

Legal Mechanisms for the Protection of Personal Data in Case of Video Surveillance in Employment Relationships at the National and International Levels

Abstract

The article deals with the legal mechanisms of personal data protection in employment relations at national and international level on the example of video surveillance by the employer in the workplace.

The technological progress of the 21st century has posed a new reality and legal problems to the modern world that, due to their specificity, need solution adequate for modernity. Naturally, the need for personal data protection arose in the sense that, as a result of technological advances, infringement of such data has been greatly simplified, as evidenced by the value of personal data in this regard, employment relationships are no exception, as the employer often carries out video surveillance over employees, during which the issue of protection of their personal data arises, so the purpose of the present paper is to analyze their protection mechanisms.

Due to the complexity of the topic, a number of studies were used within the paper. In addition, the methods by which the research was carried out are noteworthy; Due to its specificity, it became necessary to use several research methods; Among them, comparative and systemic methods deserve special mention.

Introduction

The US Supreme Court Justice *Louis Brandeis* described the guarantee and protection of privacy as early as 1928 as "the most comprehensive of rights and the right most valued by civilized men".

In order to create a legal and democratic state, it is necessary, first of all, for each individual to be perceived as the highest value and the fundamental rights and freedoms guaranteed to him to be protected, which, obviously, implies the right to privacy and protection of personal data.

³⁶⁵ Student of *Ivane Javakishvili* Tbilisi State University Faculty of Law

³⁶⁶ Student of *Ivane Javakishvili* Tbilisi State University Faculty of Law

In recent years, large-scale refinement of technology has led to the development of innovative ways of automated personal data processing, including the spread of video surveillance practices. In turn, video surveillance can not be, bad or good. Its properties, depending on the purposes of use, contain both goodness and danger at the same time.

Nowadays, video surveillance is used in many places, be it private or public institution, street or transport. The workplace is no exception in this case.

The purpose of using video surveillance in the workplace is mainly to protect the property of the organization, as well as the safety of employees. Due to the fact that, during video surveillance, the personal data of the employees are collected, it is obligatory to put the grounds and purposes of its use in a strict framework, so that the employer does not process the said data improperly and unlawfully.

“The fact that users do not understand how they protect their data is just one problem; The second is the breach of the security system, the more frequent cases of illegal access to data”.

According to statistics, every day, up to half a million data are lost or stolen, which, in addition to data processing organizations, harms the data owner - the data subject, as his privacy is at risk. In addition, his data may also be used for criminal purposes.

Privacy of personal data is a prerequisite for individual autonomy, independent development and protection of dignity; However, it is interesting to what extent does the Georgian legislation create strong instrument to protect the rights of employees during video surveillance? To what extent does specifically the Law of Georgia on Personal Data Protection respond to the threats related to the technological advances of the 21st century, which are in the processing of the recorded data for illegal purposes in the case of video surveillance?

These and other questions, as well as the lack of in-depth research on the given topics in the Georgian scientific space, make the discussion on the issue of video surveillance implementation in the work space quite relevant.

First of all, the purpose of this paper is to establish and analyze the provisions of the legislation of Georgia, which regulate the implementation of video surveillance in the workplace; To review Georgian practice as well. The second part of the paper will analyze the EU legislation, practices and also offer the recommendations that are linked to the development of Georgian legislation, ensuring creation of more sustainable and solid guarantees, in terms of protection of an employee's rights in case of video surveillance over the employee.

1. Grounds provided by the legislation of Georgia for video surveillance in the workplace

A video surveillance system is defined as a visual/audio monitoring of a space, event, activity, or person through an electronic device.

Video surveillance systems were originally used by the armed forces and other security organizations in the country. Soon they found their way into everyday life; Including in terms of preventive video surveillance in public areas, airports, highways, borders, coastal areas, industrial, home and personal security spheres.

According to the Law on Personal Data Protection, A video surveillance system may be installed at a workplace only in exceptional cases if it is necessary for human security and property protection, for the protection of secret information and for purposes of examination/testing and if these aims may not be achieved by other means.

Video surveillance should be used only in cases of necessity by the data processor placing the appropriate warning sign in a conspicuous place.

Positive is the fact that the law stipulates strict requirements for the use of video surveillance in the workplace, as well as, in case of this necessity creates additional guarantees to protect the rights of employees, which is reflected in the fact that each employee must be informed in writing about video surveillance and their rights.

Based on these statutory grounds, it seems that legislation of Georgia does not allow covert video surveillance in the workspace. It is interesting what the employer should do if he has a reasonable and substantiated suspicion that any of his employees steals products? The law does not regulate such cases and does not provide for exception. A review of the case law of the European Court of Human Rights on this issue is presented in the second part of the paper.

