

PRIVACY AT WORK

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Introduction

1. The basic legal framework for protecting private life at work is now well known. In particular:

(1) The starting point is Article 8 ECHR, which has been given domestic effect by the Human Rights Act 1998 (“HRA”). It states:

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

2. There shall be no interference by a public authority with the exercise of this right except as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the protection of health and morals, or for the protection of the rights and freedoms of others.

The European Court has held that Article 8 can apply to the working relationship: see especially *Halford v United Kingdom*.¹

(2) The Data Protection Act 1998 (“DPA”) and, especially, the Information Commissioner’s Employment Practices Code, finally published as a single code together with Supplementary Guidance.

(3) The Regulation of Investigatory Powers Act 2000 (“RIPA”), Part I of which governs the interception of communications in the course of transmission by the post or a public or private telecommunications system.² Part II governs directed and intrusive surveillance and the use of covert human intelligence sources carried out by certain public authorities, and makes that conduct lawful for all

¹ (1997) 24 EHRR 523.

² The Act extended coverage to private systems because of the Government’s acceptance in *Halford* that there was no law regulating such interceptions (the Interception of Communications Act 1985 only applied to public systems).

purposes if it complies with the relevant provisions.³

2. Prior to the coming into force of the HRA, the DPA and RIPA, the legal protection of private life at work was minimal. On their face, these legal developments open the potential for a radically different understanding of the employment relationship, by a variety of legal means. It is unlawful for a public authority to act in a way which is incompatible with Article 8 unless legislation compelled that result.⁴ In the context of unfair dismissal, “horizontal” effect can be given to Article 8 because a tribunal must interpret s.98 of the Employment Rights Act 1996 so as to be compatible with ECHR rights: see *X v Y*.⁵
3. But in practice the transformation has been less than fundamental, and the reasons for this are worth considering: it may be due to the conceptual limit of “private life” as a concept and, in particular, its inability to stretch into the working relationship; or it may be due to the legal culture of the UK and its historical view of the employment relationship, affecting its individual conception of privacy; or it may simply reflect the time it takes any new set of legal principles to spread into new areas. To explore these ideas, I want to focus on how the law affects specific areas in which private life is, or arguably is, engaged. I have chosen drugs and drug testing, health records and other forms monitoring and surveillance, both covert and not so covert. But first I want to explore the continuing development of the conception of private life, both in the case-law of the European Court of Human Rights and in domestic cases.

The developing conception of private life

4. In common with most political concepts, the meaning and scope of private life is contested. The Court of Appeal highlighted these definitional difficulties in *R v Broadcasting Standards Commission ex parte BBC*.⁶

³ See s.27.

⁴ See s.6 HRA.

⁵ [2004] IRLR 625, CA. See too the EAT decision in *Pay v Lancashire Probation Service* [2004] IRLR 129 holding that “the circumstances” in s.98(4) of the Employment Rights Act 1996 should, as a result of the interpretative duty in s.3 HRA, include consideration of whether there has been an infringement of an ECHR right.

⁶ [2000] 3 WLR 1327, CA.

5. The tensions in the concept are, perhaps, most visible in relation to how, if at all, the private life of workers should be protected from interference by their employers. On one view, the employer's private interest in its property trump workers' interests at work: an employer who provides a worker with a computer can, on this conception, dictate what the worker is to use it for. On another view, private life is a fundamental human right which should be protected just as much at the workplace as outside of it, and it is a right which cannot be waived. There is, I think, no simple means of resolving this conflict: each view starts from a radically different premise.⁷
6. The law has largely ducked the issue of explicitly resolving what are the fundamental principles which underpin its conception of private life. Instead, we are left with something of a cluster concept, listing the interests which may or may not be protected; often the extent of private life must be gleaned from its concrete application rather than from the statement of principles.
7. **ECHR cases.** The European Court has been careful to avoid defining private life other than by what it is not. The leading attempt at definition remains *Niemitz v Germany*.⁸

The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life". However, it would be too restrictive to limit the notion to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.

8. In subsequent cases, the Court has appeared to take a wide view of private life: see e.g. *PG and JH v United Kingdom*.⁹

There are a number of elements relevant to a consideration of whether a person's private life is concerned in measures effected outside a person's home or private

⁷ See my article "Two Conceptions of Worker Privacy" (2002) 31 ILJ 135.

