Where are the limits of monitoring communications if you suspect misconduct, e.g. Hotmail/Gmail, Instagram/Facebook on work devices or work email access on personal devices?

White Paper Conference

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I always feel like someone is watching me… I have no privacy

The legal context

- Data protection rights
- Electronic monitoring protection
- Rights of privacy
- Trust and confidence
- Risk of claims

Data protection considerations

Before monitoring can take place, employers should:

- Establish the lawful basis for processing the data – IT use and social media policy
- Carry out a data protection impact assessment (DPIA)
- Transparency is key - ensure that the employee has been given notice that the monitoring may be carried out
- Ensure your Employee Privacy Notice/BYOD policy is fit for purpose

Statutory regulation of communications

- **Investigatory Powers Act 2016** and the **Investigatory Powers (Interception by Businesses etc. for Monitoring and Record-keeping Purposes) Regulations 2018**
- It is an offence under the IPA 2016 to intercept a communication unless the activity falls within an exemption. **One exemption is lawful authority**
- The Monitoring Regulations provide the routes for relying on lawful authority. This can be
  - with consent of those involved, (but includes consent of sender and recipient, so difficult for external communications)
  - without consent – which is likely to be more relevant for employers
- There is a lengthy list of reasons why businesses can monitor without consent – this includes "*establishing whether company staff, who are using the relevant telecommunications system are achieving the standards required by their company in the course of their duties*"
- In order to rely on this exemption the employer must make all reasonable efforts to inform the employees that the interception will take place – i.e. have a policy in place

Is there a right to privacy?

- Employees have a human right to a private and family life, both in and out of the workplace (Article 8, European Convention of Human Rights)
- Private sector employees will most likely link a claim based on their privacy rights to another claim e.g. unfair dismissal
- In UK monitoring cases alleging breach of A.8, relevant factors include:
  - Whether the employee had a reasonable expectation of privacy
  - Whether the IT policy explained monitoring would happen
  - If misconduct is alleged then the employee is considered to be on notice of an investigation and possible monitoring
  - Balancing of an employer's other obligations, e.g. the health and welfare of others
- *Barbulescu v Romania* – employer's monitoring of the personal use of Yahoo messenger amounted to a breach of right to privacy – "*an employer's instructions cannot reduce private social life in the workplace to zero.*"

Brake & another v Guy & others (2022)

- Claimants former owners of business acquired by defendant and now employees
- Alleged misuse of private information and breach of confidence when defendant accessed personal emails sent by claimants from business general ‘enquiries’ account
- Court of Appeal upheld finding that no reasonable expectation of privacy and no right of confidentiality in respect of those emails sent and received using business account
- Followed *Bloomberg LP v ZXC* to reinforce the fact specific nature of the enquiry
- Confirmed burden is on claimants to show reasonable expectation of privacy – facts in this case did not support that
- Also said that where there was misconduct this was a factor which could be taken into account in considering the expectation of privacy

