

□ Procedure No.: PS/00067/2020

938-0419

RESOLUTION OF PUNISHMENT PROCEDURE

In sanctioning procedure PS/0067/2020, instructed by the Spanish Agency for Data Protection, to the entity, ACTECO PRODUCTOS Y SERVICIOS, S.L. with CIF.: B03971512 (hereinafter, "the claimed entity"), by virtue of the complaint presented by the TRADE UNION CONFEDERATION OF THE GENERAL UNION OF EMPLOYEES, (hereinafter, "the claimant"), and based on the following,

BACKGROUND

FIRST: On 08/13/19, you entered this Agency in writing, submitted TRADE UNION CONFEDERATION OF THE GENERAL UNION OF WORKERS (in hereinafter, "the claimant union"), in which it stated, among others, the following: "Since last August 1, 2019, the middle managers of the company ACTECO PRODUCTOS Y SERVICIOS, SL at the Zaragoza plant, are recording personal conversations with the workers in their work environment without them having given their consent or authorization. In the same way, the committee has not been informed either. of company on the object and treatment of these recordings. We headed to the plant manager to ask for explanations about these recordings answering us that they were legal".

SECOND: In view of the facts set forth in the claim and the documents provided by the claimant, the General Subdirectorate for Data Inspection proceeded to carry out actions for its clarification, under the powers of investigation granted to the control authorities in article 57.1 of the Regulation (EU) 2016/679 (General Data Protection Regulation, hereinafter RGPD). A) Yes,

dated 10/28/19, an information request is addressed to the claimed City Council.

THIRD: On 12/23/19, the entity claimed, sends to this Agency, in writing,

in which it informs, among others, of:

“This situation has its origin as a consequence of the ATTEMPTED AGGRESSION

PHYSICAL of a worker to the Manager when in the exercise of their functions

explanations are asked of the worker and she decides to confront her with the

intent to inflict bodily harm.

As a consequence, criticism is received from the union when the

Company makes the decision to proceed with the DISMISSAL OF THE WORKER. One of

The arguments were: what would the Manager have said so that the worker

react that way?

Faced with this type of action, it is when it is requested by those in charge of

record their own conversations that they had within the Company with the

workers to be able to defend themselves against these attacks.

The Company Management consents to the use of the recorders: 1. For a series of

Complaints from the Shift Managers. 2. Due to the attempted physical aggression suffered

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one of them during the month of July. 3. Complaints from the Works Council about the

way to address the Managers of shift to the workers.

The Company has a video surveillance system, but it does not capture the

conversations, a system that is communicated to all workers both at the beginning

of the employment relationship in the signing of the employment contract, as in the Manual of

Welcome of the Company, as well as the most senior staff with the signature to the installation of the video surveillance system and the use that can be made of it.

Personal situations that may harm the dignity of people are not recorded, all conversations are in the field of work. The recordings or the mere use of a recorder hanging around the neck is a dissuasive measure of conduct aggressive and/or offensive, since it retains instincts, and actions that if not recorded are word against word, generating defenselessness.

The recordings are saved on a hard drive as long as there has been any vexatious behavior object of denunciation, but the recorder is formatted and the recording of the day its use would only be justified in case of denying facts that are report and where the recording could be the means of proof of the complaint. The Recordings within the company do not constitute a crime nor do they violate any law.

"Can people be recorded in their workplace? In this sense, we have to mention the Judgment, dated April 16, 2015, issued by Chamber 2 of the Supreme Court. Well, the Supreme Court, in the resolution now commented, concludes that the fact of recording the images related to the professional performance in the place where it was carried out, when there were well-founded suspicions of his irregular behavior; In no way can it suppose illegal interference in your intimacy and, even less, to honor or one's own image..."

This opens the door for anyone to be recorded at their workstation. work, whether civil servant or not. Consequently, the mere recording of a conversation—even with image—in which one is a part is not constitutive of crime or violate any fundamental right. But, depending on the use made of said recording, criminal liability may be incurred. Sentence dictated by the Supreme Court indicates that the conduct of the employee - who

considered to be subjected to continued harassment at work—it did not represent a illegitimate interference in the personal privacy of the agent, since in the recording carried out by the worker with her mobile there was nothing that could be considered as concerning his intimate life or personal intimacy, since he acted as company representative.