⁸ (1992) 16 EHRR 97 at 111, paragraph 29.

⁹ Judgment of 25 September 2001 at paragraph 57.

premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, though not necessarily conclusive factor. A person who walks down the street will, inevitably, be visible to any member of the public who is also present. Monitoring by technological means of the same public scene (e.g. a security guard viewing through close circuit television) is of a similar character. Private life considerations may arise however once any systematic or permanent record comes into existence from the public domain. It is for this reason that files gathered by security services on a particular individual fall within the scope of Article 8 even where the information has not been gathered by any intrusive or covert method.

9. See too *Peck v United Kingdom*¹⁰ in which the Court stated at paragraph 57:

Private life is a broad term not susceptible to exhaustive definition. The court has already held that elements such as gender identification, name, sexual orientation and sexual life are important elements of the personal sphere protected by Article 8. The Article also protects a right to identity and personal development and the right to establish and develop relationships with other human beings and the outside world and it may include activities of a business or professional nature. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life".

10. Drawing on this expansive idea of private life, the Court has held that the Article may protect against environmental disturbances.¹¹ Though of unclear scope, rights to personal identity and to establish relationships are potentially of very wide effect.¹² The potential is illustrated by *Sidabras v Lithuania*¹³ in which former KGB officers complained under Articles 8 and 14 about their exclusion from a wide range of private and public sector posts for a period of ten years. Rejecting an argument from the Lithuanian government

¹⁰ (2003) 36 EHRR 4.

¹¹ See e.g. *Lopez Ostra v Spain*: (1994) 30 EHRR 277 "severe environmental pollution may affect an individual's well being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health".

¹² See e.g. *Goodwin v United Kingdom* (1992) 16 EHRR 97 at paragraph 99: "Under Article 8 of the Convention, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings". See too *Bensaid v United Kingdom*, (2001) 33 EHRR 10 at paragraph 47: "Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity". Cf *Botta v Italy* (1998) 26 EHRR 241: no infringement of right to develop relationships with others when disabled person could not gain access to beaches in Italy.

¹³ Application Nos. 55480/00 and 59330/00, 27 July 2004.

that Article 8 was not applicable because it did not guarantee a right to retain employment or to choose a profession, the Court said that a far reaching ban on taking up private-sector employment affected private life; here the ban affected the applicants' ability to develop relationships with the outside world to a very significant degree, even though it did not prevent them pursuing other types of professional activities, so that Article 8 was engaged.¹⁴

11. In tension with this wide approach, the Court has also referred to a "reasonable expectation" of privacy, most notably in *Halford*¹⁵ and in *PG and JH*, as a relevant or central consideration. This test applies with difficulty to cases concerned with the expansive notion of privacy referred to in other cases, in which Article 8 has been held to protect the development of relationships with the outside world: what was the reasonable expectation of the KGB officers in *Sidabras*, for example? What is left unresolved in the cases is the extent to which diminished empirical expectations can reduce the otherwise wide scope of private life - a conceptual tension which is most marked at work. If an employer tells employees that records will be kept of them, what is the extent of their reasonable expectation of privacy?

12. **Domestic cases.** There is no tort of invasion of privacy in English law.¹⁶ The principal means used to give effect to Article 8 in UK law been the development of the existing tort of breach of confidence.¹⁷ Perhaps as a consequence of this incremental growth, the conception of private life adopted has tended to be narrow one, based on the disclosure of private information rather than on the more expansive concepts referred to in the ECHR cases. In the leading authority, *Campbell v MGN*,¹⁸ Lord Nicholls (who dissented in the result) said that the "touchstone of private life is whether in respect of the disclosed

¹⁴ See paragraphs 47-50. Note that lack of access to the civil service does not, somewhat anomalously, infringe Article 8 because of the history of the ECHR: see *Glassenap v Germany* (Judgment of 28 August 1986).

¹⁵ See paragraph 40: "There is no evidence of any warning having been given to Ms Halford, as a user of the internal telecommunications system operated at Merseyside Police Headquarters, that calls made on that system would be liable to interception. She would, the Court considers, have had a reasonable expectation of privacy for such calls, which expectation was reinforced by a number of factors."

¹⁶ See *Wainwright v Home Office* [2003] UKHL 53.

