

## CASE TRANSLATION: ITALY

### CASE CITATION:

Judgement No. 11445 of 6 September 2001  
(Cassazione civile, sez. lav., 6 settembre  
2001, n. 11445)

### NAME AND LEVEL OF COURT:

Supreme Court of Cassation – Work Section

PRESIDENT: **V. Trezza**

MEMBERS OF THE COURT: **Judges Hornslet,  
Torben Melchior and Per Sørensen**

RAPPORTEUR: **A. De Matteis**

### *Admissibility of digital documents; probative value of electronic or computer systems*

Disciplinary dismissal; evidence based on electronic  
documents

#### CONDUCT OF THE PROCESS

The company Autostrade s.p.a. dismissed T. G., a toll collector at the tollbooth of (omitted), after the prior notification of the accusation that he used toll tickets “premagnetizzati”<sup>1</sup> purportedly issued by the different tollbooth of (omitted) that had never been issued by that tollbooth, and that the correct toll tickets were not found among his cashing in documents.

The appeal of the dismissal was rejected by the Magistrate in Giulianova, a decision upheld by the Court of Teramo, in a ruling dated 22 April/1 June 1999.

The court considered proven the disputed deed constituted just cause for dismissal, based on data generated by the computer system of Autostrade s.p.a., whose operation was illustrated by the witnesses examined, and reported in detail in the above sentence, assessed in conjunction with external circumstances, the subject of verbal evidence.

T. G. appealed to the Supreme Court against the ruling on one ground.

The summoned company counterclaimed, resisting.

Both parties have lodged a statement under Article 378 C.P.C.

#### GROUNDS OF DECISION

With only one ground of appeal, the appellant, inferring infringement and false application of Articles 2697, 2712, 2729 of the Civil Code (Article 360, No 3 CCP), omitted examination of a crucial point of dispute, insufficient and contradictory reasons in relation to important points of dispute (Article 360, No. 5 CCP), criticizes the decision under appeal, for founding its decision on the output of the mainframe computer operating at the office located in Florence, of which he challenges the probative value of the evidence.

The appeal is unfounded.

Article 15, paragraph 2, of Law 15 March 1997, No 59 provides that acts, data and documents produced by public administrations and private entities by means of computer or telematic tools, the contracts stipulated in the same forms and their storage and transmission with informatics or electronic tools are valid for and relevant for all purposes of law, and that the criteria and procedures for implementing this new rule are established for public administrations and private entities, with specific regulations to be issued within one hundred and eighty days from the date of entry into

<sup>1</sup> The Italian highways toll is collected as follows: When entering the highway, the driver of the vehicle withdraws from a distributing machine a magnetic ticket, “premagnetizzato”, that records the time, date and location of the issuing of the ticket. When the driver leaves the highway, she hands the ticket to the toll collector who inserts it into the exit station machine. The fee is then immediately calculated and displayed for the traveller, who pays to the toll collector. In some

stations, there are automated cashing machines where the driver can pay directly with their credit or debit cards without any human intervention. If the distributing machine is out of work, the driver will need to go to the assistant, who will give him the ticket. In this case, the accused was a station officer, and he was alleged to have previously forged a number of “premagnetizzati” to make them appear as if they were issued by a nearby station.

When a driver that had travelled a long distance checked out, the station officer would claim that the payment display was out of order. He then would collect the due amount (e.g. 50 euros) without giving any receipt (“out of order...”). He would then insert the ticket he had forged as issued by the nearby station into the checkout machine, that would lead to a small amount (say 3 euros) being recorded, and then he would pocket the difference.

force of the law. The Decree of the President of the Republic (D.P.R.) of 10 November 1997, No 513,<sup>2</sup> was issued on that basis, and regulated the formal and evidential value of various types of electronic documents.

First, it defines the electronic document as the electronic representation of acts, facts or legal data. Therefore, the information provided by the central computer system of Autostrade s.p.a. constitute an electronic document representative of the cashing operations carried out by various collectors at the many highway tollgates.

The doctrine distinguishes between electronic documents in the strict sense, namely those documents stored in digital form that cannot be read except by means of computers, and electronic documents in a broad sense, meaning paper products normally formed by means of a computer.

The fundamental distinction made by the Regulation, in respect of the purpose of this case, is between: a) an electronic document digitally signed by means of an asymmetric key pair (Articles 4, 5, 10), which complements the legal requirement of written form, also in respect of the purpose of articles 1325 No 4 and 1351 of the Civil Code, and therefore has the probative value of private deeds in accordance with Article 2702 of the Civil Code; b) electronic documents such as in the present case, unsigned, which have the evidential value set out in article 2712 of the Civil Code (Article 5, paragraph 2) as already determined by doctrine and jurisprudence, in that they are traced back to the photographic or cinematographic reproductions, sound recordings and, in general, any other mechanical (and now electronic) representation of facts and things which make full proof of the facts and things represented on the face of the document, if the person against whom they are produced does not disclaim their conformity with the facts or the same things.

