014] UKEAT 0259/13/2901. Employers across the land will no doubt be tremendously

reassured and comforted by the words of HHJ Peter Clark who, overturning the Tribunal's finding of unfair dismissal, held as follows:

> "[The Tribunal] found the dismissal of SH unfair because, in their view (paragraph 92), no reasonable employer would categorise sexual activity between two adults out of hours in a deserted office as gross misconduct justifying summary dismissal. We are prevented by Judge Richardson's order from considering whether such a conclusion is legally perverse. However, we agree with Ms Jeram that, despite their self-direction to the contrary, this is a plain example of the ET impermissibly substituting their views for that of the employer.
>
> …
>
> The conduct in question involved a senior manager engaging in sexual activity with a member of his staff on the company's premises after hours, accompanied by a conversation which revealed, at the least, a complete lack of respect for his boss. Plainly, dismissal for that conduct fell within the range of reasonable responses open to the employer."

CRB Checks and Access to Employment

91. Since its inception, the statutory regime of Criminal Records Bureau ("CRB") checks has long been the subject of considerable debate. In **R (on the application of T) v Chief Constable of Greater Manchester & Others** [2013] EWCA Civ 25, the CA held that the scheme as it presently operated was incompatible with Article 8 of the ECHR. The CA held that while the scheme clearly pursues legitimate aims (protecting employers and vulnerable persons, and enabling employers to make an assessment as to whether an individual is suitable for a particular kind of work), a blanket rule requiring prospective employees to disclose all recorded convictions and cautions is disproportionate.

92. The CA considered the case of, among others, T, who at the age of 11 received two warnings from Manchester Police in connection with two stolen bicycles. At the age of 17 T sought a part-time job at a local football club. The club requested

a CRB check that revealed the Police warnings (which T believed to be spent). Following representations from T, the Police agreed to 'step down' the warnings so that only the Police had access to the records and they would not be disclosable to third parties. However, in 2010, the process of 'stepping down' records was abolished.

93. In September 2010, T enrolled on a university course which involved teaching and contact with children. Again, a CRB check revealed the existence of the old Police warnings. In the course of its judgment, the CA noted that in the ten years which had passed since the Police warnings had been issued to T, he had not been subject to any further criminal proceedings of any kind; and "*indeed his conduct appears to have been exemplary*".

94. In T's case it was difficult to see what relevance the warnings could have to the question of whether he was suitable to be enrolled on the university course and have contact with children. The CA held that a fundamental objection to the scheme is that it "*does not seek to control the disclosure of information by reference to whether it is relevant to the purpose of enabling employers to assess the suitability of an individual for a particular kind of work*". Importantly, the CA also rejected the assertion that an employer can be trusted to assess the relevance of a conviction or caution by taking into account matters such as the seriousness of the offence, the age of the offender at the time and the lapse of time since it was committed. In the CA's view, evidence suggests that employers do not always handle and interpret this sort of personal information correctly and fairly.

95. In light of its finding that the scheme was incompatible with Article 8, the CA went on to hold that the scheme under the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975, by which T was obliged, subject to a civil penalty, to disclose the warnings if asked by a potential employer, was also disproportionate.

96. Permission to appeal to the Supreme Court was granted; and a hearing took place in late 2013. A decision from the UKSC is eagerly awaited.

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