Videosorveglianza dei dipendenti: ok alle telecamere nascoste, ma…..

Renzo La Costa

La Corte europea dei diritti dell'uomo di Strasburgo, in una causa intentata da dipendenti di un esercizio commerciale di Barcellona contro il proprio datore di lavoro, con sentenza del 17.10.2019 ha concluso che il datore di lavoro che riprende con telecamere nascoste i dipendenti non viola la loro privacy, se il sospetto di aver subito furti è concreto.

Nel vigente ordinamento Italiano, la video sorveglianza è stata da ultimo disciplinata dall'art. Art. 23 D. Lgs. 151/2015 che così recita:

1. L'articolo 4 della legge 20 maggio 1970, n. 300 e' sostituito dal seguente:

«Art. 4 (Impianti audiovisivi e altri strumenti di controllo). - 1. Gli impianti audiovisivi e gli altri strumenti dai quali derivi anche la possibilita' di controllo a distanza dell'attivita' dei lavoratori possono essere impiegati esclusivamente per esigenze organizzative e produttive, per la sicurezza del lavoro e per la tutela del patrimonio aziendale e possono essere installati previo accordo collettivo stipulato dalla rappresentanza sindacale unitaria o dalle rappresentanze sindacali aziendali. In alternativa, nel caso di imprese con unita' produttive ubicate in diverse province della stessa regione ovvero in piu' regioni, tale accordo puo' essere stipulato dalle associazioni sindacali comparativamente piu' rappresentative sul piano nazionale. In mancanza di accordo gli impianti e gli strumenti di cui al periodo precedente possono essere installati previa autorizzazione della Direzione territoriale del lavoro o, in alternativa, nel caso di imprese con unita' produttive dislocate negli ambiti di competenza di piu' Direzioni territoriali del lavoro, del Ministero del lavoro e delle politiche sociali.

2. La disposizione di cui al comma 1 non si applica agli strumenti utilizzati dal lavoratore per rendere la prestazione lavorativa e agli strumenti di registrazione degli accessi e delle presenze.

3. Le informazioni raccolte ai sensi dei commi 1 e 2 sono utilizzabili a tutti i fini connessi al rapporto di lavoro a condizione che sia data al lavoratore adeguata informazione delle modalita' d'uso degli strumenti e di effettuazione dei controlli e nel rispetto di quanto disposto dal decreto legislativo 30 giugno 2003, n. 196.».

I fatti attinenti la causa suddetta risalgono al 2009, allorquando il titolare di un supermercato aveva verificato un grave scostamento delle merci giacenti in

magazzino, ritenendo quindi necessario istallare delle telecamere poste all'uscita dell'esercizio commerciale e altre appositamente nascoste. Ciò gli aveva consentito di individuare i dipendenti infedeli, che aveva successivamente licenziato. Il ricorso prodotto da tali dipendenti fondava sul motivo che la loro privacy fosse stata violata: l'accoglimento del ricorso avrebbe quindi portato alla illegittimità delle riprese e alla conseguente infondatezza dei licenziamenti. La Corte europea dei diritti dell'uomo ha respinto il ricorso con ampia motivazione, ritenendo che la loro privacy non fosse stata violata.

Ciò in quanto il sospetto del datore di essere derubato proprio dai dipendenti era concreto e le perdite economiche erano reali e provate. Peraltro, non si era compiuto un uso indiscriminato di tali riprese, essendosi utilizzato il sistema occultato per soli 10 giorni, senza inoltre aver divulgato le immagini che erano state poi riservate alla visione ad un ristretto numero di persone dell'organizzazione aziendale . Nè, infine, l'accertamento posto in essere poteva essere realizzato con metodiche o mezzi alternativi.

La pronuncia in questione, pur stridendo con la vigente normativa italiana, va intesa nel senso che la suddetta metodologia occulta di indagine deve evidentemente costituire l'extrema ratio e come tale non può divenire prassi comune.

