

# EMPLOYEE RELATIONS IMPLICATIONS OF MONITORING AND SURVEILLANCE IN THE WORKPLACE

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## Abstract

This article analyses the views of workplace monitoring held among a sample of, employees and employers. Workplace regulation of this nature is a contentious and sensitive issue. Inappropriate monitoring might lead to legal claims relating to anti-discrimination law, breach of contract and alleged infringements of freedom of expression and privacy under human rights legislation. The study gathered data from three sources. First, it draws on 50 semi-structured interviews with key stakeholders including: HR specialists; line managers; trade union officials and employees. Second, an analysis of legal cases brought by employees against employers implicating a legal infringement in relation to monitoring practice. Finally, organisation policies relating to monitoring and surveillance at work were examined.

## Key words

**Monitoring and Surveillance, Privacy, litigation, business law, human resource management, employment relations**

This article explores employer and worker perceptions of monitoring and surveillance in the workplace and determines the effect of such monitoring and surveillance on those exposed to it and the implications for employment relations. First, the literature on privacy is outlined together with reasons why employers might want to engage in surveillance. Second, the legal framework pertaining to privacy is discussed. Next, the article describes the research method, before the findings are reported. The study reveals the views of employers and workers on monitoring at work.

## Literature Review

There has been increasing concern about the nature and scope of surveillance at work (Lee and Kleiner 2003; Mello 2003; National Workplace Institute 2004; D'Urso 2006; Friedman and Reed 2007). A significant number of employers engage in employee monitoring and surveillance of various forms. Research in the USA has revealed that surveillance in the workplace is common practice with it being deployed by nearly 80% of employers (American Management Association [AMA] 2001; D'Urso 2006:282). In the UK context, it is estimated that 60% of employers engage in monitoring and surveillance of employees (Waugh 2012). This degree of management control over the workplace has added a new dimension to employer and employee relations. In particular, it has been noted that employers have particular power to limit worker autonomy through invasions of privacy (Oliver 2002). There are a variety of reasons that an employer might wish to monitor the activities of their staff: on security grounds; health and safety; performance management; protecting organizational resources and interests and compliance with legal and regulatory requirements. Advances in computer technology have increased the employer's ability to monitor the electronic communications of employees in the workplace (King 2003). Employers monitor a variety of employee communications and activities in the workplace including: e-mail; telephone calls; Internet use and computer files. Employers are also increasingly monitoring their employees' email to prevent their own potential liability stemming from employees' use (or misuse) of email while at the workplace (Friedman and Reed 2007).

## Legal Context

An employer's monitoring and surveillance policy must not contravene prohibited discrimination in respect of the following protected characteristics listed in s.4 of the Equality Act 2010: age (s5); disability (s6); gender reassignment (s7); race (s9); religion or belief (s10); sex (s11); or sexual orientation (s12).

## Regulation of Investigatory Powers Act 2000

The Regulations permit an employer to intercept communications without consent (from both parties to the communication) only if it complies with the provisions of the Telecommunications (Lawful Business Practice) Interception of Communications Regulations 2000(SI 2000/2699). The Regulations create a number of 'lawful purposes' whereby employers can monitor and record communications between parties without their consent, provided that the employer has made 'all reasonable efforts to inform' every person who uses the telecommunication system that their communications might be monitored and recorded. These lawful purposes include: creating records in case a dispute arises; ensuring compliance with regulatory or statutory rules; ascertaining or demonstrating employee standards; customer care; prevention of crime and security against hackers; investigating the unauthorized use of the telecommunications system. The provisions make it possible to engage in a variety of monitoring and surveillance for business-related reasons.

### **Data Protection Act (DPA) 1998**

In accordance with the DPA 1998, employers must process their employees data 'fairly and lawfully (Sch 2 and, for sensitive data Sch3). Protection covers both computer-processed personal data, if the data were retrieved 'by reference to an employee', and paper-based personal records stored in filing systems 'by reference to employees or criteria relating to them'. There are wide-ranging rights for employees to receive copies of their personal files, to ask for corrections or removal of inaccuracies, and to be told why personal information about them is being kept. Employers should have an identified individual who has responsibility for ensuring that the company complies with data protection requirements.

