

Protection of Employees' Privacy and Personal Information in Spain: General Patterns and Case Law Trends

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1. Protection of employees' privacy and personal information in the Spanish system: general framework overview

The protection of employees' privacy and personal data is nowadays an issue of raising concern, in particular in regard to the impact of the rapid development of information and communication technologies, multimedia tools and increasingly sophisticated audio-visual devices. Obviously, the growing influence of these technical instruments in the workplace context has significantly intensified the chances and possibilities for monitoring of employees. On the other hand, it involves a tendency to fainting borders between personal and professional realm. As a result, workers are more easily exposed not only to a deeper scrutiny by the employer, but also to innovative risks of intrusion in their private sphere and of personal data leakage¹. The already existing

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¹ GAETA, L., 'La dignidad del trabajador y las 'perturbaciones' de la innovación', in APARICIO TOVAR, J./ BAYLOS GRAU, A. (Eds.), *Autoridad y democracia en la empresa*, Trotta, 1992, p. 68 et seq.; MERCADER UGUINA, J. R., 'Derechos fundamentales de los trabajadores y nuevas tecnologías: ¿hacia una empresa panóptica?', *Relaciones Laborales*, num. 10, 2001, p. 11 et seq.; BIAGI, M./ TREU, T., 'Lavoro e Information Technology: riflessioni sul caso italiano', *Diritto delle Relazioni Industriali*, num. 1, 2002, p. 5 et seq.; SEMPERE NAVARRO, A. V./ SAN MARTÍN MAZZUCCONI, C., *Nuevas tecnologías y Relaciones Laborales*, Aranzadi, 2002, p. 32 et seq.; MARTÍNEZ LÓPEZ, F. J./ LUNA HUERTAS, P./ INFANTE MORO, A./ MARTÍNEZ LÓPEZ, L., 'Los sistemas de control de la actividad laboral mediante las nuevas tecnologías de la información y las comunicaciones', *Relaciones Laborales*, num. 12, 2003, p. 95 et seq.; RAMOS LUJÁN, H. V., 'La intimidad de los trabajadores y las nuevas tecnologías', *Relaciones Laborales*, num. 17, 2003, p. 41 et seq.; ALARCÓN CARACUEL, M. R., 'La informatización y las nuevas formas de trabajo', in ALARCÓN CARACUEL, M.R/ ESTEBAN LEGARRETA, R. (Eds.), *Nuevas tecnologías de la información y la comunicación y Derecho del Trabajo*, Bomarzo, 2004, p. 11 et seq.; CAMAS RODA, F. 'La intimidad y la vida privada del trabajador ante las nuevas modalidades de control y vigilancia de la actividad laboral', in ALARCÓN CARACUEL, M.R/ ESTEBAN LEGARRETA, R. (Eds.), *Nuevas tecnologías de la información y la comunicación y Derecho del Trabajo*, Bomarzo, 2004, p. 161 et seq.; GONZÁLEZ ORTEGA, S., 'La informática en el seno de la empresa. Poderes del empresario y condiciones de trabajo', in ALARCÓN CARACUEL, M.R/ ESTEBAN LEGARRETA, R. (Eds.), *Nuevas tecnologías de la información y la comunicación y Derecho del Trabajo*, Bomarzo, 2004, p. 19 et seq.; GOÑI SEIN, J. L., 'Vulneración de derechos fundamentales en el trabajo mediante instrumentos informáticos, de comunicación y archivo de datos', in ALARCÓN CARACUEL, M.R/ ESTEBAN LEGARRETA, R. (Eds.),

awareness on this matter has been ultimately boosted by some latest judgements of the Spanish higher courts, which have been moderately covered by mass media and highly discussed in academic comments recently published².

However, in despite of this quite widespread consciousness on the new challenging threats for employees' privacy and personal data protection, Spanish Labour Law does not offer a complete and detailed statutory regulation on this subject. Nevertheless, it contains at least some general provisions of great importance in this field. First of all, it expressly recognises workers' right to safeguard of their privacy and dignity, including protection against harassment, especially in the cases of discriminatory, gender-related or sexual grounds. This is established as a basic right of the employee in the main legal piece of Spanish Labour Law, the Statute of Workers [SW for short, Royal Legislative Decree 1/1994, 24th March, art. 4.2.e)], in connection to the fundamental right to privacy established in the Spanish Constitution (art. 18)³. On the other hand, a similar right is also recognised to public employees of the civil service in their specific legislation [Act 7/2007, 12th April, Basic Statute of the Public Employee, art. 14.h)].

The Statute of Workers itself provides some further guidelines for protection of this basic right to privacy previously proclaimed. According to article 20 SW, the employer shall respect employees' dignity and privacy when using his managerial powers, and in

Nuevas tecnologías de la información y la comunicación y Derecho del Trabajo, Bomarzo, 2004, p. 49 et seq.; GOÑI SEIN, J. L., 'Controles empresariales: geolocalización, correo electrónico, Internet, videovigilancia y controles biométricos', *Justicia Laboral*, num. 39, 2009, p. 12 et seq.; CALVO GALLEGÓ, J., 'TIC y poder de control empresarial: reglas internas de utilización y otras cuestiones relativas al uso de Facebook y redes sociales', *Aranzadi Social*, num. 9, 2012, p. 125 et seq.

² Constitutional Court Judgements 241/2012, 29/2013 and 170/2013; Supreme Court Judgement 26th September 2007. Some of these decisions have been mentioned in general or financial newspapers (*El País*, 9-10-2013, http://sociedad.elpais.com/sociedad/2013/10/09/actualidad/1381308839_163115.html; *Cinco días*, 9-10-2013, http://cincodias.com/cincodias/2013/10/09/economia/1381313335_489651.html?rel=rosEP; *Expansión*, 24-10-2007, <http://www.expansion.com/2007/10/24/juridico/1049656.html>).

For academic comments about those judgements, CARDONA RUBERT, M. B., 'Reinterpretación de los derechos de intimidad y secreto de las comunicaciones en el modelo constitucional de relaciones laborales: un paso atrás', *Revista de Derecho Social*, num. 60, 2012, p. 169 et seq.; MARÍN ALONSO, I., 'La mensajería electrónica en la empresa: un paso atrás en la protección constitucional del derecho al secreto de las comunicaciones', *Relaciones Laborales*, num. 3, 2013, p. 89 et seq.; MUÑOZ RUIZ, A. B., 'Social Networking: New Challenges in the Modern Workplace', *Spanish Labour Law and Employment Relations Journal*, V. 2, 2013, p. 32 et seq.; SEPÚLVEDA GÓMEZ, M., 'Los derechos fundamentales inespecíficos a la intimidad y al secreto de las comunicaciones y el uso del correo electrónico en la relación laboral. Límites y contra límites', *Temas Laborales*, num. 122, 2013, p. 197 et seq.; CARRASCO DURÁN, M., 'El Tribunal Constitucional y el uso del correo electrónico y los programas de mensajería en la empresa', *Revista Aranzadi Doctrinal*, num. 9, 2014, p. 53 et seq.; MARTÍN VALVERDE, A., 'Uso extralaboral del correo electrónico empleando medios informáticos de la empresa. Control empresarial: requisitos', *Actualidad Laboral*, num. 2, 2014, p. 184 et seq.; MONEREO PÉREZ, J. L./ DEL MAR LÓPEZ INSÚA, B., 'El control empresarial del correo electrónico tras la STC 170/2013', *Aranzadi Social*, num. 11, 2014, p. 225 et seq.

³ About employee's right to privacy in general, GOÑI SEIN, J. L., *El respeto a la esfera privada del trabajador*, Civitas, 1988, p. 21 et seq.; DE VICENTE PACHÉS, F., *El Derecho del Trabajador al respeto de su intimidad*, CES 1998, p. 81 et seq.; RODRÍGUEZ- PIÑERO Y BRAVO- FERRER, M., 'Intimidación del trabajador y contrato de trabajo', *Relaciones Laborales*, num. 8, 2004, p. 1 et seq.; ARIAS DOMÍNGUEZ, A./ RUBIO SÁNCHEZ, F., *El derecho de los trabajadores a la intimidad*, Thomson- Aranzadi, 2006, p. 19 et seq.; FERNÁNDEZ LÓPEZ, M. F., 'La intimidación del trabajador y su tutela en el contrato de trabajo', in CASAS BAAMONDE, M. E./DURÁN LÓPEZ, F./CRUZ VILLALÓN, J., (Eds.), *Las transformaciones del Derecho del Trabajo en el marco de la Constitución Española*, La Ley, 2006, p. 615 et seq.

particular in regard to the adoption of surveillance and control measures for monitoring workers' performance⁴. Article 50 SW allows the employee to claim paid termination of the employment contract when that right has been violated. On the other hand, the employer is entitled by several legal provisions to use disciplinary faculties in order to penalise employees for harming another worker's dignity and private sphere, for example in the case of harassment (namely, art. 54 SW). Finally, some rules stand for protection of employees' privacy and personal data concerning documents transmitted to the workers' representatives for purposes related to information and consultation collective rights (art. 64 and 65 SW).

