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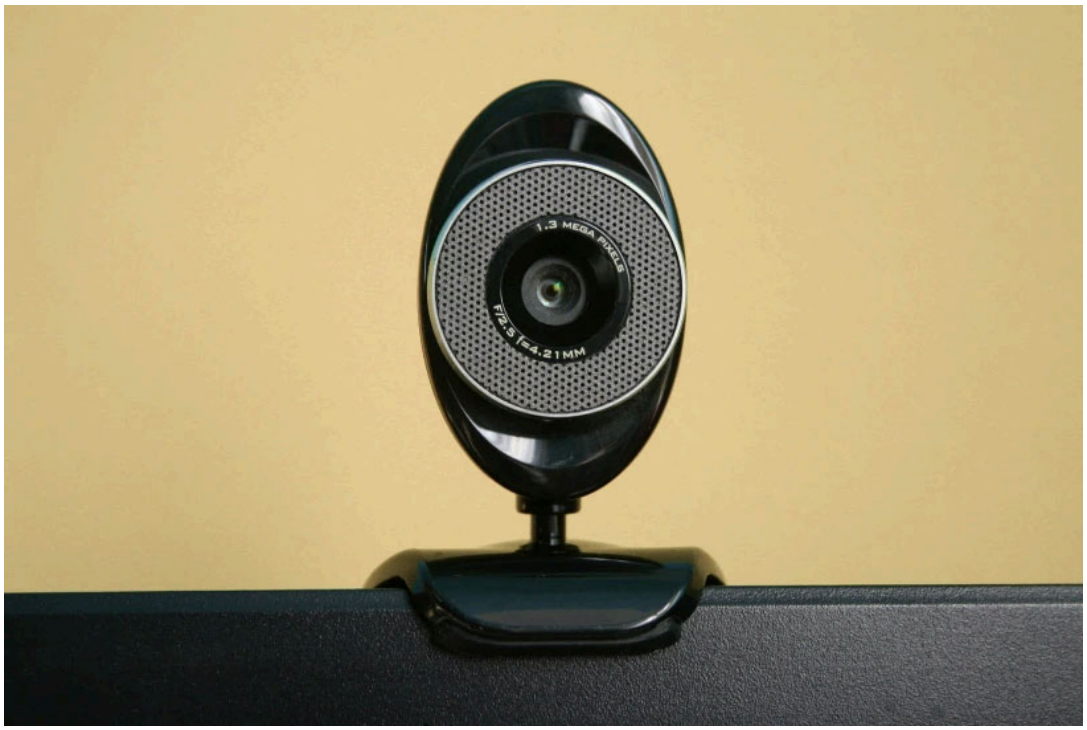
Employee Monitoring as a Form of Imprisonment – Jeevan Hariharan and Hadassa Noorda



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A cursory Google search of employee monitoring tools reveals the breadth of technologies now available for companies to track worker activity. The top results are dominated by advertisements for software with features like keystroke logging, website monitoring, video surveillance and geolocational tracking, all with the goals of keeping managers informed and harnessing productivity. While monitoring employees is hardly a new phenomenon, the interest in such technologies has dramatically increased as a result of the Covid-19 pandemic with the surge of people working from home (WFH).

From a legal perspective, the permissibility of these monitoring practices is complex. Two excellent posts on this blog (one by Philippa Collins and another by Eleni Frantziou) have recently addressed the issue, focusing on the compatibility of employee monitoring while WFH with the right to respect for "private and family life, home and correspondence" enshrined in Article 8 of the European Convention on Human Rights (ECHR).

This post comes at employee monitoring from a different angle, addressing the connection between monitoring and imprisonment. As we see it, much of the contemporary discourse around employee monitoring is predicated on the idea that the wrongfulness of monitoring lies in the impact that it has on an employee's privacy, especially their informational privacy. On this logic, if informational privacy risks can be appropriately managed, then monitoring can be justified. But an employee's control over their information and data is not the *only* value that is at stake, especially where monitoring activities are egregious. In more extreme cases, there are also important ways in which an individual's liberty is restricted, such that the monitoring practices can also be considered a form of imprisonment. Understanding the connection between monitoring and imprisonment in egregious cases is important, because it provokes deeper thinking into why monitoring generally is troubling and how the law can address it.

