

COMPLAINT

1. On the 28th November 2023, [REDACTED] (the “**complainant**”) lodged a complaint with the Information and Data Protection Commissioner (the “**Commissioner**”) pursuant to article 77(1) of the General Data Protection Regulation (the “**Regulation**”) alleging that [REDACTED] (the “**controller**”) processes her personal data by means of production cameras that “*monitors our [employees] performance at the table during shifts anonymously 24 hours a day*”.
2. The complainant, an employee of the controller, stated that she performs her employment tasks in front of a camera and the controller has a team that monitors her performance during shifts in an anonymous manner. The complainant further explained that the employees are assigned a score for a number of points, such as, the employees should not look tired, the employees could not move their eyes from the cameras for more than three (3) seconds, and the skin of the employees should not look shiny. If the score assigned to the employee is not equal or not greater than 85%, the employee will not receive the monthly company bonus and disciplinary action may be initiated. Therefore, the complainant alleged that the controller is abusing the use of the production cameras in such a manner to exercise total and constant control of the employee, which as a result, leads the complainant to carry out her employment duties under immense physical and emotional stress.
3. As supporting documentation, the complainant submitted feedback provided by the employer in relation to her performance, such as, “*Thank you for the decent performance! Some preparation for the shift [sic.] have been done. The eye contact with the camera is maintained as well as the straight posture. Game is [sic.] lead without delays ... please, do not close the*

bets over the wheel. It is advised to minimize touching of the wheel (it should be touched once per betting time right before the spin). Add some powder to achieve matt look. Good luck!"

INVESTIGATION

4. As part of the investigation procedure of this Office, the Commissioner provided the controller with the opportunity to provide its submissions in order to defend itself against the allegation raised by the complainant. In particular, in terms of article 58(1)(e) of the Regulation, the Commissioner requested the controller to provide the following information:
 - a. to provide copies of any policies in relation to the processing operation conducted by means of the cameras;
 - b. to clearly outline the purpose(s) and the legal basis of the processing operation conducted by means of the cameras pursuant to article 6(1) of the Regulation;
 - c. to indicate if the complainant has been informed of the processing operation pursuant to the transparency obligation, and if yes, to explain how she was informed;
 - d. to indicate if recordings are kept, and if in the affirmative, for how long are these kept; and
 - e. to explain if the controller reviews the performance of the employees in real time or not.

5. By means of a letter dated the 12th January 2024, the controller provided the following documentation:
 - the CCTV Privacy Policy which is made publicly available on [REDACTED]
 - photos of CCTV warning signs located at the premises of the controller;
 - [REDACTED]
 - [REDACTED];
 - [REDACTED]
 - [REDACTED]

- an extract of the Register of Processing;
- a Data Protection Impact Assessment [REDACTED]
- a Data Protection Impact Assessment [REDACTED];
- [REDACTED];
- Uniform and Presentability Policy;
- Remuneration Policy; and
- [REDACTED].

6. In its submissions, the controller provided the following arguments in relation to the complaint:

- a. that the controller clarifies that it has two (2) separate camera systems: general close circuit televisions cameras which are used for security purposes and production cameras related to the services provided by the controller;
- b. that the purposes of the processing by means of the cameras are as follows: (i) to protect the company's employees; (ii) to protect the company's premises and assets; (iii) to prevent pilfering, malingering, deliberate damage or other misconduct; (iv) to ensure – and record – that company's procedures are being followed; (v) to use video footage or screenshots as evidence to defend the legitimate interest of the controller or a third party; (vi) to use video footage or screenshots as evidence for internal investigation against an employee or any third person; (vii) employee performance assessment related processes; and (viii) to ensure the integrity and safety of the game and services offered by the controller;
- c. that the processing conducted by the controller is covered by legitimate interest and, or legal obligation linked with the controller's field of business;
- d. that the employees are informed of the processing activities conducted by the controller by means of the employment agreement, internal procedures and rules, and all the main documents are made available to all employees within the internal resource platform, which is made available to employees 24/7 online;
- e. that the information in relation to the processing is also provided orally during the training of an employee and the employee is briefed about internal procedures and policies, including the performance assessment system;