Moreover, some other legal pieces within Labour Law set up additional provisions on protection of privacy. In the first place, legislation on health and safety at work establishes several cautions concerning monitoring over employees' physical conditions and medical examinations, as it will be explained below. In the second place, regulations on infringements and penalties to be applied by the Labour Inspectorate (Royal Legislative Decree 5/2000, 5th August) explicitly foresee penalties for employers regarding harassment against the employee or violation of his right to privacy. On the other hand, the statutory act on Labour Law litigation (Act 36/2011, 10th October) enables preferential and brief procedures –and some especial facilities and guarantees too– for actions aiming at protecting the constitutional fundamental rights of the worker, including privacy among all others. As a result of this kind of trials, the final judgement can compel to remove any effect of behaviours declared against the worker's constitutional rights, and tort damages can also be awarded. In addition, this procedural law also adopts some caution rules in order ensure respect to privacy within the process itself.

Anyway, Spanish Labour Law offers only general clauses and quite isolated rules in the field of the protection of employees' privacy and personal information, thus requiring integration with support on other provisions. Above all, attention must be paid to the constitutional framework, considering in particular four fundamental rights proclaimed in the Constitution of 1978 with the highest statutory rank and the maximum level of protection: the right to privacy (art. 18.1), the right on self- image (art. 18.1), the right to confidentiality of communications (art. 18.3) and the right to data protection (art. 18.4). As established by the Constitution itself (art. 10), the reference to some of these rights must be additionally interpreted according to applicable supranational texts, namely the regulation of similar rights in the European Convention on Human Rights (art. 8, respect for private and family life) and the EU Charter of Fundamental Rights (art. 7, respect for private and family life; art. 8, data protection).

The recognition of these fundamental rights in the Constitution and in the supranational texts does not specifically address employees in the context of the employment relationship. However, they are applicable in this ground as a result of the aforementioned statutory provisions that proclaim the worker's right to respect for his privacy and dignity [art. 4.2.e) and 20 SW] and, above all, of case law interpretation. In this sense, the Spanish Constitutional Court has repeatedly affirmed the directly binding effects of fundamental rights also within the workplace, considering that 'the conclusion of an employment contract does not imply deprivation of the citizen's rights for [...] the worker', and stating that salaried working for an employer shall not involve 'temporary

⁴ RODRÍGUEZ-PIÑERO Y BRAVO-FERRER, M., 'Intimidación del trabajador y contrato de trabajo', *Relaciones Laborales*, num. 8, 2004, p. 8 et seq.

dispossession or unjustified limitations in regard to Fundamental Rights and Freedoms' of the employees⁵. This includes, among others, the rights to privacy, the right on self-image and the right to data protection⁶. Nonetheless, this case law also remarks that the effects of fundamental rights can be subject to some 'modulations' in the framework of the employment contract in order to safeguard the fulfillment of contractual obligations and the adequate performance of professional tasks⁷. But, at the same time, the Court outlines that these adjustments are acceptable only to the strictly necessary extent required on the basis of legitimate business needs⁸.

Below the constitutional level, further development on constitutional fundamental rights to privacy, self-image and data protection is provided by some statutory provisions that shall be taken into account in regard to the protection of employees' personal and private sphere, although they are general acts outside the boundaries of Labour Law. The first one to mention is Organic Act 1/1982, 5th May, on civil protection of the rights to honour, privacy and self-image, which defines these rights and the basic rules fore their exercise, describing also different types of behaviours to be considered as unlawful intrusions against them. Besides, especial attention must be paid to Organic Act 15/1999, 13th December, on Personal Data Protection (LOPD for short), which was adopted as national transposition of Directive 95/46/EC, the EU common legal framework on data protection. This legal piece provides regulations of a general character, but nonetheless

⁵ Constitutional Court Judgement 88/1985. In the same sense, Constitutional Court Judgements 6/1988, 6/1995, 4/1996, 90/1997, 57/1999, 98/2000, 186/2000, 20/2002 and 49/2003. MOLINA NAVARRETE, C., 'Bases jurídicas y presupuestos políticos para la eficacia social inmediata de los derechos fundamentales (El paradigma de la 'Drittwirkung' laboral a propósito de la reciente jurisprudencia constitucional)', *Revista de Trabajo y Seguridad Social*, num. 3, 1991, p. 63 et seq.; PEDRAJAS MORENO, A. *Despido y derechos fundamentales*, Trotta, 1992, p. 25 et seq.; DEL REY GUANTER, S., 'Derechos fundamentales de la persona y contrato de trabajo: notas para una teoría general', *Relaciones Laborales*, num. 3, 1995, p. 15 et seq.; BILBAO UBILLOS, J. M., *La eficacia de los derechos fundamentales frente a particulares*, BOE/ Centro de Estudios Políticos y Constitucionales, 1997, p. 233 et seq.; ORTIZ LALLANA, C., 'Derechos fundamentales y relación laboral', *Revista del Ministerio de Trabajo y Asuntos Sociales*, num. 13, 1998, p. 17 et seq.; NARANJO DE LA CRUZ, R., *Los límites de los derechos fundamentales en las relaciones entre particulares*, BOE/ Centro de Estudios Políticos y Constitucionales, 2000, p. 206 et seq.; RIVERO LAMAS, J., 'Derechos fundamentales y contrato de trabajo: eficacia horizontal y control constitucional', in MONTOYA MELGAR, A. (Eds.), *El trabajo y la Constitución. Estudios en homenaje al Profesor Alonso Olea*, Ministerio de Trabajo y Asuntos Sociales, 2003, p. 491 et seq.

⁶ Referring explicitly to the rights to privacy and to confidentiality of communications, Constitutional Court Judgements 98/2000, 186/2000, 241/2012 and 170/2013; in regard to the right on self-image, Constitutional Court Judgement 99/1994; concerning the right to data protection, Constitutional Court Judgements 11/1998, 202/1999, 153/2004 and 29/2013.

⁷ Among others, Constitutional Court Judgements 120/1983, 6/1988, 126/1990, 4/1996 and 20/2002. MARTÍN VALVERDE, A., 'Contrato de Trabajo y derechos fundamentales', *Revista de Derecho Social*, num. 6, 1999, p. 14; RODRÍGUEZ- PIÑERO Y BRAVO- FERRER, M., 'La integración de los derechos fundamentales en el contrato de trabajo', in SEMPERE NAVARRO, A. V./ MARTÍN JIMÉNEZ, R. (Eds.), *El modelo social en la Constitución Española de 1978*, Ministerio de Trabajo y Asuntos Sociales, 2003, p. 214 et seq.; GARCÍA MURCIA, J., 'Los derechos de la persona en el ámbito del trabajo asalariado', in GARCÍA MURCIA, J. (Ed.), *Derechos del trabajador y libertad de empresa. 20 casos de jurisprudencia constitucional*, Thomson- Aranzadi, 2013, p. 35 et seq.

⁸ Among others, Constitutional Court Judgements 99/1994, 1/1998 and 186/1996.

applicable in the scope of the employment relationship too, where they can play in fact a relevant role, as seen in sections below⁹.

Collective bargaining agreements could also establish regulations on the protection of employees' privacy and limits to the employer's managerial powers and surveillance faculties, of course within respect to statutory provisions. According to case law, they could play a relevant role by previously determining the terms and circumstances in which monitoring of work shall be implemented. This could be useful to clarify what actions and spaces would be under observation for legitimate business reasons, therefore excluding any expectation of confidentiality, and which others could conversely be preserved as areas suitable for personal or private behaviour. For instance, collective agreements can detail conditions for the employees' use of communication and information technologies at the workplace, consequently enabling some sort of control by the employer, in the sense pointed by an important judgement that will be commented below. This type of practice is increasing rapidly, but it is not really widespread in Spanish collective bargaining nowadays¹⁰. On the other hand, the exact extent to which the collective regulation of these issues shall be admitted and the value that should be given to such collectively agreed rules are still a matter of debate, as it will be seen afterwards.

Anyhow, in the absence of an exhaustive statutory regulation, the frequent conflicts between employer's business aims and the employees' rights to privacy and data protection (art. 18 Constitution) are often solved on the basis of balancing by judges and courts. In fact, specifically in regard to emerging challenges related to the impact of new technologies in the employment relationship context, it has been said that the regulation framework currently available in Spain is basically made of case law patterns¹¹. Accordingly, especial attention must be paid to the relevant guidelines delineated by some leading cases of the Supreme Court of Justice and even of the Constitutional Court, which have already dealt with several disputes about the employer's control over employees and its limits arising from due respect to the workers' constitutional rights, referring in particular to the deployment of audio-visual surveillance devices and to monitoring on the use of computers and electronic communications in the workplace. At the international level, the European Court of Human Rights has also drawn up remarkable standards in this field, declaring the applicability of the rights to privacy and confidentiality of communications established by the European Convention on Human Rights (art. 8) within the framework of the employment relationship, and interpreting their extent in this context by means of very important criteria followed later by the Spanish courts.

