

# **The intersecting lines**

## **Business interests and personal autonomy**

Paper prepared for Lecture to Employment Law Class  
University of Waikato, 12 September 2018  
by Chief Judge Christina Inglis<sup>1</sup>

---

“Everyone has the right to respect for his private and family life, his home and his correspondence.”

Article 8 of the European Convention on Human Rights<sup>2</sup>

Article 8, and how it is to be applied in practice, has excited a considerable amount of attention overseas. As a Europe-only convention, it does not apply in New Zealand and we have no legislative equivalent. That is not to say that an employee has no legitimate expectation of privacy; or that an employer can mount any incursion it likes into an employee’s life away from work. What does our legal framework say about respecting the boundary line between an individual’s professional and private life, both within the workplace and away from the workplace?

The issue of privacy and the workplace is an increasingly controversial topic, as the international jurisprudence and commentary suggests, and it is only a matter of time before it gathers momentum here. I suggest that the time is ripe for reflection, to think about how we conceive of an employer’s appropriate sphere of interest, especially in an age of increasing workplace flexibility and reliance on technology, and (conversely) what limits can reasonably be placed on individual privacy interests. The topic raises important issues from a legal, moral and ethical perspective.

---

<sup>1</sup> Chief Judge of the Employment Court. The views expressed in this paper are my own personal views. I would like to acknowledge the contribution of Suzanne Innes-Kent, Judges’ Clerk, to the preparation of this paper.

<sup>2</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms (The European Convention on Human Rights) (1953).

For instance:

- Can photos of an employee placed on Facebook showing she was drunk and semi-naked at a party be used as the basis of an employment disciplinary investigation?
- Can an employer secretly film an employee's behaviour at work (a) just to check that he is working hard; and (b) when the employer believes he may be forwarding commercially sensitive information to a competitor?
- Can an employer microchip an employee, to facilitate (amongst other things) ease of access to the workplace?

It is true that technology provides many opportunities – both positive and negative. Social media offers an unprecedented mine of information for employers, including about the suitability or otherwise of prospective employees and what their current employees are getting up to, both within work time and within their own time. It is also well established that employees lose a degree of autonomy when at work, and that employers have the right to manage and protect their business interests. But how far can it go?

At any particular point in legal history there will be room for differing views as to where the appropriate line might be drawn, and views generally evolve over time. Our understanding of privacy rights has indisputably developed over the years, spearheaded by the enactment of the Privacy Act 1993 and worked through in numerous cases, including the development of the tort of breach of privacy.<sup>3</sup> However, it is probably fair to say that notions of privacy have failed to generate much traction in the employment sphere. The early signs were not encouraging, with the Employment Court casting doubt on whether a breach of privacy by an employer could be used to support a claim of unjustified action. That might, it was said, amount to an objectionable collateral use of the principles contained within the Privacy Act 1993, which the employment institutions had no jurisdiction to enforce.<sup>4</sup>

---

<sup>3</sup> *Hosking v Runting* [2003] 3 NZLR 385 (HC), [2005] 1 NZLR 1 (CA).

<sup>4</sup> *Clarke v Attorney-General* [1997] ERNZ 600 (EmpC) at 610. See also *NZ Amalgamated Engineering and Manufacturing Union Inc v Air New Zealand* [2004] 1 ERNZ 614 (EmpC).

A slight thawing might be detected more recently. In this regard it has been suggested that the Privacy Act “adds to what constitutes fair and reasonable treatment by an employer, for such treatment would entail substantial compliance with the Information Privacy Principles.”<sup>5</sup> These Principles include:<sup>6</sup>

- Principle 4: Personal information shall not be collected by unlawful means or by means that, in the circumstances of the case, are unfair or intrude to an unreasonable extent upon the personal affairs of the individual concerned.
- Principle 8: An agency that holds personal information shall not use that information without taking such steps (if any) as are, in the circumstances, reasonable to ensure that, having regard to the purpose for which the information is proposed to be used, the information is accurate, up to date, complete, relevant and not misleading).
- Principle 11: There are limits on disclosure of personal information.

