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

Press Release
issued by the Registrar of the Court

ECHR 392 (2022)
13.12.2022

The use of GPS mileage data recorded on a medical representative's company vehicle as grounds for his dismissal did not breach the Convention

In today's **Chamber** judgment[1] in the case of Florindo de Almeida Vasconcelos Gramaxo v. Portugal (application no. 26968/16) the European Court of Human Rights held, by four votes to three, that there had been:

no violation of Article 8 (right to respect for private life) of the European Convention on Human Rights;

no violation of Article 6 § 1 (right to a fair hearing).

The case concerned the applicant's dismissal on the basis of data obtained from a geolocation system fitted in the car which his employer had made available to him for the purposes of his work as a medical representative.

The Court observed at the outset that the applicant had been aware that the company had installed a GPS system in his vehicle with the aim of monitoring the distances travelled in the course of his professional activity and, as applicable, on private journeys.

It also noted that, 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.

The Court considered that the Guimarães Court of Appeal 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. Hence, the State had not overstepped its margin of appreciation in the present case. The Court held that the national authorities had not failed to comply with their positive obligation to protect the applicant's right to respect for his private life.

A legal summary of this case will be available in the Court's database HUDOC (link)

Principal facts

The applicant, Fernando Augusto Florindo de Almeida Vasconcelos Gramaxo, is a Portuguese national who was born in 1967 and lives in Vila Real (Portugal).

On 7 March 1994 the applicant took up employment as a medical representative with a pharmaceutical company. Because of the travelling which his work entailed, the company assigned him, among other things, a company vehicle. The company permitted the use of the vehicle for private journeys and journeys outside working hours, although the expenses associated with the mileage on private trips had to be reimbursed. The company put in place a procedure for managing employees' business travel expenses. Under that procedure, all medical representatives had to

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

record, using a computerised application, their daily, weekly and monthly activities, visits carried out, absences, expenses and a timetable of forthcoming visits. In September 2011 the company installed GPS in its company vehicles.

On 24 October 2011 the applicant lodged a complaint with the National Data Protection Commission (CNPD) concerning the introduction of the geolocation system in the medical representatives' company vehicles and the processing of the personal data thus collected.

On 24 November 2011 the company informed the CNPD that the system had been installed in its vehicles. Having received this information, the CNPD instituted proceedings.

On 10 September 2013 the CNPD issued a resolution concerning the applicant's complaint, finding that the rules on data protection had not been infringed, and decided to discontinue the proceedings. On 16 January 2014 the applicant challenged that resolution before the CNPD. In a letter of 24 January 2014 the CNPD informed the applicant that there were no grounds to set aside its decision.

On 15 May 2014 the company initiated disciplinary proceedings against the applicant. It was alleged that he had increased the distances travelled in a professional capacity, so as to reduce the proportion travelled on private trips at weekends and on public holidays and thus avoid having to reimburse the corresponding amounts. The applicant was also accused of manipulating the GPS by removing the GSM card from the device. Lastly, on the basis of the GPS data concerning the times at which the vehicle set off and when it stopped at the end of the day, it was alleged that the applicant had not worked the required eight hours per day.

On 3 September 2014, on conclusion of the disciplinary proceedings, the company informed the applicant that the matters of which he was accused were found to have been established and that he was therefore dismissed. On 12 September 2014 the applicant challenged his dismissal before the Employment Division of the Vila Real District Court.

In a judgment of 3 July 2015 the Vila Real District Court held that the dismissal had been justified. Referring to a judgment delivered by the Supreme Court on 13 November 2013, the court rejected the argument that the geolocation system was unlawful, taking into account the aims pursued by the company. The court considered that a device of this kind did not constitute a means of remote surveillance within the meaning of Articles 20 and 21 of the Labour Code and that, even assuming that it was such a means, the data it transmitted did not fall within the scope of private life.

On 12 August 2015 the applicant appealed against the judgment of the Vila Real District Court to the Guimarães Court of Appeal.

In a judgment of 3 March 2016 the Guimarães Court of Appeal upheld the judgment of the Vila Real District Court, although it based its decision on different reasoning. Unlike the District Court, it considered that the use of a GPS device in a professional setting to monitor an employee's activity constituted a means of remote surveillance within the meaning of Article 20 § 1 of the Labour Code, as stated recently by the CNPD in resolution no. 1565/2015 of 6 October 2015. The Court of Appeal therefore considered it necessary to review the Supreme Court's judgment of 13 November 2013. It observed that the technology in question had evolved considerably in recent years. Thus, in the Court of Appeal's view, it did indeed constitute a means of remote surveillance prohibited by Article 20 of the Labour Code. On the basis of these considerations, the Court of Appeal set aside the finding concerning the applicant's failure to observe the required working hours. However, it found that the use of GPS solely to determine the distances travelled did not fall within the scope of professional performance monitoring within the meaning of Articles 20 and 21 of the Labour Code and that it was therefore lawful.