⁹ About the impact of Organic Law 15/1999 on Data Protection in the framework of the employment relationship, MARTÍNEZ FONS, D., *El poder de control del empresario en la relación laboral*, CES, 2002, p. 201 et seq.; FERNÁNDEZ VILLAZÓN, L. A., *Las facultades empresariales de control de la actividad laboral*, Thomson-Aranzadi, 2003, p. 117 et seq.; DESDENTADO BONETE, A./MUÑOZ RUIZ, A. B., *Control informático, videovigilancia y protección de datos en el trabajo*, Lex Nova, 2012, p. 79 et seq.

¹⁰ For an exhaustive analysis of the regulations on this matter contained in collective bargaining agreements, SAN MARTÍN MAZZUCONI, C./ SEMPERE NAVARRO, A. V. (Eds.), *Derechos fundamentales inespecíficos y negociación colectiva*, Aranzadi, 2011, p. 138 et seq.

¹¹ CALVO GALLEGO, J. 'TIC y poder de control empresarial: reglas internas de utilización y otras cuestiones relativas al uso de Facebook y redes sociales', *Aranzadi Social*, num. 9, 2012, p. 128.

2. Personal data management in the employment relationship and in the hiring process

Spanish Labour Law does not regulate explicitly the employer's management of workers' personal data during the execution of the contract or in the hiring process. It provides only the already mentioned general clauses and a single reference to excluding the employees' private information from the documents passed on to workers' representatives for information and consultation aims (art. 64 SW). Although general legislation aiming at preserving personal information is applicable in many different contexts, and the employment relationship is not an exception. Organic Act 15/1999 on Data Protection and its complementary regulations are applicable to collection, registration, management and transmission of the employees' personal information by the employer, particularly –although not exclusively- in the case of 'especially protected data' as health condition and clinical facts, trade union or political membership, ideological preferences, religious belief, etc.

Therefore, dealing with personal data in the workplace must be in accordance to both general principles and security rules contained in these legal provisions, which have been interpreted and clarified by the Constitutional Court in its Judgement 292/2000: appropriateness of data handling according to legitimate aims, prohibition of deviated use and proportionality (as set in art. 4 LOPD); prerequisite of previous information and consent by the concerned person, except for data to be considered as strictly necessary for concluding or maintaining the employment contract (as regulated in arts. 5, 6 and 7 LOPD); confidentiality and other guarantees over collecting and keeping of personal information (arts. 10 to 12 and 25 to 32 LOPD), including duties of notification and registration before the Data Protection Agency, the specific public body created for monitoring and ensuring compliance with Data Protection legislation; finally, personal rights legally recognized to rejection, access, correction and cancellation in regard to personal data registration. Additionally, this legislation involves important consequences concerning some kind of measures for monitoring of work, namely the use of video cameras, but this will be explained later.

According to this framework, the employer can access the employees' personal data only on the grounds of pertinent and lawful business reasons and avoiding disproportionate excess in regard to those deemed objectives. The employee must be precisely informed in advance of the aims and extent of data collection, registration and handling. The employer's management of the collected data is limited by these terms of the previous information provided, so the employee's personal facts cannot be used for different purposes or as a basis for broader consequences. Express consent of the worker is needed except in the case of information that is strictly necessary for concluding or maintaining the employment contract (art. 6.2 LOPD). Concerning the 'especially protected data' mentioned above (ideology, trade union membership, health, religion, etc.), the employee's consent shall be not only explicit but also written (art. 7 LOPD). Last but not least, the creation of personal data files and passing on of this kind of information must be notified by the employer to the Data Protection Agency, in the detailed terms established by law (arts. 25 to 34 LOPD).

Especial mention must be made to the information on trade union membership. The employer's awareness of employee's association to a union is quite usual and sometimes even necessary in regard to specific aims legally foreseen and supported (i.e., application

of special guarantees for dismissal of trade union members or discount of trade union contributions from salaries). Nevertheless, this does not imply loss of the protected status of this information, which must be treated accordingly to its consideration as 'specially protected data' in Organic Act 15/1999, in the terms aforementioned. This also means that the employers can only use their knowledge of trade union affiliation of the workers for the concrete objectives that justified the communication of that circumstance. In this sense, a large series of rulings of the Constitutional Court led by Judgement 11/1998 declares unlawful the use of affiliation files created in regard to collection of associates' contributions for the deviated purpose of practising discounts due to strike on the earnings of those employees who were affiliated to the promoter union. On the other hand, the faculty of keeping trade union membership undisclosed is additionally protected by the right to reject revealing ideological or religious belief (art. 16.2 Constitution), as it is highlighted in Judgements 292/1993 and 145/1999 of the Constitutional Court¹². According to these decisions, the workers and their representatives can refuse to communicate this information to the employers, even when this type of requests are authorised by Law or collective agreements in order to check the representativeness of each trade union at the company level, on the grounds of legitimate aims such as assigning collective rights proportionally. In this sort of situations, the Constitutional Court calls for the application of alternative procedures allowing the preservation of the identity of the affiliates unrevealed, in harmony with the orientations on the matter given by the ILO Freedom of Association Committee¹³.

Referring in particular to the hiring process, any tests or enquiries applied must respect constitutional fundamental rights –among others, the rights to privacy, to data protection and the right to refuse revealing ideological or religious belief- and shall also be in line with the application of the commented prescriptions of the legal framework basically contained in Organic Act 15/1999, fulfilling the requirements of pertinence, proportionality, previous information and consent of the interested person. This means that information requests on, for example, affective relations, sexual orientation, ideological preferences or religious belief are in general forbidden, as they are in opposition to legislation on data protection, to good faith principle and, in some cases, to non-discrimination provisions too¹⁴. The employer's scrutiny on these non-professional fields can therefore be rejected by job applicants, who can refuse to answer questions, elude them

¹² GARCÍA MURCIA, J., 'Implantación sindical y acreditación del número de afiliados: entre los derechos fundamentales y el sentido común' (Sentencia 145/1999, de 22 de julio), in ALONSO OLEA, M./ MONTOYA MELGAR, A. (Eds.), *Jurisprudencia Constitucional sobre Trabajo y Seguridad Social*, V. XVII, Civitas, 2000, p. 204 et seq.; MONTOYA MELGAR, A., 'Poder del empresario, libertad sindical y libertad ideológica en la comprobación de los presupuestos para la designación de delegado de Sección Sindical' (Sentencia 292/1993, de 18 de octubre), in ALONSO OLEA, M./ MONTOYA MELGAR, A. (Eds.), *Jurisprudencia Constitucional sobre Trabajo y Seguridad Social*, V. XI, Civitas, 1994, p. 712 et seq.

¹³ ILO Freedom of Association Committee, 336 Report, case num. 2153, par. 166; 302 Report, case num. 2132, par. 661; 327 Report, case num. 2132, par 661.

¹⁴ DE VICENTE PACHÉS, F., *El Derecho del Trabajador al respeto de su intimidad*, CES, 1998, p. 81 et seq.; RODRÍGUEZ- PIÑERO Y BRAVO- FERRER, M., 'Intimidación del trabajador y contrato de trabajo', *Relaciones Laborales*, num. 8, 2004, p. 4 et seq.; FERNÁNDEZ LÓPEZ, M. F., 'La intimidación del trabajador y su tutela en el contrato de trabajo', in CASAS BAAMONDE, M. E./ DURÁN LÓPEZ, F./ CRUZ VILLALÓN, J. (Eds.), *Las transformaciones del Derecho del Trabajo en el marco de la Constitución Española*, La Ley, 2006, p. 664 et seq.

or even lie, as it would be justified in order to preserve his private life without suffering any harmful consequences in the field of employment¹⁵.

3. Audio-visual surveillance in the workplace

The use of audio-visual surveillance devices in the workplace can be justified on the basis of different purposes such as general business or trade security, monitoring of work performance by the employees or compliance with health and safety requirements. And, at least in regard to closed-circuit TV, this is a quite widespread practice in Spain¹⁶. Even though some limits are to be applied, as the deployment of these tools involves a high potential risk for workers' fundamental rights, namely the right to privacy, the right on self-image and the right to personal data protection (art. 18 Constitution)¹⁷. However, Spanish Labour Law does not establish an explicit and detailed statutory regulation specifically referred to audio-visual technologies. As said before, it only provides some general clauses on the safeguard of dignity and privacy as a basic right of the employee [art. 4.2.e) SW], and as a limit to the employer's managerial powers (art. 20 SW).

Nevertheless, there are some general statutory provisions outside the borders of Labour Law, which are also relevant regarding audio-visual surveillance in the workplace. The first legal piece to mention is Organic Act 1/1982 on protection of the rights to honour, privacy and self-image. This act considers that placement of audio, video and optical devices or any other technical instruments for recording or reproducing peoples' private life is an illicit intrusion against the protected rights (art. 7.1 and 2). In addition, it also prohibits the use of photographs, video or any other procedure for capturing, reproducing or publishing the personal image of an individual at any place or moment of his life, private or not (art. 7.5). Nevertheless, these actions can be legitimated both on the basis of

¹⁵ In this sense, it is discussed whether there is a 'right to lie'. Although this might be quite excessive, most academics agree nonetheless that not saying the truth is at least a lawful behaviour when it is the only way for the job applicant to safeguard his personal and private sphere before inappropriate and unlawful enquiries in the hiring process. GOÑI SEIN, J. L., *El respeto a la esfera privada del trabajador*, Civitas, 1988, p. 63; DE VICENTE PACHÉS, F., *El Derecho del Trabajador al respeto de su intimidad*, CES, 1998, p. 96; RODRÍGUEZ CARDO, I. A., *Poder de dirección empresarial y esfera personal del trabajador*, Consejo Económico y Social del Principado de Asturias, 2009, p. 151.