Of course it is not only employers who owe obligations and who are constrained as to what information they can and cannot lawfully access in respect of their employees. Employees are subject to a raft of obligations owed to their employer, including the obligation to act in good faith; to be responsive and communicative; to act with fidelity and not to breach the employer’s confidence. These obligations (like the obligations arising under the Privacy Act) are not temporally bound. They do not start on arrival at the employer’s premises in the morning and finish on departure, even assuming that the employee’s work is undertaken in this way.

The increasing flexibility about what is regarded as a place of work (including the kitchen table in a private residence) will likely give rise to ongoing legal issues for both parties to the employment relationship.<sup>7</sup> Add in the omnipresence of digital devices which enable workers to be available to work, and to communicate at all hours of the day and night, and it is easy to see both the advantages and disadvantages that the new way of working presents, and its potential to seriously intrude into the worker’s personal sphere of life. All of this reinforces the need to understand where the boundaries between personal and professional lie, and what

---

<sup>5</sup> *Mazengarb’s Employment Law* (online looseleaf ed, LexisNexis at [3800.8]).

<sup>6</sup> Privacy Act 1993, s 6.

<sup>7</sup> Including in relation to health and safety obligations.

recognition might be given by the law to an employee's right to enjoy a private life protected from unnecessary employer intrusion.

Not only are work arrangements in danger of blurring the divide between work and personal life, but advances in technology more generally are creating challenges both at work and away from it. Technology provides the means of carrying out on and off-site surveillance of employees, monitoring their communications, tracking their movements (including through GPS tracking systems) and assessing the quality and quantity of their work and the extent to which they may be involved in non-work-related activities.

It was recently reported that a Wisconsin company is embedding micro-chips in its workforce, enabling them to open doors, access computers and so on without cards or passwords. It also enables the company to collect extensive personal information about its workforce, particularly about their movements in and out of work.<sup>8</sup> And there was outcry when Daily Telegraph staff arrived at work to find, under each of their desks, a heat and motion sensor to monitor whether they were sitting at their desks or not.<sup>9</sup>

To what extent is an employer entitled to undertake such activities; to intercept communications by an employee, for the purpose of ensuring compliance with regulatory or self-regulatory practices or procedures; to monitor the content of such communications; and to use the communications to support disciplinary action? To what extent does the employer have to draw such surveillance techniques, intrusive practices and the information harvested, to the employee's attention? And to what extent can such surveillance reach into the employee's life outside work?

The European Court of Human Rights has recently grappled with at least some of these issues and has clarified the framework for analysis in that jurisdiction. Last year it found that monitoring an employee's emails was a breach of his right to respect for his private life and correspondence.<sup>10</sup> The case, *Barbulescu v Romania*, concerned the dismissal of an employee for sending personal emails on work equipment in breach of the employer's policy, and the

---

<sup>8</sup> See, for example, <[www.latimes.com/business/technology/la-fi-tn-microchip-employees-20170403-story.html](http://www.latimes.com/business/technology/la-fi-tn-microchip-employees-20170403-story.html)>; <[www.nzherald.co.nz/business/news/article.cfm?c\\_id=3&objectid=12110556](http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=12110556)>.

<sup>9</sup> Kathryn Dalziel "Workplace surveillance and privacy – what's happening in New Zealand and Europe?" (2017) ELB 102.

<sup>10</sup> *Barbulescu v Romania* [2017] EHCR 742.

alleged failure of the Romanian courts to protect his right to respect for his private life and correspondence under Article 8. The European Court acknowledged that employers have a recognised right to monitor their employees' communications, described as a "... right to engage in monitoring, including the corresponding disciplinary powers, in order to ensure the smooth running of the company."<sup>11</sup> The right was, however, confirmed as a *qualified* right.

