

SUMMARY

## **<p>EELC 2013/49 Employer may not subject employees to lie detector tests (HU)</p>**

***&lt;p&gt;An employee in a financial institution was suspected of fraud. He was asked to undergo a lie detector test (&lsquo;polygraph&rsquo;). He agreed and consented in writing to the test. Four days after undergoing the test he was dismissed. He filed for unfair dismissal. Although the court dismissed the claim for unfair dismissal, the employee was awarded damages for violation of his right to privacy. Subjecting an employee to a polygraph examination is an excessive and therefore unlawful method of gathering evidence in respect of which the employer bears the burden of proof.&lt;/p&gt;***

### **Summary**

An employee in a financial institution was suspected of fraud. He was asked to undergo a lie detector test ('polygraph'). He agreed and consented in writing to the test. Four days after undergoing the test he was dismissed. He filed for unfair dismissal. Although the court dismissed the claim for unfair dismissal, the employee was awarded damages for violation of his right to privacy. Subjecting an employee to a polygraph examination is an excessive and therefore unlawful method of gathering evidence in respect of which the employer bears the burden of proof.

### **Facts**

The employee in this case had worked as an assistant since 1 November 1977 at a financial institution. A police investigation was launched against him following suspicion of fraud. The

police claimed that the employee knowingly used forged salary certificates in processing of loan applications. In light of the police investigation, the employer organised a hearing on or about 6 August 2008, during which a polygraph examination took place. A polygraph is a device which measures a number of physiological characteristics such as blood pressure, pulse and respiration to determine whether the subject is telling the truth. Normally, the testing is performed by private security firms. The employee had provided prior written consent and voluntarily subjected himself to the polygraph examination.

The employee denied wrongdoing. Moreover, he claimed that he lacked the authority to make decisions on loan applications. Nevertheless, four days after the hearing, the employee was dismissed summarily for gross misconduct. The notice of dismissal claimed that the employer had lost its trust and confidence in the employee as a result of the police investigation. The employee initiated legal action for unfair dismissal and claimed non-pecuniary damages for breach of his privacy and the misuse of his personal data in relation to the polygraph testing.

### **Judgment**

The court of first instance denied the employee's claim in its entirety. In relation to the use of a polygraph, the court noted that the employer had acted properly, given that informed, prior consent of the employee excludes any claim for damages or for breach of privacy and personal data. The employer had an express policy in place in relation to the use of a polygraph, which provided that its use was strictly voluntary and subject to the employee's prior written consent.

In addition, the policy provided that employees would not be subject to any sanction for refusal to undergo a polygraph examination and that an employee who had given his consent could withdraw it at any time prior to the examination. The examination was conducted in a secluded room, personal data obtained as the result of the examination was treated as confidential data and there was no data transfer to any third party. In his statement, the employee admitted that there had been no coercion and that the employer had handled him with due courtesy and discretion. The court of first instance noted that there was no special statutory rule prohibiting the use of a polygraph and therefore the employer was not in breach of the law.

The employee appealed. As the result of the appeal, the Court of Appeal affirmed the initial judgment in connection with the unfair dismissal. However, it reversed the judgment in relation to the permissibility of the polygraph. In relation to the appeal, the employee obtained an opinion from the Hungarian Ombudsman's Office which provided that the use of a polygraph is not permissible, or at least questionable, in an employment relationship, as it

exceeds the scope of a contract of employment, given that it is not the function of an employer to investigate criminal offences. The polygraph test is a breach of data protection legislation *per se* due to its intrusive nature and it is contrary to the human dignity of employees. The Court of Appeal agreed with this view and noted that it is not possible to provide for adequate safeguards in an internal policy. Whilst the policy required consent, this was not sufficient, as an employee is likely to feel compelled to consent to secure his or her job and livelihood. Therefore, the consent obtained by the employer does not exclude the right of the employee to request damages. As a result of this decision, the Court of Appeal awarded non-pecuniary damages of HUF 1 million (approximately EUR 3,400).