¹⁶ GOÑI SEIN, J. L., 'Controles empresariales: geolocalización, correo electrónico, Internet, videovigilancia y controles biométricos', *Justicia Laboral*, num. 39, 2009, p. 42.

¹⁷ About audio-visual surveillance, DE VICENTE PACHÉS, F., *El Derecho del Trabajador al respeto de su intimidad*, CES, 1998, p. 323 et seq.; LÓPEZ PARADA, R., 'Análisis jurisprudencial acerca de la instalación por el empresario de sistemas de videovigilancia en el lugar de trabajo', *Información Laboral (Jurisprudencia)*, V. 3, 1999, p. 5043 et seq.; MARTÍNEZ FONS, D., *El poder de control del empresario en la relación laboral*, CES, 2002, p. 67 et seq.; FERNÁNDEZ VILLAZÓN, L. A., *Las facultades empresariales de control de la actividad laboral*, Thomson- Aranzadi, 2003, p. 71 et seq.; FERNÁNDEZ LÓPEZ, M. F., 'La intimidad del trabajador y su tutela en el contrato de trabajo', in CASAS BAAMONDE, M. E./ DURÁN LÓPEZ, F./ CRUZ VILLALÓN, J. (Eds.), *Las transformaciones del Derecho del Trabajo en el marco de la Constitución Española*, La Ley, 2006, p. 631 et seq.; DESDENTADO BONETE, A./MUÑOZ RUIZ, A. B., 'El control de la prestación del trabajador a través de las nuevas tecnologías: un estudio sobre la videovigilancia en la doctrina judicial', *Justicia Laboral*, num. 44, 2010, p. 14 et seq.; ÁLVAREZ ALONSO, D., 'Derecho a la intimidad y vigilancia audiovisual en el medio de trabajo: Sentencia TC 98/2000, de 10 de abril', in GARCÍA MURCIA, J. (Ed.), *Derechos del trabajador y libertad de empresa. 20 casos de jurisprudencia constitucional*, Thomson- Aranzadi, 2013, p. 338 et seq.

express consent by the concerned person or in the case of an explicit legal entitlement (art. 2).

In this sense, Act 23/1992 on Private Security (art. 5) allows the installation of video cameras or closed-circuit TV in business places for ensuring security of goods and persons, provided that these devices are fitted and maintained –under certain conditions– by a security firm with previous authorization of the Home Affairs Ministry, not by companies or employers themselves. Besides, Labour Law enables the employer to adopt any surveillance measures he deems in order to verify compliance of working duties and obligations by the employee, albeit it imposes paying due consideration to ‘human dignity’ (art. 20.3 SW). These provisions have been seen as enough legal entitlement for audio-visual monitoring of the workplace, even without the previous consent of workers¹⁸. But they circumscribe the allowance of those surveillance instruments to the mentioned legitimate aims of business security and supervision of working duties compliance, in the strict terms described, thus being unlawful their use in other contexts or for different purposes to those specifically authorised. This means, for instance, that it is banned to focus on some areas of the workplace not directly related to work performance such as bathrooms, locker rooms and rest zones, as case law has emphasised¹⁹. And, as a general rule, it should also be considered forbidden for the employer to apply audio-visual control over the employees’ personal life outside the workplace, except in case of a strong professional reason making it strictly necessary²⁰.

Moreover, the mention of art. 20.3 SW to the worker’s dignity as a limit to the employer’s surveillance powers calls for additional consideration of general law on the protection of fundamental rights and, further ahead, for striking a balance between business necessity and the respect to constitutional rights of the employee which might be involved²¹. In the first place, as audio and video are useful means for registration or transmission of personal information concerning identified or identifiable individuals, the use of audio-visual surveillance may affect the right to data protection (art. 18.4 Constitution) and it is to be submitted to the general provisions on the matter, contained in Organic Act 15/1999 on Personal Data Protection and its complementary regulations. This has been underlined by the Data Protection Agency (AEPD, regulated in the mentioned

¹⁸ GOÑI SEIN, J. L., *El respeto a la esfera privada del trabajador*, Civitas, 1988, p. 141.

¹⁹ Constitutional Court Judgement 98/2000. Referring to a significant amount of judgements of the labour courts in this sense, DESDENTADO BONETE, A./MUÑOZ RUIZ, A. B., *Control informático, videovigilancia y protección de datos en el trabajo*, Lex Nova, 2012, p. 31 et seq. See also MARTÍNEZ FONS, D., *El poder de control del empresario en la relación laboral*, CES, 2002, p. 105 et seq.

²⁰ However, the labour courts have sometimes admitted audio-visual surveillance of employees outside the workplace too generously. For instance, some judgements accept the use of photographs and video recordings obtained by private investigators in public places as valid proof in order to adopt disciplinary decisions against employees for simulating a state of illness. In this sense, Galicia Higher Court Judgement 27th November 2004 and I. Balears Higher Court Judgement 17th October 2008. GOÑI SEIN, J. L., ‘Controles empresariales: geolocalización, correo electrónico, Internet, videovigilancia y controles biométricos’, *Justicia Laboral*, num. 39, 2009, p. 51.

²¹ MERCADER UGUINA, J. R., ‘Derechos fundamentales de los trabajadores y nuevas tecnologías: ¿hacia una empresa panóptica?’, *Relaciones Laborales*, num. 10, 2001, p. 15 et seq.; FERNÁNDEZ VILLAZÓN, L. A., *Las facultades empresariales de control de la actividad laboral*, Thomson- Aranzadi, 2003, p. 83 et seq.

act) regarding in particular the use of video cameras, closed-circuit TV systems, webcams or similar technologies²².

According to this legal framework, these practices shall meet the following requisites²³: the control will be limited to legitimate purposes recognised by law, as said above; monitoring must be circumscribed to what is strictly necessary for business reasons, avoiding intrusion in private behaviours or conversations; the concerned people must be previously informed by means of posters, hand-outs, personalized information and communication to the workers' representatives, in terms legally detailed²⁴; registered images must be cancelled within 30 days (they can be preserved longer only in case of recording an infraction or breach of occupational duties) and third-party access to them is forbidden except in the case of certain legally based grounds; security rules and personal rights to rejection, access, modification and cancellation of personal data registration shall be guaranteed; last but not least, the proportionality principle will be strictly abided²⁵.

The essential role of the proportionality principle has also been highlighted by case law of the Constitutional Court on monitoring of work by audio-visual means, which has established key guidelines to deal with these issues in the absence of fully detailed statutory regulations. The Constitutional Court has declared that the employer's use of these technical surveillance instruments may be lawful, although it must be made compatible with the obliged respect to the fundamental constitutional rights of the worker, in particular the right to privacy (art. 18.1 Constitution), which can be submitted to modulations in the professional context, but only to the strictly necessary extent on the ground of justified reasons. These considerations lead to a balance between the employee's constitutional rights and the employer's needs, for which the main guidelines are given in leading cases 98/2000 and 186/2000 of the Constitutional Court, where the proportionality principle arises as the main tool²⁶.

Judgement 98/2000 refers to the installation of hearing devices for monitoring some areas of a casino (i.e. roulette table), a new surveillance method added to the previously installed closed-circuit TV with the declared aim of enhancing business and clients security. This measure was claimed against by the employees, who considered it as an infringement of the right to privacy, as the Constitutional Court finally did too. The reasoning of this decision states that it had not been proven that audio capturing and recording was absolutely necessary for ensuring security in the game room, sufficiently safeguarded by the already existing closed circuit TV system. On the other hand, this very

²² Royal Decree 1720/2007, 21st December, art. 5.1; AEPD Instruction 1/2006. GOÑI SEIN, J. L., 'Controles empresariales: geolocalización, correo electrónico, Internet, videovigilancia y controles biométricos', *Justicia Laboral*, num. 39, 2009, p. 43 et seq.

²³ GOÑI SEIN, J. L., 'Controles empresariales: geolocalización, correo electrónico, Internet, videovigilancia y controles biométricos', *Justicia Laboral*, num. 39, 2009, p. 45 et seq.

²⁴ AEPD Instruction 1/2006, art. 3.

²⁵ AEPD Instruction 1/2006, art. 4.