In this regard the Court emphasised the role of proportionality in assessing the justification for a dismissal, and the need to strike a balance in cases concerning a conflict between an employee's right to privacy and the employer's right to ensure the smooth running of the company (by monitoring employees' communications and/or internet use). So, where (as in *Barbulescu*) the employee is dismissed on the basis of evidence acquired by interfering with his right to private and family life, such as via covert surveillance, the dismissal will (on the European Court's analysis) be held to be unfair unless that interference was justified and proportionate.

In *McCann v Clydebank College*<sup>12</sup> the employer College instructed agents to secretly monitor one of its employees, Mr McCann, while he was off work on sick pay, on suspicion that he was carrying out other jobs while purportedly unfit to work. The agents, who monitored Mr McCann's home and place of work, produced video evidence which confirmed the employer's suspicion. Mr McCann complained that his subsequent dismissal was unfair. The tribunal dismissed his claim that the dismissal was unfair, finding the use of surveillance to be justified and proportionate in its degree of interference with the claimant's rights. The Employment Appeal Tribunal (UK) upheld that finding.

It is clearly desirable to make clear what the employer's intentions are in relation to any activity which may be said to intrude into an employee's personal space. It is, however, unlikely that simply setting out in a policy a purported right to carry out surveillance will smooth the path which might otherwise present navigational difficulties for the employer in using such information. The Court's observations in *Barbulescu* are apt:<sup>13</sup>

... an employer's instructions *cannot* reduce private social life in the workplace to zero. Respect for private life and for privacy of correspondence continues to exist, even if these may be restricted in so far as necessary.

---

<sup>11</sup> At [132].

<sup>12</sup> *McCann v Clydebank College* [2010] UKEAT 0061\_09\_1706.

<sup>13</sup> *Barbulescu* at [80].

At this juncture it is helpful to refer to the Employment Relations Act 2000 (the Act), which provides an analytical framework for assessing justification in the employment context in New Zealand. Section 103A relevantly provides that, in assessing whether the employer's actions were justified, consideration must be given to whether what the employer did and how they did it was what a fair and reasonable employer could have done in all the circumstances at the time. The Act also touches on the mutual obligations of parties to an employment relationship to be responsive and communicative and to act in good faith towards one another.<sup>14</sup>

The cases reflect a focus on the employer's interests and the impact of the employee's conduct on those interests, whether occurring within or away from the workplace. As the Court of Appeal has emphasised, in a case involving two employees and a visit home one lunchtime:<sup>15</sup>

Dismissal for serious misconduct cannot be confined to conduct in the course of employment in any but the widest sense. It has long been recognised that conduct outside the work relationship but which brings the employer or his business into disrepute may warrant dismissal.

It follows that while an employee might genuinely think that what they are doing is private, and unrelated to the employer's business, that is not the focus of inquiry in employment law. Rather, it is the nexus between the conduct complained about and its impact (or potential impact) on the employer's business – and whether it undermines the necessary trust and confidence in the relationship to a sufficient extent.<sup>16</sup> It has been suggested that the focus is somewhat employer-centric – whether the *employer* could reasonably have formed the view that dismissal was warranted in the circumstances, rather than on the employee and (for example) whether the employee intended to undermine the employment relationship.<sup>17</sup>

So, a senior executive caught up in what was described in the media as a road-rage incident was dismissed for serious misconduct, although the conduct took place on a suburban street

---

<sup>14</sup> Refer Employment Relations Act 2000, s 103A and s 4; and the discussion in the full Court judgment of *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160, [2011] ERNZ 466.

<sup>15</sup> *Smith v Christchurch Press Company Ltd* [2001] 1 NZLR 407 (CA) at [21].

<sup>16</sup> At [25].

<sup>17</sup> See, for example, the discussion in G Anderson "Transforming Workplace Relations: the way forward" (VUW Legal Research Papers, Paper No 90/2018, Vol 8 Issue 17, 2018).

during the employee's private time.<sup>18</sup> The incident attracted wide media coverage. The employee had had a public profile as a commentator on financial matters, and feedback from customers and staff suggested it would have a negative effect on the employer's business. The employer's decision to dismiss was upheld as justified, in the circumstances where it had valid concerns about reputational damage and the extent to which the employee's ongoing ability to do his job might be compromised.

