Review of private WhatsApp messages on work mobile phone deemed unlawful

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Background

In June 2017 a Swiss-based company (the employer) dismissed an employee with immediate effect on the grounds that she had made wrongful use of her work mobile phone by installing WhatsApp and using it for private purposes, thereby infringing the employer's terms of employment. In particular, she had made a defamatory statement against the company's director, harassed a colleague, given access to sensitive information and faked an illness – all of which had been reflected in a private WhatsApp conversation with a third party.

The company's decision to dismiss the employee with immediate effect was made following the discovery of the WhatsApp conversation on the employee's work mobile phone. The employer took screenshots thereof and submitted it as evidence to challenge the respective dismissal with the Labour Court of the District of Zurich (the first-instance court).

However, the first-instance court concluded that the company's review of WhatsApp messages had been unlawful and the related screenshots were thus inadmissible as valid evidence.

On 28 September 2018 the company appealed to the Supreme Court of the Canton of Zurich (the second-instance court), which confirmed the first-instance decision.

Decision

The second-instance court considered the employer's investigation to be a data processing activity in accordance with the Federal Data Protection Act (FDPA). Further, the court stated that any such processing that lacks a connection to an employee's workplace is unlawful in an employment context. In particular, the court strictly determined that any personal data that is not required to assess an employee's job suitability or performance under an employment contract cannot be processed. Correspondingly, the second-instance court followed a restrictive opinion, stating that Article 328b of the Code of Obligations (CO) prevails over the FDPA and that unlawful processing within the meaning of Article 328b cannot be legitimised by one of the reasons provided for under Article 13 of the FDPA (ie, consent, overriding public or private interest or statutory provision) which would permit processing by way of justification.

The second-instance court further held that data processing which aims to verify compliance with a company's internal policies (including terms of employment) was in principle lawful under Article 328b CO. Nonetheless, the assumption that WhatsApp had been primarily installed for private purposes would only have required deleting it as a non-work app. However, even if the app had been deemed to also have been used for business purposes, the fact that the employer's suspicion had been linked to the employee's private messages on the app suggested to the second-instance court that the review of this content was unrelated to the employment contract and thus prohibited under Article 328b CO. Consequently, the employer had no authorisation to view the private content of the employee's messages, even though the information was located on the latter's work mobile phone.

The second-instance court also confirmed the first-instance court's decision that the screenshots had been illegally obtained because they violated data protection principles and infringed the employee's privacy. Therefore, the screenshots were deemed inadmissible as evidence within the meaning of Article 152(2) of the Code of Civil Procedure.

Comment

This decision clarifies that employers must clearly regulate the private use of work communication devices, as well as any related control mechanisms. Under no circumstances can employers view information that is declared to be private. Further, data processing such as verifying WhatsApp chat messages – even if the information is stored on a work mobile phone – must be done in accordance with the more restrictive Article 328b CO, which strictly limits the lawfulness of personal data processing that is required to assess an employee's job suitability or performance under an employment contract.

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