



**Workplace investigations
and Privacy**
by
Richard Owen-Thomas

Workplace Investigations

Investigations form an important part of:

- Grievances
- Disciplinary

Workplace Investigations

The Basics

A proper investigation is essential but the process as a whole must be considered

Workplace Investigations

Shrestha v Genesis Housing Association Ltd [2015] EWCA Civ 94, [2015] IRLR 399

- Claimant dismissed for inflating travel expenses
- *“What mattered was the reasonableness of the overall investigation into the issue”*

Workplace Investigations

City and County of Swansea v Gayle
[2013] IRLR 768

- Employee seen in a gym when he ought to have been at work
- Placed under surveillance

Workplace Investigations

- *“whether the investigation leads and lends proper weight to the reasons which inform the belief”*
- Tribunal found there had been an unwarranted breach of Article 8 and therefore the Dismissal was unfair
- The EAT couldn't have failed to agree less

Workplace Investigations

- No right to privacy in public
- No right to privacy during work hours
- No right to privacy while committing a crime
- There is a public interest in detecting crime

Anyway – the investigation either supports dismissal or it does not

Workplace Investigations

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. What is reasonable or unreasonable must have that focus. The decision which is to be held reasonable or unreasonable is that of dismissal.

Workplace Investigations

Barbulescu v Romania (App no 61496/08)
[2016] IRLR 235, ECtHR

- Gayle tested by the ECtHR
- Use of emails at work for personal reasons discovered during an investigation

Workplace Investigations

European Court held:

Article 8 was engaged; but there was no breach, because:

- Reasonable and proportionate for the employer to protect its interests in this way

Workplace Investigations

Factors which contributed to the decision:

1. There was a clear contractual term outlawing *any* personal usage;
2. that policy was enforced – to the claimant's knowledge, another employee had been dismissed not long before for just such misconduct;

Workplace Investigations

3. when first challenged, the claimant had denied *any* personal usage;
4. the employer and the Romanian courts had concentrated on the *type of usage* involved here (personal, contrary to the contractual term), not on the *content* of the emails, in judging the misconduct.

Workplace Investigations

The decision was not unanimous

- The policy had been drawn to the employee's attention
- A colleague had recently been dismissed for breaching the internet policy
- The connection to the outside world can be misused to the employer's detriment

Workplace Investigations

The employee had denied personal use :

- This did not prevent the application of Art 8
- It did mitigate against the effect of the intrusion

Workplace Investigations

Distinguished:

Copland v United Kingdom (App. no. 62617/00, (2007) 25 BHRC 216, where personal use was allowed and the surveillance aimed to determine whether the applicant had made 'excessive use' of the facilities); in the instant case, the employer's regulations explicitly prohibited all personal use of company facilities, including computers and internet access.

Workplace Investigations

Distinguished:

Peev v Bulgaria [2007] ECHR 64209/01)

- Personal belongings stored in workplace searched
- The Court held that the search amounted to an interference with the applicant's 'private life'; the Court found that the applicant had a reasonable expectation of privacy with regard to the personal belongings that he kept in his office. No Policy against keeping personal items at work and no warning

Workplace Investigations

Distinguished:

Halford v United Kingdom [1997] IRLR 471, where one of the landlines of the office had been designated for the applicant's personal use.

- Pre – ECHR incorporation (employer was a public body and so direct effect)
- No warnings about interception
- The lack of a prohibition on the interception of internal calls at the time. (Now RIPA 2000, amongst others)

Workplace Investigations

Key points

- Policy
- Limit expectations
- Distinguish between act and content



Questions and Answers

Richard Owen-Thomas

Specialising in:

Commercial | Crime | Employment | Family | Personal Injury & Clinical Negligence
Property & Chancery | Public Law & Regulatory | Technology & Construction