

Employment Law Remark

Turn of the screw in the doctrine of the Supreme Court of Justice of  
Madrid with respect to temporary video surveillance cameras

17th May 2018

About the High Court of Justice of Madrid sentence dated February 7, 2018 (Mutua Cualtis Case)

One of the most talked about matters since we began to advertise Employment Commentaries is the treatment given by the Social Order Courts to the installation of video surveillance cameras, whether they are permanent and visible or hidden and temporary.

On October 21st, 2016, we developed comments on "Video surveillance cameras and the recent jurisprudential doctrine of the Supreme Court" and on March 14th 2017, new comments under the headline "The Supreme Court admits permanent video surveillance camera recordings as evidence for disciplinary dismissal for unlawful acts of employees.

The events lead us to return to this matter, and this is in response to the recent judgment of the Social Chamber of the Supreme Court of Justice of Madrid dated 7 February 2018 (RS 1268/2017; Mutua Cualtis Case) confirming the inappropriateness of a disciplinary dismissal, not only for the prescription of the misdemeanours, but also on the basis of the constitutional jurisprudence and the ECHR of 9th June 2016, by stressing that the applicant's right to "private life" would have been violated. The decision of the trial judge not to admit the evidence of recordings made by hidden and temporary video surveillance cameras (period from 15-5 to 13-7-2016) was validated.

In this case, the purpose of establishing the video surveillance system was due to the improper use by some workers of the cards that were given to customers who came to the company for medical check-ups and which they used to buy products from the vending machines.

As noted in the LB II of the High Court of Justice of Madrid sentence:

"The plaintiff worker was not informed that video-surveillance cameras would be installed in the breakfast rooms, first and second floors, nor that any sign had been affixed to advertise them or that they were perceptible or had been communicated to the workers' representatives, and the plaintiff was not. Rather, as described in the facts of the judgment at first instance, its installation was completely unknown; both for lack of information on its placement and because it was not visualized, and there was a manifest intention on the part of the company that its existence and use should be unknown".

We do not know whether the aforementioned ruling is final, but its doctrine is in frank and open contradiction with previous similar judicial precedents of the Madrid Territorial Court itself, in which the use of video surveillance camera systems has been dealt with, in its temporary rather than permanent connotation.



In fact, the Supreme Court of Justice of Madrid in its judgment of 21 January 2016 (Alcampo case; RS 634/2015) assumed that any measure restricting fundamental rights was determined by strict observance of the principle of proportionality, and it was necessary to determine whether it met the following three conditions:

- 1.- Whether such a measure is likely to achieve the proposed objective (suitability assessment).
- 2.- If, in addition, it is necessary, in the sense that there is no other more moderate measure for the attainment of that purpose with equal effectiveness (judgment of necessity).
- 3.- And, finally, if it is weighted or balanced, because it derives more benefits or advantages for the general interest than damage to other conflicting goods or values (proportionality judgment in the strict sense).

To finally give full legality to the temporary recordings made stating that in the case analyzed:

"The placement of a camera to record the activity that was carried out, where appropriate, within the premises or warehouse - where the trays in which the fish and butchery products are packed are kept, as well as the paper used to wrap the charcuterie products - in order to find out the facts that were happening, which affected the safety and hygiene of the packaging and paper, which were then used for the preparation and packaging of the food that was then put on sale, should be considered as an ideal, justified and proportional measure, in view of the fact that remains of urine were found in a storage unit for the aforementioned containers, which was normally closed, and in view of the suspicion that a company employee was carrying out his or her needs inside the unit, as it had already been verified in advance, the appearance of remains of urine inside the storage unit, without it being possible to establish with certainty, the origin of the remains that were later found, and until they were subsequently cleaned, on the floor, pallets, containers, paper and other belongings, which were stored there.