¹⁷ See *Douglas v Hello* [2005] EWCA Civ 595, at paragraph 52.

¹⁸ [2004] UKHL 995.

facts the person in question had a reasonable expectation of privacy”.¹⁹ Lord Hope thought that, outside of areas easily identified as infringements of privacy, a useful test was whether the disclosure or observation of the conduct would be highly offensive to a reasonable person of ordinary sensibilities.²⁰ These tests are not apt to capture the wide notion of private life in the ECHR cases.

13. A similar conservative approach is found in *R v Worcester CC ex parte SW*,²¹ which concerned a challenge to the Consultancy Service Index maintained by the Secretary of State for Health to provide checks for potential employers, on which was noted the names of persons involved in child care work who were convicted while in that work or who resigned or were dismissed in certain circumstances. Newman J, obiter, said in relation to the *Niemitz* conception of private life:

(1) The “notion of private life” is broad enough to include, to a certain degree, activities which can be seen to be an aspect of the development and fulfilment of an individual’s personality, for example, in establishing relationships, even though the activities have occurred in a professional or business context.

(2) The effect, where appropriate, of including activities occurring in a business and professional context within Article 8 is limited and selective. It recognises the conduct as being within private life. It does not extend the notion of private to an individual’s business or professional life.

(3) Activities occurring within an individual’s business and professional life will be encompassed within Article 8 where the dividing line between them and private life is not clearly distinguishable, for example, where it can be seen it occurred at a place where access to the public is excluded and some domestic authority is exercised.

The conception treats private life and working life as isolated from each other, with Article 8 only protecting the hazy border region; and the paradigm case of private life is, it seems, the home and property ownership (“domestic authority”). On that conception, it is not surprising that Newman J held that the material gathered about a teacher’s

¹⁹ At paragraph 21. Cf Lord Hoffman, who sought to address the underlying principles as being based on the protection of human autonomy and dignity.

²⁰ See paragraph 94. The test comes from Gleeson CJ in *Australian Broadcasting Corp v Lenah Game Meats* (2001) 185 ALR 1, cited by Lord Hope at paragraph 93.

²¹ [2000] HRLR 702.

conduct, as a teacher, did not engage private life. It is not easy to reconcile this reasoning with that of some ECHR authorities on the holding and disclosure of information, such as *Rotaru v Romania*²² or those viewing relationships at work as part of private life, such as *Sidabras*.

14. In future, English courts will have to grapple with what is the effect of the wider approach of the ECHR authorities. They have only just begun to do so, most recently in connection with the challenge to the ban on hunting with dogs.²³ It will take more than an incremental development of breach of confidence to achieve this.

Some Applications of Article 8 in Employment

15. Against that background, I want to examine the treatment of some specific issues in the workplace. For the conception of private life the courts use is rarely rendered as explicit as it was in *ex parte SW*: it is best viewed through its concrete application. The decisions have been mainly concerned with Article 8(1) and when private life is engaged; the courts have thus far said little about the proper approach to Article 8(2) in an employment context, a point to which I return below.
16. **Drugs and drug testing** Prior to the HRA and DPA the law said little in practice about decisions based upon a worker's use, or suspected use, of drugs. Drug testing normally takes place in accordance with an express term of the contract and, even if it did not, the contractual remedies are limited in practice. Test results which disclose the use of prescription drugs are no doubt confidential information for the purpose of breach of confidence, but this is unlikely in relation to illegal drugs because "there is no equity in the disclosure of iniquity".²⁴ Dismissals for drug use have received little scrutiny in connection with unfair dismissal.²⁵ This is particularly so because an employer can appeal

²² Judgement of 4th May 2000. There the European Court said that the holding of private information about a person's private life (in this case including relatively public information such as his political activities and studies) was itself an interference with his right to respect for his private life

²³ See, for a recent attempt, *The Countryside Alliance and others v HM Attorney General* [2005] EWHC 1677.

²⁴ *Gartside v Outram* (1875) 26 LJ Ch.

