

In case 6643 / 2018

ANSWER

No. 15645

Sofia, 18.11.2019

IN THE NAME OF THE PEOPLE

The Supreme Administrative Court of the Republic of Bulgaria - Fifth Department, in a court session on October 10, composed of:

CHAIRMAN:

ANNA DIMITROVA

MEMBERS:

ILIANNA SLAVOVSKA

TINKA KOSEVA

to secretary

Nikolina Avramova

and with participation

to the prosecutor

Lyubka Stamova

listened to what was reported

by the judge

ILIANNA SLAVOVSKA

by adm. case no

6643/2018

The proceedings are under Art. 208 et seq. of the Administrative Procedure Code (APC).

It was formed on a cassation appeal filed by "Bulgarian Telecommunications Company" EAD, Sofia, through procedural representatives, against decision No. 1205/26.02.2018 in administrative case No. 12786/2017 of the Administrative Court - Sofia - city, which rejected the appeal of "Bulgarian Telecommunications Company" EAD, against decision No. Ж-153 of

24.10.2017 of the Commission for the Protection of Personal Data (PCPD), on the appeal filed by E. Grozdeva, in which allegations were made for misuse of her personal data and their use without her knowledge and consent to enter into a contract with "Bulgarian Telecommunications Company" EAD. CPLD has imposed on "Bulgarian Telecommunications Company" EAD a property sanction in the amount of BGN 20,000. The liquidator maintains in his appeal and in the court session that the decision is incorrect - substantively illegal, he requests its cancellation, the award of costs in the case.

The defendant in the cassation appeal – (KPLD) Commission for the Protection of Personal Data, through a procedural representative in a court session, asks the court to issue a decision to uphold the appealed decision and to award legal fees.

The defendant in the cassation appeal - E. Grozdeva, with an address in [town], through a procedural representative in a written response and in a court session, contests the cassation appeal, claiming payment of administrative costs.

The prosecutor from the Supreme Administrative Prosecutor's Office gives a reasoned conclusion that the cassation appeal is groundless.

The Supreme Administrative Court (SAC), a composition of the Fifth Division, during the ex officio review of the contested decision pursuant to Art. 218, para. 2 of the APC and considering the arguments presented in the cassation appeal, considers the following established:

The cassation appeal was filed by an actively legitimized party, within the period under Art. 211 of the APC and is procedurally admissible, but examined in substance it is unfounded, due to the following considerations:

Administrative proceedings were initiated before the CPLD on a complaint by E. Grozdeva, against "Bulgarian Telecommunications Company" (BTK) EAD, regarding misuse of personal data, as a result of which, on behalf of E. Grozdeva, but without her knowledge, a contract was concluded with " Bulgarian Telecommunications Company EAD (VIVACOM) for the purchase of a pay-as-you-go mobile phone and SIM card. After an administrative proceeding, with decision No. Ж-153/2016 of 24.10.2017, the CPLD accepted E. Grozdeva's complaint as well-founded. Pursuant to Art. 42, para. 1 of the Labor Code imposes on "Bulgarian Telecommunications Company" EAD, in its capacity as a personal data administrator, an administrative penalty of a pecuniary penalty in the amount of BGN 20,000 (twenty thousand) for processing the applicant's personal data in violation of Art. 4, para. 1 of the Labor Code.

From the evidence collected in the administrative file and, in particular, the results of the expertise carried out objectified in protocol No. 28 of 26.05.2017, according to the inventory of the Ministry of Interior - RUP Sandanski and more precisely the

conclusion of task No. 3 of the expertise, it is indisputable that he signed under the disputed contract was not submitted by the complainant Grozdeva, therefore there is no consent for the processing of her personal data for the purposes of the contract. Given the fact that in the specific case, none of the other alternatively specified hypotheses in Art. 4, para. 1, items 1, 3, 4, 5, 6 and 7 of the Labor Code, it follows that the personal data of the complainant were processed by BTC EAD for the conclusion of the contract in violation of Art. 4, para. 1 of the GDPR, without the presence of a condition for the admissibility of the processing.

With the appealed decision, the court of first instance, after a legality check, accepts that the contested administrative act was issued by a competent authority, in the form provided by law, in compliance with the administrative procedure rules provided for in the law, but in violation of the substantive law and its purpose, rejects the appeal of "Bulgarian Telecommunications Company" EAD against Decision No. Ж-153/2016. dated 24.10.2017 of the Commission for Personal Data Protection. The decision is correct.

Based on a correctly explained factual situation, the conclusion of the ASSG is justified and lawful, that Grozdeva's allegations of illegal processing of her personal data by BTC EAD, of concluding a contract that she was not informed about and for which she did not give her consent are reasonable. The onus was on the personal data administrator - the assessee in the present proceedings to prove that he processed the personal data on any of the grounds under Art. 4 (repealed) LLPD, when Grozdeva claimed that she never entered into a contract with him, nor consented to the processing of her personal data by "Bulgarian Telecommunications Company EAD" (VIVACOM) EAD. The company has not presented such evidence, which is why the conclusion of the ASSG is substantiated that none of the hypotheses of the material legal norm applicable at the time of Article 4 (repealed) of the Labor Code - nor Article 4, paragraph 1, item 1-7 (repealed) ЗЗЛД The provision of Art. 4, para. 1, item 2 of the GDPR requires the unequivocal and informed consent of the individual who provided personal data for their processing. This should be done in each individual case of processing, which is why the statement that the individual has other concluded contracts with the same company does not change the fact of lack of consent for the case in question.

