SPANISH REPORT

RIGHT TO PRIVACY IN THE WORKING RELATION

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Table of Abbreviations

ECHR	European Court of Human Rights
EU- CFR	Charter of Fundamental Rights of the European Union
GLSS	General Law of Social Security
JJCC	Judgment of Spanish Constitutional Court
JSSC	Judgment of Spanish Supreme Court
LC	Labour Code
LLRP	Labour Law of Risk Prevention
OLDP	Organic Law of Data Protection
SC	Spanish Constitution
SCC	Spanish Constitutional Court
SDPA	Spanish Data Protection Agency
SPC	Spanish Penal Code
SSC	Spanish Supreme Court

I. INTRODUCTION, GENERAL REMARKS AND SOURCES OF LAW

1. - Right to privacy in Spain

1.1. Constitutional recognition

The right to privacy is expressly recognized in the framework of the Spanish Constitution (SC, onwards). Indeed, article 18 of the constitutional text is expressed in the following terms: "*is guaranteed the right to honor, personal and family privacy and self-image*".

From the wording of art.18 SC, it could be interpreted that we are faced with a single right with a wide and complex content. However, we have to understand that we have 3 autonomous rights. This emerges clearly and unequivocally from the preamble of the Act that gives the article 18 SC - development and which will be subject to further analysis-, Organic Law 1/1982, of May 5, *civil protection of the right to honor, to personal and family privacy and self-image*, which the legislator refers to them as separate and distinct rights. In the same direction moves the Constitutional Court (SCC, onwards) by stating that it is autonomous rights and noun although closely linked, as personality right derived from human dignity and aimed at the protection of the moral heritage of people[1].

As regards the right to honor, the interpretation of national jurisprudence has led to the distinction between an immanent aspect of law, which has to do with the esteem that every person has of himself, and another that consists in the recognition of others of our dignity, being closely linked therefore with fame and social opinion. In this sense, it is considered that the right to honor should be assessed taking into account the public relevance of the person, their involvement in professional or private life as well as the specific circumstances in which it occurs[2].

On the other hand, the right to personal and family privacy may be defined as the right to everyone to "The existence of a proper and reserved area in front of the action and knowledge of others, necessary, according to the guidelines of our culture, to

[1]In this sense, the judgment 2003/14.

[2] SSTC 46/2002, 25 de February, 20/2002, de 28 de January, 204/2001, de 15 de October

maintain a minimum quality of human life"[3]. If the latter can be considered as the negative side of the right, it is also true that it has another active side that translates into the power of government or control of those facets in principle intimate, so that "the guarantee of privacy adopts today a positive understanding that translates into a right to control over the data relating to the person himself"[4]. This is known as the right to computer freedom or right to self-determination information that nonetheless other authors consider as an autonomous right linked to the right to data protection whose constitutional anchor is not always identified in a peaceful way in art. 18.4 SC.

The right to privacy includes the right to family privacy, as well as the right to personal privacy, understood as the right to oppose any inquiry into the body of the person who is carried out against the will of the same[5]. In this last aspect, the right to privacy is directly related with the prevention of occupational hazards and in particular medical examinations (that we'll talk about later).

Finally, the right to self-image safeguards the external projection of the image as a means to avoid unwanted interference[6], ensuring a certain image external [7]or preserve our image public[8]. This law is considered by some authors as a specific manifestation of the right to privacy, in order to protect it against the development of the means of acquisition of images in our society. However, it is possible to circumventing this right without affecting the constitutionally considered privacy itself.

1.2. Legal recognition

The rights to honor, personal and family privacy and self-image have the range of fundamental rights. It follows, among other things, that the normative development of Article 18 SC must be carried out by Organic Law (OL or it, in forward)[9]. Therefore, fulfilling the mandate of article 81.1 SC proceeded to regulate the exercise of the rights of article 18 SC through the enactment of the 1/1982, of May 5, *civil protection of the*

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[3]JCC 231/1988 of December 2, 1988
[4] JCC 202/1999, of November 8, 1999
[5] JCC 196/2004 of November 15, 2004
[6] JCC 139/2001of July 18, 2001
[7] JCC 156/2001 of July 2, 2001
[8] JCC 81/2001 of March 26, 2001
[9] The Organic Law differs from the Ordinary Law because its approval, modification or repeal must be made on the basis of a majority reinforced in the General Courts.

right to honor, to personal and family privacy and self-image, which guarantees civil protection against all kinds of illegal interference that the same law provides.

In compliance with the mandate contained in the 4th paragraph of art.18 SC that entrusts the Law with the task of limiting "the use of information technology to guarantee the personal honor and privacy and family of citizens and the full exercise of their rights", the Organic Law 15/1999, of 13 December, of *Protection of data of Personal character* (OLDP) was also promulgated. This law aims to guarantee and protect the honor, personal and family privacy and civil liberties and fundamental rights of individuals in general, with regard to the processing of personal data ensuring owners control over their personal data, in order to control its use and destination and to prevent illicit trafficking in them and may oppose such data to be used for other purposes for which consent was provided to obtain.

1.3. Right to privacy in industrial relations: The regulation of statute of workers

The relationship of dependency and subordination in which the worker is, necessarily implies the inference of business powers in the private sphere of the workers.

This reality can lead to situations of frontal collisions between fundamental rights, other rights and constitutionally protected interests, which are not resolved in our legal system clearly, thus relying to court resolution of the problems resulting from this regulatory anomie.

The starting point to address this challenging task is to assume, on word of the Spanish TC, *"the total effectiveness of the fundamental rights of workers in the framework of the employment relationship, since this may not imply in any way the deprivation of such rights for service providers"*[10].

Otherwise, the contract of employment cannot legitimize cuts in the exercise of the fundamental rights which are incumbent upon the worker as a citizen that does not lose its status as such by entering the field of a private businessman organization. This

[10]JCC 90/1997 of May 6, 1997

is so since "the conclusion of a contract of employment does not imply deprivation for one of the parties, the worker, or the Spanish Constitution rights"[11].

Furthermore, no right - even fundamental rights - is set in the Spanish legal system as absolute right, admitting as modulations and restrictions as a result of the necessary protection of other rights and constitutionally guaranteed interests. Although initially, it is admitted that the inclusion of workers in the productive organization outside could lead to a limitation of the constitutional rights of those who are workers, this thesis was gradually replaced by another that bet by necessary and preferential protection of fundamental rights and the establishment of a system of limitation mutual every time your exercise shocked with other goods and interests constitutionally guaranteed freedom of enterprise as article 38 SC. This work of analysis and weighting, entrusted primarily to the jurisprudence, has resulted in a case very abundant and varied from which we will try to realize in this work.

