[doc. web no. 9567429]

Injunction order against the Municipality of Commezzadura - 25 February 2021

Register of measures

no. 68 of 25 February 2021

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, which was attended by prof. Pasquale Stazione, president, prof.ssa Ginevra Cerrina Feroni, vice president, dr. Agostino Ghiglia and the lawyer Guido Scorza, components, and the cons. Fabio Mattei, general secretary;

HAVING REGARD TO Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, concerning the protection of natural persons with regard to the processing of personal data, as well as the free movement of such data and repealing Directive 95/46/ CE, “General Data Protection Regulation” (hereinafter, “Regulation”);

HAVING REGARD TO Legislative Decree 30 June 2003, n. 196 containing the "Code regarding the protection of personal data, containing provisions for the adaptation of the national legal system to Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27 April 2016, relating to the protection of natural persons with regard to the processing of personal data, as well as to the free movement of such data and which repeals Directive 95/46/EC (hereinafter the "Code");

CONSIDERING the Regulation n. 1/2019 concerning internal procedures having external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor for the protection of personal data, approved with resolution no. 98 of 4/4/2019, published in the Official Gazette no. 106 of 8/5/2019 and in www.gpdp.it, doc. web no. 9107633 (hereinafter "Regulation of the Guarantor n. 1/2019");

Given the documentation in the deeds;

Given the observations made by the general secretary pursuant to art. 15 of the Regulation of the Guarantor n. 1/2000 on the organization and functioning of the Guarantor's office for the protection of personal data, doc. web no. 1098801;

Supervisor Prof. Geneva Cerrina Feroni;

WHEREAS

1. The complaint.

With a complaint presented to this Authority by Mr. XX on the XX date, the publication on the institutional website of the Municipality of Commezzadura of resolution no. XX of the XX, concerning the "acknowledgement and acceptance of the

voluntary resignation of the employee Dr. [initials of the complainant's surname and first name]" and containing information relating to the employment relationship at the time in place between the Municipality and the complainant - who was employed in the capacity of XX at the Municipality -, including evaluations regarding his work and information related to his state of health.

The interested party also complained about the fact that these events and assessments had been mentioned in an article in the newspaper XX del XX. This article reported, in particular, some passages of the aforementioned determination, as well as a declaration by the mayor of the Municipality regarding the fact that the complainant had asked to benefit from flexible working hours and that he had been absent from work due to illness during the holidays Christmas.

2. The preliminary investigation.

With a note of the XX (prot. n. XX), the Municipality, in response to a request for information formulated by the Office, declared, in particular, that:

"the employment relationship [with the complainant] terminated early due to voluntary resignation";

"the adoption of the determination of acknowledgment and acceptance of the resignation was a necessary act in the process of the administrative procedure for termination of the employment relationship";

"[in this determination] the personal data of the [complainant], and in particular with reference to identification data, have been processed in compliance with the principles of lawfulness, correctness, transparency and minimization";

"no name [is] indicated in the provision, but only the mere initials, the exposure of which is not detrimental to the right to privacy, considering on the one hand the very short period of time of actual work performed (quantified in 19 days [...]) , and on the other the domicile [of the complainant] located 63 km away from the place of work, with therefore difficulties in establishing relationships outside of work, which would have allowed [the complainant] (at his first experience in Commezzadura) to be known locally and therefore subsequently identified as a subject known or knowable by third parties only as a result of the initials";

"as regards the complained treatment of data relating to health, [...] the information [is] characterized by elements of extreme generality with the absence of any reference to any pathologies not reported in the medical certificates produced";

"with reference to the complained indications of assessments regarding the work, [...] the public interest of the entity in personnel recruitment procedures [...] consists in acquiring the best professionalism available to guarantee the performance of

the public service" , considering the provisions of the articles 97, paragraph 4 and 98 of the Constitution, requiring the Municipality "that its resources give practical implementation in carrying out the work activity of the knowledge, attitudes and skills that have allowed them to pass the public competition for access to the post";

"with reference to the publication on the Municipality's website, in the Praetorian Register section, this fulfillment is prescribed for the purposes of acquiring the enforceability of the individual decisions (management measures)";

"furthermore, the publication complies with precise obligations of publicity, transparency and dissemination of the work of the public administrations [...]. The fulfillment therefore took place in compliance with the specific legislation identified in art. 1 c. 1 lit. g) of Regional Law Trentino Alto Adige 29 October 2014 n. 10 and art. 23 c.1 Legislative Decree 33/2013";

"the determination in its integral text was published for the period from the XX and up to the 8th day of the month of XX at the latest. Subsequently, the document was obscured for reasons of expediency", although "it is not possible to find a trace of the exact date of obscuration of the document" and the Municipality has not deemed it "possible [...] to remove the reference to the object of the deed, unless committing specific offenses regarding the transparency of administrative action".