²⁶ DESDENTADO BONETE, A./MUÑOZ RUIZ, A. B., 'El control de la prestación del trabajador a través de las nuevas tecnologías: un estudio sobre la videovigilancia en la doctrina judicial', *Justicia Laboral*, num. 44, 2010, p. 16 et seq.; ÁLVAREZ ALONSO, D., 'Derecho a la intimidad y vigilancia audiovisual en el medio de trabajo: Sentencia TC 98/2000, de 10 de abril', in GARCÍA MURCIA, J. (Ed.), *Derechos del trabajador y libertad de empresa. 20 casos de jurisprudencia constitucional*, Thomson- Aranzadi, 2013, p. 338 et seq.

narrow contribution to improving security in the casino was in contrast with the excessive intrusion on privacy caused by the continuous and indiscriminate hearing of all conversations of workers and clients, including those of private nature. The conclusion is that the use of hearing devices was to be considered disproportionate and consequently a violation of the right to privacy²⁷. Since then, labour courts tend to consider audio surveillance of work as unlawful except in very few cases in which it can be justified in the light of the proportionality principle (i.e. recording commercial telephone calls for security reasons in the telemarketing sector, as it will be seen later)²⁸.

Not much later, Judgement 186/2000 of the Constitutional Court deals with the use of a hidden video camera for discovering who among the employees of a supermarket was to be held responsible for repeatedly stealing money from the cash register, in order to subsequently dismiss them on disciplinary grounds. The court makes a balance between the worker's right to privacy and business legitimate needs, applying even more explicitly the proportionality principle as a three-step test on the requirements that any audio-visual surveillance measure adopted by the employer must fulfil to be considered lawful: 1) it shall be useful and adequate in regard to legitimate business aims (adequateness test); 2) it shall be strictly necessary, in the sense that those legitimate aims would not be successfully achieved with less aggressive methods (necessity test); finally, 3) it shall be a balanced measure, avoiding the excessive sacrifice of the worker's rights on behalf of minor business interests (strict sense proportionality test)²⁹.

This scheme is applied by Judgement 186/2000 to the particular circumstances of the case, emphasizing as relevant facts that the video camera was installed only after the appearance of consistent suspicions on stealing, just for the brief period of time needed for the subsequent investigation and exclusively focusing on a very limited area, not recording anything else than the cash register and the workers' hands. These appreciations lead to declare the employer's behaviour lawful, even the furtive nature of watching by means of a hidden camera. This sort of surveillance was considered adequate, necessary and proportionate in the concrete situation examined, as far as a visible device would surely fail in the attempt to get evidence of the previously suspected infringement and to find out who was the guilty employee. Anyhow, following these criteria, later decisions of the labour courts judge monitoring of the workplace by video capturing or recording in regard to the proportionality principle, thus requiring sufficient justification on unfailing business grounds, declaring it unlawfully disproportionate if the observed areas or the number of

²⁷ DEL REY GUANTER, S., 'Los límites del control por el empresario en el centro de trabajo mediante mecanismos auditivos (Comentario a la STC 98/2000, de 10 de abril)', in ALONSO OLEA, M./ MONTOYA MELGAR, A. (Eds.), *Jurisprudencia Constitucional sobre Trabajo y Seguridad Social*, V. XVIII, Civitas, 2000, p. 192 et seq.

²⁸ DESDENTADO BONETE, A./MUÑOZ RUIZ, A. B., *Control informático, videovigilancia y protección de datos en el trabajo*, Lex Nova, 2012, p. 28 et seq.

²⁹ ESCRIBANO GUTIÉRREZ, J., 'El derecho a la intimidad del trabajador. A propósito de la STC 186/2000, de 10 de julio', *Relaciones Laborales*, num. 1, 2001, p. 85 et seq.; MONTOYA MELGAR, A., 'Control del trabajador desleal y alcance del derecho de este a la intimidad (Comentario a la STC 186/2000, de 10 de julio)', in ALONSO OLEA, M./ MONTOYA MELGAR, A. (Eds.), *Jurisprudencia Constitucional sobre Trabajo y Seguridad Social*, V. XVIII, Civitas, 2000, p. 315 et seq.

cameras are excessive and rejecting surreptitious surveillance with hidden devices, except in the case of previous suspicions on a breach of workers' duties³⁰.

More recently, Judgement 29/2013 of the Constitutional Court refers again to the use of video cameras at the workplace, this time in the light of the right to data protection (art. 18.4 Constitution), and assessing in particular the prerequisite of previous information to the observed people, as laid down in Organic Act 15/1999 and its complementary regulations. The facts refer to an employee of the University of Seville who was disciplinary banned for continuous breaches of his working time schedule, using as evidence the recording of his frequent late incoming to the office by the video cameras for controlling access to the buildings. The reasoning of this decision states that the utilization of cameras for monitoring of work requires giving in advance explicit, precise and clear information to the employees about the extent of image capturing and its use for supervision on working duties compliance, except in the case of an explicit legal exemption to this general obligation. In the case, the Court (as the AEPD) considers that these conditions were not properly accomplished, because, although the implementation of video cameras met the terms of law and was correctly adverted by posters in regard to building security aims, there was however no earlier information concerning their deviated use for the different purpose of controlling workers. The judgement concludes therefore declaring the existence of a violation of the fundamental right to data protection, clearly outlining the unlawful character of surreptitious video surveillance not previously announced, to some extent in contradiction with the preceding Judgement 186/2000.

This latest decision could be quite controversial. In fact, a dissenting opinion signed by Judge Andrés Ollero Tassara emphasizes the mentioned discordance in regard to Judgement 186/2000 and criticizes the absence of an adequate balancing between the protection of the worker's rights and legitimate business needs according to the proportionality principle, suggesting that this could have led to a different solution. It also remarks that the reasoning of Judgement 29/2013 ignores some relevant facts of the case that, from this other point of view, should have been considered more carefully: on the one hand, that governmental authorizations given to the University of Seville for the use of video recording files included one explicitly referred to 'monitoring access of persons belonging to University's community'; on the other hand, that the areas under video surveillance were public places and that the presence of cameras was clearly adverted by informative posters which were noticeable for anyone³¹.

Anyhow, the new case law guidelines provided by Judgement 29/2013 could be of great importance. First of all, this decision underlines the relevance of giving precise information in advance as a general prerequisite for the use of cameras or CCTV for the monitoring of workers, therefore questioning undisclosed video observation in a more strict way that it had been already done before. This statement should lead to the revision of the former criteria adopted by several labour courts, which used to accept the utilisation of hidden devices in too broad terms, on the basis of mere suspicions of a breach of

³⁰ DESDENTADO BONETE, A./MUÑOZ RUIZ, A. B., *Control informático, videovigilancia y protección de datos en el trabajo*, Lex Nova, 2012, p. 25 et seq.; ÁLVAREZ ALONSO, D., 'Derecho a la intimidad y vigilancia audiovisual en el medio de trabajo: Sentencia TC 98/2000, de 10 de abril', in GARCÍA MURCIA, J. (Ed.), *Derechos del trabajador y libertad de empresa. 20 casos de jurisprudencia constitucional*, Thomson- Aranzadi, 2013, p. 361 et seq.

³¹ Sharing that criticism, RODRÍGUEZ COPÉ, M. L., 'Facultades de control empresarial y circuito cerrado de televisión', *Temas Laborales*, num. 121, 2013, p. 199 et seq.

working obligations and regardless of the seriousness of those infringements³². But, furthermore, this innovative doctrine of the Constitutional Court also reinforces the conditions and limits applicable to the deployment of these video surveillance instruments with the aim of controlling employees, even when it is done in open access areas and by means of perfectly visible equipments, without an unrevealed or furtive nature. This points again to the reconsideration of the traditional orientations followed by some earlier judgements, which quite often tended to validate video surveillance over workers without previous explicit announcement when it was done in public places open to observation by anyone³³.

4. Control over employee's communications (I): general rules and traditional tools

Communication instruments available in the workplace, as telephones or postal service facilities among the most traditional, are to be seen above all as tools of the employer's property that are meant to be used by employees primarily for business aims. Given the fact that they are supposed to be applied mainly for commercial and professional tasks and they entail costs and risks of improper utilization, it is reasonable to admit the employer's legitimate interest in establishing some controls. Nevertheless, as long as those resources easily offer possibilities for a double professional and personal use, which is often culturally assumed and tolerated in our societies, monitoring must surely be submitted to some cautions, in order to safeguard the workers' private sphere and to avoid the employers' abuse. Although there are not explicit and detailed statutory provisions on the matter in Spanish Labour Law, some already mentioned general clauses [art. 4.2.e) and 20.3 SW] validate this type of controls, but abiding respect to the employee's dignity and right to privacy (art. 18.1 Constitution). In addition, attention must be paid to another fundamental right particularly relevant in this specific field: the right to confidentiality of communications (art. 18.3 Constitution)³⁴.

This framework shall be applied taking into consideration important case law on the matter drawn up by the European Court of Human Rights. The leading Judgement of 25th June 1997 (*Halford vs. UK*) refers to a female police officer, whose office telephones were submitted to interception by higher rank officers for the purpose of obtaining information to use against her in discrimination proceedings she had initiated before. The Court declares that this was a violation of the European Convention on Human Rights, stating important criteria that can be summarized as follows: calls made from or to businesses may also be covered by the right to private life and the guarantees against interception of communications established in art. 8 of the Convention, which is violated when the employer intercepts them surreptitiously and without any previous warning, acting thus

³² GOÑI SEIN, J. L., 'Controles empresariales: geolocalización, correo electrónico, Internet, videovigilancia y controles biométricos', *Justicia Laboral*, num. 39, 2009, p. 48.