In addition to the above-mentioned grounds, the issue of processing the recorded data as a result of video surveillance should also be considered. According to the legislation, an employer is required to process this data fairly, without violating the dignity of the employee, only to the extent necessary to achieve a legitimate aim. Besides, the data must be genuine and accurate and, if necessary, updated. Data collected without legal grounds and incompatible with processing aim, should be blocked, deleted or destroyed. The storage period for the data is the time it takes to achieve the aim of data processing. After achieving this aim, they must be blocked, deleted or destroyed, or stored in a form that excludes the possibility of identifying a person, unless otherwise provided by law.

In view of all the above, the legislation clearly and distinctly stipulates that the protection of personal data must serve to maintaining of a balance between the legitimate interest of the employer and the rights of the employee. The protection of personal data in employment relationships does not imply a prohibition for the employer to collect and process information necessary in the employment process.

1.2 Does the right to carry out video surveillance imply recording audio?

It is noteworthy that video surveillance does not automatically imply audio monitoring (audio recording). Therefore, during video surveillance, it should not be possible to listen to the conversation of employees, except in exceptional cases (such as security measures, etc.), about which the employee

should be notified, and cumulatively, there should be principles and grounds for processing personal data collected by audio monitoring.

The current version of the Law of Georgia on Personal Data Protection, along with video monitoring in public and private institutions, does not provide for the possibility of conducting audio recording, although it does not prohibit it. It should be noted that the mentioned new draft law eliminates the shortcomings and Article 11 provides for specific grounds that may be relied on for conduction of audio monitoring.

2. Overview of practical cases of unlawful video surveillance

As already mentioned, the use of video surveillance in the workplace is a fairly common practice in Georgia. Therefore, it is interesting and necessary to pay attention to the facts that is related to the use of video surveillance on unlawful grounds and purposes, and the processing of accumulated personal information as a result of that, and the response of the state agency, in particular, the State Inspector.

First of all, it should be emphasized that the employer, in many cases, uses video surveillance for such an unlawful aims as controlling the activities of employees, monitoring their visual appearance and actions. This is confirmed by the fact that the personal data protection inspector, in the reporting period of 2015, fined the two large companies selling products, with 500-500 GEL. In particular, in cases of video surveillance the aim of the companies, along with the protection of property and personal security, was to control the quality of services provided by employees, which is an unlawful purpose.

As for the individual case, one of the most notorious cases in this regard is related to the supermarket chain Fresco, whose employees claimed that the administration secretly monitored them in changing rooms.

Based on the facts of the case, it is clear that only female employees' changing rooms were equipped with video cameras, which were used to monitor the employees how they changed their clothes.

According to the employees, Chief Security Officer D. B. and his deputy - A. K., who were men, had access to the materials recorded as a result of the video surveillance.

In response to the employees' statement, the company explained that the video surveillance systems were indeed installed in changing room, the main purpose of which was to control the employees and prevent them from stealing products. However, the company's administration categorically denied the information provided by the employees that the male security guards had access to the material recorded as a result of the video surveillance.

The case was investigated by the Office of the Personal Data Protection Inspector on the basis of information provided by the company's staff. Inspection carried out by the Office included getting acquainted with the situation on-site, as well as requesting/studying documents, records and information, holding an oral hearing with the participation of representatives of the organization,

receiving explanations from the data subject, etc. Depending on the specific circumstances, the necessary measures will be determined and the Inspector's Office will use all the necessary powers provided by law to ensure that the inspection is carried out thoroughly and that all the circumstances are investigated.

The inspection showed that the video surveillance was indeed carried out in the changing rooms, which is directly prohibited by Article 12(4) of the Law on Personal Data Protection and, this fact cannot be justified by any reason. Accordingly, due to the violation of the Law, the inspector fined the administration of "Fresco" with 2000 GEL.

The above analysis reveals problems of a certain nature, among which, first of all, it should be noted that inspections in the workplaces do not take place periodically. In the first case, the Personal Data Protection Inspector Fined Fresco only after the employees provided her with the information; In the case of another store, such as New Balance, the use of video surveillance for unlawful purposes has not yet resulted in a fine at all.

According to the information requested from the trade union organization, the employees, despite being aware of the existence of video surveillance used unlawfully by the employer, do not report it to the Office of State Inspector for fear of losing their job; In some cases, employers blackmail them with video-recordings.

To solve the problem and protect the rights of employees, it would be better if the Office of the State Inspector intensifies inspections in the workplaces and carries it out at certain intervals. In such a case, the practice of unlawful use of video surveillance will be reduced and employees will no longer be under the fear of losing their job or being blackmailed.

3. EU legislation and its basis for video surveillance in the workplace

The Council of Europe was established after the Second World War to unite European states in order to promote the rule of law, democracy, human rights and social development. To this end, it adopted the European Convention on Human Rights in 1950, which entered into force in 1953.