Infatti, anche nella sua nuova formulazione, l'articolo 4 della legge sopra citata prevede che l'installazione di un impianto di videosorveglianza non possa avvenire antecedentemente a (e quindi in assenza di) uno specifico accordo con le organizzazioni sindacali o, in mancanza di esso, alla intervenuta autorizzazione rilasciata da parte della Direzione del Lavoro territorialmente competente.
La violazione della previsione dell'art. 4 non è esclusa dalla circostanza che tali apparecchiature siano solo installate ma non ancora funzionanti, né dall'eventuale preavviso dato ai lavoratori, né infine dal fatto che il controllo sia discontinuo perché esercitato in locali dove i lavoratori possono trovarsi solo saltuariamente (Cass. 6 marzo 1986, n. 1490, Cass. 921/97).
In tal senso, nel corso degli ultimi anni, si registrano diverse sentenze che confermano il divieto di installazione di tali impianti in difetto dei presupposti previsti dall'art. 4 della legge n. 300/1970, anche nel caso di telecamere "finte" montate a scopo esclusivamente dissuasivo.
La condotta criminosa è rappresentata dalla mera installazione non autorizzata dell'impianto, a prescindere dal suo effettivo utilizzo (Cass. Penale n. 4331/2014; "l'idoneità degli impianti a ledere il bene giuridico protetto, cioè il diritto alla riservatezza dei lavoratori, necessaria affinché il reato sussista ... è sufficiente anche se l'impianto non è messo in funzione, poiché, configurandosi come un reato di pericolo, la norma sanziona a priori l'installazione, prescindendo dal suo utilizzo o meno").
La stessa Autorità Garante della Privacy ha ribadito più volte che non è legittimo provvedere
all'installazione di un impianto di video-sorveglianza senza che sia intervenuto il relativo accordo con le rappresentanze sindacali o, in subordine, senza l'autorizzazione rilasciata dalla Direzione Territoriale del Lavoro.

Nell’immediatezza della pubblicazione della sentenza , si registra il commento del Garante della Privacy:

Telecamere sul luogo di lavoro: dichiarazione di Antonello Soro, Presidente del Garante per la privacy, su sentenza Corte di Strasburgo

La sorveglianza occulta non diventi prassi ordinaria. I controlli devono essere proporzionati e non eccedenti

"La sentenza della Grande Camera della Corte di Strasburgo se da una parte giustifica, nel caso di specie, le telecamere nascoste, dall'altra conferma però il principio di proporzionalità come requisito essenziale di legittimazione dei controlli in ambito lavorativo.

L'installazione di telecamere nascoste sul luogo di lavoro è stata infatti ritenuta ammissibile dalla Corte solo perché, nel caso che le era stato sottoposto, ricorrevano determinati presupposti: vi erano fondati e ragionevoli sospetti di furti commessi dai lavoratori ai danni del patrimonio aziendale, l'area oggetto di ripresa (peraltro aperta al pubblico) era alquanto circoscritta, le videocamere erano state in funzione per un periodo temporale limitato, non era possibile ricorrere a mezzi alternativi e le immagini captate erano state utilizzate soltanto a fini di prova dei furti commessi.

La videosorveglianza occulta è, dunque, ammessa solo in quanto extrema ratio, a fronte di "gravi illeciti" e con modalità spazio-temporali tali da limitare al massimo l'incidenza del controllo sul lavoratore. Non può dunque diventare una prassi ordinaria.

Il requisito essenziale perché i controlli sul lavoro, anche quelli difensivi, siano legittimi resta dunque, per la Corte, la loro rigorosa proporzionalità e non eccedenza: capisaldi della disciplina di protezione dati la cui "funzione sociale" si conferma, anche sotto questo profilo, sempre più centrale perché capace di coniugare dignità e iniziativa economica, libertà e tecnica, garanzie e doveri".

Di seguito il testo integrale della sentenza, disponibile in lingua inglese.

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Press Release
issued by the Registrar of the Court

ECHR 355 (2019)
17.10.2019

Spanish supermarket cashiers covertly filmed by security cameras did not suffer a violation of their privacy rights

In today's **Grand Chamber** judgment[1] in the case of López Ribalda and Others v. Spain (applications nos. 1874/13 and 8567/13) the European Court of Human Rights held, **by 14 votes to three**, that there had been:

no violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights, and,

unanimously that there had been **no violation of Article 6 § 1 (right to a fair trial).**

The case concerned the covert video-surveillance of employees which led to their dismissal.

The Court found in particular that the Spanish courts had carefully balanced the rights of the applicants – supermarket employees suspected of theft – and those of the employer, and had carried out a thorough examination of the justification for the video-surveillance.

