

SUMMARY

2017/20 Data gathered by GPS as a basis for disciplinary dismissal (PT)

<p>Distance-related data gathered by GPS and data reported manually by the employee (a sales representative at a pharmaceutical company) are valid and admissible sources of evidence in the context of a disciplinary dismissal procedure. This decision is innovative in that it contradicts the usual view of the Supreme Court of Justice on the scope of ‘distance-controlled supervision’ for the purposes of assessment of employee conduct.</p>

Summary

The Guimarães Court of Appeal recently decided that distance-related data gathered by GPS and data reported manually by the employee (a sales representative at a pharmaceutical company) are valid and admissible sources of evidence in the context of a disciplinary dismissal procedure.

This decision is innovative in that it contradicts the usual view of the Supreme Court of Justice on the scope of ‘distance-controlled supervision’ for the purposes of assessment of employee conduct.

Facts

The employer, a Portuguese pharmaceutical company, took disciplinary action against one of its sales representatives, who was responsible for northern Portugal, based on a discrepancy between the GPS reports regarding distance driven during working time and the reports filed by him on the company’s customer relationship management (‘CRM’) platform.

Company policy required the installation of GPS equipment in all company cars for the purpose of fleet control and surveillance. The GPS equipment allowed the company to access

comprehensive reports on an online platform containing, for example: (i) the start and end times of each route; (ii) the start and end location of each route; (iii) the distance travelled in kilometres; and (iv) periods the car was moving and stationary.

The company alleged that on several occasions the employee did not observe his work schedule and it provided evidence to support this.

The GPS reports often showed that no distance was travelled during work days and the company was able to show that the employee must have manipulated the GPS, so as to prevent the regular transmission of data to the company.

The company's sales reps were allowed to use their company cars for personal purposes. Although petrol and tolls were paid by the company, employees had to reimburse the company for every kilometre travelled for personal purposes. Generally, the sales reps would submit a report to the CRM platform about his, but they were aware that GPS data would periodically be used to confirm the accuracy of their reports.

During a disciplinary procedure, the company alleged that the employee had interfered with the GPS equipment in his company car to falsify the distance declared on the CRM platform and credit kilometres that were driven for personal purposes (e.g. on weekends) as work usage on week days.

The company terminated the employment relationship with the employee for cause (gross misconduct), with effect from 5 September 2014.

The employee challenged his dismissal by filing a claim before the competent first instance court.

The Court ruled the dismissal lawful and the employee appealed to the Guimarães Court of Appeal. He requested the court to (i) rule the dismissal unlawful; (ii) order the company to reinstate him; (iii) order it to pay all salary that would have been payable had the employment relationship not been terminated; and (iv) order it to award moral damages.

The employee based his request, among other things, on the grounds that (i) the dismissal was based on inadmissible evidence; (ii) the GPS malfunctioned and he was not responsible for this; (iii) even if he were, he was acting lawfully, as he is entitled to act in self-defence in relation to any order or instruction of the employer which is contrary to his rights and guarantees.

Judgment

The Court of Appeal upheld the decision of the court of first instance and ruled the dismissal lawful.

However, it did so based on a different line of argument than that submitted by the company and used in the first instance judgment.

In essence, the legal reasoning was centered on the answer to the following question: is it unlawful to use evidence gathered by GPS for disciplinary purposes?

The Portuguese Labour Code provides that, save for situations where surveillance is justified for the protection and safety of individuals and property, the use of remote surveillance instruments in the workplace is forbidden when aimed at controlling employees' professional activity. Therefore, gathering evidence using surveillance tools is, in principle, unlawful.

The court of first instance had found that GPS equipment was not a remote surveillance tool and did not compromise the employee's right to privacy as it did not gather sound or images. By contrast, the Guimarães Court of Appeal concurred with the employee's reasoning and concluded that GPS equipment is a form of remote surveillance because it allows the employer both to determine the geographical location of its employees and to control their work performance – albeit indirectly (e.g. observance of the work schedule and fulfillment of the sales plan).

For that reason, the Court considered that all findings relating to the employee's failure to observe his work schedule were invalid and should be disregarded in the judgment.