Aside from its constitutional recognition, the right to privacy also has express recognition and protection in the LC. In its article 4.2 e) d, is recognized for that: *"In the statement of work, workers are entitled to respect for their privacy and consideration due to their dignity, including protection against harassment on grounds of racial or ethnic origin, religion or convictions, disability, age or sexual orientation, and sexual harassment and harassment on grounds of sex"*.

1.4. The role of article 8 ECHR and article 7, 8 EU-CFR in the Spanish Case Law

The SC, in its article 10(2), States the following:

"2. rules relating to fundamental rights and freedoms that the Constitution shall be interpreted in accordance with the Universal Declaration of human rights and the international treaties and agreements on the same matters ratified by Spain".

In this sense, there is no doubt that both the ECHR and the EU-CFR represent fundamental hermeneutical tools that help to decipher the complex and changing content of fundamental rights. Despite this, the Spanish law has been shown usually quite reticent when it comes to go to these instruments and when it did it so it has used it primarily to reinforce interpretations made at national headquarters.

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[11] As for example JJCC N. 88/1985, 99/1994 y 904/1997, between other

II. SURVEILLANCE AT WORK

1.- The legality of surveillance at work

1.1. - Power of supervision and control of the employer

The power of supervision and control granted to the employer is intended to preserve its commercial interest, as well as the right to property protected in Article 33 SC, in relation to the right to freedom of enterprise established in Article 38 SC.

The SSC has made extensive recognition of these powers. An example of this is Article 18 (1) SC which, despite being entitled "The inviolability of the worker's person", contains the regulation of so called "personal searches": a search of the worker's person, personal effects or box office. Due to the affection of the rights of the worker that can result from this measure, the precept determines that the measure of surveillance and control must be carried out with the utmost respect for privacy and dignity of the worker, rights recognized in Articles 18.1 and 10.1 SC.

Other limits to this corporate control power are related to the purpose of its exercise, which must be justified on the basis of the requirement of protection of the corporate patrimony and the rest of the workers of the company. It is also clarified that these are checks that are only carried out in the place of the provision of the labour activity and during the agreed working day. In order to strengthen the protection of the right to privacy of workers and their dignity, a representative of the workers or another worker is also required when there are no representatives in the company[12].

This type of controls exceeds the functional scope of article 20.3 LC, referring to the power of direction and control of the work activity, and 20.4 LC over the power of the employer to check the health status, so this power is linked to the defence of the corporate patrimony or the patrimony of the workers of the company[13]. In these cases, the conflict occurs between the right to inviolability and privacy of the worker's person with the right to property of the employer, and not with his right to freedom of business.

[12] The function of these premises is to limit an exceptional authority of the employer and limit it to the scope and working hours, together with avoiding the secrecy of searches. JSSC 2007/7514, of September 26th.

[13] JSSC 2007/7514, of September 26th.

In order to carry out these personal searches, there is no need to justify the reason to choose the employee, when it is not known that he may be responsible for the damage done to the corporate patrimony. This is indicated by the Judgement of the Supreme Court of Justice of Madrid of April 2, 1998, which in its legal grounds determine that in order to proceed to a registry it is not necessary that there are indications or suspicions that a worker has attacked said patrimony, which could be necessary in small workplaces, where there is closeness and trust, but it cannot be adequate for companies that due to their size or the peculiarity of their products need more effective measures of protection.

That said, also in this case, the necessary respect for the fundamental rights of workers imposes that the legitimacy of the limits to their exercise derived from the need to protect another right or interest constitutionally protected as the private property of art. 33 EC to comply with the proportionality test applied in general for the other measures of business surveillance and control. In order to verify whether a measure restricting a fundamental right exceeds the proportionality test, it is necessary to determine whether it fulfils the following three requirements or conditions: whether such a measure is likely to achieve the proposed objective (suitability judgment); if 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); and finally, if it is balanced or balanced, to derive from it more benefits or advantages for the general interest than damages on other goods or securities in conflict (strict proportionality judgment)[14]."

2.2. - Surveillance at work

In the same area, article 20 LC is developed. Section 3 establishes the business powers of management and control of labour activity. In reference to the monitoring and control capacity that can be exercised by the employer, he/she is entitled to "take the measures he/she deems most appropriate for monitoring and control to verify the fulfilment by the worker of his obligations and labour duties."

Thus, the recognition that Article 20.3 LC makes of the business powers of supervision and control of the work activity is characterized by its unusual extension.

[14] JJCC 66/1995, of May 8th, and others.

The employer is authorized to adopt all control measures "which he deems appropriate" although they are only admitted for the purpose of controlling compliance with the labour obligations.

The same article 20 LC, in section 4, grants the employer the power to check the health status of the worker, when the absence is due to illness, and may end up suspending the economic rights borne by the employer in case of negative of the worker to undergo medical supervision.

“The employer can check the health status of the worker when it is alleged by the employer to justify his absence from work, by recognizing a position of medical personnel. The worker's refusal and recognition could determine the suspension of the economic rights that hold a position of the employer”

This question is quite striking, especially if we consider that the public health service has controlled the health status of the worker already. In this way, the entrepreneur is given the authority of appoint medical personnel to carry out a second self-check that may result in the suspension of the worker's economic rights.

The special extension of the recognition to the employer of the power of supervision and control over the work activity of the workers at their service, as well as their special potential detrimental to their rights, has given rise to an important casuistry of jurisprudence that, through the use of the technique of weighting, has contributed to delineate the contours of lawful business power in this area. The following pages are dedicated to the analysis of the same.

2.3. - Installation of devices for the filming of images or recording of sounds

The installation of this type of video surveillance cameras can restrict the rights to honour, privacy and self-image. This is expressly recognized by Law 1/1982 of Civil Protection of the Right to Honour, Personal Intimacy and Family and Self-Image, which in its article 7.1 qualifies as illegitimate intrusion "the installation of means suitable to record the lives of people, or in section 5 of the same article where the same interference is determined the capture of photographs, images and films.

Regarding its use in the workplace, the jurisprudence[15] has established that the installation of systems for the capture of images at a work centre does not affect the dignity of the worker, understood as these technical means are suitable to exercise the authority of entrepreneurial management and control in the place where the employment relationship is provided. It follows the principle that these technical means capture the same thing that can be captured directly by the employer and his delegates. This is so provided that the control is directed exclusively to the scope of work provision and is exercised during the time in which it is performed. Hence, it should be understood that it is not permissible to install recording media or the use of images in places not intended for the execution of the employment relationship, such as toilets, dining rooms or places for leisure. This is so that the activity that the workers develop in these spaces does not correspond to the scope of the employment relationship, but that "they constitute an extension of the privacy of a person[16]".