1. **Monitoring and Informational Privacy**

In order to interrogate the orthodox link drawn between monitoring and informational privacy, and think about potential links with imprisonment, it is helpful to start with an actual example. Recent reporting by the Guardian on monitoring systems being introduced at Teleperformance, one of the world's largest call centre companies, provides a useful case study. According to an article published at the end of March 2021, some staff at Teleperformance will face the installation of specialist webcams connected to an artificial intelligence system that will scan their remote working spaces for breaches of business rules. The system called "TP Observer", uses facial recognition and location tagging technology which scans for infractions like "missing from desk", "unauthorised mobile phone usage", and "detecting an idle user" (which happens if the system detects no keyboard strokes or mouse-clicks). Eating on a shift is not allowed, and if staff want to leave their desk to get a glass of water, they must click "break mode" on the associated app. If any breach is detected, the system will capture a still photograph which is immediately sent to the employee's manager.

Teleperformance (which employs approximately 380,000 people in 34 countries) has said that the use of the technology will differ depending on the country, and that the software's remote-scanning capability will not be used in the UK. It should also be noted that the company has denied claims in the Guardian articles more generally. On the human resources website, Personnel Today, a spokesperson for Teleperformance is reported as saying, amongst other things, that:

> *"We absolutely trust [staff] to do their jobs in a professional manner. It is important to reaffirm that regardless of the new technologies, tools and third-party providers that are being used, our work-at-home tools and processes ensure that the processing of our employees data complies with the General Data Protection Regulation (GDPR) and other applicable regulations."*

The spokesperson's comments here may seem rather mundane. But the words almost certainly would have cleared checks by an internal legal department or external counsel, and they reveal something important; namely, that the way Teleperformance itself understands the legal risks of their monitoring activity seems to be purely in terms of employee data. The company recognises that the monitoring tools being deployed result in data being processed. It is, however, confident that relevant laws are complied with, such as the General Data Protection Regulation (GDPR) (which continues to be part of UK law following Brexit as retained EU law). The GDPR, as is well known, creates a broad system of rules for the processing of "personal data", defined broadly as "any information relating to an identified or identifiable natural person". This includes provisions that data needs to be processed on one of the lawful grounds set out in Article 6, and that processing must be transparent. The regime is chief amongst the ways in which the law protects our informational privacy, or control over information about ourselves.

Teleperformance is hardly alone in viewing employee monitoring primarily through the lens of information and data. If anything, even for those of us who are critical of monitoring practices, the main issue with monitoring is that it compromises people's ability to keep important information about themselves private, such as when and how long they are away from their desk, the websites they are visiting, and whether they check their mobile phone. The fact that a manager can have access to this information at their whim also provides a basis for us to understand the deep psychological harms caused by monitoring. As Frantziou highlights in her post, employees have reported extreme levels of stress as a result of monitoring, and that the levels of scrutiny have left staff demoralised. Moreover, knowledge that a boss can access information or details as to one's communications or social media activity helps explain why monitoring may have a chilling effect on some other rights, such as freedom of expression.

2. **Moving Beyond Informational Privacy**

The significant way in which monitoring can compromise an employee's informational privacy should not be underestimated. At the same time, however, we should be careful not to assume that the *only* reason why people are psychologically impacted or change their behaviour as a result of monitoring is that employers have access to information or data employees want to keep private. In our view, employee monitoring, especially while WFH, is a complex and multi-layered issue which requires consideration of other values as well. Two points in particular here are worth noting.

The first point is that on many theoretical accounts of privacy, "informational privacy" is only one component of a person's privacy. In the English legal context, for instance, Nicole Moreham has argued that beyond information, privacy also encompasses "physical privacy" which on her account covers "unwanted access to the physical self". The idea here is that when someone is watched, listened to or otherwise sensed against their wishes, the principal objection is not necessarily that any meaningful "information" has been obtained by the observer; rather the concern is "primarily physical". In Moreham's words, "the observer is, through the use of the senses, physically experiencing something of you against your wishes and/or allowing others to do the same". The precise nature of this physical privacy interest, and how it interacts with informational privacy is not discussed further in this post. But it is important to bear in mind because it supports the idea that concerns with monitoring run deeper than an objection to information access and data processing.

3. **Imprisonment**

The second point is that going beyond privacy, extreme monitoring can have the effect of forcing people to stay in a particular place. In this way, it constrains liberty and can constitute a form of imprisonment. This connection emerges partly from the language employees use to describe their experience of surveillance activities. In a BBC story about monitoring in office workspaces prior to the pandemic, an employee says, "if we stood up or spoke to each other we were constantly watched, it felt like we were in prison". The employee here is deploying the notion of imprisonment figuratively. However, when we consider surveillance in the WFH context, especially while people are confined to a room in their homes, the link between monitoring and imprisonment becomes all too real. This is a connection that has received little attention so far in the discussion of employee monitoring, and is worth unpacking.