- f. that the latest changes linked to the [REDACTED] were implemented in 2020 and these changes were communicated to employees on the 24th August 2020¹ and during meetings with employees;
 - g. that the retention period for production cameras is up to thirty (30) days and kept in back-up up to ninety (90) days, back-ups have limited access rights;
 - h. that in specific cases, exceptions can be applied to mentioned retention periods for specific recordings, for example, during on-going investigation and, or legal proceedings;
 - i. that the performance reports are kept for up to two (2) years due to local legal accounting and employment requirements;
 - j. that performance of the game presenter and/or shuffler are reviewed in real time and the assessment is done in a limited time required for the relevant employee to perform it according to the internal procedures and policies, and therefore, the performance of the employee is not monitored constantly;
 - k. that, however, in some cases the performance can be reviewed from a recording (not older than forty-eight hours), such as for example, when the employee responsible for the performance assessment did not assess the relevant employee during his/her shift;
 - l. that the controller rejects the arguments of the complainant that the cameras are used *“as a tool to have total and constant control of the employee”* and *“our sessions are recorded, so they can always access them”*; and
 - m. that according to internal procedures and policies, the complainant and other employees have the right to dispute any performance assessment report received.
7. The Commissioner provided the complainant with the opportunity to rebut the arguments of the controller. On the 23rd January 2024, the complainant submitted the following salient arguments:
- a. that the controller accesses the tables anonymously and the employees cannot know if they are really being evaluated in real time;

¹ A screenshot was provided by the controller.

- b. that due to the nature of the activity, the complainant is aware that certain controls can take place for prevention of fraud and security reasons, however, this does permit the controller to judge the employees at an undefined time and provide its feedback even days later; and
 - c. that the assessments conducted by the controller should be made in such a manner to allow the employees to know that they are being monitored in real time.
8. On the 25th January 2024, the Commissioner provided the controller with the opportunity to rebut the submissions of the complainant and requested further clarifications in relation to the following:
- a. to clearly provide evidence that the complainant was informed about the processing operation, in particular, that it is carried out for the purpose of assessing her performance;
 - b. to indicate if the employee is informed by the controller in real time that she is being monitored for the purpose of assessing her performance; and
 - c. to state how frequent is the performance of the employee being monitored and whether it occurs per session.
9. By means of an email dated the 2nd February 2024, the controller submitted the following considerations for the Commissioner to take into account during the legal analysis of this case:
- a. that the complainant has been informed about the processing operations in several ways and through various communication channels, which include the following:
 - i. the General Privacy Notice to employees of the [REDACTED];
 - ii. the [REDACTED];
 - iii. [REDACTED]
 - iv. [REDACTED]
[REDACTED]
 - v. [REDACTED]
[REDACTED]

- vi. [REDACTED]
 - vii. [REDACTED]
- b. that the controller conducts performance assessment in real time and by using pre-recorded videos from last forty-eight (48) hours;
 - c. that these recordings are pre-recorded randomly by bot, and it creates draft of performance assessment with attached video;
 - d. that then these drafts are being assigned to [REDACTED] Performance Assessment Specialist;
 - e. that the performance assessment specialist bonus depends on their productivity/speed so that they do not have time to go back to the same Game Presenter several times to evaluate the specific employee;
 - f. that all assessments being done during the shift of Performance Assessment Specialist are approved at the beginning of the next shift except where the score is below [REDACTED] and in the latter case, the assessments should be reviewed and approved by the Team Manager of the game presenter;
 - g. that game presenters are not informed in real time that they are being assessed by the Performance Assessment Specialist otherwise the employee in question would not be motivated to perform in good quality at all times but only during the period of assessment;
 - h. that the Performance Assessment Specialist provides from 2 to 3 assessments to the Game Presenter per month, and therefore, not all sessions are assessed; and
 - i. that, finally, the controller does not perform activities to reduce the bonuses received by their employees.

LEGAL ANALYSIS AND DECISION

10. As a preliminary step of the investigation, the Commissioner assessed the complaint submitted by the complainant pursuant to article 77(1) of the Regulation, wherein the complainant alleged that the controller unlawfully monitors her performance in real time without her knowledge, and that as a result, the complainant considered this to be an infringement of the data protection legislation.
11. During the course of the investigation, it was established that the controller provides B2B online casino services and part of these services is to provide its games to its clients via live stream. The controller explained that the live stream of the game is recorded for various purposes, which include, *inter alia*, processing for the purpose of assessing the performance of its employees.
12. Accordingly, the Commissioner will solely consider the lawfulness of the processing activity conducted by means of the production cameras for the purpose of assessing the performance of the employees of the controller. During the investigation, it was revealed that the game presenters are not monitored continuously as alleged by the complainant, however, the game presenters are not informed in real time that they are being assessed by the Performance Assessment Specialist as otherwise this would defeat the purpose of the exercise conducted by the employer.

