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## Surveillance - How much is too much?

Jeremy Hazelhurst 19 July 2014

**A host of new monitoring tools mean no part of working life is truly private. But the law may have other ideas...**

Several years ago, a large US retailer wanted to know why staff in some stores seemed to sell far more than others. Bosses suspected it was something to do with team spirit, the way people spoke and the style of interaction. If the question they posed was ordinary enough, their solution was unusual: the business persuaded salespeople to carry small devices, indistinguishable from ordinary ID badges, which measured where they were and recorded their voice patterns, as well as gauging stress levels.

The data proved revelatory. In shops with two floors, salespeople stuck to their own floor. It also showed that the number of customer interactions varied greatly, and that some staff were doing too much talking and not enough listening. The result was an end to two-storey shops, and a steady stream of text messages sent to staff on the floor to remind them of where they needed to improve their patten. Sales saw an immediate uplift.

It's a miracle of modern science, but this sort of tale – typical of the new wave of people analytics, which involves tracking, watching or otherwise monitoring staff in order to improve performance – raises some serious questions about privacy, ethics and the legality of surveillance, and its implications for the psychological contract in the workplace.

Modern monitoring is far more all-encompassing, and potentially far more invasive, than anything that has gone before, the natural conclusion of a journey that began with clocking-in cards and now sees the widespread use of CCTV in British workplaces. It's not unusual for company vehicles to be tracked to prevent speeding or dangerous driving, and corporate monitoring of email and internet communication, once regarded as far too invasive for the British workplace, is now commonplace.

But information gleaned from the new wave of surveillance isn't just being used to ensure attendance, fight fraud or enhance safety – it's helping us make complex decisions about individuals and the way they work together. It's also skirting the boundaries of consent. Karen O'Leonard, head of talent analytics and benchmarking at HR consultancy Bersin by Deloitte, says one big pharmaceuticals firm reduced attrition rates in China by creating an algorithm that told them who was at risk of jumping ship. They used the information to pre-emptively address those people's concerns.

Even the humblest bit of workplace kit is awash with useful data these days. Neil Pickering, director at analytics firm Kronos, points out that a modern biometric clocking-on machine in a hospital is a goldmine. "If you take 1,000 employees, you are probably capturing a million pieces of data on their work activity through simple time and attendance every year," he says. "If you start to bring that together with data from other systems, you have a wealth of information." Firms like AXA, IBM and Royal Dutch Shell are beefing up their HR function with sociologists and statisticians who crunch numbers and dream up ways to improve performance.

Comments by **Paul McAleavey, Employment Lawyer at Payne Hicks Beach** first published on People Management

This is just the beginning, says Edward Houghton, CIPD metrics research adviser. “There is a lot of potential in using big data and human capital analytics to really explore how you can get the best performance out of people.” Ben Waber, managing director of Sociometric Solutions, one of the pioneers of workplace monitoring

products, says technology like the staff-monitoring cards “will be in every workplace in five years”. Hitachi clearly agrees: it has produced a ‘Business Microscope’ ID card which can measure the number of staff interactions and the tone of voice deployed and even, one tabloid indignantly noted, “how long people spend on the toilet”.

The information modern clocking-on systems produce can also contribute to staff retention by, for example, ‘optimising’ the amount of overtime people work, says Carl Tsukahara, executive vice president at workforce analytics firm Evolv. “Too much or too little overtime are both bad,” he says. “Too much and you tend to burn those people out and they leave the organisation. Too little and they don’t feel like they are making enough in variable compensation and also leave.”

Waber suggests that one day offices might have staircases and furniture that move about ‘like in Hogwarts’ to cause you to bump into certain people. “It will engineer serendipity,” he says. This is no pipe dream. Some firms are already putting chips in office furniture to check which office layouts make people most productive. Not only do the walls have ears these days, those comfy new swivel chairs are taking your blood pressure.

But will increased efficiency come at the price of turning the workplace into a digital panopticon, or a disturbingly manipulative force? It’s telling that the surveillance revolution is mostly taking place in the US, where privacy laws are much more laissez-faire. In English law, questions about monitoring staff sit at the intersection of data protection, employment and privacy law, and as such are extremely complex.

Fundamentally, the law on monitoring is based around ensuring employees are not engaged in wrongdoing, and says that employers can monitor them in a way that is ‘reasonably proportionate to their business interests’, and only when they have a ‘clear and credible’ reason to do so, such as preventing fraud.