The Court of Appeal concluded that the applicant's dismissal had been justified. By failing to report his mileage on professional journeys and by interfering with the operation of the GPS device

installed in his vehicle, the applicant had sought to prevent the correct transmission of the geolocation data and had thus breached his duty of loyalty to his employer. In the appellate court's view, that conduct had led to a breakdown of the bond of trust, justifying the termination of the employment contract. Accordingly, the dismissal had been proportionate to the applicant's misconduct.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private life), the applicant alleged that the processing of geolocation data obtained from the GPS system installed in his company vehicle, and the use of that data as the basis for his dismissal, had infringed his right to respect for his private life.

Relying on Article 6 § 1 (right to a fair hearing), he complained that the proceedings before the domestic courts had been unfair, as the courts' decisions had been based almost exclusively on unlawful evidence obtained by means of the GPS system installed in his company vehicle. He also complained of a conflict in the domestic case-law, contrary to the principle of legal certainty.

The application was lodged with the European Court of Human Rights on 9 May 2016.

Judgment was given by a Chamber of seven judges, composed as follows:

Yonko **Grozev** (Bulgaria), *President*,
Faris **Vehabović** (Bosnia and Herzegovina),
Iulia Antoanella **Motoc** (Romania),
Gabriele **Kucsko-Stadlmayer** (Austria),
Pere **Pastor Vilanova** (Andorra),
Jolien **Schukking** (the Netherlands),
Ana Maria **Guerra Martins** (Portugal),

and also Ilse **Freiwirth**, *Deputy Section Registrar.*

Decision of the Court

Article 8

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 decided to examine the applicant's complaints from the standpoint of the State's positive obligations under Article 8 of the Convention.

The Court noted that the applicant had not challenged in the administrative courts the CNPD's decision of 10 September 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 appeal against it under section 23(3) of the Personal Data Protection Act.

The Court therefore had to determine 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.

First of all, the Court observed that the domestic courts had 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 document dated 5 January 2012 which the company had sent to the employees concerned, concerning the installation of the GPS device and the reasons for the measure. That document had stated clearly that the system was intended, in particular, to monitor the distances covered 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. It was therefore not in

doubt that the applicant had been aware that the company had installed a GPS system in his vehicle with the aim of monitoring the distances travelled in the course of his professional activity and, as applicable, on private journeys.

The Court went on to note that the applicant had been dismissed by his employer on two grounds. Firstly, the company had penalised him for increasing the distances driven for professional purposes 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 Vila Real District Court had found that the grounds for dismissal were justified, the Guimarães 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 and not contested by the company before the administrative courts, and which prohibited the company from using geolocation devices in its company vehicles, the Court of Appeal had departed from the assessment made by the Vila Real District Court in the light of the Supreme Court judgments of 22 May 2007 and 13 November 2013 by holding that geolocation devices could not be used to monitor employees' performance or observance of their working hours. Applying the resolution in question retrospectively, the Guimarães Court of Appeal had held that the geolocation data obtained by the company to monitor employees' performance came within the category of remote surveillance prohibited by Article 20 § 1 of 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. Accordingly, the Court of Appeal had not found all the geolocation data in question to be invalid, but only those consisting in monitoring the employee's professional activity.

The Court considered that, 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.

In the Court's view, the Guimarães Court of Appeal 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. Hence, the State had not overstepped its margin of appreciation in the present case. The Court therefore found that the national authorities had not failed to comply with their positive obligation to protect the applicant's right to respect for his private life.

There had thus been no violation of Article 8 of the Convention.

Article 6 § 1

The Court observed that the applicant had 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 Guimarães Court of Appeal on 3 March 2016 had been duly reasoned, in terms of the facts and the law, and the assessment made appeared neither arbitrary nor manifestly unreasonable.

The Court considered that the use in evidence of the geolocation data relating to the distances driven by the applicant in his company vehicle had not undermined the fairness of the proceedings in the present case.

There had therefore been no violation of Article 6 § 1 of the Convention on account of a lack of fairness in the proceedings.

The applicant also complained under Article 6 § 1 of the Convention of a conflict in the domestic case-law, contrary to the principle of legal certainty.

In the present case the applicant alleged that the judgment of the Guimarães Court of Appeal had contradicted two Supreme Court judgments and one judgment of the Évora Court of Appeal. The Court noted that Article 629 § 2 (d) of the Code of Criminal Procedure provided for the possibility of appealing against a judgment of a court of appeal where it conflicted with a judgment of another court of appeal on the same legal issue. In the Court's view, this was an effective remedy in respect of the applicant's complaint of a conflict in the case-law. Since the applicant had not availed himself of that remedy, this complaint had to be declared inadmissible for failure to exhaust domestic remedies.

Separate opinion

Judges Motoc, Pastor Vilanova and Guerra Martins expressed a joint dissenting opinion which is annexed to the judgment.

The judgment is available only in French.

Press contacts
echrpress@echr.coe.int | tel.: +33 3 90 21 42 08

We would encourage journalists to send their enquiries via email.

Denis Lambert (tel.: + 33 3 90 21 41 09)
Tracey Turner-Tretz (tel.: + 33 3 88 41 35 30)
Inci Ertekin (tel.: + 33 3 90 21 55 30)
Neil Connolly (tel.: + 33 3 90 21 48 05)
Jane Swift (tel.: + 33 3 88 41 29 04)