Employee Monitoring

13. Thus, the Commissioner proceeded to assess whether the processing activity conducted by means of the production cameras within the studio areas for the purpose of evaluating the performance of the employees is based on any of the legal bases as set forth in article 6(1) of the Regulation.
14. In recent years, the European Court of Human Rights (the “ECHR”) conceptualised the right to private life under article 8 of the European Convention on Human Rights within the context of the workplace. Nonetheless, this is subject to the requirement to strike a fair balance between the right of the employee and the protection of the business interests of the employer. Generally, the right of employee revolves around the right to the protection of their personal data in their correspondence or data, which may include emails, or images stored as a result of employee monitoring.

15. The ECHR in the landmark judgment of ‘Bărbulescu v. Romania’² affirmed the right of the employer to monitor the employees’ online activities and electronic communications insofar as this is subject to certain safeguards and restrictions. The case related to an engineer who used the employer’s instant messenger account to send personal communication to his relatives in breach of the policy of the employer. The employer monitored and recorded the communications of the employee in real time and proceeded to take disciplinary action against him. The employee alleged that the monitoring and recording of his personal communication infringed his right to respect for private life in terms of article 8 of the European Convention on Human Rights. In this case, the Grand Chamber of the ECHR held that the monitoring was unlawful as the employer failed to take into account a number of considerations when resorting to the monitoring in real time. The ECHR gave due weight to the requirement of transparency and the ECHR held that the employer did not appear to give the employee prior notice of the monitoring, in particular, the nature and extent of the intrusion³. This was also tied to the reasonable expectation of the employees that their privacy would be protected and respected within the workplace. The conclusion derived from this judgment is that the employee should fully comply with the requirements of transparency, necessity and proportionality when engaging in employee monitoring activities.

16. The requirements established by the ECHR in the ‘Bărbulescu v. Romania’ were also transposed to a case of ‘López Ribalda and others vs Spain’⁴ where the employer used video surveillance to monitor the employees. The ECHR established the following principles in relation to the recording and storing of images of the employees: (i) the measure of video surveillance must be proportionate to the pursued legitimate aim of the employer; (ii) the employee must be informed about the video surveillance by the employer; (iii) the extent of the monitoring; (iv) whether legitimate aims were pursued by the employer which would justify the monitoring; (v) whether it would be possible to choose less intrusive monitoring tools; (vi) whether the consequences of the monitoring were considered; and (vii) whether the employer implemented appropriate safeguards.

Lawfulness of the Processing

17. The Commissioner highlights that every processing operation which falls within the meaning of article 4(2) of the Regulation must have a legal basis in terms of article 6(1) of the Regulation.

² Application no. 61496/08, delivered on the 5th September 2017.

³ Para. 78.

⁴ Applications nos. 1874/13 and 8567/13, decided on the 17th October 2019.

The Court of Justice of the European Union (the “CJEU”) in the judgment ‘ZQ vs Medical Service of the Health Insurance North Rhine’ held that: “*The first subparagraph of Article 6(1) of the GDPR provides for an exhaustive list of cases in which processing of personal data may be considered lawful. Therefore, in order to be considered lawful, processing must fall within one of the cases provided for in that provision*”⁵ [emphasis has been added].

18. Pursuant to the principle of accountability as set forth in article 5(2) of the Regulation, the controller should be responsible for, and be able to demonstrate that the processing by means of the production camera is indeed lawful. To this end, the Commissioner sought to establish whether the processing undertaken by the controller is indeed based on any lawful ground in terms of article 6(1) of the Regulation.
19. In its submissions, the controller stated that the processing of the personal data of its employees is based on its legitimate interest and submitted a copy of the ‘legitimate interest assessment’ which it conducted to legitimise this processing activity. Article 6(1)(f) of the Regulation provides that a controller may rely on this legal basis if it manages to effectively demonstrate that the processing “*is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data*”.
20. The case-law of the CJEU reiterated on a number of occasions that the controller may rely on article 6(1)(f) of the Regulation if it satisfies the three-part test⁶. In particular, the CJEU in the landmark ruling of Rigas stated that:

*“In that regard, Article 7(f) of Directive 95/46 lays down three cumulative conditions so that the processing of personal data is lawful, namely, first, the pursuit of a legitimate interest by the data controller or by the third party or parties to whom the data are disclosed; second, the need to process personal data for the purposes of the legitimate interests pursued; and third, that the fundamental rights and freedoms of the person concerned by the data protection do not take precedence.”*⁷

⁵ Case C-667/21, 21st December 2023, paragraph 75.