To conclude RECORD A CONVERSATION IN WHICH ONE HAS INTERVENED IT IS NOT A CRIME; HOWEVER, THE USE THAT AFTER THAT CONVERSATION IS MADE. Judgment no.

114/1984, dated November 29, issued by Chamber 2.3 of the Court

Constitutional Judgment No. 213/2014, dated December 2, issued by the Section

3.5 of the Ilma. Zaragoza Provincial Court Judgment No. 222/2015, dated 16

April, issued by Chamber 2.3 of the Supreme Court Judgment No. 678/2014, of

dated November 20, issued by the Chamber of the Supreme Court"

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In the same way, the use of recorders was justified for the Company Committee and its union representatives, but even so the Company must continue to defend its actions before public bodies, at no time is it communicated or put into question the use made of the recordings, but whether they can be done or not. They are dissuasive measures, in a situation that is complex, since it generates defenselessness against word attacks. The only complaints for a incorrect treatment have been written by the Managers there is none in writing of no production worker. The Company has a PROTOCOL OF

WORKPLACE HARASSMENT, where a COMPLAINT model is established, to communicate the acts or facts that they consider to be the object of harassment of a sexual, racial or labor nature, This PROTOCOL has been communicated, as well as the COMPLAINT model to all workers has even been posted on the EMPLOYEE PORTAL.

The Company has the EQUALITY PLAN, since this year, and one of its measures has been the generation of the aforementioned HARASSMENT PROTOCOL. The recorders will be eliminated with the WRITTEN COMMITMENT of the COMMITTEE OF COMPANY to stop the disputes, the misunderstandings, and the aggressions that suffer those IN CHARGE, all as a sign of good faith, a proposal that was made in a meeting with the Committee but the answer was that they are the ones in charge "they speak badly to people,..." so the only way to guarantee that they don't produce verbal aggression is to continue with the recorders until the problem is resolved. situation. It is a lesser evil to guarantee social peace.

The Company has a video surveillance system declared and communicated to all the people of the organization, from the beginning of the employment relationship or from the moment in which the video surveillance system was established in the Company.

For all these reasons, it is requested that by means of this document any allegation of illegal use of the recording media that the Company has for the exercise of their power of direction and organization in the workplace.

FOURTH: On 06/10/20, the Director of the Spanish Agency for the Protection of Data agreed to initiate sanctioning proceedings against the claimed entity, by virtue of the established powers, for failing to comply with the provisions of article 13 of the RGPD, regarding the information that must be provided to the interested parties when collect personal data from them, with a warning sanction, argued therein that: "although the company is entitled to carry out audio recordings in the workplace, always adhering to the provisions of the

RGPD and in the LOPDGDD, the works council has not been informed

conveniently, on the object and treatment of these recordings”.

FIFTH: Once the initiation agreement has been notified, the entity claimed, by means of a written dated 07/07/20, made, in summary, the following allegations:

“This situation has its origin as a consequence of the ATTEMPTED AGGRESSION

PHYSICAL of a worker to the Manager of shift when in the exercise of their

job functions, the worker is asked for explanations and she decides to confront

her with the intention of inflicting physical harm, and thanks to the intervention of her

companions manage to separate her and that the aggression does not take place.

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As a consequence, criticism is received from the union when the

Company makes the decision to proceed with the DISMISSAL OF THE WORKER. One of

The arguments were: what would the Manager have said so that the worker

react that way? The situation is as follows, the way of speaking is criticized,

which generates an enormous defenselessness to the person who has suffered an attempt to

aggression, in the wake of above you will now be the person who has to defend yourself

in the face of a mere insinuation without evidence, when what is true and proven is the attempt to

assault. Faced with this type of action is when it is requested by the

In charge of recording their own conversations that they had within the

Company with the workers to be able to defend themselves against these attacks. The direction

of the Company consents to the use of recorders:

1. Due to a series of complaints from the Shift Managers.

2. Due to the attempted physical assault suffered by one of them during the month of July.
3. Complaints from the Company Committee about the way in which the Persons in Charge of turn to the workers.

Present at this point the background surrounding the situation of the plant:

1. Mostly foreign staff of African origin.
2. Personnel with difficulties in understanding the Spanish language.
3. The staff confuses the literalness of the Spanish set phrases, with an insult serious to his person.

The Company has a video surveillance system, but it does not capture the conversations, a system that is communicated to all workers both at the beginning of the employment relationship in the signing of the employment contract, as in the Manual of Welcome of the Company, as well as the most senior staff with the signature to the installation of the video surveillance system and the use that can be made of it.

