Ref: CNS 62/2018

Legal report in relation to the query made on the obligation to report disciplinary proceedings to the bodies of collective representation

Background

A letter is submitted to the Catalan Data Protection Authority in which it is requested that the Authority issue an opinion in relation to the scope of the legal provision contained in article 118.1 of Legislative Decree 1/1997, of 31 of October, on the obligation to give an account of the disciplinary proceedings to the bodies of collective representation.

Specifically, it states that, as a result of CNS opinion 5/2017 issued by this Authority on February 15, 2017, the general management adopted some criteria in relation to communications to union representatives in disciplinary matters, according to which the Article 40.1.c of the TREBEP would enable these communications regarding penalties for very serious offences.

However, it states that the Complaints Ombudsman of Catalonia addressed a letter to the Minister of the Department of Digital Policies and Public Administration in which, according to records, the desirability of requesting a new report from the Authority on the scope of article 118.1 of the aforementioned Legislative Decree 1/1997, "to determine if this legal authorization is sufficient to inform the bodies of collective representation of the initiation, and in its case, of the penalty imposed on public workers duly identified and without their express consent by the commission of serious and minor offences".

Analyzed the consultation, which is accompanied by the document (...) called, "Note on the scope of communication to the personnel representation bodies in the framework of the processing of disciplinary files", and in accordance with the 'report of the Legal Advice I issue the following opinion:

Legal Foundations

I

(...)

II

As stated by the consultant, this Authority based on the request made by that general management, issued Opinion CNS 5/2017. In that case the consultation letter

stated that "it is doubtful that the authorization contained in article 40 of the EBEP is a sufficient basis for the transfer of personal data, nominal and specific, of the persons subject to disciplinary sanctions, if it is not with the express consent of the employee holding the data". For this reason, it was requested that "the Authority pronounce itself on whether, from the perspective of data protection, the union representatives could be informed of the identity of the civil servant sanctioned for a very serious offense without their consent or well if this communication would be contrary to the regulations for the protection of personal data."

In the CNS opinion 5/2017 mentioned, it was concluded that given that article 40.1.c) of the EBEP enables the communication to the workers' representatives of the data relating to officials sanctioned for very serious offences, from the perspective of the regulations for the protection of personal data there is no obstacle to carry out this communication, indicating the name and surname of the person sanctioned and the sanction imposed.

In the new consultation formulated, the issue is raised in relation to the possible authorization contained in article 118.1 of Legislative Decree 1/1997, of October 31, which approves the recasting in a Single Text of the precepts of certain texts laws in force in Catalonia in the field of public service, "to inform the bodies of collective representation of the initiation and, in their case, of the sanction imposed on public workers duly identified and without their express consent by the commission of serious offenses and mild."

In order to address the new issue raised, it is necessary to take into account the provisions of General Data Protection Regulation 2016/679, of April 27, of the European Parliament and of the Council (RGPD) as well as Organic Law 3/2018, of December 5, Protection of Personal Data and guarantee of digital rights (LOPDGDD.

III

From the perspective of the protection of personal data, access by staff representative bodies to workers' personal information constitutes data processing that must comply with the regime established by the RGPD.

According to the RGPD, any information about an identified or identifiable natural person is personal data (article 4.1 RGPD). Any processing of personal data, understood as "operation or set of operations carried out on personal data or sets of personal data, whether by automated procedures or not, such as collection, registration, organization, structuring, conservation , adaptation or modification, extraction, consultation, use, communication by transmission, dissemination or any other form of enabling access, access or interconnection, limitation, deletion or destruction" (art. 4.2 RGPD) , it must be subject to the principles and guarantees of the RGPD.

Among these principles provided for by the RGPD, it is necessary to take into consideration, first of all, the principle of lawfulness (Article 5.1.a) according to which personal data must be treated in a lawful, fair and transparent manner in relation to the interested party . According to article 6 of the RGPD, the treatment will only be lawful if it meets at least one of the followin

"1. The treatment is only lawful if at least one of the following conditions is met: a) The interested party has given consent to the treatment of their personal data, for one or more specific purposes. b) The treatment is necessary to execute a contract in which the interested party is a party or to apply pre-contractual measures at their request. c) The treatment is necessary to fulfill a legal obligation applicable to the person responsible for the treatment. d) The treatment is necessary to protect the vital interests of the person concerned or of another natural person. e) The treatment is necessary to fulfill a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible for the treatment. f) The treatment is necessary to satisfy legitimate interests pursued by the person in charge of the treatment or by a third party, as long as the interests or fundamental rights and freedoms of the interested party that require the protection of personal data do not prevail, especially if the interested is a child. (...)