Imprisonment is the restraint of a person's liberty, typically in a prison institution with walls and locks. It subjects the targeted person to the control of others and infringes on individual liberty. However, other constraints can deprive individuals of their liberty even if they are not put behind bars. Elsewhere, Hadassa Noorda has introduced the concept of "exprisonment" to describe practices of restraint that do not subject individuals to prison or jail sentences but do restrain or control them in their daily lives. The argument that imprisonment may be exercised over a subject on the street or at home is also in line with how the concept of "imprisonment" is understood in the context of the English tort of false imprisonment. Clearly, the tort of false imprisonment does not require incarceration in a prison facility. Rather, as Lady Hale recently stated in *Regina (Jalloh) v Home Secretary* [2020] UKSC 4 at [24]:

> *"The essence of imprisonment is being made to stay in a particular place by another person. The methods which might be used to keep a person there are many and various. They could be physical barriers, such as locks and bars. They could be physical people, such as guards who would physically prevent the person leaving if he tried to do so. They could also be threats, whether of force or of legal process."*

This means that, even without using an actual prison facility, persons can be so restricted that they are in fact prisoners. The methods of imprisonment vary from confinement with physical barriers to control of individuals without actually locking them up. An inmate in an actual prison facility is subject to the control of others, cannot move freely, cannot make choices with respect to when they eat, for instance, or when they sleep, is usually unable to keep her job, or to make choices with regard to the work they do, and maintaining and starting familial and other intimate relationships is difficult. In these ways, confinement in a prison facility curtails the individual liberty of the targeted person. Extreme monitoring in the WFH context can have similar impacts: it can have the effect of forcing people to stay in a particular place, controlled by their manager in almost all their activities. In most cases, the impact of monitoring does not extend across all rights that are related to individual freedom, but a person subjected to monitoring when WFH can be like a prisoner in some areas of life: such as, for example, when an employee is restricted from moving from her desk.

The aforementioned Teleperformance case is an exemplary illustration of monitoring that curtails the freedom of individuals subjected to monitoring when WFH in a comprehensive way. Employees are not under lock and key in a literal way, but the cumulative effect of the monitoring practices adopted is that people's free movement and behaviour is heavily curtailed. In such situations, extreme monitoring can restrict individuals in their ability to move, contact family and friends, make choices with respect to when they eat, drink, etc. This does not mean that every practice of monitoring is similar to imprisonment, but in extreme cases, monitoring can restrict an individual's liberty, such that the monitoring practice can potentially constitute a form of imprisonment.

4. **Monitoring versus requirements to be physically present in conventional workplaces**

We will shortly offer some preliminary thoughts on how the connection between monitoring and imprisonment might be helpful when thinking about legal responses to monitoring practices. Before doing so, we want to address a potential objection to our view about whether monitoring differs from any number of requirements to be physically present in conventional workplaces, both before the pandemic and now. The objection can be put in various ways, using different examples. Some might point to rules for workers to be confined on a factory floor for the duration of a shift. Others

might think about requirements for a supermarket employee to use 'clocking in' machines at the beginning and end of shifts, which allow employers to monitor hours closely. In each of these situations and others, we do not usually think about employees as being imprisoned by their working requirements. So, it might be asked, is our claim that extreme monitoring while WFH represents some special restriction on liberty such that it specifically constitutes imprisonment, different from restrictions on physical movement in conventional workplaces?

As we see it, answering this question properly requires us to go back and consider pre-pandemic/conventional workplace situations more deeply. There are various working environments, and always have been, that put employees into confined spaces for a period of time or involve high degrees of supervision. These requirements, in our view, do not ordinarily constitute imprisonment. It does not follow from this proposition, however, that an employee can *never* be imprisoned at work. If, for example, a worker who was confined to a supermarket floor broke business rules and was locked in a storeroom as punishment, this would constitute a form of imprisonment in most people's eyes. What this example seems to prise out is that the difference between a person being imprisoned or not in the workplace is not about the inability to move in and of itself. Rather, the relevant boundary seems to be around consent, and whether the employee can be said to have voluntarily accepted the restrictions on their movement.

