

ECtHR 17 October 2019, applications no. 1874/13 and 8567/13 (López Ribalda), Privacy, Fair Trial, Unfair Dismissal

López Ribalda and others – v – Spain

Legal background

The European Convention on Human Rights (the ‘Convention’) provides for various fundamental rights. For example, Article 8 concerns the right to respect for private and family life. Article 6(1) entails the right to a fair trial.

Facts and initial proceedings

The applicants, five Spanish nationals, worked as cashiers or sales assistants in a supermarket. In 2009, there were irregularities between the stock and sales, leading to losses for over five months. The supermarket manager then installed both visible and hidden CCTV cameras.

Using these cameras, it was established that 14 employees, including the five applicants, took part in the theft of supermarket goods. They were dismissed on disciplinary grounds, for helping customers and other co-workers to steal items as well as stealing themselves.

Three of the five applicants signed a settlement agreement in which they acknowledged the theft. They also committed not to challenge their dismissal. In exchange, the supermarket would not initiate criminal proceedings.

All applicants (including the three who had signed a settlement agreement) started proceedings in Spain for unfair dismissal. They asserted that the use of covert cameras had breached their right to privacy and hence could not be admitted as evidence. The Employment Tribunal dismissed their claims. For those who signed the settlement agreements, their claim was invalid because of that. As regards the other two employees, there had been no breach of their right to privacy, the

recordings were admitted as evidence and the dismissals were deemed lawful.

The High Court upheld the judgments. In particular, one employee had relied on domestic legislation requiring prior notion of surveillance, but it was held that such measures instead were subject to a proportionality test. The supermarket had acted lawfully as its actions were justified for suspicion of misconduct. They were also appropriate for the aim, and necessary.

The applicants then claimed before the European Court of Human Rights that the use of covert video surveillance and the acceptance thereof as evidence were in breach of Articles 8 and 6(1) of the Convention. Moreover, they asserted that the settlement agreements were signed under duress by virtue of the video material and could not form evidence that the dismissals had been fair.

On 9 January 2018, the Chamber of the Court held that there had been a breach of Article 8, but not of Article 6(1). After a request by the Spanish government, the case was then referred to the Grand Chamber.

Considerations and decision

Article 8: Principles

The principles in the case *Barbulescu – v – Romania* are transferable to the case at hand. So the domestic courts had to consider:

- i. Whether the employee has been notified about the possibility of video surveillance and the implementation thereof. This notification should normally be clear about the nature of the monitoring and be given prior to implementation thereof.
- ii. The extent of the monitoring and degree of intrusion of the employee’s privacy. This includes the level of privacy in the area, any limitations in time and space and the number of people that have access to the results of the monitoring.
- iii. Whether the employer has provided legitimate reasons to justify the monitoring and the extent thereof. A more intrusive monitoring requires a weightier legitimate reason.
- iv. Whether less intrusive methods were necessary, to be assessed in light of the particular circumstances of the case.
- v. The consequences of the monitoring for the employees, particularly the use of the results of the monitoring vis-à-vis the stated aim of the measure.
- vi. Whether there have been appropriate safeguards, especially where the monitoring is intrusive. Exam-

ples: information to the employees and staff representatives about installation and the extent of monitoring, a declaration to an independent body or the possibility to make a complaint.

These factors must be used to decide whether the right to respect for their employees' private life was sufficiently protected when weighing the competing interests of the employer and the employees.

Article 8: Application

The national authorities had to strike a balance between two competing interests, namely the right to respect for the private lives of the employees versus the possibility for the employer to ensure the protection of its property and the smooth operation of its company, particularly by exercising its disciplinary authority.

With there being a Spanish framework as well as case law, the question is whether the courts breached the Convention by foregoing the fact that the employer had failed to fulfil its domestic legal obligation to provide information about the monitoring.

The domestic courts found that the video surveillance had been justified by legitimate reasons, namely the suspicion of thefts. The employer also had a legitimate interest in taking measures in order to discover and punish those responsible, with the aim of ensuring the protection of its property and the smooth functioning of the company.

The degree of intrusion was limited, since the cameras only covered the checkout area (where the thefts were likely to be committed) and only lasted as long as was needed to confirm theft. While the cameras operated permanently, it was in a place that was open to the public and where there was permanent contact with customers. In this context, it must be observed how much privacy an employee can reasonably expect – an office or even a toilet demand more privacy than a place that is open to the general public. Moreover, the camera footage was only seen by the supermarket manager, the legal representative and the union representative. The intrusion thus was limited.

The recordings were used for no other purpose than to trace those responsible for the losses. There also were no other means to fulfil the legitimate aim pursued. The fact that the domestic courts could have explored this more in-depth, does not change this.

Last, while there are legal safeguards which require prior notification of video surveillance, the provision of information to the individual being monitored and its extent constitute 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. However, if such information is lacking, the safeguards deriving from the other criteria will be all the more important.

In the present case, the domestic courts were able, without overstepping the margin of appreciation, to take the view that the interference with the applicants' privacy was proportionate. While one cannot accept the general statement that the slightest suspicion of misappropriation or any other wrongdoing might justify covert video surveillance, the reasonable suspicion of serious misconduct and the extent of the losses in the present case may constitute weighty justification. This all the more 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.

Moreover, the applicants chose not to make a claim based on remedies provided for by the Personal Data Protection Act.

Under those circumstances, the national authorities did not fail to fulfil their positive obligations under Article 8. There had been no violation.

Article 6: Principles

The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. Regarding evidence used, it must be examined whether the applicants were given an opportunity to challenge the authenticity of the evidence and to oppose its use. The quality of the evidence must be taken into consideration, as must the question whether the circumstances in which it was obtained cast doubt on its reliability or accuracy.

While the principles set out above were developed in a criminal law context and the States have greater latitude when dealing with civil cases, they may nevertheless form inspiration. In the present case, they are applicable to the examination of fairness of the civil proceedings.

In this case, the applicants had been able to contest the use of video footage as evidence and the courts had motivated their decisions extensively. The applicants had not challenged the authenticity and accuracy of the video footage. Moreover, there had been other evidence as well. The video evidence thus did not undermine the fairness of the trial.

The applicants who signed a settlement agreement had been able to challenge the settlement agreements and their use of evidence. The courts' finding that no duress or intimidation had been used does not seem arbitrary or manifestly unreasonable. Therefore, there also had not been an infringement.

Concluding remarks

The judges De Gaetano, Yudkivska and Grozev had a dissenting opinion in that they found a breach of Article 8. This opinion is annexed to the original judgment. [<http://hudoc.echr.coe.int/eng?i=001-197098>]