The workers have surprised us on many occasions, making recordings both to what the Managers tell them, and in the meetings with all the group of workers, for the explanation of projects or services, even to directors. Nothing is hidden because the meetings are of a public nature, so anyone can be recorded. No personal situations are recorded that may offend people's dignity, all conversations are within the scope from work. Recording or the mere use of a tape recorder around the neck is a dissuasive measure of aggressive and / or offensive behavior, since it retains instincts, and actions that if not recorded are word against word, generating helplessness.

The recordings are saved on a hard drive as long as there has been any vexatious behavior object of denunciation, but the recorder is formatted and the recording of the day Its use would only be justified in case of denying facts that are

report and where the recording could be the means of proof of the complaint. The

Recordings within the company do not constitute a crime nor do they violate any

fundamental right. "Can you record people in their workplace?"

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In this sense we have to mention the Judgment, dated April 16, 2015,

issued by the 2nd Chamber of the Supreme Court. In this case those that were recorded and

caught red-handed were some civil guards who, in their defense, alleged the

violation of their "rights to privacy, honor and the image of the

accused (art. 18.1 CE) because, (...) that they were recorded in the place of the

facts, that it was a room reserved for searching travelers' luggage,

the acts committed by the appellants through hidden cameras and with deficiencies

in its judicial authorization and subsequent treatment."

Well, the Supreme Court, in the resolution commented on now, concludes that "the

fact of recording the images related to the professional performance of the Guards in

the place where it was carried out, when there were well-founded suspicions of

his irregular behavior, in no way can suppose illegal interference in his privacy

and, even less, to the honor or the image itself.» This opens the door to recording

to any person in his job, whether civil servant or not.

Consequently, the mere recording of a conversation –even with an image– in the

that one is a party does not constitute a crime nor does it violate any fundamental right.

But, depending on the use made of said recording, it may be possible to incur

criminal responsibilities.

The ruling issued by the Supreme Court indicates that the conduct of the employee – who considered herself subjected to continued workplace harassment – did not represent a illegitimate interference in the personal privacy of the agent, since in the recording carried out by the worker with her mobile there was nothing that could be considered as concerning his intimate life or personal intimacy, since he acted as company representative. The Supreme adds that the existence of a prior conflict situation between the parties adds «a note of reasonableness to the conduct of the defendant".

To conclude RECORD A CONVERSATION IN WHICH ONE HAS INTERVENED IT IS NOT A CRIME; HOWEVER, THE USE THAT AFTER THIS CONVERSATION IS MADE.

Judgment No. 114/1984, dated November 29, issued by the 2nd Chamber of the Court Constitutional; Judgment No. 213/2014, dated December 2, issued by the Section 3 of Ilma. Zaragoza Provincial Court; Judgment no. 222/2015, of dated April 16, issued by the 2nd Chamber of the Supreme Court; Judgment no. 678/2014, dated November 20, issued by the 1st Chamber of the Supreme Court"

In the same way, the use of recorders was justified for the Company Committee and its union representatives, but even so the Company must continue to defend its actions before public bodies, at no time is it communicated or put into question the use made of the recordings, but whether they can be done or not. They are dissuasive measures, in a situation that is complex, since it generates defenselessness against word attacks.

The only complaints for incorrect treatment have been made by those in charge not there is none in writing from any production worker. can be attached complaints for different reasons: Lack of respect for questions or matters of

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labor nature. Not attending to the orders of those in charge because of her condition as a woman.

This would list several reasons for which the Managers have put in writing

and have reliably communicated to the Company's Management. The

workers have communicated only verbally, without specifying without giving more information

that can be investigated or at least contrasted The Company has a

WORKPLACE HARASSMENT PROTOCOL, where a COMPLAINT model is established,

to communicate the acts or facts that they consider to be the object of harassment of a sexual nature,

racial or labor, this PROTOCOL has been communicated, as well as the model of

A COMPLAINT to all the workers has even been posted on the PORTAL OF THE

EMPLOYEE.

The Company has the EQUALITY PLAN, since this year, and one of its measures

has been the generation of the aforementioned HARASSMENT PROTOCOL.