A key argument made by the applicants was that they had not been given prior notification of the surveillance, despite such a legal requirement, but the Court found that there had been a clear justification for such a measure owing to a reasonable suspicion of serious misconduct and to the losses involved, taking account of the extent and the consequences of the measure.

The domestic courts had not exceeded their power of discretion ("margin of appreciation") in finding the monitoring proportionate and legitimate.

Principal facts

The applicants, Isabel López Ribalda, María Ángeles Gancedo Giménez, María Del Carmen Ramos Busquets, Pilar Saborido Apresa, and Carmen Isabel Pozo Barroso, are five Spanish nationals who were born in 1963, 1967, 1969 and 1974 and live in Sant Celoni and Sant Pere de Vilamajor (Ms Pozo Barroso) (both in Spain). Ms Gancedo Giménez passed away in 2018 and her application was continued by her husband.

In 2009 the applicants were working as cashiers or sales assistants for supermarket chain M. After noticing irregularities between the shop's stock and its sales and finding losses over five months, the manager of the supermarket installed both visible and hidden CCTV cameras in June of that year.

Soon after installing the cameras he showed film of the applicants and other staff taking part in the theft of goods at the shop to a union representative. Fourteen employees, including the applicants, were dismissed on disciplinary grounds. The dismissal letters stated that the videos had caught the applicants helping customers and other co-workers to steal items and stealing them themselves.

Three of the five applicants signed a settlement agreement acknowledging their involvement in the thefts and committing themselves not to challenge their dismissal before the labour courts, while the employer company committed itself not to initiate criminal proceedings against them.

1. Grand Chamber judgments are final (Article 44 of the Convention).
All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

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All the applicants subsequently began Employment Tribunal proceedings for unfair dismissal, objecting in particular to the use of the covert video material as a breach of their privacy rights and arguing that such recordings could not be admitted in evidence.

For the first two applicants, who did not sign settlement agreements, the Employment Tribunal examined the case in the light of principles set down by the Constitutional Court on the need for proportionality when using video-surveillance in the workplace. The Employment Tribunal found that there had been no breach of the applicants' right to respect for their private life, that the recordings were valid evidence, and that their dismissal had been lawful.

The Employment Tribunal dismissed the other three applicants' cases, upholding the employer's objection that the action was invalid because they had signed settlement agreements.

The High Court upheld the first-instance judgments on appeal. The first applicant expressly relied on the need under domestic legislation for prior notification of surveillance, but the High Court held that such measures had rather to be subjected to a proportionality test under the Constitutional Court's criteria. The supermarket's surveillance had met the criteria because it had been justified owing to suspicions of misconduct, had been appropriate for the aim, and necessary.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private life) and Article 6 § 1 (right to a fair trial), the applicants complained about the covert video-surveillance and the courts' use of the data obtained to find that their dismissals had been fair. The applicants who signed settlement agreements also complained that the agreements had been made under duress owing to the video material and should not have been accepted as evidence that their dismissals had been fair.

The two applications were lodged with the European Court of Human Rights on 28 December 2012 and 23 January 2013.

In a Chamber judgment of 9 January 2018 the Court held by six votes to one that there had been a violation of Article 8 and unanimously that there had been no violation of Article 6 § 1. On 28 May 2018 the Grand Chamber Panel accepted a request by the Government that the case be referred to the Grand Chamber. A hearing was held on 28 November 2018.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Linos-Alexandre **Sicilianos** (Greece), *President*,
Guido **Raimondi** (Italy),
Angelika **Nußberger** (Germany),
Robert **Spano** (Iceland),
Vincent A. **De Gaetano** (Malta),
Jon Fridrik **Kjølbro** (Denmark),
Ksenija **Turković** (Croatia),
Işıl **Karakaş** (Turkey),
Ganna **Yudkivska** (Ukraine),
André **Potocki** (France),
Aleš **Pejchal** (the Czech Republic),
Faris **Vehabović** (Bosnia and Herzegovina),
Yonko **Grozev** (Bulgaria),
Mārtiņš **Mits** (Latvia),
Gabriele **Kucsko-Stadlmayer** (Austria),
Lətif **Hüseynov** (Azerbaijan),
María **Elósegui** (Spain),

and also Søren **Prebensen**, *Deputy Grand Chamber Registrar.*

Decision of the Court

Article 8

Case-law principles

The Court held that the principles set out in *Barbelescu v. Romania*, about an employer's monitoring of an employee's email account, were transferable to a case of video-surveillance in the workplace.

