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The right to privacy and personal data applies to all, not just the Premier League

December 08, 2017 by Dominic Crossley

Media lawyers and judges have, since the Human Rights Act came into force in 2000, grappled with numerous circumstances where the right to privacy competes with other rights, perhaps most notably the rights of the media to freedom of expression.

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Privacy isn't just for footballers, argues Dominic Crossley; ordinary people are protected, too

We have Premier League footballers to thank for much of the early case law. However, the right to privacy applies to all of us and is engaged in numerous different circumstances as we go about our daily lives at home and at work.

In an important recent judgment of the European Court of Human Rights (ECHR) the Court examined the competing interests of employers in monitoring the activities of their employees and those employees' right to privacy.

The case of Barbulescu v Romania concerned an employee who was dismissed for his use of a Yahoo Messenger account at work – which he had been asked to set up for work purposes.

After monitoring his use of the account, the employer accused the employee of breaking its ban on personal use of work communications systems. He denied this.

The employer responded by presenting Mr Barbulescu with extensive evidence of his personal use of the Yahoo account, including transcripts containing sensitive personal information.

Mr Barbulescu informed his employer that he believed it had breached his right to privacy, but was fired in any event.

Having been unsuccessful in challenging his dismissal in the Romanian courts, he complained to the ECHR that the employer's actions had breached his right to privacy.

The ECHR decided a fair balance between the employee's right to privacy and the employer's interests had been struck. Mr Barbulescu's firing was therefore considered to be lawful.

The final appeal was to the Grand Chamber of the ECHR, which overturned the ECHR's earlier ruling, holding that the employer had failed to adequately protect Mr Barbulescu's right to privacy.

The Grand Chamber concluded that although Mr Barbulescu had been informed of the ban on personal use of work communications systems, the employer had not given clear advance warning of the nature and extent of its monitoring activities.

In particular, it had not warned of the possibility that it would access the actual contents of employee's personal communications.

The judgment provides weighty authority for the need to strike a fair balance between employees' right to privacy and a company's own interests in access to information.

It acknowledges that employers have legitimate reasons for monitoring employees' communication but that any monitoring must be proportionate.

Whilst an employer can place restrictions on personal use of work communications systems, this does not mean employees' right to privacy can be excluded entirely.

Employers who wish to monitor their workforce should first carry out an impact assessment, considering why the monitoring is necessary, its impact on employees and whether their objectives can be achieved through less intrusive means.

Before any monitoring takes place, employees should be notified of its nature and extent, the reasons for it, and how the information obtained will be used.

There is little doubt that the Grand Chamber's judgment will be seen as another shift in favour of expanding privacy rights.

Those monitoring staff, without ensuring that safeguards are in place to protect privacy, are likely to find that they are the ones exposed to an uncomfortable claim.

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