Despite this, the Court found it was lawful for the employer to use the GPS equipment to check the accuracy of the employee's reports. The Court found that the employee's rights (namely to privacy) were not infringed, as the provisions that forbid employers from controlling employees did not specifically concern work performance (i.e. where, how and when the employee performs his or her duties).

The Court disregarded most of the GPS evidence, but found that the GPS system had been manipulated and inaccurate CRM reports submitted in bad faith. This was a serious breach of contract, resulting in an irreparable breach of trust and it compromised the maintenance of the employment relationship. The dismissal was therefore found to be lawful.

Commentary

In order to understand the Court's reasoning, some legal background is needed. As mentioned above, the Labour Code provides that remote surveillance in the workplace is, in principle, forbidden. It also says that when surveillance tools are installed they must be accompanied by

wording indicating that the location is under surveillance and that video images and, if applicable, sound, will be captured.

This last point has caused some debate, as there is more than one way to interpret it. The Supreme Court has taken a literal interpretation, which only includes equipment that captures sound and images – thereby excluding GPS and similar systems. This position is sustained by most of the case law (which is not extensive) – as well as the court of first instance in the case at hand, even though this ran contrary to the legal recommendations issued by the National Commission for Data Protection.

In practical terms, this allowed employers some room for manoeuvre, as provided they did not gather sound and images, they could use GPS for disciplinary purposes.

The innovative aspect of the judgment in this case is that it deviates from the literal approach that courts have been adopting – indeed it holds that there are other surveillance methods that are equally good for controlling employees' performance, including GPS installed in vehicles used by employees for the performance of their duties.

This approach to the law (which was also used by the Porto Court of Appeal in a similar case in 2013 and more recently in December 2016), aims at bringing the interpretation of the law closer to the purpose for which it was designed: to protect the employee's constitutional right to privacy. The focus is not whether the equipment records images or sounds, but rather that it collects data (regardless of format) that enable the employer to control the movements of its employees to the point that their right to privacy may be compromised. The new interpretation broadens the scope of the provision so that compliance does not depend on the type of equipment used but on its effects.

In practical terms, if this line of thought gains relevance (which will only happen if the Supreme Court issues a similar decision), employers will have to start approaching the issue of remote surveillance with added caution.

Comment from other jurisdiction

Finland (Kaj Swanljung and Janne Nurminen, Roschier, Attorneys Ltd): In Finland, under similar circumstances, the employer would not have had the right to use the location information to monitor compliance with the terms of employment.

In Finland, location and location information are considered personal data if a natural person can be identified based on it. According to Section 3 of the Finnish Act on the Protection of Privacy in Working Life, the employer may only process personal data that is directly

necessary for the management of the employment relationship; for the employee's benefit or which arises from the nature of the work concerned. If the employer intends to locate their employees using a surveillance tool, the processing of their personal data must be appropriate and justified. A justifiable reason might be, for example, to ensure employee safety. But note that no exceptions can be made to the necessity requirement, even with the employee's consent.

The employer has the right to supervise work, as the employee is required to work under the employer's management and supervision. The employer may determine how, where and when the work is to be performed. If work is performed outside the employer's premises, locating the employee may be necessary to support the rights and obligations of the employment. If a device is to be used for monitoring working time, this should be made clear in advance and it should be reasonably justifiable, for example, if the work is performed entirely or mainly outside the employer's premises and there are no less intrusive ways of tracking working hours. The tracking tool used should be as clearly delineated as possible – possibly a separate device used for that purpose alone. Employees must have clear instructions on how to use it and what personal information it collects. If it is not specifically set to monitor work time in this way, and the co-operation procedure required by law has not been applied in the workplace, the Data Protection Ombudsman is likely to consider that the location information should not be used to monitor employee compliance with their terms of employment.

According to the Data Protection Ombudsman, the right of the employer to supervise work does not extend to employees' free time or, for example, time spent during leave of absence. The employer must ensure that the employee can turn the surveillance tool on and off, especially when the employee is allowed to use the device outside working hours (e.g. a mobile phone).

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