However, the necessary protection of fundamental rights requires special caution and involves certain limits and restrictions. Thus, it is relevant to differentiate between those cases in which filming is selectively produced and, for a certain period of time, as a measure of labour control on suspicion of a specific and serious breach; and those cases in which images are captured in a generalized and indiscriminate way of spaces with permanence in time as a measure of labour control or as a general security measure.

In this way, the reason for which these monitoring devices are installed is of great relevance, and the images captured should be of different utility if the system was installed for job control functions or security control reasons; the Organic Law 15/1999 of 13 December on the Protection of Personal Data and the "duty of prior information" of the employer to the worker and his representatives of the labour surveillance system become very important.

Regarding the first case, where the filming takes place selectively and for a certain time, JCC 186/2000 of July 10 is pronounced in relation to the admissibility of the filming obtained by means of an image recording system installed in the cash register area of a commercial establishment, without prior communication / information

[15] JSSC 1447/1995, of Mach 1st.
[16] JSSC 5830/1998, of July 7th.

to workers and their representatives. In this case, the CC understands that, because of the well-founded suspicions of irregularities committed by a worker, it is a great measure installing a video surveillance system to capture images only in the cash register area during the time necessary to prove that it is a conscious and repeated behaviour, and not an error in the performance of the worker's tasks.

In this case, the installation of the monitoring system was carried out without communication to the Works Council or to the workers, as required by Article 64.1.3.d) LC, which stipulates that such controls should be done with publicity, not with hidden procedures. The evidence obtained by the recording of the surveillance systems could be null and void if it were obtained with violation of the Fundamental Rights of the worker, such as the right to privacy and self-image of Article 18.1 SC, and the Tribunal must discern whether this fundamental right was violated with the non-communication of the installation of the system to the workers.

It is understood in this case that the prior information to the worker is not appropriate since the monitoring and control measure is aimed to verify the incorrect fulfilment of the labour obligations.

In order to reach this conclusion, the TC uses the aforementioned proportionality test between conflicting rights and interests in such way that if the control measure applied (in the case the filming of images to demonstrate irregularities in the workplace by part of the worker) exceeds this proportionality test, it will be admissible.

It is thus determined Jurisprudentially the "duty of prior information" of the employer to the workers on the utility of the means of video surveillance, if it is by the function of direction and control of the work activity, for the admissibility of such filming in a later disciplinary proceeding against the worker.

This is consistent with the rules on data protection which also impose the duty of warning the means of control (video surveillance zone sign)[17]. In fact, in any case of image capture, Article 5 of OL 15/1999 obliges to inform the potential affected in an express, precise and unequivocal manner of the purpose of collecting the data (article 5.1.a)) or of the consequences of obtaining them (Article 5.1.c)) so that if the obtaining

[17] Spanish Agency for Data Protection, Instruction 1/2006 of November 8th.

of images could become negative consequences for the worker, workers and their representatives should be warned.

Thus, the JSCC of May 13, 2014 pronounces in reference to the admissibility or not as evidence of images taken by a camera installed in a supermarket, which controlled the cash register area and recorded irregularities in the performance of the task of a worker in reference to the collection of products.

The judgment took as its starting point the jurisprudence, SSCC 29/2013, to decree the violation to the right to the protection of data of the worker. In that case, the monitoring system was aimed at preventing customer theft and was used for the purpose of controlling work activity, without informing workers or their representatives of the possibility of such recordings, the purpose of permanently installed system control, or the consequences of data processing[18].

2.4. - Use of audio recordings

Regarding the use of audio recordings to justify the sanctioning procedure developed against a worker, similar premises are followed that are developed in relation with the use of images. Thus, together with the need of prior information of the control measure to the workers and their representatives and the warning of the means of control, the proportionality test must be applied to the case, to determine if the measure used is appropriate, necessary and proportional.

On this point, the TC has had an opportunity to pronounce itself in the Judgment resolution n. 98/2000 of 18 May. The case is about the installation of a system of microphones in the casino of *La Toja*, as a complement to a system of image recording previously installed. This installation of microphones is done without being communicated to the works council, although the commissioning of the system of sound pickup was made after this communication to employees and Committee. The purpose of the installation was to control conversations between customers and employees of the cash and gambling zones as a measure of labour activity control.

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[18] The difference between the cases in which the installation of surveillance cameras for labor control without prior communication is carried out as an ad hoc measure against the complaint of a third party to verify the irregularity and in which the images are tried to use Captured by a permanent system without prior communication of their use to workers.

In that judgment resolution, it is determined that the work space is not alien to the exercise of the right to privacy, because in that area the mean used can also cause injuries to this right. For this reason, other factors, such as the indiscriminate and massive nature or not of the installation, its visibility or the intended purpose of the installation, are important, together with the place where the audio-visual control mechanisms are installed by the company.

The court, after applying the proportionality test of the measure in the specific case, concludes that the measure of recording conversations between employees and customers, although suitable to achieve the interests of the company, is particularly invasive and not It is believed that such recording of conversations is indispensable for the security and good functioning of the casino. Therefore, the control measure is not justified and is not valid.

As quoted in the same judgment resolution, the result of the proportionality test derives from the legality or unlawfulness of the measure, since the result would be different from having been proved that "the installation of the sound recording system was indispensable for the safety and proper functioning of the company ".

In this sense, the JSSC of December 5, 2003, refers to the random but permanent control of telephone conversations of the commercial advisers of a telephone marketing company. In this case, the Court carries out the proportionality test of the measure, determining that it was in fact suitable for the purpose of controlling the conversations between the commercial agents and the clients, and that it was necessary, since the work performed by the workers its only through telephone conversations, there was no other measure less damaging to labour control, and it was considered proportionate, because only a random control was made.

2.5. - Control of the worker through GPS traces

GPS devices allow a precise and real-time location of the object or person who carries it. The installation of these means, although it can respond to security reasons, allows controlling the possible extra-business use of business media, extending the control beyond even the agreed working day. In this sense, these are means capable of violating the right to privacy of workers. Judicial doctrine allows the employer to use these devices reasoning that the measure is not connected directly with the control of the

worker, but to an organizational productive utility (advise the nearest available employee in an emergency situation) or safety (vehicle location Luxury driven by chauffeur or route checking).

The legal doctrine considers that the installation of GPS systems respects the principle of proportionality, as it is not a measure especially harmful to the right to privacy for the control of workers who carry out mobile or itinerant activities, resulting in the deactivation of these devices without justifiable reason of sanction. As it is a less invasive control measure with the right to privacy, since this control is performed on a specific medium (vehicle, mobile phone) and not indiscriminately, and what is obtained is the location of the instrument and not the Recording of images or sound, the cautions for the admissibility of evidence in sanctioning processes against workers from these means are minor.

