Applications nos. 1874/13 and 8567/13

Isabel LÓPEZ RIBALDA against Spain
and María Ángeles GANCEDO GIMÉNEZ
and Others against Spain

(Additional) Submission

by

the European Trade Union Confederation (ETUC) under Rule 44(5)

(14/09/2018)

Introduction

1 The European Trade Union Confederation (ETUC) is honoured to be able to submit (further) observations in this very important case. Having been admitted as Third Party in the procedure before the Chamber, the Registry by a letter dated 15.06.2018 informed the ETUC that it could provide further Observations if it so wished.

2 Indeed, the ETUC has already submitted observations dated 20.07.2015 before the Chamber of the Third Section (Submission). Accordingly, the ETUC would refer to those observations and not just repeat them. Instead, it will try to take into account the further developments, in particular the Chamber's judgment (09.01.2018)[1] and the Court's questions (13.07.2017) as appropriate and general considerations.

3 However, the ETUC would highlight that, in procedural terms, it is neither aware of the Spanish Government's request (and its motivation) nor of the reasoning of the Grand Chamber Panel to grant the appeal. Accordingly, ETUC's ability to react to the principles which might be at stake is limited.

4 In substance, the ETUC continues to attach great importance to decent working conditions in combination with the protection of private and family life:

[1] ECtHR (Third Section), 09.01.2018, Nos. 1874/13 and 8567/13, *López Ribalda e.a. v. Spain*.

> Effective data protection is a fundamental right of any human being, which needs to be respected and guaranteed. In the EU the right to the protection of personal data is guaranteed in Article 8 of the Charter of Fundamental Rights of the European Union (CFREU), as well as in Article 16 TFEU, and it is inseparable from Article 7 CFREU; the right to respect for private life.[2]

5 This is all the more true in relation to the protection of personal data in the employment relation. These issues are of grave concern to the ETUC which represents many workers in potentially similar situations. The ETUC is concerned that states will not sufficiently protect workers' privacy in the workplace.

6 In the case at hand, two human rights are examined, as indicated by the Court in the Questions to the Parties, by starting with Article 8 followed by Article 6 of the Convention. Before doing so, specific references to 'Relevant international law and material' appears to be required.

Relevant international law and material

7 Before going into any detail, the ETUC would like to recall the principle that the Court 'can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs'.[3] That is why it attributes specific importance to these developments.

In relation to the Chamber's judgment

8 The ETUC is of the opinion that the Chamber's judgment did not (yet) sufficiently take international and European standards into account. Whereas the Chamber refers in its judgment in §§ 34 – 39 to relevant international and European standards and materials to an important extent, there are elements which still should be taken into account (as referred to in the ETUC Submission):

9 In particular, Articles 7 and especially 8 of the Charter of Fundamental Rights of the European Union (CFREU) on the protection of private and family life as well as protection of personal data[4] are missing. Although it is admitted that the CFREU was not yet 'legally binding' at the time of events at stake (2009 and 2006, respectively) it should be noted that Spain was also a country on whose behalf the Council had solemnly proclaimed this Charter already in 2000[5] and that the CJEU referred to it even at times when it was not yet legally binding.[6]

10 Moreover, the Chamber did not refer to the European Committee of Social Rights' interpretation of Article 1(2) of the European Social Charter[7] concerning the right to work

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[2] ETUC position on the General Data Protection Regulation – improving the protection of workers' data - Adopted at the Executive Committee on 17-18.10.2012.
[3] ECtHR (GC), 12.11.2008, No. 34503/97, *Demir and Baykara v. Turkey*, ECHR 2008-V, pp. 395 ff, § 85.
[4] See the ETUC Submission (para. 18) and also the reference (para. 24) to the *Ryneš* judgment (CJEU Judgment, 11 December 2014 - Case C 212/13 – *Ryneš*) in which the CJEU had recently explicitly qualified the video surveillance as 'processing of personal data'. This judgment was based on Directive 95/46/EC and therefore relevant at the time of the events in this case. This is (at least indirectly) confirmed by the Chamber's references to this standard quoted in para 37 of the judgment.
[5] 'The European Parliament, the Council and the Commission solemnly proclaim the text below as the Charter of Fundamental Rights of the European Union.'
[6] See i.a. CJEU (GC), 11.12.2007, C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union*), [2007] ECR I-10779 para. 43; (GC) 18.12.2007, C-341/05, *Laval un Partneri* [2007] ECR I-11767, para. 90.
[7] See the ETUC Submission (para. 9); also applicable in relation to the Revised European Social Charter (1996).

extending the latter's protection in the way that '[i]ndividuals must be protected from interference in their private or personal lives'. It felt the need to respond to '[m]odern electronic communication and data collection techniques'.