³³ Referring to several decisions of labour courts in this sense, DESDENTADO BONETE, A./MUÑOZ RUIZ, A. B., *Control informático, videovigilancia y protección de datos en el trabajo*, Lex Nova, 2012, p. 35 et seq. See also, FERNÁNDEZ VILLAZÓN, L., 'Tiempos de labor y otros tiempos retribuidos: los controles y sus límites', in ARGÜELLES BLANCO, A. R./ ROMERO BURILLO, A. M. (Eds.), *Régimen jurídico y gestión racional del tiempo en la empresa*, Aranzadi, 2013, p. 160 et seq.

³⁴ Particularly in regard to telephone calls and postal service communications, FERNÁNDEZ VILLAZÓN, L. A., *Las facultades empresariales de control de la actividad laboral*, Thomson- Aranzadi, 2003, p. 92 et seq.

against a ‘reasonable expectation of confidentiality’ held by the employee on the basis of preceding authorization or simply tolerance of private use of office telephones.

These guidelines have been followed by Spanish Labour Courts, assuming in particular the standard of the ‘reasonable expectation of confidentiality’. Nonetheless, they allow phone tapping or even recording of calls in the workplace when some requirements are fulfilled, in order to preserve the workers’ right to privacy. In this sense, the leading case is surely a Judgement of 5th December 2003 of the Supreme Court, which validates control over communications between clients and employees in the telemarketing sector, as long as applied to telephones provided expressly and exclusively for professional use, with previous explicit warning and information to workers on the monitoring system, and just to the extent strictly needed for legitimate business aims, according to the proportionality principle³⁵.

To conclude this summary of relevant case law, one should also mention Judgement 114/1984 of the Constitutional Court, which clarifies the correct interpretation of the specific right to confidentiality of communications (art. 18.3 Constitution) in the case of a telephone call between a worker and one of his bosses, recorded by the last and subsequently used as evidence for disciplinary dismissal. The Court outlines that this right protects freedom and confidentiality of correspondence and telephonic communications in the sense of forbidding third- party interception of the message and intrusive external access to its content –regardless of being of private character or not- or to other data as the interlocutors’ identity. However, it does not prevent the recording of or storing the conversation by one of its internal partners, although further transmission to other people might be against the right to privacy (art. 18.1 Constitution) when the information is in fact of private nature. On this basis, the judged capturing of the telephone call, which was not of private substance, was considered not contrary to the fundamental right alleged by the employee.

5. Control over employee’s communications (II): e-mail and other Internet messaging software

Obviously, new technologies have hugely increased facilities and the variety of tools available for communication in the workplace context and also the possibilities for their monitoring, hence deepening the problem of harmonizing the employer’s legitimate interest in supervision and, on the other hand, the safeguard of the employee’s privacy and dignity against abusive intrusions. The already common use of instruments as e-mail or Internet messaging software (i.e. MSN Messenger, Whatsapp, Line, Trillian...) and widespread social networking (among others, on Facebook, Twitter, Google+ or LinkedIn), often with an unclear mix of personal and professional purposes or private and public contents, involves innovative potential risks and challenges for Law in different fields, including the one of the employment contract.

³⁵ DESDENTADO BONETE, A./MUÑOZ RUIZ, A. B., *Control informático, videovigilancia y protección de datos en el trabajo*, Lex Nova, 2012, p. 28 et seq.; ÁLVAREZ ALONSO, D., ‘Derecho a la intimidad y vigilancia audiovisual en el medio de trabajo: Sentencia TC 98/2000, de 10 de abril’, in GARCÍA MURCIA, J. (Ed.), *Derechos del trabajador y libertad de empresa. 20 casos de jurisprudencia constitucional*, Thomson- Aranzadi, 2013, p. 362.

However, legislation goes clearly behind reality in this ground and, not surprisingly, Labour Law does not offer explicit statutory regulations on the matter³⁶. Therefore, the rapidly growing amount of conflicts arising is being dealt with by means of *ad hoc* solutions of the courts in the light of the constitutional rights to privacy (art. 18.1 Constitution) and confidentiality of communications (art. 18.3 Constitution), frequently using the method of balancing and the proportionality principle and applying analogically some previous case law guidelines originally drawn up in regard to more traditional instruments as video cameras and telephones, as it has been explained in the sections above. Although the resulting judicial answers to these issues are not sufficiently unified and consolidated, some leading cases within case law of the higher courts can at least be summarized here³⁷.

Judgement 3rd April 2007 (Copland vs. UK) of the European Court of Human Rights declares the violation of the right to privacy and confidentiality of communications (art. 8 of European Convention on Human Rights) in the case of a female worker of a Higher Education College whose telephone calls, e-mails and Internet navigation were widely spied by her supervisor, adducing as justifiable aim the investigation of a possible abuse in personal use of College's facilities. The Court recognizes that monitoring of the employee's use of telephones, e-mail and Internet in the workplace may be allowed to the employer on the ground of legitimate purposes foreseen by law and under certain conditions. But these practices are rejected when they are applied, as in the judged case, in the lack of a consistent legal entitlement and in a surreptitious way, without previously informing the employee and outside the boundaries of a clear and published general policy on control measures and privacy. The absence of these earlier warnings would create a 'reasonable expectation on privacy' for workers, a context of confidence for private behaviours and communications that are to be protected against unforeseen and unapproved intrusions, in the sense already outlined by the aforementioned Judgement of 25th June 1997 (Halford vs. UK).

Among case law of the Constitutional Court, the first decision to mention is Judgement 241/2012, about two employees who were disciplinary banned for offensive comments on other workers, clients and supervisors made in conversations through an Internet instant messaging programme (Trillian) that they had installed in a computer at the workplace. Another worker discovered by chance those conversations and informed the supervisors, who decided to fully read the whole content of the dialogues by means of checking the folders and temporary files of the computer in which they were automatically recorded. The involved employees claimed that this behaviour was a violation of their rights to privacy (art. 18.1 Constitution) and to confidentiality of communications (art. 18.3 Constitution). However, the Court refused this allegation relying in two relevant facts:

³⁶ In the absence of a more precise statutory regulation on employer's monitoring of employees' electronic communications, some scholars have drawn up different proposals of guidelines to follow. FERNÁNDEZ VILLAZÓN, L. A., *Las facultades empresariales de control de la actividad laboral*, Thomson-Aranzadi, 2003, p. 123 et seq.; GOÑI SEIN, J. L., 'Controles empresariales: geolocalización, correo electrónico, Internet, videovigilancia y controles biométricos', *Justicia Laboral*, num. 39, 2009, p. 32 et seq.; COLÀS NEILA, E., *Derechos fundamentales del trabajador en la era digital: una propuesta metodológica para su eficacia*, Bomarzo, 2012, p. 145 et seq.

³⁷ For a more exhaustive analysis of the guidelines outlined by the labour courts in regard to the employer's control on the employees' use of e-mail, MARÍN ALONSO, I., *El poder de control empresarial sobre el uso del correo electrónico de empresa*, Tirant lo Blanch, 2005, p. 126 et seq.

1) the computer was for common use of different workers, and anyone had full access to it even without a password; 2) there were explicit and previous instructions given by the employer forbidding installation of software without authorization in the office computers and preventing their use for non-professional purposes.

Taking into account those particular circumstances, the judgement declares that there was not a 'reasonable expectation of confidentiality' in the sense of the above explained European case law, denying the existence of violation of the right to privacy as the workers themselves were who decided to carelessly make those comments in a context in which confidentiality was not likely. And, in regard to the right on confidentiality of communications, the Court outlines that it refers exclusively to closed transmission channels, therefore not being applicable to those which are open to foreseeable third-party access, as was considered in this case³⁸. Nevertheless, the solution given in this judgement is quite controversial, and it has been emphatically criticised in a dissenting opinion signed by two of the members of the Court (Fernando Valdés Dal-Ré and Adela Asua Batarrita). In their opposite view, the open access of office computers and previously established general prohibition of installing software in those equipments are not enough basis to enable any kind of employer's monitoring over Internet messaging between employees. These judges highlight that supervisors could have adopted disciplinary measures as soon as they had noticed unauthorized use of the computers, with no need of reading the private content of the messages among the workers. But they preferred to wait and –for more than two months- furtively spy employees' communications by exhaustively searching temporary files and fully reading the conversations, behaviour that should have been considered as absolutely unlawful. On the other hand, the disagreement also refers not only to the concrete decision adopted in this case, but also to the idea underlying its reasoning in the sense that the employer seems to be entirely free for unilaterally establishing prohibitions and conditions in regard to the use of information and communication technologies in the workplace.

