

TEACHING NOTE

1. Teaching objective: Why are we teaching this case?

The objective of this case study for the student is to analyse the current regulations on a subject of some interest, which is becoming increasingly frequent in practice and in which various legal institutions converge: the issues arising from surveillance by audiovisual means in the workplace. In addition, the student will have to become familiar with the procedural rules of domestic law and those specific to the ECtHR for the submission of applications to this international judicial body.

Therefore, the student will have to deal with the international and EU law regulations on this subject, and the national regulations as well.

Cross-cutting competences: The student will acquire competences to search for substantive rules applicable to the case and, additionally, to identify the domestic procedural rules for the exhaustion of national remedies, taking into account it is a necessary step to go to the ECtHR. Thirdly, he/she needs to identify the procedural rules that regulate the regime for lodging applications before the ECtHR.

Finally, in order to write an application draft to the ECtHR, the student must be able to search for the appropriate form on the ECtHR website and then exercise his/her ability to synthesise the wording, use the correct terminology, concrete the relevant legislation and be coherent in his/her presentation.

Students will develop their ability to search for the appropriate court ruling, from internal and international bodies.

2. Teaching process

This case study is designed to be carried out in class, either individually or in groups.

The appropriate working time is 4 hours.

The tutor will have to check each step with the student (or group of students).

The process would be as follows:

- 1.- Information of the facts. The case has to be discussed with the students and they are asked to carry out a search of National rulings of the Courts to study the current judicial tendencies, taking into account the possibility of evolution of applicable criteria regarding the normative.
- 2.- The student must debate the applicable regulations identified and justify their criteria.
- 3.- The student will have to carry out a search of case law both at national and international level, in particular from the ECtHR.
- 4.- The student will have to identify the form for the drafting of the application as

stated in <https://www.echr.coe.int/Pages/home.aspx?p=applicants/forms&c>

5.- The student will have to revise if the admissibility criteria is accomplished (Note: this is a crucial part of the case). It is recommended that the student consults the practical guide on admissibility available on https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf

6.- Drafting of the application. This part should be carried out by the student without the direct intervention of the tutor.

7.- The last phase would be the revision and correction of the claim, verifying that the most frequent mistakes have not been made:

a) the conditions of admissibility of article 47 are respected.

b) the document is signed (by the student as plaintiff or as legal representative)

c) the facts are concise and well written (note: it is important that the student only uses the maximum 3 pages of the form, not the 20 additional pages available)

d) the citations to the articles of rights alleged to have been violated have been included sustained. Listing the articles is not sufficient.

e) the list of domestic remedies used is not missing.

f) the date of the last domestic decision is not missing in order to meet the deadline stipulated in Article 35 (4 months).

g) the copies of the documents are attached (the student should not actually attach them, but should fictitiously list the documents mentioned).

3. Facts of the case

Mrs. Worker is a cashier in a supermarket in Cádiz. Her supervisor, Mr. Jiménez, noticed some inconsistencies between the stock level and the sales figures. Mr. Jiménez decided to install CCTV cameras, some visible and others hidden. The visible cameras were directed towards the entrances and exits of the supermarket. The hidden cameras were placed at a certain height and directed towards the checkout counters.

During a meeting the supermarket's staff was informed of the installation of the visible cameras on account of the management's suspicions about thefts. Neither the staff nor the staff committee were informed of the hidden cameras. Beforehand, in 2007, the company had notified the Spanish Data Protection Agency that it intended to install CCTV cameras in its shops. The Agency had pointed out the obligations to provide information under the legislation on personal data protection. A sign indicating the presence of CCTV cameras had been installed in the shop where the applicants worked but the parties did not indicate the location of the cameras or precise content.

After some weeks, the management of the supermarket informed the union representative that the footage recorded by the hidden cameras had revealed thefts of goods at the tills by a number of employees. The representative watched the recordings. Mrs. Worker was called to individual interrogation and, subsequently she was dismissed. She was informed by the union representative, about the images he had watched on the video recordings.

During the individual interrogations, which were attended by the manager, the legal representative of the company M. and the union representative, the employees concerned were notified of their dismissal on disciplinary grounds with immediate effect. The dismissal letters given to the employees indicated that the hidden CCTV cameras had filmed them helping customers or other supermarket employees to steal goods and stealing goods themselves.