11 In conclusion, these references to the EU primary law and the ESC are important as they (additionally and, thus, in an enhancing way) show the increasing relevance of the fundamental rights character of protection of private life in general and the rights to data protection in particular. This is all the more important as these developments (as well as others mentioned in the Chamber's judgment in §§ 36 and 38) have taken place following the *Köpke* decision.[8]

In relation to new developments

12 The most important development which has taken place since the Chamber's judgment is probably the (legally binding) application of the 'General Data Protection Regulation' (GDPR)[9] as from 25 May 2018[10] characterised by some as 'the most important change in data privacy regulation in 20 years.'[11]

13 In its Chapter IX on 'Provisions relating to specific processing situations' the data protection in the employment relationship is defined in the following way:

> Article 88 - Processing in the context of employment
>
> 1. Member States may, by law or by collective agreements, provide for more specific rules to ensure the protection of the rights and freedoms in respect of the processing of employees' personal data in the employment context, in particular for the purposes of the recruitment, the performance of the contract of employment, including discharge of obligations laid down by law or by collective agreements, management, planning and organisation of work, equality and diversity in the workplace, health and safety at work, protection of employer's or customer's property and for the purposes of the exercise and enjoyment, on an individual or collective basis, of rights and benefits related to employment, and for the purpose of the termination of the employment relationship.
>
> 2. Those rules shall include suitable and specific measures to safeguard the data subject's human dignity, legitimate interests and fundamental rights, with particular regard to the transparency of processing, the transfer of personal data within a group of undertakings, or a group of enterprises engaged in a joint economic activity and monitoring systems at the work place.

14 Although this provision provides the EU Member States with powers to legislate it is understood, that the content of the GDPR has to be accepted as minimum level of protection.[12] Moreover, the specific need to 'safeguard the data subject's [i.e. the worker's] human dignity, legitimate interests and fundamental rights' should be noted.

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[8] ECtHR (dec.), 05.10.2010, No. 420/07, *Köpke v. Germany*.
[9] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1–88.
[10] Article 99(2) GDPR.
[11] https://eugdpr.org/.
[12] A guidance Communication on the direct application of the Regulation was adopted in January 2018, see Communication from the Commission to the European Parliament and the Council (COM/2018/043 final Brussels, 24.1.2018) 'Stronger protection, new opportunities – Commission guidance on the direct application of the General Data Protection Regulation' as of 25 May 2018, p. 8 ('Member States' actions in this context are framed by two elements: 1. Article 8 of the Charter, meaning that any national specification law must meet the requirements of Article 8 of the Charter (and the Regulation which builds on Article 8 of the Charter)').

15 Finally, in its Principle 10(c) the European Pillar of Social Rights proclaimed solemnly by the European Parliament, the Council and the Commission at the 'Social summit for fair jobs and growth' in Gothenburg at 17 November 2017,[13] confirms the following:

> Workers have the right to have their personal data protected in the employment context.[14]

Interim Conclusions

16 These elements should be 'taken into account' by the Court when interpreting Article 8 ECHR. Indeed, limitations to these rights should be construed strictly and require a high degree of justification.

Article 8 of the Convention

General considerations

17 Before going into any details on Article 8 ECHR, the ETUC would like to draw the Grand Chamber's attention to the Government's 'conclusion' in relation to Article 8 ECHR. In its judgment, the Chamber had stated in § 50 that

> the Government **concluded** that the installation of covert video surveillance without prior notice to the applicants had **not been in conformity with** Article 18.4 of the Spanish Constitution or **Article 8** of the Convention. Nonetheless, they reiterated that, under Article 1 of the Convention, the State should bear no responsibility, since the covert video surveillance had been carried out by a private company. (Emphases added)

18 In particular, ignoring the wording of this 'conclusion', the ETUC is prevented from commenting on it. However, when more thoroughly examining the legal effect of the 'conclusion', the Grand Chamber might come to the conclusion that the former should be given more weight than the Chamber attributed to it.

