This article from European Employment Law Cases is published by Eleven international publishing and made available to anonieme bezoeker

basis that there were reasonable suspicions of theft and there was no other option that would sufficiently protect the employer's rights whilst being less intrusive from the point of view of the employees.

The claimants argued that the tribunals' acceptance of the covert footage as valid evidence was in breach of Articles 6(1) (right to a fair trial) and 8 (right to respect for private life) of the European Convention on Human Rights and that the Kingdom of Spain should be held accountable for failing to uphold their rights.

Summary of the judgment

The ECtHR held that:

1. Under Spanish data protection law, the company should have given clear prior notice to the employees that they were under surveillance.
2. The covert surveillance was not a proportionate measure and did not comply with Spanish law. Consequently, there was a breach of Article 8 of the Convention.
3. The employees were allowed by the courts to challenge the authenticity of the footage in adversarial proceedings. The footage was not the only evidence used by the court in order to hold the dismissals as fair (as there were also witness statements) and therefore, there was no breach of Article 6(1).

The ECtHR awarded the employees damages, to be paid by the Kingdom of Spain.

Commentary

Luis Aguilar and Jacobo Martinez *[2]

The case reminds us of the importance of carrying out a detailed legal analysis before installing video cameras surveillance in the workplace in Spain. As the footage collected will be considered as personal data relating to the employees, it is vitally importance to give employees prior notice of the installation of cameras and the possible disciplinary use of any evidence obtained using them. Failure to do so will be a breach of the employees' fundamental right to privacy.

2. *Jacobo Martínez Pérez-Espinosa is partner and Luis Aguilar is a legal director with Eversheds Sutherland Nicea, Madrid.*

ECtHR 23 January 2018, application no. 15374/11, Unfair dismissal, Other fundamental rights

Mr Güç – v – Turkey, Turkish case

Summary

Dismissal for harassment despite acquittal in criminal proceedings is not incompatible with Article 6(2) of the Convention (presumption of innocence).

Facts

Mr G was a caretaker employed at the Public Education Centre in Giresun, Turkey. On 8 February 2006, he was taken into police custody on suspicion of child molestation, after being caught in an allegedly indecent position with a 9-year-old girl at the primary school located in the same building as the Public Education Centre.

On 8 March 2006, the public prosecutor charged Mr G with the sexual abuse, sexual assault and unlawful detention of a minor. During the proceedings, various statements were taken from (former) colleagues and parents, most notably from an eyewitness who had caught Mr G. Most of the evidence was indirect. Ultimately, on 18 December 2008 the Espiye Criminal Court of First Instance ordered Mr G's acquittal, holding that it was not possible to establish beyond reasonable doubt that he had committed the sexual acts forming the basis of the charge.

(Partly) parallel to these criminal proceedings, the Public Education Centre had started a disciplinary investigation into allegations of harassment by two inspectors. They took various statements and took into account a report dated 2003 describing the physical and social developmental attributes of the girl as weak and very timid, diagnosing autism. The investigation report found the allegations to be well-founded and recommended the dismissal of Mr G for "*shameful and disgraceful conduct incompatible with the civil service*", as provided under Turkish law. The Public Education Centre therefore dismissed Mr G.

Mr G appealed all the way up to the Supreme Administrative Court, arguing that he had not been convicted (and indeed had been acquitted). In 2010, he appealed to the ECtHR, arguing that his dismissal had been incompatible with Article 6(2) on the presumption of innocence. During the ECtHR proceedings, he made

doi: 10.5553/EELC/187791072018003001031

This article from European Employment Law Cases is published by Eleven international publishing and made available to anonieme bezoeker

another, unsuccessful, attempt to re-open his case in Turkey.

ECtHR's Findings

As regards the admissibility of his appeal, Article 6(2) safeguards the presumption of innocence until someone is proven guilty according to the law. There are two aspects to the presumption of innocence. First, there is a prohibition against public officials from making premature statements about a defendant's guilt. This acts as a procedural guarantee to ensure the fairness of the criminal trial itself, but also requires that no representative of the State should say that someone is guilty before that has been established by a court, outside the scope of criminal proceedings. The second aspect is that a person's innocence must not be called into question in subsequent proceedings. In the present case. This implies that Article 6(2) applies to the case as it falls within the scope of the first aspect.

As regard the merits of the appeal, Turkey pointed out that the burden of proof in disciplinary proceedings is different than in criminal proceedings. Further, it argued that dismissal was not decided on from a criminal law standpoint. Article 6(2) first and foremost applies within the context of criminal proceedings. There is a distinction between statements about (mere) suspicions and clear declarations about someone's guilt (in the absence of a conviction). Public officials must therefore choose their words carefully, but their words must also be placed in context. In previous, similar cases, the ECtHR has held that Article 6(2) does not prevent authorities vested with disciplinary powers from imposing sanctions for acts which also have been the subject of criminal proceedings, where such misconduct has been duly established. The two sets of proceedings may take place in parallel. Further, exoneration from criminal responsibility does not, as such, preclude the establishment of civil or other forms of liability based on the same facts, albeit based on a less strict burden of proof, unless this would impute criminal liability nonetheless.

In the present case, the ECtHR must determine whether the Turkish (disciplinary and administrative) authorities breached the presumption of innocence by their reasoning or language. It notes that the legal basis for the dismissal was "*shameful and disgraceful conduct incompatible with the civil service*", which as such does not entail any criminal connotations. The two investigators established the facts independently. There is nothing to suggest that the administrative procedure was interfered with by the criminal investigation. Moreover, the disciplinary authorities described the incident as "harassment of a minor", not "sexual abuse" or "sexual assault". The use of "harassment" does not in itself present a problem, as it is used in a wider context than in criminal law alone. While there might have been a not-entirely-appropriate reference to a statement by someone who had heard rumours about previous indecent behaviour by Mr G (prior to the incident taking place), even the use of unfortunate language can be tolerated, in certain circumstances, bearing in mind the nature of the task of the domestic courts. Also, a civil court's reliance on a statement made, or evidence produced in the criminal proceedings, is not itself incompatible with Article 6(2) as long as reliance on that evidence does not result in the civil court commenting on the defendant's criminal responsibility or drawing inappropriate conclusions. Even if the Turkish court considered Mr G to be guilty, use of this statement alone did not amount to an imputation of criminal guilt.

Ruling

The ECtHR:
- declares the application admissible; and
- holds that there has been no violation of Article 6(2) of the Convention.

ECtHR 23 January 2018, application no. 60392/08, Unfair dismissal, Other fundamental rights

Seven – v – Turkey, Turkish case

Summary

The Turkish Supreme Administrative Court cast doubt on a dismissed police officer's innocence by failing, in an appeal review, to take proper account of the fact that he had been acquitted of rape, in breach of the presumption of innocence contained in Article 6 §2 of the European Convention on Human Rights.

Facts

Hamit Seven is a Turkish national who served as a police officer in Ankara, Turkey. In 2002, a woman filed a criminal complaint against Hamit and a colleague police officer, alleging that she had been taken into a police car and raped. The police officers admitted that they had picked up the woman, while patrolling, but allegedly did this because the woman looked intoxicated, had hailed them, stopped their car and asked for their help to go to a safe place. They had taken the woman to the home of Hamit's colleague allegedly with the inten-

doi: 10.5553/EELC/187791072018003001031