

GDPR Case Study: Use of the Bradford Factor by the Electricity Authority of Cyprus

Neophytos Christou
Brown University

Abstract

The Cypriot Data Protection Officer (DPO) issued a fine of €40000 to the Electricity Authority of Cyprus (EAC) for violating Articles 6(1) and 9(2) of the GDPR. Specifically, the DPO ruled that the EAC's use of the Bradford Factor as a scoring system for their employees' medical absences without the employees' consent had no legal basis and violated the aforementioned articles, since it is considered to be processing of the data subjects' data concerning health.

1 Introduction

On January 21, 2020, the Cypriot Data Protection Officer filed a complaint against the Electricity Authority of Cyprus (EAC), informing them of a potential violation of the GDPR Articles 6(1) and 9(2) [6, 9]. The violation regarded the use of the Bradford Factor [1] by the EAC (the data controller and processor), which was used in order to give a score to EAC's employees' (the data subjects) based on the frequency of the employees' leaves of absences due to medical reasons. The DPO filed the complaint herself, after having issued a fine to another group of Cypriot companies (the "LOUIS GROUP" of companies), regarding the use of the same scoring system [4, 5]. The DPO was verbally informed that the EAC had been using the same system since 2011 [7]. The "LOUIS GROUP" case was concluded and the fine was imposed on 25 October, 2019.

After being made aware of the fines imposed to the "LOUIS GROUP" regarding the use of the Bradford factor, the EAC suspended the use of the system. This decision was made on January 16, 2020, a few days before the complaint was filed to the EAC. After some correspondence between the DPO and the EAC [6], on 8 December, 2020, the DPO ruled that the use of the Bradford Factor system had no legal basis and decided to impose a fine of €40000 to the EAC.

2 Background

2.1 The Bradford Factor

The Bradford Factor [1] is a system used to score employees based on the number and duration of leaves of absence an employee takes. It is designed such that it gives a higher (worse) score to employees that take short and frequent absences. The score for an individual is calculated using the following formula:

$$B = S^2 * D$$

where S is the number of absences over some set period, and D are the total days of absence.

2.2 The "LOUIS GROUP" case

This case was the first case in Cyprus where a fine was imposed for the use of the Bradford Factor for scoring employees. Specifically, after a complaint filed by the group's employees' trade union, the DPO ruled that the use of the scoring system for profiling and absence monitoring was unlawful and imposed a fine of €82000 in total, due to violation of articles 6(1) and 9 of the GDPR [4].

2.3 Use of the Bradford Factor by the EAC

The EAC started using the Bradford Factor as a scoring system in January 2011 [7], after noticing an increase in the number of leaves of absences taken by their employees. They suggested the system would help "prevent abuse of the absence system by employees". Specifically, each employee would get a Bradford score over a set period of 52 weeks. The EAC would then take different levels of action based on the accumulated score of the employee, starting with a simple consulting discussion for the first 150 accumulated points. Following that, the employee would receive notice letters from the HR department and personal interviews would be conducted with them to determine if the absences were justified. If the absences would continue, there would be mandatory medical

checks of the employee by the EAC's own medical officers to determine whether or not the employee can continue to perform their duties.

In the correspondence between the DPO and the EAC, the EAC claimed that since 2017, the Bradford system was not being used to its full extent because it required updates to the EAC's computer systems, something which did not take place. As the EAC claims, since 2017 the system was only being monitored occasionally and there had been plans to discontinue it.

To make use of the system, the EAC collected various personal data from the employees, such as as their name, reason for medical absence and the duration and dates of each absence.

