EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

DECISION

Application no. 70573/17
George GARAMUKANWA
against the United Kingdom

The European Court of Human Rights (First Section), sitting on 14 May 2019 as a Committee composed of:

Aleš Pejchal, *President,*
Tim Eicke,
Raffaele Sabato, *judges,*
and Renata Degener, *Deputy Section Registrar,*

Having regard to the above application lodged on 19 September 2017,

Having deliberated, decides as follows:

## THE FACTS

1. The applicant, Mr George Garamukanwa, is a British national, who was born in 1970 and lives in Southampton. He was represented before the Court by Joe Sykes, a lawyer practising in London.

### A. The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

#### *1. The background to the present complaint*

3. The applicant was employed by a National Health Service Trust ('the Trust') from 16 October 2007 as a clinical manager. The applicant formed a personal relationship with L.M., a fellow member of staff. The relationship ended in May 2012.

4. On 21 June 2012, the applicant sent an e-mail to a colleague expressing concern that L.M. had allegedly formed a personal relationship with D.S., a junior member of staff. On 25 June 2012, the applicant sent an

e-mail to L.M. and D.S. raising the issue of their alleged relationship. L.M. complained to her manager, stating that she wanted the applicant to 'leave her alone'. The manager thereafter spoke with the applicant regarding the e-mail and explained that he felt it had been inappropriate. By this time, an anonymous letter had been sent to the same manager alleging that L.M. and D.S. had been behaving inappropriately at work.

5. Thereafter, between the period of June 2012 and April 2013, L.M. and D.S. appear to have been the victims of a campaign of stalking and harassment. A number of anonymous e-mails were sent to employees of the Trust, both individually and collectively. Further anonymous e-mails and messages were sent to L.M. personally. All these e-mails and messages sent from bogus accounts were malicious in nature and content and made personal allegations against L.M. and D.S. Property belonging to both L.M. and D.S. was damaged.

6. In April 2013, L.M. approached the police and complained that the applicant was stalking and harassing her. The police informed the Trust that they were investigating L.M.'s claims and that there were serious concerns about the applicant's behaviour. On 12 April 2013, the Trust suspended the applicant. On 24 April 2013, the applicant was arrested, but no charges were brought against him.

7. In the course of their investigation, the police found photographs on the applicant's iPhone of L.M.'s home address and a sheet of paper which contained details of the e-mail addresses from which the anonymous e-mails had been sent ('the iPhone material'). The police, acting on legal advice, passed evidence from its investigation, including the iPhone material, to the Trust. The Trust then carried out its own internal investigation. Relying on the iPhone material, the investigation concluded that there was sufficient evidence to link the applicant to at least some of the anonymous e-mails.

8. At a disciplinary hearing held between 17 and 23 December 2013 the applicant was dismissed on the basis of gross misconduct. During the course of the disciplinary hearing, the applicant voluntarily provided the panel with further evidence intended to support his defence, including personal e-mail and Whatsapp correspondence between him and L.M. In their letter confirming the outcome of the disciplinary hearing, the panel referred to various pieces of evidence, including *inter alia* the iPhone material and selected personal e-mails and Whatsapp messages which the applicant had sent to L.M.

### *2. Proceedings before the Employment Tribunal*

9. The applicant raised a claim before the Employment Tribunal alleging *inter alia* unfair dismissal and unlawful race discrimination. A 7-day hearing was held between February and March 2015. In the course of the hearing, the applicant's representative argued that the Trust had acted in breach of section 6 of the Human Rights Act 1998 and Article 8 of the

Convention by examining matters which related to the applicant's private life and using this as evidence to justify its decision to dismiss him.

10. On 20 March 2015, the Employment Tribunal dismissed the applicant's claim and upheld his dismissal. The Employment Tribunal found that Article 8 was not engaged. In reaching this conclusion, the Employment Tribunal noted in particular that the anonymous e-mails were sent to the work e-mail addresses of the recipients and in part dealt with work-related matters.

### *3. Proceedings before the Employment Appeal Tribunal and Court of Appeal*

11. The applicant appealed to the Employment Appeal Tribunal on various grounds. He argued in particular that the Trust had relied on private and personal material to justify its decision to dismiss him; material he reasonably expected would remain private. The applicant contended that the Trust failed to draw a distinction between public material (such as the anonymous e-mails sent to multiple employees of the Trust) and private material (such as the personal messages and e-mails sent to L.M.). Accordingly, there had been a violation of Article 8 of the Convention.