“The more intrusive the monitoring, the more difficult it is to justify legally,” says **Paul McAleavey, an employment lawyer at Payne Hicks Beach**. Most importantly, a firm has to be able to show that it couldn’t get the information it wants in any other, less intrusive way.

The data firms collect – especially biometric data – would have to be handled incredibly carefully and anything that could identify an employee, such as a recording of their voice, is also very sensitive. Just as serious is any interception of employees’ email or phone calls, which could even trigger criminal charges under the Regulation of Investigatory Powers Act, a law originally designed to prevent illegal spying.

Many people do consent to being monitored. Sociometric Solutions says 90 per cent of staff it works with agree to wear its badges, and those who don’t get ‘dummy’ badges so they’re not marked out as refuseniks.

Pickering says many people welcome the intrusion. “They want their productivity levels to be visible to the management, because they are competing against other people in the organisation,” he argues, adding that many younger staff share so much on social media that they are more relaxed about privacy.

But in law, consent is a fuzzy concept. “There is a big risk with consent, and generally speaking a view that you can’t really rely on it,” says Paula Barrett, a partner at Eversheds. “It is not a solid thing to base things on.”

Employees can be seen to be under pressure to assent to requests from those who pay their wages. Businesses have to make it very clear that there will be no consequences for not consenting, and that it can be withdrawn at any time. Barrett points out that things get even more legally complicated when data is sent to departments or partners in other countries, where it could be subject to different jurisdictions. Are you happy for your biometric information to wing its way to China or the US.

The law makes things hard for a reason. People might throw off a lot of information, but treating them as data points in a system – as a senior executive in one analytics firm puts it – is probably disrespectful and certainly morally dubious.

As the CIPD’s Houghton puts it: “A very philosophical debate has to go on in HR about how people view the business and the business views people, and that they align. People perform best when you treat them like people, not machinery.”

### **Whole person interviews: a whole lot of trouble**

The alignment of personal and corporate values is the new holy grail for recruiters. Companies realise that when things go wrong, it's often character, not competence, that's to blame, and they'd rather hire employees who share their mindset.

Or as Steve Hallam, managing director of recruitment firm Michael Page, says: "We are finding more and more that the person is as important as the technical skills."

This laudable aim is encapsulated in the new trend for 'whole person interviews' which seek to measure the emotional intelligence and moral turpitude of candidates by probing not only their ethics but their personal background too. John Lewis and the NHS are just two organisations known to deploy such techniques.

But while there is no suggestion either has been improper in its questioning, recruiters are concerned some firms are beginning to cross a line considered sacrosanct in recent decades by requesting personal information that leaves them open to accusations of bias.

"We are seeing some quite personal questions now in the interview process," says Hallam. "Some candidates say they felt intrusive – asking if they are in a relationship, for example."

If that sounds innocuous to some, the law is clear: jobseekers are protected by the Equalities Act and if a candidate felt they missed out on a role because of their personal circumstances, they could bring a tribunal claim that the questions they were asked implied a bias against them. The tribunal wouldn't have to think the bias was the sole reason for the candidate not getting the job, merely that it played a part.

(There is a single, narrow exception, called the genuine occupation requirement rule. This covers such cases as an employer who wants a churchgoer to run a Bible study bookshop, or a genuine Bangladeshi chef for a Bangladeshi restaurant.)

In practice, this rules out a whole range of questions, with anything alluding to pregnancy the most obvious no-no. A candidate won a recent tribunal in just such circumstances, even though no written record was kept of her interviewer asking her if she planned to start a family.

Questions which lean towards ethnicity, religion or sexual orientation, however vaguely, are also unwise. Hallam says some interviewers believe an open-ended question such as 'tell me about your private life' is safer. Needless to say, they're mistaken.

"It's about setting yourself up so you are not in receipt of information which puts you in a difficult position," says Paula Barrett of Eversheds. "You have to be incredibly careful not to ask questions which on the face of it seem like reasonable, social, human questions to ask, but do have inherent in them some form of discrimination."

Direct questions, she says, will always expose you to risk, but even asking about plans for the summer could become a problem if the answer involved getting married, for example. While wanting to get to the values behind the person is understandable, the way you get there is fraught with risk.

***Paul McAleavey, employment lawyer at Payne Hicks Beach***