### **Breach of the Contract of Employment**

Monitoring and surveillance policies can give rise to a number of difficult legal and employee relation's issues. If an employer does not handle these difficulties appropriately, they can lead to disgruntled employees and legal challenges. For example, if an employee believes that the monitoring and surveillance policy is oppressive or introduced unilaterally it might give rise to an action for breach of contract. It would need to be established that the employer action constituted a breach of the implied duty of mutual trust and confidence (*United Bank v. Akhtar* [1989]). Sometimes ill feeling can be caused by the introduction of rules relating to monitoring and surveillance and this might elicit hostile reactions from employees. An employer who engages in excessive or intrusive monitoring risks facing discontented employees, lawsuits and damaged organisational loyalty. Furthermore, if an employee with two years' continuous service was dismissed as a result of unreasonable monitoring the employer might face an unfair dismissal claim.

### **Human Rights Act 1998**

In respect to the Human Rights Act 1998 Section 3(1) provides, so far as it is possible to do so, primary legislation and subordinate legislation that must be read and given effect in a way which is compatible with the European Convention on Human Rights 1950. The provisions of the Human Rights Act 1998 that might be relevant to monitoring and surveillance policies is Article 8 which gives a right to respect for private and family life, home and correspondence, Article 9, which lays out the right to freedom of thought, conscience, and religion and Article 10, the right to freedom of expression.

In the employment context, Article 8 in particular is used to protect employees' privacy. It may allow employees to challenge over-intrusive policies by employers. For example, if the employer opens 'private and confidential' documents addressed to an employee, the employee may be able to bring a claim under Article 8. If the worker is a public sector employee, he may have a freestanding claim under Article 8. If the employee is a private sector employee, he may be able to rely indirectly on Article 8 in an unfair dismissal or breach of contract context (Phillips and Scott 2014: 425).

### **Method**

Semi-structured interviews were conducted with a sample of respondents. The interviews typically lasted 45 minutes and each respondent is reported on an anonymous basis but provided with an identifier to highlight their role. The research, based on 50 interviews with HR specialists; line managers; trade union officials and employees was conducted between July 2016 and October 2016. The participants were recruited through a snowball sampling method. Semi-structured interviews were conducted at locations that were convenient to the participants, usually away from the workplace. The flexibility offered by semi-structured interviews King, 2004; Nath 2011) allowed for an in-depth exploration of the workers' feelings and attitudes. The respondents were informed that the aim of the study was to understand a variety of work-related experiences of monitoring in the workplace. They were assured that their participation would be strictly anonymous and that the conversations

would be treated with confidentiality. An interview guide was developed to cover similar issues with all the participants. This provided for a systematic and comprehensive mode of enquiry (Patton, 1990:283; Nath 2011:713). The guide consisted of questions relating to participants experiences of monitoring and surveillance in the workplace.

The sample consisted of 60 per cent male and 40 per cent female respondents. Their age ranged from 24-70 and participants were drawn from a range of occupations and industries covering both the public and private sector.

The findings on workplace monitoring and surveillance in this paper are divided into four main issues: (i) reasons for monitoring taking place in organisations; (ii) employees views of monitoring; (iii) how employees are informed of monitoring; and (iv) employment relations issues. The sub-sections explore workers' experiences of monitoring and surveillance in the workplace. The tensions associated with an employers desire to monitor staff and employees concerns over infringements of privacy are outlined.

### **(i) Reasons for surveillance and monitoring in organisations**

#### **a) Protecting organisational resources**

The majority of respondents in the study stressed the significance of protecting the assets and resources of their firm through monitoring. As anticipated, owners and senior managers in both small and larger organisations highlighted the need for employees to act in line with the firm's best interests and the normative expectations of appropriate, professional and indeed ethical standards in their respective sectors. A security manager at a financial firm observed:

*It is common and relatively straightforward for workers to abuse the use of company property and assets so monitoring and surveillance is not unreasonable, in fact, the failure to do so would constitute poor management.*