Applicability of Article 8 (Question 2)[15]

19 By referring to several previous judgments, the Court asks the parties to comment on applicability of Article 8 ECHR.

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[13] Interinstitutional Proclamation on the European Pillar of Social Rights, OJ C 428, 13.12.2017, p. 10–15.

[14] In relation to this Principle, it should be noted that the Commission Staff Working Document (Accompanying the document Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions) 'Establishing a European Pillar of Social Rights' (SWD/2017/0201 final, Brussels, 26.4.2017) as well as the Commission Staff Working Document, (Accompanying the document Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee) 'Monitoring the implementation of the European Pillar of Social Rights (SWD(2018) 67 final, Strasbourg, 13.3.2018) refer respectively under the heading of 'The Union acquis' / 'Existing EU law in this field' to:

- Article 8 CFREU (respectively on p. 40/48) and
- the General Data Protection Regulation (see para. 12) (respectively on p. 41/49) allowing Member States by law or by collective agreements to provide for more specific rules to ensure the protection of the rights and freedoms of employees.

In both documents reference is also made, that in order 'to facilitate the application of the data protection rules, the Article 29 Working Party (composed of the 28 national Data Protection Authorities) will issue in 2017 an opinion on personal data processing in an employment context". (respectively p. 43/52) The latter opinion 'Opinion 2/2017 on data processing at work 'was adopted indeed in 8 June 2017.

[15] The questions referred to in this (Additional) Submission are contained in the Court's letter to the parties dated 13.07.2018 (see above para. 2).

20 At the outset, it appears important to notice that in all three rulings the Court had found that Article 8 ECHR was applicable. Moreover, even in the (In-)Admissibility decision in the *Köpke* case the Court had unambiguously found that Article 8 ECHR was applicable.[16] In this context, it should be born in mind that this judgment did not take into account any of international relevant instruments whereas the Grand Chamber in its unanimously adopted judgment had required it (see above para. 7).

Application of 'adequate and sufficient safeguards' (Question 3)

21 As regards 'adequate and sufficient safeguards' (Question 3) the Court refers mainly to the *Bărbulescu* judgment.[17]

The application of the relevant factors

22 For the purpose of assessing whether the (six) 'factors' mentioned in paras. 119 to 122 (specifically in para. 121) of the *Bărbulescu* judgment, the ETUC would briefly refer to the respective considerations of the Chamber (see below paras. 23 and 24) and, subsequently provide the Court with more general considerations in relation to certain of these factors (see below paras. 27 ff).

23 The factors which appear to have been taken into account by the Chamber could probably considered to be the following:

- (*i*) whether the employee has been notified: this was not the case (see § 65 with reference to the Government's acknowledgment and § 67),
- (*ii*) the extent of the monitoring by the employer and the degree of intrusion into the employee's privacy: there was no time limit (§ 68),
- (*iii*) whether the employer has provided legitimate reasons to justify monitoring: according to the judgment, there was an 'arguable suspicion of theft' (§ 62),
- (*iv*) whether it would have been possible to establish a monitoring system based on less intrusive methods and measures: it was possible 'at least to a degree, by other means, notably by previously informing the applicants' (§ 69).

24 However, two factors might have not (sufficiently) considered:

- (*v*) the consequences of the monitoring for the employee subjected to it: it would appear that in its assessment the Chamber did not specifically mention the dismissal which the Court has qualified in the form of a dismissal without notice[18] as 'heaviest sanction possible under labour law'.[19]
- (*vi*) whether the employee had been provided with adequate safeguards, especially when the employer's monitoring operations were of an intrusive nature: this question as such does not appear to be (at least directly) addressed in the Chamber's judgment. The principle question would probably be to which extent the cameras which 'were zoomed in on the checkout counters, which covered the area behind the cash desk' (§ 8) controlled further activities and behaviour of the applicants.

