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Control Measures in the Company vs. the Fundamental Rights of Workers (Office IT and Video Surveillance)

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The right to honour, to personal and familial privacy and to a personal image is a power that is granted to individuals in order to be able to deny others access to information about their private life, constitutionally recognised by Article 18.1 and reinforced by the category of Fundamental Rights.

There currently exists an important and well-established constitutional doctrine that recognises the effectiveness of these Fundamental Rights in the private sphere, and more specifically in the working environment. But within the company, on occasion, these rights must yield to certain measures that involve limitations upon them.

We refer of course to employer actions designed to ensure that employees are performing their duties correctly and that there is no existing factor that could affect the productivity and efficiency of their work-related performance.

Hence Article 20.3 of the Statute of Workers states the following:

"The employer may take the actions it deems most appropriate in the surveillance and monitoring of the employee in order to verify their compliance with their obligations and work duties, and in the adoption and application of these measures they must maintain the due consideration for human dignity and take the actual capacity of disabled workers into account."

Therefore, in principle, it is lawful for the employer to adopt certain measures designed to investigate the activities carried out by employees over the course of the working day, if they significantly impair the development of the task.

However, even though the only limitation established by Article 20.3 of the Statute of Workers is that of maintaining – in the application as well as in the adoption of the measures - the due respect for the dignity of the employee, this is not to say that all company actions limiting the aforementioned fundamental rights of workers are legal.

However, the employer's auditing powers are restricted, as we shall now explain.

Given the inadequate legal regulation, it is essential to specify the kinds of restrictions on fundamental rights of workers which are actually lawful.

The Constitutional Court has ruled several times on this issue, limiting the circumstances in which restrictions on fundamental rights of workers are justified.

The assessment made by the Constitutional Court on this matter is the relative and conditioned acceptance of the priority of employer interests where justified and where the violation of the fundamental right of workers occurs in accordance with the principle of proportionality.

According to the above, the company's measure must be capable of achieving the proposed objective, in the sense that there exists no other more moderate option for achieving such a purpose with the same efficiency, and this should result in more benefits for the general interest than damages on other conflicting values, as the right to privacy of the worker can be.

Within the powers of control that the employer has over the workers - aimed at limiting activities of a personal nature that could harm the productive system – there are many examples: from controlling office equipment (emails, browsing history, etc.) to the monitoring of telephones and even video surveillance.

The rationale for the measure carried out by the company to be justified and therefore lawful, in addition to proportionality, is the worker's prior knowledge of the control that the company holds and the information to which it has access on work-related matters and even on the person themselves.

Regarding the control of information technology, it is not necessary that this prior knowledge is regulated to a specific standard, being sufficient simply that, in the applicable conventional text, the prohibition of the Company's use of information technology for private purposes is categorized.

In this regard **the Constitutional Court presented Sentence 170/2013,** where it is established that what the Collective Agreement classifies as a misdemeanour in company use of information technology for different purposes other than those related to work performance, from which implicitly derives the power of the Company to control the use of email via sporadic inspection or examination, with the intention of verifying the worker's compliance with their laboral obligations and duties.

Moreover, Sentence 241/2012 of the Constitutional Court considers that, regardless of the regulation on the use of information technology, there exists no infringement on the Right to Privacy if the computer being inspected does not contain passwords, that's to say, when it is a matter of a shared-use computer without a password, to which any user has access, the information found within it does not qualify as secret.

With regards to video surveillance, the Supreme Court states in Sentence 2618/2014 that it is not sufficient just to have signs informing of the presence of video surveillance cameras, nor simply to notify the Data Protection Agency. Rather that what really matters is prior information - precise, clear and unambiguous - for the employees themselves and their representatives, in order to control precisely what will be submitted and the purposes for which it will be used.

Ultimately, the company must first provide information to workers on the possible cases in which recordings could be reviewed, for how long and for what purpose, explaining in detail that this could be used to impose disciplinary sanctions upon a breach of the work contract.

Therefore, taking into account the existing jurisprudence and doctrine on this matter, it is demonstrated (i) that the rights to honour, personal and familial privacy and to a personal image consist in a private and family sphere that not only has an impact upon personal relationships but also other areas, such as employment, (ii) that these fundamental rights can be developed through any means of diffusion, whether they be private or the company's own, and while specific restrictions have not been established, they must continue to be of a private nature and (iii) that legislation currently in force can permit legitimate interference in these rights, in accordance with limitations and the prior knowledge of the employee.

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