Trust and confidence

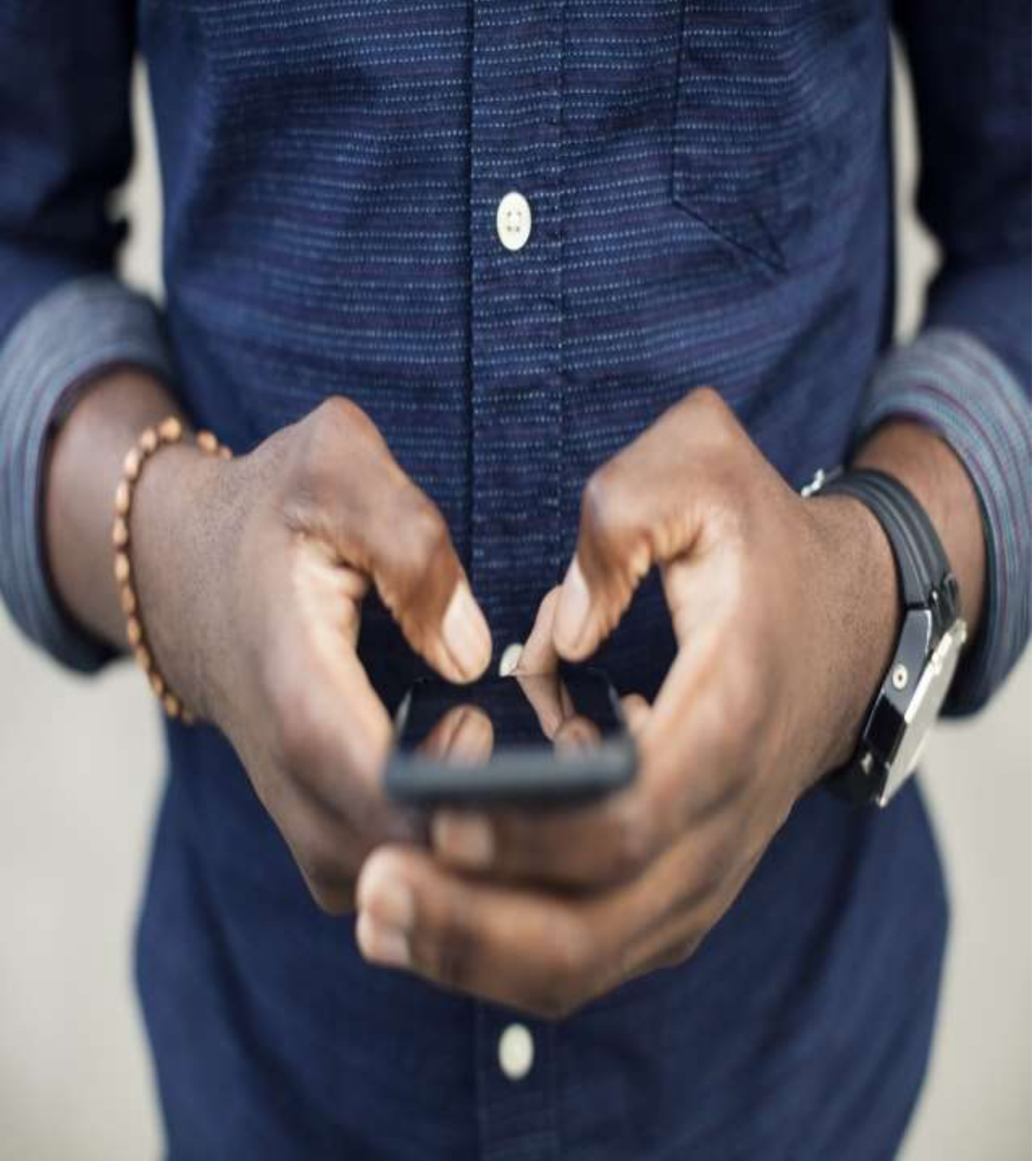
- The implied term of trust and confidence is a **mutual obligation** applying to both employers and employees
- Excessive or unwarranted monitoring by the employer may breach this term
- If the breach is sufficiently serious an employee may claim **constructive dismissal**
- If successful, in addition to compensation, the employee is released from their post-termination restrictions (e.g. non-competes)

Risk of claims

- Possible an employee will counterclaim based on stand alone data protection or other rights relating to monitoring – e.g. *Brake*
- The employee could also bring a claim for constructive dismissal – most relevant in employee competition situations
- Most likely claims are that the monitoring impacts the fairness of dismissal and/or is discriminatory:
  - Substantive fairness - The unfair dismissal legislation must be read and given effect so as to be compatible with Article 8 HRA
  - Procedural fairness - A reasonable investigation may be rendered unreasonable if the employee's data protection rights, right to privacy etc are disregarded
  - Discrimination – difference in treatment/detrimental treatment may leave the employer vulnerable

