

## In practice

# Covert surveillance in the workplace



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**Alexandra Porter examines the implications for the law of legitimate surveillance and disclosure case in the wake of the case of *Chairman & governors of Amwell View School v Dogherty*. She also offers a brief summary of the confines of permissible covert surveillance for employers and employees**

The advent of the Data Protection Act 1998 (DPA) and the Regulation of Investigatory Powers Act 2000 confirms that the trend of increasing surveillance across society is also extending into the workplace. The accompanying tension between the public and the private, what can be recorded and observed and what should not be, is increasingly becoming the subject of authority in employment tribunals. This is largely in the context of what constitutes admissible evidence in cases of dismissal and/or discrimination.

### The Amwell case

*Amwell* concerned a teacher, Mrs Dogherty, who had been dismissed for gross misconduct for an alleged physical assault on one pupil and inappropriate language used to another. She claimed unfair dismissal and recorded all discussions in relation to her dismissal on a private recording device. This included those parts of the meeting in which she was in the room and, more controversially, those parts in which she had been excluded from the room while the governors deliberated on her disciplinary hearing and then her appeal.

The tribunal ruled that the full transcript of evidence in respect of all matters was admissible. The employer appealed, arguing that none of the recorded evidence should be admissible because of the Human Rights Act (1998) article 8 right to privacy (HRA) and for public policy reasons.

The EAT, though expressing displeasure at the clandestine nature of the recordings, favoured the view that where evidence was relevant it should be admitted and, if necessary, unreasonable conduct (related to the recording and disclosure of evidence) could be penalised in costs. However, it found that this case involved wider considerations of public policy. Regard was given to the broader consequences of a ruling that all confidential discussions in relation to a party could subsequently be disclosed and that decision-makers at such a meeting might be inhibited from open discussion in their adjudications. Furthermore, it noted that there would be worries about potential satellite litigation in relation to leaked

information. These two latter concerns trumped the employee's right to avail herself of all relevant evidence. Therefore, the part of the transcript where the governors were debating in the absence of Mrs Dogherty was ruled inadmissible, although the remainder was deemed admissible.

It is noteworthy, however, that the tribunal expressly stated that the balance between the conflicting public interests might have fallen differently if the claim had been framed in terms of unlawful discrimination, where the decision was taken by a panel that gave no reasons for its decision and where the recording of private deliberations had produced the only evidence of such discrimination.

It is likely that this decision will be revisited. It is difficult to distill any straightforward principle that could be applied in cases where employees make clandestine recordings. In most scenarios where advice is sought, the employee will probably have already obtained the clandestine recording and will be seeking advice about the consequences of disclosure.

Apart from checking the recording to ensure that it only covers issues relevant to the case, *Amwell* supports the view that the material should be disclosed to the employer at the earliest opportunity, and that the employee should then await any application by the employer to exclude.

Clearly the question for employers will be: "Is there a valid policy argument for having the evidence excluded?" Much depends on the circumstances of the case. In this case, the policy reasons for exclusion were stronger. But, arguably, this case turns on its facts – deliberations at a school meeting or other public body being likely to have a wider-reaching impact than those at a private company.

### Practical considerations in proceedings

The starting point for a tribunal will be whether the evidence is relevant. To that end, the material must be watched or heard before decisions can be made about its admissibility. This raises questions of bias. Given that it will often be the same tribunal that hears the case in which clandestine evidence may have been excluded, there may be a question about whether its decision has been affected by evidence that has been excluded from decision-making. This is particularly the case when one considers that, by their controversial nature, covert recordings, are likely to be more persuasive than evidence agreed between the parties. Here, perhaps, it will become more acceptable to request that a hearing after clandestine evidence has been excluded be remitted to another tribunal.

Note that the tribunal can in certain circumstances view or consider evidence in private without ruling it inadmissible (see schedule I, paragraph 16 (1) (b) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004). In *XXX v YYY*, video evidence from the private home of Y showed Y allegedly making sexual advances to X, the nanny who subsequently brought a case alleging sex discrimination. This

was appealed to the European Court. It ruled that while the evidence should not be publicly disclosed, relevant as it was, it could be viewed by the tribunal in private under schedule 1.