Thus, it is valued that the employer has clearly defined the obligations of the worker who uses the object followed by GPS, who has been warned of the installation of the same and had not agreed or tolerated a private use of it. The control warning about the business environment can be generic, without specifying the GPS installation.

GPS control and surveillance should be based on work activities during working hours. In case the devices allow the worker to be located outside the workplace, which is in the context of his private life, the measure would only be admissible in exceptional cases, as the Judgement of the Supreme Court of Justice of the Basque Country of May 10, 2011 states, in relation with the installation of a GPS in the private vehicle of a worker which had the aimed to find out if he performed activities incompatible with his state during a situation of temporary incapacity.

2.6. - Monitoring and control of computer use and email

The case law is based on the premise that the computer provided to the worker, or corporate e-mail correspond to work tools owned by the company, and requires the existence of a clear business policy in relation to its use. This allows the employer to limit their use for personal use, which makes it possible to control them. Such control over these electronic means may result in an unlawful interference with the privacy

rights and the secrecy of the communications recognized to the person of the worker, because as indicated above, the work space is not alien to the right to privacy[19].

In the most recent jurisprudential evolution the concept of "expectative of privacy", in relation to which the worker could have with respect to the computer or electronic mail, takes force. The doctrine from the ECHR states that in the absence of a prior warning about the control of computer use or electronic mail, the worker has a reasonable expectative of privacy when using business means. What makes the latest Constitutional Jurisprudence is to use this doctrine to justify that in the presence of a restrictive business policy regarding business means, all expectations of privacy disappear. From the affirmation of the expectation of privacy in the absence of previous warning by the ECHR, a total capacity of control is built when the company is restrictive regarding the use of these means, eliminating any protection that must be realized on the Fundamental Rights of the worker.

This expectation of privacy is articulated in relation to the permissiveness or not of the use for personal purposes. Thus, in the last judgments in the matter, the Spanish courts consider that the existence of a clear business policy on the prohibition of extra labour use of these means would eliminate all expectations of privacy with the consequent exclusion of the protected area from personal privacy and power increase of business control.

To these effects, the judicial pronouncement made in JCC 241/2012 is especially significant. In the case, in a computer of shared use made available to the workers by the company, files with electronic conversations of two workers were registered by means of the use of a program installed by them.

According to the ruling of the CC, in this case it does not come into play the right to secrecy of communications of Article 18.3 SC, since in the applicable collective agreement was punished as a minor offense the use of electronic mail ex-work. Hence, the Court concludes that: "being the applicable regime, the authority of control of the company over the computerized tools of business ownership made available to workers could legitimately be exercised, by Article 20.3 LC, both for the control of the correct

[19] JJCC 98/2000 of April 10th.

fulfilment of the contractual obligations of the workers and for purposes of control of professional use of these instruments.

The existence of a clear business policy regarding the prohibition of extra labour use of these means make disappear in the workers any expectation of confidentiality derived from the use of the installed program contrary to the norms established by the company. This is so, in the opinion of the court, also taking into account the open (not subject to password or other security system) of the program, also installed on a computer owned and shared by the company. From all this, the CC derives a kind of "resignation" to the right to privacy, giving legitimacy to the measure of control over the medium played by the entrepreneur that originates the reading of said personal communications.

In the same sense, the Court pronounces in Judgment Resolution 170/2013 of 17 October, referring to a matter in which the company, due to the well-founded suspicions regarding the disclosure of privileged information by a worker to companies of the competition, accesses the portable computer made available to the employee for the purpose of checking e-mails sent and received from the same and with the corporate e-mail address, effectively verifying the unfair action. The CC does not consider that the right to privacy has been harmed since, despite there being no express prohibition of extra-work use of the computer, the applicable collective agreement considered such conduct as a minor infraction. This leads to an explicit prohibition of such uses, which makes it possible to monitor and control these computer media both to verify the performance of their work activity and to prove the non-use for personal purposes. The existence of the provision in the collective agreement would therefore imply, according to the argument of the CC, that the worker could not count on a reasonable expectation of confidentiality and privacy and that he considered it probable that the employer exercised his legal power of supervision over the worker emails. As far as business action falls within the scope of protection of the right to privacy, it is considered, therefore, the resort to a proportionality test.

With this evolution of jurisprudence, it seems that the Constitutional Court is progressively relaxing the protection of the right to privacy of workers when it conflicts with the business interest.

3. - Data Protection relating to health

3.1.- Employer's obligation of the health surveillance against the employees' rights

A) Employees' health rights.

Article 15 SC argues that the fundamental right to health and people's integrity is an inviolable right in the development of working relation. Along with this rule, more precisely, art 22 LLRP recognizes the employee right to enjoy the service of periodic health surveillance in relation to the risks of each work. Wherefore, the implementation of the medical labour control will have as a purpose the verification of the impact of the working conditions on workers' health.

However, the worker must also fulfil, during the duration of the employment relationship, the general duty to cooperate with the employer in all that is necessary to ensure that the working conditions are safe and that they do not present risks to the safety and health of other workers (art. 20.2 LC and art. 29.2.6 LLRP).

B) Employers' duty of surveillance and control the employees' health.

Surveillance of workers' health consists of the employer's obligation related to the worker's right to undergo periodic medical examinations (art. 22.1.1 LLRP). The employer may ask its employees to disclose all necessary information about their state of health or submit to a medical test when justified by the type of work performed; not allowing, by any means, capricious controls on workers' health.

Likewise, the Spanish legislator has imposed, to deal with the development of the employer power of the periodic health control the following limits:

The employer must refrain from performing any search for ordinary pathologies that are not directly related to the execution of the agreed work or are not justified by reasons of general interest, a legal provision or are not expressly consented to by the person affected (AIDS, diabetes, drug use …)

The entrepreneurial knowledge of certain data belonging to the private sphere of the worker could in certain cases be a confrontation with the worker's fundamental right to privacy (art. 18 SC) and dignity (art. 10 SC). Therefore, the employer must abstain

from performing all health surveillance and control measures that do not respect the right to privacy and dignity of the employee (art 22 LLRP)[20].

The employers have to look after these measures cause the least possible inconveniences to their employees[21] and they must always be proportionate to the risk of the job done (art. 22.1 LLRP). To this it should be added that the execution of this test should be by the most appropriate mean to search for those pathologies directly related to the word developed, so that there should not be in any way other instrument less aggressive for the knowledge of this data.

In addition, art. 22.6 LLRP indicates that these tests can only be carried out by health personnel with technical competence, training and accredited capacity. In this way, the medical tests by the employer won't be allowed under any circumstances, since the employer is only entitled to receive health data related directly with the job tasked.