According to the employer, these acts constituted a serious breach of the obligations of good faith and loyalty required in the employment relationship and justified the termination of the contract with immediate effect. At no time before their dismissal, either during the meeting with the union representative or during their individual interrogations, were the employees able to view the recordings from the CCTV cameras.

4. Tasks

- 1) The student has to take on the role of a junior lawyer in a law firm dedicated to National, European Union and International law. After having brought consecutive actions before the different domestic courts seeking recognition of the wrongful dismissal of Mrs. Worker, which were dismissed, he/she is asked by his/her supervisor to write a legal analysis on the possibility of bringing an application before the ECtHR (Discuss with the student the results of task 1 before moving on to task 2).
- 2) After having discussed the outcome of task 1 and having concluded that there is a high probability that a complaint can be lodged with the ECtHR, the student has to identify the law applicable to the case (Discuss with the student the results of task 2 before moving on to task 3).
- 3) After having discussed the outcome of task 2, the student is given the task of drafting a complaint (discuss with the students' possibilities for drafting the complaint, according to the requirements set out for it).

5. Legal context /Relevant provisions of EU and National Law

A) RELEVANT EUROPEAN AND INTERNATIONAL LAW

Council of Europe

Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data

Article 5 – Quality of data

“Personal data undergoing automatic processing shall be:

- a. obtained and processed fairly and lawfully;
- b. stored for specified and legitimate purposes and not used in a way incompatible with those purposes;
- c. adequate, relevant and not excessive in relation to the purposes for which they are stored;
- d. accurate and, where necessary, kept up to date;
- e. preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored. ...”

Article 8 – Additional safeguards for the data subject

“Any person shall be enabled:

- a. to establish the existence of an automated personal data file, its main purposes, as well as the identity and habitual residence or principal place of business of the controller of the file;
- b. to obtain at reasonable intervals and without excessive delay or expense confirmation of whether personal data relating to him are stored in the automated data file as well as communication to him of such data in an intelligible form;
- c. to obtain, as the case may be, rectification or erasure of such data if these have been processed contrary to the provisions of domestic law giving effect to the basic principles set out in Articles 5 and 6 of this Convention;
- d. to have a remedy if a request for confirmation or, as the case may be, communication, rectification or erasure as referred to in paragraphs b and c of this article is not complied with.”

The Venice Commission

In 2007 the Venice Commission, the Council of Europe’s advisory body on constitutional matters, adopted an Opinion on “video surveillance by private operators in the public and private spheres and by public authorities in the private sphere and human rights protection” at its 71st plenary session (Venice, 1-2 June 2007, CDL-AD(2007)027). The relevant parts read as follows:

“18. For the purposes of this study, the private sphere will also include workplaces and the use of video surveillance in workplace premises, which raises legal issues

concerning the employees' privacy rights....

52. As regards workplaces, the introduction of video monitoring requires respecting the privacy rights of the employees.

53. Here, video surveillance would, in general, be allowed to prevent or detect fraud or theft by employees in case of a well-founded suspicion. However, except in very specific circumstances, videotaping would not be allowed at places such as toilets, showers, restrooms, changing rooms, or smoking areas and employee lounges where a person may trust to have full privacy.

54. Moreover, secret surveillance should only be allowed, and then only on a temporary basis, if proven necessary because of lack of adequate alternatives....

57. As regards shops, camera surveillance may be justified to protect the property, if such a measure has proven to be necessary and proportional. It may also be justified at certain locations in the shop to prevent and prosecute robberies under threat but, again, only if proven necessary, and no longer than necessary.

58. National legislation will have to clearly define the legal basis of the surveillance and the necessity of the infringement in view of the interests protected.... ”

b) RELEVANT DOMESTIC LAW AND PRACTICE¹

The Spanish Constitution

Article 18

“1. The right to respect for honour, for private and family life and for one’s own image shall be guaranteed....

4. The law shall restrict the use of data processing in order to guarantee respect for the honour and private and family life of citizens and the full exercise of their rights.”

Article 24

“1. Everyone has the right to effective protection by judges and the courts in the exercise of his or her legitimate rights and interests, and in no case may defence rights be curtailed.

