SUMMARY

2017/21 Legal rules for employers for monitoring employees in Slovakia (SK)

<p>An employer can monitor an employee's emails provided it has made it clear beforehand that it might do so. It is permissible for the employer to prohibit employees from using its electronical equipment for private use, but if the employer is going to check whether this rule was being complied with, it needs to have a significant reason to do so and must respect the principles of legality legitimacy and proportionality.</p>

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Legal background

Privacy protection of employees in the Slovak Republic is mainly based on the Charter of Fundamental Rights and Freedoms of the EU, Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the 'Directive'), the Constitution of the Slovak Republic, Act no. 311/2001 Coll. Labour Code, as amended and Act no. 400/2009 Coll. on the Civil service as amended.

According to the Charter, everyone has the right to protection against unauthorised interference in private and family life. Pursuant to Article 13 of the Charter no one can breach the secrecy of correspondence or other documents and records, whether privately kept or sent by mail or otherwise, except as law. This also guarantees the secrecy of correspondence by

phone or email. This principle is reflected in the Constitution.

The Directive sets specific rules for processing personal data and non-compliance with these makes the processing of employee data unlawful.

The Labour Code prohibits the employer from breaching the privacy of employees in the workplace and common areas by the recording of phone calls and the monitoring of electronic mail without prior notification, unless there are significant reasons related to the nature of the activities of the employer that warrant an exception to be made. The Labour Code determines the conditions under which the employer may set up monitoring.

Thus, the law establishes a legal framework to protect the privacy of employees at work, whilst setting out the conditions necessary for establishment effective monitoring tools for employers.

Facts

The employee was employed by the Ministry of the Interior in Slovakia in accordance with the Law on the Civil Service. This Law does not provide for the protection of privacy but such protection is provided under the Labour Code.

The employee was not allowed to use his work email address for private purposes. The use of email was governed by the 'Instruction of the General Director of IT, telecommunications and security, Ministry of the Interior' of 18 May 2011. This Instruction allows employees to email for official employment purposes only and prohibits them from sending messages unrelated to work. The Instruction also provides sanctions for breach, such as fine or – in the most serious cases – termination.

The employee sent multiple private emails from his work and had used his job title and civil service logos for his own benefit. The employer regarded this as inappropriate, serious misconduct. The employer terminated the employment relationship with immediate effect. In the termination letter, the employer only summarised the emails, but did not set them out in full.

The Court of First Instance took the text of the emails into consideration and held that the conditions for immediate termination were not met. It therefore found the termination invalid. The Court of Second Instance reached the opposite conclusion and so the employee appealed to the Supreme Court.

Judgment

The Supreme Court ruled that the employee's conduct was inappropriate. It also held that: "Even where the employee is obliged to perform work tasks, he does not lose his privacy rights, but under certain conditions, this must be balanced against the rights of the employer.

In the workplace, a conflict may occur between the employee's privacy rights and the right of the employer to know how an employee is performing his or her duties, whether the employee is respecting the various restrictions and how and for what purpose he or she is using electronic communications via equipment owned by the employer.

The employer undoubtedly also has the right to verify whether the employees are adhering to the rules on working hours and how they use these hours."

If the employer prohibits employees from using electronical equipment for private purposes in an internal regulation, the employer must also have the appropriate tools to check whether the prohibition is being respected (and if not, the scope of the breach). The employer must also be allowed to obtain evidence that the employee has failed to comply with the prohibition. The employer must also have the opportunity to take measures to supervise email use.

The Supreme Court also concluded that, if during supervision, private email communication is disclosed, this should be regarded as a necessary, minor (secondary) infringement of the privacy rights of the employee.

According to the legal opinion of the Supreme Court, it was reasonable for the courts of first and second instance to be made fully aware of the employee's emails and to base their decision on that evidence, provided they respected the principles of legality, legitimacy and proportionality.

In coming to this view, the Supreme Court had weighed up two ECtHR judgments. One was the case of Halford – v – UK (5 June 1997), which in essence stated that "private correspondence does not lose its private character even, when is sent out of the workplace." In the other, the case of Bărbulescu – v – Romania (12 January 2016) the ECtHR had concluded that, in the specific circumstances of that case, the monitoring of communications of a particular employee during working hours on a work computer was not contrary to Article 8 of the UN Convention on the protection of human rights and fundamental freedoms, and therefore, did not interfere with the right to privacy. The ECtHR agreed with the conclusion of the Romanian Court that monitoring the employee was appropriate and was the only way of establishing whether there had been a breach of discipline.

The ECtHR also specified three principles of lawful monitoring: legality, legitimacy and proportionality. The employer can monitor the employee in accordance with these principles, but only if it has a significant reason to do so relating to the specific nature of the activities of the employer. Otherwise, the employer is not entitled to interfere with the privacy rights of employees.

Commentary

Thus, it can be seen that the privacy of employees can be at odds with right of the employer to monitor the work. The balance can be held if the employer respects the principles of legality, legitimacy and proportionality whilst supervising an employee's work emails. This includes informing the employee that his or her emails may be supervised in advance. If not, the employer will not have the right to supervise the employee.

Comment from other jurisdiction

Finland (Kaj Swanljung and Janne Nurminen, Roschier, Attorneys Ltd): In Finland, the employer may also prohibit the use of an email system for private communications, but it is common practice under a good staff policy to allow employees to manage their private affairs to a reasonable extent using a work email account. The provisions of the Act on the Protection of Privacy in Working Life protect personal emails sent to an employee's work email account and the employer is generally not permitted to retrieve or open them, except under certain conditions provided by that Act.

However, the Information Society Code provides that the employer may process identification information from employees' electronic communications if it suspects the unauthorised disclosure of business secrets to outsiders or if it wants to prevent data leaks. Processing traffic data is only allowed to the extent necessary for the purpose of the processing and the confidentiality of messages and protection of privacy may not be compromised any more than necessary.

The employer does not have the right to information about the content of the employee's emails. According to Finnish law, the employer may only process the traffic data of users to whom it has provided access to business secrets or of users who, by some other means that the employer accepts, have access to its business secrets.

Subject: Privacy, unfair dismissal

Parties: Employer – v – Ministry of the Interior of the Slovak Republic

Court: Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic)

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

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