

The plaintiff was employed by the defendant as an on-trade regional manager. The defendant decided to open an internal investigation during which the company cell phones and laptop computers of some of the employees, including those of the plaintiff were collected for the purpose of inspection. The plaintiff also handed over his private cell phone operated by a company SIM-card to enable the defendant to carry out the investigation as a result of which the parties terminated their employment relationship by common agreement. On 21 December 2015, the plaintiff challenged, in writing, the parties' common agreement by referring to a mistake on his part. In his legal action, the plaintiff requested the court to establish the invalidity of the parties' common agreement, restore his employment and order the defendant to pay him arrears of salary and compensation for grievance due to a breach of his personality rights, originating from the defendant's inspection. In his defence statement, the defendant requested the court to dismiss the plaintiff's claims. The court of first instance dismissed the plaintiff's action. The court of second instance upheld the first instance judgement. In his petition for judicial review, the plaintiff requested the Curia of Hungary, primarily, to quash the final judgement and order the defendant to pay him compensation for grievance, secondarily, to order the court of first instance to reopen its proceedings. In his defence petition, the defendant requested the Curia to uphold the final judgement.

The Curia established the well-foundedness of the petition for judicial review. Section 11, subsection (1) of the Labour Code stipulates that employees may be monitored by their employers only in respect of the formers' employment-related conduct. The employers' monitoring and the means and methods thereof should not amount to a violation of the employees' right to human dignity. In its Grand Chamber judgement delivered in the case of *Bogdan Mihai Bărbulescu v Romania* (application number 61496/08), the European Court of Human Rights defined the criteria which should be taken into consideration by the national courts in the assessment of the lawfulness of the exercise of the employers' supervisory and disciplinary powers. The lower instance courts in the case at hand failed to properly assess whether the internal investigation could have been carried out by another means having a less restrictive effect on the plaintiff's private life and whether the plaintiff had been provided with appropriate safeguards in respect of his employer's investigatory action. It could be stated that the plaintiff had not consented to the processing of his personal data. The term "any other data carrier", laid down in the employer's internal regulations cannot include a privately-owned device used with the employer's authorisation, since such device is provided not by the employer but by the employee. Due to the lack of the plaintiff's consent, the processing of his personal data by the defendant was unlawful [section 9, subsections (2) and (3) of the Labour Code, section 5, subsection (1), point a) of the Privacy Act].

The Curia found that the defendant had carried out an unlawful investigation concerning the plaintiff's private life and had gained access to the plaintiff's private messages in an unauthorised manner. With regard to the above and on the basis of section 275, subsection (4) of the Code of Civil Procedure, the Curia partially quashed the final judgement and partially modified the first instance judgement in respect of the compensation for grievance and, in addition, established that the plaintiff's right to privacy and to the protection of personal data had been violated as a result of an internal investigation, carried out by the defendant in October 2015, affecting the plaintiff's privately-owned cell phone. The Curia's conclusions were as follows:

- I. The employee's right to privacy and to the protection of personal data is violated by the employer if the latter processes the former's personal data without giving appropriate information beforehand and without the former's express written consent thereto.
- II. Prior to conducting an inspection, the employer has to determine the methods and measures with which he may have direct access to the content of the employee's private correspondence, the employer has to inform the employee about whether such an inspection would also extend to the latter's personal data.
- III. The employer's inspection is lawful if the consequences thereof are proportionate to the declared legitimate aim to be achieved by the employer and if the latter provides sufficient guarantees to prevent abuses [section 9, subsections (2) and (3) and section 11 of the Labour Code, section 5, subsection (1), point a) of the Privacy Act].

In its reopened proceedings, the lower instance court will need to examine the claim for compensation for grievance on the basis of section 2:52 of the Civil Code.

Budapest, the 3<sup>rd</sup> of September 2019