²⁵ See e.g. *Racal Services v Flockhart* EAT 701/00 in which the EAT substituted a finding of fair dismissal when an employee engaged on safety critical track-side work on the railways was sacked following a positive drugs test for cannabis: in its view that was the only rational conclusion open to an employment

to the effect employing a drug user may have on other employees.²⁶

17. A compulsory urine test on a prisoner suspected of taking drugs, backed by a disciplinary sanction in the case of refusal, was held by the European Commission to infringe Article 8 in *Peeters v The Netherlands*, though the interference was justified under Article 8(2) in the interests of the prevention of crime and disorder, in part because interference with a detainee's private life is relatively easy to justify.²⁷
18. But how does Article 8 affect drug testing and drug use in the employment sphere? So far, the signs are of little change in the attitude of UK courts. In *Whitefield v General Medical Council*.²⁸ a GP challenged conditions imposed on him by the GMC, including that he abstained from alcohol and submitted himself for regular testing. Dealing first with the ban on drinking, the Privy Council said:²⁹

There is no authority to support the proposition that a ban on the consumption of alcohol is, *per se*, an interference with the right to respect for private life under Article 8(1). The appellant is not prevented from going to his local public house or engaging in his social life while drinking non-alcoholic drinks...
...In the instance case the appellant's right to respect for private life is reduced to the extent that as a doctor he has brought (and is likely to bring) his private life into contact with public life, or into close connection with other potential interests. His "right" to an unrestricted social life must give way to the wider public interest in ensuring that he does not present a risk to his patients.

The Privy Council went on to find, second, that although the taking of samples without consent engaged Article 8, that condition was necessary and proportionate in the circumstances.³⁰ The second finding is not surprising; but it would come as a surprise to many people that a ban on alcohol was not even something which engaged the right to "private life", even though it might well be justifiable under Article 8(2).

tribunal.

²⁶ See e.g. *Mathewson v R B Wilson Dental Laboratory* [1988] IRLR 512.

²⁷ (1994) 77A DR 75.

²⁸ [2003] IRLR 62.

²⁹ At paras 27 and 29.

³⁰ At para 31.

19. To similar effect is *O’Flynn v Airlinks*³¹ in which a customer care assistant for a coach company was dismissed after she was found to be positive for cannabis following a random drug test (she also admitted taking cocaine the weekend before). Though the dismissal took place before the HRA came into force, the EAT nevertheless dealt with an argument based on Article 8, stating:

It is thus difficult to see how the policy entrenched upon Miss O’Flynn’s private life save to the limited extent of her being required to provide a sample of urine as part of an established and unopposed random screening process and save also to the extent that the company’s policy meant that no drugs having certain persistent detectable characteristics could be taken by employees in their private time without probably jeopardising employment.

In light of the tribunal finding that Miss O’Flynn might be asked to assist drivers in manoeuvring coaches and could serve hot drinks, the EAT declined to overturn the tribunal’s finding that any infringement of Miss O’Flynn’s private life was proportionate for the purposes of Article 8(2).

20. These decisions should be contrasted with the DPA Code of Practice, derived from an Act whose purpose is to protect Article 8 rights.³² The Code, for example, says that drug and alcohol testing is “unlikely to be justified unless it is for health and safety reasons”, that testing should be based on “reliable scientific evidence of the effect of particular substances”, that random testing should be confined to those engaged in safety critical activities, and that testing to detect illegal use outside work will rarely be justified unless such use would cause serious damage to the employer’s business.³³ The contrast with *O’Flynn* is obvious.
21. **Health records.** The legal landscape looks very different when one is concerned with health records. Quite apart from the HRA and DPA, the existing law afforded strict protection to health records. The information in them is confidential, so that disclosure

³¹ EAT/0269/01.

³² The Directive which led to the DPA refers to Article 8 in its preamble (Directive 95/46/EC at paragraph 10).

³³ See pp 86-87.

will be protected by breach of confidence.³⁴ The Access to Medical Reports Act 1988 prevents an employer applying to a medical practitioner responsible for treating an employee for a medical report without the consent of the subject,³⁵ and the individual may refuse consent to disclosure.³⁶ In tension with the decisions on drug testing, insisting that an employee undertook a psychiatric examination in the absence of an express power was a repudiatory breach of contract in *Bliss v SE Thames Regional Health Authority*.³⁷