The recorders will be eliminated with the WRITTEN COMMITMENT of the COMMITTEE OF

COMPANY to stop the disputes, the misunderstandings, and the aggressions that suffer

those IN CHARGE, all as a sign of good faith, a proposal that was made in

a meeting with the Committee but the answer was that they are the ones in charge

"they speak badly to people, ..." so the only way to guarantee that they do not

produce verbal aggression is to continue with the recorders until the problem is resolved.

situation.

It is a lesser evil to guarantee social peace. The company has a system of

video surveillance declared and communicated to all the people of the organization,

from the beginning of the employment relationship or from the moment in which the

company video surveillance system. For all these reasons, it is requested that through the

This writing disproves any allegation of illegal use of the means of communication.

recording that the Company has for the exercise of its power of direction and

organization in the workplace. The different investigations of the nature of harassment

that have been denounced and are being investigated result in the treatment of

word of the workers to those in charge and the only justification is the word of

facing each other, these recordings shed light on the ways in which the situation of

current tension and settle the problems of discriminatory treatment the actions of

managers and workers.

SIXTH: On 08/04/20, the entity claimed was notified of the proposed

resolution in which it is proposed that, by the Director of the Spanish Agency for

Data Protection is sanctioned with "warning", for an infringement of article

13) of the RGPD, in accordance with the provisions of article 58.2) of the aforementioned RGPD.

SEVENTH: After notification of the proposed resolution, it has not been received in this

Agency, no written arguments to the proposed resolution, in the period

granted for the purpose.

In view of everything that has been done, by the Spanish Data Protection Agency

In this proceeding, the following are considered proven facts:

PROVEN FACTS

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1.- According to the claimant union, since 08/01/19, the managers

intermediaries of the claimed entity, "are recording, by means of tape recorders

personal conversations with workers hanging around their necks

in their work environment without their consent or authorization.

Nor has the works council been informed about the purpose and treatment of these recordings.

2°.- According to the address of the claimed entity, this situation has its origin as consequence of the attempted physical assault of a female worker on the shift manager when, in the exercise of his labor functions, explanations were requested from the worker and she decided to confront her with the intention of inflicting physical harm, being the claimant union who, "questions the words of the person in charge addressed to the worker so that she would react in that way". before these facts and the complaint for defenselessness of those in charge, the Management of the Company consent to the use of recorders so that situations do not occur again similar.

3°.- According to the claimed entity, it has a system of video surveillance, but does not capture the conversations, a system that is communicated to all workers both at the beginning of the employment relationship at the signing of the employment contract job, as in the Company Welcome Manual.

4°.- According to the claimed entity, the use of voice recorders was justified when Company Committee and its union representatives, and provides a copy of the document entitled, "MONITORING ACTIONS PLANT ZARAGOZA- August 8, 2019", where, among others, it is reported:

"After the meeting held last July 22 at the facilities of the Acteco de Zaragoza and having estimated a series of actions/conclusions of that meeting, we went on to detail their current situation: (...)

CONFLICT RESOLUTION

Communicate that ACTECO has made itself available to the Managers and

Sub-commissioned some recorders that they must carry throughout their working day and whose

Recordings will be uploaded in their entirety to the computers.

In this way, in any conflict they can be used and valued objectively by the

Company Committee, Management and other labor entities, the different situations

exposed and causing such conflict.

Recordings of conversations to which one is a party do not constitute

crime nor do they violate any fundamental right and this was corroborated by the sentence

of

dated April 16, 2015, issued by the 2nd Chamber of the Supreme Court.

Therefore, recording a conversation in which one intervenes is considered a crime.

In any case, it could be considered a crime, the use that is subsequently made of these

recordings. If it is considered as evidence in a trial there would be no problem,

while, if it is for dissemination in the media, social networks, etc.

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could be committing a crime by revealing secrets or by assuming a

illicit interference in privacy, the right to honor or the image of the company

affected.

The recordings are saved on a hard drive as long as there has been any

vexatious behavior object of denunciation, but the recorder is formatted and the

recording of the day its use would only be justified in case of denying facts that are

report and where the recording could be the means of proof of the complaint. The

Recordings within the company do not constitute a crime nor do they violate any

fundamental right. "Can you record people in their workplace?".

FOUNDATIONS OF LAW

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The Director of the Spanish Agency is competent to resolve this procedure.

Data Protection, in accordance with the provisions of art. 58.2 of the RGPD in the art. 47 of LOPDGDD.