In the interpretation and application of this rule, it

should be born in mind the established teaching of this court, that the repudiation of conformity of one of the reproductions mentioned in Article 2712 of the Civil Code to the facts in this case does not have the same effect of repudiation under Article 215, second paragraph, CCP of private writings, because, while the latter, lacking a request for verification and its positive result, precludes the use of the writing, the former does not prevent a court from ascertaining their conformity with the original, including by means of other evidence, including presumptions (Cass. 12 May 2000 No 6090, with regard to photocopying; Cass. 26 January 2000 No 866 and Cass. 5 February 1996 No 940, in terms of photographic copies, Cass. 22 December 1997 No 12,949 in terms of computer print-outs summarizing wages, Cass. 8 July 1994 No 6437 in terms of tachograph records; Cass. 10 September 1997 No 8901 on charges of evidence for the users that challenge the matching of their telephone traffic to the findings of the central measuring station).

This court also stated that the rules of the Civil Code on the repudiation of conformity to the original of a non-authenticated photocopy of a writing only apply when this is invoked as an agreement to derive direct and immediate obligations, and not when the document is used only to demonstrate a historical fact to be assessed in the judgment of a more complex case, leaving the court free to form its own opinion, making use of any circumstance suitable to make plausible a specific commitment as well as any other indicator, provided it appear serious, precise and concordant (Cass. 25.01.1999 No 659).

Finally, the norms established by the Civil Code in respect of the onus of proof and of admissibility and effectiveness of various means of evidence relating to substantive law, must be linked with those related to the procedural review of the Supreme Court; because their violation gives rise to “errors in application of the law” and not “errors in procedure”, the applicant that applies to the Court of Cassation and submits that the judgment is in violation of these rules, has the burden

<sup>2</sup> It should be noted that since the date of this decision, Decreto del Presidente della Repubblica 10 novembre 1997, n. 513 (Decree of the President of the Republic of 10 November 1997, No 513) has been amended and replaced by a number of instruments. The one currently in force is Decreto Legislativo 7 marzo 2005, n.82 Codice dell'amministrazione digitale (Gazzetta Ufficiale

N. 112 del 16 Maggio 2005). Note also Decreto legislativo 4 aprile 2006, n. 159, Disposizioni integrative e correttive al decreto legislativo 7 marzo 2005, n. 82, recante codice dell'amministrazione digitale (Gazzetta Ufficiale N. 99 del 29 aprile 2006 (suppl. ord. n. 105)).

to describe in detail the elements necessary to the assess complaints in this regard, specifying the evidence posed by the judge “of the referring court” at the base of the contested decision and the reasons for their inability to provide legal evidence to support the decision, stating the reasons for the submission – denial of the subscription, challenging the compliance with the original copy, etc. – as well as of its way and cause, to the purposes of assessing its accuracy, timeliness and procedural requirements (Cass. 4 February 2000 No 1247).

This court has repeatedly deemed correct the decisions of lower courts, asserting the legitimacy of the disciplinary dismissal of employees, which assumed, expressly or by implication, the issue of the probative value of electronic or computer systems (Cass. 24 May 1999 No 5042 and Cass. 11 February 2000 No. 1558), relating to Autostrade s.p.a.’s toll collectors, for non compliance detected by the computer records; (Cass. 20 January 1998 No. 476, concerning non compliance of bank employees arising from the bank’s computer system). On such occasions, this court has reiterated its instruction that the presumption is considered by the law a complete evidence, and can also be used to deem the onus of proof is fulfilled regarding the grounds for dismissal, provided that it is based on a fact known or included in the case by normal means of investigation (20 January 1998 Cass. n. 476 cited, 2428/1971, 419/1983, 3198/1987, 1843/1995).

In the present case, the court did not only base its decision on the electronic document resulting from the central computer process, which was also equipped with a continuous self-diagnosis program, but on a set of external circumstances of counterchecks, reports by several witnesses, including, with decisive evidential value, those that in the alleged tollbooth of (omitted) where the “premagnetizzati” would have been emitted, 150 tickets were stolen, of which 34 were received and cashed in by T.; that in the time presumably needed to travel the distance between the tollbooth of (omitted) and the tollbooth of (omitted), where T. worked, a few kilometers away, such tickets did not turn out as issued, that the accounting irregularities exclusively regarded T., tracking his different shifts on different exits to which he was assigned.