Although these rights do not explicitly provide for the protection of personal data, they include this based on the broad nature of the document. The protection of personal data is an interest protected by Article 8 of the European Convention on Human Rights. Article 8 establishes the right to respect for private and family life, home and correspondence, and defines the specific cases in which this right may not be restricted.

In the 1960s, with the advent of information technology, there was a growing demand for special legislation to protect personal data. By the mid-1970s, the Committee of Ministers of the Council of Europe had adopted a number of resolutions on the protection of personal data, which referred to Article 8 of the European Convention, including one of the most important - the Convention 108, ratified by Georgia. It covers all types of data processing by both, the private and public sectors, including the judiciary and law enforcement agencies. It protects human rights from violations related

to the processing of personal data, and its Additional Protocol is intended to regulate their international transmission.

The most important regulation that deals with video surveillance in the workplace, among other instruments, is the General Data Protection Regulation 2016/679 of European Union (EU) ("Regulation" or "GDPR").

The regulation became mandatory in 2018 for all EU member states. It applies to personal data controlling or processing institutions in European Union areas, or to companies that are not registered in the Union but offer their goods and services in those zones, and therefore have access to citizens' personal data.

The Regulation applies to fully or semi-automated data processing, it does not apply to the collection of personal data by an individual personally for personal reasons.

Given the importance of the document, it is quite interesting to see impact of the regulation on the implementation of video surveillance in the workplace. By general definition, according to the GDPR, employers have the right to observe the activities of employees if they have a legal ground to do so and the aim of their monitoring is clearly communicated to employees in advance.

The legal grounds for monitoring includes both the aim of protecting the safety of employees and the prevention of crime. Employers who rely on legitimate interests as the legal ground for processing are obliged to balance the stated interest with the interests, rights and freedoms of employees. In addition, employers must also use safeguards and take measures provided by the legislation in order to ensure that employees' rights are protected and to prevent prejudice to them.

According to the GDPR, if an employee objects to the use of a video camera, the burden of proof, as well as burden of demonstration will be imposed on the employer, that he or she has a "compelling legitimate grounds" for the use of video surveillance.

However, this regulation restricts the employer from using video surveillance in areas where the risk of violating the privacy of employees is potentially high.

In view of all the above, it is clear that the Regulation is an act corresponding to the development of technology, which relevantly responds to the challenges and violations arising in the modern world, therefore, it is quite important and necessary to bring Georgian legislation in line with the GDPR. Although the GDPR is not a mandatory normative act for Georgia to approximate with it, as already mentioned, it can be applied to Georgia as well, primarily due to its territorial application. Besides, Article 14 of the Association Agreement between the EU and Georgia obliges Georgia to cooperate with the EU to ensure a high level of protection of personal data in accordance with the EU, Council of Europe and international legal instruments and standards referred to in Annex I to this Agreement.

4. The case law of the European Court of Human Rights

Unlike common courts of Georgia, the case law of the European Court of Human Rights on video surveillance in the workplace is quite diverse.

Although the protection of personal data and the right to privacy are two distinct rights, they are closely linked to each other. In both cases there is expressed a strong aspiration for the protection of similar values - human independence and dignity. Consequently, these rights give a human a personal space where he can freely develop and form his personality, thoughts and views.

In the light of a general analysis of the case law of the European Court of Human Rights, in cases of a violation of personal data, it holds a violation of Article 8 of the Convention.

In this paper, the 3 most high-profile cases will be considered, which, in their essence, are very important precedents in the field under consideration.

According to the facts of the first case, the plaintiff was an employee fired by the employer for theft from his job, without any notice. As evidence of the theft, the employer presented a video camera recording made with the help of a detective.

The European Court of Human Rights declared the application inadmissible because it considered that the decision rendered by the German common courts was essentially correct. In court's opinion, in the event of video surveillance, the balance between the employee's right to privacy and the employer's right to protect his property from theft must be maintained, which, in this case, had really taken place. The Court also highlighted the fact that the lawfulness of video surveillance was determined by the identity and number of its processors. In particular, the data was processed only by detectives and supermarket executives who revealed the fact of theft; At the same time, in the Court's view, the duration of the surveillance was absolutely relevant, consistent with the legitimate aim of the employer. Thus, the Court held that there had been no violation of Article 8 of the Convention.

The next case was heard by the European Court of Human Rights on 28 November, 2017. According to the factual circumstances, the plaintiffs were two professors of the Montenegrin School of Mathematics, who considered that the placement of video cameras in the study space, in particular in the classrooms, by the school administration, was illegal and contrary to the norms of domestic law. The Montenegrin courts dismissed their claim on the ground that the classrooms were public spaces and that the plaintiffs' right to privacy had not been violated by installing videocameras there.

The opinion of the European Court of Human Rights is very interesting, contrary to the argument of the local courts; The Court noted that it had established in its practice that private life could also include professional activities which, in the present case, had indeed taken place, thus the Court found the violation of Article 8 and also pointed out that the use of video surveillance was contrary to domestic law of the country as well.

