EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Legal summary

December 2022

Florindo de Almeida Vasconcelos Gramaxo v. Portugal - 26968/16

Judgment 13.12.2022 [Section IV]

Article 8

Positive obligations

Dismissal on the basis of data concerning the mileage of the applicant's company vehicle, collected by a GPS device installed by the applicant's employer with his full knowledge: *no violation*

Article 6

Civil proceedings

Article 6-1

Fair hearing

Proceedings challenging the grounds for the applicant's dismissal not undermined by the use in evidence of lawful geolocation data: *no violation*

Facts – In 1994 the applicant took up employment as a medical representative with a pharmaceutical company. In 2002 the company put in place a procedure for managing requests for reimbursement of the costs associated with employees' business travel. All the medical representatives were required to use a computerised application known as Customer Relationship Management (CRM) in order to record their daily, weekly and monthly activities, visits carried out, absences, expenses and a timetable of forthcoming visits. In 2011 the company installed GPS in the company vehicles of its medical representatives, including the applicant's vehicle. The employees concerned were informed of the installation and the reasons for the measure, which was mainly designed to monitor the distances driven by employees in the course of their activities, and of the consequences in the event of a discrepancy between the GPS data and the data entered in the CRM.

Shortly afterwards, the applicant lodged a complaint with the National Data Protection Commission (CNPD) concerning the introduction of the geolocation system and the processing of the personal data thus collected. In 2013 the CNPD found that the rules on data protection had not been infringed and decided to discontinue the proceedings.

In 2014 the applicant was dismissed. On the basis of cross-referencing of the data collected by the GPS installed in his vehicle and the information he had recorded in the CRM, it was established that he had increased the distances travelled in a professional capacity, so as to reduce the proportion apparently travelled on private trips at weekends and on public holidays and thus avoid having to reimburse the corresponding amounts. Furthermore, according to the GPS data concerning the times at which the

vehicle set off and when it stopped at the end of the day, the applicant had not worked the required eight hours per day.

The applicant challenged his dismissal before the Employment Division of the District Court, which found that it had been justified. The Court of Appeal upheld that judgment but took into account only the geolocation data concerning the distances travelled by the applicant, finding the data monitoring his professional activity to be invalid.

Law – Article 8:

(a) *Applicability* – The general principles concerning the applicability of Article 8 in a professional context were set out in the judgment in *López Ribalda and Others v. Spain* [GC].

The present case was to be distinguished from cases previously examined by the Court concerning respect for private life in the context of employment relations, since the information in question did not take the form of images (*Köpke v. Germany* (dec.), *López Ribalda and Others v. Spain* [GC], and *Antović and Mirković v. Montenegro*), emails (*Bărbulescu v. Romania* [GC]), or computer files (*Libert v. France*), but rather geolocation data. Nevertheless, it also raised the issue as to what type and degree of monitoring of employees by their employers were acceptable, as well as the issue of the need to protect private life in a professional context.

The GPS system had been installed in the vehicle which the employer made available to the applicant for his business travel. The use of the vehicle for private journeys was permitted, on condition that the costs associated with the mileage were reimbursed to the employer.

The geolocation system enabled a vehicle's movements to be tracked in real time. It was thus possible to identify the geographical location of the person or persons presumed to be using the vehicle at a given moment or on a continuous basis. That information constituted personal data (*Uzun v. Germany*), according to the definition set out in the Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data.

In the present case the data had been recorded for the purpose of obtaining additional information such as the length of time for which the vehicle had been used, the distances covered, the times at which the vehicle set off and stopped, and the speed at which it was driven. The employees were not permitted to deactivate the geolocation system, which operated around the clock. Accordingly, the recording was systematic and permanent and made it possible to obtain geolocation data during the applicant's working hours and outside of working hours, undoubtedly encroaching on his private life. Moreover, the geolocation data concerning the distances travelled had formed the basis for the applicant's dismissal, a measure which had certainly had serious repercussions on his private life.

Conclusion: Article 8 applicable.

(b) *Merits* – Since the interference with the applicant's private life had resulted from action taken by his employer, a private company, and not by the State, the Court, following the approach previously adopted in similar cases, decided to examine the applicant's complaints from the standpoint of the State's positive obligations under Article 8.

A set of rules had existed at the relevant time designed to protect the private life of employees in situations such as that in the present case. Those rules did not appear to be in issue, nor had the applicant alleged that they lacked safeguards against abuse.

Furthermore, the applicant had not challenged in the administrative courts the decision given by the CNPD in 2013 in respect of his complaint concerning the actual installation of the GPS device in his company vehicle, of which he had been duly informed, although it had been open to him to challenge it under the Personal Data Protection Act.

Accordingly, it had to be determined whether the domestic courts, in balancing the interests at stake, had afforded sufficient protection to the applicant's right to respect for his private life.