2. Likewise, everyone has the right to ... a public trial without undue delay and with full guarantees ...”

Article 33

“1. The right to private ownership ... shall be recognised.”

Article 38

“Free enterprise shall be recognised within the framework of a market economy. ...”

¹ Take into account that the national regulations could be amended.

Relevant provisions of labour law

Article 5 – Workers’ duties

“Workers have the following basic duties:

(a) To fulfil the obligations inherent in their post, in keeping with the principles of good faith and diligence....”

Article 20

“2. ... In all cases, the worker and the employer shall be bound by the requirement of good faith in the fulfilment of their reciprocal obligations.

3. An employer may use monitoring and surveillance measures which it deems most appropriate to verify that an employee is fulfilling his or her employment duties, taking into account, in their adoption and application, of the consideration due to his or her human dignity ...”

Employment Proceedings Act, approved by Royal Legislative Decree no. 2/1995 of 7 April 1995, as in force at the relevant time, read as follows:

Article 90

“1. The parties may rely on all the evidence prescribed by law ... save where it has been gathered directly or indirectly in breach of fundamental rights and freedoms....”

Article 108

“... 2. A dismissal based on any of the grounds of discrimination provided for by the Constitution or the law, or implemented in breach of fundamental rights and freedoms, shall be regarded as null and void.”

Relevant procedural provisions

Section 11 of Organic Law no. 6/85 of 1 July 1985 on the Judiciary provides as follows:

“1. The principle of good faith must be complied with in all proceedings. Evidence obtained, directly or indirectly in violation of fundamental rights or freedoms will be excluded ...”

Legislation regarding the protection of personal data

Organic Law no. 15/1999

Organic Law no. 15/1999 on the protection of personal data (Ley Orgánica de protección de datos de carácter personal – the “Personal Data Protection Act”), as in force at the material time, was enacted on 13 December 1999 by transposing Directive 95/46/EC (see paragraph 63 below) and entered into force on 14 January 2000. Its aim was to safeguard the fundamental rights of individuals in connection with the processing of personal data, and more specifically their right to respect for their honour and their personal and family privacy (section 1 of the Act). It applied to the

collection of personal data, defined as any information concerning identified or identifiable individuals recorded on a physical medium which may be subject to processing, and also covered the future usage of such data for public or private purposes (sections 2 and 3 of the Act).

The Spanish Data Protection Agency, created by the Act, is the authority responsible for the supervision of its application. In that capacity it is entitled to carry out inspections, examine complaints and impose penalties for contraventions of the Act, namely fines of up to EUR 600,000 (sections 35 et seq.).

The provisions of the Act concerning information and the consent of those concerned by the collection of their personal data, as applicable in the present case, read as follows:

Section 5 – Right to information on the collection of data

“1. Data subjects whose personal data are requested must be previously, explicitly, precisely and unambiguously informed of the following:

- (a) the existence of a personal data file or the fact that the data will be processed, the purpose thereof and the recipients of the information;
- (b) the obligatory or optional nature of their response to the questions asked;
- (c) the consequences of providing or refusing to provide the data;
- (d) the existence of rights of access, rectification, erasure and objection;
- (e) the identity and address of the controller or, as appropriate, his representative.

...

4. Where personal data have been collected without the data subject being approached, the person must be informed thereof in an express, precise and unequivocal manner by the file manager or his or her representative, within three months from the recording of the data, except where the data subject has already been informed of the content of the processing, the origin of the data, and the information referred to in letters (a), (d) and (e) of subsection 1 of the present section.

5. The provisions of the preceding subsection shall not apply in cases where the law expressly provides otherwise, where the data-processing has historical, statistical or scientific purposes, or where it is impossible to inform the data subject, or where this would involve a disproportionate effort in the opinion of the Data Protection Agency or the corresponding regional body, in view of the number of data subjects, the age of the data and the possible compensation measures.

Furthermore, the provisions of the preceding subsection shall also not apply where the data are obtained from sources accessible to the public and are intended for advertising or market research, in which case each communication sent to the data subject shall inform him or her of the origin of the data, the identity of the

person/entity responsible for processing the data and the rights of the data subject.”