In the execution of this power of control, the duty of entrepreneurial confidentiality will prevail, so that the knowledge about the state of health only falls to the employer who did this control and to the affected one. By ensuring the confidentiality of the obtained results ensures the respect and guarantees the right to privacy of the employees.

Lastly, all the obtained results in the health surveillance must be communicated to the affected employee so that he/she can know about the state of his/her health in order that he/she may have knowledge of the reasons for his ineptitude or inadequacy to a specific work.

3.2. - Health data in the development of working relations

A) The disclosure of health data of the applicant to the work place.

Regarding the communication or transfer of health data of an applicant, the LOPD[22] establishes a special regime for the treatment of this type of information and,

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[20]Spanish CC understands that a violation to the right to privacy happens when the business action, on the own and reserved area of the employer, is not in accordance with the law or has not been expressly consented and goes beyond collecting the strictly necessary data for the correct performance of the contracted work activity without danger.
[21] JCC 143/1994, Of February 15th.
[22]Organic Law 15/1999, of December 13th, of Data Protection.

where appropriate, for its communication, considering them at all times specially protected data (art 7.3 LOPD). In this sense, the data concerning the health of the applicant can only be obtained by the employer if the applicant expressly consents, or in the cases in which a legal provision establishes, or when it is tried to verify if the state of health of the worker can constitute a danger for the same, for the other workers or for other persons related to/with the company, as it is mentioned in art.22 LLRL and art.11.1 OLDP.

Therefore, the employer will not be able to have the medical information about the applicant, *since* it is established in Article 22.4 LLRP, this information will be limited to medical personnel and health authorities who carry out the health surveillance of employees, without being able to be provided to the employer or other persons without the express consent of the worker.

However, the employer and the people and bodies with responsibility in prevention shall be informed of the conclusions derived from the examinations made in relation to the aptitude of the worker for the performance of the job[23]. In other words, the employer will only have the conclusion related to if a employee is suitable or not for a particular work[24], and not of the pathologies suffered by the applicant.

B) Disclosure of health data in the execution of the work.

According to art.22 LLRP, when the employee is immersed in an employment relationship, the employer must guarantee the service of periodic monitoring of the health status of its workers in relation to the risks inherent in the work.

If in the development of the agreed job an employee suffers from an illness, temporary incapacity..., which could have an impact on the development of the job, the employer must immediately inform to the employer as long as the principle of confidentiality of the data is guaranteed. However, the employee will not be obliged to

[23] JCC 196/2004, of November 15, 2004.

[24]In the process of selecting candidates, Spanish jurisprudence employs the general criterion of "personal restraint" (JCC 207/1996, December 16, 1996). So that all those capricious and intimidating questions that can be formulated in these selective processes, against this general criterion, will be considered as unjustified and will be considered invalid the business decision taken as a consequence of its excessive limitation. All questions that have been formulated should have a purpose and a strictly professional motivation to assess their aptitude or ineptitude for the job to which they aspire.

disclose that personal information that has no repercussion or has negative effects in the execution of the job entrusted.

3.3. - Submission of the employee to medical examinations

A) Voluntary medical tests.

Spanish Legal System provides the general rule about the voluntariness of the affected (art. 22.1 LLRP) to submit to medical tests. In other words, the employee will be free to decide if he/she will submit to the medical tests or not, allowing his/her medical test as long as the obtained results are connected with the agreed job.

Only the consent that has been freely and voluntarily issued will be accepted and it will also be required that the person concerned has been informed of the techniques used, the pathology sought and any analytical or evidence that may affect her/his physical privacy (This is known as the "*judicial doctrine of Informed Consent*"). In this context, the Spanish Constitutional Court considers as a invalid consent issued by an employer when she/he has not been sufficiently informed, neither by the company nor by the medical services, about the possible medical tests carried out. That is, any search for general information on the health status of the person that is not directly related to the type of work performed and the risks inherent in it will be proscribed[25].

Lastly, it is important to remember that medical tests must never exceed the limit of maximum respect for the fundamental right to the worker's privacy (Article 18 SC), nor can they go beyond the purpose for which this measure was concluded[26]. In the latter case, the Spanish National Audience has considered that it is necessary to take care in each specific case that treatment is effectively directed to prevention and to do a medical diagnostic, since otherwise it would not be covered by the OLDP.

B) Obligatory medical tests

On the other hand, art. 22.1 LLRP provides as an exception to the general principle of voluntariness, the compulsion to submit to medical tests. The submission to this control will be mandatory when the following requirements appear:

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[25] JCC 196/2004, of November 15th.

[26] JCC 57/1994, February 28th L. B. Number 5; 143/1994, May 9 th, L.B. Number 6; 54/1996, March 26 th, L. B. number 7.

The state of health of the employee can constitute a danger to the same, for the rest of the employees or other people related to the company.

When it is necessary to evaluate the effects of working conditions on the health of employees.

In the cases mentioned, it will be essential to issue a prior report of the employees 'representatives (not necessarily binding) on the appropriateness of the measure for the mandatory control of employees' health.

Likewise, the Spanish Constitution Court has qualified this obligation through the establishment of the following limitations:

The accomplishment of these medical tests must have an indispensable character, proving the objective necessity of their implementation in attention to the own risk of the job done.

Presence of a preponderant interest of a social group or of a labour collective, since an obligatory medical test cannot be imposed if only the health of a single employee is at stake and if there is no certain risk or danger.

-Proportionality of mandatory medical control to the risk inherent to work, due to the lack of alternative options with less impact on the worker's privacy.

3.4. Control of working absenteeism.

Along with all of the above, it is important to analyse the issue of control of work absenteeism. In the first place, absenteeism means the lack of assistance of the worker to her/his job, differentiating between:

Justified absenteeism: understood as that derived from a disease or an accident, holiday periods and strikes.

Unjustified absenteeism: in which workers, do not go to work without realizing it, being treated as absent.

In this sense, article 20.4 LC establishes an exceptional control mechanism, by means of which the employer can verify the health status of the employees as proof of the absence of attendance at the job. The control of absenteeism of workers will only be

justified because it obeys a general labour interest directly related to the work developed. For this reason, and to avoid the excessive production of controls on absenteeism, the Spanish courts have also focused their work on establishing a number of limits on this power of verification of the state of health:

Firstly, only business actions will be able to be carried out to verify the state of the incapacity and the authenticity of the alleged cause, without being able to overcome these budgets. Therefore, if the absence is unjustified, all economic expenses incurred during this period will be in charge of the employee. Secondly, the verification of employees' state of health can only be carried out by the competent medical personnel. The latter must be added that this employer power can only be articulated when in fact there is an agreed economic complement to include the Temporary Disability work benefit to the habitual wage perceived by the employee, since in this type of situation there is a waste of employee purchasing power.