The thorough investigation (with meticulous reconstruction of the central electronic processing

system run by Autostrade s.p.a., and hearing of several witnesses on the case and the circumstances external to it) and the reasons of the trial judge does not deserve the applicant’s complaints (see Cass. 4 February 42000 No. 1247 cited above) and must be confirmed, because it is consistent with the principle of law stated in the preamble, and that can be summarized as follows: with regard to dismissal for just cause, the data provided by a computerized detection and documentation system can constitute, under Article 2712 of the Civil Code and article 5, paragraph 2 of D.P.R. 10 November 1997, No 513, evidence of the alleged offense, where the functionality is ascertained of the electronic system and the results thereof may stand up as presumptive evidence in conjunction with circumstances external to it, otherwise proven.

The appeal is therefore dismissed.

Court costs following the unsuccessful appeal are settled in lira 50,000 in addition to the three million lira for lawyers’ fees.

#### FOR THESE REASONS

rejects the appeal and requires the applicant to pay the costs of these proceedings settled in lira 50,000 plus three million lira for lawyers’ fees.

Lodged on 6 September 2001.

*With thanks to Ing. Franco Ruggieri, FIR DIG Consultants di Ruggieri Franco & C s.a.s., for taking the trouble to check this unofficial translation for accuracy. All mistakes remain those of the editor.*

#### Editorial commentary

In this decision, for the first time, the Supreme Court considered the dismissal of an employee where evidence of the alleged misconduct was mainly in the form of digital data. The court held that the data held by the computer system controlled by the employer can be admitted as a result of its business operations to prove the method by which the toll operations were carried out by various toll collectors at the many toll gates, and that the data was legally relevant in accordance with the Decreto del Presidente della Repubblica 10 novembre 1997, n. 513 (Decree of the President of the Republic of 10 November 1997, No 513).

Article 5 of this regulation governs electronic evidence (please note, the translations into English below may

not be absolutely accurate):

Art. 5 - Efficacia probatoria del documento informatico

1. Il documento informatico, sottoscritto con firma digitale ai sensi dell'articolo 10, ha efficacia di scrittura privata ai sensi dell'articolo 2702 del codice civile.
2. Il documento informatico munito dei requisiti previsti dal presente regolamento ha l'efficacia probatoria prevista dall'articolo 2712 del codice civile e soddisfa l'obbligo previsto dagli articoli 2214 e seguenti del codice civile e da ogni altra analoga disposizione legislativa o regolamentare.

Article 5 - Evidentiary value of the electronic document

1. An electronic document signed with a digital signature within the meaning of Article 10 has the value of a private document under Article 2702 of the Civil Code.
2. A document produced by a computer and equipped with the requirements of this regulation has probative value under Article 2712 of the Civil Code, and meets the obligations under Articles 2214 and following of the Civil Code and any other similar law or regulation.

Article 5(2) requires digital documents to have a digital signature to have legal effect. However, it should be observed that the provisions of article 2712 of the civil code are also relevant:

Art. 2712 Riproduzioni meccaniche

Le riproduzioni (Cod. Proc. Civ. 261) fotografiche o cinematografiche, le registrazioni fonografiche e, in genere, ogni altra rappresentazione meccanica di fatti e di cose formano piena prova dei fatti e delle cose rappresentate, se colui contro il quale sono prodotte non ne disconosce la conformità ai fatti o alle cose medesime.

Article 2712 Mechanical reproductions

Reproductions (Code Civ. Proc. 261) of photographs or cinematograph films, sound recordings and, in general, any other mechanical representation of facts

and things are full evidence of facts and things represented, where the person against whom they are produced does not challenge the facts or the same things.

The members of the Supreme Court considered all the evidence in the case, not only the digital evidence presented to the court. The court determined that by itself, the digital evidence was not capable of providing proof of the facts recorded on the face of the digital document, because the data did not have a digital signature. However, when taken together with additional evidence, the court concluded there is a rebuttable presumption under article 2729 of the civil code:

Art. 2729 Presunzioni semplici

Le presunzioni non stabilite dalla legge sono lasciate alla prudenza del giudice, il quale non deve ammettere che presunzioni gravi, precise e concordanti. Le presunzioni non si possono ammettere nei casi in cui la legge esclude la prova per testimoni.

Article 2729 Rebuttable presumptions

The presumptions established by law are left to the prudence of the judge, who must admit any presumptions that are serious, precise and consistent. Presumptions may not be used in cases where the law excludes evidence of witnesses.

In this case, the Supreme Court examined the legal effectiveness of digital evidence, and concluded that the evidence did not have legal effect because it was not signed with a digital signature. However, the provisions of article 2729 of the civil code enabled the digital evidence to be considered as evidence, and, taken together with other evidence, was capable of forming a rebuttable presumption.