To that end domestic courts had to consider whether employees had been informed of such surveillance measures; the extent of the monitoring and the degree of intrusion; whether legitimate reasons had been provided; the possibility for less intrusive measures; the consequences of the monitoring for the employees; and the provision of appropriate safeguards, such as appropriate information or the possibility of making a complaint.

The Court noted that the applicants had argued that under Spanish law they should have been informed of the surveillance and that the domestic courts' findings had been wrong. It therefore examined how the courts had come to their conclusions.

Domestic courts' review

It first held that the courts had correctly identified the interests at stake, referring expressly to the applicants' right to respect for their private life and the balance to be struck between that right and the employer company's interest in protecting its property and the smooth running of its operations.

The courts had gone on to examine the other criteria, such as whether there were legitimate reasons for the surveillance, finding it to be justified by the suspicion of theft. They had also looked at the extent of the measure, holding that it had been limited to the checkout area and had not exceeded what was necessary, a conclusion the Court did not find unreasonable.

Noting in addition that the applicants had worked in an area open to the public, the Court distinguished between the levels of privacy an employee could expect depending on location: it was very high in private places such as toilets or cloakrooms, where a complete ban on video-surveillance could be justified, and was high in confined workspaces such as offices. However, it was clearly lower in places that were visible or accessible to colleagues or the general public.

Given the surveillance had only lasted 10 days and that a restricted number of people had viewed the recordings, the Court took the view that the intrusion into the applicants' privacy had not attained a high degree of seriousness.

Furthermore, while the consequences for the applicants had been serious as they had lost their jobs, the courts had observed that the videos had not been used for any purpose other than to trace those responsible for the losses and that there was no other measure that could have met the legitimate aim pursued.

Spanish law also had safeguards to prevent the improper use of personal data in the shape of the Personal Data Protection Act, while the Constitutional Court required that the ordinary courts carry out reviews of video-surveillance measures for their conformity with the Constitution.

Prior notification of video-surveillance measures

On the specific point that the applicants had not been informed of the monitoring, the Court noted a widespread international consensus that such information should be provided, even if only in a general manner. If it was lacking, the safeguards from the other criteria for the protection of privacy were all the more important.

The Court held that while only an overriding requirement relating to the protection of significant public or private interests could justify the lack of prior notification, the domestic courts' had not exceeded the limits of their discretion ("margin of appreciation") in finding that the interference with the applicants' rights had been proportionate.

While the Court could not accept that simply a slight suspicion of wrongdoing by an employee could justify the installation of covert video-surveillance by an employer, it found that the reasonable suspicion of serious misconduct and the extent of the losses in this case could be a weighty justification. This was all the more so when there was a suspicion of concerted action.

Furthermore, the applicants had had other legal remedies available such as a complaint to the Data Protection Authority or an action in court for an alleged breach of their rights under the Personal Data Protection Act, however, they had not used them.

Given the domestic legal safeguards, including the remedies which the applicants had failed to use, and the considerations justifying the video-surveillance as assessed by the domestic courts, the Court held that the authorities had not overstepped their margin of appreciation and there had been no violation of Article 8.

Article 6 § 1

The Court examined whether the use of the video-recordings in evidence had undermined the fairness of the proceedings as a whole.

It considered in particular that the applicants had been able to contest the use of the recordings and that the courts had given extensive reasoning in their decisions. The video material had not been the only evidence in the case file, the applicants had not questioned its authenticity or accuracy and the Court took the view that it was sound evidence which did not need further corroboration. The courts had taken other evidence into consideration, such as the parties' testimony.

The Court thus held that the use of the video material as evidence had not undermined the fairness of the trial.

The Court also noted that the third, fourth and fifth applicants had been able to challenge the settlement agreements and their use in evidence. The domestic courts' findings that no duress or intimidation had been used did not appear to be either arbitrary or manifestly unreasonable. The Court saw no reason to call into question the domestic courts' findings on the validity and weight of the settlement agreements and found no violation of Article 6 on this point either.

Separate opinion

Judges Yudkivska, De Gaetano, and Grozev expressed a joint dissenting opinion which is annexed to the judgment.

The judgment is available in French and English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.