From the literal tenor of art. 20.4 LC there is no obligation on the worker to undergo the tests prescribed by the employer, so that nothing in this way prevents him from refusing to submit to them. However, this must be qualified, since the mentioned article provides for a number of economic sanctions against refusal to submit to such recognition (loss of the wage supplement for Temporary Disability and the economic provision of Social Security). It is added that numerous Spanish judgments such as that of SCJS País Vasco (AS 2004/3734) identify the employee's resistance to these findings as a presumption that the alleged disease is simulated.

However, even if the rule refers only to an economic suspension, the employer sanction applies to two types of rights:

The economic complement agreed to incorporate, in charge of the company, the economic complement of the Temporary Disability to the wage usually received by the employee (SSC 1984/2952, May 2sd).

The economic benefit of Social Security due to Temporary Disability (JSCC 37/1994, February 15 and 129/1994, of May 5, 1994) which corresponds to the employer (article 131.1-2 GLSS).

The fact that the rule only provides for a sanction that reduces economic rights and does not legitimize other types of corporate sanctions is explained by the fact that

the absentee employee will have the legitimating element of the declaration of Temporary Disability and the medical certificate of sick expedite by a Professional of Social Security.

On the other hand, the Spanish Medical Inspection will be the body responsible for issuing the report of the employee who is being investigated. If the employer is dissatisfied with this report, he/she cannot modify the diagnosis, but he/she can request a review to the Medical Inspection that corresponds to the employee, in a situation of withdrawn, to verify that this situation is correct, as far as its duration and diagnosis. The Medical Inspection will intervene to resolve the dispute, and the opinion it has issued will be decisive, since this action seeks to verify the Employee Disability to develop the work and it will serve as proof of the suspension of the employment contract[27].

Also, for the verification of the disease or the legitimacy of the incapacity benefit, the Spanish Labour System provides a number of procedures are foreseen as they are realized by the hiring of medical personnel; Mutual funds; Companies that are specialized in the control of absenteeism, which include visits to the employee's home and the issuance of technical reports on their abuse or fraud; etc.

In this context, the Spanish Courts have recently admitted the validity of the facts based on reports of private detectives investigating on behalf of the company a temporary employee absent[28]. In this way, this type of action, exercised in a legitimate and reasonable manner, will not imply any type of violation of the right to privacy[29]. However, it should not be forgotten that as enabling budgets for this type of action, the existence of specific and motivated suspicions that do not allow the employer to abuse this type of actions are foreseen.

Finally, the incorporation of health data to a file with the sole purpose of performing absenteeism controls is not allowed in Spanish law. In this sense, data on the medical diagnosis of an employee cannot be stored in a computer medium without the consent of the employee, as this would mean an inadequate and unjustified measure[30]. In this sense, the Spanish Constitutional Court, in numerous judgments, has

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[27]Judgement of the Supreme Court of Justice of País Vasco N. 2004/3734, of July 6th, 2004
[28] Law 5/2014, of April 4, of Private Security.
[29] Judgment of the Supreme Court of Valencia N. 3978/1999, of February 3, 2000
[30]JCC N. 202/1999, of November 8, 1999.

determined that the creation of these files for the control of absenteeism is not appropriate, necessary and proportional[31]. This is because its creation would entail more disadvantages and prejudices on the invoked right to the privacy of the injured than business benefits.

4. - The role of collective representation bodies

According to article 64.5 of the Labour Code, the works council has to be previous informed about the employer's decision to establish or modify the surveillance systems and has the faculty to issue a previous report on it. However, legal system does not recognize it the right to express a previous binding approval on the employers' decision on this issue.

The previous information and consultation of works council is required both to establish and to modify a surveillance measures. It means that, whatever the employer implement in the company surveillance measures, he must inform the works council in advance. These measures could be aimed at (or suitable for) monitoring or checking the attendance, the behaviour or the performance of employees, monitoring (like hidden camera surveillance), establish internal videophone, security cameras, telephone recording, etc.

5. - Executive and/or independents authorities occupied with data protection

In Spain, the independent authority designated to monitor and safeguard data protection is the Spanish Data Protection Agency (SDPA), created in 1993. This public body, which has its headquarters in Madrid and extends its scope of action to all the territory of the Spanish State, is trusted with the function of ensuring the correct compliance of the OLDP.

As stated in the OLDP, we can say that it is a public law entity with its own legal personality and full public and private capacity that acts independently of the public administration in the exercise of its functions. Its main mission is to monitor compliance of data protection legislation by the file managers (public entities, private companies,

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[31]JJCC N. 66/1995, of May 8th, 1995 L. B. N. 5; 207/1996, May 9 th, 1996 L.B. N. 6; 54/1996, December 16 th, 1996 L. B. number 4.e.

associations, etc.) and monitor their application in order to guarantee the fundamental right to data protection. The SDPA carries out its powers of investigation primarily at the request of citizens; although it is also empowered to act by it owns choice. The Agency is statutory, which means that it is governed by regulations or statutes that define its operation; hierarchically independent and related to the Government through the Ministry of Justice, since the economic resources depend on the Agency and the Ministry of Justice, who also proposes the director of the Agency.

Beside the existence of this authority, there are in Spain other agencies who work at a regional level in Catalonia and the Basque Country which work with the public files of their own communities.

On the other hand, the Spanish Data Protection Agency is part of the Article 29 Working Group (WP29 or WP29), an independent advisory body created in 1997 that is composed of the European Data Protection Authorities, the European Commission and the European Data Protection Supervisor. WP29 discusses issues that affect or may affect data protection and their comments are reflected in decisions, recommendations, opinions, reports and working documents, which are not legally binding but have a high doctrinal value.

The SDPA is also part of the Joint Control Authorities of Europol and Schengen (also exercising control over the Spanish part), the Customs Information System and Eurojust; In addition to its participation in the Consultative Committee of the Council of Europe, where it assists the authorities designated by the States in the matter of data protection.

In Latin America, the Agency exercises the permanent secretariat of the Ibero-American Data Protection Network, a forum to promote and advise countries on this fundamental right.

5.1. –The imposition of sanctions by the authorities

The Spanish Data Protection Agency may impose monetary sanctions as a consequence of violation of data protection.

The amount of these penalties will be graduated depending on the nature of the rights affected, the number of proceedings carried out, the benefits obtained, the degree

of intentionality, the recidivism, the damages caused to the interested persons and any other circumstance that is relevant to determine the degree of guilt.