With a note of the XX (prot. n. XX), the Office, on the basis of the elements acquired, the checks carried out and the facts that emerged following the preliminary investigation, notified the Municipality, pursuant to art. 166, paragraph 5, of the Code, the initiation of the procedure for the adoption of the provisions pursuant to art. 58, par. 2, of the Regulation, concerning the alleged violations of articles 5, par. 1, lit. a) and c), 6 and 9 of the Regulation and of the articles 2-ter and 2-septies, paragraph 8, of the Code, inviting the aforementioned owner to produce defense writings or documents to the Guarantor or to ask to be heard by the Authority (art. 166, paragraphs 6 and 7, of the Code, as well as art. 18, paragraph 1, of Law No. 689 of 24 November 1981).

The Municipality sent its defense briefs with a note of the XX (prot. n. XX), representing, among other things, that:

- "the resignation of the [complainant] [...] created considerable inconvenience to the Municipality of Commezzadura which, in the midst of the winter season and the Christmas holidays, found itself without the figure of the XX [...]";
- "the conduct of the Municipality was based on the protection of the superior public interest in safeguarding the balance of the budget and guaranteeing the performance of services to the community";
- "the assumption of resolution no. XX of the XX also represented the necessary conclusion of an employment relationship (and of the related administrative procedure connected and subsequent to the resignation); with the same it was not intended

[...] in any way to cause damage to the employee but to acknowledge the resignation motivating them according to a principle of transparency";

- "in relation to the further dissemination of the content of the determination, no direct contact was made by the Municipality towards the press, since the Body's task is linked to the adoption of administrative acts and not to the use of different channels of publication and dissemination of news on one's own work other than institutional ones";

- "since the 20th [...] no trace of the determination has remained",

In the context of the hearing requested by the Municipality and held on the XX date, the Municipality represented, in particular, that:

- "the Municipality has acted and continues to act in absolute good faith, given that the Municipality has precise obligations towards the community, having to account for its actions. The determination object of the complaint had [indeed,] as its objective not only a legal but also a moral obligation, satisfying a need for transparency towards the community, which had to be explained why the disservices had occurred";

- "the complainant had a working relationship with the Municipality for a period of about twenty days, carrying out the activity in a public car park, mostly meeting foreign tourists. Therefore, the possibility of identifying the claimant was limited to a very limited context limited to the territory of the Municipality. Furthermore, in such a small Municipality, it would have been impossible to guarantee anonymity, because the person concerned would have been a municipality identifiable through the mere elements of the context mentioned in the decision";

- "the article that appeared in the newspaper [...] substantially repeated what was already reported in the resolution. However, there was no will on the part of the Municipality to give resonance to the story. It is the journalists who consult the electronic registers to obtain interesting news, and then ask the Administration for information".

3. Outcome of the preliminary investigation.

3.1 The regulatory framework.

The personal data protection regulations provide that public bodies, even if they operate in the performance of their duties as employers, can process the personal data of workers, also relating to particular categories of data - which also include the " data relating to health" (see art. 9, paragraph 1, of the Regulation) - if the processing is necessary, in general, for the management of the employment relationship and to fulfill specific obligations or tasks established by national sector

regulations (articles 6, paragraph 1, letters c) and e); 9, par. 2, lit. b) and par. 4; 88 of the Regulation).

European legislation provides that "Member States may maintain or introduce more specific provisions to adapt the application of the rules of this regulation with regard to treatment, in accordance with paragraph 1, letters c) and e), determining more precisely specific requirements for processing and other measures aimed at guaranteeing lawful and correct processing [...]" (Article 6, paragraph 2, of the Regulation). In this regard, it should be noted that the operation of "dissemination" of personal data (such as online publication), by public entities, is permitted only when required by law or, in the cases provided for by law, by regulation (Article 2-ter, paragraphs 1, 3 and 4, letter b), of the Code).

In any case, "data relating to health", i.e. those "related to the physical or mental health of a natural person, including the provision of health care services, which reveal information relating to his state of health" (Article 4, paragraph 1, no. 15, of the Regulation), due to the greater guarantees that the Regulation and the Code recognize due to the particular delicacy of this category of data, "cannot be disclosed" (Article 2-septies, paragraph 8 of the Code and Article 9, paragraph 4 of the Regulation).