22. This already strict protection is likely to be reinforced following the HRA and DPA. In *X v Commission of the European Communities*³⁸ an applicant for a post refused to undergo an AIDS test. The Commission's medical officer ordered that further tests be taken of a blood sample already provided by him and from these tests concluded that Mr X had AIDS. Stating that "the right to respect for private life requires that a person's refusal be respected in its entirety", the ECJ ruled that the right precluded any testing liable to point to the presence or absence of AIDS. The sting in the tail was its conclusion that if a person refused his consent to a test, the employing organisation could not then be obliged to employ him.³⁹ But this does not detract from the importance of obtaining consent,⁴⁰ and ensuring that any refusal is respected. It follows that a failure to inform a person as to the reasons for which health testing is being undertaken may well amount to an infringement of Article 8 - and an infringement which would be hard to justify under Article 8(2).⁴¹
23. The same strict protection is reflected in the DPA Code of Practice. Health information is, of course, sensitive personal data within the meaning of s.2 DPA. Because collecting

³⁴ See *X v Y and others* [1988] 2 All ER 648: disclosure to press of HIV status of doctors did not outweigh public interest in preserving confidentiality of medical records.

³⁵ See s.3.

³⁶ See s.5.

³⁷ [1987] ICR 700, CA.

³⁸ [1995] IRLR 320.

³⁹ See paras 17-23..

⁴⁰ The Advocate General was more explicit as to the need for fully informed consent if there was to be any interference with a person's physical integrity or right to keep secret information about his or her health: see paras 24-5.

⁴¹ The justification arguments failed in *X v Commission*: after all, he could have simply been told what was proposed and invited to agree or refuse.

such information “will be intrusive and may be highly intrusive”, the Code is anxious to ensure that health information is only collected where this is necessary for e.g. the protection of health and safety, that the information is protected with security measures, and that workers have a genuine free consent to refuse consent to the obtaining of information.⁴²

24. **Surveillance by technical means.** The common law and statute has traditionally given little protection against forms of surveillance such as CCTV and monitoring computer use: these matters have been viewed as part of the employer’s right to manage its business. Some protection is given by breach of confidence and health and safety law but the remedies are of limited practical importance.⁴³
25. Secret surveillance may, of course, engage Article 8 ECHR. In *Halford v UK*, referred to above, the Court held that secret tapping of the phone calls of a police officer made from her office phone interfered with her “private life” when she had a reasonable expectation that the calls were private. Other forms of covert surveillance have been held to engage the Article, such as the installation of secret listening devices and even the recording of suspects’ voices at a police station.⁴⁴ In addition the Article applies specifically to “correspondence”. This includes letters and telephone conversations⁴⁵ and no doubt, by analogy, e-mails. Depending upon the circumstances, so may filming of a person⁴⁶ and the retention or disclosure of the resulting records.
26. It is less clear whether respect for private life could extend to protect against surveillance which was constant and intrusive but not secret. In *Peck*⁴⁷ the applicant’s attempted suicide was caught on CCTV and pictures were later published in the press and the

⁴² See pp 8–85.

⁴³ There is a duty buried in Display Screen Equipment Regulations 1992, for example, that no quantitative or qualitative checking facility may be used without the knowledge of operators or users: see the Schedule, paragraph 4(b).

⁴⁴ See *PG and JH v United Kingdom*, Application No.44787/98.

⁴⁵ Telephone tapping has been held to engage Art 8 whether the phone calls concerned private or business matters: see *A v France* (1994) 17 EHRR 462.

⁴⁶ See the Commission decision in *Friedl v Austria* (30 November 1992, unreported: filming of demonstrators in public did not engage Article 8) but cf. *Murray v United Kingdom* (1995) 19 EHRR 193 (photographing suspect without consent did engage Article 8).

⁴⁷ (2003) 36 EHRR 41.

footage was shown on television. The Court said that filming an individual in a public place did not interfere with private life but recording the data in a permanent form may do so. Here the applicant complained about the disclosure of the pictures and footage to the public. The Court decided that even though he was in a public place he was not there to participate in any public event and, in the circumstances, disclosure was a serious breach of Article 8. Similar considerations are likely to arise in employment: an employee tracked by CCTV cameras cannot complain about the filming but he or she may be able to complain about the storage or disclosure of the records. But what if the contract of employment makes clear that the records will be retained?