With the entry into force of 2/2011 Law, of 4 March, on Sustainable Economy, articles referring to the regulation of the procedure and classification of infractions and sanctions are modified, resulting in the following classification:

- Minor infractions, with sanctions between 900 € and 40,000 €.
- Serious infringements, punishable with penalties between 40,001 € and 300,000 €.
- Very serious infractions, sanctioned with fines of between 300,001 € and 600,000 €.

5.2. - The collection or processing data in violation of the applicable protective provisions

As we have just seen in the previous section, the protection of personal data is regulated by Organic Law 15/1999 of 13 December on the Protection of Personal Data, together with Royal Decree 17/2007 of 21 December, which is the regulation that develops it.

In both standards, we find civil and administrative penalties that punish violation of data protection, as we saw earlier. Despite this, the right to data protection is also protected by the criminal law. Thus, article 197, section 2 of the Spanish Penal Code, penalizes those who commit crimes related to violations of the right to data protection, namely:

"*The same penalties (imprisonment from one to four years and a fine of twelve to twenty-four months) shall be imposed on anyone who, without being authorized, seizes, uses or modifies, to the detriment of third parties, personal, family or from other confidential information that is registered in files, electronic supports, telematics supports, or in any other type of file or registry, public or private. The same penalties shall be imposed on anyone who, without being authorized, access by any means to them and to those who alter or use them to the detriment of the data owner or a third party*. "

In conclusion, we can say that data protection protects the privacy and privacy of the citizen against those intrusions or violations of the right to data protection.

However, this criminal classification of the right to data protection has been widely criticized by various authors since, according to the doctrine, the civil and administrative regulation on data protection would be sufficient, and the classification of this right as a crime would only complicate the determination of this criminal conduct.

Finally, we must conclude by affirming the existence of a protection of the right in question, not only civil and administrative, but also criminal, to which we must only resort last, or last ratio, according to the principles that govern our right and due to the seriousness of their consequences (imposition of custodial sentences). This will take place, as long as an administrative or civil sanction is not effective enough.

6. - The use of material obtained through illegal surveillance measures for dismissals.

In general terms, evidence obtained in violation of Fundamental Rights is not valid. This is established in Article 287 of the Law on Civil[32] Procedure, which determines the wrongfulness of the evidence obtained with violation of fundamental rights, and in Article 90 of the Law on Social Jurisdiction[33], which stipulates that the evidence obtained with violation Fundamental Rights cannot be practiced, and if it is practiced, it will haven´t effects.

As regards the workplace, when the evidence obtained by the power of supervision and business control violates a Fundamental Right of the worker, jurisprudence has evolved relaxing the monitoring of the protection of these Fundamental Rights.

The judgment of the Spanish Constitutional Court 186/2000 of 10 July admits the evidence obtained by recording hidden video surveillance cameras, which is a measure of surveillance and control covert and in collision with the fundamental right to the protection of personal data Enshrined in art. 18.4 SC, if the employer has suspicions

[32] Law 1/2000 of 7 January, update of 10/28/2015.
[33] Law 36/2011 of 10 October, update of 10/10/2015

of irregularities by a worker, provided that it overcome the proportionality judgment of the measure.

With this interpretation of the CC, what could be a violation of the fundamental right to the protection of personal data outside the workplace, such as the capture of personal images without communication or authorization, is legitimized as a measure of business control.

The recent ruling of JSCC 39/2016 of March 3further diminishes the importance of the requirement of prior information on the treatment of images captured by a video surveillance system to workers. In the case, recordings are used as evidence to dismiss a worker for irregularities in the handling of the box of a store, being there previous suspicions by the fails in the box.

If the system is visible and warned in terms of art. 5 OLDP, the Court considers that it is not necessary to specify the purpose of such a surveillance system, whether it is for the control of work activity or to a safety measure. In this way, the powers of corporate control which are recognized in art. 20.3 LC is sufficient to perform the data processing provided that the specific measure overcomes the proportionality judgment.

The most recent SSC doctrine, with judgments 77/2017 of 31 January, 86/2017 of 1 February and 554/2016 of February 2, confirms the preference for the criterion of proportionality and extends the possibility of using as proof in the trial the recording of images, obtained without the consent of the interested. It concludes that the very existence of the employment relationship between the parties does not require the individual consent of the workers, nor of the collective for the adoption of a measure of control of the work activity, which nevertheless is fulfilled with placement of the corresponding sign that warned of his existence.

III. WHISTLEBLOWING

1. The system of whistleblowing in Spanish legal system.

First of all, in Spanish legal system there is no general rule on the systems of complaint of labour irregularities, except for the Banking Sector[34]. Therefore, the implementation of these complaint systems is referred to the Corporate Ethical Codes and Corporate Social Responsibility mechanisms.

2. Requirements of labour irregularities complaints.

The implementation of whistleblowing procedures raises many problems with regard to their combability with data protection regulations and with the guarantee of the constitutional rights of the people involved.

In order to adjust complaint mechanisms to the Internal and Community legislation, the SDPA has intervened requiring that the internal complaint systems comply the requirements set our in Directive 95/46/CE and in the OLDP. According to the Legal Report n. 128/2007, complaints must respect the following characteristics:

Reportable fronts. The SDPA requires that complaints must be limited to those negligent behaviours that can produce an effective consequence on the development or maintenance of the contractual relations between the company and the condemned. It excludes, therefore, the activation of these mechanism for any behaviour or irregular facts. That is, only those behaviours that constitute a violation of the contractual rules between the company and the employee, as well as any violation of the commitments assumed by the employees through the acceptance of the Company's Ethical Codes, may be denounced. In that sense, it should be noted that the behaviour of revelating personal data that are not related to these purposes could lead to an unlawful interference in the private sphere of the interested.

[34]As an exception to this, art. 79 of the Securities Market Law, 24/1998, 28 th July expressly regulates the notification, investigation and prosecution of the violation of legal duties.

Security measures. Complaints must be submitted to a subsequent research process which will determine whether or not they are sufficiently serious. Otherwise, they will be archived (art. 44 OLDP).

Inadmissibility of anymous complaints. The SDPA pays attention on the whistleblower identification and on the protection of the whistleblower employee identity. It establishes as a condition for the admissibility of complaints the identification of the whistleblowing employee, guaranteeing the confidentiality of his/her personal data (art. 10 OLDP).

Complete and prior information about the internal whistleblowing system. The implementation of the whistleblowing system must be known and expressly accepted by the employees when they sign the labour contract. This is justified by art. 5 OLDP that establishes the obligation of the controller to inform the interested about the existence and purpose of the system, the receivers of complaints and the right to access, rectification and suppression of the accused. In addition, this obligation includes the duty of information to employees of the behaviours denounceable in the company.