⁶ C-13/16, Rigas satiksme, paragraph 28 and C-708/18 TK v Asociația de Proprietari bloc M5A-ScaraA, paragraph 40.

⁷ C-13/16, paragraph 28.

21. In this respect, the Commissioner assessed the present case in the light of the three (3) cumulative conditions as laid down by the CJEU. All the three (3) conditions identified by the CJEU need to be present: (i) the existence of a legitimate interest justifying processing; (ii) the necessity of processing for the realisation of the legitimate interest; and (iii) the prevalence of that interest over the rights and interests of the data subject, which calls for balancing of interests.
22. First, the processing is conditional upon the existence of legitimate interests of the controller or of a third party. The Regulation does not define legitimate interest and thus, it is for the controller to determine whether there is a legitimate aim that could justify an interference with the right to the protection of personal data.
23. The Commissioner interprets “*interest*” to be the broader stake that a controller may have in the processing, or the benefit that the controller or third parties may derive from such processing. This interpretation is substantiated by the recitals of the Regulation, which provide some non-exhaustive examples of situations in which legitimate interest could exist and this could be processing for the purpose of preventing fraud, processing for direct marketing purposes, the transmission of certain data within groups of companies and processing for the purpose of ensuring network and information security. Furthermore, the case-law of the CJEU held that transparency or the protection of the property, health, and family life, are legitimate interests⁸.
24. Accordingly, the Commissioner examined the submissions of the controller, including the legitimate interest assessment conducted by the controller, wherein it argued that it had a legitimate interest in assessing the performance of its employees 2-3 times per month based on the hours worked. The controller argued that the processing is necessary to ensure high quality of its products, to track progress of the employee in question, to identify mistakes, to improve the performance of its employees, to encourage career development of the employee within the company, and also to contribute to the economic growth of the company.
25. Indeed, the Commissioner agrees with the controller that an employer has a legitimate interest in assessing the performance of its employees, particularly, to ensure that the employees are performing their employment duties pursuant to the policies, procedures and standards of the employer.

⁸C-92/09 and C-93/09, Volker and Markus Schecke and Eifert, paragraph 77 & C-212/13, Rynes, paragraph 34.

26. In relation to the second condition of the legitimate interest test, the Commissioner proceeded to determine whether the processing of personal data pertaining to the complainant was indeed necessary for the purpose of the attainment of the legitimate interest at issue. In this regard, the Commissioner noted that the principle of data minimisation as laid down in article 5(1)(c) of the Regulation requires that the processing shall be adequate, relevant, and limited to what is necessary in relation to the purpose of the processing. It therefore follows that the processing of personal data should be limited to what is plausibly necessary to pursue the legitimate interest, and, therefore, there should be a connection between the processing and the interest pursued.
27. In such case, the controller explained that not all the sessions of the Game Presenters are assessed by the [REDACTED] st, and these assessments are done 2-3 times a month depending on the hours worked. This means that the controller is not continuously monitoring the employees, and therefore, the processing for this purpose is limited in time. After examining the manner how the assessment is being conducted by the controller, the Commissioner is of the view that the controller managed to effectively demonstrate that there are no other less intrusive means which could be used by the controller to reach its intended objective. This is namely due to the nature of the role of the ‘game presenter’ who is expected to perform her tasks virtually and live on camera at all times, and therefore, there is no other plausible alternative way how the controller could assess the performance of the employee.
28. Finally, article 6(1)(f) of the Regulation calls for a balancing test, which requires that the controller assesses whether the legitimate interests of the controller and the third parties are overridden by the interests or fundamental rights and freedoms of the complainant. In this respect, account shall be taken, *inter alia*, of the nature of the legitimate interests being pursued, the nature of the personal data at issue, and the impact on the data subject. Recital 47 of the Regulation requires that:

“The legitimate interest of a controller, including those of a controller to which the personal data may be disclosed, or of a third party, may provide a legal basis for processing, provided that the interests or the fundamental rights and freedoms of the data subject are not overriding, taking into consideration the reasonable expectations of data subjects based on their relationship with the controller”
[emphasis has been added].