That is not to say that the individual circumstances, including the employee's culpability and whether s/he deliberately set out to undermine the relationship or whether it was inadvertent, will not be relevant. An employer is obliged, prior to taking disciplinary action, to provide the employee with an opportunity to respond to the concerns raised. But the employer is entitled to weigh the explanation (for example, that the employee believed that their communication was protected by a privacy setting) against other matters, such as the impact of the communication on their business, in determining an appropriate response.<sup>19</sup>

If employees are entitled to an *irreducible* minimum right to private social life, how might this play out against the traditional focus on the actions of the employer and the employer's interests within the justification framework, as opposed to the employee's rights and interests?

## **Conclusion**

It is indisputable that employees are individuals who have an interest in enjoying time away from work without unnecessary intrusion, and to express their own personal views without unnecessary fear of reprisal. There are as yet ill-defined limits as to where the boundary lines should be drawn, and how far an employer can go in protecting and furthering their legitimate business interests, while encroaching on their employee's private life.

An employer who tramples over an employee's privacy interests and sphere of personal autonomy, is likely to face an uphill battle in persuading the Court that their actions fell within the permissible range. To date, the issue has tended to be analysed within a procedural framework (justification being assessed on whether the employer handled the process of investigation and dismissal lawfully, rather than whether the privacy issue, breached either by

---

<sup>18</sup> *Hallwright v Forsyth Barr Ltd* [2013] NZEmpC 202, [2013] ERNZ 553.

<sup>19</sup> At [44].

the employee or the employer, mattered).<sup>20</sup> There is, however, scope for a wider analysis and application of individual interests in employment law that has yet to be fully explored. All of which provides ideal fodder for further analytical work.

I propose to finish in precisely the same way I started – with questions, not answers. I invite you to reflect on the following:

- Can an employee be justifiably dismissed for tweeting her thoughts on the Government’s abortion policy?<sup>21</sup>
- Can an employee be sacked for having ‘a rant’ about her employer on Facebook?<sup>22</sup>
- What of an employee who is dismissed for posting homophobic comments on his Facebook page? Which, of the following factors, might support or undermine the justification for the dismissal?
  - The Facebook post is expressly said to reflect the employee’s personal views.
  - The Facebook post is protected by a privacy setting, with viewing restricted to the employee’s “friends”.
  - The privacy setting was restricted to five people.
  - The privacy setting was restricted to 1000 Facebook “friends”.
  - The employee was a school teacher.
  - One of the people with access to the employee’s Facebook page is another employee within the employer’s business, who identifies as gay.

---

<sup>20</sup> See, for example, *Excell Corporation Ltd v Stephens (No 2)* [2003] 1 ERNZ 568 (EmpC).

<sup>21</sup> Such a case is currently unfolding in Australia in relation to a Cricket Australia employee. Lawyer’s weekly “Cricket Australia employee sacking sets a dangerous precedent”.

<[www.lawyersweekly.com.au/biglaw/23752-cricket-australia-employee-sacking->](http://www.lawyersweekly.com.au/biglaw/23752-cricket-australia-employee-sacking->).

<sup>22</sup> *Bylevens v Kidcorp Ltd* [2014] NZERA Auckland 373.

- One of the people with access to the employee's Facebook page is a personal friend who also happens to be the Chief Executive of the employer's biggest client, which markets itself as promoting diversity.
- The employer hacks into the employee's Facebook page and downloads a copy of the post without the employee's permission.
- The post was made during work hours on the employee's work-provided device.
- The post was made while the employee was on annual leave on the employee's personal device.
- The post came from the employee's Linked In account which has details of the person's employment.

Finally, how much does individual privacy and personal autonomy matter in the New Zealand workplace, and to what extent does or should the law reflect that?