The data controller is then, in any case, required to respect the principles regarding data protection, including that of "lawfulness, correctness and transparency" as well as "minimization", according to which personal data must be "processed in a lawful, correct and transparent manner in relation to the interested party" and must be "adequate, pertinent and limited to what is necessary with respect to the purposes for which they are processed" (Article 5, paragraph 1, letter a) and c) of the Regulation).

3.2 The dissemination of personal data.

In this context, it is noted that, although the determination in question did not expressly mention the name and surname of the complainant, the latter was in any case identifiable through reference to his initials. Moreover, considering that at the time the complainant was XX in service at the Municipality and that the determination refers to "[initials of the surname and name] as XX", the complainant is, in any case, easily identifiable, both internal and external to the Entity, having therefore to consider the information contained in the determination, relating to the complainant, as "personal data" pursuant to art. 4, par. 1, no. 1, of the Regulation (see, on this point, provisions of 2 July 2020, n. 118, web doc. n. 9440025, and 2 July 2020, n. 119, web doc. n. 9440042).

As regards the circumstance that the determination in question only mentioned the claimant's absence due to illness, without

the indication of the diagnosis, it is noted that, according to the constant orientation of the Guarantor, the notion of personal data relating to health "can also include information relating to absence from service due to illness, regardless of the circumstance that the diagnosis is explicitly indicated at the same time" (par. 8 of the "Guidelines on the processing of personal data of workers for the purpose of managing the employment relationship in the public sector " of the Guarantor, provision n. 23 of 14 June 2007, web doc. n. 1417809; see also, with specific regard to the working context, provision 7 May 2015, n. 269, web doc. n. 4167648; provision 10 October 2013, web doc. n. 2753605; provisions of 7 July 2004, web doc. n. 1068839 and 1068917; in case law, see point 50 of the judgment of the Court of Justice of the European Communities of 6 November 2003 C-101/01, Lindqvist, and Cass. civ. Section I, 8 August 2013, n. 18980, where it is stated that "it cannot be doubted that an absence from work "due to illness" constitutes personal data "related to health" of the subject to whom the information refers").

With regard to what was declared by the Municipality, namely that "with reference to the publication [of the determination] on the website of the Municipality, in the Praetorian Register section, this fulfillment is prescribed for the purposes of acquiring the enforceability of the individual determinations (management measures)" , it should be noted that the Municipality has not proven the existence of a specific law that establishes the publication of a determination acknowledging the resignation of an employee as a requirement for the integration of the effectiveness of the deed. Moreover, even in the presence of a law that provides for the publication of deeds and documents of the public administration (cf. art. 124 of Legislative Decree no. 267 of 18 August 2000) - which in any case must also be respected with with regard to the time span of publication established by this - the principles of data protection must, however, be respected, including the principle of "data minimization" (Article 5, paragraph 1, letter c), of the Regulation; see part II, par. 3(a), of the Guarantor's Guidelines mentioned above), it being understood that, in any case, data relating to health cannot be disclosed (art. 2-septies, paragraph 8, of the Code).

In the present case, the determination in question, which contained detailed information relating to events connected with the employment relationship, as well as assessments regarding his work and explicit references to his state of health, was, moreover, published for a very long, a circumstance which further connotes the disclosure of the personal data contained therein as unlawful.

The Municipality also declared that the publication of the determination in question in the online Praetorian Register of the Municipality would have "occurred [a] in compliance with the specific legislation identified in art. 1 c. 1 lit. g) of Regional Law Trentino Alto Adige 29 October 2014 n. 10 and art. 23 c.1 Legislative Decree 33/2013". In this regard, it should be noted that

