

# Right to privacy: will reliance on WhatsApp messages in misconduct proceedings be a breach of the right to privacy?

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The police force was entitled to rely on officers' WhatsApp messages in misconduct proceedings.

## THE FACTS

During an investigation into a serious sexual offence, a detective constable found WhatsApp messages on a mobile phone belonging to a suspect, who was a constable. The messages were shared with members of two WhatsApp groups of which the suspect was a member, one called "Quality Polis" and the other "PC Piggies". The messages were sexist, racist, anti-Semitic, homophobic, mocked disability and included a flagrant disregard for police procedures by posting crime scene photos of current investigations. The messages also included pictures of a police shift pattern and a police bulletin.

The messages were forwarded to the Professional Standards Regulator, which relied on the messages to bring misconduct charges for breaches of standards of professional behaviour against several of the police officers who were members of the WhatsApp groups.

Ten of the officers petitioned the Court of Session (the supreme civil court of Scotland), seeking a declaration that the use of the messages for the purpose of bringing misconduct proceedings in respect of non-criminal allegations was in breach of their rights to a private life under Article 8 of the European Convention of Human Rights.

The Court of Session refused the petition, and the officers appealed to the Inner House (the Scottish court corresponding to the Court of Appeal), which dismissed the appeal.

The key question for the courts was whether the police officers had a reasonable expectation of privacy. It would usually be the case, for an ordinary member of the public, that there is a reasonable expectation of privacy even where the content of correspondence is abhorrent. However, police officers are subject to professional standards which apply both on and off duty. The courts considered that, by becoming a police officer, police accept that their right to privacy is limited by these professional standards. In contrast with an ordinary member of the public, the content of messages can inform the question of whether there was a reasonable expectation of privacy. It was also relevant that the professional standards to which members of the WhatsApp groups were subject as officers placed an obligation on them to report the type of messages that were being sent. This obligation increases the risk of disclosure of such messages, and is therefore relevant to the question of whether the officers had a reasonable expectation of privacy. There were many messages that called into question the extent to which the officers recognised their duty to uphold fundamental rights and accord equal respect to all people, and there was also messages which were a clear breach of their duty of confidentiality in relation to information obtained in the course of their duties.

## WHAT DOES THIS MEAN FOR EMPLOYERS?

The question of whether an individual has a reasonable expectation of privacy will always involve an objective test and will depend on all the circumstances.

Employers should be aware that ordinary members of the public will usually have a reasonable expectation of privacy in relation to messages on WhatsApp groups (or similar social media). However, in light of this judgement, this may not always be the case. For employees who are subject to professional standards and/or who work in regulated roles (for example, lawyers, doctors and those holding roles regulated by the FCA) there may be circumstances under which employers can rely on private messages in disciplinary proceedings, but all the circumstances should be considered carefully before doing so.

[\[BC and others against Iain Livingstone QPM, Chief Constable of the Police Service of Scotland and Others \[2020\] CSIH 61\]](#)

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