SPANISH CONSTITUTIONAL COURT
Cabinet of the President
Press Office

INFORMATIVE NOTE No. 23/2016

THE PLENARY MEETING ENDORSES THE INSTALLATION OF CAMERAS AT THE WORK PLACE, WITHOUT THE EMPLOYEE's CONSENT, IF THIS IS NECESSARY TO SUPERVISE CONTRACTUAL PERFORMANCE

The Plenary Meeting of the Constitutional Court (TC) has dismissed an appeal for constitutional protection filed by a worker who was dismissed after her employer ascertained, by installing a video-surveillance camera at the work place, that she had withdrawn money from the till. The judgment, where Encarnación Roca was the Reporting Judge, does not agree with the fact that, in this case, the capturing of images without the employee's express consent constitutes a breach of Article 18, paragraphs 1 and 4, of the Spanish Constitution (CE), protecting the rights to personal privacy and self-image. A particular dissenting vote was issued by the Judge Fernando Valdés Dal-Ré, which was adhered to by the Vice-President of the Court, Adela Asúa, and the Judge Juan Antonio Xiol.

According to the facts described in the challenged judgment, the applicant for constitutional protection was dismissed in June 2012 "*due to a breach of contractual good faith*", after her employer company ascertained that she had withdrawn cash from the shop till. The company's security department, thanks to a new software system implemented in the till, detected that "*many irregularities*" had taken place in the establishment where the appellant worked. This raised suspicion about the possibility of some of the employees stealing money, which is why a security company was ordered to install a video-surveillance camera to check the till where the applicant worked. The workers were not expressly advised that the camera was installed, but the shop window did display an informative sign, in a visible place.

First of all, the judgment explains that one's image constitutes "*personal data*", pursuant to the Spanish General Act on Data Protection [Ley Orgánica 15/1999, de 13 de diciembre, de protección de datos (LOPD)]. Secondly, according to the case-law, a characteristic feature of this fundamental right to data protection is the affected party's right to "*agree to the collection and use of his personal data and to be adequately informed".*

The LOPD makes exceptions to this general rule and, amongst other situations, waives the need to gather the affected party's consent in an employment context when "*personal data treatment is necessary to maintain and perform the contract signed by the parties*". If data are used "*for purposes other that contractual performance*" it "*will be necessary*" to obtain the consent of the affected workers.

Along with a duty of consent, the law also foresees a duty of prior information

on data use and purpose. This duty will remain intact even in those cases where consent is not necessary.

The Plenary Meeting affirms that, according to the LOPD, "*an employer does not need a worker's express consent for the processing of images*"; and it claims that the Workers Statute entrusts an employer with a right of management, entitling it to "*adopt any surveillance and control measures it deems appropriate to verify that the worker is fulfilling his employment obligations and duties, duly upholding his human dignity when adopting and applying said measures*". Consequently, it concludes, "*consent is deemed implicit upon acceptance of the contract*".

The duty of information, explains the judgment, will persist despite a waiver of the duty of consent; nevertheless, in order to determine whether this absence of information does or does not breach Art. 18.4 CE, the Court should examine in each case the proportionality of the surveillance measure using security cameras.

In this case, the camera was placed where the plaintiff was carrying out her work, "*directly focused on the till*". Furthermore, in compliance with Instruction 1/2006, of 8 November, of the Spanish Data Protection Agency, the company placed an informative sign about existing cameras ("*area under video-surveillance*") in the shop window.

According to the Plenary Meeting, thanks to the placement of said sign, the applicant of constitutional protection "*was aware that cameras existed and what they had been installed for". "The worker"*, adds the judgment, "*knew that the company had installed a video-surveillance control system, without having to specify, beyond mere surveillance, the exact purpose assigned to this control"*. Consequently, the duty of prior information was fulfilled.

Furthermore, the judgment reaches the conclusion that the installation of video-surveillance cameras was aimed at checking performance of an employment contract: "*The video-surveillance system captured the misappropriation of cash from the shop till by the appellant, and was consequently the object of a disciplinary dismissal (...) Let us recall that the cameras were installed by the company because it suspected that some shop worker was taking money from the till".* Therefore, an infringement of Art. 18.4 CE cannot be claimed.

As for the challenged judgment, the Court considers that it "*adequately*" appraised the proportionality of the surveillance measure adopted by the employer. The measure was "*justified (as there was reasonable suspicion that some of the workers who were providing their services at said till were withdrawing money); suitable for the purpose sought by the company (to ascertain whether any of the workers was in fact committing the irregularities suspected and, in such case, to adopt the necessary disciplinary measures); necessary (as the recording would be used as evidence of such irregularities); and balanced (as the recording of images was limited to the till area). Consequently, "it is dismissed that any infringement took place of the right to personal privacy enshrined in Art. 18.1 CE*".

In their particular vote, Judges Valdés and Asúa affirm that the judgment constitutes "*a step back in the protection of workers' fundamental rights*". In their opinion, the dismissal should have been declared null and void because the cameras were installed

without informing the employee of their specific purpose, consequently infringing her fundamental right of self-image (Art. 18.4 CE). In their opinion, the judgment changes the case-law by overlooking the scope given until now by the Court to the right protected by Art. 18.4 CE; the difference between this right and the one enshrined in Art. 18.1 (right to personal privacy); and the fact that control of the use and purpose given to personal data "*is constitutionalised based on an enshrinement of this fundamental right*"; this idea, they claim, has great relevance at present given the technological means available and the fact that "*any images recorded and treated may be used for disturbing purposes such as the drawing up of a profile on ideology, race, sex, economic means, etc., or may be placed at the service of other personal threats*". Finally, they consider that the judgment "*does not separate a legitimate purpose*" pursued in this specific case by the company (to ascertain compliance of the employee's labour obligations) "*from the constitutionality of the act*" itself (requiring that the necessary prior information be given on the purpose of the cameras installed).

In turn, Xiol considers that generic information on the installation of video-surveillance cameras addressed to the public is "*insufficient*" in an employment scenario. In his opinion, to allow an employer "*if it suspects anything" "to be constitutionally authorised"* to freely install cameras to control its workers "*is dynamiting the core of a fundamental right to data protection, "rendering it ineffective, lacking any practical sense and making it unrecognisable*".

Madrid, 18 March 2016.