#### **(b) To protect the employer from legal claims**

It was also evident from the interviews that employers were monitoring staff to ensure they did not face claims of harassment or discrimination. If employees send, inappropriate emails or post derogatory remarks on the company twitter page the employer could be vicariously liable for any discriminatory behaviour (Equality Act 2010). It is sensible for employers to take measures to protect themselves against such incidents. For example, in one case two co-workers posted remarks on a colleague's facebook page relating to his sexual orientation. The incident happened during the course of employment and the conduct related to the relationship between staff and a manager. As the events occurred in work time the employer was held vicariously liable for the conduct which constituted harassment on the grounds of sexual orientation (*Otomewo v. Carphone Warehouse Ltd* [2012]). However, some of the monitoring in this domain was also designed to protect staff, for example, to detect hostile abuse or discrimination of staff by customers. Interviews revealed a widespread prevalence for front line customer service workers to be subject to such hostility and bullying treatment. It is well established that victims of customer-instigated verbal abuse can experience high levels of stress and depression (Boyd, 2002; Yagil, 2008), emotional dissonance and burnout (Grandey et al 2004). The ill treatment and customer hostility was attributable to a variety of reasons, which included being unable to resolve consumer problems or general rudeness of members of the public.

It is evident that both to protect themselves from legal action and to protect employees from abuse it is fair and sensible for an employer to monitor the use of social media and IT devices in this respect.

#### **(c) Health and safety factors**

Six respondents in the sample justified monitoring citing safety reasons. An interviewee in the commercial construction sector explained that health and safety monitoring was essential to the smooth running of the business and how safety statistics and indicators were routinely collated by the firm and therefore worker behaviour and dress code requirements (e.g. high-visibility jackets, hard hats and boots) were seen as encouraging the safety culture of employees and thereby enhancing the safety climate of the organisation.

*It is important to monitor that staff act appropriately on the site, wear acceptable clothing and use the safety equipment provided – you have to be equipped to do that job in a safe fashion. If the firm breaches the law significant financial penalties and reputational damage is likely to be the outcome.*  
(Senior Health and Safety manager, Construction)

#### (D) Employee screening

Pre employment screening is a growing practice. It was considered important for some employers to check the accuracy of candidate profiles, for example, credit history, criminal records, directorships and to identify changes in circumstances that could pose a risk to the organisation. The following quote is illustrative:

*It is becoming common practice to rescreen employees, or a random selection of employees, annually as well as on promotion or a change of responsibilities.* [HR Manager].

Another aspect of employee screening mentioned by several respondents was drug and alcohol testing. One manager in an estate agency commented:

*I am strongly in favour of an employers right to test all workers for drug or alcohol if they wish irrespective of their occupation. In fact I think it should be done every Monday morning. It relates not just to health and safety issues but also directly to the quality of work performance.*

#### (E) Monitoring work performance

It is apparent that many organisations in the sample feel a need to monitor to ensure appropriate levels of productivity, maintain work quality, ensure appropriate behaviour in the workplace and to ensure workers do not waste time.

*We had one employee who was subject to disciplinary action for spending hours of work time searching the Internet for cheap weekend breaks. Monitoring software enabled us to show exactly how much work time had been taken up with this activity.* [HR Manager Insurance Company].

*Management observation of performance definitely influences the way some people behave and the way they work. Some people tend to work long hours to show visible commitment to the business. It seems to have caused a presentieesm culture – to show you are working long hours.* [Employee, Recruitment Industry]

#### (F) Monitoring outside work hours

A particular controversial aspect of monitoring and surveillance was covert monitoring outside work. The majority of respondent employees were against the practice completely. However, several respondents thought it might be justified in specific and exceptional circumstances.

The operator of an investigation and surveillance business stated:

*We have seen a growth in cases where we are being asked to investigate cases of long-term absenteeism where employees are using that time to run or start their own businesses. We were engaged by an employer to investigate an employee and he ended up being dismissed following covert surveillance, which established that he was playing squash when he should have been working!*

However, many employees thought monitoring outside working hours was disproportionate and unjustified.

*As a general rule I am against surveillance outside work unless there is a significant justification such as suspected fraud.*

*I can understand why employers engage in covert monitoring of social media although it does make me feel rather uncomfortable. As a general policy I do not think it should be done unless some kind of suspicion about an employee has surfaced.*

Overall the majority of respondents saw covert surveillance outside the workplace as something that could only be legitimate in limited circumstances, usually where the employer had suspicions about particular workers behaviour. However, what was evident from interviews with employers was that covert monitoring of social media and checking of employee absence was relatively common amongst employers.

#### **(ii) Employees views on monitoring**

Employees generally accepted monitoring where it is fully explained to them, they are asked to provide consent and it relates to performance of their work. Overall employees were hostile to the idea of out of work monitoring unless the employer had a reasonable ground, based on some evidence.