Consent in the workplace is a vexed issue. On the one hand, it might be argued that an employee can always quit their job without notice so, in one sense at least, they are always working consensually. This may be so, but the reality is almost always more complicated. Especially when it comes to an employer asking an employee to do something specific when they are already working somewhere, the power imbalance between the parties will often mean that an employee realistically has little choice but to accept what is being asked of them. This is a point that both Collins and Frantziou raise in their posts, highlighting that there is good reason to be sceptical whenever the notion of consent arises in employment situations. It also chimes with scholarship in the United States legal context on worker surveillance. Ifeoma Ajunwa, Kate Crawford, and Jason Schultz have argued that where there is asymmetrical bargaining power between the employer and the employee, "employee consent is essentially ceremonial with no space for true negotiation."

In treading this line between what is clearly performed consensually at work, and where the situation is more complicated, an important factor in our view is the employee's expectations of their workplace and what they are accepting when they sign-up to work somewhere. When a ferry worker applies for and accepts a job working on board a boat, they know the way and extent to which their movements will be restricted as a part of the job. But if there are further restrictions on liberty which go beyond what would ordinarily be expected or understood by the employee, then our sense that their movement is being unjustifiably restricted would begin to kick in.

Seen in this light, it becomes clearer why our focus is on high levels of monitoring, particularly while WFH after the start of the pandemic. These situations are by no means the only circumstances which could raise imprisonment concerns. Indeed, the BBC story mentioned above where an employee described surveillance as prison-like was before Covid-19, in an in-person office environment. But the pandemic does seem to have accelerated the interest in surveillance technologies considerably. Moreover, the fact that employees often undertook a quick transition to working from home makes it precisely the type of situation susceptible to a mismatch between what workers understood when they were signing up for a job, and what they were suddenly required to do one day. If anything, the pandemic has created the perfect conditions for employers to shift work rules around very quickly, capitalising on the vulnerability of workers in an economic downturn and the fact that many workers were subject to government restrictions anyway. Situations where intense monitoring has been introduced quickly while workers have transitioned to WFH therefore seems to deserve careful scrutiny from an imprisonment perspective.

5. **Implications**

One of our main goals writing this post has simply been to provoke thought on connections between monitoring and imprisonment. In this final section, we begin the process of taking this discussion one step further and consider some potential legal implications of the above analysis. While there are various avenues one might take after acknowledging that monitoring implicates more than just informational privacy, there are two points in particular worth mentioning.

First, in very egregious cases, there could potentially be a basis for an employee to bring a claim against their employer that monitoring practices constitute a false imprisonment under English law. This is not the first time that this tort has arisen for consideration in the context of people staying at home as a result of the Covid-19 pandemic. In a post on the UK Constitutional Law Association Blog, Jonathan Morgan examines the question of whether any member of the UK population subject to the first Covid-19 lockdown from March 2020 could claim that they were falsely imprisoned. Drawing on the Supreme Court's decision in *Jalloh* (which has already been noted above), Morgan points out that the issue of whether a hypothetical claimant was imprisoned in the sense required for the tort is ultimately a fact-sensitive exercise. In *Jalloh* itself, the claimant was not restrained by any physical barrier but rather subject to an (unlawful) curfew imposed by the Secretary of State, backed by electronic tagging and the threat of criminal sanctions for any breach. It did not matter that the claimant ignored his curfew from time to time. What mattered was that the claimant's compliance with the curfew was enforced, not voluntary, backed by the full authority of the state. As Morgan's post highlights, whether there was imprisonment in the population-wide Covid-19 lockdown requires careful consideration of the regulations in force, and in particular the extent to which being permitted to leave for a "reasonable excuse" meant that

there was no curtailment of liberty. If there was imprisonment, a second issue would arise about whether the imprisonment was "false" which would turn on whether the Covid-19 regulations were lawful.