### The broader public/private distinction

In the ordinary course of events, cases relating to clandestine recordings are decided primarily in the context of whether they breach the HRA article 8's right to privacy. The primary consideration is whether someone's privacy has been breached, contrary to article 8(1). If article 8(1) is found to have been breached, the breaching party can then use article 8(2) to justify its behaviour in terms of protecting public safety, their economic well-being, the protection of health and morals, or for the protection of the rights and freedoms of others.

It is telling that in *Amwell*, article 8, while considered, was held not to apply. This was because those who were recorded – public governors – were considered by the EAT to have discarded their rights as private individuals not to be recorded. *Amwell* supports the view that in many cases article 8 will be of no help to tribunals considering the issue of covert recording, and that tribunals will have to resort to notions of public policy to assist in their decision-making.

The nature of article 8, which applies only to individuals and not to organisations, means that it will offer more protection to employees who are recorded at work than to employers who are more likely to be seen as operating in a public rather than a private sphere. The difficulties of using article 8 as a guide on privacy issues in a tribunal show the limitations of our privacy law in the workplace. Without article 8, tribunals are dependent upon broad balancing acts involving competing policy considerations. This can mean deciding cases upon their unique facts, which is rarely conducive to legal certainty.

### Conclusion

While the Data Protection Act code of practice is helpful in establishing the ordinary parameters of acceptable surveillance, it is of limited value as a guide for litigants on how the tribunal will decide the admissibility of evidence. It is further notable that the penalties for breaching the Act are limited to a fine of up to £5,000. There is thus a lacuna in the law when it comes to issues of breaches of employer/employee privacy, with cases being decided according to the tribunals' discretion in the context of broader decisions of the dismissal/discrimination in dispute. While this is unsatisfactory, it is difficult to propose a better alternative when the spectrum of cases relating to disclosure covers such factually and morally diverse scenarios.

### Limits of covert surveillance in the workplace

#### Employers can:

- sometimes rely on evidence discovered in private locations such as the employee's own home. There is a

general principle that a court of law should decide the case on the basis of all available evidence. But there is a high risk of costs being awarded against them for unreasonable conduct, depending on how the evidence was obtained and the circumstances of disclosure (see *McGowan v Scottish Water*)

- covertly survey access of internet sites, but only in accordance with DPA principles. Employees should be notified in their employment contracts that their cyber-movements may be observed
- under the Telecommunication Regulations 2000, monitor correspondence, phone calls and emails to sanction compliance with regulatory procedures (but see *Halford v UK*). But they should be careful about the provisions of the DPA code in relation to the period of retention/disclosure/storage of secret filming, intercepted letters and telephone conversation (see *Peck*). It states that the purpose and benefits of monitoring should be considered, and that monitoring should be authorised by senior managers and only used for the prevention or detection of crime or equivalent malpractice. Workers should be notified of the nature, extent and reasons for monitoring, unless (exceptionally) covert monitoring is justified.

#### Employees can:

- tape record interviews/disciplinary hearings, but should be aware that recordings of parts of the hearing where they were not present will probably be excluded
- complain about breaches of the DPA principles to the Information Commissioner, who may subsequently prosecute the employer and fine them up to £5,000
- have access to confidential records held about them under the DPA by making a request (pursuant to part 2 of the DPA but subject to the exceptions comprised of in part 3 and elsewhere). But they should be careful about the provisions of the DPA code and the provisions in s.1 of the Regulation of Investigatory Powers Act 2000. These make unlawful the interception of telecommunications and post (apart from by someone authorised in a regulatory context). Interestingly, the penalty in relation to breach of this section is not clear from the legislation itself.

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#### Cases referred to:

*Chairman & governors of Amwell View School v Doherty* UKEAT/0243/06

*XXX v YYY* [2004] IRLR 167

*McGowan v Scottish Water* [2005] IRLR 167

*Halford v UK* [1997] 24 EHRR 523

*Peck v UK* [2003] 36 EHRR 41