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Spettacolo e Telecomunicazioni

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VIDEOSORVEGLIANZA
Sentenza Grande Camera Corte UE

A seguito della importante sentenza della Grande Camera della corte Europea in materia di videosorveglianza ed alla rilevanza mediatica che essa ha avuto, abbiamo ritenuto opportuno effettuare i seguenti approfondimenti per eventuali riflessi che la questione può avere sul quadro normativo presente nel nostro paese.

USO DELLE TELECAMERE NEI LUOHI DI LAVORO

La sentenza della Grande Camera della Corte Europea n. 355/2019, del 17 ottobre 2019, ha ritenuto ammissibile l'utilizzo di telecamere nascoste a tutela del patrimonio aziendale, in presenza di presupposti specifici (*si erano rivolte alla Corte cinque cassiere di un supermercato spagnolo, licenziate dopo essere state riprese a rubare merci, invocando la mancanza di una informazione preventiva alle riprese nonché la violazione della privacy*). Nel merito la Corte ha riaffermato il principio di proporzionalità quale requisito essenziale per giustificare il controllo occulto.

Nel caso specifico i presupposti erano:
- Fondati e ragionevoli sospetti di furto a danno del patrimonio aziendale di ingenti dimensioni;
- Videocamere in funzione per un periodo limitato e registrazioni visionate da un ristretto numero di persone;
- Area circoscritta ed aperta al pubblico;
- Impossibilità a ricorrere a mezzi di prova alternativi.

Sulla vicenda è intervenuto con una nota anche il Garante italiano per la privacy, secondo il quale "*la videosorveglianza occulta è 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 potendo diventare dunque una prassi ordinaria.

Il parere del Garante è condivisibile in quanto riafferma nella sostanza il principio per noi fondamentale del diritto alla dignità, alla riservatezza ed alla privacy dei lavoratori.

La rilevanza mediatica della sentenza (in tal senso si veda anche la sentenza della Grande Camera della corte Europea - Barbelescu c. Romania, del 5 settembre 2017) è forse superiore rispetto ai risvolti pratici che la decisione può avere nel nostro ordinamento, già peraltro improntato ai principi sanciti dalla Corte. Dal campo di applicazione della disciplina italiana sui controlli a distanza dei lavoratori, ammessi solo per specifiche finalità e nel rispetto di particolari procedure (si veda di seguito la nota esplicativa dell'art. 4, dello Statuto dei Lavoratori legge 300/1970, così come modificato dall'art. 23 del d.lgs. n. 151/2015, attuativo del cd. Jobs Act) sono infatti esclusi, secondo la giurisprudenza prevalente, i controlli difensivi svolti in modo circoscritto e specifico dal datore di lavoro al fine di accertare e prevenire comportamenti illeciti del lavoratore, specie se configurabili ipotesi di reato.

In tal caso infatti il controllo non riguarda l'attività lavorativa ma è finalizzato a colpire un comportamento illecito destinato a ledere il patrimonio dell'impresa (al riguardo si veda in particolare Cassazione 27 maggio 2015, n. 10955, in un caso in cui le mancanze contestate al lavoratore erano state confermate attraverso un accertamento reso possibile con la creazione, da

parte del responsabile del personale, di un falso profilo di donna su Facebook, con il quale il dipendente si era intrattenuto a conversare dopo essersi allontanato per un tempo prolungato dal posto di lavoro; si veda anche Cassazione 15 giugno 2017, n. 14862).

LA LEGITTIMITA' DEI CONTROLLI A DISTANZA

Sui controlli a distanza l'art. 23 del decreto legislativo n. 151/2015, attuativo del Jobs Act, aggiorna l'art. 4 dello Statuto dei Lavoratori, in relazione all'attuale contesto tecnologico e produttivo secondo cui l'installazione di impianti audiovisivi e di altri strumenti dai quali derivi anche la possibilità di controllo a distanza dell'attività dei lavoratori può avvenire esclusivamente per specifiche finalità (esigenze organizzative e produttive, sicurezza del lavoro, tutela del patrimonio aziendale, requisito quest'ultimo aggiuntivo rispetto allo Statuto), nonché previo accordo con le RSU/RSA. In alternativa nel caso di imprese con più unità produttive dalle OO.SS. comparativamente più rappresentative sul piano nazionale. In mancanza di accordo possono essere installati previa autorizzazione della sede territoriale o della sede centrale dell'Ispettorato del lavoro (da segnalare che l'accordo sindacale non può essere sostituito dal consenso dei lavoratori interessati, potendo ravvisarsi in tal caso una condotta antisindacale, perseguibile ai sensi dell'art. 28 dello Statuto dei lavoratori; Cassazione penale 8 maggio 2017, n. 22148).

In ogni caso i provvedimenti autorizzatori adottati dall'Ispettorato sono di carattere definitivo (in tal senso le modifiche apportate dal dlgs 185/16. Per indicazioni operative circa l'installazione e utilizzazione di impianti audiovisivi e altri strumenti di controllo, si veda la circolare dell'Ispettorato nazionale del lavoro n. 5, del 19 febbraio 2018).

L'accordo con le Rappresentanze sindacali non è invece necessario per sottoporre a controllo «gli strumenti utilizzati dal lavoratore per rendere la prestazione lavorativa» (ad esempio pc, tablet, telefonini; per la definizione di «strumento di lavoro», Tribunale Roma, 24 marzo 2017), nonché «gli strumenti di registrazione degli accessi e delle presenze» (ad esempio badge o rilevatori di presenza).

Le informazioni raccolte, in entrambi i casi, potranno essere utilizzate «a tutti i fini connessi al rapporto di lavoro», quindi anche a fini disciplinari (salvo un divieto esplicito di utilizzo in tal senso da parte del contratto collettivo). Tuttavia, condizione è che al lavoratore sia data una «adeguata informazione delle modalità d'uso degli strumenti e di effettuazione dei controlli», nel rispetto di quanto disposto dal dlgs 196/03 (tutela della privacy). Sono previste sanzioni penali in caso di violazioni.

La revisione della disciplina dei controlli a distanza, tenuto conto, da un lato, dell'evoluzione tecnologica e delle esigenze organizzative e produttive e, dall'altro, della tutela della dignità e della riservatezza del lavoratore, necessita di un'attenta applicazione sul piano contrattuale per evitare possibili abusi.

Da sottolineare come di recente numerose esperienze di contrattazione aziendale siano intervenute a precisare alcuni aspetti che riguardano il rapporto tra organizzazione del lavoro e utilizzo degli strumenti digitali dati in dotazione (orari di lavoro, diritto alla disconnessione, geolocalizzazione, ecc.) confermando quindi come la contrattazione assuma anche in questi casi un ruolo importante a garanzia dei diritti dei lavoratori e nell'ampliamento delle tutele.

La Segreteria Regionale FISTel CISL Veneto

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.

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.