The employer filed an extraordinary appeal with the Hungarian Curia (previously known as the Supreme Court). It argued that the Court of Appeal's findings were overly broad and that the legality of the use of a polygraph should be measured on the basis of a proportionality exercise. This means that if the aim of the test is not to obtain information on the employee's private life, an infringement of privacy is not automatic and not disproportionate. In the absence of an express statutory rule, voluntary consent means that the employee cannot claim breach of privacy. The employer also argued that certain of its employees had not consented to polygraph testing and that it had never applied any sanction against them. Therefore the implied forced nature of the test in the reasoning of the Court of Appeal was a fiction.

The Curia upheld the second instance judgment. Unlike the Court of Appeal, the Curia approached the question more from a human rights perspective. The Curia expressly referred to the principles developed by the Hungarian Constitutional Court in relation to limitations to human rights to strengthen its arguments. This means that, instead of relying solely on principles of data protection, the Curia applied the normal test used in cases of infringement of human rights. The Curia noted that any limitation on the right to privacy and protection of personal data requires a legitimate aim and that such a limitation must be necessary for that aim and proportionate in reaching it.

The Ombudsman's opinion provided that in an employment context, due to the nature of the relationship between employer and employee, a polygraph test is excessive, as it is impossible to provide for adequate safeguards for its use. The Curia agreed with this observation, but added that since the employer bears the burden of proof in an unfair dismissal case, it cannot obtain evidence by polygraph testing. The Curia agreed with this observation and added that under Hungarian employment law, it is always the employer that must prove a termination of employment was lawful and it has the burden of proof in cases initiated by employees. As a result, the Curia argued, the polygraph test is nothing more than a way for the employer to obtain evidence that it can use in court. It can therefore never be in the interest of employees to give consent to such a test.

Therefore, contrary to what the employer argued, any such testing is always in the interest of the employer and not the employee. This meant that the aim of the testing already failed the first limb of the ‘necessary and proportionate’ test, as it is not in the interest of the employee, but solely conducted to enable the employer to obtain the results of a lie test. Therefore, while the test used by the Curia was different, the result of the test was the same as that of the Court of Appeal. An interesting twist was that all three courts in this case accepted that the summary notice of dismissal was lawful and fair and that therefore the employee’s only remedy was an award of damages.

### **Commentary**

This case is an interesting example of the increased focus on data protection and privacy in employment relationships. While the case is based on the old Labour Code and does not take into account the new, more liberal set of rules in the current Labour Code effective from 1 July 2012 or the revised Hungarian data protection legislation, the outcome would likely have been the same under the new rules. The different judgments in the various stages of proceedings underpin that workplace privacy is more subjective than other, traditional employee rights. The case also highlights the difficulties surrounding the concept of informed consent in employment - which has come up in EU law in connection with Article 7 of the Data Protection Directive. The view is that informed consent is difficult to accept as justification for data processing by reason of the inherent inequality in employment relationships.

The decision of the Curia confirms that data protection and privacy in the workplace must be analysed in the broader context of human rights, and that data protection and privacy overlap. This means that restrictions on privacy must pass the ‘necessary and proportionate’ test in order to be valid, irrespective of informed consent.

While the Curia upheld the decision of the Court of Appeal declaring polygraphs (and probably similar testing methods) unlawful per se without the need for the detailed balancing exercise based on the circumstances, the Curia found no legitimate reason for the testing and therefore no need for a detailed balancing exercise. Interestingly, the courts did not make direct reference to EU law, although Article 7 of Directive 95/46 is capable of having direct effect (see joined Cases C-468/10 and C-469/10, *ASNEF* - although it may be relevant that in that case the defendant was a governmental agency). This indicates that awareness of EU law in the Hungarian judicial system remains relatively low.

**Subject:** Privacy

**Parties:** Not published

**Court:** Curia

**Date:** 2013

**Case Number:** EBH 2013. M.9.

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**Creator:** Kuria (Hungarian Supreme Court)

**Verdict at:**

**Case number:** EBH 2013. M.9.