Section 6 – Consent of data subjects

“1. Processing of personal data shall require the unambiguous consent of the data subject, unless laid down otherwise by law.

2. Consent shall not be required where the personal data are collected for the exercise of the functions proper to public authorities within the scope of their duties; where they relate to the parties to a contract or preliminary contract for a business, employment or administrative relationship, and are necessary for its maintenance or fulfilment; where the purpose of processing the data is to protect a vital interest of the data subject under the terms of section 7(6) of this Act or where the data are contained in sources accessible to the public and their processing is necessary to satisfy the legitimate interest pursued by the controller or that of the third party to whom the data are communicated, unless the fundamental rights and freedoms of the data subject are jeopardised.”

Under sections 13 to 18 of the Act, data subjects had, in particular, a right of access, rectification and deletion in respect of their personal data. Section 19 of the Act provided for a right to compensation as follows:

Section 19 – Right to compensation

“1. Persons who, as a result of any failure by the data-processing manager or controller, have sustained any damage to their property or to their rights, shall be entitled to compensation. ...

3. If the files are held by private-law entities, any proceedings shall be brought in the ordinary courts.”

On that basis a judgment of the Supreme Court ordered an employer to pay compensation to one of its former employees, who had been dismissed two years earlier, for providing potential employers with personal information concerning the employee’s dismissal and thus apparently reducing the employee’s chances of finding a new job (judgment no. 609/2015 of 12 November 2015).

Instruction no. 1/2006

Instruction no. 1/2006 of 8 November 2006 on the processing of personal data for monitoring purposes using video-surveillance devices, issued by the Spanish Data Protection Agency, contains the following provisions:

Article 3 - Information

“Everyone who uses video-surveillance devices must fulfil all the obligations prescribed in section 5 of Organic Law no. 15/1999 of 13 December. For that purpose they must:

(a) place at least a sufficiently visible information board in the areas monitored ... and

(b) make available to the data subjects a document containing the information provided for in section 5.1 of Organic Law no. 15/1999 ...”

Article 4 – Principles of quality, proportionality and purpose of data processing

“1. In accordance with section 4 of Organic Law no. 15/1999 ..., images may only be processed if they are appropriate, relevant and not excessive in relation to the scope and to the legitimate and explicit aims justifying the installation of video-surveillance.

2. The installation of cameras ... is permitted only where the aim of the monitoring cannot be fulfilled, without disproportionate effort, by other means that would be less intrusive for the privacy of individuals and their right to the protection of personal data.

3. ... In all situations, any data processing should be avoided if it is not necessary for the aim pursued.”

The website of the Data Protection Agency, moreover, provides a factsheet on video-surveillance and a model board indicating the information required by law.

Law no. 3/2018

Law no. 15/1999 was repealed by a new Organic Law, no. 3/2018, on the protection of personal data and the safeguarding of digital rights, enacted on 5 December 2018, which entered into force on 7 December 2018. Section 22 of the new Law expressly governs the processing of personal data collected by means of video-surveillance. It provides in particular as follows:

“4. The obligation to provide information under Article 12 of Regulation (EU) 2016/679 is deemed to be fulfilled by the placing of an information board in a sufficiently visible place, indicating at least the existence of the processing, the identity of the person responsible and the possibility of exercising the rights provided for by Articles 15 to 22 of Regulation (EU) 2016/679. ...”

As regards video-surveillance in the workplace, section 89(1) of the Law provides as follows:

“1. Employers are entitled to process images obtained by means of video-surveillance devices in the exercise of their authority to monitor employees or officials, as laid down in Article 20 § 3 of the Labour Regulations ... provided that this possibility is used in the statutory framework and within its inherent limits. Employers must inform employees or officials of the introduction of such a measure beforehand and in an explicit, clear and concise manner.

In the event that CCTV cameras film employees or officials clearly committing an illegal act, the obligation to provide information shall be deemed fulfilled when at least the mechanism provided for in section 22(4) hereof has been put in place.”

Solution outline

Note: the case is based on the European Court of Human Rights (Grand Chamber) Judgement of 17 October 2019, Case of López Ribalda and others v. Spain (Applications nos. 1874/13 and 8567/13).