3. The basis of the treatment mentioned in section 1, letters c) and e), must be established by: a) The law of the Union, or b) The law of the member states to which the person in charge is subject treatment."

The Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights (LOPDGDD), in relation to the processing of data due to legal obligation, public interest or exercise of public powers, establishes:

1. The treatment of personal data can only be considered based on the fulfillment of a legal obligation required of the person in charge, in the terms provided for in article 6.1.c) of Regulation (EU) 2016/679, when so provided by a law of the European Union or a rule with the rank of law, which may determine the general conditions of the treatment and the types of data subject to it as well as the assignments that proceed as a consequence of the fulfillment of the legal obligation. Said rule may also impose special conditions on treatment, such as the adoption of additional security measures or others established in Chapter IV of Regulation (EU) 2016/679.

2. The treatment of personal data can only be considered based on the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible, in the terms provided for in article 6.1 e) of Regulation (EU) 2016/679 , when it derives from a competence attributed by a rule with the rank of law."

IV

This Authority has previously analyzed the right of access of workers' representatives to information available to the company or entity that would be necessary for

the exercise of the functions that correspond to them in Opinion 5/2017, to which the query refers, but also opinions CNS 70/2015, CNS 36/2015, CNS 18/2015 or CNS 2/2012 available on the website http ://apdcat.gencat.cat).

In relation to the authorization contained in article 41 of the EBEP, which was the issue that was analyzed in the opinion 5/2017 that we reproduce below, it would constitute a sufficient legal basis to carry out this communication to the workers' representatives , indicating the name and surname of the person sanctioned and the sanction imposed, with regard to the very serious infractions of both official and labor personnel in the service of public sector entities, as follows:

"Specifically, with respect to the disciplinary regime regulated in Title VII of the EBEP, article 93.1 of the EBEP provides that:

"1. Public officials and labor personnel are subject to the disciplinary regime established in this title and in the rules that the Public Service laws dictate in development of this Statute."

Article 15 of the EBEP recognizes a series of rights for public employees, among others, to freedom of association and collective bargaining, for the exercise of which the trade unions are assigned a function of representing the workers, and to guarantee the exercise of their rights, in the terms provided by the EBEP (article 31 et seq. EBEP).

It should be borne in mind that, according to article 39.1 of the EBEP, the specific bodies representing civil servants are the staff delegates and staff boards, and as such these are the bodies that are authorized to exercise a series of functions in defense of the rights and interests of public workers.

For the fulfillment of their functions, the workers' representation bodies require certain information, in the terms provided for in article 40 of the EBEP.

Regarding the communication of information regarding disciplinary proceedings, it is necessary to refer to article 41 of the EBEP, relating to the guarantees of the representative function of the staff, which provides that:

"1. The members of the Personnel Boards and the Personnel Delegates, in their case, as legal representatives of the officials, will have in the exercise of their representative function the following guarantees and rights: (...) c) The hearing in the disciplinary proceedings to which its members could be subjected during the time of their mandate and during the year immediately following, without prejudice to the hearing to the interested party regulated in the sanctioning procedure. (...)"

Therefore, in general, communications on disciplinary matters would be limited to those cases in which the affected person is a staff delegate or a member of the staff board.

However, article 40.1.c) contains a specific provision for cases of penalties for very serious offences:

"The Personnel Boards and the Personnel Delegates, as the case may be, will have the following functions, in their respective areas: (...) c) Be informed of all the sanctions imposed for very serious faults." (...)

This precept contemplates a specific qualification for the communication to the representatives of the workers of all the sanctions imposed for very serious offences. In these cases, the legislator has considered this access in particular necessary, which would enable the communication to the representatives of the workers, without the consent of the people affected, of the sanctions imposed for very serious offences.

Therefore, it would be in accordance with data protection regulations to communicate this information individually, indicating the name and surname of the official sanctioned for a very serious offense and the sanction imposed.

(...)

On the other hand, to the extent that the authorization contained in article 40.1.c) is limited to those sanctions imposed by the commission of very serious offences, the rule would be proportional to the purpose pursued.

