

CLIENT ALERT

European Court of Human Rights Confirms the Proportionality Test for Use of Hidden Cameras on the Work Floor

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On October 17, 2019 the Grand Chamber of the European Court of Human Rights (ECHR) revised the judgment of the ECHR's Third Chamber in *López Ribalda and Others v. Spain*. The Grand Chamber decided that in certain circumstances, and in conformity with the proportionality test in article 8 of the European Convention on Human Rights (the Convention), the use of hidden surveillance cameras on the work floor may be justified if the intention is to reveal a criminal offense (in this case theft).

The Facts

In the context of an internal investigation to discover the reason for inconsistencies between the stock level and the sales figures, an employer installed CCTV cameras in his supermarket. Some of them were visible, others were hidden. During a staff meeting the employees were informed only about the installation of the visible cameras, on account of the management's being suspicious of theft. A sign indicating the presence of video surveillance was installed. After ten days of constant monitoring, 14 employees were identified and dismissed for theft, with immediate effect.

Two of the 14 dismissed employees initiated court proceedings on the grounds that the use of hidden cameras breached their fundamental right to protection of their privacy. They requested that the recordings obtained by these means be considered inadmissible as evidence in the proceedings.

The Spanish Employment Tribunal dismissed the employees' request and found that in light of the Labor Regulations and article 18 of the Constitution (right to privacy), the fundamental right of the employees had not been breached because the actions taken were:

- **Justified** by the reasonable suspicion of serious misconduct.
- **Appropriate** given the intended aim, namely to verify whether an employee was in fact committing misconduct and to adopt sanctions if necessary.
- **Necessary**, because the recordings could provide evidence of the misconduct in question.
- **Proportionate**, because the monitoring was limited in space and time to what was required to fulfill the aim.

The High Court of Justice of Catalonia in turn confirmed the proportionality test as performed by the Spanish Employment Tribunal and agreed that, as a result, the video-surveillance measures taken by the employer did not require the prior consent of the employees under section 6(2) of the Spanish Personal Data Protection Act.

Defeated at the national level, the employees brought the case before the ECHR.

The Grand Chamber's Decision

When evaluating whether the Spanish Courts construed their judgment in conformity with article 8 of the Convention, the Grand Chamber took the opposite view to the Third Chamber and concluded:

- **The steps taken by the employer were justified:** the installation of the video-surveillance was justified by legitimate reasons, namely the suspicion of theft following significant unexplained losses recorded over several months.
- **Regarding the extent of the monitoring and the degree of intrusion,** the surveillance was limited in terms of area and of staff being monitored because the cameras covered only the checkout area, which was the area where it was deemed likely that the losses occurred. The duration of the surveillance did not exceed what was necessary in order to confirm the suspicion of theft (10 days).
- **Consequences:** in the circumstances of the case, there were no other means by which to fulfill the legitimate aim pursued and the measures taken could therefore be regarded as “necessary.”
- The employees performed their function in a supermarket, a **place that is open to the public** and that involves constant contact with customers. The level of protection of privacy that an employee could reasonably expect differs depending on the place of the video-surveillance: a very high level of protection may be expected in places that are private by nature (offices, toilets, cloakrooms, etc.) but a manifestly lower level of protection is reasonable in places that are visible or accessible to colleagues or to the general public.

In light of these factors, the Grand Chamber took the view that the intrusion into the employees’ privacy did not attain a high degree of seriousness and, hence, was admissible in the specific circumstances.

Regarding the **hidden cameras and the lack of information**, the Grand Chamber was of the opinion that although in general (and particularly in the context of an employer-employee relationship) the principles of transparency and the rights on information are fundamental, 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.”* (§131-133). In the present case, the Grand Chamber confirmed that the national courts had applied the proportionality test correctly by deciding that the employer’s failure to inform the employees of the hidden cameras on the basis of the personal Data Protection Act was not relevant as *“only an overriding requirement relating to the protection of significant public or private interests could justify the lack of prior information.”* Moreover, the employees *“had other remedies available to them, as provided for by the [Spanish] Personal Data Protection Act, for the specific purpose of obtaining sanctions for breaches of that legislation.”*

Takeaways

This decision is of particular interest in the labor law context for its bearing on the use of evidence obtained in an irregular way, such as via irregular monitoring. In Belgium, there is a multitude of European and national rules regarding data processing and privacy that have to be respected by the employer and it is not easy to ensure compliance. An employer wanting to rely on irregular (monitoring) evidence to dismiss an employee must take account of the potential risk that this evidence will be rejected by the courts, especially as some Belgian courts have traditionally defended a hard line attitude (e.g., the Belgian Supreme Court). This judgment confirms that the ECHR takes a pragmatic approach that balances the employees' fundamental right of privacy as protected by article 8 of the Convention against the protection of significant private interests of the employer.

As a result of this case, companies now have a clearer mandate to consider using hidden camera surveillance in certain situations (suspicion of theft, fraud, corruption, etc.). They may even be able to justify the hidden monitoring of e-mails, internet usage, etc., providing they have applied the proportionality test in article 8 of the Convention to their specific circumstances, and have made sure that all other relevant (national) legislation is respected.

You can read the [full text of this decision on the ECHR website](#) in English or French.

Our Brussels Labor & Employment and our Privacy and Cybersecurity practices are available to advise and assist companies with respect to HR privacy questions and all matters related to data protection and privacy issues.

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