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Employment and Employee Benefits

Workplace Investigations

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On occasion an employer may decide that it is necessary to engage the services of a private investigator to covertly monitor actions of employees. This may be for different reasons relating to long term sick leave, alleged fraud or to investigate possible breaches of confidentiality. Engaging in covert surveillance of this nature has been found to be incompatible with data protection law.

On occasion an employer may decide that it is necessary to engage the services of a private investigator to covertly monitor actions of employees. This may be for different reasons relating to long term sick leave, alleged fraud or to investigate possible breaches of confidentiality. Engaging in covert surveillance of this nature has Data Protection implications and surveillance has been found to be intrusive. According to the Data Protection Commissioner it also possibly breaches Article 8 of the European Convention on Human Rights and the Constitutional right to privacy of the individual. Given these potentially serious implications, there are a number of issues that an employer engaging the services of a private investigator should consider before a decision is taken to monitor staff or by any individual who employs a private investigator to carry out surveillance.

Data Protection Commissioner's Position:

A report issued in 2009 by the Data Protection Commissioner¹ (DPC) is particularly critical of covert surveillance of employees. The particular complaint involved an employee who was watched by a private investigator and a DVD of the employee and his children's movements was provided to the employer. In this instance, the DPC found that the company had contravened section 2(1)(a) of the Data Protection Acts by the processing of the employee's and his children's personal data, in recording of images by a private investigator acting on the employer's behalf, without the employee's knowledge or consent. The DVDs were requested to be destroyed. The DPC was critical of the surveillance saying:

'Covert surveillance of individuals is very difficult to reconcile with the Data Protection Acts. As a minimum and this may not even make such surveillance legal, there must be strong and evidence based justification for such surveillance in the first instance.'

Comments of a similar nature were made by the DPC in case studies carried out in 2011. In Case Study 13² the DPC investigated a complaint where a data protection request had been made by a former employee of the company, HSG Zander Limited when a private investigator had been hired to monitor the employee. The DPC stated that there was no contract in place between HSG Zander Ireland Limited and the private investigator who had prepared the security report and engaging the services of a private investigator was no different than engaging the services of any other third party. He stated that engaging a private investigator to obtain personal data about the data subject carried the serious risk of breaching the Data Protection Acts as well as the risk of the general rights to

¹ 2009] IEDPC 14 (2009)

² Available at http://dataprotection.ie/viewdoc.asp?m=c&fn=/documents/caseStudies/Case_Studies_2011.htm#13

privacy afforded by the Constitution and the European Convention on Human Rights. As a result, it was stated that there must be a contract in place between the employer and the private investigator which complies with the provisions of section 2 C (3) of the Data Protection Acts 1988-2003. This section requires the data controller to ensure that the 'processing is carried out in pursuance of a contract in writing or in another equivalent form between the data controller and the data processor and that the contract provides that the data processor carries out the processing only on and subject to the instructions of the data controller and that the data processor complies with obligations equivalent to those imposed on the data controller by section 2(1)(d) of this Act'.

Further it was stated that where the private investigator, pursuant to its obligations under contract from the data controller, processes the personal data of an individual on behalf of the data controller, the private investigator should:

- 1 Process the personal data only in accordance with specific instructions of the data controller;
- 2 Process the personal data only as is necessary for the fulfilment of its duties and obligations under the contract with the instructing data controller;
- 3 Implement appropriate measures to protect against accidental loss, destruction, damage, alteration, disclosure or unlawful access to the personal data in his possession;
- 4 At the conclusion of each investigation deliver all data collected and processed under the contract of service to the instructing data controller and delete all such personal data held by itself at that time;
- 5 Not further disclose the personal data to any other party except with the express approval of the data controller.

The DPC recommends that the precise use of the information should be clearly outlined to the private investigator, and that they should not attempt to operate outside of these parameters. If the data is processed in an unlawful manner it is likely that its production as evidence before a court will be strongly challenged.

Position of the High Court:

The High Court recently addressed this issue in relation to a teacher who claimed bullying and harassment against a school when she had been subjected to invasive surveillance by a private investigator that had been hired by the school principal, Dr. C, in **Sweeney v Ballinteer Community School**³.

In his judgment, Mr Justice Herbert was very critical of the decision of Dr C to engage a private investigator for four days stating 'covert surveillance on the plaintiff during college hours amounted to a most serious harassment of the plaintiff by him during working hours'. The Court found that it was reasonably foreseeable in the case for Dr C that if the plaintiff became aware of being 'pursued by an unknown male the effect upon her was likely to be so traumatic as to precipitate her into mental illness'. The Court particularly noted that Dr C had been aware that the plaintiff had absences from work medically certified on each occasion as due to being work related stress. From this Dr C knew or would have known had he chosen to consider the matter that this rendered the plaintiff very vulnerable to some form of mental illness such as a nervous breakdown. The plaintiff was successful in her claim of bullying and harassment and it was clear that the hiring of a private investigator was a part of this decision. Mr Justice Herbert was particularly critical of the decision of Dr C to arrange for 'this single lady to be stalked by a private investigator'. In relation to the hiring of the private investigator the Court stated as follows:

³ High Court, Herbert J, 24th March 2011

'For Dr C to have so acted whether deliberately or with reckless indifference even though he ought to have been aware that mental harm to the Plaintiff might result from his actions amounted, in the judgement of the Court, to malicious targeting and harassment of the Plaintiff.'

Employers need to carefully consider the implications of hiring a private investigator to monitor their staff. In particular the following should be noted:

- In the first instance there must be strong evidence that hiring a private investigator is warranted;
- If a private investigator is hired, a contract should be put in place to ensure compliance with section 2(1) C of the Data Protection Acts 1988-2003.

Failure to adhere to these requirements leaves an employer open to a complaint being made to the Data Protection Commissioner and any evidence gathered in an unlawful manner is likely to be challenged as to its admissibility before a Court. Finally in the Sweeney case the High Court was very critical of the decision to hire an investigator at all. It appears that if a decision is taken to hire a private investigator it should be carefully considered to ensure that there are no other less invasive options open to the employer before taking this step.

This note is intended merely to highlight issues and not to be comprehensive, nor to provide legal advice. It is given wholly without any liability or responsibility on the part of Eugene F. Collins Solicitors and does not replace the necessity to obtain legal advice.

For further information on this topic or generally in relation to workplace investigations please contact Paul Gough, Associate, Employment & Employee Benefits Group

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