29. The element of reasonable expectation plays a predominant role in ensuring the lawfulness of the processing activity. The European Data Protection Board defines this concept of ‘reasonable expectation’ as processing that should not be surprising to the data subject and this is by considering the possible adverse consequences processing may have on the data subject and having regard to the relationship and potential effects of imbalance between the data subject and the controller⁹.
30. During the course of the investigation, the controller stated that the employees are informed *a priori* about the fact that their performance would be reviewed. To this end, the controller submitted evidence, including, a communication dated the 14th July 2020 published on [REDACTED], that reads as follows:

“The main task of Performance Assessment Specialists will be to measure Game Presenters performance to support company’s standards. The idea is to provide qualitative and objective performance assessment and suggest how to improve the quality across all sites, with the aim to ensure equal performance standards in all [REDACTED]

...
The Performance Assessment team will execute regular performance evaluation activities in all [REDACTED] across the globe. We will start with evaluating Game Presenters performance in I [REDACTED] Malta, [REDACTED] and [REDACTED]. Evaluations will be then passed on to the Team Manager, who will deliver the feedback to the Game Presenter” [emphasis has been added]

31. Furthermore, the controller referred to its FAQs published on its [REDACTED] that inform the employees about the evaluation of the performance of the Game Presenter:

“Why do we have Game Presenter evaluations?

*Game Presenter evaluations are just one of the ways we can work together to help make sure our Game Presenters continue to be world class. As the face of our products the way our Game Presents [sic.] appear on camera and interact with players has a direct impact on the quality of our products. **Having regular evaluations where we assess your live games helps you identify areas where you***

⁹ Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects, version 2.0, adopted on the 8th October 2019.

are doing great and areas where you may need to improve." [emphasis has been added].

"Why have you changed from my Team Manager carrying out my evaluation to a new global team?

The independent team has been introduced so that both the evaluation process and the score giving will be consistent across all teams and all locations. A dedicated global team focused only on evaluations means we will be able to provide you with a greater number of evaluations each month, and you and your Team Managers will still be the ones discussing your evaluations with you, highlighting areas you are doing well and working with you on areas where you may need to improve".

"How many times a month will I be evaluated, and which score will be used as my final score?

The Performance Assessment Teams aims to evaluate each Game Presenter 3 to 5 times a month, but this may vary depending on how many hours and shifts you work in a particular month." [emphasis has been added].

32. This effectively demonstrates that the complainant was informed *a priori* that her performance would be reviewed at a given time, and therefore, the complainant could not argue that the processing activity comes as a surprise. Furthermore, the assessment is carried out by the employer at a time when the complainant is being watched by the players who may also lodge a complaint about her performance, and consequently, the complainant should have a reasonable expectation that her data would be processed at a point in time by the controller for the purpose of assessing her performance, particularly, her ability to present and follow procedures and game leading process.
33. Without prejudice to the foregoing, the Commissioner strongly urges the controller to adopt a comprehensive and well-defined *ad hoc* policy that governs *inter alia* the nature, extent, manner, and frequency of the evaluation process, including, appropriate information about the processing of personal data as a result of this activity. This in line with the Article 29 Working Party, which states that "[i]n the absence of an easily understandable and readily accessible workplace monitoring policy, employees may not be aware of the existence and consequences of the monitoring that is taking place and are therefore unable to exercise their rights"¹⁰.

¹⁰ Opinion 2/2017 on data processing at work – wp249, adopted on the 8th June 2017.



On the basis of the foregoing considerations, the Commissioner is hereby deciding that the processing activity conducted by the controller by means of the production camera for the purpose of assessing the performance of the complainant is lawful in terms of article 6(1)(f) of the Regulation, and therefore, the complaint is being dismissed in its entirety.

Ian Digitally signed
DEGUARA by Ian DEGUARA
(Signature) (Date: 2024.08.09
 09:52:59 +02'00')

Ian Deguara
Information and Data Protection Commissioner

Right of Appeal

In terms of article 26(1) of the Data Protection Act (Cap 586 of the Laws of Malta), "*any person to whom a legally binding decision of the Commissioner is addressed, shall have the right to appeal in writing to the Tribunal within twenty days from the service of the said decision as provided in article 23*".

An appeal to the Information and Data Protection Appeals Tribunal shall be made in writing¹¹ and addressed to:

The Secretary
Information and Data Protection Appeals Tribunal
158, Merchants Street
Valletta.

¹¹ More information is available at: <https://idpc.org.mt/appeals-tribunal/>