In this context, Spanish Legislation does not require the prior authorization of the accused to process their personal data obtained as a result of the complaint filed or an authorization by the SPDA for the implementation of the system of reporting irregularities, requiring only notification to the SPDA on the implementation of this system of denunciation, with the purpose of obtaining its corresponding registration in the General Registration of Data Protection (GRDP).

Information to the condemned. The condemned employee must be informed of the complaint made and attributable to her/him, the addressees of the information collected by a third person, the internal department that will carry out the issue and the rights that assist him/her in the field of Data Protection (right to access, rectification, opposition and cancellation), within the maximum period of three months provided in art. 5.4 OLDP. Exceptionally, Spanish Doctrine argues that the requirement of notification may be omitted when there is a significant risk that such notification could

compromise the ability of the company to investigate the allegations or to gather evidence.

Security measures. Regarding access to the content of the complaint, the SDPA limits the compliance counter and users who carry out the investigation, users who must register in a specific access system in order to be able to comprehensively control who accesses to the knowledge of that information.

Conservation data. As a general rule, the data mentioned in the complaint may be conserved for the entire duration of the judicial processing and they will be removed in the period of two months since the end of the investigation procedure. In this way, the complaints that have no substantiation will be immediately destroyed and those that need the verification of the denounced facts should be removed once they are not useful or when appropriate measures have been taken against the accused.

Thus, if the complaint of corporate irregularities had been formulated without respecting these characteristics, its legal invalidity will be able to be denounced under the SADP, as a result of the violation of the LDP and the company will able to take criminal and labour reprisals against the false whistleblower.

3.- Protection of the whistleblowers against dismissal.

Nowadays, one of the most important problems posed by the whistleblowing mechanism is the possible retaliation to which the whistleblower employee is exposed because he/she has denounced relevant facts occurring within the company. In this sense, Spanish Labour Law does not admit as a reason of dismissal the fact that the employee has complied with the Ethical Code[35] to prevent the commission of future crimes or to denounce the crimes already consummated.

The Spanish Doctrine has been pronounced about this, mentioning that the right to expression and information of employees covers the dissemination of facts, data or statements concerning the company when it is of general interest, when it can affect consumers or users or when they take out in light of irregularities or illicit acts; provided that the information is truthful, respects contractual good faith and does not

[35] SCC 3469/2000, April 10th, 2000

reveal confidential data[36]. In this way, once the good faith and her/his loyalty of the whistleblower have been proven (art 5 LC), no dismissal or unfavourable sanction for the worker will be allowed. In this sense, the Social Courts have declared, on many occasions, the invalidity of the dismissal, condemning the company the whistleblower employee and the company must indemnify and compensate her/him for the salary which did not receive between the date of the dismissal and her/his readmission[37].

In order to denounce without fear of reprisals, certain complaints procedures established by companies within Corporate Social Responsibility include commitments to protect those who report in good faith a breach, stating that no corporate body will take relator measures, nor will allow any person to retaliate against her/him, and specifying in the case of the employee that he will not be dismissed, degraded from work, intimidated, harassed or discriminated against under any conditions of employment.

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[36] HCJ Andalucía 2611/2007, October 2sd, 2007

[37] HCJ Andalucía 687/2013, April 3rd, 2013. In this judgment Iberia had dismissed an employee after he had reported the company to the Labour Inspectorate for irregularities in the holidays and overtime of the eventual staff. The Labour Inspector gave him the point and Iberia opened a sanction file against the airline mentioned and the declaration of nullity of the dismissal made at that time.

IV. SOCIAL MEDIA IN WORKING RELATION

1. - Working environment

The rise of social networking leads to new conflicts in the use of the same. The right to privacy, guaranteed in article 18 SC, could be susceptible to graduation with other constitutionally protected right, such as freedom of expression in article 20 SC.

As to the legal consequences that manifestations expressed in social networks of a worker may have, we must first analyse article 54 of Royal Legislative Decree 2/2015, which approves the revised text of the law of the Statute of workers.

"Article 54. Disciplinary dismissal

2. will be considered breach of contract:

(c) offences verbal or physical to the entrepreneur or persons working in the company or family members who live with them."

In accordance with the provisions of article 54 LC, the offenses directed at the employer may be a sufficient cause to consider that there is a breach of contract and, therefore, cause the disciplinary dismissal of the worker.

This article, however, does not clarify if the manifestations expressed in the social networks fall within the scope of the same, reason why the jurisprudence will be the one in charge of this task. In this regard, two issues are of special interest:

Firstly, courts have examined the consequences filled by the worker with respect to the publication of comments on web pages, blogs, forums or platforms, that either contain harmful or demeaning statements to the company or to other colleagues, or well demonstrate labour breaches of that person (for example, informing the content of an agreement of exclusivity relieving confidential information of the company, or displaying the personal use of your goods.

Secondly, the courts have analysed differently the legitimacy or illegitimacy of the conduct the employer used the information published by the worker in social networks (and consequently punishing worker), and which has been translated either in control of situations of temporary disability, or in access to information that could influence negatively on the image of the company. In such cases come in conflict goods

and different interests: on the one hand, the exercise of the power of direction and control of the employer and by the other side, data privacy and freedom of expression of the worker. For this purpose, one of the criteria used by the jurisprudence has been how public access to social networks settings or access restricted.

In the cases in which free enterprise comes into collision with the free expression of the worker, regarding comments that may negatively affect the image of the company, the jurisprudence opts for the following interpretative criterion: it is not enough that the company, employer or co-workers consider offensive such statements, but that they will have to be assessed in the abstract to verify that they have that real offensive character. In these cases, the worker may be recipient of a disciplinary sanction consisting of a dismissal (reserved only for manifestations more serious in respect for the principle of proportionality).

If, on the contrary, these manifestations are mere reproductions of events occurring in the company, the right to freedom of expression of the worker and not be any sanctions would prevail for this reason.

2. - Criminal matters

All of the above shall apply without prejudice to the statements made by the worker may be establishing a libel of article 208 of the Criminal Code offence or an offence of slander in article 205 of the same regulatory body.

"Article 205 SPC

It is slander the imputation of a crime made with knowledge of its falsity or reckless disregard to the truth."

"Article 208

Injury is the action or expression that injures the dignity of another person, impairing his reputation or attacking his own estimation."

However, it is important to highlight the fact that the demonstrations should be considered in such gravity that might lead to the dismissal of the worker does not imply in any way the Commission of the criminal type, as the fact that in the workplace these manifestations are sufficient to understand broken good contractual faith, does not necessarily imply that we are facing a criminally relevant behaviour.

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