*I can see that monitoring might be justified in limited circumstances but completely disagree with illicit monitoring. If you want to improve employee behaviour the best way to achieve this is through education and training not monitoring of activities.*

*I do not agree with monitoring in the workplace but if an employer is going to monitor he should, disclose this, obtain consent and fully involve employees in the process.*

*I can see in certain circumstances monitoring can be useful for employees for example in the police, if someone makes a false accusation. However, too extensive a monitoring is intrusive and not appropriate. Whether monitoring is reasonable depends on the setting and the circumstances. I think a general blanket policy is wrong.*

Generally workers could accept that there is some justification for some level of workplace monitoring in a professional working environment. However, worker respondents strongly echoed the view that there were limits and it should not be overly intrusive.

#### **(iii) How employees are informed of monitoring**

Stoney and Tompkins (1997) argue that employee involvement in the design and implementation of monitoring systems and the restriction of monitoring to performance-related activities may increase acceptance. This is reflected in the following experience of a line manager.

*If you involve employees in the design and implementation of monitoring systems they are generally accepting and understanding of the reasons behind the policy. Good communication is the key. Policies need to be fairly and consistently applied to ensure employees do not respond negatively to initiatives or feel that they are being discriminated against. [Line Manager]*

*Our monitoring of email and computer use does not infringe privacy of employees since they have agreed to it in the contract of employment and information about monitoring is disseminated through company policies. [HR Manager Hi Tech Firm].*

Respondents reported that whilst some level of monitoring can make you more disciplined at work and contribute to improved work performance it was evident a delicate balance needed to be struck. Excessive monitoring can negatively effect performance, result in a lack of trust, demotivate staff and is not conducive to the creation of a positive work environment.

#### **(iv) Employment Relations Issues**

In the next section the employee relation's implications of monitoring and surveillance is explored. In particular, how such policies were implemented and adhered to by the employer.

First, policies were unsurprisingly more formalised and comprehensive in the larger organisations within the sample and were enforced more strictly. For example, where breaches of internet or email policy occurred the following system of disciplinary procedure was invoked a) verbal warning; b) written warning; c) final writing warning; d) dismissal. The presence of an explicit policy was largely absent in the smaller to mid-sized firms. In these environments, there was a general expectation that employees would be socialised into the culture of the firm and learn to act appropriately through day-to-day observation.

Next, the findings in relation to employer and employee attitudes and practices relating to covert surveillance are considered. The majority of employee respondents conveyed the view that whilst monitoring and surveillance within the work environment was acceptable, monitoring outside was not. However, there was an acceptance that the boundary can be blurred in relation to the monitoring of social media. For example, one employee identified a case that arose where the company had checked out a new worker that had been provided by a recruitment agency on social media because he had been making extravagant claims about his previous work experience. From social media monitoring the employer discovered he had been previously convicted of fraud and that he was stealing company products and selling them privately. Information about the previous conviction had not been disclosed by the recruitment agency and without social media monitoring would not have been detected.

Both employers and employees noted inconsistencies in the way some breaches of rules were dealt with when they had been revealed by monitoring, with the rigorousness and the nature and extent of sanctions being dictated by (a) Management attitude, (b) the nature of the role the employee held – perceived star performers were dealt with more leniently than other workers (c) the degree of importance the organization attached to the particular breach, (d) the importance placed on health and safety regulations which were revealed to have been breached by monitoring.

### **Conclusion**

Monitoring and surveillance in the workplace raises pertinent employee relation's issues. Is an employer acting fairly and reasonably? Does monitoring have a negative or positive effect on work performance? Is monitoring used to punish individuals? Is monitoring too intrusive that it leads to stress or anxiety? Does the employer have a monitoring and surveillance policy, which is communicated to workers? Employee and employer perceptions of what constitutes reasonable and unreasonable monitoring seems to be constantly evolving along with the technology that can be utilised to engage in monitoring activities. There is an emerging consensus that good surveillance is targeted and dependent on the work context. In this study whilst isolated issues of concern and poor employee relations practice were unearthed there was no widespread evidence of disgruntled employees making complaints to employees about monitoring practices. However, serious concerns were raised about the nature and extent of employer use of social media monitoring. Furthermore, as technology develops and employer demand for information on worker performance increases human resource management practices and legal issues might become more prominent and problems more prevalent.

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