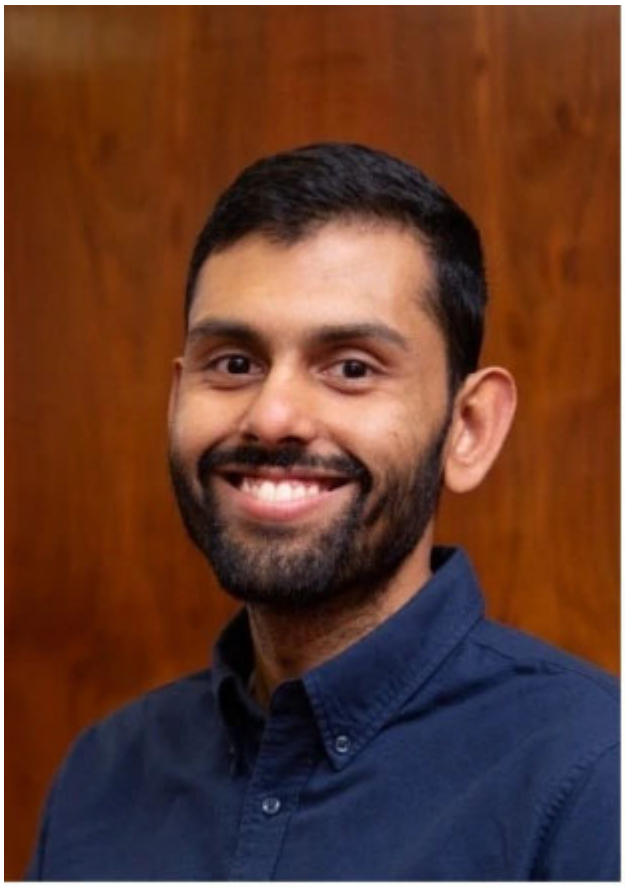
Determining whether employee monitoring is a false imprisonment in a specific case will involve some similar considerations. If, for example, an employee is allowed to leave their room for breaks, there will be an issue about whether the person's movement is seen as sufficiently constrained to constitute an imprisonment. But there are also important differences where the defendant is a private employer, not the state. In the employment situation, false imprisonment does not turn on whether the defendant has the legal authority sourced in legislation to detain the claimant. Rather, and entirely consistent with the discussion above, a key issue would be about whether the employee consents, because false imprisonment requires the absence of consent. From the employer's perspective it would no doubt be argued that an employee has voluntarily entered into a contractual arrangement to work in certain conditions, and so cannot be said to be falsely imprisoned by those conditions. Old cases such as *Herd v Weardale Steel Coal and Coke Co Ltd* [1915] AC 67 may be invoked in support, where the House of Lords held that it was no false imprisonment when a plaintiff miner descended to the bottom of a pit and was not transported back up when he refused to work because he thought it unsafe.

In line with the analysis above, our view is that consent as a bar to a false imprisonment claim is a complicated issue in this context. The best way of explaining the decision in *Herd* is to consider it analogous to the ferry example we introduced above, and see it as a situation where the court was comfortable that the mine worker understood and voluntarily accepted the restrictions on liberty involved in their job. But this does not mean that the position would be the same in all cases. Rather, consistent with the reasoning in *Jalloh*, whether certain monitoring situations constitute imprisonment will be a highly fact-specific matter. Especially if an employment contract or working arrangement is not clear as to extreme monitoring practices, or intense monitoring is sprung on employees without properly informing workers (e.g. because of a quick transition to employees WFH), a strong argument could be made that there is no consent to the deprivation of liberty and that liability for false imprisonment should follow.

The second implication concerns how firms approach the task of managing the risks associated with employee monitoring. Thus far, this post has primarily discussed the connection between employee monitoring and imprisonment in extreme cases. Certainly, it seems clear that the tort of false imprisonment would only ever be made out in an egregious situation where the employee is totally constrained in their free movement as a result of the surveillance. However, even though we may only attach the label of "imprisonment" to monitoring in an extreme case, this tells us something important about more "normal" cases as well; namely, that the activity in question is in some respects on the same spectrum as imprisonment. This is significant because it might mean people's attitudes towards the risks of monitoring changes. When monitoring is understood only in terms of informational privacy, there can be a tendency to minimise its impacts. And

from an employer perspective, it is somewhat easier to cast off concerns and determine that the risks can be managed without too much difficulty, by providing employees with minimal notice of the monitoring or by obtaining fairly passive consent from an employee (not dissimilar to the passive consent mechanisms we are all subject to when we click "accept" to the use of cookies online).

If we move beyond informational privacy and see monitoring as implicating aspects of our liberty as well, the position for employers seeking to impose monitoring practices becomes (in our view, appropriately) less straightforward. If the only factors that differentiate monitoring in a particular case from being imprisonment is that the employee's movement is not fully constrained or that the employee consents, then the business will need to scrutinise their practices very closely, making sure that the monitoring does not slide into imprisonment territory. In particular, the nature of consent given will come into sharp focus, bringing with it all the complexities of whether and how consent in the workplace actually operates. At the very least, it seems questionable that a person could ever be considered to have accepted significant reductions in their ability to move freely merely because of a quick click of a button on top of fine print that nobody reads or because of text buried in an employment contract. In short, businesses have to take more seriously that on top of privacy concerns, their monitoring could at least be in the same realm as certain forms of imprisonment and analyse the permissibility of their practices accordingly.



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