The domestic courts had identified the various interests at stake, referring on the one hand to the applicant's right to respect for his private life and on the other hand to the employer's right to monitor the expenditure arising out of the use of the vehicles issued to its employees.

The courts found it established that the applicant had been informed that any vehicle supplied to him would be equipped with a GPS device. The applicant had signed the relevant document, which had made clear that the system was intended to monitor the distances travelled in the course of employees' activities. It had also indicated that disciplinary proceedings could be brought against any employee in the event of a discrepancy between the mileage data provided by the GPS and the data provided by the employee.

The applicant had been dismissed by his employer on two grounds provided for in the Labour Code. Firstly, on the basis of the data collected, the company had penalised him for increasing the distances driven in a professional capacity in order to conceal the distances driven privately, and for failing to observe the prescribed working hours. Secondly, the applicant had been penalised for interfering with the operation of the GPS at weekends.

While the District Court had found that the grounds for dismissal were justified, the Court of Appeal had set aside one of those grounds, concerning the applicant's failure to observe his working hours. Taking into account the resolution adopted in the meantime by the CNPD, which prohibited the company from using geolocation devices in its company vehicles, the Court of Appeal had held that geolocation devices could not be used to monitor employees' performance or observance of their working hours. Applying the resolution in question retrospectively, the Court of Appeal held that the geolocation data obtained by the company to monitor employees' performance came within the category of remote surveillance prohibited by the Labour Code and had been unlawful. On the other hand, it considered that the geolocation data recording the distances travelled did not fall within the scope of remote surveillance within the meaning of that provision and had therefore not been unlawful.

By taking into account only the geolocation data relating to the distances travelled, the Guimarães Court of Appeal had reduced the extent of the intrusion into the applicant's private life to what was strictly necessary to achieve the legitimate aim pursued, namely to monitor the company's expenditure. Furthermore, the applicant had not disputed the mileage data generated by the GPS device or the discrepancies between those data and the data he had entered in the CRM.

Moreover, the circulation of such information had been very limited, as it was made available only to the persons in charge of assigning and approving visits and expenses.

In view of the foregoing, and more specifically the fact that the applicant had not challenged the CNPD's decision in respect of his complaint to that body concerning the installation of the GPS device in his company vehicle, the Court of Appeal could not have done more than it did, bearing in mind that it had been called upon to rule only on the grounds for the applicant's dismissal. Thus, it had carried out a detailed balancing

exercise between the applicant's right to respect for his private life and his employer's right to ensure the smooth running of the company, taking into account the legitimate aim pursued by the company, namely the right to monitor its expenditure. The State had therefore not overstepped its margin of appreciation in the present case and the national authorities had not failed to comply with their positive obligation to protect the applicant's right to respect for his private life.

Conclusion: no violation (four votes to three).

Article 6 § 1:

On conclusion of the judicial proceedings concerning the applicant's dismissal, only the data relating specifically to the distances travelled had been taken into account. The Court had not found a violation of Article 8 in that regard.

Regarding the alleged unlawfulness of the evidence, the Court of Appeal had taken the view that the use of the geolocation system to determine the distances travelled had not been unlawful. This interpretation of the domestic law did not appear manifestly unreasonable in view of that court's ruling, which had reduced the extent of the intrusion into the applicant's private life.

As to the quality of the evidence, taking into account the documents in the case file and the statements of the parties' witnesses, the District Court had found it established that the applicant, in entering data in the CRM, had increased the distances travelled in a professional capacity and had interfered with the operation of the GPS device in his vehicle. It was not the Court's task to challenge the assessment of the evidence that had led the District Court to that conclusion. Furthermore, the applicant had not validly contested those facts before the Court of Appeal.

Furthermore, the Court of Appeal judgment had not been based solely on the geolocation data but on a combination of evidence including the disciplinary file, the technical report produced by an IT company and the statements of the parties and their witnesses.

The applicant had also had an opportunity to challenge his dismissal before the domestic courts, putting forward the arguments and evidence he considered relevant to his defence. These had been assessed in adversarial proceedings and the judgment delivered by the Court of Appeal had been duly reasoned, in terms of the facts and the law, and the assessment made did not appear to be arbitrary or manifestly unreasonable.

Thus, the use in evidence of the geolocation data relating to the distances travelled by the applicant in his company vehicle had not undermined the fairness of the proceedings.

Conclusion: no violation (four votes to three).

(See also *Uzun v. Germany*, 35623/05, 2 September 2010, Legal summary; *Köpke v. Germany* (dec.), 420/07, 5 October 2010, Legal summary; *López Ribalda and Others v. Spain* [GC], 1874/13 and 8567/13, 17 October 2019, Legal summary; *Bărbulescu v. Romania* [GC], 61496/08, 5 September 2017, Legal summary; *Antović and Mirković v. Montenegro*, 70838/13, 28 November 2017, Legal summary; *Libert v. France*, 588/13, 22 February 2018, Legal summary)

To access legal summaries in English or French click here.
For non-official translations into other languages click here.