

Employment Update

Trade union information "in paper form" and the prohibition of access to work with any personal object

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Regarding the Decision of the National High Court, November 15, 2018

If we have been told that a Trade Union or Workers' Committee denounces that the security policy imposed by the company prevents access to workplaces with any type of object, and also makes it impossible for workers' representatives to disseminate trade union information on paper and to use their mobile phones, which a priori would hinder their trade union action, The reader believes that we are dealing with an assumption of a laboratory that would serve as a starting point to elucidate between the game of fundamental rights (privacy and freedom of association) and the measures of vigilance and control that the company can establish to verify the fulfilment of the work duties of the workers.

Nothing could be further from the truth, we are a judicial staging of the increasingly widespread "clean desks policy". In a pioneering resolution, the recent ruling of the Social Court of the Audiencia Nacional (National High Court) dated 15 November 2018 (Teleperformance Case) resolves the implanted practice of limiting access to the workplace with no personal purpose whatsoever, either because of customer demands or because of the consumer and user data protection policy.

In the case analyzed, the antecedents extracted from the statement of proven facts (HDP) that should be retained are:

- a. The company's activity is carried out in the telephone telemarketing and customer service sector, involving access to the reserved data of customers and users of the service (personal data; credit or debit card data; financial information; campaign data; information or documentation on customer procedures/processes, strategy or campaigns; training material; confidential business information; access passwords and company documentation, procedures and policy), for the security of which the company is responsible in contracts with its customers (HDP 3^o).
- b. The company has published security protocols containing an instruction on "clean desks", which includes a ban on the introduction of bags, backpacks, coats, USB, mobile phones, external memory devices, file sharing software, instant messaging software, PDAs, digital cameras, paper and pens onto platforms. The company has also published a sanctioning procedure, in which misconduct involving non-compliance with its policy of clean desks (HDP 4^o) is typified as misconduct. Finally, the company has been sanctioned by the Data Protection Agency due to data theft, based on breaches of its security policy (HDP 9).
- c. At the conclusion of the hearing, the company and all the Unions, except the CIG, reached a partial agreement under which the company undertook to make available to the workers: (i) lockers and allow them access to the platform with medicines and intimate hygiene items (in an opaque toilet bag), and (ii) telephones, on each platform, which they can contact in emergency situations. Stressing that in no case will access to the platform be allowed with electronic objects, mobile phones, notebooks or any other means by which information can be stolen (Fact Background, VI).

The petitions of the plaintiffs Unions that were prosecuted in the lawsuit were two:



1. The claim that workers' representatives should be allowed to distribute "paper" union communiqués among their representatives, with business opposition insofar as the company understood that alternative ways had been offered to disseminate its communiqués, as efficient or more, than their dissemination on paper, specifically through a Web page implemented on the company's Intranet or through the Employee Portal, apart from the dissemination of communiqués on bulletin boards, as well as in common places.
2. To authorize the use of mobile phones on platforms, opposing the company, because mobile phones entailed objective risk for the security of data, which could be photographed with serious consequences for the company, especially if they were broadcast externally.

Faced with such important questions, what has been the response of the Audiencia Nacional? The sentence is clearly "Solomonic", considering the first claim and rejecting the second.

In effect, as for the distribution of "trade union information on paper", the Court assumes that workers' representatives have the right to disseminate information to their representatives in their workplaces, without any limitations other than to communicate it to the company and not to disturb the normal development of the work. More specifically, article 8.1.b) of the Trade Union Freedom Law (LOLS) provides that workers affiliated to a union may, within the scope of the company or work centre, among other activities, distribute union information outside working hours and without disrupting the normal activity of the company, while article 8.1.c) of the LOLS recognizes that union members have the right to receive the information sent to them by their union.

Apart from the quotation of article 68.d) of the worker's statute insofar as the legal representation of workers can publish and distribute, without disturbing the normal performance of work, publications of labour or social interest, communicating it to the company.

Thus, although the Audiencia Nacional admits that the company is legitimized to organize the work, as well as to establish the control and security systems necessary to ensure its security obligations with the personal data entrusted by its clients and users of the service, these powers are not absolute and cannot indiscriminately invade the legitimate rights of the workers' representatives, to literally affirm that they are the same:

"They are not absolute, nor can they prevent or limit the right of workers' representatives, unless it is proven that such measures are appropriate, reasonable and proportionate to the proposed purpose. Consequently, it should have proved that the introduction of written paper on the platforms constitutes a patent and current risk, even if workers are not allowed to introduce means of writing on it, for the security of the personal data of their clients and users, which has not been proven at all".

And, regarding the "use of mobile phones" on platforms, the National Court considers it reasonable that the company has prohibited the use of mobile phones for security reasons:

"(...) since it is impossible to control all terminals at all times, with the consequent risk that mobile phones will be used to photograph information on relevant data, without this restriction damaging the right of communication of workers, provided that the company deploys sufficient telephones to enable workers to communicate in situations of need, which has been demonstrated".

In an exercise of reflection on the resolution, we mean these particulars:

- a. The conformity between the parties involved in the process that by security policy, exceptionally ("clean desks"), personal objects that are brought daily to the workplaces are totally forbidden to introduce them (mobiles, bags, backpacks, USB external memory devices, paper, pens, etc.).
- b. The lawfulness of prohibiting workers' legal representatives from accessing mobile work platforms, as the company has enough telephones to receive calls and communicate with the outside world.

Finally, it is more than debatable, despite the literality of article 68.d) of the worker's statute, that in judicial headquarters it is declared the persistence of the right of the representatives to distribute

union information releases "in paper format", when the company, taking into account the social reality of the times offered other alternative measures for the dissemination of the releases via intranet.

It should be remembered that with the official wage receipts, and faced with the initial legal obligation to deliver them to the companies in documentary support, the Supreme Court gave validity to the business decision that replaced the delivery of paper payrolls with the inclusion of the same in the personal account of each worker accessed through a computer terminal (all STS 1-12-16; rec. 3690/14).

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