3 GDPR Violation

3.1 Ruling

The DPO judged that the use of the Bradford factor had no legal basis and violated articles 6(1) and 9 of the GDPR [6]. Specifically, she determined the following:

- The data collected by the EAC are considered "data concerning health" according to article 9(1).
- None of the points in article 6(1) applied. The consent for the use of such data was given through the employees' trade union and not by the data subjects themselves, which does not abide by GDPR's definition of consent in article 4(11). Also, the EAC did not provide any evidence for having a legal interest in collecting and using this data, so article 6(1)(f) did not apply. The EAC would have avoided the fine had they presented a valid legal reason to collect and process the data.
- An employer does have the right to monitor the frequency of their employees' leaves of absences as well as the validity of the medical certificates provided for medical leave. However, the employee must do so in a manner that does not violate the employees' privacy and is constrained to the minimum necessary information possible. The use of a scoring system and the subsequent measures taken by the EAC were excessive and had no legal basis.
- The EAC could have handled cases where an employee was suspected to be abusing the absence system more discretely and in a less intrusive manner.
- The EAC completely suspended the use of the system only after it was informed of the fines imposed to the LOUIS GROUP and did not do so voluntarily when the GDPR went in effect.

3.2 Response by the EAC

The DPO presented her correspondence with the EAC [6], where the EAC presents some points trying to defend their case, after the initial complaint filed by the DPO. Some of the main points are the following:

- The system succeeded in reducing the leaves of absence and the EAC was awarded the Cypriot Innovation Award by the Cyprus Employers and Industrialists Federation for implementing the system in 2014 [3].
- The system was not being used to its full effect since 2017 and even less so in 2018, when the GDPR went into effect. Also, the system abided by the law during the main period of its use, before the GDPR.
- Very sensitive medical cases, such as long-term absences, absences due to pregnancy and chronic diseases were not included in the system.
- The abuse of the absence system by EAC's employees is against the EAC's Disciplinary code.
- The DPO's judgment that the EAC only suspended the use of the system due to the penalties imposed to the LOUIS GROUP was unfair, since there had been plans to suspend it before the DPO's ruling for the LOUIS case.
- The system was compliant with the GDPR since it was "necessary for the performance of a contract to which the data subject is party", according to GDPR article 6(1)(b).

3.3 Penalties

In her report [6], the DPO mentions various mitigating and aggravating factors that led to the decision to impose the €40000 fine. A brief summary is the following:

Aggravating factors:

- The system was in place for a long period of time (9 years) and collected the data of over 2000 employees.
- The nature of the data being collected (medical data).
- There was not an individual violation of articles 6(1) and 9 of the GDPR, but rather the violations would occur on a regular basis.

Mitigating factors:

- Some very sensitive cases were excluded from the system.
- The EAC fully cooperated with the DPO in suspending the use of the system.
- The DPO did not receive any official complaints about the use of the system before being made aware of its use.

3.4 Prevention

The EAC could have taken one of two measures to prevent the violation. First, from a legal standpoint, as the DPO mentioned, the EAC could have made a case that the data was processed because of legal interest. If that was the case, the processing would have been compliant with the GDPR according to article 6(1)(b). Secondly, and perhaps the more obvious measure, would be a revision of the EAC's internal policies after the GDPR went into effect.

4 Discussion

I find this case particularly interesting since it shows that even though the data controller (and in this specific case an employer) does have the right to collect some specific data about the data subjects, there is still a line between what is and is not considered excessive processing and use of the data. As the DPO mentions in the report, an employer is of course allowed to collect some information about their employees' absences, but how specific the information is and the purpose of the processing of such information should still be kept to the minimum possible degree necessary.

I believe that the DPO handled this case properly and still imposed a proper fine to the DPO even though the Bradford factor stopped being used by the time the complaint was filed. I would say that the relatively high amount of the imposed fine is perfectly justified, especially when taking into consideration that the nature of the data was very sensitive.

Furthermore, this case shows that companies should have revised their internal policies after the GDPR came into effect to make sure they are compliant, since I feel most companies only focused on changing the interactions with their customers, but not their own employees. The use of the specific scoring system may not be commonplace in most companies, but I would guess that a lot of the companies that did not review their policies after the GDPR probably have at least a slight violation of some article.

Finally, even though I could not find any public statement from the EAC regarding this case apart from the correspondence published by the DPO, it does seem that they are reviewing some of their policies regarding data protection to make sure they are compliant with the GDPR [2, 8].

References

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