Supreme Court rules on monitoring of employee WhatsApp conversations

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In June 2017 the Supreme Court rendered an important decision concerning the protection of employees' privacy rights. The court reversed a first-instance labour court decision and ruled that the dismissal of an employee was unlawful on the grounds that (among other things) the employer had used the employee's WhatsApp conversations (obtained in an impermissible way) as evidence, thus violating the employee's right to privacy.

Facts

A group of employees presented a collective petition to their employer in which they:

- made demands regarding the employer's salary policy;
- expressed their opinions about changes resulting in unfair working conditions; and
- raised claims of mobbing.

The employees also set up a WhatsApp group in which various messages about their work conditions were exchanged. The mobile phones and SIM cards used by the employees belonged to the employer, but most of the WhatsApp messages were sent outside working hours.

The WhatsApp conversations between the plaintiff employee and his colleagues were revealed to the employer by another employee, who had also participated in the group chat. Subsequently, the employer took statements from the employees involved and terminated the plaintiff's contract. The employee who had informed the employer of the WhatsApp group conversation was only issued a warning.

The plaintiff filed a reinstatement action and argued that the employer had terminated his employment without a valid reason.(1)

First-instance decision

The first-instance labour court rejected the reinstatement case on the basis that the behaviour of the plaintiff and his colleagues had disturbed the peace in the workplace and could therefore be regarded as a breach of the employer's confidence and a valid reason for the termination. The plaintiff appealed the decision.

Supreme Court decision

In June 2017 the 9th Civil Chamber of the Supreme Court reversed the first-instance court decision and accepted the reinstatement case. In its decision, the Supreme Court stated that WhatsApp is an online communication platform where users can communicate individually or through group chats. However, this application is self-protected and conversations are closed to third parties. Therefore,

as long as the work of employees is not affected by these group chats, they can communicate via WhatsApp. In this context, employee communications are protected as personal data.

After summarising the facts of the case, the Supreme Court determined that the employer had:

- obtained confidential data in an impermissible way; and
- protected the informant employee (ie, treated him differently by only giving him a warning, whereas the other employees were fired).

More importantly, the Supreme Court underlined that sharing a complaint or demand with an employer about working conditions is a democratic right and cannot be a reason for termination. In this respect, the Supreme Court rejected the case and concluded that the employer had borne the burden of proof and failed to prove a rightful and valid reason for the termination of the plaintiff employee's contract.

Comment

The protection of employees' right to privacy has various dimensions and touches on several legal disciplines, including labour law and data privacy. In the above decision, the Supreme Court handled the matter from a narrow perspective, but nonetheless participated in the recent trend of protecting the right to privacy, which was also the subject of a recent European Court of Human Rights decision (*Barbulescu v Romania*, Case 61496/08). These decisions have increased the scope of legal protection following the growth in popularity of online communication platforms like WhatsApp, which has made people's private lives much more accessible.

However, the rights of employers also need to be considered. In cases where trust between an employee and an employer has collapsed irrevocably, forcing the employer to continue the working relationship is arguably a controversial approach that is contrary to the universal and basic principles of labour law. Further, it should be remembered that unlimited protection in this manner could lead to abuse.

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Endnotes

(1) Under Turkish law, if an employee has worked for at least six months for a company which has 30 or more employees, the employer can terminate his or her employment only for a valid reason. 'Valid reasons' can be an employee's capability or behaviour or the requirements of the enterprise, workplace or job. If such conditions are not met, an employee can file a reinstatement action.