12. On 1 March 2016, the Employment Appeal Tribunal dismissed the appeal. It found that on the evidence the Employment Tribunal had been entitled to conclude that the applicant had no reasonable expectation of privacy in relation to the material relied on by the Trust. It was significant that the applicant had at no stage objected to the use of or reliance on any of the material when faced with the disciplinary proceedings. After L.M. complained to her manager regarding the applicant's e-mail of 25 June 2012 to her, the applicant must have expected that she would complain of feeling harassed by his ongoing correspondence with her, and he could have had no expectation of controlling when and where she complained or what she did with e-mails sent to her. Finally, the content of the e-mails sent to L.M.'s private e-mail address was not purely personal, and touched upon workplace issues as well.

13. In any case, even if Article 8 of the Convention was engaged, any interference with the applicant's rights was justified by the Trust's need to protect the health and welfare of other employees. The inevitable conclusion would have been that any interference was justified.

14. At a hearing on 22 March 2017, the Court of Appeal refused the applicant permission to appeal from the Employment Appeal Tribunal.

## B. Relevant domestic law and practice

### *1. Human Rights Act 1998*

15. The Human Rights Act 1998 came into force on 2 October 2000. Its aim was to give effect under domestic law to the rights and freedoms enshrined in the European Convention on Human Rights. Pursuant to section 6, it is unlawful for a public authority to act in a way which is incompatible with the Convention.

### *2. Relevant case-law*

16. *X v. Y* [2004] EWCA Civ 662 concerned a claim for unfair dismissal where an employer had dismissed its employee after it discovered that he had been cautioned by the police for an offence of gross indecency in a public place. The Court of Appeal found that what is "private life" depended on all the circumstances of the particular case, such as whether the conduct took place on private premises and, if not, whether it happened in circumstances in which there was a reasonable expectation of privacy for conduct of that kind. The Court of Appeal concluded that Article 8 of the Convention was not engaged in the circumstances – the applicant's conduct took place in public and it was a criminal offence, which is normally a matter of legitimate concern to the public and ought to have been disclosed by him to his employer.

17. *J38, Re Application for Judicial Review (Northern Ireland)* [2015] UKSC 42 (1 July 2015) concerned the publication of CCTV images of a child aged 14 years in newspapers as part of a police campaign. A majority of the Supreme Court held that Article 8 of the Convention was not engaged. The "touchstone" for the engagement of Article 8 of the Convention was whether the applicant, on the facts, had a reasonable expectation of privacy in relation to the subject matter of his complaint. The test was objective and had to be applied broadly. The court would, in taking account of all the circumstances, consider the applicant's attributes, the nature of the activity in which he had been involved, the place where it had happened and the nature and purpose of the intrusion.

# COMPLAINT

18. The applicant complained under Article 8 of the Convention that the Trust's decision to dismiss him from his employment relied on material that was private, including the iPhone material and personal e-mail and Whatsapp correspondence between him and L.M. He argued that the domestic courts' decisions upholding his dismissal therefore constituted a breach of his right to privacy within the meaning of Article 8 of the

Convention. The Trust had no right to retain or rely on the evidence provided to them by the police, nor did they have the right to rely on private material from L.M. or any other employee of the Trust.

## THE LAW

19. Complaining about the interference with his right to privacy, the applicant relied on Article 8 of the Convention, which provides as follows:

> "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 such as is in accordance with the 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 prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

20. The Court notes that it was never called into question that the Trust was a "public authority" for the purposes of section 6 of the Human Rights Act (see paragraph 9).

21. The Court notes that in the present case, both the Employment Tribunal and the Employment Appeal Tribunal found that Article 8 of the Convention did not apply on the basis that the applicant had no reasonable expectation of privacy in relation to the material relied upon by the Trust in the disciplinary proceedings.

22. The sending and receiving of communications is covered by the notion of "correspondence" (*Bărbulescu v. Romania* [GC], no. 61496/08, § 74, 5 September 2017 (extracts)). The Court has reiterated that communications from business premises as well as from the home may be covered by the notions of "private life" and "correspondence" within the meaning of Article 8 of the Convention (see *Halford v. the United Kingdom*, 25 June 1997, § 44, Reports of Judgments and Decisions 1997-III, § 44; and *Copland v. the United Kingdom*, no. 62617/00, § 41, ECHR 2007-I). In order to ascertain whether the notions of "private life" and "correspondence" are applicable, the Court has on several occasions examined whether individuals had a reasonable expectation that their privacy would be respected and protected (see *Bărbulescu*, cited above, and *Benedik v. Slovenia*, no. 62357/14, §§ 115-118 24 April 2018). In that context, it has stated that a reasonable expectation of privacy is a significant though not necessarily conclusive factor (see *Bărbulescu*, cited above, § 73).