the art. 1, paragraph 1, lett. g) of Regional Law 29 October 2014, no. 10, merely provides that "article 23 of [legislative decree 14 March 2013, no. 33] applies only to paragraph 1 and with the exclusion of letter b)", that "instead of the lists of measures, measures adopted by political bodies and managers may in any case be published", as well as that "in addition to these measures, all the other provisions adopted by the political bodies and managers be published, without prejudice to the provisions of paragraph 3 of this article". Pursuant to paragraph 3 of this article, "the publication of documents, information and data pursuant to this article is carried out in compliance with the rules on the protection of the confidentiality of personal data. The administrations take steps to make non-pertinent or non-essential personal data unintelligible pursuant to article 7-bis, paragraph 4 of the decree [...]". Given that the Municipality had no obligation to publish the determination in question, since none of the cases provided for by art. 23 of Legislative Decree 14 March 2013, n. 33 (which, moreover, provides for the publication of only the "lists of measures adopted"), it should be noted that art. 7-bis, paragraph 3, of the same decree, to which art refers. 1 of the Regional Law mentioned above, provides that "public administrations may order the publication on their institutional website of data, information and documents that they are not obliged to publish pursuant to this decree or on the basis of specific provisions of the law or regulation, in compliance with the limits indicated in article 5-bis, proceeding with the indication in anonymous form of any personal data present". The Municipality, on the other hand, published the determination in question, moreover disseminating personal data relating to the state of health, in violation of the specific prohibition established by art. 2-septies, paragraph 8, of the Code.

Nor does what the Municipality affirms regarding the fact that the publication of the decision in question was made due to the generic need, represented by the Municipality, to defend its actions towards the community and guarantee the transparency of its choices, relevant the treatment - for what has been said above - without an appropriate legal basis.

Likewise, statements made to the press are unjustified and illegal (see definition of "communication" pursuant to article 2-ter, paragraph 4, letter a) of the Code), by the Municipality, in the person of the Mayor, with regard to information relating to the employment relationship, including data relating to the state of health of the interested party, in the absence of an appropriate legal basis and in violation of art. 2-septies of the Code, with consequent further dissemination by means of the press of the same data.

In the light of the foregoing considerations, the overall processing appears to have occurred in violation of articles 5, par. 1, lit. a) and c), 6 and 9 of the Regulation and of the articles 2-ter and 2-septies, paragraph 8, of the Code.

4. Conclusions.

In the light of the assessments referred to above, it should be noted that the statements made by the data controller during the preliminary investigation the truthfulness of which may be called upon to answer pursuant to art. 168 of the Code , although worthy of consideration, do not allow overcoming the findings notified by the Office with the act of initiation of the procedure and are insufficient to allow the closure of the present procedure, since none of the cases provided for by the 'art. 11 of the Regulation of the Guarantor n. 1/2019.

It is also represented that for the determination of the applicable rule, in terms of time, the principle of legality pursuant to art. 1, paragraph 2, of the law no. 689/1981 which establishes as «The laws that provide for administrative sanctions are applied only in the cases and in the times considered in them». This determines the obligation to take into consideration the provisions in force at the time of the violation committed. From the preliminary investigation documents it emerged that the determination in its entirety was published from XX to XX and, therefore, in full force of the provisions of the Regulation and of the Code. Subsequently, on an unspecified date, the document was obscured, although the Municipality deemed it unable to provide for the cancellation of the object of the determination, from which it was possible, however, to obtain the information that the worker, identifiable by the initials of the surname and first name, had resigned. Only "from the XX", as declared by the Municipality, "no trace of the determination has remained".

Therefore, the preliminary assessments of the Office are confirmed and the illegality of the processing of personal data carried out by the Municipality of Commezzadura is noted, for having disclosed personal data relating to the complainant, contained in determination no. XX of the XX, and for having communicated the same data to the press (with consequent dissemination in the press in the article of the newspaper XX of the XX), in the absence of suitable regulatory conditions, in violation of articles 6 and 9 of the Regulation and of the articles 2-ter and 2-septies, paragraph 8, of the Code, as well as the basic principles of treatment contained in art. 5, par. 1, lit. a) and c) of the Regulation.

The violation of the aforementioned provisions makes the administrative sanction envisaged by art. 83, par. 5, of the Regulation, pursuant to articles 58, par. 2, lit. i), and 83, par. 3, of the same Regulation and art. 166, paragraph 2, of the Code.

In this context, considering, in any case, that the conduct has exhausted its effects, given that the publication of the determination on the Municipality's website has ceased, the conditions for the adoption of further corrective measures pursuant to art. . 58, par. 2, of the Regulation.

5. Adoption of the injunction order for the application of the pecuniary administrative sanction and accessory sanctions (articles 58, paragraph 2, letter i and 83 of the Regulation; article 166, paragraph 7, of the Code).

The Guarantor, pursuant to articles 58, par. 2, lit. i) and 83 of the Regulation as well as art. 166 of the Code, has the power to "impose a pecuniary administrative sanction pursuant to article 83, in addition to the [other] [corrective] measures referred to in this paragraph, or instead of such measures, according to the circumstances of each single case" and, in this context, "the Board [of the Guarantor] adopts the injunction order, with which it also orders the application of the ancillary administrative sanction of its publication, in whole or in part, on the website of the Guarantor pursuant to article 166, paragraph 7, of the Code" (art. 16, paragraph 1, of the Guarantor's Regulation no. 1/2019).