The court of first instance correctly concluded that Decision No. Ж-153/2016. of 24.10.2017 was decreed by a competent authority. According to the provision of Art. 6, para. 1 of the LLDP, the LDLP is an independent state body that carries out the protection of individuals in the processing of their personal data and in the implementation of access to this data, as well as the control of compliance with this law. The commission performs this function by exercising the powers granted by law specified

in Art. 10, para. 1 of the Labor Code. This administrative body is authorized to consider complaints against acts and actions of administrators that violate the rights of natural persons under this law, as well as complaints of third parties in connection with their rights under this law - Art. 10, para. 1, item 7 of the Labor Code.

When issuing the document, the provisions of Art. 59 APC written form. The factual and legal grounds for issuing the act are set out. The facts established by the authority are brought under the corresponding legal norm.

No significant violations of the administrative procedure rules were committed, which would be grounds for annulment of the act. The requirements of Art. 9, para. 4 of the Labor Code and Art. 39, para. 1 of the Rules of Procedure of the Commission for the Protection of Personal Data, with the complaint being considered in an open court session, with the summoning of the parties and gathering of evidence, and the decision was taken unanimously by the members of the administrative body, with the necessary quorum and majority.

The administrative court correctly cited the provision of § 1, item 1 of the GDPR, which provides a legal definition of the term "processing of personal data", namely any action or set of actions that can be performed with regard to personal data with automatic or other funds, including and dissemination. In this case, the evidence established that BTC EAD processed the personal data of its client in connection with a contract that was found not to have been signed by him. In this regard, the cassation appellant's arguments that he had access to Grozdeva's personal data, as he had other contracts with her, are groundless. The company was punished because it illegally used the person's personal data to conclude a new contract with him. The fact that the company did not know that there were illegal actions by the company's employees, in violation of their official duties, is also irrelevant to the dispute, since the responsibility of the legal entities is innocent. According to Art. 4, para. 1, item 3 of the GDPR, processing is permissible when it is necessary for the fulfillment of obligations under a contract to which the natural person to whom the data relates is a party, as well as for actions preceding the conclusion of a contract and undertaken at his request. According to Art. 3, para. 4 of the Labor Code, the administrator ensures compliance with the requirements of Art. 2, para. 2. The court finds that in this case the applicant made an unlawful use of personal data that he had. It is undisputedly established that E. Grozdeva did not sign the contract in connection with which she submitted the complaint to the CPLD. In the company's information system, this contract is registered in the name of E. Grozdeva, and amounts are charged to her. The conclusion follows from the above that the company did not take the necessary measures to protect the personal data of its client, which led to their unlawful processing. In this way, the processing of personal data in

violation of Art. 4 of the GDPR is the result of non-taken measures to protect personal data by the administrator in violation of the objectives under Art. 2, para. 2 of the law. The argument that the specific employees who processed the contract have not been identified does not change the conclusion of unlawful processing of personal data, as they do not exclude the company's responsibility.

The provision of Art. 4, para. 1, item 2 of the GDPR requires the unequivocal and informed consent of the individual who provided personal data for their processing. This should be done in each individual case of processing, which is why the statement that the individual has other concluded contracts with the same company does not change the fact of lack of consent for the case in question.

The administrative court's conclusion that the sanction was correctly determined, which is close to the minimum amount provided for in the law, is substantiated. The fact that the individual has not suffered financial losses is of no legal importance for determining the sanction.

The current court panel finds the arguments cited in the cassation appeal for a violation in the constitution of an interested party in the proceedings to be groundless, it should be taken into account that the natural person participated in the proceedings for the issuance of an administrative act (Article 38 of the Civil Code), which is why the objection for lack of legal interest in constituting a party is contrary to the rules for determining parties.

In view of the above, the present judicial panel of the Supreme Court accepts that the appealed decision, which is valid and admissible, is correct and should be left in force, as having been issued in the absence of cassation grounds for annulment.

In view of the outcome of the case, the cassation appellant should be sentenced to pay the CPLD administrative costs, representing a legal consultancy fee in the amount of 100 (one hundred) BGN on the basis of Art. 78, para. 8 of the Code of Civil Procedure, cf. Art. 37 of the Law on Legal Aid, cf. Art. 24 of the Ordinance on the Payment of Legal Aid, given the factual and legal complexity of the dispute, payable by the assessor, as well as to the defendant E. Grozdeva, the administrative costs specified in the attached contract for legal aid protection and assistance in the amount of 1130.00 (one thousand one hundred and thirty) BGN.

For the stated reasons and on the basis of Art. 221, para. 2 APC, Supreme Administrative Court, Fifth Department  
RESOLVE:

Decision No. 1205 of 26.02.2018, issued in administrative case 12786/2017 of the Administrative Court - Sofia - city,

REMAINS IN FORCE.

JUDGMENT "Bulgarian Telecommunications Company" EAD, Sofia, Mladost district, Tsarigradsko Shose Blvd. No. 115 I, to pay the Commission for the Protection of Personal Data the sum of BGN 100.00 (one hundred) administrative expenses.

JUDGMENT "Bulgarian Telecommunications Company" EAD, , Sofia, Mladost district, Tsarigradsko shose Blvd. No. 115 And to pay E. Grozdeva, with [ID] the amount of BGN 1130.00 (one thousand one hundred and thirty) clerical expenses.

The decision is final and not subject to appeal.

True to the original,

CHAIRMAN:

/p/ Anna Dimitrova

Secretary:

MEMBERS:

/p/ Iliana Slavovska

/p/ Tinka Koseva