25 Finally, the Grand Chamber in *Bărbulescu* referred to the need of an 'access to a remedy before a judicial body with jurisdiction to determine, at least in substance, how the criteria

[16] See also the previous ETUC Submission para. 26.
[17] ECtHR (GC), 05.09.2017, No. 61496/08, *Bărbulescu v. Romania*.
[18] From the Chamber's judgment it is not sufficiently clear whether it was a dismissal with or without notice. Even in the former case it would still be the second heaviest sanction.
[19] ECtHR 21.07.2011 – No. 28274/08, *Heinisch v. Germany*, § 71.

outlined above were observed' (§ 122). Whereas the applicants have had access as such to the competent judiciary bodies it would appear doubtful whether the latter have determined (all) criteria required. For example, it is not clear whether they have taken into account the unlimited time in which the covert video surveillance was in operation (*ii*).

26 For the ETUC, all factors taken together would already appear sufficient to conclude that the measures taken were not 'accompanied by adequate and sufficient safeguards', even more so when requiring a high degree of justification (see above para. 11).

Additional safeguards by workers representation needed

27 Nevertheless, it appears useful, if not important to provide the Court with additional information about the collective aspect of labour relations. In its Submission, the ETUC had referred to the need of labour-specific procedural safeguards by referring to the system of workers' representation (paras. 37 – 41 of the ETUC Submission). Generally speaking, such a system is of a mainly preventive nature and tries to (at least as much as possible) compensate the individual workers dependent situation vis-à-vis the employer.

28 For the solution of the present case is appears of particular importance that the relevance of such a system has been specifically recognised by a Recommendation of the Committee of Ministers (CM/Rec(2015)5) on the processing of personal data in the context of employment (Recommendation)[20] referred to and quoted also in the Chamber's judgment (§ 36). This document is all the more relevant as it:

- specifically addresses the problems which are at stake in the present case,
- is the most recent document in this area within the framework of the Council of Europe (CoE) and accordingly,
- covers all CoE Member States (and is, thus, not only limited to EU Member States).

29 Besides many other important elements contained therein, Principle 21 which deals with 'Additional safeguards' is of specific relevance. Although limiting the need for 'Additional safeguards' to 'particular forms of processing, set out in Part II of the present recommendation' it is clear that 'video surveillance' is covered. Indeed, the latter is dealt with in Principle 15 ('15. Information systems and technologies for the monitoring of employees, including video surveillance') which itself is included in Part II. Accordingly, these 'additional' safeguards apply and should not be misunderstood in the sense of a 'voluntary' nature. Instead, 'additional' here means the necessary protection needed additionally in specific cases, i.e. those mentioned in Part II.

30 Principle 21 contains several obligations. For the purpose of workers representation lit c. is of particular importance, reading as follows:

> For all particular forms of processing, set out in Part II of the present recommendation, employers should ensure the respect of the following safeguards in particular: …
>
> c. consult employees' representatives in accordance with domestic law or practice, before any monitoring system can be introduced or in circumstances where such monitoring may change. Where the consultation

[20] Recommendation of the Committee of Ministers (CM/Rec(2015)5) adopted by the Committee of Ministers on 1 April 2015, at the 1224th meeting of the Ministers' Deputies. As to the general relevance of international law in relation to the interpretation of provisions of the Convention see above, para. 7. Moreover, the Court has in many cases referred specifically to Committee of Ministers' Recommendations, see e.g. ECtHR (GC) 04.12.2015, No. 47143/06, *Zakharov v. Russia* , par. 143 (Recommendation by the Committee of Ministers, regulating the use of personal data in the police sector, adopted on 17 September 1987 (No. R (87) 15)).

> procedure reveals a possibility of infringement of employees' right to respect for privacy and human dignity, the agreement of employees' representatives should be obtained;

31 The three elements contained therein (information, consultation and agreement) appear important at least in relation to factors (*i*), (*iv*) and (*vi*).

Information

32 As regards the factor (*i*) on prior notice of the workers concerned (i.e. the applicants) the Chamber states that 'neither they [the workers] nor the company's staff committee were informed of the hidden cameras' (§ 8). This means that a staff committee existed and that this worker-specific protection was denied as well.

33 In relation to the factor (*iv*) on less intrusive measures one has to consider that in a case (*quod non*) in which the prior information of the workers concerned might not be possible the less intrusive measure would still be the prior information of the workers' representation (*in casu* the 'staff committee').