In this regard, taking into account the art. 83, par. 3, of the Regulation, in the present case - also considering the reference contained in art. 166, paragraph 2, of the Code – the violation of the aforementioned provisions is subject to the application of the same pecuniary administrative sanction provided for by art. 83, par. 5, of the Regulation.

The aforementioned pecuniary administrative sanction imposed, depending on the circumstances of each individual case, must be determined in the amount taking into due account the elements provided for by art. 83, par. 2, of the Regulation.

In relation to the aforementioned elements, the long period of time in which the personal data was disseminated was considered; this also in the light of the indications that, since 2014, the Guarantor has provided to all public subjects in the Guidelines on the processing of personal data, also contained in administrative deeds and documents, carried out for the purpose of advertising and transparency on the web by public subjects and other obliged bodies, mentioned above. The circumstance that the complainant's personal data was also disclosed in the press was also considered, as a result of statements made by the Mayor of the Municipality.

On the other hand, it was favorably noted that the Municipality has maintained a collaborative conduct with this Authority in order to remedy the violation and mitigate its possible negative effects. There are no previous relevant violations committed by the data controller or previous provisions pursuant to art. 58 of the Regulation.

Based on the aforementioned elements, evaluated as a whole, it is deemed necessary to determine the amount of the pecuniary sanction, in the amount of 6,000.00 (six thousand) euros for the violation of articles 5, par. 1, lit. a) and c), 6 and 9 of the Regulation and of the articles 2-ter and 2-septies, paragraph 8, of the Code, as a pecuniary administrative sanction withheld, pursuant to art. 83, par. 1, of the Regulation, effective, proportionate and dissuasive.

Taking into account the extended period of time during which the aforementioned data were made available on the net, it is also believed that the ancillary sanction of publication on the website of the Guarantor of this provision should be applied, provided for by art. 166, paragraph 7 of the Code and art. 16 of the Regulation of the Guarantor n. 1/2019.

Finally, it should be noted that the conditions pursuant to art. 17 of Regulation no. 1/2019 concerning internal procedures having external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor.

ALL THIS CONSIDERING THE GUARANTOR

pursuant to art. 57, par. 1, lit. f), of the Regulation, declares the conduct held by the Municipality of Commezzadura to be unlawful, described in the terms referred to in the justification, consisting in the violation of articles 5, par. 1, lit. a) and c), 6 and 9 of the Regulation and of the articles 2-ter and 2-septies, paragraph 8, of the Code, in the terms set out in the justification;

ORDER

to the Municipality of Commezzadura, in the person of its pro-tempore legal representative, with registered office in Via Del Comune, 10 - 38020 Commezzadura (TN), Tax Code 00252960224, pursuant to articles 58, par. 2, lit. i), and 83, par. 5, of the Regulation and 166, paragraph 2, of the Code, to pay the sum of 6,000.00 (six thousand) euros as an administrative fine for the violations indicated in the justification;

ENJOYS

to the aforementioned Municipality to pay the sum of Euro 6,000.00 (six thousand) according to the methods indicated in the attachment, within 30 days of notification of this provision, under penalty of the adoption of the consequent executive acts pursuant to art. 27 of the law no. 689/1981. In this regard, it is recalled that the offender retains the right to settle the dispute by paying - always according to the methods indicated in the annex - an amount equal to half of the fine imposed, within 30 days from the date of notification of this provision, pursuant to art. 166, paragraph 8, of the Code (see also art. 10, paragraph 3, of Legislative Decree no. 150 of 09/01/2011);

HAS

pursuant to art. 166, paragraph 7, of the Code, the publication of this provision on the website of the Guarantor, believing that the conditions set forth in art. 17 of the Regulation of the Guarantor n. 1/2019 concerning internal procedures having external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor.

Pursuant to articles 78 of the Regulation, 152 of the Code and 10 of Legislative Decree no. 150/2011, against this provision it

is possible to lodge an appeal before the ordinary judicial authority, under penalty of inadmissibility, within thirty days from the date of communication of the provision itself or within sixty days if the appellant resides abroad.

Rome, 25 February 2021

PRESIDENT

Station

THE SPEAKER

Cerrina Feroni

THE SECRETARY GENERAL

Matthew