

Supreme Court rules on compensation for illegal GPS tracking

16 September 2020 | Contributed by [Graf & Pitkowitz Rechtsanwälte GmbH](#)

Facts

Decision

Comment

The Supreme Court recently ruled for the first time on the issue of whether GPS tracking without an employee's consent warrants compensation for immaterial damage.⁽¹⁾

Facts

The employee (plaintiff) was part of the employer's (defendant's) sales force. He was provided with a company car that he was also allowed to use for private purposes. When the employee learned that his employer had installed a GPS tracking system which detected the sales staff's positioning and also transmitted data on the cars' battery levels showing the exact times when the ignition had been switched on, the employee requested from his superior (the head of sales) that this practice be stopped – particularly with respect to his leisure time. Based on data transmitted through the tracking system, the employee's superior often called him to enquire why he had left his home so late. The employee abstained from using the company car for his private travels and instead used his own car.

The employment relationship lasted for approximately six months. After the employer gave notice of termination, the employee sued for damages, claiming €1,000 for each month during which he was exposed to the employer's unlawful GPS tracking, arguing that this practice amounted to an invasion of privacy causing emotional distress.

The employer asserted that:

- the employee knew about the GPS tracking and its purpose;
- the employee had agreed to its use; and
- the GPS tracking was necessary for an efficient fleet management and deployment of the employer's resources.

The trial court afforded damages of only €400 per month (€2,400 in total), but otherwise followed the plaintiff's line of argument, concluding that the GPS tracking qualified as a control measure that touched on human dignity and without a plant agreement in place, in the absence of a works council and the employee's express consent to the measure, the GPS tracking was unlawful and compensation justified.

The court of appeal confirmed the first-instance decision, but also noted that the Supreme Court had not yet decided on the issue and allowed the case to proceed.

Decision

The Supreme Court upheld the lower courts' decisions and gave clear guidance on the legal principles governing employees' privacy rights.

One of the core provisions of Austrian civil law (Section 16 of the Civil Code) provides that each individual has inherently natural rights, protecting human dignity. Employment legislation reflects on this aspect of an individual's inalienable rights when it effectively states that personality rights are also protected in an employment context and that control measures touching on human dignity require either the works council's or the employee's express consent. The objective of the consent requirement is to protect employees' free development of personality against undue interference by their employer.

Control measures by employers concern human dignity when such measures also allow the employer to control

AUTHOR

**Jakob
Widner**



employees' private lives. 'Control measures' are defined as the systematic monitoring of an employee's actions, conduct and traits by their employer.

While employers have a viable interest in monitoring employees' performances and protecting their property, employees' personal rights must also be respected. Based on the proportionality principle, an employee's personality rights must be restricted only where it is justified by a legitimate interest of control. Employers must choose the gentlest measures to achieve the intended and a legitimate level of control.

Based on these principles, tracking systems deployed during working hours encroach on human dignity and are inadmissible when an employee is off duty. Employees cannot validly consent to a control measure that violates human dignity, such as during non-working hours. In the case at hand, the plaintiff had not consented to the control measure outside of his working hours. Therefore, the GPS tracking was unlawful.

Employees can claim compensation for non-material damage if the violation of their privacy by their employer was substantial. The more private the circumstances are, and the more serious the misconduct on the employer's part, the more likely an entitlement to compensation is warranted in the given context. Therefore, the scope and intensity of the infringement of privacy rights is decisive. Given the employer's refusal in the above case to stop the GPS tracking regardless of the employee's repeated requests, which caused considerable inconvenience for the employee, the Supreme Court concluded that the substantiality threshold had been exceeded and approved the employee's compensation claim which was not contested by the defendant.

Comment

Employers that use GPS tracking systems or similar control measures to monitor their staff should ensure that they agree the system's introduction with the works council or have each affected employee expressly consent to such a measure if no works council has been elected. Without such consent, control measures touching on human dignity are not only unlawful but might also prompt compensation claims. Given the scope and intensity of the intrusion in the present case, the Supreme Court could also have approved a higher compensation package.

For further information on this topic please contact [Jakob Widner](mailto:j.widner@gpp.at) at Graf & Pitkowitz by telephone (+431 401 17 0) or email (j.widner@gpp.at). The Graf & Pitkowitz website can be accessed at www.gpp.at.

Endnotes

(1) OGH 9 ObA 120 /19s.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).