27. Since the advent of the HRA and DPA, the courts have generally focussed on the question of admissibility of evidence rather than on whether the evidence was obtained in breach of Article 8. It should be noted that, according to the case law of the European Court, the fact that evidence has been obtained in breach of Article 6 does not mean it is inadmissible; the central question is whether the proceedings as a whole were fair, and whether the admission of the evidence creates unfairness.⁴⁸
28. In *Jones v University of Warwick*⁴⁹ an enquiry agent obtained access to the claimant's house by posing as a market researcher and used a hidden camera to film her. The claimant objected to the admissibility of the video evidence at her personal injury trial. It was admitted that the enquiry agent was guilty of trespass. The Court of Appeal decided that the infringement of the claimant's privacy was a matter to be weighed by the judge in exercising his discretion to admit the evidence. In the circumstances, however, the evidence was admitted, though the Court said that a judge can reflect disapproval of such conduct by making costs orders.⁵⁰ Such a wide power is not available in the employment tribunal because the general power to make costs orders is restricted to unreasonable etc. conduct in bringing or conducting the proceedings.⁵¹

⁴⁸ See *Khan v United Kingdom* (2001) 31 EHRR 1016: admission of evidence obtained in breach of Article 8 did not infringe right to fair trial in Article 6.

⁴⁹ [2003] EWCA Civ 151

⁵⁰ The Court of Appeal ordered the defendant to pay the costs of the hearings to resolve the issue below and before it: see paragraph 30.

⁵¹ See rule 40 of the 2004 Rules.

29. *McGowan v Scottish Water*⁵² concerned an unfair dismissal action based on the employee falsifying time-sheets. The EAT (by a majority) held that, although covert surveillance of a person's home raises a strong presumption that the right to respect for private life is being invaded, the surveillance operation was not disproportionate in circumstances in which surveillance at the workplace was impracticable and the secret filming was undertaken to protect employer's assets. It is not clear if the conclusion of the EAT was (i) that Article 8(1) was not engaged (ii) that it was breached but Article 8(2) was met or (iii) that Article 8 was breached but that the evidence should be admitted nonetheless. It is hard to see how the Article could not be engaged at all, when the filming took place of what was the claimant's home,⁵³ including during a time of bereavement, and when a video record was kept of the footage; and questions of proportionality are more apt for assessing whether the infringement is justified under Article 8(2) than whether Article 8(1) is engaged. Yet, curiously, there was no explicit discussion of Article 8(2), and the need for the surveillance to be "in accordance with law". The better interpretation may be, then, that the evidence was admissible even though Article 8 was breached.
30. The EAT has been more anxious to protect third parties. In *XXX v YYY and ZZZ*⁵⁴ a child was caught on a secret video on which a nanny wished to rely for the purpose of her sex discrimination claim against her employers, the child's parents. Having already ruled at an earlier appeal that the tribunal should have considered the effect of admitting the video on the child's private life, at the second appeal it said:

The public description or publication of such images would be severely embarrassing to him as he grows older. A more obvious infringement of [the child's] right to respect for his private life is hard to envisage. It is quite different from the Employment Tribunal's example of a video recording made by closed circuit television in a public street.

Was the critical feature that a child was filmed, that the video revealed sexual advances by the father to the nanny or that it took place in the home? The EAT went on to rule that

⁵² [2005] IRLR 167.

⁵³ Though, oddly, the EAT referred to the fact that he lived in a tied house which it could be argued was part of the workplace: see paragraph 13.

⁵⁴ [2004] IRLR 137.

because admission of the video evidence would infringe Article 8, and hence the duty imposed on the tribunal as a public authority by s.6 HRA. Hence the tribunal could sit in private under old rule 10(2), now rule 16(1) of the 2004 rules, because the information could not be disclosed “without contravening a prohibition imposed by or by virtue of any enactment”

31. We await, then, an action explicitly based on an infringement of Article 8 itself (e.g. against a public authority under s.6 HRA) rather than a case in which Article 8 is invoked to prevent evidence being admitted, to clarify the circumstances in which surveillance breaches the Article. The DPA Code of Practice is likely to be relevant: it makes clear that the purpose and benefits of monitoring should be established. It says that “workers should be aware of the nature, extent and reasons for monitoring, unless (exceptionally) cover monitoring is justified”.⁵⁵ It says that any policy on monitoring electronic communications should be communicated to workers, and takes the view that continuous video or aural monitoring of particular individuals is only likely to be justified in rare circumstances.⁵⁶ It suggests that covert monitoring should be authorised by senior management, should only be used for the prevention or detection of crime or equivalent malpractice.⁵⁷
32. **Covert surveillance: “in accordance with law” and RIPA.** The European Court has held that in order for secret surveillance to be “in accordance with law” and hence potentially justifiable under Article 8(2), the law must “give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference”.⁵⁸ In *Halford*, albeit in the context of a public authority, the UK government conceded that the interception of the applicant’s telephone conversations was not “in accordance with law” because, at the time, domestic law did not regulate interception on private networks.⁵⁹ In that light, it is surprising that there has been little case-law on this requirement in the

⁵⁵ See pp 56-59.