23. The Court observes that the applicant's complaint refers to both private photographs stored on the applicant's iPhone, as well as personal e-mails and messages sent to employees of the Trust. The Court considers

that the former would fall within the ambit of "private life" for the purposes of Article 8 of the Convention, while the latter would fall within the ambit of "correspondence". The Court must therefore examine whether on the particular facts of the present case the applicant could be considered to have had a reasonable expectation of privacy in relation to the material relied upon by the disciplinary panel to dismiss him.

24. The disciplinary panel of the Trust accepted an internal investigation's conclusion that the applicant had sent at least two e-mails of a malicious nature to the Trust's employees (see paragraph 7 above). In reaching this conclusion, the disciplinary panel relied upon a range of evidence, including the iPhone material and private communications (such as e-mails and Whatsapp messages) sent between the applicant and other employees of the Trust, notably L.M. It is apparent that some of the private communications were passed to the Trust by the police, while others were voluntarily provided by the applicant and other employees of the Trust (see paragraph 8 above). The applicant has not however complained about the lawfulness of the passing of the iPhone material and private communications to the Trust before this Court or the domestic courts. Accordingly, the Court will not examine the issue.

25. The Court notes that some of the e-mails sent by the applicant to L.M. were from a work e-mail address and concerned workplace issues. In light of the Court's findings in *Bărbulescu* (cited above, §§ 69-81) the Court does not consider that because an e-mail touches upon both professional and private matters, or has been sent from a workplace e-mail address, this would automatically mean it would fall outside the scope of the applicant's private life for the purposes of Article 8 of the Convention.

26. It is clear from the Court's case-law that in some circumstances reliance by an employer on material or communications of a private nature may engage Article 8 of the Convention (see for example, *Libert v. France*, no. 588/13, § 25, 22 February 2018). The Court however agrees with the conclusion of the Employment Appeal Tribunal that in the circumstances the applicant did not have a reasonable expectation of privacy in respect of the iPhone material and private communications relied upon by the Trust.

27. The Court observes that the applicant was arrested and interviewed in respect of allegations made by L.M. of harassment in April 2013 (see paragraph 6 above). By that time the applicant had been aware for almost a year, since 21 June 2012, that L.M. had raised concerns to the Trust that his communications with her and other employees amounted to harassment and that the Trust considered his behaviour to be inappropriate (see paragraphs 4 and 6 above). In these circumstances, the Court considers it relevant that the applicant had sufficient prior notice that allegations of harassment had been made against him by L.M. Accordingly, the applicant could not have reasonably expected that any materials or communications post-dating 21 June 2012 which were linked to the allegations made by L.M. would

remain private. In this regard, the Court considers that the present case can be distinguished from *Bărbulescu*, where the Court found that the applicant in that case had not been put on notice as to the extent and nature of his employer's monitoring activities (cited above, §78 and *Copland,* cited above, § 42).

28. The Court also considers it relevant that the applicant did not seek to challenge the use of the iPhone material or any private communications during the course of the disciplinary hearing. On the contrary, during the course of the disciplinary proceedings, the applicant voluntarily provided the Trust's disciplinary panel with further private communications between him and L.M. consisting of Whatsapp messages of an intimate nature.

29. In the circumstances, the Court considers that there was no reasonable expectation of privacy over any of the material or communications before the disciplinary panel. It notes that the domestic courts considered the applicant's Article 8 arguments and came to the same conclusion and the Court cannot see that the applicant has introduced any strong reasons as to why this Court should find otherwise (see *McDonald v. the United Kingdom*, no. 4241/12, § 57, 20 May 2014).

30. Accordingly, the Court considers that the applicant's complaint is incompatible *ratione materiae* with the Convention pursuant to Article 35 §§ 3 (a) and 4.

For these reasons, the Court, unanimously,

*Declares* the application inadmissible.

Done in English and notified in writing on 6 June 2019.

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| Renata Degener<br>Deputy Registrar | Aleš Pejchal<br>President |