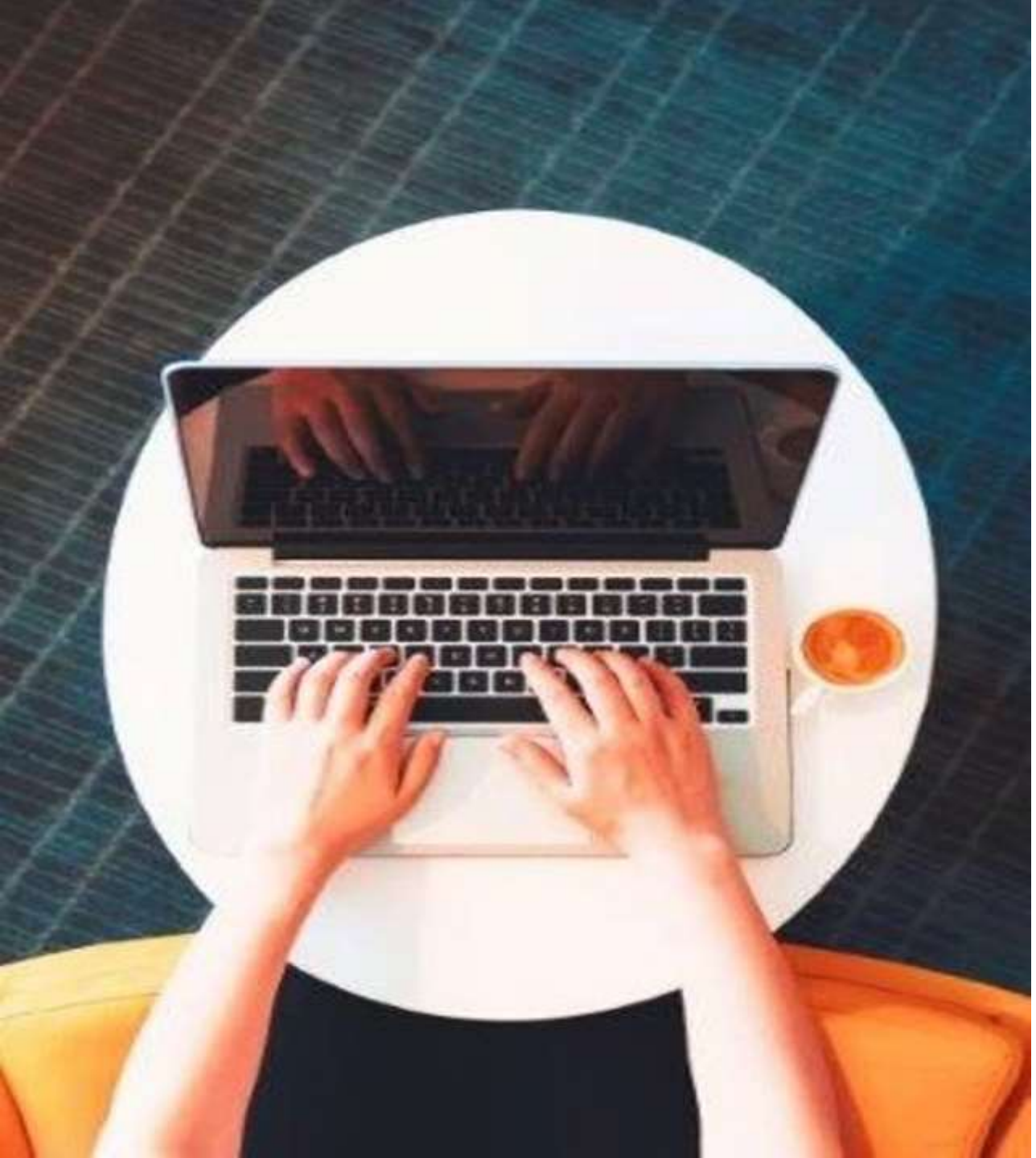
Garamukanwa v UK (2019)

- Claimant an employee accused of harassment by a colleague
- Alleged misuse of private information and breach of confidence when employer used evidence provided by the police after criminal complaint investigated
- European Court of Human Rights found the dismissal was fair:
  - No right to privacy engaged – this was lost after the initial complaint of harassment in relation to evidence relating to that complaint
  - Even if there was a right of privacy, it was proportionate for the employer to interfere with it to protect the health and welfare of others
  - But…fact specific investigation as to whether privacy was engaged



Limits on monitoring personal communications on work devices in a misconduct situation

- Practical steps:
  - Consider other means of investigation
  - Check privacy notice
  - Document formal or informal DPIA
  - Do not review obviously private and irrelevant information
  - If relevant evidence may include private information, document justification for looking at it
  - Limit circulation of evidence obtained



Limits on monitoring work email access on personal devices in a misconduct situation

- Unless the employee is using the device for work purposes, unlikely to obtain access to personal devices voluntarily:
  - May be able to monitor access to remote work systems, likely lower risk, as less expectation of privacy – access for work purposes
- If the employee uses a personal device for work:
  - Check technology – depending on how it is set up dictates access
  - Ensure you have good BYOD policy
  - If you can access private information, proceed with caution

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