TASK 1

The student has to check whether the conditions for admissibility of the application before the European Court of Human Rights are met. The student will first analyse whether the case complies with the requirements set out in Rule 47 of the European Court of Human Rights.

Rule 47

“ – Contents of an individual application

1. An application under Article 34 of the Convention shall be made on the application form provided by the Registry, unless the Court decides otherwise. It shall contain all of the information requested in the relevant parts of the application form and set out

(a) the name, date of birth, nationality and address of the applicant and, where the applicant is a legal person, the full name, date of incorporation or registration, the official registration number (if any) and the official address;

(b) the name, address, telephone and fax numbers and e-mail address of the representative, if any;

(c) where the applicant is represented, the dated and original signature of the applicant on the authority section of the application form; the original signature of the representative showing that he or she has agreed to act for the applicant must also be on the authority section of the application form;

(d) the name of the Contracting Party or Parties against which the application is made;

(e) a concise and legible statement of the facts;

(f) a concise and legible statement of the alleged violation(s) of the Convention and the relevant arguments; and

(g) a concise and legible statement confirming the applicant's compliance with the admissibility criteria laid down in Article 35 § 1 of the Convention.

2. (a) All of the information referred to in paragraph 1 (e) to (g) above that is set out in the relevant part of the application form should be sufficient to enable the Court to determine the nature and scope of the application without recourse to any other document.

(b) The applicant may however supplement the information by appending to the application form further details on the facts, alleged violations of the Convention and

the relevant arguments. Such information shall not exceed 20 pages.

3.1. The application form shall be signed by the applicant or the applicant's representative and shall be accompanied by

(a) copies of documents relating to the decisions or measures complained of, judicial or otherwise;

(b) copies of documents and decisions showing that the applicant has complied with the exhaustion of domestic remedies requirement and the time-limit contained in Article 35 § 1 of the Convention;

(c) where appropriate, copies of documents relating to any other procedure of international investigation or settlement;

(d) where the applicant is a legal person as referred to in Rule 47 § 1 (a), a document or documents showing that the individual who lodged the application has the standing or authority to represent the applicant.

3.2. Documents submitted in support of the application shall be listed in order by date, numbered consecutively and be identified clearly.

4. Applicants who do not wish their identity to be disclosed to the public shall so indicate and shall submit a statement of the reasons justifying such a departure from the normal rule of public access to information in proceedings before the Court. The Court may authorize anonymity or grant it of its own motion.

5.1. Failure to comply with the requirements set out in paragraphs 1 to 3 of this Rule will result in the application not being examined by the Court, unless

(a) the applicant has provided an adequate explanation for the failure to comply;

(b) the application concerns a request for an interim measure;

(c) the Court otherwise directs of its own motion or at the request of an applicant.

5.2. The Court may in any case request an applicant to provide information or documents in any form or manner which may be appropriate within a fixed time-limit.

6. (a) The date of introduction of the application for the purposes of Article 35 § 1 of the Convention shall be the date on which an application form satisfying the requirements of this Rule is sent to the Court. The date of dispatch shall be the date of the postmark.

(b) Where it finds it justified, the Court may nevertheless decide that a different date shall be considered to be the date of introduction.

7. Applicants shall keep the Court informed of any change of address and of all circumstances relevant to the application."

Secondly, the student have to confirm that in the case they have used the available

effective remedies in the country concerned, including appeals, taking into account that it had complied with the four-month time-limit.

TASK 2

The student must verify the adequacy and validity of the applicable regulations.

TASK 3

The student will have to download the application form from the official ECHR website and fill in the necessary identification data and other requirements, while paying particular attention to the facts of the case. In particular, the most important question is to fill in correctly all the information concerning the facts, complaints and compliance with the requirements of exhaustion of domestic remedies and the four-month time-limit laid down in Article 35 § 1 of the Convention must be set out in this part of the application form (sections E, F and G). It is not acceptable to leave these sections blank or simply to refer to attached sheets.

In addition, it will be necessary to identify the alleged violation(s) of the Convention and/or the protocols and relevant arguments.

Include in the form the effective remedies concerned in the Country that have been used in the ruling (including appeals if necessary). The student also has to indicate in the form the date when the final decision at domestic level was delivered and received, to show the compliance with the time-limit.