In case 13937 / 2016

ANSWER

No. 3989

Sofia, 28.03.2018

IN THE NAME OF THE PEOPLE

The Supreme Administrative Court of the Republic of Bulgaria - Fifth Department, in a court session on the seventh of March, two thousand and eighteen, composed of:

CHAIRMAN:

JOVKA DRAZEVA

MEMBERS:

DIANA DOBREVA

EMANOIL MITEV

to secretary

Nikolina Avramova

and with participation

to the prosecutor

Georgi Kamburov

listened to what was reported

by the judge

DIANA DOBREVA

by adm. case no

13937/2016

The production is Art. 208 et seq. of the Administrative Procedure Code (APC) in connection with Art. 38, para. 6 of the Personal Data Protection Act (PAPA).

It was formed based on a cassation appeal of [company], submitted through a legal representative against decision No. 6477 of 26.10.2016, issued under adm. case No. 5603/2016 of the Administrative Court of Sofia - city (ACSG), which rejected the

appeal of the assessee against decision No. Ж-194/27.04.2016 of the Commission for the Protection of Personal Data (PCLD/Commission). With this her decision, the appeal with reg. No. Ж-194/26.05.2015, submitted by S.N.Ch. against [company] for violation of Art. 4, para. 1 of the Labor Code, given the absence of any of the conditions specified in the same provision for the admissibility of the processing of the applicant's personal data by the company, carried out in the hypothesis of their collection, as on the basis of Art. 42, para. 1 of the Labor Code in connection with item 1 of the decision, an administrative penalty was imposed on [company] - a "property penalty" in the amount of BGN 11,000.

The annulment of the court decision is requested as incorrect due to a violation of the substantive law, a substantial violation of the rules of judicial procedure and unreasonableness - grounds for annulment under Art. 209, item 3 of the APC.

The main complaints of the cassation officer, cited in the cassation appeal and in the court session, are about incorrect application of the substantive law, since when determining the sanction, Art. 327, para. 3 of the Electronic Communications Act (EAC), which is a special law with regard to the PPE. In addition, having accepted as established that there is no contract for the provision of services and therefore there is no consent for the processing of the client's personal data, the court did not take into account the provision of Art. 25, para. 1 of the Labor Code and has transferred the burden of proof for the existence of a contract to the assessee.

The defendant - the Commission for the Protection of Personal Data, through its legal representative, contests the cassation appeal as groundless and claims legal fees.

The representative of the Supreme Administrative Prosecutor's Office gives a conclusion confirming the decision.

The present instance finds the cassation appeal to be procedurally admissible as filed in time and by the proper party. In examining it, it essentially found the following:

In order to establish this legal result, the court accepted that the contested decision of the CPLD is a valid and lawful administrative act that does not suffer from the vices under Art. 146 of the APC. On the basis of the accepted administrative file, the court responded to the arguments of the contesting commercial company and concluded that there was a violation under Art. 4, para. 1, item 2 of the GDPR - processing of personal data without the consent of the person to whom they refer.

According to Art. 218, para. 1 and 2 of the APC, in the cassation proceedings, the court reviews the appealed judgment in accordance with its defects indicated in the complaint, and it is obliged to monitor the validity, admissibility and compliance of the decision with the substantive law ex officio. The court assesses the application of substantive law based on the facts

established by the trial court. Accordingly, taking into account the arguments of the parties and verifying the appealed decision, the court of cassation finds that the same is valid, admissible and correct. This conclusion is drawn by the present panel after discussion of the evidence collected in the case, finding the following from a factual and legal point of view in relation to the committed violation within the meaning of Art. 4, para. 1 of ЗЗЛД:

In the reasons for the decision of the CPLD, it is stated that the appellant Ch. claims that he did not conclude contract No. Ch 0589465 of 15.01.2015, on the basis of which [company] collected his personal data. For its part, [company] claims that such a contract was concluded and was terminated with a contract termination application dated 25.06.2015. By letter No. P-10920/22.12.2015, CPLD requested [company] to present the concluded contract, but this was not done. In view of the distribution of the burden of proof between the parties, the Commission has accepted that the mobile operator has not proved the conclusion of a contract between the parties and therefore the collection of personal data for S. Ch. is in violation of Art. 4, para. 1, items 1 - 7 of the GDPR, i.e. in the absence of a legal basis for their processing.

With the factual situation explained in this way, in the grounds of the appealed court decision, it is accepted that the dispute between the parties is whether the contract was signed by Ch. and whether there is an unlawful use of his personal data in the sense of the Labor Code.

According to item 3 of Section I of the General Terms and Conditions for the relationship between [company] and the subscribers, the contract concluded for the provision of the telecommunications service is in writing, which is a generally known fact. Its existence and authenticity can only be established when this contract is presented and the admissible means of evidence are used. In the cassation appeal, it is unfoundedly claimed that the court did not comply with the provision of Art. 25, para. 1, item 1 of the Personal Data Protection Act, according to which after achieving the purpose of personal data processing or before stopping their processing, the administrator is obliged to destroy them, therefore the contract was destroyed and cannot be presented. The destruction of personal data is not an identical process to the destruction of a written contract, therefore this objection to the appealed decision cannot be accepted.

The present composition shares the conclusion of the ASSG that it has not been established that the procedural contract was concluded in order to have a lawful processing of personal data in the presence of consent and/or in fulfillment of a contractual obligation. The burden of proof for its existence and the identity of its signatories rests with [firm], and no such proof has been made.

The complaint in the cassation appeal that the decision is illegal because the general law was applied instead of the special law is groundless. The provision of Art. 327, para. 3 of the ZES provides for an administrative penalty of BGN 1,000 to BGN 10,000 for an enterprise providing public electronic communication networks and/or services that fails to fulfill an obligation related to ensuring the protection of personal data in the field of electronic communications. The ACSG correctly assumed that this legal provision was not applicable to the trial case and referred to a violation in the transmission of electronic messages. In addition, the violation is clearly related to the non-fulfillment of an obligation under an already concluded contract, which in the present case has not been proven to exist.

As for the amount of the imposed pecuniary sanction, the ASSG has correctly indicated that it is consistent with the nature and degree of the committed violation and is close to the minimum established in the provision of Art. 42, para. 1 of the Labor Code.

In view of the above, there are no grounds for annulment of the first-instance decision and it should be left in force.

With this outcome of the case in favor of CPLD, a legal consultancy fee of BGN 100 should be awarded, for the payment of which [company] should be sentenced.

Led by the above and pursuant to Art. 221, para. 2 of the APC, the Supreme Administrative Court, composition of the fifth department,

RESOLVE:

REMAINS IN FORCE decision No. 6477 of 26.10.2016, issued under adm. case No. 5603/2016 of the Administrative Court Sofia - city.

ORDERS [company] to pay the Commission for the Protection of Personal Data the amount of BGN 100 (one hundred) costs.

The decision is final.

True to the original,

CHAIRMAN:

/p/ Yovka Drazheva

Secretary:

MEMBERS:

/p/ Diana Dobreva

/p/ Emanoil Mitev