More recently, Judgement 170/2013 of the Constitutional Court refers to an employee of a chemical company who was disciplinary dismissed for passing on industrial information to another company, unfaithfulness that was evidenced by checking some e-mails sent from his business account. Conversely to the allegations of the worker, the Court declares that those checks did not violate the right to privacy (art. 18.1 Constitution), nor the right to confidentiality of communications. The decision deems that in the circumstances of the case there was no 'reasonable expectation of confidentiality' to be protected, given that disciplinary regulations in the collective bargaining agreement applicable explicitly banned non-professional use of business e-mail account, implicitly pointing to the employer's monitoring on those tools as foreseeable, and leading consequently to decline its consideration as a surreptitious intrusion on the private sphere or as an unlawful interception over closed-channel communications. On the other hand, the control is considered not disproportionate as it was adopted regarding a previously suspected infringement of occupational duties and just to the necessary extent, referring to just a few mails of strictly professional –not private- content.

This last decision can be subject to some discussion too. In particular, it is doubtful to what extent the disciplinary regulations contained in collective bargaining agreements in

³⁸ MUÑOZ RUIZ, A. B., 'Social Networking: New Challenges in the Modern Workplace', *Spanish Labour Law and Employment Relations Journal*, V. 2, 2013, p. 34.

regard to electronic communications can be deemed as sufficient previous warning to workers in order to make all 'expectations of confidentiality' decline, consequently enabling any kind of interception of e-mails or Internet messaging by the employer³⁹. In this sense, the aforementioned case law of the European Court of Human Rights requires information in advance to the concerned people about what is going to be submitted to supervision, specifying clear and precise indications on the concrete methods and instruments of control which are going to be applied⁴⁰. These strict requirements do not seem to be adequately accomplished by the sole regulation of prohibitions and disciplinary consequences related to improper use of information technologies in sector collective agreements. In a more correct understanding of the guidelines given by the European Court, expectations of confidentiality could only be fully excluded on the basis of a much more explicit and detailed announcement of surveillance measures and privacy policy at the company level⁴¹.

In conclusion, although the general patterns outlined by these latest judgements of the Constitutional Court are surely correct, they are probably not enough to solve all kinds of conflicts concerning monitoring of electronic communications in the workplace, and they also are arguable in some aspects. In fact, they have raised up an intense debate among scholars, many of whom regard Judgements 241/2012 and 170/2013 as 'a step backwards' in the protection of employees' privacy and personal sphere at the workplace⁴², whilst some others consider them equilibrate decisions⁴³. Hence, further clarifying on those particular issues pointed out and, in broader terms, on possibilities and limits of employer's control over e-mails and other Internet messaging tools is surely needed. New interesting contributions by scholars and forthcoming judgements are surely to be expected.

6. Further control on computers and Internet browsing

Leaving apart the specific issue of the interception of e-mails and other electronic communications, employers can be interested in monitoring the use of computers in the

³⁹ SEPÚLVEDA GÓMEZ, M., 'Los derechos fundamentales inespecíficos a la intimidad y al secreto de las comunicaciones y el uso del correo electrónico en la relación laboral. Límites y contra límites', *Temas Laborales*, num. 122, 2013, p. 209 et seq.; MONEREO PÉREZ, J. L./ DEL MAR LÓPEZ INSÚA, B., 'El control empresarial del correo electrónico tras la STC 170/2013', *Aranzadi Social*, num. 11, 2014, p. 225 et seq.

⁴⁰ European Court of Human Rights Judgements of 25th June 1997 (Halford vs. UK) and 3rd April 2007 (Copland vs. UK).

⁴¹ CARRASCO DURÁN, M., 'El Tribunal Constitucional y el uso del correo electrónico y los programas de mensajería en la empresa', *Revista Aranzadi Doctrinal*, num. 9, 2014, p. 53 et seq.

⁴² CARDONA RUBERT, M. B., 'Reinterpretación de los derechos de intimidad y secreto de las comunicaciones en el modelo constitucional de relaciones laborales: un paso atrás', *Revista de Derecho Social*, num. 60, 2012, p. 169 et seq.; MARÍN ALONSO, I., 'La mensajería electrónica en la empresa: un paso atrás en la protección constitucional del derecho al secreto de las comunicaciones', *Relaciones Laborales*, num. 3, 2013, p. 89 et seq.; MONEREO PÉREZ, J. L./ DEL MAR LÓPEZ INSÚA, B., 'El control empresarial del correo electrónico tras la STC 170/2013', *Aranzadi Social*, num. 11, 2014, p. 216 et seq.; SANTIAGO REDONDO, K. M., 'Intimidad, secreto de las comunicaciones y protección de datos de carácter personal. El art. 18 CE', *Relaciones Laborales*, num. 1, 2014, p. 119 et seq.

⁴³ In regard to Judgement 170/2013, MARTÍN VALVERDE, A., 'Uso extralaboral del correo electrónico empleando medios informáticos de la empresa. Control empresarial: requisitos', *Actualidad Laboral*, num. 2, 2014, p. 184 et seq.

workplace in a broader sense. In particular, they might be concerned by the proper use of Internet browsing for several reasons: ensuring that employees do not waste their working time in non-professional activities as, for example, reading newspapers, watching YouTube videos or social networking⁴⁴; preventing potential risks for the equipment as cookies, viruses and spy software upcoming from navigation on unsecure websites; last but not least, preventing the use of professional computers as an instrument for unlawful behaviours or even criminal offences as, for instance, sharing illicit pornography. There are not explicit statutory rules in regard to this matter, but case law of the Supreme Court has already dealt with some conflicts related to the employer's supervision of internet browsing by the employees, mainly through checking of temporary files stored in computers, as they are like the track left behind of the visited websites.

In a case solved by a Judgement of 26th September 2007 of the Supreme Court, the repair of a virus infection in an employee's computer allowed to discover (by checking temporary files) that the source of contamination was Internet navigation on unsecure sites of pornographic content, and this lead subsequently to the dismissal of that worker. Reasoning on the involved rights and interests, the Court declares that, on the one hand, the employer is entitled to monitor computers of his own property; but, on the other hand, that should be done respecting the workers' right to privacy, which extends its protection to private information deduced from internet temporary files. Looking for a balanced solution, the judgement follows the above explained guidelines of the European Court of Human Rights in Judgements Halford and Copland, therefore considering that employer's controls on Internet browsing are lawful when they are predictable according to previous warnings or company level regulations, but they are on the contrary a violation of the worker's fundamental rights when practised without earlier information and therefore against a 'reasonable expectation of privacy', as it had happened in the judged case.

The Supreme Court gives a very similar answer in a more recent Judgement of 8th March 2011, this time in regard to the dismissal of a worker after a technical audit of informational systems in the company, which revealed that he had been spending a huge part of his working time browsing on Internet contents as videos and other multimedia entertainment resources, commercial advertisements and piracy software websites. As in the aforementioned case, the Court relies on earlier case law on 'reasonable expectations of confidentiality', therefore concluding that this sort of monitoring is to be considered as a violation of the right to privacy when unexpectedly applied in the lack of a previous warning or regulation on the matter.

Finally, in a later Judgement of 6th October 2007, the Supreme Court deals with the disciplinary dismissal of an employee who, ignoring the explicit instructions and prohibitions set by the employer, repeatedly used the Internet during working time and from her office computer for personal aims such as selling used goods, visiting travel agency websites and managing a small business of her own. All this was evidenced by means of installing spy software that enabled to furtively capture and to reproduce afterwards all the screens successively shown in the computer. In this case, the Court denies the existence of a violation of the right to privacy, considering that no 'reasonable expectation of confidentiality' could be alleged, given the fact that there was a previous

⁴⁴ Referring in particular to social networks, CALVO GALLEGOS, J. 'TIC y poder de control empresarial: reglas internas de utilización y otras cuestiones relativas al uso de Facebook y redes sociales', *Aranzadi Social*, n. 9, 2012, p. 146 et seq.; MUÑOZ RUIZ, A. B., 'Social Networking: New Challenges in the Modern Workplace', *Spanish Labour Law and Employment Relations Journal*, Vol. 2, 2013, p. 32 et seq.

explicit instruction -lawfully adopted by the employer- in the sense of absolutely prohibiting any non-professional use of telephones, computers, Internet and any other tools provided by the company.

However, a dissenting opinion to this judgement signed by five judges considers that the existence of an absolute prohibition of using computers for personal aims is not sufficient by itself for making expectations of confidentiality decline, thus legitimating any kind of monitoring by the employer. According to this opposite view, the employer should additionally have informed on the type and extent of the exact control measures to be applied. The conclusion in regard to the circumstances of the case is that a violation of the right to privacy should have been declared, as there was no previous warning on the use of such a specific surveillance mean as spy software, by the way seen as a particularly invasive method.