The joint assessment of the documentary evidence in the procedure brings to knowledge of the AEPD, a vision of the denounced action that has been reflected in the facts declared proven above reported. However, about the allegations presented by the entity claimed at the initiation of the file, indicate the following:

In the first place, the recordings of the conversations between the managers and the workers, are carried out in the workplace, during working hours and with equipment provided by the company, are not personal recorders, purchased by the own commissioned, but provided by the management of the company for the exercise of their functions as plant managers, and not used to record personal or private conversations, of those in charge of what, the affirmation that does the claimed entity of, "record a conversation in which one has intervened it is not a crime; however, it can be a crime the use that is subsequently made of said conversation", cannot be taken into account in this area.

Apart from this, the company is fully entitled to "treat the images obtained through recording systems for the exercise of control functions of the workers" and this is indicated in article 89 of the LOPDGDD. Also article 20.3 of the Workers' Statute, when it says that: "The employer may adopt the measures it deems most appropriate for surveillance and control to verify the

fulfillment by the worker of his labor obligations and duties, keeping in its adoption and application due consideration to their dignity (...)", allowing, for Therefore, the use of voice recorders, for the proper functioning of the work. Regarding this type of control, article 89.3 of the LOPDGDD indicates that, "the use of systems similar to those referred to in the previous sections for the recording of sounds in the workplace will be admitted only when they are relevant risks to the safety of facilities, goods and people arising from the activity carried out in the workplace and always respecting the principle of proportionality, that of minimum intervention and the guarantees

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provided in the previous sections. Suppression of sounds preserved by These recording systems will be carried out in accordance with the provisions of article 22.3 of this law".

Therefore, as an obligation of the company, the rule obliges it to inform prior, and expressly, clearly and concisely, to the workers or their representatives, of the measures implemented in the company, as in this case, the use, by of those in charge, of voice recorders for the correct development of the work, to the just as he does, according to his statements, when he informs the workers of the use of recorded images.

Regarding the information that must be provided to workers or their representative, article 13 of the RGPD, indicates that, when they are obtained from a interested (worker) personal data relating to him, as in this case, his voice, the

responsible for the treatment, will provide you with information, among other things, about: the identity and contact details of the data controller; the ends of treatment and the legal basis thereof; the period during which the data will be kept personal information; existing rights, etc.

In this sense, in the document presented by the claimed entity, in the allegations at the initiation of the file, entitled "MONITORING ACTIONS ZARAGOZA PLANT", 8/8/19, although the company logo is printed, "ACTECO", is not signed or stamped by the company, nor is it identified no person responsible for it, in the event that it was a document posted on the information board for workers. Nor is it signed, as acknowledgment of receipt, by any member of the works council or union representative, if this document had been sent to the Works Council or to the representatives from the workers.

Therefore, although the company is entitled to use means of labor control, as in this case, the use of voice recorders is also obliged to expressly, clearly and concisely report these facts to the workers.

In view of the foregoing, the following is issued:

RESOLVES:

NOTICE: to the entity ACTECO PRODUCTOS Y SERVICIOS, S.L. with CIF.: B03971512 for violation of article 13) of the RGPD.

REQUEST: to the entity ACTECO PRODUCTOS Y SERVICIOS, S.L. so that, in the within a month from the notification of this resolution, take the necessary measures to inform the workers' representatives of the measures taken in the audio recording in the workplace in accordance with the provisions of article 89 of the LOPDGDD and in article 13 of the RGPD.

NOTIFY: this resolution to ACTECO PRODUCTOS Y SERVICIOS, S.L.

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In accordance with the provisions of article 50 of the LOPDPGDD, this

Resolution will be made public once it has been notified to the interested parties.

Against this resolution, which puts an end to the administrative procedure in accordance with art. 48.6 of the

LOPDPGDD, and in accordance with the provisions of article 123 of the LPACAP, the

Interested parties may optionally file an appeal for reconsideration before the

Director of the Spanish Agency for Data Protection within a month from

counting from the day following the notification of this resolution or directly

contentious-administrative appeal before the Contentious-Administrative Chamber of the

National Court, in accordance with the provisions of article 25 and section 5 of

the fourth additional provision of Law 29/1998, of July 13, regulating the

Contentious-administrative jurisdiction, within a period of two months from the

day following the notification of this act, as provided in article 46.1 of the

aforementioned Law.

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Director of the Spanish Agency for Data Protection.

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