The recording was also necessary in order to obtain the necessary evidence to accredit such improper and irregular conduct, the authorship of which was unknown to the company, especially in view of the obligation to provide effective protection in the area of occupational health and safety and hygiene, imposed on the company by Law 31/1995 on the Prevention of Occupational Hazards, as well as those derived from the obligations legally imposed on the company in the area of food safety and consumer rights".

The same doctrine sat in the Supreme Court of Justice of Madrid on December 29th, 2015 (RS 487/2015), by giving full validity to a temporary recording system motivated by the concealment and disguise tactics that the actor had been using to do so repeatedly with part of the proceeds of the box and in the absence of any other alternative means with which to expose the transgressive conduct.

Other Social Chambers of different Supreme Courts have reached the same conclusion about the legality of the installation of temporary video surveillance cameras, without the knowledge and information of the workers, when the proportionality judgment was exceeded.

An excellent example is the file analysed in the Supreme Court of Justice of Murcia of 22 February 2016 (Ferrovia case; RS 714/2015):

*"in view of the well-founded suspicions of irregularity in the applicant worker's compliance with his work obligations, the recording of images at the workplace on 14th November 2014, at 9 p.m., by the private detective hired by the defendant company does not infringe article 18.1, as it was a justified measure (since there were reasonable grounds for suspecting that the appellant had committed serious irregularities at his workplace); it was appropriate for the purpose intended by the company (to verify whether the employee was actually committing the suspected irregularities and, if so, to take appropriate disciplinary action); (since the recording would serve as evidence of such irregularities); and balanced (since the recording of images was limited to the area in which he was working and was carried out for a limited period of time, sufficient to verify that it was not an isolated event or a confusion. (...)"*

On the occasion of the complaint that the one-off recording infringed the so-called right to "computer privacy" contained in Article 18.4 of the EC, when it states, "The law shall limit the use of computers to guarantee the honour and personal and family privacy of citizens and the full exercise of their rights", the Supreme Court of Justice of Murcia is categorical:

"On the other hand, in the present case, there is no permanent video surveillance system of the workplace installed by the company, but a punctual and time-limited recording of images of a specific worker by a detective, which does not meet the criteria for classification as a personal data file and unless the defendant company is the owner of the file, nor the party responsible for or in charge of processing the data."

The majority doctrine is in line with that contained in High Court Judgement 186/2000, of 10 July (Ensidesa; RA 2662/1997) when it pointed out that, on the 'absence of information', the fact that the temporary installation of a CCTV system was not previously notified to the Works Council and the workers concerned (no doubt due to the company's justified fear that knowledge of the existence of the filming system would frustrate the desired purpose) was of no importance from a constitutional point of view, since the Works Council's prior report was or was not required in the light of Article 2(2)(1) of the EC Treaty. 64.1.3 d) of the Workers' Statute, it would in any case be a question of mere ordinary legality.

And also in the speech, among others, of the High Court Sentences of the Valencian Community of February 8, 2017 (RS 3428/2017) and Andalucía (Málaga) of January 17, 2018 (RS 1878/2017), when both temporary recordings were validated, emphasizing that the employer does not need the consent of the worker, nor does the duty of information persist, in both cases dealing with a punctual and temporary installation of cameras, after proven reasonable suspicions of breach of contract and with the sole purpose of verifying such events.

By way of a recap. We will have to wait if the doctrine of the Madrid High Court Judgement of February 7th, 2018 is confirmed by a possible future ruling of the Supreme Court or if it is consolidated by future judicial rulings of the same Social Chamber.

Having said the above and without prejudice to the fact that the necessary specific case will have to be analysed (individualising criterion), the necessary reflection to be made is whether, in the presence of reasonable and obvious suspicions of serious irregularities in the workplace on the part of a worker's part, a temporary image recording measure is, a priori, fully balanced or proportional in order to verify the reality of the facts committed (it is not possible to do so in any other less onerous way) and is not legally enforceable (the purpose of the investigation would also be frustrated): i) that the employee concerned be informed that video surveillance cameras were to be installed; ii) that no signs were put up to warn them; or that they be communicated to the workers' legal representatives.

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