

EMPLOYEE VIDEO SURVEILLANCE: POSITION OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Labor, Employment, and Workplace Safety Alert

By: Christine Artus, Sarah Chihi

On October 17, 2019, the European Court of Human Rights (ECHR) approved the installation of a Closed-Circuit Television ("CCTV") surveillance system which was used to monitor supermarket cashiers without informing those employees of the fact that it had been installed.

In this case, a Spanish supermarket manager decided to install cameras in the supermarket because of suspected thefts. He installed (i) visible cameras pointing at the supermarket's entrance and exit of which he had informed the staff and (ii) hidden cameras pointing at the cash registers of which neither employees nor staff representatives had been informed.

The hidden cameras revealed that thefts were being committed by several employees at the cash registers. The concerned employees were dismissed. Some of them brought an action before the Spanish Labor court arguing that the use of CCTV without their prior knowledge was a breach to their right to privacy and that such evidence could not be admitted in the dismissal procedure.

Like French law, Spanish law requires the person responsible for a CCTV system to inform the concerned employees of the existence, purpose, and methods of the collection of their personal data, prior to implementation of the system.

The case was brought before the ECHR, which gave a first decision on January 9, 2018, concluding that Article 8 of the European Convention for the Protection of Human Rights, relating to the right to privacy, had been breached. The case was then referred to the Grand Chamber.

The issue raised was to find the proportionality and the balance between (i) the reasons justifying the implementation of a CCTV system (*i.e.*, the right of the employer to ensure the protection of its property and the proper functioning of its business) and (ii) the employees' right to privacy.

The ECHR stated that "*domestic courts must ensure that the introduction by an employer of surveillance measures that infringe the employees' privacy rights is proportionate and is implemented with adequate and sufficient safeguards against abuse*", referring to its previous case law [1].

The ECHR considered that in order to ensure the proportionality of CCTV measures in the workplace, domestic courts should take into account the following factors when balancing the interests involved:

1. Has the employee been *informed* of the possibility of being subject to a video surveillance measure?
2. What is the *extent* of the video surveillance and what is the degree of intrusion into the employee's private life?
3. Has the use of video surveillance been justified by the employer on *legitimate grounds*?
4. Was there an *alternative surveillance system* based on less intrusive means and measures available to the employer?
5. What were the *consequences* of the surveillance for the employee who was subject to it?
6. Was the employee concerned by the video surveillance measure offered *adequate guarantees*?

Therefore, prior notification to the employees is only one of the criteria taken into account in the balance of interests.

In this particular case, the ECHR approved the examination of proportionality of the video surveillance measure. The Judges decided that despite the lack of prior notification to the employees, the CCTV was (i) justified by suspicions of theft, (ii) limited in space (only a few checkout counters), and (iii) limited in time (10 days). The Court also noted that very few people watched the recordings and then concluded that the degree of intrusion into the employees' privacy was limited.

Consequently, the Grand Chamber considered that there was no violation of the employees' privacy rights.

Although this decision does not directly concern France, it remains very interesting since French regulations (*i.e.*, the Data Protection Act, the General Data Protection Regulations, and the Labor Code) provide:

- that the monitoring measures implemented by an employer must not impose restrictions on the employees' rights and freedoms which would neither be proportionate nor justified by the nature of the task to be performed (Article L. 1121-1 of the Labor Code); and
- that concerned employees and staff representatives must be informed prior to the implementation of a video surveillance system (Article L. 1222-4 of the Labor Code).

According to French case law, any system that is not compliant with the above is considered illicit and the information collected could not be used as evidence of an employee's misconduct [2].

The ECHR's decision seems to challenge French case law: where the absence of prior notification to employees is considered as an overwhelming obstacle by French judges, the ECHR considers that it is merely one of the several criteria to be taken into account to assess the proportionality of the infringement to the employee's right to privacy.

The question that remains is: what will be the impact of the ECHR's decision in France?

NOTES

[1] ECHR, Grand Chamber, September 5, 2017, n°641996/08, Bărbulescu c. Roumanie; ECHR, decision, October 5, 2010, 420/07, Köpke c. Germany.

[2] See French Supreme Court, June 7, 2006, n°04-43866 ; French Supreme Court, September 20, 2018, n°16-26482.

KEY CONTACTS



CHRISTINE ARTUS
PARTNER

PARIS
+33.1.58.44.15.38
CHRISTINE.ARTUS@KLGATES.COM



SARAH CHIHI
SENIOR ASSOCIATE

PARIS
+33.1.58.44.15.10
SARAH.CHIHI@KLGATES.COM

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