⁵⁶ See pp 64, 68.

⁵⁷ See pp 69-70.

⁵⁸ See *Malone v United Kingdom* (1984) 7 EHRR 14 at paragraph 67.

⁵⁹ At the time the legislation was the Interception of Communications Act 1985. It has now been superseded by the Regulation of Investigatory Powers Act 2000 as a result.

employment context, when much secret surveillance occurs in the absence even of an express policy, let alone a contractual provision.⁶⁰

33. As a consequence of *Halford*, RIPA was passed. It is designed to provide a basis in domestic law to ensure that the conduct to which it applies is “in accordance with law” for the purpose of Article 8(2). Part I, introduced to fill the gap in the Interception of Communications Act 1985 revealed by the decision in *Halford*, controls the interception of a “communication” in the course of its transmission, whether on a private or public system.⁶¹ It applies to the interception of correspondence, phone calls and e-mails. It is a statutory tort to intercept a communication on a private network without lawful authority.⁶² The Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000,⁶³ however, make lawful certain kinds of interception by employers and others for the purpose of s.1 RIPA, including monitoring in order to “establish the existence of facts..applicable to the system controller in the carrying on of his business” or to “ascertain compliance with regulatory ...procedures”.⁶⁴
34. Part II applies to directed and intrusive surveillance and the use of covert human intelligence sources. These concepts are defined, in broad terms, to include various forms of covert surveillance.⁶⁵ Only designated persons within public authorities may grant authorisations,⁶⁶ the authorisation must specify the description and purpose of the surveillance,⁶⁷ and it must be in writing (save in cases of urgency) and be limited in duration for three months.⁶⁸ RIPA specifies that surveillance should only be authorised

⁶⁰ Note that in *Smith v United Kingdom* (2000) 29 EHRR 493 it was conceded that a Ministry of Defence policy had the quality of law for this purpose.

⁶¹ See s.1.

⁶² See s.1(1) and s.1(3).

⁶³ SI 2000 No.2699.

⁶⁴ See regulation 3(1)(a)(i). Note that a “business” includes the activities of a public authority: see regulation 2(a).

⁶⁵ See s.26(2)(3) and (8).

⁶⁶ See s.30(1) and, in relation to the police, ss 33-34. See now the Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions) Order 2000 (SI 2000 No. 2417).

⁶⁷ See e.g. ss 28(4), 29(4)(5).

⁶⁸ See s.43.

if it is necessary and proportionate to certain specified ends.⁶⁹

35. I have referred to the detail of RIPA largely for the sake of contrast. It is remarkable that in these two areas of surveillance - the interception of communications and covert surveillance by public authorities - domestic legislation has provided a series of detailed safeguards designed to ensure that the surveillance is “in accordance with law”. Outside of the areas of surveillance explicitly governed by RIPA, however, there is virtually no legislative framework at all. Nor does the common law do anything to meet the requirements of *Malone*. Unless the DPA can fill the vacuum, there is scope for arguing that secret surveillance engaged in by employers which falls outside RIPA should contain analogous safeguards if it is to be “in accordance with law”. One means may be by terms set out in a contract of employment or in express employment policies which seek to mirror the safeguards set out in RIPA or in the DPA Code of Practice. In the absence of some such “law”, it is not clear how justifications can be advanced under Article 8(2).

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⁶⁹ See ss 28, 29 and s.32. RIPA does not make surveillance which fails to comply with the procedures unlawful. On the contrary, s.80 makes clear that nothing in RIPA “shall be construed as making it unlawful to engage in any conduct [which may be authorised under the Act] which is not otherwise unlawful under this Act”. But it does operate as shield to actions under Article 8, by providing a basis in domestic law for the purpose of Article 8(2).