The third case, which is considered in this paper, is the most important and interesting, because it is in this case where the Grand Chamber of the European Court of Human Rights stated its opinion on the legitimacy of covert video surveillance over the employee.

It is noteworthy that this case was first heard by the Third Section of the European Court of Human Rights in 2018, and in 2019, after an appeal, was transferred to the Grand Chamber.

According to the factual circumstances of the case, the plaintiffs were 5 persons employed in a supermarket. They were fired for theft. The theft was recorded by surveillance cameras placed by the employer. It is noteworthy that the employer had warned employees about the existence of cameras other than secretly installed ones.

In its judgment of 9 January, 2018, the Third Section of the European Court of Human Rights found that covert video surveillance was unlawful and thus violated Article 8 of the Convention (right to privacy). The court took into account the fact that the video surveillance took place for a longer period of time than necessary and the employee was not accurately and clearly warned in advance about the video surveillance.

The Grand Chamber formed a completely different view from the Third Section. In the Court's view, the video surveillance, including covert surveillance, did not constitute an offense. This opinion was based on the following arguments: the video surveillance took place only in the areas that belonged to the public space, it lasted for a limited period, in particular, it took place only during one working day until the fact of theft was revealed; This shows the legitimate aim of the covert video surveillance by the employer.

The Court also noted that prior to the implementation of video surveillance, it is necessary to inform the monitored persons clearly about the collection of data on them. It stated that "the requirement of transparency and the ensuing right to information are fundamental in nature, particularly in the context of employment relationships, where the employer has significant powers with regard to employees and any abuse of those powers should be avoided." Nevertheless, the Court also considered that the provision of information is only one of the criteria that is not mandatory to be met when it comes to important public or private interests that may outweigh the lack of prior information.

In view of all the above, the Grand Chamber of the Court has not found a violation of Article 8 of the Convention.

It is clear that the court favors the use of covert video surveillance in the workplace, however, it also believes that this should not continue constantly, but in very strictly defined, individual cases, the example of which is a reasonable suspicion of the employer about the theft committed by the employee and not, for example, mere suspicion or a disciplinary misconduct of the employee.

5. Georgia and the European Union, compliance of the legislation and general recommendations

First of all, it should be noted that the Law on Personal Data Protection is fully in line with the European Convention on Human Rights and Convention 108 of Council of Europe for the Protection of Individuals with regard to Automatic Processing of Personal Data in terms of video surveillance in the workplace.

However, the above law regarding the GDPR is relatively outdated and does not fully correspond to the challenges associated with the development of technologies, including video surveillance systems.

As already mentioned, the European Union has modernized legislation, namely the GDPR, which is fully in line with the process of technological advances in the 21st century, that implies increased risks of vulnerability of data security.

Although the regulation is binding only on the member states of the European Union, it would be better if the Law on Personal Data Protection was modified and made more compliant with the GDPR.

In addition, it should be noted that only a few paragraphs of Article 1 of the Law on Personal Data Protection refer to the use of video surveillance in the workplace. It will be better if it becomes widely detailed and the rights of the employee are specified.

Given the cases of violations mentioned above, it is desirable to prescribe more obligations of employers by law in terms of using video surveillance in the workplace; In particular, the obligation to elaborate a video surveillance policy. Preferably, this includes the employer's aims for which it requires video surveillance, as well as the conditions under which the monitoring will take place, its nature, how the personal data collected will be used, and how long the recordings will be maintained.

Besides, the employer should be obliged to take into account and create such solid systems when elaborating video surveillance policy, which will protect the video recordings from cyberattacks and, consequently, from the illegal distribution of the collected data.

In addition, the amount of the sanction should be increased, as the maximum of 10,000 GEL does not prevent large companies from carrying out video surveillance unlawfully.

Conclusion

Workplace video surveillance is a widespread and well-established practice nowadays.

Given that the need for its use is already quite increased, it is necessary that implementation of video surveillance in practice be carried out in accordance with strict legislation framework and be used only in exceptional cases, if it is necessary for the purposes of security and protection of property, secret information and if these aims cannot be achieved by other means.

When implementing video surveillance, it is important to observe the principle of proportionality. An employer who collects and processes personal data should use video surveillance if he fails to achieve the set aim by other means, or other means require disproportionately large efforts. In addition, it is worth mentioning the obligation of the employer in terms of transparency, in particular, he is obliged to provide the employee with detailed information about the implementation of video surveillance, as well as to justify the need to use it as an extreme and proportionate means to achieve the aim.

The paper raises some issues revealing that the frequent and recurring violations in the process of video surveillance and violations related to processing obtained data are due to inadequate ways of resolving these issues and, in many cases, to the fact that the processor has less strict liability.

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