In conclusion, the doctrine on 'reasonable expectations of confidentiality' has become an important milestone in the field of monitoring on computers and Internet browsing at the workplace, according to European and national relevant case law. This scheme tends to give great importance to the previous publishing of the employer's 'privacy and control' policy on the matter or even to the adoption of preceding company level regulations and prohibitions in regard to the use of new technologies by the employees, as these instruments seem to be entitled to respectively delimitate in advance which areas are to be considered within the confidential sphere and which others are exposed to legitimate supervision. Nevertheless, some aspects of these reasoning patterns could be still unclear or even controversial. Firstly, it is doubtful to what extent the employers can absolutely ban employees' personal use of new technologies through that kind of rulings. Some authors reasonably argue that the employer should not be considered entirely free to unilaterally forbid any sort of non professional utilisation of those tools, demanding at least an analysis of proportionality according to legitimate business needs and supporting that a minimum space for autonomous behaviour is needed to preserve employee's dignity⁴⁵. Secondly, it is also questionable if the sole existence of those prohibitions is sufficient basis for making all expectations of confidentiality vanish. In fact, to some extent in contradiction with the last ruling of the Supreme Court mentioned, a closer look at the criteria outlined by the European Court of Human Rights leads to affirm that a simple interdiction of a broad and general character is not enough to exclude any kind of privacy expectations, which can only be effectively weakened by much more explicit and precise warnings on the control measures deployed. Finally, this matter should also be regarded in the light of other different criteria that seem to be currently underrated by some courts, namely the rules and principles arising from legislation on data protection (Organic Act 15/1999), that are surely applicable to processing of personal information by means of information technologies, especially when using such invasive tools as 'spy software'⁴⁶.

⁴⁵ CALVO GALLEGOS, J. 'TIC y poder de control empresarial: reglas internas de utilización y otras cuestiones relativas al uso de Facebook y redes sociales', *Aranzadi Social*, n. 9, 2012, p. 131 and 140; FERNÁNDEZ VILLAZÓN, L. A., *Las facultades empresariales de control de la actividad laboral*, Thomson- Aranzadi, 2003, p. 111 et seq.

⁴⁶ In this sense, FERNÁNDEZ VILLAZÓN, L. A., *Las facultades empresariales de control de la actividad laboral*, Thomson- Aranzadi, 2003, p. 113 et seq.; GOÑI SEIN, J. L., 'Controles empresariales: geolocalización, correo electrónico, Internet, videovigilancia y controles biométricos', *Justicia Laboral*, num.

7. Medical examinations and health data

Medical examinations on employees at the request of the employer are explicitly legitimated in Spanish legislation in regard to justifiable aims mainly related to health and safety at work. Nevertheless, they often involve invasive practices and allow to obtain sensitive personal data, so they must be submitted to some cautions. In this sense, Act 31/1995 on Prevention of Hazards at Work (art. 22) establishes the following rules and principles: the monitoring on workers' health must be performed within respect to the worker's privacy and dignity; the check-ups require previous consent of the employee, with the exception of explicit legal entitlement in regard to specific hazards or when strictly necessary either for the evaluation of the impact of working conditions on health or to prevent danger to the worker himself or to others⁴⁷; the proportionality principle shall be abided, so medical examinations must be in correspondence with the risks to prevent and the less invasive as possible; finally, the results of health analyses must be treated confidentially and cannot be used for discriminating or harming the employee. Besides, information on an individual's physical condition is to be regarded under the framework of Organic Act 15/1999 on Personal Data Protection, therefore being also applicable not only its regulations on confidentiality of health data, but also all other guarantees foreseen in this legal piece.

There is also some important case law in regard to medical examinations. First of all, Judgement 196/2004 of the Constitutional Court declares the existence of a violation of the right to privacy in the case of an employee dismissed due to the results of a check-up, which revealed consumption of 'cannabis'⁴⁸. The Court emphasises that the right to privacy involves several different conditions and limits to these examinations over workers, some of them explicitly endorsed by statutory law, and some others stated in this case law decision. In the first place, they must be voluntarily accepted, except in the case of a specific legal entitlement for establishing their obligatory character in regard to individual or collective rights and interests of other people or strict necessity. In the second place, valid consent to medical inspection requires earlier information on the aims and the extent of the checks to be made. Finally, the data obtained must be treated confidentially and cannot be used for different purposes to those mentioned in the information previously provided, unless the interested person gives express authorisation⁴⁹. According to these requirements, the absence of 'informed consent' and the deviated use of the analysis results determined the unfairness of the dismissal in the concrete case judged.

39, 2009, p. 30 et seq.; THIBAUT ARANDA, J., 'La vigilancia del uso de internet en la empresa y la protección de datos personales', *Relaciones Laborales*, num. 5-6, p. 67 et seq.

⁴⁷ About these medical examinations of compulsory character, DE VICENTE PACHÉS, F., *El Derecho del Trabajador al respeto de su intimidad*, CES, 1998, p. 279 et seq.; MARTÍNEZ FONS, D., *La vigilancia de la salud de los trabajadores en la Ley de Prevención de riesgos laborales*, Tirant lo Blanch, 2002, p. 35 et seq.

⁴⁸ RUIZ CASTILLO, M. M., 'Derecho a la intimidad y controles de salud en la persona del trabajador: sentencia TC 196/2004, de 15 de noviembre', in GARCÍA MURCIA, J. (Ed.), *Derechos del trabajador y libertad de empresa. 20 casos de jurisprudencia constitucional*, Thomson- Aranzadi, 2013, p. 35 et seq.

⁴⁹ DE VICENTE PACHÉS, F., *El Derecho del Trabajador al respeto de su intimidad*, CES, 1998, p. 272 et seq.; MARTÍNEZ FONS, D., *La vigilancia de la salud de los trabajadores en la Ley de Prevención de riesgos laborales*, Tirant lo Blanch, 2002, p. 29 et seq.; FERNÁNDEZ LÓPEZ, M. F., 'La intimidad del trabajador y su tutela en el contrato de trabajo', in CASAS BAAMONDE, M. E./DURÁN LÓPEZ, F./CRUZ VILLALÓN, J. (Eds.), *Las transformaciones del Derecho del Trabajo en el marco de la Constitución Española*, La Ley, 2006, p. 658 et seq.

Moreover, Judgements 202/1999 and 153/2004 of the Constitutional Court refer to the protection of facts and figures related to health as personal and reserved information, covered by the protection of constitutional fundamental rights. Both cases deal with the employer's attempt to keep a file for registering and controlling employees' absences to work because of illness. The Court recognises that fighting against absenteeism at work is a legitimate aim. Nevertheless, these two judgements disclaim the described practice, which is to be considered as a violation of the rights to privacy (art. 18.1 Constitution) and to data protection (art. 18.4 Constitution)⁵⁰. On the other hand, except in the case of some explicit legal entitlements, storing information on employee's medical circumstances without their consent (or against their will) is clearly in direct contradiction to statutory provisions contained in Organic Act 15/1999 on Personal Data Protection (art. 7).

8. Conclusions

Spanish Labour Law does not provide a fully detailed statutory regulation framework on the protection of employees' privacy and personal information. In the absence of sufficiently explicit and complete legal rules, judgements of the higher courts have accomplished a key role in this matter, delineating useful patterns in regard to disputes between the employer's legitimate interest in monitoring of work or using personal information and, on the opposite side, the need to safeguard the employees' rights. In general, this case law response by means of instruments like the proportionality principle or the standard referred to 'reasonable expectations of confidentiality' has allowed suitable solutions for conflicts arising from the use of new technologies.

In fact, this approach has shown enough adaptability and flexibility to adequately deal with new problems not sufficiently foreseen within written legislation. However, it is doubtful whether *ad hoc* balancing by judges -even through the proportionality principle and the criteria based on confidentiality expectations- is the most appropriate method to face every kind of challenges that the rapid innovation of information and communication tools entails in relation to conflicts amongst business interests and the protection of workers' privacy. As seen above, these case law solutions are quite often controversial and sometimes not completely unified, therefore leaving in the air some feeling of uncertainty⁵¹. In particular, as it has been already remarked, some of the commented latest judgements about interception of electronic communications by the employer have risen up an intense debate between dissenting opinions among judges and scholars, what undoubtedly points to the convenience of a more explicit statutory regulation.

Consequently, further completion of the existing legal regulation would surely be desirable, for instance, by providing some basic statutory rules on the employees' use of computers and the Internet at the workplace and on the extent and limits of the employer's control over it. Besides, it would be also recommendable to establish more explicit provisions on how legislation on data protection should be applied in the scope of the employment relationship. In this sense, the current revision process regarding the European Union common framework on the matter contained in Directive 95/46/EC could be a good

⁵⁰ RODRÍGUEZ-PIÑERO Y BRAVO-FERRER, M., 'Intimidad del trabajador y contrato de trabajo', *Relaciones Laborales*, num. 8, 2004, p. 7.

⁵¹ GOÑI SEIN, J. L., 'Controles empresariales: geolocalización, correo electrónico, Internet, videovigilancia y controles biométricos', *Justicia Laboral*, num. 39, 2009, p. 18.

chance for more specifically and clearly addressing the application of these rulings in the workplace. Finally, regardless of that supplementary development, it seems opportune to remind that the rules and principles contained in Organic Act 15/1999 on Data Protection are already binding in that context, and cannot therefore be ‘forgotten’ or replaced by judges’ own valuations when solving disputes through balancing between the employer’s needs and the employee’s rights, as it may have occurred sometimes⁵².

⁵² Pointing in a similar direction, GOÑI SEIN, J. L., ‘Controles empresariales: geolocalización, correo electrónico, Internet, videovigilancia y controles biométricos’, *Justicia Laboral*, num. 39, 2009, p. 15 et seq.