Therefore, in accordance with the provisions of the RGPD, the communication to the representatives of the workers of the data relating to officials sanctioned for very serious offenses would also be enabled."

v

Apart from the regulation provided for by the EBEP, it is necessary to take into account the regulatory development carried out by the Generalitat of Catalonia in the field of public service, specifically Legislative Decree 1/1997, of 31 October, by which approves the recasting in a single text of the precepts of certain legal texts in force in Catalonia in the field of public service, and the different legal regime for civil servants and labor personnel that this ru

The duties and responsibilities of the personnel subject to the scope of application of this rule are regulated in articles 108 to 121 of the aforementioned Legislative Decree 1/1997. With regard to labor personnel, it must be taken into account that article 2.2 of the same legislative decree provides that this rule will only apply to them in cases where express reference is made to its application.

Regarding the disciplinary procedure for civil servants, article 118.1 establishes:

"1. The procedure to determine disciplinary responsibility and the imposition of sanctions, if applicable, must be established by regulation, which must guarantee the principles of legality, contradiction, hearing, presumption of innocence and proportionality and that account is taken of of the disciplinary proceedings to the bodies of collective representation. The maximum duration of the file is six months, unless the Administration justifies an express extension or there is dilatory behavior on the part of the accused.(...)"

The regulation established by the RGPD determines, in accordance with the principle of legality, that the treatment must be based, at least, on one of the legal bases provided for in article 6.1. When this legal basis is the fulfillment of a legal obligation applicable to the person in charge of the treatment (art. 6.1.c RGPD) it will be necessary for this obligation to be established by the law of the Union or the law of the Member States that applies to the person in charge of the treatment (art. 6.3 RGPD). Thus, the LOPDGDD has collected this prescription specifying that it must be a rule with the rank of law and that this law will be able to determine the general conditions of the treatment, the typology of data subject to the treatment and the transfers that come from as a result of compliance with the legal obligation (art. 8.1 LOPDGDD).

Although article 118.1 of Legislative Decree 1/2017 states that the personnel representative bodies must be informed about the initiation and outcome of disciplinary proceedings, it refers to regulatory development the concretization of the procedure to determine disciplinary responsibility and the imposition of sanctions and, also, the articulation of the obligation of communication to the representative bodies of the staff it foresees.

Thus, Decree 243/1995, of 27 June, which approves the Regulation on the disciplinary regime of the public function of the Administration of the Generalitat of Catalonia, provides in article 56 that "it must be given account of the initiation and outcome of the disciplinary proceedings in the personnel representation bodies".

In the absence of concreteness of the terms of this communication in a rule with the rank of law, it is necessary to interpret the data communication obligation provided for in article 118.1 in the light of the principles of article 5 of the RGPD, specifically of the principle of data minimization (art. 5.1.c RGPD) according to which personal data must be adequate, relevant and limited to what is necessary in relation to the purpose for which they are processed.

It can be considered that the purpose of communicating the initiation and outcome of disciplinary proceedings to collective representation bodies is to establish guarantee mechanisms for workers, providing workers' representatives with the information they need for the development of the functions they are legally assigned.
In order to achieve this purpose, in accordance with the principle of minimization, it would be necessary to provide the minimum necessary data that would allow them to be aware of the initiation and outcome of the disciplinary procedures. Thus, it would be possible to facilitate the relationship of all the disciplinary proceedings instituted during a certain period of time with the identification of the proceedings, the meaning of the resolutions, and with the indication of the typologies of the offenses and the sanctions imposed.

It should also be taken into consideration that the data relating to the commission of administrative offenses do not enjoy special protection in the RGPD as was the case with the regulation

provided for in the old LOPD, since the RGPD reserves this special protection for data relating to convictions and criminal offenses (art. 10 RGPD).

Consequently, from the point of view of data protection regulations, the obligation provided for in article 118.1 of Legislative Decree 1/1997 constitutes a legitimate basis for the treatment. Thus, in those disciplinary procedures that affect personnel subject to their scope of application, the obligation to inform the workers' representatives can be carried out by bringing to their attention the data that is strictly necessary regarding the initiation of disciplinary proceedings, the identification of the persons filed and the result thereof, whether for minor, serious or very serious offences.

In accordance with the considerations made in these legal foundations in relation to the consultation raised by the Director of Public Service in relation to the obligation to report disciplinary proceedings to collective representation bodies, the following are made,

Conclusions

The obligation provided for in article 118.1 of Legislative Decree 1/1997, of October 31, which approves the recasting in a single text of the precepts of certain legal texts in force in Catalonia in matters of public function, constitutes a basis legitimate processing of the data of public employees subject to its scope of application, consisting in the communication of the data strictly necessary to inform the bodies of collective representation of the initiation and outcome of disciplinary proceedings by the commission of the infractions provided for in that rule.

Barcelona, January 11, 2019