Consultation

34 Finally, concerning the factor (*vi*) on 'adequate safeguards, especially when the employer's monitoring operations were of an intrusive nature' the preventive aspect of information and consultation of the workers representation is crucial. According to Principle 21 (c.) of the Recommendation on the need ('employers should ensure') of workers representatives' prior consultation.[21] Such a consultation could lead to important preventive requirements 'before any monitoring system can be introduced or in circumstances where such monitoring may change', in particular, to limitations in relation to

- the definition of conditions of prior information (*i*), in particular 'the obligation to previously, explicitly, precisely and unambiguously inform those concerned' (§ 69)
- the definition of
  - (strict) time limits and
  - (the very limited) number of people who could have access to the results (*ii*),
- the establishment of a limited and exhaustive list of 'legitimate reasons to justify monitoring' (*iii*),
- the definition of conditions under which a monitoring system can be put in place (*iv*),
- a catalogue in relation to the (proportional) consequences (*v*).

35 Obviously, this list is non-exhaustive. It is construed upon the factors developed by the Court and aimed at illustrating the added value of better implementation by preventive collective system of workers representation.

Agreement

36 Also in relation to factor (*vi*) on 'adequate safeguards' it appears important to note that Principle 21 (c.) of the Recommendation goes even further by referring to the need of an agreement in case of a possible infringement on the 'right to respect for privacy and human dignity'. Thus, the Committee of Ministers recognises the added value of a collective involvement even beyond information and consultation of the workers representation.

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[21] In general, consultation has always to be preceded by (the need for timely, full and accurate) information (see e.g. Article 21 Revised European Social Charter 'The right to information and consultation' and Article 27 CFREU 'Workers' right to information and consultation within the undertaking'). This 'information' has to be distinguished from the information in the form of prior notice (see above paras. 32 and 33).

37 This general collective approach is confirmed by Article 88 GDPR providing for better regulations i.a. by 'collective agreements' (see above para. 13).

Interim conclusion

38 None of these safeguards have been established as complied with. Concerning the prior information the Chamber had already stated that the staff committee had not been informed. As regards prior consultation on a general framework within the company no information is available (but this is even less probable). The same applies to a possible agreement with the workers' representation. Accordingly, in addition what has been concluded in para. 26 there are even more grounds to hold that the requirements of Article 8 ECHR have not been fulfilled.

Article 6 of the Convention

39 Concerning the right to fair trial the Court raised two questions (5 and 6). In this respect, the ETUC would first like to refer to its previous Submission (paras. 42 ff) in which it had explained the reasons why it came to the conclusion that Article 6 ECHR was violated in respect of both Groups (A and B) of applicants. In addition and in reaction to the Chamber's judgment, the ETUC would now like to stress the following elements:

Use of evidence obtained in breach of Convention rights (Group A)

40 In order to demonstrate that the proceedings would not be 'as a whole unfair' (§ 87) if the evidence coming from the covert video surveillance (and that, accordingly, Article 6 ECHR was not violated) the Chamber uses two arguments. The first relates to the applicant's procedural opportunities (§ 88) and the second to the other elements of evidence (§ 89).

41 It might probably be correct in assuming that the applicants had 'ample opportunities' to challenge 'the authenticity and use' of the material. Nevertheless, the second element does not appear that clear. Although several other elements were referred to, it remains still that the degree to which the evidence coming from the covert video surveillance might have been in the end decisive. At least in this case, the proceedings should be considered 'as a whole unfair'.

Denying the access to court by means of a settlement agreement (Group B)

42 Also on respect of this element, the Chamber first refers to the procedural opportunities of the applicants (§ 93) and the domestic courts' careful evaluation of the circumstances of the agreements reached (§§ 94 and 95).

43 Whereas the first argument might be correct, the second appears too formalistic. Indeed, it does not (at least not sufficiently) take into account the very specific situation in which a worker is placed when being faced with accusations and the information 'to initiate criminal proceedings'. In fact, this is a situation in which the whole personality of the worker is put into question (at least psychologically). Compared, for example, to a consumer which in the EU context has the 'right of withdrawal'[22] such a protection should be the minimum.

[22] Directive 2011/83/EU of 25.10.2011 on consumer rights. See, for example, Recital 37: '… Concerning off-premises contracts, the consumer should have the right of withdrawal because of the potential surprise element and/or psychological pressure. …'

Conclusions

44 Taking the domestic and international legal situation into account, the ETUC continues to be of the opinion that Spain has violated:

- Article 8 ECHR in respect of all applicants and
- Article 6 ECHR in respect of both Groups of applicants (A and B).

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